review humanities and law intercultural <
CALUMET

CALUMET – intercultural law and humanities review
ISSN 2465-0145 (on-line)
ISSUE 14(2022)
For Info: www.calumet-review.com

Melisa Liana Vazquez

Futile Otherness
Religion and Culture *vs.* Futile Motives in Criminal Law

Abstract
Within Italian criminal law, the category of motive entitled *motivi futili,* or futile motives, is used as an evaluation standard in determining an increase in the severity of a penalty for a crime committed, not unlike the designation 'aggravated' in common law systems. An application of the penalty means that the motive for a crime is deemed so unreasonable, illogical, superficial, without sense that it becomes especially abhorrent and therefore additionally punished. Courts rule on what internal reason or lack of reason drove the defendant to commit the crime. However, secular criminal law operates from the premise that it is tasked with evaluating and ruling on 'facts,' not on the *forum internum* of individuals. Thus, an interpretive evaluation of motive, which lies squarely in the domain of the internal forum, is not really an undertaking that properly belongs to law. Nevertheless, it is impossible to determine just punishment for crimes without an evaluation of the degree of the crime. The qualification of degree, at least in Western legal systems, depends on an evaluation of motive, and complicating matters, intent. The issue of culture is also inextricably tied to questions of motive and intent in intricate ways that are frequently the cause of further interpretative confusions, including the role of religion, understood anthropologically, within cultural evaluations. I will argue that the category of futile motives offers a valuable keyhole to viewing cognitive struggles inherent to the evaluation of crimes, and motives more generally, in the Italian legal context in ways that are, however, globally relevant. The adjudication of a subject's motives as 'futile' demonstrates how specific categorical schemes shaped by cognitive assumptions betray an alleged universalism that prevents law from maintaining legitimacy before its subjects. 'Futile' motives sound an alarm demanding we pay more critical attention to the relationships among facts, culture, and the law's aspirations towards a representative justice. Intercultural translation offers an alternative theoretical and practical approach that could lead to better solutions.

Keywords: futile motives, cultural crimes, sentencing, intent, facticity, intercultural law, religion

1. Preamble

In this essay I will address the issue of 'futility' in the commission of crimes with specific reference to criminal law approaches involving cultural difference. The problem has arisen in several Italian legal cases and has compelled judges and legal scholars to reconsider the historical, theoretical, and conceptual premises of the aggravating circumstance related to so-called 'futile or abject motives.' In this regard, it should be immediately noted that this is not an exclusively Italian normative provision. It can be found in many legal systems, in both civil law and common law, with different modalities and formulations. The subject therefore has a theoretical and, at the same time, practical importance of general, if not global, scope. For this reason, it is important to examine the historical and cultural presuppositions of modern criminal law and specifically the relationship between the objective/factual

dimension and the subjective/psychological dimension of crime within the modern liberal tradition. As I will show, such an approach is necessary because the distinction between 'objective' and 'subjective' cannot be made without considering the cultural factor.

When 'culture' appears in the constitutive elements of factual categorizations in an explicit way, the distinction between subjective and objective inevitably blurs. This is also because everything that is 'Other' risks being classified as subjective simply because it is not part of the 'implicit context' that lies beneath every culturally connoted universe of discourse. On the other hand, in the constitutional-liberal legal/political traditions, individual freedom represents a pillar of the systems' legitimacy. Limiting this freedom can only be justified if it is based on values that appear as objective social values. The problem, however, concerns the modalities of interpretation and the particular ways these social values are rendered objective. At first glance, one might think that they coincide with constitutional values and, therefore, with the same values found in human rights. However, fundamental human rights have by definition a universal scope or, at least, must be considered to be genetically 'open' to universalization. National and local socio-political experiences, on the contrary, tend to generate 'criteria of objectivity' that are deeply anchored in indigenous historical and cultural traditions. This distinction remains almost unnoticeable until problems of cultural difference arise in the adjudication of crimes and the determination of penalties. When subjects belonging to different cultural universes are involved in the reconstruction of the criminally relevant fact, the tension between the universality of the so-called objective values connected to the provisions contained in the constitutions and declarations of rights and local variations emerges with great clarity. What occurs in these cases is precisely a crisis of the axiological objectivity of the qualifications made by national criminal laws and jurisprudence.

The problem is not only interpretative but, in many ways, also cognitive. For when it comes to interpreting the conduct of subjects, judges are not merely engaging hermeneutically with legal codes, one side, and conduct on the other; they are relying on the basic cognitive frame of what 'is' and what 'should be'. What is considered 'subjective' in the case is separated from the taken-for-granted objectives facts of the matter. Indeed, the twin pillars of objectivity and subjectivity hold up the liberal legal tradition, responsible for the move towards the so-called 'criminal law of the fact,' with roots in the thought of Bentham and Austin[1] in the common law tradition, and von Liszt[2] in the civil law tradition. Thus, the distinction between 'fact' and 'subject' in criminal cases has deep political and cultural roots and is tied tightly to the birth of religious freedom within legal modernity. "No one can be punished for what he thinks or for what he believes, but only for what he has done": this sentence embodies the incipit of modern criminal law, and its generative axis is the drive towards an egalitarian legal subjectivity unaffected by religious affiliation, at least from a historical point of view. The question takes on cognitive significance, however, to the extent that distinguishing between fact and subject, between what is objective and what is subjective, between what is external and what is internal, involves values and is therefore inescapably filled with culture.

It is exactly for this reason that the reflection on 'futile motives' and cultural differences, when seen through criminal cases involving people of minority cultures and religions, becomes a critical benchmark to verify the compatibility between modern criminal law and its universalist-inspired rights discourse, which allegedly provides the foundation for the very legitimacy of any criminal sanction and

[1] Bentham (1996), Austin (2002).
[2] Von Liszt (2002).

the deprivation of liberty. From the point of view of criminal dogmatics, in fact, the explicit superimposition of the cultural/religious element revives the basic problem traceable in the history of the modern liberal criminal legal experience concerning the distinctions among 'fact,' 'intent,' and 'motives' in the adjudication of crimes. The 'non-relevance of motives,' the principle whereby 'motives' do not fall within the ontological categorization of the crime, seems to be perfectly in line with the constitutional and liberal presuppositions outlined above. At the same time, however, the calling into play of the same 'motives' in the determination of penalties and the gravity of crimes, applying criteria such as 'aggravating' or 'mitigating' circumstances, becomes a kind of poisoned apple within this same tradition.

The paradox can be seen as soon as one considers that the so-called 'criminal law of the fact' is rooted in the intent to protect individual freedom from the discriminatory and ideologically oriented attitudes of political power. However, in the determination of the punishment, which often moves between extremely broad maximum and minimum parameters, judges base their evaluations on motives, the personality of the offender, and their social dangerousness. This contradiction, which is likely connected to the emergence—in the late 19th and the early 20th century—of insufficiencies in the 'criminal law of the fact' in the protection of society, impinges on the general theory of modern criminal law. Many legal scholars have attributed this lack of consistency to the inexistence, from a conceptual point of view, of a meaningful distinction between fact and motive or, at least, between the psychological aspects defined as 'intent,' and linked to the categorization of the fact of crime as if they were objectively integral, versus those defined as 'motives,' considered external to the criminal action and its factual configuration. These authors have underlined how the distinction is the result of qualifications made at a political—and certainly not conceptual—level by legislators and therefore by the political aspects of positive law. This consideration, moreover, would seem to be confirmed by the recent emergence of crime categories such as the so-called 'cultural crimes' or 'culturally oriented crimes,' as well as 'hate speech,' in which the element of subjective motives, the internal sphere of the individual imagination, becomes part of the qualification of the criminal action. Needless to say, rivers of ink have been spilled since the regulatory configuration of these forms of crime. I believe, however, that this is a problem that goes back to the very origins of modern legal thought and its epistemological presuppositions, which in turn are deeply ingrained in the epistemology of secularization.

As mentioned above, some recent decisions emerging from Italian jurisprudence represent a kind of materialization of the issues under examination. These are decisions which, from this point of view, have not only a local/national but also a global relevance, and this precisely because of the ubiquity of the notion of 'abject' or 'futile' motives in various national criminal contexts. My analysis will therefore begin with case law. Through an analysis of the motives identified/adopted by the judges in these cases, I will then try to show how the contradictions evident at the argumentative level derive from theoretical assumptions of which, in most cases, judges seem to be completely unaware. I will try to demonstrate, subsequently, how this unawareness can lead them to assume interpretative attitudes, concerning both the reconstruction of the facts and the related legal interpretation, which tend towards discriminatory solutions. Even when this does not happen, however, the disposition of judges seems to be based more on intuitive evaluations than on any real examination of the cultural and cognitive aspects underlying the conduct of individuals from 'other' cultures. Furthermore, 'culture' is in most cases an extremely broad spectrum that, importantly, includes major aspects of individual world-making such as religious belief. For this reason, I will undertake an examination of the relevant jurisprudence to highlight how

the analysis of 'futile motives' in cases marked by cultural difference is deeply relevant for religion in the legal context. It is no coincidence that in many legal cases from the beginning of the 20th century to present, religion has been qualified, in the name of secularization, as a factor that is only relevant for the evaluation of the 'motives' of the crime: therefore, an irrelevant element in the determination of both the category to which the presumably criminal conduct should be ascribed, and the intent. The same interpretative dynamic arises today in cases where cultural difference comes into play. 'Culture' is somehow treated as an element that is co-extensive with religion and as such, becomes 'off limits,' or beyond the competence of secular judges. The result is a sort of 'legitimized ignorance.' Blindness to the Other, supported by the otherness of 'religion' in secular juridical discourse, becomes thereby an implicit reason for transforming religion into irrationality and, therefore, into 'futility,' even absent any social danger. Among other things, this operation seems to give space, as I will illustrate, to unmistakably Islamophobic tendencies.

In the remainder of the essay, I will engage an in-depth analysis of the theoretical and historical assumptions behind the relationship between modern penal constructions and processes of secularization. A return to the thread of the critical analysis of the relevant jurisprudential and positive data will attempt to help clarify the argument in more empirical terms. The conclusion will then turn to the techniques of intercultural translation as a possible solution to the problems encountered in the jurisprudential interpretation of legal situations likely to be configured as 'futile.' Nevertheless, the use of intercultural translation techniques in the judicial decisional process is only one means for the implementation in case law of the constitutional principles and human rights that legitimize criminal legislation itself. On the contrary, the unpreparedness of judges and the lack of awareness of the cognitive and axiological implications of the processes of secularization represent a major risk: compromising the respect of those principles and provoking a real bankruptcy of the constructive and operational coherence of secular legal systems.

2. Distinguishing aberration, futility and more in motives and the monkey wrench of culture

Contemporary legal systems depend on a qualification of intent to determine whether a crime was committed[3], and more commonly how it should be sentenced. This intent is distinguished from motives. In the case of homicide, intent is critical to the qualification of the crime. Murder is distinguished from manslaughter, and both from 'justifiable homicide' or killing authorized by the state. A murder committed involuntarily, meaning 'without intent to kill,' will have a vastly different outcome from one judged to be committed with 'gross negligence,' sometimes referred to as aggravated murder. On the contrary, motives (so called) are considered irrelevant in the determination of the 'fact of the crime.' They are only relevant in the determination of the sanction, which paradoxically should be the ground for the protection of freedom and which, instead, invites the subjective dimension to judicial evaluation. And yet, the determination of motive in the commitment of a crime immediately throws in evidence the impossibility of seeing inside an acting person's thoughts and feelings with clarity. For this reason, too, the thesis of the 'irrelevance of motives' in the determination of the 'fact

[3] Relevant to the arguments considered here are qualifications such as Italian jurisprudence's '*errore sul fatto*,' or 'mistake of fact' in which an act is not adjudicated as criminal because it is said to be caused by the 'cultural diversity' of the accused which, it is then determined, has led him to an 'erroneous perception of reality,' see in this regard Basile (2010: 322-331).

of crime' has been a cornerstone of modern secular criminal law.[4] Nevertheless, in the empirical legal experience, determining *why* a crime was committed without running the risk of falling prey to biases, undemonstrated assumptions, and unreflective attitudes would appear to be impossible. This does not deter legal systems, however, from perpetually attempting the task, and inventing new ways of adjudicating based on exactly the problematic area of motives.

At this point we can turn to the legal category that drives this essay, the Italian category of motive *motivi futili*, futile motives. Futile motives are, as their name implies, those which cannot be explained[5], which have no recourse to legal comprehension, even sometimes called 'non-motives.' This qualification is to be distinguished from *motivi abietti* or, abject motives, which are those motives considered to be particularly reprehensible or vile, but comprehensible in some way. Both forms of aggravated motive result in increased punishment for crimes committed, in fact, up to a one-third increase in the weight or duration of a sentence. Likewise, if a punishment seems to be excessive to the nature of the crime, the judge can apply *attenuanti generiche*, attenuating circumstances, which reduce the penalty incurred by up to a third. The courts are responsible, then, for determining both the quality of intention of a perpetrator as well as the quality of the penalty.

Among the considerations when evaluating motive is whether the act was premeditated, and this can be further assessed on two axes. The first is chronological: what time span occurred between when the perpetrator 'conceived' of the act and when it took place? The second is psychological: was there firm and irrevocable criminal intent, regardless of the timing?[6] The qualification of motives in Italy specifies that in order to be deemed futile, they must be judged to be 'mild,' 'banal/common,' or so excessively disproportionate to the crime committed that they are found to be incomprehensible, that is, futile[7]. If for example a young person steals a few snacks from a bar and in response the owner and his son bash the person's head in with a crowbar and kill him, the Court may sentence the perpetrators

[4] In a large literature, see Husak (1989), Binder (2002) who usefully articulates the various stages of attempts to deem motives irrelevant as follows. First attempt: the idea that intention is a cognitive state of mind e.g., an expectation or perception of risk whereas motive is a desiderative state, e.g, desire, purpose, end. But in this case motive becomes relevant, since criminal law often determines liability based on desires/ends of the accused. Second attempt: desiderative states can be divided. Immediate goals can be qualified as intention whereas remote goal can be classified as motive. Unfortunately, any act could be explained by any goal, and any goal could be put in either category. Third attempt: intentions are those goals that are 'offense elements,' while motives are remote goals and therefore irrelevant. But if they are irrelevant, then they don't have any bearing on offenses, and we are left with nothing but a tautology. Binder rightfully points out that the 'motive is irrelevant' maxim has withstood a century of criticism though neither its utilitarian formulation nor its tautological doctrinal version would appear to hold together in any meaningful way. In short, "Unsuited to survive on their own, the two versions of the motive is irrelevant maxim sustain one another, each disguising the other's failings." Binder (2002: 96).

[5] And perhaps for this reason are sensationalized by the media… https://www.gonews.it/2020/06/21/accoltellato-21enne-a-pisa-si-pensa-per-futili-motivi/
http://www.strettoweb.com/2020/06/reggio-calabria-folle-gesto-futili-motivi-22enne-arrestato-flagranza-tentato-omicidio-nome-video-dettagli/1025133/

[6] Basile (2014: 15).

[7] Futile motives were defined by the Cassation Court as occurring "when the criminal action is caused by an external stimulus that is so mild, banal and disproportionate relative the gravity of the crime that it appears absolutely insufficient to provoke the criminal act, so much so that it can be considered less a determining cause of the event than a mere pretext for the unleashing of a criminal impulse." (translation mine). Original: "quando la determinazione criminosa sia stata causata da uno stimolo esterno così lieve, banale e sproporzionato rispetto alla gravità del reato, da apparire (…) assolutamente insufficiente a provocare l'azione criminosa, tanto da potersi considerare, più che una causa determinante dell'evento, un mero pretesto per lo sfogo di un impulso criminale." Cass., Sez. I, 13 October 2010 (dep. 5 November 2010),

with 'futile motives,'[8] finding that the act was exceptionally violent and disproportionate to the motivating circumstances. In cases as extreme as this one, the designation is, perhaps, not difficult to understand. Many other cases, however, introduce more uncertainty. This is because at its core, the concept of futility in motives exists in what might be called an extrajudicial realm, one that requires the making of a socially and morally determined judgment. In other words, futile motives have everything to do with culture.

In 2018, The Italian Court of Cassation pronounced once more on the designation of futile motives in a case involving two young immigrants who attacked one of their peers with repeated knife stabbings.[9] The victim survived, but the perpetrators were convicted of attempted murder. They were further assigned the designation of futile motives. Given the non-Italian ethnic origin of the perpetrators, the question of culture was brought to bear on the case. Specifically: was the motive truly futile? Or could there be relevant cultural factors? To be clear, the guilt of the perpetrators was not in question. The only question regarded the sentencing, and therefore the motives behind the crime. The Court declared in no uncertain terms that no matter what the cultural role of violence in the lives of these South American youths, who were possibly gang affiliated, there could be no acceptable explanation of motivation for the stabbing:

> The futility of motive is not excluded by the perpetrator of the crime's belonging or closeness to groups or communities, such as young South American gangs, that recognize violence as a positive value and recognize the use of force as an affirmation of individual personality and manifestation of belonging to the group, which is then exercised when the victim is or appears to be part of an 'enemy' group. [Accepting] such a conception and model of behavior would mean allowing for the free rein of brutal and despotic impulses which are in direct contrast with the fundamental values recognized by the legal order, which protects first and foremost life, security and personal liberty.[10]

The cognitive confusions that seem to emerge from this declaration are numerous, so it is probably best to take them one at a time. First, the statement points out that the perpetrators belong to a group or community "such as South American gangs." South America, of course, is a continent of twelve sovereign states with a total population of nearly 500 million people speaking more than 400 languages. To refer to individuals as 'South American' is about as precise as referring to Italians as 'Westerners' when evaluating their motives. The next characterization regards the view of violence attributed to 'South American gangs.' As it turns out, the perpetrators were of El Salvadorian origin (a detail that does not appear in the Court's sentencing), where in fact it has been estimated that in a population of around 6 million people as many as 500,000, or 8%, are involved in gang violence, through direct

[8] As in this 2010 case: Cass. Pen., sec. I, sentence 29 March 2012 (dep. 1 August 2012), n. 31454

[9] Penale Sent. Sez. 1 Num. 25535 Anno 2018. Sentence in Italian available here: https://www.giurisprudenzapenale.com/wp-content/uploads/2018/06/cass-pen-25535-2018.pdf

[10] Translation from the statement of the Court mine. Original: "*...la* **futilità del motivo non è esclusa** *dall'appartenenza o dalla vicinanza dell'autore del reato a* **gruppi o comunità**, *quali le bande giovanili sudamericane, che riconoscono come* **valori positivi la violenza** *e l'***uso della forza** *quale* **forma di affermazione della personalità individuale** *e di manifestazione dell'appartenenza al gruppo da esercitare per il solo fatto che la vittima sia o appaia militare in formazione contrapposta, dal momento che* **tali concezioni e modelli comportamentali** *offrono occasione per dare libero corso ad impulsi brutali e prevaricatori e si pongono* **in contrasto con i valori fondamentali riconosciuti dall'ordinamento giuridico**, *che tutela in primo luogo la vita, la sicurezza e la libertà personale.*"

participation or coercion and extortion by relatives.[11] This is a situation that has evolved since 1992, which marked the end of a 12-year-long civil war. These circumstances are, to say the least, markedly different from those of the social and historical context where the crime took place, namely, Italy. The crime, however, took place with the exclusive participation of young people from El Salvador who were in an El Salvadorian gang. The Court's statement both acknowledges and denies the possible cultural effects of these circumstances simultaneously. By generalizing to 'South American,' the role of gang violence becomes unsubstantiated, and is essentially dismissed by the Court as being unimportant. However, specifying a particular characterization of such violence, which may well have support in an assessment of the current state of affairs in El Salvador, has the effect of negating relevance, as of course is the intention, since the point is that futility of motive cannot, per the Court, be excluded in this case. The final justification for this acknowledgement/negation is that if this 'model of behavior' (again, an extremely broad term for what is potentially a complex group of social actions with equally complex origins) were to be fully acknowledged, then it would mean somehow giving credence or acceptance to 'savage impulses' in direct contrast with the legal order's mandate to protect life and liberty. This, too, is an odd logical move given that the criminality and therefore unacceptability of the actions from a legal point of view are not in doubt, but rather the punishment to be assigned. The implication is almost that the legal order cannot recognize 'savage impulses' to exist within the realm of human behavior, a rather obtuse and myopic idea whose dangers I will address in more depth below.

What seems to emerge in this ruling is the use of a category, 'futile motives,' functioning as a kind of icon for a cognitive dualism that puts strict limitations on which kinds of conduct are deemed understandable and which are not. Indeed, the Court specified that, "a motive is considered futile when it is so *banal*, *trivial* and *disproportionate* to the gravity of the crime committed that it appears as utterly *unqualified* and *insufficient* to have spurred the crime, constituting thus more an opportunity to give free reign to *aggressive*, *antisocial* instincts."[12] In other words, a line is drawn between comprehensible motives and futile motives where futile motives come from base instincts. They represent animalistic behavior[13] that not only cannot be accepted, but further, cannot be *made sense of* by civilized humans. And yet the merest of glances at the language called to task within this legal assessment demonstrates a struggle between facts and values. Banal, trivial, disproportionate, unqualified, insufficient, aggressive, and antisocial are all concepts that are deeply culturally determined. Words like 'disproportionate' and 'unqualified' imply distinct objective measurable quantities, evaluations that can be made objectively, neutrally. But what is deemed to be a neutral assessment is actually a silent referral to a semantic dimension with particular cultural-historical characteristics.

This can be readily seen if we look to the motives that have been assessed as potentially futile but ultimately instead considered justifiable within Italian jurisprudence. A comprehensive accounting

[11] One 'exposé' on the violence of life in El Salvador notes that, "Young people grow up in warlike conditions and are often socialized into the gang, beginning for MS-13 [one of the gangs named in the Italian court case] with a 13-second beating. The ubiquity of violence is devastating to regular psychological development—and this violence is normalized."https://foreignpolicy.com/2019/11/30/el-salvador-gang-violence-ms13-nation-held-hostage-photography/

[12] Translation from the statement of the Court and emphasis mine. Original: "*...il motivo è* ***futile*** *quando sia così banale, lieve e sproporzionato rispetto all'azione criminosa realizzata ed alla sua gravità da apparire del tutto inidoneo ed insufficiente a dar luogo al reato, costituendo piuttosto occasione per dare libero sfogo ad istinti aggressivi ed antisociali.*"

[13] Jahoda (1999) offers a historical recounting, replete with illustrations, of the atrocious and enduring persistence of the attribution of 'animality' to certain people at certain times throughout modern history.

would exceed the limits of this paper however it is possible and necessary to give some indicative examples:

- Any crime committed for political or ideological motives is not considered futile unless it can be found to possess an evident banality and derisiveness with respect to common feeling.[14]
- A crime committed for religious or cultural reasons in which a parent attempted to murder his own daughter because of behaviors that demonstrated her cultural distancing from her family of origin was not considered futile.[15]
- The Supreme Court has found that jealousy is a strong human motivator, able to push people to act irrationally and thus cannot be considered a futile motive. As an exception, in the case that the jealousy was accompanied by a punitive spirit aimed at the victim stemming from the perpetrator's belief that she 'belonged' to him and then dared to rebel against him,[16] then futility is called into play.
- The desire to carry out a vendetta is also not considered to be futile.[17]

Jealousy yes, possessiveness no. Vendetta yes, ideology no. Where in these assessments are the facts upon which law is alleged to rule?

Italian jurisprudence has been inconsistent even within the darkly limited scope of motive for filicide; there have been several cases with precisely this profile considering whether a father of non-Italian origin who causes the death of his daughter because of her 'Western behavior' should be understood to have 'cultural motives.' Perhaps the most infamous of these is the 2006 Hina Saleem case[18] which took place in Brescia, Italy. Hina Saleem was a Pakistani-born young woman who came into conflict with her family after several years of living in Italy for her refusal to agree to an arranged marriage in Pakistan. She was murdered in the family home by her father, with the assistance of two of her brothers-in-law. The case was important not only for the horrific nature of the crime,[19] but also because it brought the topic of honor killings in Italy to the public spotlight. At issue was, of course, the motive for the crime. Initially, in an attempt to reduce the penalty from 30 to 18 years, the defense argued that this was a culturally motivated crime. Hina's father was attempting to 'rescue her honor,' which according to Pakistani culture, it was argued, was a motive of high moral value.

Importantly, in the background of the case was the existence of support in Italian law for the reduction of penalties in the case of murders classified as honor killings. Up until 1981, Italian law

[14] Court of Cassation Penal Section V n. 52747/2017 (translation mine).
[15] Court of Cassation Penal Section I 51059/2013 (translation mine).
[16] Court of Cassation Penal Section V n. 35368/2006 (translation mine).
[17] Court of Cassation Penal Section I n. 7274/2013 (translation mine).
[18] Final decision, Court of Cassation Penal Sez. I, 18 February 2010, n. 6587
[19] Much was made of the details of the crime. It was reported that Hina was stabbed 28 times while her head was "forced to face Mecca." See: https://milano.repubblica.it/cronaca/2018/11/17/news/hina_saleem_brescia_foto_lapide_tolta_dal_fratello-211928090/ and https://www.wired.it/attualita/media/2016/01/22/hina-ci-insegnato-lassassinio-giovane-pachistana/ for just two of many examples.

recognized as a 'crime of honor' (*delitto d'onore*, Art. 587 c.p.)[20] acts, including murder, committed to avenge the honorability of one's own name or family, with particular reference to certain contexts such as sexual, matrimonial or other kinds of family relations. The justification was that honor is a socially relevant value that can and should be taken into account for legal purposes. The law held that the maximum sentence for the murder of one's daughter, wife, sister, would be five years imprisonment. It is unclear whether the legal strategy of arguing for cultural motives was an attempt to distance the acts from Italian culture and behavior or find paradoxical resonance with it. Representatives of the Pakistani community in Italy, however, argued vociferously that the murder of one's daughter would be utterly unacceptable also in Pakistan and should not be attributed to their culture. Feminist voices also argued that it was not ethnic or national culture behind the motive but rather misogyny.[21] In any case, the cultural motives strategy was rejected by the judiciary which ultimately concluded that the real motivation was a distorted sense of fatherly control.[22]

A few short years before the Hina case, another young woman was murdered[23] in Italy by her father for having had a romantic relationship with someone while being engaged to another man through an arranged marriage. The defense for the father attempted to dissuade the Court from the addition of 'aggravating circumstance' by citing culture, because of the accused's Moroccan origins. Specifically, the defense noted "atavistic and socio-cultural values," a "strong and extreme sense of family," a "concept of honor, tarnished by the irregular behavior of his daughter," as well as the "rules of his ethnic group," as mitigating cultural factors that should exclude the charge of 'aggravating circumstance' referred to in Art. 61 no. 1 of the Criminal Code. The Courts (in the first instance and on appeal) rejected the arguments. They upheld, instead, the charge of futile motives. Whereas in the Hina case the father's 'distorted sense of fatherly control' was attributed to him personally, and not to his cultural background, in this case "Muslim culture" was evaluated as suffering from an illegitimate misogyny deriving from Islam, and then dismissed because of this illegitimacy, which was then transformed into futility. The Court states, "even if one evaluates the cultural background and the

[20] Penal code art. 587 read: "Whoever causes the death of a spouse, daughter or sister, due to having discovered an illegitimate carnal relationship and thus being in a state of anger caused by the offense to his/her honor or that of his/her family, shall be punished by imprisonment for three to seven years. The same punishment applies to anyone who, under the said circumstances, causes the death of a person who is in an illegitimate carnal relationship with a spouse, daughter or sister," translation mine.
Original: "Chiunque cagiona la morte del coniuge, della figlia o della sorella, nell'atto in cui ne scopre la illegittima relazione carnale e nello stato d'ira determinato dall'offesa recata all'onor suo o della famiglia, è punito con la reclusione da tre a sette anni. Alla stessa pena soggiace chi, nelle dette circostanze, cagiona la morte della persona che sia in illegittima relazione carnale col coniuge, con la figlia o con la sorella."

[21] In 2021, 100 women were murdered by family or men they were in relationships with. 68 of these were murdered by their romantic partner/husband. Data from the report by the Interior Ministry, Department of Public Security, available here: https://www.interno.gov.it/sites/default/files/2022-03/settimanale_omicidi_7_marzo_2022.pdf

[22] "...the overwhelming motivation of the action of the accused comes from a pathological and distorted relationship of 'parental possession' expressed by a furious rejection of his daughter's behavior and is based not on religious or cultural reasons (in such case it would have been necessary to ascertain a sequence of rebukes based on such reasons or customs) but is rather motivated by anger caused by the lack of effectiveness of his paternal position." (translation mine). Original: "...la motivazione assorbente dell'agire dell'imputato è scaturita da un patologico e distorto rapporto di 'possesso parentale' essendosi la riprovazione furiosa del comportamento negative della propria figlia fondata non già su ragioni o consuetudini religiose or culturali (in tale caso si sarebbe dovuto accertare l'esistenza di una sequela di riprovazioni basate su tali ragioni o consuetudini) bensì sulla rabbia per la sottrazione al proprio reiterato divieto paterno."

[23] Padova Tribunal 9 June 2005; Venice Court of Appeal 9 January 2006; Court of Cassation 14 June 2006.

environment in which the perpetrator lives and has acted, the futility of the motives must be affirmed." And further, "in the case in question we are dealing with a person of Muslim culture who, under the pretext of an apparent legitimacy deriving from the Islamic religion, adheres to models of life in which there is a disparity of treatment between men and women, the latter being by custom, according to archaic rules, subject to the arbitrariness of the patriarchal tribal family that disposes of her as property and does not consider her as a person."[24]

Here again we have a series of cognitive misfires, one after another. It is determined that culture is not a factor. Still, culture is evaluated. How? By make sweeping generalizations about 'Muslim culture' and 'the Islamic religion.' Is it necessary to point out that there are two billion people in the world who identify as Muslim as well as five distinct branches of Islam, in short, an overwhelming diversity of people and cultures? What can be gained by making reference to 'Muslim culture' and 'the Islamic religion' in this unqualified way? Their mass repudiation in the laconic comments of the Court is at the very least ignorant if not utterly disrespectful. Even setting this aside, we find confusion. The defendant is not to use culture as a reason for his actions, and yet he is defined directly by the court as a person *of* this 'culture,' who 'adheres' to its rules. The conclusion to this culture/not-culture stance is *futility*, meaning the actions are deemed to be so disproportionate that they merit increased penalty. In brief, even if the man was acting according to his culture, and even if his culture can be evaluated as repugnant, there is no rationale to be found in his actions: the murder was senseless. Senseless murder is a very common collocation. It is a way of expressing outrage over the crime. Its profound meaning should not, for this reason be overlooked. Once again, the framework of semiotic ideology and the particular history of secularism is useful. The idea that something is without sense, without reason, is anathema to the project of modern European secularism.[25] There is a judgment at work here that is part and parcel of the moral narrative of modernity. As Keane aptly describes:

> The moral narrative of modernity is a projection onto chronological time of a view of human moral and pragmatic self-transformation. This moralization of history can (but doesn't necessarily) produce a largely tacit set of expectations of what a modern, progressive person, subject, and citizen, should be. The details vary, of course, but characteristic of this subject is rationality and an aspiration to authenticity, manifested in sincere or transparent forms of self-expression. This subject is also characterized by self-knowledge. In particular, it knows itself to be the true agent of its actions, in contrast to those non-moderns who displace their own agency onto gods, demons, spirits, and so forth. [...] To say that the idea of modernity is inflected with a certain moralization, then, means that it includes the sense that one ought to become a modern subject, or that to do otherwise is an ethical failing. Moreover, that failing can be dangerous...[26]

[24] Citations from the Court in Basile (2014: 182), wherein see an extensive analysis of futile motives, cultural motives, and the relevant cases in Italy and abroad. Translation from the Italian mine. The Court's original statement: "nel caso di specie trattasi di persona di cultura musulmana che, col pretesto di una apparente legittimazione derivante dalla religione islamica, aderisce a modelli di vita in cui vi è una disparità di trattamento tra uomo e donna, essendo quest'ultima per consuetudine, secondo regole arcaiche, assoggettata all'arbitrio della famiglia patriarcale tribale che dispone di lei come una proprietà e non la considera come persona."

[25] I use 'European secularism' as shorthand here because a complete discussion would take the essay off course, but there is a large body of work on the multiplicity of secularisms even within Europe, perhaps spearheaded originally by José Casanova but then undertaken and advanced by a wide range of international scholars. My own small contribution reflects on secularism in the Swedish and Italian contexts (Vazquez, 2018).

[26] Keane (2013: 160-161).

When we find ourselves before an 'ought' (one *ought* to become a modern subject) we are in nestled within a semiotic ideology that places cognitive impositions on our way of seeing and understanding the world. It shapes our responses, including what is to be considered an object of fear. The designation of futile motives is a perfect product of the fear of irrationality, an irrationality which must be doubly punished for its failure to comply with the existential duty of the modern subject. This is all the more evident if we consider how readily categories appear to define motives 'meaningfully,' even in the context of intimate and family murder. An American textbook on the subject identifies four categories of motive: 1) killing for profit; 2) obsession and jealousy; 3) power, control and abuse; and 4) killing for love. Introducing the first motive, the authors summarize, "Murder in the family and other intimate relationships spans a wide range of motives, from jealousy to revenge, from attention-seeking to mercy. It is one of the most insidious motives, if only for its selfish cold-bloodedness, when the family unity occasionally becomes a vehicle for profit." [27] The listing of motives seems almost casual, so taken for granted is their inclusion in the sense-making of the reader. Here again we see how culture, as a semiotic sense-making operation, is determinative of every evaluation in, of, and about motivation in crime. Understanding better what this means is a necessary historical, theorical and reconstructive next step, to which I will now turn.

3. Facts and culture in criminal law and their historical roots

The exponential increase of the plurality of our societies puts inevitable pressure on the legal adjudication of so-called non-normative issues, that is, criteria for analysis that unsettle existing interpretations of legal norms. While this tension is always endemic in law, when there is congruity among constituents, meaning when legal culture and social culture are in harmony, the adjudication of crimes in which values are explicitly called into play is likewise more harmonious. When, instead, as I have been trying to illustrate, there is heterogeneity among legal cultures and the people ruled and judged by them, values-driven conflicts emerge with greater vehemence.

As observed above, the law assigns itself the contentious task of distinguishing act from crime, actor from criminal. These distinctions, however, easily fall into the pits of ontology. This is because the transformation of an act into a crime requires a *what*, *when*, *where*, *how*, and most onerously, a *why*. In modern western legal scholarship, there is increasing acceptance of the idea that the definition of an act as a crime, the establishment of this legal 'fact,' produces not simply a material entity, with previously established claims of 'objectivity,' but rather a conclusive set of assessments that are recognized to be subjectively connoted.[28] Despite the ongoing predominance of positive law as the face and voice of Western legal systems, the facticity of the categories of law cannot in good faith be understood as immutable or fixed. Any inquiry into the 'why' of an infraction of the law reveals the impossibility of depending entirely on pre-established norms, rules, or even precedents since every case will inevitably introduce new variables, new ways of acting in the world, new ways of producing effects. To put it plainly: what people do and why they do it changes dramatically as societal possibilities and needs change. Thus, even within a large homogenous population, the constant advance of technology

[27] Fox and Levin (2001: 56-71).
[28] Canepa (2011: xiii).

(intended in the broadest of senses) and ways of living will create diverse behaviors, and these will require new assessments.

The tension in law between what is established (by both rule and precedent) and what occurs over time, is as old as law itself and has been treated by philosophers, jurists, politicians, and social scientists of every stripe. It is reflected by contradictory judgments on similar sets of 'facts.' This mutability reflects, however, a debilitating blindness to an intertwining of facticity and culture, to the ways in which values and ends determine what *is*. The very idea of justice upheld within legal systems is itself part of a particular historical semiotic ideology, a key idea to understanding the interweaving of facts/values which I will return to in greater detail further on. In the modern secular world, the primacy of the individual citizen subject and the hoped-for inviolability of a universally applicable rational Law have combined powerfully. While they have undoubtedly engendered important freedoms over the course of the centuries, together they have also shaped the categorical foundations of Western legal systems which posit as a given the possibility of rationally assessing facts that would appear to exist *a priori* in a univocal world that operates according to same rules for one and all. Far from being neutral or universal, legal systems depend on a precise continuum of sense between sets of culturally established values with extensive religious roots belonging to the majoritarian culture. This coherence is necessary for these laws to be understood and obeyed, and also underpins every assessment of their violation and the subsequent punishment. Should there be any doubt regarding the unacknowledged and fully pervasive set of cultural values and assumptions that determines the shape and output of legal systems, we need only look at what is deliberately called culture to see it emerge.

The introduction of the term 'cultural' in legal assessments reveals a resistance to the above outlined view of law and its role. The 'cultural factor' is typically used as a short-cut means of placing behaviors in a largely unexamined category, a way of saying 'one of these things is not like the other' and leaving it there. The 'cultural motive' comes from a premise that culture is what other people have,[29] people who are considered foreign to the country whose legal system is tasked with adjudication. Furthermore, it does not recognize any sort of experiential flux, but instead places action within a static culture bucket disguised by vague value labels such as 'honor', which are rigorously kept apart from any such labels nevertheless present (sometimes for centuries) within the autochthonous context. The assessment of why people do what they do must contend with constant change *and also* it can never be anything other than cultural, understood as "relating to the ideas, customs, and social behavior of a society." It will always call into play the culture of the adjudicators as well as that of the adjudicated, and any insistence on seeing these cultures as incommensurable will shut down processes of inquiry and therefore any chance at meaningful and/or just resolution.

These entanglements have historical roots that are relevant to finding alternative paths. For the attempt to keep law stable and the desire to treat all constituents of law as equal before the law are the products of a particular set of histories replete with good intentions that need not be de-constructed entirely out of existence. Rather, there is an opportunity to reveal where the universalist spray paint of conclusions has covered up the particularity of cases thereby defeating its own aims for justice. Cultural motives and futile motives are products of an unbalancing of the scale, with legal logical stability on one side and just treatment of individuals on the other. A dismantling of this dichotomy calls for an unsettling of the categories in use with attention to stability/precedent vs. particularity/present, but

[29] Ricca (2008).

not only. The very legal logics on which this dichotomy depends are misapplied in many cases. Whereas the law is first and foremost called to engage in processes of inquiry which cannot be already furnished with conclusions but must instead be open to whatever may be uncovered, too often the desire to arrive at definitive conclusions instead takes the place of this process.[30] Futile motives and the cultural factor are ways of qualifying that imply conclusions, solutions to the problem of how to understand a person's motivation in committing a crime. But they conceal a missing process of inquiry which relies on 'culture' and more specifically, as I will show, 'futility,' as icons; when assessment skips immediately to conclusion, it can hide an instrumentalization of these iconic terms, used to induce—more or less aware—politically motivated results.

That politics enters the discussion is a consequence of the history of the dichotomy between a quest for legal certainty and the protection of individuals, which is best understood by taking a broader view. This is because if we are to meaningfully assess rationality and justice, facticity and social fluidity, motive and intent in crime, and their relationships with culture and law, we should understand the context in which these terms have developed, with specific regard to Western legal systems. To understand the history of these systems, we must consider their origins, which are deeply entangled with religion. For the Western legal conception of motive and culpability is preceded by and intertwined with ways of evaluating crimes, motives, and punishment that are difficult to separate from their religious origins. To be clear, the religious entanglement to which I refer should be understood not in terms of denomination or a particular religions institution (e.g., the Catholic church), but rather anthropologically, as a complex social phenomenon that has shaped public understanding and culture in crucial ways. Centuries before state courts codified right and wrong, societies were guided by theologically based ethical ideas. Religious authorities ran schools and hospitals and were much more seamlessly integrated into everyday life than is the case in secular societies today. Processes of secularization that have divided state and church in Western contexts did not eliminate the long histories of thought and conduct that held them together in prior eras. A comprehensive historical account is well beyond the scope of this essay. Nevertheless, an outline of some of the relevant contributing elements is necessary.

The Enlightenment idea of man as rational, free, and deserving of equality accompanies a move away from religious transcendental views which instead had characterized him as subject to the will of God. Ideas of enchantment, in which mystery remains active in both mundane life and the coming transcendental realm are newly eschewed. They are relegated to a dark, ignorant past and transcendence is equivocated with superstition; man is made uniquely responsible for his actions (and I use the masculine pronouns deliberately since women were, in the salient historical texts, absent).

[30] This observation comes directly from philosopher John Dewey who as early as 1924 eloquently stated:
"In strict logic, the conclusion does not follow from premisses; conclusions and premisses are two ways of stating the same thing. Thinking may be defined either as a development of premisses or development of a conclusion; as far as it is one operation it is the other.
Courts not only reach decisions; they expound them, and expositions must state justifying reasons. The mental operations herein involved are somewhat different from that involved in arriving at a conclusion. The logic of exposition is different from that of search and inquiry. In the latter, the situation as it exists is more or less doubtful, indeterminate and problematic with respect to what it signifies. It unfolds itself gradually and is susceptible of dramatic surprise; at all events it has, for the time being, two sides. Exposition implies that a definitive solution has been reached; that the situation is determinate with respect to its legal implication." A judgement that rests on predefined ideas about culture and motivation will never be open to surprises for it has already built in its conclusions: Dewey (1924).

Enlightenment takes root bolstered by a newfound sense of control, a drive towards mind over matter. Spurred by Cartesian thinking, rationalism begins its ascent over pure empiricism, and a kind of foundation is laid for a subject that can be bifurcated into a secular mind and a secular body. Taking its cue from the Cartesian divide between *res cogitans* and *res extensa*, a series of distinctions are generated within modern thought and then projected onto different spheres of experience. First, there is the relationship between faith and reason which, translated into socio-political terms, becomes the relationship between the religious and secular spheres. In this way, the overlap between epistemological and socio-political profiles creates a correspondence between the cognitive and socio-political planes. Secondly, however, since the secular mind is defined by its rationality and reasonableness, it operates under the assumption that all things secular are rational. This rationality is distinguished as such by the irrationality of all things deemed to be religious. The presumed rationality of the secular mind is however founded on the asserted self-evidence of Cartesian 'clear and distinct ideas' 'transfigured in subsequent Kantian thought into analytical judgments.' Still, the self-evidence of Descartes' 'clear and distinct ideas' does not exclude, from a cosmological point of view, the presence of a God who, as the creator of a coherent universe, acts as an aprioristic guarantor of the harmony between these rational ideas and the structure and meaning of the world, that is, between *res cogitans* and *res extensa*. This connection, nourished by an axiom that is both epistemological and theological, breaks down as modernity progresses and secularization processes begin to take shape. What remains is the cultural, and in many ways silently theologically oriented imprint of analytical categories that is, of 'clear and distinct ideas', adopted as rational and a priori in every branch of knowledge. These same ideas are then used in the determination of facts and, therefore, of the primary qualities that can be rationally and objectively attributable to facts through processes of categorization. Alas, all categorization is inescapably cultural. So, in this way, the cultural element comes to merge with objectivity under the guise of a neutral reason, believing itself to be universal and transparent. The result of these operations of 'semantic qualification,' however, has been to camouflage the subjective, cultural, teleological, and axiological elements that are present in categories, which are only surreptitiously defined as rational. Categorizations are deemed to be objective but are instead inevitably ethno-centric and, therefore, reflective of incomplete processes of secularization[31]. In short, cognitive-cultural identity has been progressively passed off as universality, generating one of the most devastating weapons to have fortified the planetary spread of colonization through the obscuration of the Other.

Once all things excluded from categorical structures of rational universality are defined as irrational, the move to obliteration is straightforward. Since rationality comes from reason, and it is neutral, objective, and universal, it is therefore understood to be *uniquely true*. The legitimacy of anything that can be proven to be 'irrational' is automatically disqualified. At least one immediate challenge lies in the impossibility of 'proving' irrationality, particularly when we understand that even the empirical, even the evidence presented to us through our senses, does not have *unique* truth claims. Descartes himself wrote about optical illusions and other phenomenon that can deceive us. I would like to make a more radical argument, however, regarding the conflict between rationality-as-truth and the evidence of the senses, both of which are at the basis of the above-described ideas of rationality and

[31] The use of the plural is important here, since contrary to early secularism scholarship, there is now a growing understanding that the particular blend of secular and religious that shapes modern Western societies is strongy influenced by which ssecular and which religious forces were historical present and in what combination. Swedish secularism and Italian secularism, for example, produce dramatically different social contexts. See Vazquez (2018).

truth: the position one takes regarding what exists a priori in the world, including rationality itself, is an act of categorization that cannot have any inherent legitimate truth claims. If we are to understand the deep and pervasive impact of this kind of idea, we can benefit from seeing it within the context of a 'semiotic ideology,' as mentioned above. Anthropologist Webb Keane has written extensively about this way of understanding the world view 'frames' that shape a given cultural context. A semiotic ideology "refers to people's underlying assumptions about what signs are, what functions signs do or do not serve, and what consequences they might or might not produce."[32] Signs are, here, the 'stuff' of meaning. A semiotic ideology in which the secular is equivocated with an a priori rationality that defines itself as neutral and objective, must consequently deny importance to embodiment,[33] relationality, and affect. It supports a set of ideas about people's ability to have intentions, make plans, and carry out actions without being overtaken by physical or emotional occurrences. It furthermore empowers an understanding of 'facts' as rationally identifiable and distinguishable from emotions.

Legal 'facts' are central to this semiotic ideology. Motive, after all, meaning "that which inwardly moves a person to behave a certain way, mental state or force which induces an action of volition" has within it a bodily concept, that of motion. There is no induction of action without a body to act. Behavior is bodily, and not only. Enactivist scholars have much to say about the ways in which the embodied and socio-technical environment-embedded dimensions of perception have important consequences for our ability to perceive, much less understand the behaviors of others.[34] And yet, modern Western legal systems continue to grapple with a seeming desire to make clean distinctions that qualify the actions in the 'external forum' using presumptions about the 'internal forum.' In some sense, the internal forum is a product created by the idea of the external forum, and paradoxically, the distinction imbues the internal forum with a kind of transcendental power. It becomes that which is unknown, unseen, not public. And yet, in order to rule upon it, the law *must* 'know' it, that is, the law must make determinations about it to adjudicate behavior. The distinction between *forum internum* and *forum externum*, used broadly today in Western legal systems and international law, predates even Descartes, as it was first introduced in the decrees of the Council of Trent in 1545 and 1563. Whereas today *forum externum* is defined in international law as the only sphere where law can rule (there are no illegal thoughts or feelings, only illegal acts) when the distinction was first introduced it reflected a far more interrelational understanding in which both the internal 'court of conscience' (thoughts) and the 'public court' (acts) were concerned with sin, which meant internal and/or external transgressions, wrongdoing that imbricated moral, legal, and divine codes of conduct. Juridical work was shared by church and state, and subjects were educated and raised within a holistic view of wrongdoing that straddled morality and state law.[35] Processes of secularization displaced these coherences but could do nothing about the inconvenient circumstance that morality is not rational; nor could the 'stickiness' of historically-shaped ways of understanding be escaped.

Morality is a cultural product made of values that develop through societal agreements made over time. This is precisely where modern law finds itself unmoored. No longer overtly supported by ecclesiastical authorities and codes, secular law must 'see all' and make value judgments about right and

[32] Keane (2018: 65).
[33] The natural corollary to the secular mind is the secular body, upon which are visited expectations about how to dress, what to eat and how to move in society, as well as important consequences for how birth, birth control, death, and other body-centric social practices are regulated. This division of boy and mind is determinative of *every way* in which bodies/people are rule.
[34] See Van Grunsven (2021) and references therein, as well as Di Paolo (2020) and Di Paolo et al (eds) (2018).
[35] Petkoff (2021).

wrong. It must behave as a kind of superhuman controlling power, as if there were objectivity in these judgments, as if values could be proven to be universally reasonable and rational, as if these terms were not themselves utterly subjective. Moderns are no longer beholden to notions of transcendence, afterlife, or deistic control. Modern people control their own fates, make their own destinies. Across Europe and the Americas this is a crucial tenet of secular governments and legal systems. Instead, the modern rational subject finds itself faced with an impossible task: to find reasons for every behavior, to form judgments systematically and logically, 'without subjective values.' The reader may immediately balk: well not *without* values, and this is precisely the rub. The values once overtly declared and jointly adjudicated by religious and state authorities have simply gone underground. Once clearly subjective, they have become 'objectivized.' Since is impossible to do without values (value judgments, let us say), our allegiance to reason drives us to find answers and explanations and that distinguish the rational from the irrational through a kind of denying mental gymnastics. The truism 'truth is stranger than fiction' reveals a belief that we are overwhelmed by the inexplicability of our worlds, that it is impossible to always find logic, to always control outcomes. The modern requirement is, ironically, a suspension of this belief. Underground subjective values, however, come at a cost: they produce nonsensical evaluations. For how can a legal system simultaneously consider itself to be fully objective and at the same time claim to know what an individual was precisely feeling at the moment of committing a crime and why? How can an external judge claim to know the internal state of another person? Again, the work of enactivist scholars has illuminated much about the pervasive dangers of cognitive misrecognition.[36]

As argued above, the whole problem comes from the engulfing of the axiological dimension—present in any form of knowledge and categorization—within the structure of empirical judgments that are based on the so-called primary qualities, qualities that are presented as neutral, objective, and universal. Their factuality is the result of a transformation, one that comes from the adoption of a priori assumptions within each branch of knowledge—according to Kantian thought—which become axioms for the construction of the theoretical structures within all areas of scientific knowledge. They are accompanied by the use of analytical judgments understood as 'logical operators' in these constructions. The Cartesian-inspired division between mind and world has therefore promoted the tendency—on both the epistemological and ethical-moral, and therefore juridical levels—to fix coordinates of objectivity that have been assumed in normative terms. Starting from these normative coordinates, modern thought has subsequently elaborated a sort of 'anthropology of knowledge' based on the objectivity/rationality/universality of those coordinates. This 'objectivity' however, is no longer intrinsic to the world, as it was understood to be in the Aristotelian-Thomistic tradition, but is instead entirely relative to the rational, noetic dimension of human experience. In addition, it has an affective force that contributes to the 'disappearing' of the transformation that has taken place from subjective to objective, from assumptive to extant.

Despite this process of relativization of knowledge—a consequence of Kant's critical turn—the rationality of the subject, of the 'mental', sustained a 'de-subjectification': rationality and its categorial

[36] At stake is our very capacity to qualify behavior we do not understand as inhuman.Van Grunsven cites, among others, the work of Trip Glazer in the field of Epistemic Injustice, which identifies "the countless ways in which people can be silenced or deprived of resources they need (and should reasonably expect to have access to) in order to successfully relate to themselves and others as the knowing, meaning-expressing, sense-making beings that they are." Van Grunsven (2021: 291).

forms were assumed as universal even thought they were also subjected to processes of falsification and verification. In other words, ideas were no longer considered as continuous and inherent to the outside world, but thanks to their rationality were considered capable of generating judgments endowed with objectivity and delivered into the world. As mentioned above, these 'ideas' remained steeped in culture and indebted to categories of thought from a past in which religion, considered in its anthropological and cognitive projections, was a crucial agent for the production of meaning, and an intrinsic element in the elaboration of cognitive categories. From this perspective, trust in secularization ended up becoming the main enemy of secularization itself, since it blinded its actors, rendering them unaware of how much religion remained in their allegedly secularized imaginary.[37]

To complete this historical foray, we can turn to the founder of modern legal-rational thought, namely, Hugo Grotius. The natural-rational universe of juridical experience, defined as true even with the great concession *etsiamsi daremus* (*even if there were no God...),* is based on a normative structure that assumes certain values as the a priori presuppositions of every possible juridical phenomenology. The subjectivity of these value judgments, transfigured into axiological rationality, provided the foundation for legal categories that were endowed with objectivity. They leveraged a vocabulary capable of defining institutions in which the subjective element was absorbed into the very definitions of the behavior assumed by individuals. The subjective will of all engaged parties was thus camouflaged in an objectivity/rationality of purpose/value that legitimated contractual operations, while remaining separated from the personal motives of each person involved. Personal motives were thus considered irrelevant for the purposes of legal regulation. The same was true for criminal behavior. What mattered was the "fact" of the crime, not who committed it.

Still, a problem remained: how to attribute a sequence of actions—e.g., the steps leading to homicide—to a single individual without presupposing the existence of a plan, some end that would coordinate them functionally and as such be present in the mind of the subject agent? This was resolved using yet another artifice. The categorization of criminal behavior included an objectified goal within its very structure, qualified as 'intent.' In this way, intent, lodged within the semantic and objective structure of any criminal action could be distinguished from motives, which instead remained in the 'subjective internal' sphere and, in the name of protecting freedom and equality, were separated from the attribution of any responsibility. In other words, one could be judged and criminally condemned exclusively for what had been 'objectively'carried out but not for what one believed or planned. Intent, therefore, was elaborated in the forms of *dolus* (willful intent) or *culpa* (negligence).

Curiously, these were defined as 'subjective elements of the crime', in the sense that they belonged to the crime, considered in its objectivity, but were considered irrelevant to the subjective motives that drove the individual to commit the crime. As is evident, the strategy of subtracting the 'subjective' from what is constructed as 'objective,' already crucial to what we might term the epistemology of secularization, is also foundational for law. Observing the evolution of this 'objectivity-rationality' and its subsequent application to relations with other cultures—marked by colonization and the unfettered exportation of Western legal models—leads to an inevitable conclusion. The 'objectivity' generated by Western culture does nothing other than impose built-in and camouflaged elements of subjectivity onto

[37] Something which was not at all the case for those with different histories, making the cognitive clashes encountered in colonial contexts in some sense predictable. The compulsory force of secularism is not experienced by those with entirely different semiotic ideologies as is keenly and thoroughly illustrated in Keane (2007).

Others, thus transforming their cultural 'objectivity' into irrationality, superstition, meaninglessness and, ultimately, social danger.[38]

4. The Cultural Castles Behind Motives

Part of the trouble in addressing motive comes from the circumstance that modern secular law is not, at its fundaments, well-equipped to rule on the internal forum of individuals. Motive belongs to the mysterious inner workings of human psychology, cultural upbringing, education, environment. It comes from a chaotic mix of nature/nurture and is often inscrutable even to the actors themselves. It is not possible to arrive at a fully objective conclusion about someone's motivation, in part because it can be so complex and in part because motives involve not just values but also cognitive schemes. This, however, requires further elaboration. While it may seem obvious to say that motive is complex and not always intelligible, the reasons for this extend far beyond a simple acknowledgement of human volatility. In recent decades, consensus has been steadily growing across a wide range of disciplines including cognitive science, psychology, philosophy and even law, that the traditional Cartesian dualistic models for understanding human cognition and behavior—upon which modernity relies—are not adequate to their meaningful apprehension. The field of research on this topic is prodigious, but even a few select observations should be of use here.

As a foundational premise directly related to motive, bodies and their actions do not exist in separate spheres, neither in terms of time nor in terms of materiality. Rather, bodies spend most of their days performing habitual, often automatic, actions, from our basic survival functions to the ways we see, hear, and physically move in the world. More importantly, from William James' "bundles of habits," to Pierre Bourdieu's concept of habitus, we have long had phenomenologically informed insight into and confirmation of the ways in which our bodies are not only organic, but also consist of their minded aspects: what they choose to do, express, care about, what they are sensitive to and capable of. It bears repeating that these aspects are *co-constitutive*. They cannot be divided from the body since they are entangled with it, no single aspect can exist alone[39]. It follows, then, that just as we consist of internal sets of relations, these relations extend to our surrounding environment. Human actions cannot be reduced to single overt events but must instead be seen as rooted in sets of relations to other acts, other bodies, other environmental processes. John Dewey described the underground existence of habits, which individually take turns guiding our conduct.[40] Which habits are "steering the ship" at any given time depends, of course, on the waters upon which we sail. At the risk of oversimplifying, we can

[38] For a comprehensive treatment of this objectivization process that does nothing more than camouflage conclusions arrived at through deeply subjective ways of seeing, see Ricca (forthcoming). And for a clear and concise analysis of how this takes place see again Keane, who notes with reference to religious believers, just one notable group of Others within the modern secular semiotic ideology "those people who seem to persist in displacing their own agency onto such rules, traditions or fetishes (including sacred texts) are out of step with the times. They are morally and politically troubling anachronisms, pre-moderns or anti-moderns." Keane (2013: 160).

[39] In short, "Sensorimotor bodies are assembled by processes of networked relations between precariously equilibrated sensorimotor schemes, they are literally made by organized potential and actual enactments," Di Paolo (2020: 17). For a concise elucidation of the relational qualities of body, mind and culture including an outline of the ecological psychology view, see Ingold (1999).

[40] *Ibid*, at Note 11.

at least begin from an acknowledgement that the complexity of motives is related to the complexity of behavior and thus of bodies and minds and their co-constitutive productions and anarchies. Add to this the inescapable interrelatedness of all individuals and the surrounding communities and environments and we begin to have a sense of how impracticable isolating motive can be.

Now, if we think of culture as a castle (perhaps built of Legos, but bear with me) we can imagine the ways in which it conditions our cognitive schemes, our frameworks of meaning, vital for making sense of the world: its walls help us know what is in and what is out, its windows give us specific vistas, its moat protects us from attack, its drawbridge allows us to control who or what comes in or out. This metaphor is intended to convey the solidity of culture and the way it can determine and contain our outlook. It only works, however, if we imagine its construction materials as changeable – sand, or Legos. This is because though we behave as if our way of living and looking at the world were a monument of truth in fact it is only a kind of mirage of certainty. Intricate cultural castles are built which represent only the latest determinations within a given set of agreements of what *is*. Like brick and mortar castles, the castle of culture was built in the past, it is made of history and of experiences already lived. What was to come could never have been predicted. It is not equipped, if there might be room for a drop of levity, with Wi-Fi. Bodies, people and cultures are "enacted into existence," to borrow Di Paolo's phrase.[41] This means that they must be de- and re-constructible if they are to survive, they must change to suit ever evolving human needs and environmental constraints. From a legal point of view this involves values, such as in the basic categories used to determine what is legal/illegal, just/unjust, comprehensible/incomprehensible, but it also involves things, facts. A jail cell is not objectively a jail cell to all people throughout time and space. If this seems strange, consider the jail cells of the Arhuaco people of Columbia whose doors do not lock. Their concept of restorative justice means that perpetrators remove themselves from society to 'treat' the societal wound they have inflicted. Jails are called 'harmonization centers,' and the 'incarcerated' remain in their cells cooperatively, participative in their remorse and reformation.[42] Such jail cells from a Western point of view would not be considered jail cells at all. Even objects and thus facts are the culmination of specific experiences which lead to agreements, ways of organizing and categorizing, means intended to achieve particular ends.

Experience teaches us to make cognitive assumptions, a crucial human skill, to be sure. Without the assumptions we depend on to move through our lives we would be forced to re-learn every micro concept again and again. Instead, we can rely on robust cultural learnings that are passed on in many cases through a kind of osmosis, not individuated and taught, but experienced and absorbed[43]. This reliance however comes with risk: the confusion of what is currently understood with what irrefutably *is*. When a 'fact' (or an object or a value) is deemed to be so, it rests on cognitive assumptions which are based on axiological presumptions formed through allegedly empirical categorization schemes. We experience, we evaluate those experiences, we come up with suitable categorizations based on those experiences and evaluations, and then move on. If, however, we repeat the experiments carried out to come up with our categorization schemes, we are likely to obtain different results. From ways of understanding crime to punishment to reform, all of our fundamental categories have changed

[41] *Ibid.*
[42] Gutiérrez Quevado (2018).
[43] Pioneering research on the origins of social cognition by comparative psychologist and linguist Michael Tomasello succinctly argues that the human capacity for cultural transmission is the missing differentiator evolutionary biologists have long been looking for, see Tomasello (1999).

drastically over time and continue to do so. If we confuse our place-holder categories with untouchable monuments of what *is*, we leave no room for the very human freedom the categories were intended to protect. This is because even our most 'objective' schemes are always full of values. Our basic ways of measuring time, of organizing families, cities, the ways in which we use objects, are choices among an endless span, and perhaps even more importantly, they are constituted with and by our environments and all the people in them. Following the latest formulations of enactivist theory (but anticipated by Dewey, Peirce, and others) it is not the case that there is a diversity of actions within a pre-existing world. Rather, *actions bring forth a world*:

> Embodied agents enact a world of significance, and this is an ongoing achievement done in conjunction with other agents...Real acts are not easily split into abstract phases such as intention, perception, thought, emotion, and so on. These elements relate organically (Di Paolo 2015). In the case of social interaction, they involve others, who may have a say in their meaning, in how they are taken up, amplified, negated, etc. (De Jaegher and Di Paolo 2007). To the extent that we become aware of these relations, our agency is ethical. [44]

If one culture qualifies its own moral value schemes as objective, as capable of determining what is in the range of human behavior/motive and what is not, then the distinction between objective and subjective evaporates dangerously. Ideological and culture-laden judgments are passed off as objective. Ways of being or even intending being in the world can be denied out of existence. Di Paolo refers to this phenomenon as 'we-ness,' the phenomenon of depending on the otherness of Others to define the coherence of one's own group ("there is no us without them"). The terrible risk of this false dichotomy is that when the dependence we have on each other for co-constituting, or to use his term, co-becoming, is denied, "we will equate humanity with our group only, whether we recognize this or not. If concrete knowing engagement is curtailed, others can only become humans for us in the abstract.[45]

This is the knot at the heart of the futile motive designation. Judgment of motivation assumes that a) the person being judged knows precisely how their actions relate to the cultural expectations of the community and the law[46] and that b) the law is able to evaluate their motives without undue bias, understanding how a person's actions relate to their own cultural make-up. In other words, judgment of motivation depends upon a shared language, one that uses the same terms and shares the same values. There is an assumption that we are all sitting in the same castle. But if we return to the sample list of motives that are not considered to be futile within Italian jurisprudence (jealousy, vendetta, etc.), we see that the sheer specificity of value judgments makes it extremely difficult to apply such cognitive/cultural lenses to people from other cultures. While it is of course impossible to determine just punishment for crimes without some kind of evaluation of the degree of the crime, this evaluation must be understood for what it is: an application of values, as well as of cognitive concepts that are culturally sculpted. The problems encountered in the ruling of 'abject' or 'futile' motives are perhaps even more relevant because they mirror broader conflicts that involve inner forum and outer behavior, the rigidity of predetermined categories, and more specifically, legal clashes between the secular and the religious, reflecting incomplete processes of secularization. Pausing to briefly elaborate on this

[44] Di Paolo and De Jaegher (2022: 244).
[45] *Ibid.* at 249.
[46] Unless, of course, they patently don't, as in the case of so-called crimes of ignorance, wherein a perpetrator can be excused for their behavior because of a demonstrated incapacity to have known in advance that they were committing a crime. For a complete analysis on crimes of ignorance and the role of intercultural translation in their adjudication, see Ricca (2014).

context a bit further may help to clarify the contours of the 'we-ness' that is enacted and protected by legal qualifications of motive.

5. The Implicit Cognitive Impositions of Secularization on Criminal Legislation and Case Law

Moving from the historical-theoretical basis developed thus far, the case law analyzed in section two can now be further considered from a critical perspective. Futile motives are a way of othering, a way of pushing behavior out of the category of rationality. And yet Italy has a deep and important history and relationship with its religiously infused past, and religion is in many ways the *neo plus ultra* of otherness in the moral narrative of modernity. Despite its long and complex relationship with the Catholic church, the Italian state is officially secular. Thus, organized religion is ruled from the outside, as it were, through state recognition of specific denominations through *intese*, or agreements. These include tax exemptions, the regulation of funding opportunities and the entitlement to spaces of worship, etc. The state also takes on a protective role towards religions, guaranteeing freedom of belief and worship, protection of sacred objects and spaces, and sometimes even protection against insult/defamation. In keeping with modern understandings of the proper division of the rational and the transcendental, these legal practices are intended to safeguard (and perhaps contain) religion as a cultural thing-out-there like any other. Alas, religion, like everything that is inextricably linked to the inner forum, is decidedly not an objectively perceivable and measurable thing-out-there, far from it, at least if we expand our view beyond institutions to include believers and all their ways of living their faith. Instead, religion is a kind of fish out water[47] as a thing-law-rules because its entire existential foundation is incommensurable with law's self-understanding. Law is its own highest power; religion presupposes a divine higher power. Law depends on facts; religion depends on belief. Law rules over 'objective occurrences'; religion is sustained by faith. How, then, are these two opposites able to ever co-exist peacefully?

Peaceful coexistence results from the historical-cultural circumstance that the substantial overlap of these domains in the past lives on, underground, not unlike a Deweyan habit, nestled within and giving shape to shared operative cognitive schemes. Far from being neutral or universal, the legal system relies on a precise continuum of sense between sets of culturally established values with extensive religious roots belonging to the majoritarian culture and the laws themselves. It is this shared cultural fabric that allows laws to be understood and obeyed. Basic legal concepts of truth, ownership, belonging and so on, but also duty, justice, remorse and retribution come directly from a shared past, one with deep anthropologically Christian roots. The theologically inspired content of politics and law have long been decried either as pointing to the fundamental sins of modernity or as constituting its saving grace. I would like to argue alongside the most recent secularization theorists that of most interest is not the what (is secularization a curse or a boon) but the how: in what ways are we conditioned to see and

[47] Within the scholarship on epistemic justice, we can also find a current that addresses religion. For just as ignorance about minority cultures leads to racism and bigotry, so too does ignorance about theology lead to bias against religious people, a phenomenon that has been termed 'religious alien' whereby "anyone who seems to inhabit a religious form of life that one does not take oneself to inhabit" is 'othered.' Ian James Kidd points out that not only is it a mistake to discriminate against those of religious belief, but religions traditions can actually be rich sources for 'latent epistemic aspects of religious concepts of justice,' despite strong criticism to the contrary. See Kidd et al, (2019: 389-390) and Griffiths (2010).

comprehend through lenses that are shaped, often without our awareness, by culturally-Christian roots? Do the cultural lenses being used ever reveal their non-neutrality? Could a potential unawareness be a root (intended doubly) cause of conflicts?

Many pages could be filled examining these issues, but we need only look at one topic parallel to the subject of this essay, futile motives, to see the cultural imbrication of law and its anthropologically Christian roots: a theological perspective on imputability. Catholiculture.org defines imputability as follows:

> The moral responsibility for one's human actions. A person is accountable to God only for his or her deliberate actions. They are acts performed with knowledge of what one is doing and with the consent of the will. In order to gauge the accountability of a particular action, one must consider the degree of deliberateness involved. If a person's knowledge of the nature of the act or his or her consent is diminished, the imputability will be lessened. Catholic moral theology recognizes six chief hindrances to full imputability: ignorance, fear, passion, habits, violence, and mental disorder. (Etym. Latin in-, *in* + *putare*, to consider: *imputare*, to bring a fault into the reckoning; to ascribe.)[48]

There is an almost perfect consistency with the legal understanding of responsibility, which defines motive very much in terms of the consent of the will. Legal motive takes for granted a degree of deliberateness; indeed, it is the presumption of deliberateness that allows for the deduction of motive. The futile motive, we recall, is one that is banal, trivial, disproportionate, unqualified, insufficient, meaning it cannot be linked by the judging party to a reasonable standard of deliberateness. The futile motive is not compatible with ignorance, fear, passion, etc. It is so foreign, so incomprehensible, that it is a non-motive, utterly and completely outside the category of what constitutes motive or reason. The designation of futile motives is a complete abnegation of subjecthood; it zeroes out any possibility of humanness of the subject. While 'abject' motives, by contrast, cast a clear moral judgment on their perpetrator as being morally repugnant, 'futile' motives go a step beyond to classify the subject as indeterminable, unrecognizable, unjudgeable as human. The concept of imputability is clearly only the tip of the iceberg. The entire juridical institution of punishment is a descendant of Christian concepts of remorse, retribution and the restitution of grace to the soul, necessary for salvation and the return to the fold as a child of God.[49] The person committing an act with futile motives is beyond comprehension and thus beyond redemption.

To be clear, there is nothing inherently problematic about the cultural consensus between modern legal systems and their religiously rooted cultural pasts. Indeed, this alignment is a key part of the success of the law. It is why people know how to obey laws without any legal education, among other social benefits. Challenges emerge when people from cultures other than the dominant one find themselves in contrast with the law. As we have seen, the law cannot adjudicate on motive without attempting to examine the internal forum of the subject, which however is neither the principle role nor the competence of the law. Any effort to examine the internal forum must contend with the cultural universe of the subject, a universe being viewed through the lenses of another universe. Again, in the Italian context we can see the cultural specificity of the lenses at use when we consider a phenomenon such as the Mafia. In the original case examined in this essay, the Court stated that the perpetrator's motive could not be explained by their belonging to groups that recognized violence as a positive value.

[48] https://www.catholicculture.org/culture/library/dictionary/index.cfm?id=34135
[49] Ricca (2014).

Who would deny that the Mafia recognizes violence as a positive value? Would an Italian judge? Surely Mafia crimes are prosecuted vigorously also for their violence. The question is whether the motives behind them find their place within existing motive categories such as vendetta, jealousy, financial gain, self-protection, etc., or are instead relegated to the hopeless desert of futility. Along these very lines, the Italian penal code introduced in 1982 the so called "Rognoni-La Torre" law[50], which regulates "mafia type associations" (*associazioni di stampo mafioso*) defined as those whose members make use of specific kinds of tactics and attitudes in the execution of crimes. These include intimidating force, the conditions of subjugation and silence, and particular kinds of organizationally driven aims. Here we can see an attempt to corral behaviors that have been consistently found in crimes associated with Mafia organizations. Singling these qualities out is a cultural operation, an attempt to make sense of what has been identified as a consistent pattern of behaviors so that the law is better able to respond in crimes where the pattern is present. Though the aim is to identify a certain kind of criminality and penalize it accordingly, this is still an including action, a way of making sense of behaviors. This is the exact opposite of the operation of the category of futile motives which instead expunges meaning from behavior.

What I am calling the cognitive impositions of secular law are the culturally shaped categories that can do a disservice when their cultural specificity is ignored, or worse, passed off as neutral and universal. The punishments of law, like every social institution, are cultural "factors" not only as products of past collections of experience leading to certain preferences and sensibilities but also in the sense that they produce culture and values[51]; their application expresses and contributes to the formation and defense of a particular ethical-political vision of a society.[52] When secular law succeeds, it is because processes of semantic homogenization of linguistic and pragmatic habits[53] have already taken place, they have already formed culture. When this culture, hidden behind screens of dualities such as futile motives, ends up categorizing behaviors as non-comprehensible and therefore non-existent, it serves as a kind of alarm bell.

In the judgment for the case involving the El Salvadorean youths, cited at the beginning of this essay, the Court states, "the impulse [motive] for the crime lacks that minimum of consistency that the collective consciousness requires in order to make an acceptable connection on the logical plane with the action committed."[54] The question then is: why aren't the perpetrators part of the collective consciousness?

The categories used to qualify behaviors as legal/illegal and motivated/unmotivated are only legitimate insofar as they reflect the worlds of those who they are meant to evaluate. Those worlds are complex, plural, and ever-changing. If 'life, security and personal freedom' are the objects of the law's protection, a culturally informed assessment of the lives and personalities in question is fundamental. Even removing the question of 'people from a different culture,' what can it mean to say that a motive is a non-motive? A similar issue is raised in the distinction between action and omission. Husak illuminatingly demonstrates the dilemma that arises in attempting to categorize certain actions as

[50] Italian penal code, Art. 416 bis, 13 September 1982, n. 646.
[51] Tuminello (2011: 4)
[52] See Garland (1990).
[53] Ricca (2018).
[54] Original from the Court's judgment: "*la spinta al reato manca di quel minimo di consistenza che la coscienza collettiva esige per operare un collegamento accettabile sul piano logico con l'azione commessa.*"

positive and others as omissions for example in the case of euthanasia. It does not seem quite right to argue that failing to replace an emptied bag of nutritive sustenance should be qualified as intentional murder, or homicide. But what about withdrawing the same bag? He argues that when euthanasia is tolerated, the legal reasoning is gerrymandered to obtain the desired result, so, the conduct is deemed an omission in order to ensure lack of liability. I concur that this is indeed 'arguing backwards.' As in the judicial reason we find for futile motives, the factor that really explains the conclusions of the judgment is hidden.[55]Furthermore, the blurring between facts and motives is once again in evidence. Once we understand that worlds are made and unmade in networked constant flows of action and interpretation, we have to set aside once and for all the fiction of a priori facts, pre-existing and in need of discovery. In the legal context we see this patently denied and enthusiastically embraced by turns. So, all legal cases depend on the establishment of facts at the outset, through a process of matching material behaviors to pre-existing legal codes: did the defendant kill another person using a weapon? If yes, then murder. There is no question about the facticity of the murder. And yet every case includes an assessment of motive and intent (falsely, I argue, making a distinction between the two). This because those assessments can change, for the law, the very 'fact' of murder which becomes manslaughter or accidental death, or another qualification. Re-categorizing is a regular feature of legal cases. If the defendant attacks another person, the fact is assault. But if the attack takes place because the defendant believes the other person is about to steal his wallet, then the fact is defense of property. This change is perfectly normal for the law and reveals how it is impossible to determine the meaning of external actions without making some referral to and assessment of the internal dimension, which is always subjective, literally belonging to the *subject* in question. The internal subjective dimension, for its part, cannot be understood without referral to the underlying universe of sense-making that is its home and driver. In this way the subjective and the objective conflate, and the teleological dimension is exposed in its cultural relativity. Legal actors are forever trying to find ways around this conundrum using ideas such as "the reasonable man,"[56] an idea about which a great deal has been written and debated, particularly in English and American legal systems attempting to create a universally representative person-figure who could somehow serve as the reference for how 'a person should act.' We see formulations in the same vein when the European Court of Human Rights refers to conditions of "good living together" (arguing against the wearing of Muslim garments) and again when Italian courts speak of "common sentiment." All of these are attempts to sidestep the operation of objectivization that has already been operated on subjective categories and configurations in the name of a counterfeit 'rationality.'

[55] About euthanasia judgments Husak states, "It is disingenuous to invoke a distinction in support of a decision if that decision is reached on grounds having nothing to do with the distinction. The distinction between positive actions and omissions contributes nothing to the analysis in many of these cases. The factor that *really* explains these decisions is hidden from critical scrutiny." Husak (1989: 9).

[56] With regard to criminal law the point is succinctly summarized by one of the 'dons' of the American legal tradition Oliver Wendell Holmes who stated regarding motive, "The test of foresight is not what this very criminal foresaw, but what a man of reasonable prudence would have foreseen." Cited in Binder (2002: 44).

6. Conclusion. Legal qualification and intercultural translation: Cognition as a remedy to pernicious discriminating ignorance of Other's 'cultural objectivity'

I have tried to illustrate how the adjudication of a citizen subject's motives as 'futile' is nothing other than an evasion of responsibility for the objectivized subjectivity that is rules in these cases and is just one component of a system that remains blind to its own subjective categorial schemes shaped by cognitive assumptions that are universal only in name. The objectivizing impulse, if we can call it such, is understandable. It stems from the need to hit the pause button on the constant flux of human actions and reactions, becoming and undoing. A conflict occurs, a murder even, something must be done, an assessment must be made, perhaps punishment, restitution. These are all part of the social contract. Still, it is at our peril that we fail to recognize that this pause, this objectivization of past circumstances codified by legal norms, is only temporary. The law is always straddling the past and the future, trying to analyse what has happened and predict what will happen so as to regulate it. This requires abstraction since the future is always unknown. This abstraction however must remain open to semantic variation. It can never lose site of the continuum that unites motive and action, culture and knowledge. It must acknowledge that motive/intent are always already inside the 'facts' of a crime as they are conceived in each case. They are shaped by past judgments as well as by the cultural universe of sense in which all parties are moving. If these continuums, these fluidities are ignored, then law can only be what it has already been, and in so rigidifying loses its entire purpose. For if we already know what will be, there is no need for regulation. In this way, the possibilities for difference, which is the core of all human freedom, will be truncated, blocked from any and all growth or flourishing. Law must try to understand human actions, and the only way to understand is to create a story out of the events, to create a narrative, a deeply subjective process. The meaning of actions, necessary to the weaving together of the story, does not exist a priori universally like an Aristotelian essence, present across time and space, quite the contrary. It depends on and springs forth from a particular teleological universe which is profoundly cultural. The inclusion of the cultural horizon is subjective: it depends on the subject and the myriad experiences that constitute the subject's life before during and after the crime. No system can define what can live inside the humanity of a given subject to qualify her as human. Modern legal systems depend on a presupposition of the humanity of subjects (as clearly shown by provisions such as freedom of speech, freedom of thought, freedom of religion, etc.). And yet such a vision must be supported by a horizontal discomposition of the categories employed within a given judgment that actively attempts to *make sense* through an upending of previous categories and a creation of new ones. What is inside categories of "consistency with the logical plane" of motive and what is outside must be articulated openly, up for discussion and negotiation, interculturally translated. Until we reclassify 'futile' as 'not yet understood,' and unless we keep the categories of judgment fluid, particularly when it comes to Others who are not native to the cultural seas in which they are now drifting, legal systems will not be representative of their constituents and any efforts toward a meaningful justice for all inhabitants will itself be futile.

The importance of adopting a sophisticated technique of intercultural translation therefore emerges with extreme clarity. In this regard, it should be noted that the 'legal qualification of the fact' is itself—within the so-called judicial syllogism—always an activity of translation. From the empirical factual language, judges—like doctors diagnosing their patients' symptoms—must translate technical legal terms. But this translation is never neutral. The positivist tradition holds that law 'makes its own

facts.'[57] This means that law chooses from the world of facts which elements to consider and which to ignore to determine the 'legally relevant fact.' This operation is cultural and never ends with one judgment or another, one norm or another. The judge is not a machine that mechanically applies normative schemes to reality.[58] This is also because reality has no 'labels' on which 'categories can be pinned.

Each time, therefore, the judge must decide whether there are the necessary elements in the case in question to include it within the semantic/deontological spectrum of one legal rule or another. This decision often triggers conflicts between norms, conflicts that are simultaneously semantic and legal, and end up affecting the reconstruction of the fact. Importantly, however, these operations are not only textual interpretations, as if the empirical 'fact' were neutral, objective and could be essentially 'taken for granted.' The 'natural language' used to describe empirical 'facts', meaning people's conduct, is not a separate entity from the legal language. The legitimization of their distinction and ontological autonomy, as I have tried to demonstrate, is itself nothing more than a cultural element. At work is a relative continuity between the cultural and values-based aspects beneath both legal and natural languages within relatively homogeneous communicative and social contexts that blinds its participants to its own specific (not universal) qualities. Indeed, the tendency to remain unaware of the activity of translation in the qualification of 'legal facts' depends exclusively on this continuity. When it is lost, due to the cultural difference between the universe of discourse of those who judge and those who are judged, the 'neutrality' of facts with respect to the interpretation of norms is dramatically absent. In those cases, the natural 'fact' reveals all the axiological and cultural components encapsulated in the determination of its presumed 'objectivity.'

These axiological and cultural components, however, if adequately examined through a process of intercultural translation, can reveal elements of continuity, of potential interpenetration, with the 'objective' values that function as the axis of legitimation of legal systems and legal language. At that point, what is triggered is an exchange, a sort of transaction between empirical-natural discourse and juridical discourse that can produce simultaneous changes and rearrangements in both. The values intrinsic to the categorization of a fact, due to their continuity with those that legitimize legal systems, can produce rearticulations in the relationships among legal values and thus changes in their meaning. These changes, in turn, can affect law's determination of the relevance of a given 'fact' as well as which elements are taken into account for the categorization of the empirical 'fact.' The basic problem is that law is not and can never be a self-referential linguistic and axiological system for one simple reason: in its articulation, it cannot do without including elements that are part of the 'natural' language. On the other hand, if this were not the case, it would risk being a 'super-structure' totally detached from social experience. However, the function of law and the genetic axis of its language consist precisely in the attempt to act on the social dimension by orienting it according to criteria of values and ends.

[57] Kelsen (2021: 9 ff).

[58] In fact, machines have been shown in some cases to 'outperform' judges. 'Predictive justice' is the term used in the context of using AI to analyze judicial decisions to make predictions for the outcome of cases. In at least one American study, a team of scholars studied predictions for defendants in New York City. The aim was to determine whether a judge or an AI was better able to predict a defendant's likelihood of committing another crime if released on bail while awaiting trial. Both judges and AI assessed the same pool of 500,000 defendants, making a list of who to release. The defendants selected by the AI for release were 25 percent less likely to commit a crime while awaiting trial than those released by the judges. See Kleinberg et al 2017.

Hopefully it is becoming clear how in judging the criminally relevant behaviors of people from other cultures it is necessary to open up the narrative networks underlying the morphological appearance of what, at first glance, judges might qualify as objective, factual. Those narrative networks are, ultimately, nothing more than semiotic *meshes* which contain semantic indices that are often obscured by the tendency to superimpose the cognitive schemes of judges onto those of people of different cultures.[59] An assessment of those semiotic webs leads inevitably to the recontextualization of actions and their meanings, often on the basis of elements they contain, and which are relevant to the legal system, its principles, its values. This kind of inquiry can reveal how behind others' actions there are semantic indexes that are relevant and subsumable under the umbrella of constitutional principles or human rights provisions. This dynamic can produce a recategorization of facts—through a circular hermeneutic process—that winds up being 'culturally oriented,' both from a strictly legal perspective and from an 'empirical' perspective.

Committing to the engagement of the interpretative sequences described above is extremely important when speaking of 'futile motives' and, even more so, when religious pertinence is 'attached' to them. Putting intercultural translation techniques in action can show how what appears to be futile is no such thing and, on the contrary, can have constitutional relevance both in positive terms (deserving of protection) and in negative terms (social danger and disvaluation). From another point of view, then, the commitment to intercultural translation can highlight how what is qualified as 'religious' does not at all represent a discontinuous universe of experience, incommensurable with that connected to the social dimension and to the language of secular law. Religion is more than its denominations, more than its institutions. The religion/law divide is heuristically functional thanks to the cultural continuity existing between the secular domain and the religious domain in any given cultural context. Indeed, this is the 'evidence' typical of incomplete processes of Western secularization, continuities of sense that have been and continue to be crucial to the functioning of the secular turn, if only because reinventing the cultural and juridical language from scratch would have been impossible.

Unfortunately, this very continuity has been the central problem in the relationship with other cultures. Evident during the colonial period, it remains strongly relevant to the phenomena of globalization and multiculturalism in state societies. The tendency to pass one's own identity off as universality is at the basis of discrimination and often of ignorance regarding the meaning, the anthropological scope, of religious discourse and its universe of meaning. This ignorance all too easily risks turning into the labeling of its object with the qualification of 'futile,' 'incomprehensible,' 'irrational,' and/or 'socially dangerous.' In other words, it works as a silent strategy of de-classification that paradoxically obscures any elements deserving of protection only by virtue of their presumed, aprioristic Otherness. Nevertheless, as noted at the beginning of this essay, modern criminal law relies heavily on the foundational notion that "No one can be punished for what he thinks or for what he believes, but only for what he has done." Giving the lie to this aspirational basis could risk, almost ironically, a radically compromise, setting Western law against itself.

In conclusion, I would like to offer some reflections on the practical implications of the Court of Cassation's use of the category 'futile motives' in the tragic case of Hina Saleem. In some respects, the decision of the Court has a paradigmatic significance for the possible effects that the use of this normative application may have on the systemic and social level. The judges correctly pointed out that

[59] For recent scholarly approaches that attempt to supply judges with structured assistance in the evaluation of culture within their cases ('cultural tests'), see Ruggiu (2019) and previously, Foblets and Renteln (2009).

the invocation of religious/cultural motives had to be considered as only a pretext articulated by the defense in an attempt to obtain a reduction in sentence. Implicitly, however, it rejected the idea—supported in part by public opinion—that religion should be considered a kind of futile motive and, therefore, as an aggravating circumstance of the sentence. In so deciding, the Court—perhaps not entirely intentionally—avoided two possible dangers. On the one hand, the 'rubrication' of religion as belonging to the irrational, the incomprehensible, and therefore the futile. Such a qualification would have collided with the constitutional importance guaranteed to religion in the Italian legal system and, even more so, with one of the pillars of the modern conception of criminal responsibility: the irrelevance[60] of the defendant's religious affiliation in order to classify his conduct as a crime. On the other hand, in affirming the specious bent of the defense's arguments in the concrete case, the Supreme Court suggests that the possible social danger of attitudes rooted in religious beliefs can constitute, when ascertained, a phenomenon to be considered as anything but futile. This means that within criminal policy, the possible criminogenic flip side of a religious belief could not be addressed simply through the addition of 'aggravating circumstances' to the penalty. A fair treatment of religious belief would require, on the contrary, a broad approach extending beyond basic defense 'lawyering' to the formal inclusion of social workers and experts able to decode the 'network of meanings' informing the conduct of members of the relevant religious group. Only in this way would it be possible to act preventatively.

I propose these considerations also to dispel any possible doubts regarding my ideological orientation. It is my conviction that incorporating a conscious exercise of intercultural translation in the legal qualification of the conduct of Others—meaning subjects of 'minority' cultures in any national context— is a cognitive necessity intrinsic to law and legal experience considered in and of itself. Ignoring Otherness, failing to translate it adequately, obscuring and misunderstanding its practical projections due to unilateral and indifferent views only results in the placing of even national rights—especially if inspired by constitutionalism and universalism of rights—against themselves, against their own values. At the same time, not knowing the Other can make the entire legal-social system and its capacities for social control more vulnerable, since not knowing is not only a source of discrimination against the Other but also results in an inability to understand and/or predict his or her 'anti-social' behavior. From this point of view, I reiterate that the criminal category of 'futile motives' represents a frontier for reflection, capable of galvanizing new thinking on the vast complex of value schemes and categorizations that make up modern legal experience and theory.

[60] This 'irrelevance' has also been upheld in cases where the defendant sought to classify his conduct as non-criminal because of his religious motives/intent. As Binder recounts, historic American jurisprudence has made no bones about the unacceptability of religion as a reason to excuse a crime as in *Reynolds v. United States* wherein the defendant was not excused by his religious belief that he faced damnation if he did not pursue polygamy. The judge stated, "[e]very act necessary to constitute the crime was knowingly done, and the crime was therefore knowingly committed." See Binder (2002: 35).

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melisavazquez@gmail.com

Published online on May 6, 2022