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Editorial

Good judgment?

The current issue of NoFo comprises two interesting articles that approach, from different angles, the issue of establishing and maintaining ethically just relationships in societies. In the first article, ‘Negotiating the paradoxical nature of human rights: Newspaper debate on human rights violation for Roma asylum seekers’, Chloë Delcour and Lesley Hustinx analyse the discursive struggle over the human rights of Roma asylum seekers in Belgium in 1999. The second article by Patricia Cochran, ‘Not Judging: Jurisdictional Hubris and Building a Common Legal World’, engages with relational theories of judgement to address challenges regarding legal pluralism in settler-colonial societies, in particular Canadian society.

The expulsion of Roma asylum seekers from Belgium in 1999 resulted in heated media debates and the case of *Čonka v. Belgium* in the European Court of Human Rights. Applying narrative analysis to 212 Flemish newspaper articles, Delcour and Hustinx analyse what they call discursive struggles over diverse meanings of not only human rights but also national interests and nationhood. The cogent argument Delcour and Hustinx propose is that the paradoxical relationship between human rights and national interests is negotiated over and over again in this discursive struggle, and that there are no clear-cut oppositions or alliances but that such alliances, oppositions and re-alignments are constantly being re-created within the struggle. The well-known paradoxical and indeterminate nature of human rights is thus a continuous resource for negotiations over the meaning of nation state.

Grounding their analysis in the work of those human rights scholars who have attempted to nuance ‘the commonly assumed progressive role of human rights’ by, for example, showing how human rights are subject to discursive battles, Delcour and Hustinx are able to contribute to this field of scholarship by demonstrating how ideas are being used for various purposes and often with unpredicted results.

In her article, Cochran employs the concept of not-judging to think through challenges that arise when state law renders the indigenous legal and conceptual framework invisible and provides little if any tools to 'judge across legal worlds'. In doing so Cochran addresses what she calls 'jurisdictional hubris'; the profound challenge the colonial framework of the law poses on judging and judgement, and suggests that 'in the context of diversity and inequality, perhaps justice will require, not judgement, but the suspension of judgement'. On the other hand, though, she suggests that not-judging does not mean the absence of judgement – or the possibility of it – because unjust relationships are, in addition to judgment, sustained through dis-engagement and silencing. Cochran asks whether '"our" practices of judging and not-judging work to support or undermine the kinds of relationships called by reconciliation'. Taking the case of *Kahkewistahaw First Nation v. Taypotat* (2015) as an example, she argues that sometimes judges resort to not-judging precisely when judging is required, which results in de-contextualisation and 'wilful blindness to the reality of social context in which [judging] is exercised'.

Cochran's article raises an important question on to what extent, and how, is it possible for the settler state to impose its law on indigenous people in a just manner – let alone in a manner that would endorse reconciliation. Compellingly she argues that '[w]e risk assuming that non-judging leaves space for pluralism, without thinking through the relationships that are created, maintained, undermined or consolidated through that non-judgment'. Cochran calls for 'reflective judgement' and the judges' profound responsibility in applying the 'overreaching, over-confident' colonial law '[i]n the face of the Arendtian claim that the failure to judge undermines the very conditions on which shared life may be possible'.

In addition to the two fascinating articles, this issue encompasses two extremely topical and interesting book reviews, which link with the articles at least in two respects. First, Jared Del Rosso reviews Bruno Latour's recent *Down To Earth: Politics in the New Climatic Regime*. Perceptively, Del Rosso depicts Latour as a pluralist thinker, which to Del Rosso means a call for the readers to 'to reimagine, even re-describe, their relations with their allies, their opponents, non-human life, and the very soil itself'. This pluralism, according to him, is a political project which requires new ways to think about our local environments as 'sites of lives living, teeming lives, lives dependent on one another and the earth too'. This call to embrace pluralism, one could say, requires a capacity to build worlds where relations matter. This is central to the second theme of this issue, that of judging, which emerges in the second review by Ukri Soirila of Jeanne Gaaker's *Judging from Experience: Law, Praxis, Humanities*.

Drawing on studies in law and literature, Gaaker's book presents a rich and fresh take on the practice of judging. It argues, convincingly, that

reading and literature is intrinsic for judging well, for 'law is matter of constant movement between legal rules and the narrative construction of the facts of the case'. One cannot be a good judge without the ability to understand the world and the work of narratives in it. Phronèsis, practical wisdom, called for in Gaaker's book, is a matter of character and morality. It is about the ability to understand the complexity of the human condition beyond thinking in terms of binaries and contrasts.

Call for papers

Law & Emotion special issue

We would like to take this opportunity to invite articles for Nofo's special issue 'Law and Emotions' due in 2020. As scholars interested in the ways in which law and emotion/affect intertwine in the mundane legal practices, we have initiated a research project *Law and Emotions* concentrating on questions such as how emotion/affect is experienced and communicated in legal processes and how they construct and move between (legal) subjects (see e.g. Dahlberg 2009; Damsholt 2015; Grossi 2015; Lanas 2011; Moran 2001). We invite articles that discuss law and emotion/affect from any perspective and in any context.

Law and emotion research

While law and emotions -scholarship has been relatively recently revived, it would be more accurate, according to Pasquetti (2013), to 'speak of a renewed analytic focus on the link between law and emotion' since 'it is above all the works of Durkheim that theorize the emotional foundations of legal procedures, punishment, and penal institutions'. Law and emotion scholars have challenged the exclusion of emotion in law and studied the relationship between law and emotion from different perspectives, researching topics such as the effect of emotions on different legal actors and emotion in legal decision making; (Bandes 1996; 2006; Bornstein 2010; Douglas, Lyon, & Ogloff 1997; Feigenson 1997; Little 2001; Myers, Lynn, & Arbuthnot 2002; Nussbaum 1996; Sanger 2013)[1] emotional experiences of law in legal proceedings; (e.g. Deflem 2017) and emotions in different legal fields such as criminal law,

[1] Legal realists have long since recognized that sometimes legal decision making is coincidental and affected by different kinds of emotional biases (law in books vs. law in action). Thus emotions have not been completely disregarded as unimportant, but nonetheless considered as nonlegal factors which impact legal decision making in unsuspected and legally unfounded ways. (See Mindus 2015.)

family law and transitional justice (Abrams 2009; Becker 2002; Goodrich 1998; Huntington 2008; Nussbaum & Kahan 1996; Seuffert 1999; Van Roekel 2016). Also the role of particular emotions, such as fear, shame, empathy, love, disgust and hope, have been studied in the context of law (Abrams & Keren, 2007; Bandes 2004; Goodrich 1996, 1998, 2002, 2006; Henderson 1987; Kahan 1998; 1999; Massaro 1991; Nussbaum 1999; Peterson 1998; Seuffert, 1999). (See also Abrams 2009; Abrams & Keren 2010; Maroney 2006.)

New paths for law and emotion research?

Law and emotion research can be linked with the revived focus on feeling as a scholarly concern. Although evident across disciplines, feminist theory has addressed the 'turn to affect' with most analytical scrutiny, describing it as being 'both against the and within the poststructuralist, social constructionist theories of subject and power' (Koivunen 2010). (See also Greyser 2012; Hemmings 2015; Seigworth & Gregg 2010; Sharma & Tygstrup 2015.)[2]

Is the age old dichotomy of body/soul reproduced in the renewed interest in emotion/affect? (See Leys 2011; Clore 2015; Hardt 2007; Von Scheve 2018.) Despite many insist that affects are pre-discursive, language, too, can be understood in terms of affect, since discourses consist not only of language, but also of images, symbols and objects (see e.g. Butler 1997). Furthermore, discourses contribute to practices, which are always bodily, and to the formation of bodies themselves: bodies can be understood resulting in interaction, in which 'affect is a main facilitator of this "bodily becoming"'. (Von Scheve, 2018; see also Kusenbach & Loseke 2013; Wetherell 2012.)

And what about another age-old dichotomy, that of emotion/reason? Ahmed (2004; 2014) has famously analysed the production of appropriately feeling subjects for specific political purposes, reminding us that insistence on a fixed hierarchy between emotion and reason may easily be displaced 'into a hierarchy between emotions', The 'story of the triumph of reason' may thus well be one about appropriate feelings. When a minister, for example, urges the public not to feel any compassion for the family members of ISIL fighters, women and children held in captivity in camps in Syria, he is arguing for a specific set of emotions – intertwined with a specific form of reason – which may

[2] The work of Deleuze and Massumi are seminal for those approaches to affect and affectivity that concentrate on corporeal social relations and emphasize the relationality of affect (see Deleuze 1998; Massumi 1993; 2002.) Psychological approaches to emotion/affect, on the other hand, mostly understand affect to be 'an essential motivational force for humans' and emphasises the 'interiority of individuals over relationality' (Norton 2015; see e.g. Gregg & Seigworth 2010; Alexznder & Kosofsky Sedgwick 1995; Sharma & Tygstrup, 2015).

have profound and vast ramifications as to how arguments of justice become constructed.[3]

Despite the rise of law and emotion research and affect studies, law's uneasiness with emotion, which can be traced back to early positivism, persists (see e.g. Grossi 2015). While insisting removing emotion from rational legal decision making (emotion as bias, emotion as irrational) is no longer sustainable, emotion as a simple add-on to practical reasoning is not necessarily a satisfactory step either. (See Little 2001; Mindus 2015.)

From the outset, then, the theme - law and emotion - offers a fascinating field for inquiry from a plethora of angles and perspectives, from judging to interpretation, from production of knowledge in diverse legal, juridical or more vaguely justice-related processes to investigations over methodology and epistemology in addressing emotion in law. We encourage everyone interested in the theme to submit an abstract by 30.10.2019. The deadline for articles for the special issue is 31.2.2020.

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[3] Emotion/reason (cognition) dichotomy is discussed from the cognitive perspective e.g. by Damasio (1994) and Shapiro (2011).

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Negotiating the Paradoxical Nature of Human Rights: Newspaper Debate on a Human Rights Violation for Roma Asylum Seekers

Chloë Delcour* & Lesley Hustinx**

Abstract

This article analyzes the discursive struggle that developed in Flemish newspaper media after the unlawful Belgian expulsion of Slovak Roma asylum seekers in 1999, which led to the *Čonka v. Belgium* case. We argue that within such a discursive struggle over the human rights of Roma asylum seekers, a paradox between individual human rights and national interests is at play. In order to examine how this paradox is negotiated within such a discursive struggle, we claim that we need to employ a poststructuralist discourse analytical framework. This framework allows to consider the interactive and contingent nature of discursive struggles over human rights, and helps to go beyond the focus in current research on the construction of human rights by *a particular type of actors*. We apply narrative analysis to 212 Flemish newspaper articles from 1999 through 2002. We reveal multiple contingent interactions between various actors and different narratives about a failed, justified, or glorified nation-state, with some unintended discursive effects. Importantly, all the narratives shared a focus on the relative legitimacy and responsibility of the nation-state, thereby asserting the significance of the nation-state within the human-rights practice for Roma asylum seekers.

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1. Introduction

In the attempt to add nuance to the commonly assumed progressive role of human rights in society, scholars of human-rights practice have demonstrated how this practice is less a result of the universal implementation of global standards than it is a process of construction and contestation. This article follows a group of authors within sociology of human rights, who argue that human rights are subject to discursive struggles between different interest groups who attempt to establish their definition of human rights (Plummer 2006; Cushman 2009; Nash 2009; 2015; Madsen 2011; O'Byrne 2012). In this regard, Cushman (2009, 602) argues that the study of human rights should 'understand the process of advancing human rights as a conflictual one, not only in terms of conflicts between human rights activists and states who violate human rights, but also among human rights proponents with different conceptions of what human rights ideas are.' The reason why actors can be at odds with each other in conceptualizing human rights is the indeterminate and paradoxical nature of human rights. Human rights do not have a fixed meaning but are constructed in specific cases (Morris 2006; Nash 2015). Furthermore, every construction of human rights is a product of negotiation between paradoxical principles, inherent in human rights (Nash 2015).

This article aims to study how this negotiation takes place in a specific discursive struggle for a specific group of people, namely Roma asylum seekers. This is a group for whom human rights are still highly contested, first because they are Roma, and second, because they are asylum seekers. Within this contestation, a paradox between national interests and individual human rights is at play. This paradox is inherent in human rights and relates to the fact that human rights are simultaneously the rights of national citizens and of individual human beings everywhere (Nash 2015). Because the human-rights apparatus relies on nation-states to guarantee human rights, nation-states often apply human rights only to national citizens, or even violate the human rights of non-citizens. These violations are then justified by claiming the need to protect the rights of the national citizens, regardless of the consequences for the human dignity of non-citizens. Both the Roma and the asylum seeker status ignite this paradox between the interests of national citizens and the rights of all human beings, regardless of citizenship. Both Roma and asylum seekers are groups of people for whom the individual, de-territorialized human rights would be likely to bring the most benefits, yet their situation illustrates the pervasive power of nation-states to limit the realization of their human rights.

This article will uncover how this paradox was negotiated within a discursive struggle that arose *after an alleged violation* of the human rights of Roma asylum seekers. We argue that a struggle after an alleged

violation forms a critical instance during which a vigorous discussion between many different actors develops. The specific violation we study concerns the *Čonka v. Belgium* case of 1999. In this case, the Belgian government was accused of deliberately and collectively expelling a number of Slovak Roma families, thereby violating their rights to liberty, security, and effective remedies, as inscribed in the European Convention on Human Rights (Cahn and Vermeersch 2000; ECHR 2002). Because the case occurred in 1999, when Slovakia was not yet part of the European Union, the involved Roma were still asylum seekers and not migrants exercising their right to free movement.

We study the discursive struggle that arose on this *Čonka* case in Flemish newspaper media. We perceive the media as one of the arenas of the public sphere in which a wide variety of actors are engaged in discursive struggles over human rights, yet it is scantly studied as such. The work of Nash (2008; 2009) forms an important exception, and she argues that it is in the mainstream media (e.g., newspapers, television, radio) that the discussion over human rights takes place across a wide range of political positions, strongly influencing what is assumed to be common sense regarding human rights (Nash 2009; 2010; 2015).

The crucial argument in this article is that in order to grasp how the indeterminate and paradoxical character of human rights is negotiated in discursive struggles over human rights, we need to utilize a poststructuralist discourse analytical framework. Such a framework enables 1) to grasp the interaction of actors at the level of underlying meanings, 2) to show how these discursive relations are fluid and contingent, and 3) to identify how the interaction of meanings can produce unintended discursive effects. We claim that such a framework contributes to current studies on human-rights construction and contestation, which have mainly uncovered the construction of human rights by *a particular type of actors*. Examples include the constructions by juridical actors (Madsen 2007; 2011; 2013; Morris 2009; Dezalay and Garth 2012; Staes 2014) and by activist actors (Sikkink 1993; Keck and Sikkink 1999; Stammers 1999; Houtzager 2005; Rodríguez-Garavito and De Sousa Santos 2005; Speed 2005; Goodale and Merry 2007; Rajagopal 2009; Merry et al. 2010; Clement 2011; Miller 2011; Claeys 2012; Orr 2012; Brysk 2013; Janmyr 2016). In our view, however, a crucial dimension of the discursive struggle over human rights is the *simultaneous involvement of a variety of* actors and their *interaction at the level of underlying meanings*.

Furthermore, we do not perceive this interaction as a clear-cut struggle between opposing meanings, but we claim that actors and their human-rights constructions are fluidly and contingently interrelated, and that discursive alliances and oppositions are often only temporary. Lastly, we suggest that the interaction of meanings creates dynamics that the actors do not consciously control and that can result in unintended discursive effects. This addresses the implicit assumption in existing research on human-rights constructions that actors are always

driven by strategic considerations in defending their frames. However, we argue that the paradoxical and indeterminate character of human rights causes the human-rights struggle to have discursive effects which may not have been strategically intended.

Within the discursive struggle about the *Čonka* case, the poststructuralist framework uncovers a key underlying meaning which connects different narratives: the acceptance of the relative legitimacy and responsibility of the nation-state. In this way, our analysis shows how the paradox between national interests and individual human rights was at play within the specific discursive human-rights struggle: despite the fact that a narrative was brought forward that defended the human rights of the Roma asylum seekers, this narrative centralized the nation-state. Subsequently, this narrative was also contingently and unintentionally linked to other narratives and actors that justified or even glorified the nation-state's actions, even as these actions were violating human rights.

In the following section, we present an overview of existing research on discursive human-rights contestation and explain the necessity of our proposed framework. This is followed by the methods section, in which we provide details on the human-rights case, our choice for the newspaper media, the data used, and the various phases of coding. We then present our findings and reflect on our conclusions.

2. The discursive struggle over human rights

As stated in the introduction, this article follows multiple sociologists of human rights who have conceptualized human rights as constructed during discursive struggles between a variety of actors (Plummer 2006; Cushman 2009; Nash 2009; 2015; Madsen 2011; O'Byrne 2012). To illustrate, Nash (2009; 2015) uses the term 'cultural politics of human rights' to describe how actors are engaged in a struggle to challenge and remake common-sense understandings about human rights (e.g., deciding who counts as fully human or framing specific events as 'human rights wrongs;' Nash 2015, 13). Similarly, Plummer (2006, 153) explains that '"rights work" entails claims makers involved in "claims" and "counter-claims", often animated by quasi-arguments and stories.'

Existing literature on human-rights contestation, within sociology but also within other disciplines, has identified several key actors in the struggle over human rights, predominantly focusing on juridical and activist actors. Research on human-rights construction by juridical actors is mainly found in legal and socio-legal studies. In this research, the starting point is that the principles of human-rights law are not fixed and unified, but are interpreted and applied by judges and lawyers. Morris (2009) and Staes (2014) indicate how these interpretation processes are influenced by the ideological predispositions of judges. Ng

(2018) explains how Australian judges make a very broad interpretation of the exclusion clause of the Refugee Convention, because they perceive asylum seekers as security threats. With regard to the constructions by lawyers, the work of Madsen (2007; 2011; 2013) and Dezalay and Garth (2012) on the transnational legal field of human rights has demonstrated how lawyers have utilized the legitimacy of their positions to further the political cause of human rights in judicial debates on transnational justice and human rights.

Second, research on activist actors can be found in political sociology, socio-legal studies, and anthropology and has emphasized activists' important role in advancing human rights. In particular, the work on transnational advocacy networks emphasizes the powerful and progressive role of NGOs, engaging in what is called 'naming and shaming' or 'information politics' (Sikkink 1993; Keck and Sikkink 1999; Brysk 2013). Through lobbying and making violations public, NGOs try to create a political will to protect and empower victims of human-rights abuse. Anthropologists have provided more nuanced accounts of how grassroots social movements use – or do not use – human-rights language to advance their demands, thereby adapting the meanings attached to human rights to the local context (Houtzager 2005; Rodríguez-Garavito and De Sousa Santos 2005; Speed 2005; Goodale and Merry 2007; Rajagopal 2009; Merry et al. 2010; Claeys 2012; Orr 2012; Janmyr 2016).

Although it is often pointed out that the international human-rights system is state-centric (Morris 2006; Nash 2009), few studies demonstrate how nation-states engage with human-rights discourses. Nash (2009) provides an exception, explaining that the governmental construction of human rights occurs along two dimensions. The first has to do with the form that human-rights conventions should take and how and when they might be signed or ratified. The second concerns the extent to which government policy should conform to or ignore human-rights law. In particular, Nash illustrates how national pride forms a crucial obstruction to the implementation of human rights, based on the example of how the UK and the USA have suspended human rights for suspected terrorists since the terror attacks of 9/11. These actions were legitimated as a choice between our security and their rights, thereby rendering them acceptable in a state of emergency. Multiple authors confirm this observation that nation-states often emphasize a security narrative, in which national security (and not human rights) is proclaimed as the highest good (Wibben 2011; Brysk 2013; Gliszczyńska-Grabias & Klaus 2018).

Pointing to a different national discourse, Nash (2009) explains how national pride can become discursively entangled with cosmopolitanism, in which nation-states endorse cosmopolitan ideas and take the lead in the defense of human rights in order to maximize their own national power in the world environment. Nash calls this cosmopolitan nationalism and warns for its inherent superior attitude.

It is possible that the global perspective actually becomes imperialist: 'The risk then, however, is that human rights will be co-opted by nationalism' (Nash 2009, 188).

The studies mentioned in this literature overview provide valuable insights in discursive struggles over human rights by clarifying how specific types of actors construct human rights. Yet this article centrally argues that an analysis of discursive struggles over human rights should focus on the simultaneous involvement of a variety of actors and their interaction at the level of underlying meanings. More specifically, we will focus on the four types of actors involved in a human-rights struggle as identified by Nash (2009): juridical, activist, political[1] and media actors. We strongly build on Nash's work as she also points to the importance of media as an arena for the discursive struggle over human rights and to the necessity of looking at a variety of actors involved in human-rights struggles. However, we take her approach a step further by zooming in on the media arena and analyzing not only a variety of actors participating in this arena but also their interaction at the level of underlying meanings.

The argument about this interactive nature of discursive human-rights struggles is driven by poststructuralist discourse theory (Laclau and Mouffe 1985; Laclau 1990; Fairclough 1993; Chouliaraki and Fairclough 1999; Howarth 2000), which emphasizes the relationality and contingency of discourse.[2] Following this theory, the interpretation of human rights is never made by a single actor but is a continuously renegotiated arrangement of different meanings that is always subject to challenges. Discursive struggles over human rights are constituted by continuous and contingent interactions of meanings. Furthermore, we argue that the interaction of meanings can produce unintended discursive effects. This claim is important because it is apparent from the previous discussion about human-rights construction by juridical, activist and political actors that research seems to presuppose that actors deliberately advance certain discourses on human rights. As an example, the research about transnational advocacy networks (Sikkink 1993; Keck and Sikkink 1999; Brysk 2013) identifies NGOs as actors who

[1] To note, Nash uses the term 'governmental actors', while this article speaks about political actors. We changed this term because we argue that judges, which are categorized by Nash as juridical, can also be seen as an element of governmental power. This makes the term 'governmental' confusing. We include the following actors within the political actor category: transnational intergovernmental and political bodies, local and national governmental actors, and members of political parties.

[2] It might seem counter-intuitive to look for underlying meanings when following a poststructuralist approach, which of course opposes the idea of a foundational deeper meaning level. However, this search for underlying meanings is in fact about a critical analysis, which fits very well within the poststructuralist philosophy. We want to uncover the underlying assumptions of narratives in order to investigate whether narratives that seem to be opposed at first glance also have opposing assumptions. This provides a lot of insight in the conditions that enable interaction between these different narratives. Moreover, it is very important to keep in mind that we perceive the interaction at the level of underlying meanings as contingent and thus not fixed, which is also in line with poststructuralist thinking.

rationally and strategically decide to 'name and shame' perpetrators of human rights violations.

Yet, we argue that discursive human-rights struggles are more messy, as they constitute contingent interactions of meanings which can sometimes result in unintended discursive effects. Human-rights struggles have such a messy character because the meaning of human rights is indeterminate and often inherently contradictory. Nation-states are both the main guarantors and the main violators of human rights (Nash 2015). Human rights are simultaneously the rights of national citizens and of individual human beings everywhere. While human rights have emancipatory potential, they also require global governance in order to be achieved. Although they are perceived to be universal standards, they must always be adapted to local contexts in order to be effective. Consequentially, different and paradoxical meanings can be attached to human rights, making human rights into an unpredictable and ambiguous construct.

As our case study is about Roma asylum seekers, we elaborate here on the specific paradox that is at play in discursive struggles over their human rights. First, as we define asylum seekers to be part of the broader category of migrants, we discuss the paradox that arises for migrants between national interests and individual human rights. Although migrants could be perceived as a group for which individual, de-territorialized rights would be likely to bring the most benefits, their situation also illustrates the historically prominent and currently even greater power of nation-states to control the rights of migrants residing within their territories (Morris 2009; Nash 2009; 2015). Migrants are thus bearers of human rights, but they are confronted with a world in which nation-states are increasingly controlling their borders, often violating the rights of migrants in the process (Lynn and Lea 2003; Nyers 2003; Bancroft 2005; Benhabib 2005; Fassin 2005; Turner 2007; Bauman 2009; Schinkel 2009; Nash 2015; Gliszczyńska-Grabias & Klaus 2018). These violations are then justified by claiming the need to protect the rights of the national citizens, regardless of the consequences for the human dignity of non-citizens (Nyers 2003; Rajaram and Grundy-Warr 2004; Fassin 2005; Nash 2009; Burrell 2010).

Second, the asylum seekers in our case study were Roma, and for this group the paradox between individual human rights and national interests is also particularly prominent. On the one hand, a significant human-rights campaign supports the Roma. European fora have been mobilized and European institutions and civil society have become increasingly alert to human-rights violations for Roma (Sigona and Vermeersch 2012). Roma are perceived to benefit most strongly from the European framework of human rights, because they lack a connection to any specific homeland that defends their rights (Vermeersch 2000; van Baar 2008). On the other hand however, the human-rights situation for Roma reflects the pervasive power of nation-states, as Roma are confronted with continuous violations of their

human rights in many European countries (Bancroft 2005; Bogdal 2012; Pogány 2012; Sigona and Vermeersch 2012; Chovanec 2013; Gliszczyńska-Grabias & Klaus 2018). Ideas about the Roma are submerged in multiple negative stereotypes, and this leads to exclusionary actions and policies towards the Roma.

In conclusion, this article will use a poststructuralist discourse analytical framework in order to grasp how this paradox between national interests and individual human rights was negotiated for Roma asylum seekers in the discursive struggle about the Čonka case. The details of this case will be explained below.

3. Methods

3.1 The Čonka case

The empirical analysis focuses on the *Čonka v. Belgium* case and the discursive struggle that developed in the Flemish newspaper media in the aftermath of this incident.[3] In late September 1999, the police from the Flemish cities of Ghent and Tienen sent a notice to a large number of Slovakian Roma (including the applicants from the *Čonka* case) requiring them to report to the police station in order to complete the files concerning their applications for asylum (Cahn and Vermeersch 2000; ECHR 2002). Once at the police station however, the Slovak Roma were served with notice that the federal authorities had decided that they were to be detained in anticipation of their expulsion to Slovakia. After a few hours, they were taken to a closed transit center and only a few days later they were put on an aircraft bound for Slovakia. In 2002, the European Court of Human Rights (ECHR) ruled that Belgium had violated Articles 5 (the right to liberty and security) and 13 (the right to an effective remedy) of the European Convention on Human Rights, as well as Article 4 of Protocol no. 4 (which prohibits the collective expulsion of aliens) (ECHR 2002). This ruling was considered a major advance in the protection of human rights for asylum seekers.

The actions of the Belgian government need to be contextualized in the Belgian migration context of 1999. Migration from Central and Eastern European countries, like Slovakia where the concerned Roma originated from, was gradually increasing, ahead of the big EU enlargement in 2004 (Cahn and Vermeersch 2000; Vermeersch 2000). This caused worries in the receiving Western European countries such

3. Because the violation occurred in a Flemish city, we chose to focus on Flemish newspaper media and not the newspapers distributed in the French-speaking part of Belgium. This should be considered when interpreting the findings, as the French-speaking newspapers might have given more weight to other actors/meanings involved in the discursive struggle about the *Čonka* incident.

as Belgium, where claims were made that the increased number of asylum seekers meant a threat to the social security system, to the prevailing legal order and security, and to the national identity. In response, repressive and deterrence measures were adopted (Sigona and Trehan 2009). The Belgian asylum policy was going through multiple reforms, trying to figure out how to cope with the increasing asylum applications. In the Čonka case, the Belgian government decided to unlawfully expel the Slovakian Roma, and thus they put the national interest about migration control before the human rights of the Roma. In this sense, the paradox between national interests and individual human rights was clearly at play in this specific case, and this article will analyze how this paradox was negotiated in the newspaper debate on this case.

3.2 Choice for newspaper media

As indicated in the introduction, we see the newspaper media as an important arena in which a variety of actors engage in discursive struggles over human rights. As explained by Ferree and colleagues (2002, 10), the mass media functions as a 'master forum' in the public sphere because all actors from other forums engage in political contest through the mass media, and because the mass media have the widest possible audience. With a specific focus on human rights, Nash (2009; 2010; 2015) claims that in the mainstream media (e.g., newspapers, television, radio), discussions concerning human rights take place across a wide range of political positions. These discussions bear a strong influence on what most people think about human rights, particularly in terms of what they are, how they can be effective, and in what way they are legitimate. In current modern society, the media constitute a crucial source of information for everyone, playing 'an important role in the disruption and recreation of taken-for-granted common sense concerning what is true, useful and valuable' (Nash 2015, 14). Despite this strong 'productive power' (Barnett and Duvall 2005) of media over human rights (Plaut 2014), the media have been scantly studied as an arena for discursive struggles over human rights.

Therefore, this article analyzes the discursive struggle that arose on the Čonka case in the media arena, and more specifically in newspaper media. As argued by Ferree and colleagues (2002, 47), newspapers are important 'validators' for other media, such as television and radio. Newspapers identify the most important actors in particular issues, as well as the meanings and arguments that are to be taken seriously. Newspapers could thus be regarded as a primary data source for analyzing the media debate on the Čonka case. To analyze the newspaper debate on the Čonka case, we conducted a search inquiry in the Flemish Mediargus database to collect newspaper articles. The

search terms Roma and Gypsy yielded 212 articles from several different newspapers from 1999 (year of the incident) to 2002 (the ECHR ruling).

Importantly, we need to acknowledge that the media are not just an arena for discursive struggle, but also actively frame this discursive struggle. They thus are themselves an actor in the discursive struggle over human rights. As Nash (2009, 52) explains, 'by determining which perspectives on human rights are made visible, which "voices" are heard, and which are given credibility, journalists and editors set agendas and frame human rights issues in ways that may influence the outcome of struggles over human rights.' More generally, it can be stated that the media exercise framing power in two respects: first, they determine which issues get salient and who will be quoted, second, they influence the perceptions and interpretations of the issue under discussion (Ferree et al. 2002; Dimitrova and Strömbäck 2005; Plaut 2014).

A particular way in which national media can exercise influence through framing is what Nash refers to as 'banal nationalism' (Nash 2009; 2010). When reporting about global issues, the media make national actors and national perspectives more visible, placing more value on these matters than they do on stories that are not in the national interest (Dimitrova and Strömbäck 2005; Nash 2009; 2010; van Dijk 2009; Joye 2010; 2015). With regard to human rights, Nash (2009) has remarked that the media reinforce the national framing of issues when talking about human rights. In terms of mainstream media framing of Roma, it can be stated that Roma are persistently constructed as either criminals or passive victims, and almost never as active subjects (Plaut 2012; Chovanec 2013; Bogdán 2015).

Although this article primarily perceives the newspaper media as an arena for discursive struggles over human rights, we do need to reflect upon the specific influence the newspaper media have in framing these struggles. Therefore, our analysis considers the ways in which newspapers specifically framed, emphasized, or neglected certain voices, noting how they used connotative words and descriptions to support or confirm certain positions and opinions. Furthermore, we consider what was emphasized through the use of certain headings or subtitles and which descriptions and articles were repeated throughout different newspapers and through time. Our analysis addresses a range of popular and up-market newspapers affiliated with different political traditions: De Morgen, De Standaard, De Tijd, Gazet van Antwerpen, Het Belang van Limburg, Het Laatste Nieuws, Het Nieuwsblad, Het Volk, and Knack (a weekly journal). Although it was part of the analysis to consider framing differences between these different newspapers, our results do not reveal any substantial differences between newspapers in terms of how they influenced the public debate on the Čonka case, except that the up-market newspaper De Morgen (27.4%) and the popular newspaper Het Nieuwsblad (22.2%) had the most articles on this case.

3.3 Coding

We began our analysis by delineating text fragments in the newspaper articles based on the actor whose opinion was being reflected, after which we categorized all actors according to type (political, activist, juridical, media) and the level at which they operated (transnational, national, local). The unit of analysis consisted of the text fragments for each actor. We used open coding to analyze these text fragments, looking for meanings that pointed to the negotiation of the paradoxical nature of human rights, as described by Nash (2015). We nevertheless remained open to meanings that we had not considered important beforehand.

In a subsequent coding phase, we systematically defined our codes using a coding scheme inspired by narrative analysis. In discursive struggles about human rights violations, narratives are plausible discursive phenomena (Coundouriotis and Goodlad 2010). Narratives have a clear structure: they almost always contain a beginning, middle, and end (Stone 2002; Boswell 2013). They select or exclude particular events and information, and assemble them in a compelling manner (Stone 2002; Slaughter 2010; Wibben 2011; Autesserre 2012; Boswell 2013). In this sense, human-rights narratives allow to tell in a structured way about the course of events and how these violated human rights.

Furthermore, human-rights narratives typically identify heroes, villains, and innocent victims (Mutua 2001; Autesserre 2012; Brysk 2013). By telling a compelling story in which there is a clear perpetrator and victim, narrative constructors assign responsibility and blame for the specific violating event, in an attempt to gain support for the particular courses of action that they wish to take. Although the latter seems to suggest that narratives are used deliberately and strategically, there are two reasons that this is not the case. First, narratives evolve organically as sense-making devices through social interaction, giving the actors tools to see reality in simplified terms and arrive at clear conclusions about how to move forward (Boswell 2013). Second, the actors involved in the newspaper debate on human rights cannot fully control the narratives with which they are identified, due to the framing power of media actors. We thus did not presuppose that the narratives were deliberately designed strategies when linking the actors and narratives identified in the newspaper media.

Consequentially, the main criterion to identify a narrative was not the steering by a particular actor but the coherence in terms of discursive meaning (such as 'Belgium as a failed nation-state'). The coding scheme that we used involved defining and connecting the identified codes as being part of a narrative by systematically asking the following questions (inspired by Stone 2002): What is told in the story? Which events are used? How are they linked? To whom are responsibility and blame assigned? What is the purpose of the story? Who is telling the story? In which setting is the story told?

Finally and importantly, we addressed the interactive and contingent nature of the discursive struggle over human rights by identifying the shared underlying meanings between the different narratives and the linkages between the different actors and narratives. Concretely, we did this by analyzing the relations between narratives, between codes within specific narratives, and between actors with regard to the identified codes/narratives. We did this systematically, making visual graphics of the different narratives and codes, as synthesized in Figure 1 in the Results section.

4. Results

4.1 Who was (or was not) involved?

Our analysis is explicitly aimed at identifying the *multiplicity* of actors who were represented in the Flemish newspaper debate on the *Čonka* incident. Table 1 shows all represented actors according to type and level, together with the number of text fragments with which they were associated in the coding process. We excluded all actors with less than 20 fragments. Interestingly, despite the fact that the Council of Europe and other transnational intergovernmental institutions have defended the rights of the Roma since the 1990s onwards (van Baar 2008; Sigona and Vermeersch 2012), the transnational political actors were only weakly represented in the studied newspaper debate. Furthermore, although lawyers and judges are deemed to be very important actors in the human-rights construction process (Morris 2009; Nash 2009; Dezalay and Garth 2012), newspaper accounts of the incident reflected hardly any interpretations from actors of this type. Although we were able to identify the ECHR as a represented actor within the debate, this was the case only in 2002, when it explained that the case was in breach of the European Convention on Human Rights.[4]

4. Our data span from 1999 to 2002, but we did not identify dynamics clearly linked to any specific period or particular developments. Only the finding about the ECHR was specifically linked to articles from 2002, the year in which the ECHR issued its ruling on the case.

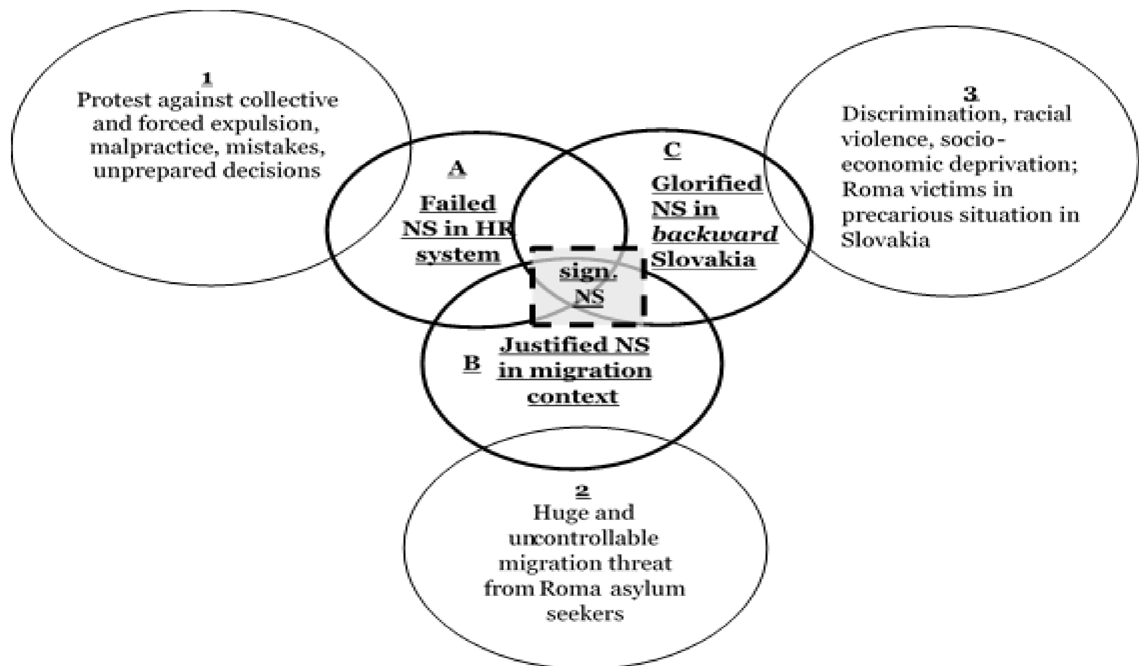
Table 1: Actors (with more than 20 <fragments>) according to type and level involved in the Flemish newspaper debate following the Čonka incident

	ACTOR LEVEL		
ACTOR TYPE	**Transnational**	**National**	**Local**
Juri-dical	<24> European Court of Human Rights	/	/
Activist	<31> Amnesty International	<61> Opre Roma	<23> Janette Danyova (spokeswoman of the Slovak community in Tienen)
		<36> Open Borders (VZW Open Grenzen)	<28> Hospitable Ghent (Gastvrij Gent)
			<21> Balog family (Slovak Roma)
Politi-cal	/	<70> Antoine Duquesne (Minister of Interior, PRL-liberal party)	<29> Mayor of Ghent (Sp.a. – socialist party)
		<24> Pascal Smet (Deputy Head of the Interior Ministry, Sp.a. – socialist party)	<40> Mayor of Tienen (Sp.a. – socialist party)
			<29> Van Cauwenberghe (Co-ordinator of asylum policy in Ghent)
News-papers	/	<58> De Morgen, <28> De Standaard, <12> De Tijd,	/
		<19> Gazet van Antwerpen, <13> Het Belang van Limburg, <16>Het Laatste Nieuws,	
		<47> Het Nieuwsblad, <11> Het Volk, <8> Knack	

4.2 Contingent interactions in the newspaper debate on human rights

Focusing on the interactive and contingent nature of the discursive human-rights struggle, we identified multiple and contingent interactions between the actors and narratives involved in the Flemish newspaper debate on the human-rights incident, as depicted in Figure 1. The large circles represent the different narratives, with numbers in the actors' boxes representing the linkages between the narratives and the actors. In the remainder of this section, we detail these narratives and their interactions in the Flemish newspaper debate following the *Čonka* incident.

Figure 1: The three different narratives (circles) and linkages to actors (numbers in boxes) identified in the Flemish newspaper debate following the Čonka incident.



POLITICAL	
	~~Trans-national~~
	National 2, 3
	Local 1, 2, 3

NEWS-PAPERS	
	~~Trans-national~~
	National 1, 2, 3
	~~Local~~

ACTIVIST 1, 3	
	Trans-national
	National
	Local

JURIDICAL	
	Trans-national 1
	~~National~~
	~~Local~~

Human rights in Belgium: Failed responsibility of the Belgian nation-state

This narrative (Circle 1 in Figure 1) was mainly linked to activist actors at all levels. It exhibits a cosmopolitan belief in the legitimacy of human rights (as can also be observed in e.g. Donnelly 2003), repeatedly indicating that the expulsion had been collective and forced, thereby breaching the international obligations involved in dealing with asylum seekers. The newspapers also contained reports on events aimed at illustrating the solidarity between the Roma and non-Roma. The most dominant argument in this narrative, however, was that the Roma were the victims, with the Belgian nation-state being the manifest villain. More specifically, multiple claims were made by activist actors at all

levels, arguing that the Belgian nation-state failed in treating its Roma residents in a dignified and appropriate manner (as also described by Cahn and Vermeersch 2000). This was done explicitly by accusing the government of malpractice, mistakes, dishonest and illegal procedures, and the neglect of fundamental rules. These accusations were accompanied by expressions of indignation about the incident and about the general asylum policy. The following quote from Amnesty International formulates this indignation briefly: 'Amnesty International discredits Belgium for collectively sending back dozens of gypsies [sic] from Slovakia' (Amnesty International, *De Standaard*, August 17, 2000).[5]

More specifically, activist actors argued that the national government had taken hasty and premature actions in the asylum cases. Surprisingly, local government actors made the same argument. Although they seemed to support the national government's expulsion policy, they were strongly critical of the inefficiency of the decisions and the lack of determined actions and clear instructions. They argued that the national government had not been sufficiently prepared for the consequences of its actions, as can be seen in the following quote from the substitute Mayor of Ghent[6]:

> On Friday, the substitute mayor Sas van Rouveroij (VLD) from Ghent was very critical of the cabinet of Minister Duquesne. "Many more could have been expelled, but because Brussels was not prepared for such a high number of participants, the intervention has been temporarily stopped. In Ghent, we anticipated everything, but Brussels appears to have been somewhat surprised by the high number". (Mayor of Ghent, *De Tijd*, October 2, 1999)

The overall opinion within the narrative was that the national government was not in control. This opinion was cited by the newspapers who wrote condemning headlines and reports, many of which focused on the inabilities of the government in the person of Antoine Duquesne, the Minister of Interior at that time: 'The Office for Immigration Affairs, led by Duquesne, has been for some time one of the most staggering phenomena of the Belgian government' (*De Standaard*, September 6, 2000).

The claims of activist, local political actors, and the newspapers (see Nr 1 in the respective actors' boxes in Figure 1) were thus united in depicting the Belgian nation-state as incapable and, sometimes, morally wrong (see the link between Circle A and Circle 1 in Figure 1). Although this could be seen as a successful strategy in addressing the human-

5. The quotations mentioned in the paper were translated from Dutch by the first author.
6. Sometimes it was not the Mayor of Ghent, Frank Beke, who was quoted in the newspaper debate, but the substitute Mayor, Sas van Rouveroij, who is affiliated with the VLD, which is a liberal party.

rights atrocity, it also served to confirm the nation-state as the central actor, emphasizing that only the nation-state could change the human-rights situation for the Roma asylum seekers (although it failed to do so). It is also important to bear in mind the *ambiguous* interactions in this narrative. On the one hand, the local government actors strengthened the claims of the activist actors. On the other hand, however, they weakened these claims by focusing more on the disapproval in terms of procedure rather than in terms of absolute conviction concerning the expulsion of the Roma.

Eastern European migration threat: Belgium's actions justified

This narrative (Circle 2 in Figure 1) contained a strong sense of threat from an uncontrollable wave of migration that could only be resolved by a strong and defensive reaction by the nation-state (as also described by Cahn and Vermeersch 2000). The narrative was constructed through specific discursive techniques, which could be linked to the 'story of decline,' which Stone (2002) defines as a story outlining an intolerable evolution leading towards a crisis and demanding action. This kind of story uses facts and figures to show that things have gotten worse. In our case, statistics were indeed used by both local and national political actors and the newspapers (see Nr 2 in the respective actors' boxes in Figure 1) to indicate that Belgium was being confronted with an enormous and uncontrollable increase in asylum applications of Roma. This can be seen in the following quote from the deputy head of the Interior Ministry, Pascal Smet:

> The drastic measure is needed in order to bring an end to the *massive flood* [emphasis in original] of Roma-gypsies [sic] to Belgium. In January, 41 gypsies [sic] asked for asylum. In February, there were 71, in March 191, and in the first days of April, there were no less than 220. "Drastic measures were needed," Smet states. (Smet + *De Morgen*, April 20, 2000)

In addition to the rising numbers, certain terms and adjectives (e.g., 'pressure,' 'invasion,' 'alarming increase,' 'massive flow,' 'huge influx') were used to add a negative, threatening, or disastrous tone to the increased numbers of Roma asylum seekers. Words with these kinds of connotations are frequently used as a device to add emotional impact to stories of decline (Stone 2002; Boswell 2013).

The story about increasing Roma asylum seekers was told in such a way that it led to agitation and fear. As a consequence, the defensive reaction of the Belgian nation-state was not only justified, but was also framed as the right thing to do, given the context (see the link between Circle B and Circle 2 in Figure 1). The status of the nation-state thus shifts from the *villain* in the previously described narrative to the *hero*

in this story. Local and national political actors demonstrate this defensive reaction. For example, the Mayor of Tienen is quoted as saying, 'From now on, there is no more sentimentality. Forced repatriation? It will take place. In recent days, I have received seven files about expulsions. They were immediately put into practice' (Mayor of Tienen, *Het Nieuwsblad*, June 16, 2001).

This narrative on the migration threat corresponds to scholarly observations (Morris 2009; Nash 2009; 2015; Gliszczyńska-Grabias & Klaus 2018) concerning the obstructive power of the nation-state in the realization of human rights for migrants. In this case, we see that a narrative is created about a threatened nation-state needing to defend its borders in order to stay strong, even if doing so would violate the human rights of the asylum seekers.

The most interesting aspect of this narrative is the involvement of the political actors at the local level, even as they were allied (at least to some extent) with activist actors in the previously described narrative. The newspapers also played a significant role in emphasizing this migration threat. This created a strong counter-narrative against the afore-mentioned narrative that decisively blamed the nation-state for the incident.

Human rights in Slovakia: Belgium glorified as a defender of human rights

A third narrative (Circle 3 in Figure 1) corresponds to the indignation expressed in the first narrative described in this article, albeit in an ambiguous way. This narrative was strongly linked to activist actors and demonstrated the severity of the situation in Slovakia. Activist actors at all levels reported discriminatory attitudes and practices, racial violence, unjust treatment, and abuse in Slovakia in such a way that it became a given in the Flemish newspaper media that the Roma were victims of discrimination in Slovakia. The activist actors also argued that discrimination had consequences for the socio-economic conditions of the Roma in terms of housing, work, health care, and education. This idea of deprivation was augmented by a general evaluation of the situation as miserable, precarious, and absurd. This narrative reflects clearly a cosmopolitan human-rights concern for the Roma in Slovakia, unambiguously identifying them as victims at a distance. The argument about a deprived situation for Roma in Slovakia is exemplified in the following quote from Hospitable Ghent: 'The situation in all those ghettos, camps, and settlements is extremely severe. The living conditions of the Roma are comparable to those of the poor in Asia or Latin-America' (Hospitable Ghent, *De Standaard*, April 25, 2000).

The cosmopolitan concern about deprivation and misery in Slovakia was inextricably linked to the assignment of an exemplary role to the Belgian nation-state, which was thus portrayed as a hero (see the link between Circle C and Circle 3 in Figure 1). Activist and local political actors asked the Belgian nation-state to intervene in Slovakia, by

providing resources for and exerting pressure on the Slovak authorities to implement better treatment of the Roma (see Nr 3 in the respective actors' boxes in Figure 1). This is illustrated in the following quote from Janette Danyova, the spokeswoman of the Slovak Roma community in Tienen: 'Your government can play an important role in preventing Slovakia from antagonizing us' (Danyova, *Het Nieuwsblad*, August 26, 2000).

Similar to the first narrative described in this article, the nation-state was portrayed as a central actor, capable of bringing change in the human-rights situation of the Roma. This narrative was conducive to emphasizing a positive role for the Belgian nation-state: protecting the human rights of the Slovak Roma in Slovakia (see the link between Circle C and Circle 3 in Figure 1). The national political actors (see Nr 3 in the box for these actors in Figure 1) glorified Belgium as a country that brings improvement and defends human rights in Slovakia, thus countering the negative blaming narrative. The following quote shows how Pascal Smet, deputy head of the Interior Ministry, emphasizes the Belgian government's positive actions in Slovakia:

> I want to point out that 1.5 million Belgian francs from the budget of Interior Affairs were given to the office of the International Organization for Migration (IOM) in Kosice, Slovakia. This money will be used for the reintegration and guidance of the expelled asylum seekers. We need to eliminate the problems at the roots. (Smet, *De Morgen*, June 15, 2000)

Thus, the story glorifying the Belgian nation-state aligned with the cosmopolitan narrative from the activist actors, with the effect of strengthening the discursive position of the nation-state. We link the narrative from the Belgian government with a cosmopolitan nationalist discourse, which was defined by Nash (2009) as the entanglement of cosmopolitanism and national pride. She identifies two national interests for this cosmopolitan nationalism. First, if you can lead the world in developing cosmopolitan values and policy, you will be considered as a *great* country. Second, if you can obtain that less people live in inhuman conditions, you can prevent mass migration and terrorism, which would otherwise harm your nation. These national interests can be translated to the Belgian nation-state at the time of the *Čonka* case, as the Belgian nation-state was in need of an image change concerning their respect for human rights and it wanted to stop the increase in Roma asylum seekers coming from Slovakia.

Importantly, Nash (2009) expresses concern that such cosmopolitan nationalism enables leader states to develop a superior and imperialist attitude. Accordingly, this narrative calls for critical examination, as it allowed Belgium to shift attention away from its own human-rights violations towards an elaborate description of a *backward* situation in

Slovakia, thereby glorifying Belgium as a human-rights hero. The newspapers played an important role in sketching this *backward* and underdeveloped image of Slovakia and its *helpless* Roma (see Nr 3 in its box in Figure 1), as illustrated in the following quotation about a visit to Slovakia:

> A boy watches his own reflection in the neatly polished body of the car for 15 minutes. He thinks it's very spectacular, as he calls all his friends to come and watch. A short distance away, a mother is draining the dirty water from her washing machine into a bucket. The clothes have been washed in it, and now it's the little child's turn… (*Het Belang van Limburg*, October 11, 1999)

We argue that the narrative had an *orientalist* effect, reproducing the difference between *us*, Belgians, and *them*, Slovak Roma. It is important to note that the narrative from the activist actors did not oppose these orientalist meanings, but rather enabled them. This illustrates how the discursive struggle over human rights can have unintended discursive effects. Although the activist actors may not have intended to tell a story about an exemplary Belgian nation-state and a *backward* Slovakia, the narrative about the situation in Slovakia aligned with the glorifying story about the national government, thereby changing some important meanings.

5. Conclusion and discussion

This article analyzed the discursive struggle about the *Čonka* case in Flemish newspaper media. We aimed to examine how the paradox between national interests and individual human rights was negotiated within this particular discursive struggle over human rights of Roma asylum seekers. We argued that to understand how such a negotiation takes place, we need to pay attention to the interactive and contingent nature of discursive human-rights struggles via a poststructuralist discourse analytical framework. We suggest that such a framework can be used in future studies aiming to grasp the negotiation of the paradoxical nature of human rights within discursive struggles over human rights.

A first feature of our poststructuralist framework is that it enables to grasp the interaction of actors at the level of underlying meanings. In this regard, our analysis showed how both activist and local political actors contributed to the narrative about the failed Belgian nation-state. Furthermore, the third narrative, in which national political actors glorified the Belgian nation-state as a human-rights hero, bringing improvement in Slovakia, was based partly on arguments of activist actors, which depicted a *backward* situation in Slovakia that needed

Belgium's help. These findings demonstrate that narratives in a discursive struggle over human rights are not single, monolithic discourses but arrangements resulting from the interaction of different meanings. These findings thus underscore the need to move beyond the focus in existing human-rights studies on how *single* types of actors construct human rights.

Second, our framework explicitly focuses on the fluidity and contingency of the relations between meanings and actors. In this way, we showed how local political actors were involved in both the narrative about the failed Belgian nation-state *and* the narrative about the migration threat, which appeared to be opposing narratives within the discursive struggle. The analysis thus demonstrates that a discursive struggle over human rights is not a clear-cut struggle between opposing meanings and actors, but instead can involve temporary discursive alliances and oppositions.

Thirdly, we argue that the interaction of meanings can create dynamics that the actors do not consciously control and that can cause the meanings to have unintended discursive effects. The data illustrate such unintended effects, and thus it proves important to take into account that some discursive arrangements within human-rights struggles are possibly not strategically intended. Most notably, although the activist actors may not have intended to tell a story about an exemplary Belgian nation-state and a *backward* Slovakia, the narrative about the situation in Slovakia aligned with the glorifying story about the national government, thereby altering some important meanings.

The most important finding which we wish to highlight here is that all the narratives in the discursive struggle about the *Čonka* case shared a focus on the relative legitimacy and responsibility of the nation-state, thereby asserting the significance of the nation-state within the human-rights practice for Roma asylum seekers (see the small square in the middle of Figure 1). This thus forms the most prominent underlying meaning which connected all three narratives and the different involved actors. It shows how the paradox between national interests and individual human rights was negotiated in this specific discursive struggle. The different narratives centralized the nation-state within the discursive struggle, including the narrative in which the human rights of Roma in Belgium were defended. The complex interaction of narratives did not reflect the power of *human rights*, but rather the legitimacy and importance of the *nation-state*. Consequently, the narratives in which the nation-state's actions were justified and glorified were able to dominate the Flemish newspaper debate. Despite the fact that the *Čonka* case was actually about protecting the human rights of the Roma asylum seekers, the debate shifted towards defending the national interests in this case.

Thus, our poststructuralist framework proved particularly well-suited to unravel how the paradox between national interests and individual human rights played out within the discursive struggle about a

particular human-rights violation for Roma asylum seekers. We suggest that our framework could also be useful for further research into discursive struggles about more recent human-rights incidents for Roma migrants, as well as for migrants in general. The paradox between national interests and individual human rights emerges even more explicitly within the contemporary context of intensified and more widely dispersed migration. On the one hand, human rights of migrants have been more firmly established, for example by the enlargement of the European Union and the resulting wider appliance of the right to free movement. On the other hand however, nation-states are increasingly controlling their borders, often violating the rights of migrants in the process. If we want to understand how the paradox between individual human rights and national interests is negotiated in more recent discursive struggles over human rights of (Roma) migrants, we suggest that it is crucial to examine the contingent interactions between different meanings and actors.

An important concluding remark that should be made is that the focus on the nation-state in the newspaper debate on the *Čonka* case is possibly caused by a nationalist tendency of national newspapers in framing the debate. If this would be the case, this result is in itself interesting, because it shows how national newspaper debate, which can have a strong influence on public perceptions about human rights, centralizes the nation-state when talking about human rights. Yet it would of course be necessary to investigate the production processes behind the newspaper debate, in order to determine how and why journalistic actors decide to frame the human-rights debate in this specific way. Furthermore, knowledge about the intentions of journalistic actors would give further insight into what we have termed in this article ‘unintended discursive effects’ of the interaction of meanings: are these effects also unintended on the part of the journalistic actors, and thus the mere result of the *messy*, paradoxical character of human-rights construction or are they a result of journalists’ deliberate framing? Moreover, future research should definitely explore which meanings prevail in the discursive struggle over human rights on social media. The emergence of social media is often attributed with the potential to stimulate processes of democratization and emancipation, and thus we could ask if social media might allow space for more cosmopolitan narratives and frames on human rights protection. Lastly, we argue that it is important to utilize our poststructuralist framework for the study of discursive human-rights struggles in other arenas than the media, such as the court, as different human-rights meanings also interact within the struggles that take place here. Indeed, the question arises if we would observe a different negotiation of the paradoxical nature of human rights when we would consider the contingent interaction of meanings and actors in a different arena of human-rights struggle.

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Not Judging: Jurisdictional Hubris and Building a Common Legal World

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In its 2015 report, Canada's Truth and Reconciliation Commission (TRC) documents the history of Indigenous-settler legal, political and cultural relationships in Canada in order to ground its 94 Calls to Action (TRC 2015). The Calls to Action are directed at redressing the legacy of residential schools and working towards reconciliation, which the Commission defines in specific relational terms: 'To the Commission, reconciliation is about establishing and maintaining a mutually respectful relationship between Aboriginal and non-Aboriginal peoples in this country' (TRC 2015, 16). In more detailed language, the TRC mandate identifies that reconciliation is 'an ongoing individual and collective process, and will require commitment from all those affected including First Nations, Inuit and Métis former Indian Residential School (IRS) students, their families, communities, religious entities, former school employees, government and the people of Canada. Reconciliation may occur between any of the above groups' (TRC 2015, 16).

Thus, for the TRC, "reconciliation" is not a political slogan nor a vague descriptor of social remediation for Indigenous peoples; it is a term exhorting people and governments to *create* and *maintain* mutually respectful relationships between Indigenous and non-Indigenous people. The TRC further identifies that '[e]stablishing respectful relationships…requires the revitalization of Indigenous law and legal traditions' (TRC 2015, 16). The relationships encompassed by the call

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for reconciliation include *legal* relationships, and the relationships between Indigenous and state legal orders.

The work of legal judgment in this context is complex. Judges making decisions in Canadian courts are individual agents and members of communities, families and cultures; they are among the 'people of Canada' who are part of the TRC's call for reconciliation. Judges are also situated in an institutional context in which they carry particular legal obligations and have a special role to play in how the Canadian state understands and participates in the relationships between Indigenous and settler communities and legal orders. This paper takes up Canadian constitutional law as a site where legal relationships are constituted on an ongoing basis, and where questions about the authorities and obligations of judges are of great significance. Here, the imperative to *judge well* reflects the aspirations of the state with respect to the creation and maintenance of just relationships.

In this context, the challenges for judging and judgment are daunting and present themselves in many forms. On one hand, the TRC meticulously documents the exercise of Canadian legal and political judgment that has imposed colonial frameworks on Indigenous laws, communities and bodies.[1] These exercises of judgment can appear as a form of jurisdictional hubris, wilfully or ignorantly imposing colonial standards in a way that maintains the invisibility of other norms and authorities and generating enormously damaging material consequences for Indigenous peoples. Given this, the desire to build just relationships might motivate a call to *suspend judgment*, to open our eyes to the realities of legal pluralism and colonial domination as undercutting the validity Canadian legal judgments about Indigenous people or laws, and to step away from this unjustified imposition of concepts and values. Like Western feminists assessing gender justice in non-Western societies, or historians critiquing the politics of different times and places, Canadian judges have uncertain standing with respect to judging Indigenous people and Indigenous law, and it is seems that an untroubled assumption of jurisdiction is legally unsustainable.[2] In the context of diversity and inequality, perhaps justice will require, not judgment, but the suspension of judgment. Not judging.

On the other hand, the TRC report also points to justice failures that do not seem fully captured by the exhortation to suspend judgment. For example, the absence or invisibility of Indigenous history in Canadian school textbooks does, to be sure, reflect an underlying judgment about the relative inferiority of Indigenous societies as compared with

[1] For example, the TRC summarizes the imposition of the *Indian Act* governance structures that are also the subject of the litigation explored in this paper (TRC 2015, 55).

[2] The Supreme Court of Canada both recognizes and ignores the contradictions inherent to Canadian constitutional jurisdiction over these lands. See for example *Tsilhqot'in Nation v. British Columbia* [2014] 2 SCR 257 at para. 69.

European societies.[3] However, the invisibility or absence itself seems inadequately captured by the notion of poor judgment; in this example, Indigenous history has fallen outside the range of things that it is possible to judge at all. A student reading such a textbook is not led to make critical or invalid judgments *about* Indigenous history; they learn that there is no such thing, nothing worthy of the critical evaluative lens that might be brought to European or colonial history. Here, the problem seems to be not (or not only) an expansive jurisdictional hubris, but the absence of a shared sense of what kinds of things are the proper subjects of judgment. The failures of collective memory, ongoing adherence to misleading colonial narratives and legal inattention to Indigenous interests and rights seem to speak, not about *too much* judgment, but about *failures to judge at all*. Here, instead of the hubristic imposition of colonial frameworks, we see unjust relationships sustained through refusal, privileged ignorance, abdication, and failures of responsibility. Not judging.

In this article, I explore the challenges of judgment that are of this kind; challenges that are, at their heart, about privileged refusal to engage and the incompleteness of the framework available to judge across legal worlds. I think through these challenges as *not judging*, and explore how to distinguish them from other kinds of judicial practices. Drawing on the definition of "reconciliation" articulated by the TRC and the particular context of Canada, I assess practices of judgment against the imperative to create and maintain just relationships between Indigenous and non-Indigenous communities and institutions in Canada. I ask whether our[4] practices of judging and not-judging work to support or undermine the kinds of relationships called for by reconciliation, and I argue that a theoretical account of legal judgment that conceives of it as world-disclosing helps provide criteria for determining when "not-judging" supports or undermines practices of legal judgment in the service of reconciliation.

The TRC is clear that "reconciliation" is a relational practice, calling on the actions and commitment of all parties. However, in this paper, I am concerned specifically with the obligations and justice demands that fall to the Canadian constitutional order and the judges whose work is embedded in that order. I am concerned with the "homework" [5] that

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[3] 'Although textbooks have become more inclusive of Aboriginal perspectives over the past three decades, the role of Aboriginal people in Canadian history during much of the twentieth century remains invisible [...] So much of the story of Aboriginal peoples, as seen through their own eyes, is still missing from Canadian history.' (TRC 2015, 235)

[4] In this paper, I sometimes use the language of "we" and "our" to describe the people negotiating the problems of legal judgment. I use this language, not to conscript the reader but to include myself in the specific undertakings I am describing and to underscore their collective elements.

[5] Sara Ahmed uses the language of "homework" to talk about spaces where we feel at home, where we work, how we assign ourselves work, how we build the places we inhabit, and how we can allow feminist theory to come home or be at home in the spaces we inhabit (Ahmed 2017).

needs to be done within non-Indigenous legal orders in order for just relationships to become possible, to identify and nourish "spaces for sharing" (Hanna, 2017).

This article has three parts. In the first part, I will expand this discussion of "not-judging" in order to more specifically identify what is at stake and situate these claims in a broader theoretical context. In the second part of the article, I describe one case example that provides a fruitful context for thinking about the complexity of the different legal and normative consequences of "not-judging." The case example is the 2015 decision of the Supreme Court of Canada in the case *Kawkewistawah First Nation v Taypotat*, and concerns the way the *Canadian Charter of Rights and Freedoms* interacts with the development of First Nations community election codes.

In the third part of the article, I draw on the work of Hannah Arendt to articulate a theoretical framework that provides useful resources for building the capacity of Canadian constitutional law to negotiate the risks and obligations of non-judgment. I argue that understanding the challenges of law and reconciliation through the lens of *judgment* theories allows us to focus on how relationships are being constantly created and sustained in law.

In the conclusion, I return to the questions raised by the *Kahkewistahaw* case and bring them into contact with the discussion of Arendtian reflective judgment in order to assess the usefulness of that encounter. I argue that Arendt's approach to judgment gives a different kind of value to a judge's ability to engage in critical self-reflection in the service of relationships, value that might be missed by other accounts. Specifically, Arendt's approach links reflective, accountable judgments to the creation of a shared world, and I argue that these arguments useful for thinking through some of the dilemmas posed by the *Kahkewistahaw* case. I argue that focusing on *judgment and non-judgment* makes it possible to maintain a rigorously critical posture towards the practices of judgment of our state-based, colonial and multi-juridical legal system, while also taking seriously the capacity of that legal system to move us towards (rather than away from) a space in which respectful relationships can be built and maintained.

1. Judging and not-judging

Talking about "judgment" in law is both familiar and unusual. While we use the language of "judges," and "judgments" to explain key institutional roles and tasks, and the language of "judgments" to describe the written reasons judges offer in support of their findings, there are many other ways that we describe what judges do. We might say they are adjudicating disputes, or applying the doctrine of precedent or the rules of evidence. We might say they are crafting outcomes that

they find politically acceptable, or acting through a set of institutional structures elaborated by the contemporary state. I think they are probably doing all of these things, but I think that we learn particular things about our practices, concepts and institutions when we conceive of legal judgment as a particular manifestation of a broad human practice of judgment, alongside aesthetic, political and moral judgment. In general terms, questions of adjudication, decision-making and "how judges decide" are the subject of longstanding conversations in legal theory (for example, Dworkin 1986). However, the idea of "judgment" invoked here is distinct from the idea of decision-making generally; it is more general in the way that legal judgment is conceived of as one form of a broader human practice, and more specific in that it evokes a particular mode of human decision-making. Focusing on "judgment" raises questions that may not arise when talking about "adjudication," for example.

Taking a broad view, "not-judging" can also describe a wide range of things, each of which might relate differently to the demands of justice and reconciliation. When searching for an alternative to "judgment," we find that judgment can be placed in contradistinction to a whole range of concepts and practices, many of which cannot be put on the same scale.[6] For example, "judgment" can be distinguished from *perception* or learning without assessment. Here, "not-judging" might signal a mental stage of perception prior to judgment, or perhaps an openness to engaging without evaluation. In a different way, judgment can also be distinguished from decision-making processes that rely on non-evaluative modes of assessment, such as the application of logical rules. In this context, "not-judging" is not prior to or different from decision-making, but a different *mode* of decision-making. Even taking up these simple aspects of judging and not-judging reveals complicated relationships to law and justice: openness and perception ("not-judging") are crucial aspects of just legal practices, as are binding rules that constrain and structure evaluation ("not-judging"). At the same time, judges making legal decisions carry an obligation to judge when called upon to do so, and to be held accountable for their judgments in particular ways. A "judge" whose practices could only be described as "not-judging" would be failing to live up to those basic obligations. Judges must apply rules ("not-judging"), but on any account of adjudication, all judges carry with them their own knowledge and experience in the way they interpret and apply legal rules and principles.[7] They *judge*.

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[6] Opposites of "judgment" could include: indecision, self-doubt, openness, deliberation, apathy and irresolution. Thanks to my research assistant Kendra Marks for broadening the range of possibilities canvassed here.

[7] For example, in the leading case describing the requirements of impartial judgment, the majority of the Supreme Court of Canada endorsed the view that: '...True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge

What criteria are available for assessing the justice of not-judging? In particular, set against the transformative demands of reconciliation for Canadian constitutional law, how should Canadian constitutional practitioners work with the tension between the legal requirement to judge and its history of jurisdictional hubris? Is non-judgment sometimes a good strategy in the face of this tension? How can we determine the difference between acts of non-judgment that might open space for making other legal norms visible, and acts of non-judgment that reaffirm the colonial map of what merits judgment?[8] In the subsequent sections, I develop criteria for thinking through the difference between non-judgment that proceeds from restraint or humility, and non-judgment that proceeds from refusal or abdication.

2. *Kahkewistahaw First Nation v Taypotat*: judging and not-judging discrimination

In the 2015 case *Kahkewistahaw First Nation v Taypotat*, the Supreme Court of Canada was called upon to assess whether provisions of a First Nations local election code (the *Kahkewistahaw Election Act)* were unconstitutionally discriminatory because of the inclusion of minimum education requirements for candidates. The Kahkewistahaw First Nation is an Indigenous community and an Indian Band in the southeast part of the province of Saskatchewan. There are about 2,020 members of the band, of whom about 670 live on reserve, and community languages include Cree and Saulteaux.[9] The community belongs to Treaty 4, which was negotiated between several Indigenous nations and the Crown in 1874.[10]

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nevertheless be free to entertain and act upon different points of view with an open mind' R. *v.* S. (R.D.), [1997] 3 S.C.R. 484 at para 119.

[8] Decolonial and third-world scholars critique the excesses of colonial judgment, but also the exercise of power that can attend "not-judgment." For example, feminist philosopher Uma Narayan argues that " 'Refusing to judge' issues affecting Third-World communities, or the representations of these issues by 'Insider' subjects, is often a facile and problematic attempt to compensate for a history of misjudgment. Such refusals can become simply one more 'Western' gesture that confirms the moral inequality of Third-World cultures by shielding them from the moral and political evaluations that 'Western' contexts and practices are subject to" (Narayan 1997, 150). Cited and discussed by Zerilli 2016, 165.

[9] City of Saskatoon: *First Nation Community Profile: Kahkewistahaw First Nation*. 2017. Available at <https://www.saskatoon.ca/sites/default/files/documents/community-services/planning-development/future-growth/urban-reserves-treaty-land-entitlement/fnp_kahkewistahaw_september2017.pdf> (visited May 31) achieved at [https://perma.cc/8MRF-WNAN].

[10] Indigenous and Northern Affairs Canada website. Available at <https://www.aadnc-aandc.gc.ca/eng/1100100020616/1100100020653> (visited 29 May 2019) Archived at [https://perma.cc/QKK5-C4LY]. An overview of Treaty 4 can be found at < https://www.aadnc-aandc.gc.ca/eng/1100100028681/1100100028683> (visited 29 May 2019) Archived at [https://perma.cc/99RQ-GMW3]. Treaty rights in Canada are constitutionally protected by s. 35 of the *Constitution Act, 1982*. For a concise overview of Canadian constitutional frameworks, see Webber 2015.

Under the federal *Indian Act,* the Minister can order that the Chief and Council of an Indian Band be selected through elections held in accordance with the terms of the *Indian Act*.[11] The vast majority of Indian Bands were subject to such orders at one time or another. Recently, the federal government has created statutory processes for the revocation of such orders, allowing bands to develop their own election codes, called "community election codes."[12] Pursuant to policies operating under the *Indian Act*, community election codes must meet certain requirements, including consistency with the individual rights protected under the *Canadian Charter of Rights and Freedoms*. In addition, such codes must be approved by the band Council and a majority of the members of the First Nation, expressed through a secret ballot.[13] As such, the development and adoption of community election codes can become an important site where the law and politics operational in Indigenous communities comes into contact with Canadian state law, and there is an interesting history of constitutional litigation about their meaning and effect.[14] The Kahkewistahaw First Nation engaged in this process and over a period of 13 years developed an election code (*Kahkewistahaw* para 5). The new election code stated that any candidate for Chief or councillor must have attained a Grade 12 education or equivalent (*Kahhewistahaw* para 6).

The claimant, Mr. Louis Taypotat, was elected chief of the Kahkewistahaw First Nation for close to 30 years, beginning in the 1970s. At the time of the Supreme Court of Canada judgment, he was 76 years old. Mr. Taypotat wanted to run again, but did not meet the new education requirement. Mr. Taypotat was a survivor of the residential school system, and although he had taken a GED test at a grade 10 level and had received a certificate from a college in recognition of his service to the community, Mr. Taypotat did not have a grade 12 education as required by the law. Mr. Taypotat challenged the education requirement in the Election Act on the grounds that it violated s. 15 of the *Charter*. Section 15(1) provides:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

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[11] *Indian Act* (RSC, 1985, c. I-5) s. 74. The Indian Act is a federal statute in Canada through which the state governs in matters relating to "Indian status," "bands," and "reserves."

[12] Conversion to Community Election System Policy. Available at <https://www.aadnc-aandc.gc.ca/eng/1433166668652/1433166766343> (visited 29 May 2019) Archived at [https://perma.cc/2WBS-8DXZ]

[13] Conversion to Community Election System Policy. Available at <https://www.aadnc-aandc.gc.ca/eng/1433166668652/1433166766343> (visited 29 May 2019) Archived at [https://perma.cc/97NJ-WE3M].

[14] For an interesting recent example, see *Whelan v Fort McMurray No. 468 First Nation* 2019 FC 732.

Before the Supreme Court of Canada (SCC), Mr. Taypotat argued that the education requirement was discriminatory because it had a disproportionate effect on older community members who live on reserve. The Supreme Court of Canada found that there was no breach of s. 15. The reasoning at the heart of this finding was that the claimant did not provide sufficient evidence to show that the education requirement had an adverse effect on an enumerated or analogous group (*Kahkewistahaw* para 15).

This is a complex case, both in terms of equality jurisprudence and in terms of legal plurality in Canada. [15] While this article does not fully engage with this case as a piece of equality rights jurisprudence, there are two aspects of this jurisprudence that I will highlight in order to provide context for my discussion. First, the current doctrinal framework for interpreting s. 15 of the *Charter* requires a claimant to show that they are experiencing unequal treatment *on the basis of a listed or analogous ground* (*Kahkewistahaw* para 16). In Mr. Taypotat's case, this meant that he would either have to show that he was being discriminated against on the basis of a listed ground (here, age or race), on the basis of an analogous ground already identified by courts (such as Aboriginality-residence), or on the basis of a ground that should be recognized as analogous to the ones in section 15 (such as level of education or social condition). While the comparative role of "grounds" is complex and disputed, and is not to be treated in a formalistic manner, connections between unequal treatment and these protected grounds is very important (Pothier 2001). Second, Canadian equality jurisprudence requires that there be some form of empirical foundation to support the factual claim that the law draws a distinction in a way that has a disproportionate effect on the relevant protected group. That is, if the law does not discriminate on its face, the claimant must *demonstrate* that it discriminates in effect.

Even just on the facts that can be discerned by reading the judgments in *Kahkewistahaw*, questions emerge about a whole host of matters, including the relationship between *Indian Act* laws and the Canadian constitution, the relationship between community election codes and Indigenous legal orders, the relationship between those constitutional orders and the legitimacy of democratic deliberation. In the following passages, I identify passages from the Supreme Court and Court of Appeal judgments that I think are important for thinking about the requirements of legal judgment. I focus on moments that might be characterized as "not-judging," and try to unpack the reasons we might have to critique or endorse these actions of non-judgment, in light of aspirations for the transformation of Canadian constitutionalism in the service of reconciliation.

[15] For analysis of the s. 15 aspects of this decision, see Hamilton & Koshan 2016; Eisen 2017.

2.1 No evidence: not judging?

In her judgment, representing the unanimous judgment of the Supreme Court of Canada, Justice Rosalie Abella found that there was *no evidence* to show that the educational requirement had a disproportionate impact on the claimant based on his membership in an enumerated or analogous group. The SCC looked first at age, and then "residence on reserve" as possibilities, and found that there was no evidence to support the claim that the education requirement had an adverse requirement on one of those groups.[16] The SCC quotes from the reports of the Royal Commission on Aboriginal Peoples in support of the claim that valuing education is extremely important to achieving justice for Indigenous people (*Kahkewistahaw* para 1), but does not mention residential schools or their legacy in the judgment, except to note that Mr. Taypotat did not raise this issue in his original pleadings (*Kahkewistahaw* para 20).

Justice Abella writes:

> There is no question that education requirements for employment could, in certain circumstances, be shown to have a discriminatory impact in violation of s. 15 […] In this case, however, there is virtually no evidence about the relationship between age, residency on a reserve, and education levels in the Kahkewistahaw First Nation to demonstrate the operation of […] [a discriminatory "headwind"]. Nor is there any evidence about the effect of the education provisions on older community members, on community members who live on a reserve, or on individuals who belong to both of these groups (*Kahkewistahaw* paras 23-24).

The issues of adverse effects and the possible grounds of discrimination were complicated by the fact that Mr. Taypotat's exact claim changed between trial and appeal, and the different courts all articulated their decisions on s. 15 in different ways (*Kahkewistahaw* paras 10-14). For present purposes, I am interested in exploring the possibility that Abella J.'s finding (that there was no factual basis on which to ground a judgment of discrimination) could be described as an exercise of non-judgment.

Given the repeated and extensive documentation of the policies and consequences of the residential school system, including the recent reports of the TRC, there are good reasons to pause over the claim that

[16] Interestingly, the Charter Committee on Poverty Issues and Canada without Poverty applied for leave to intervene in the case before the SCC, and were denied. They would have argued that level of education is properly understood as a "social condition," which should be accepted as an analogous ground of discrimination. See CCPI/CWP Application for Leave to Intervene, at para 6. Available at <http://www.socialrights.ca/docs/taypotat%20leave%20factum.pdf> (visited 29 May 2019) Archived at [https://perma.cc/Z4EF-3V8N].

there is *no evidence* that a formal education requirement would impact disproportionately on older members of Aboriginal communities who are themselves survivors of that system. To characterize Abella J.'s finding here as non-judgment would be to claim that, instead of exercising judgment, she has *deferred* judgment to a set of formalistic rules of evidence in which the party challenging the law (here, an elderly residential school survivor) is the sole source for judicial fact-finding. This sets aside possibilities such as the doctrine of judicial notice that demand a more active approach to the judicial role (Cochran 2007).

From the perspective of just relationships: does Abella J.'s refusal to look beyond admissible evidence constitute a kind of wilful blindness to the reality of the social context in which her judgment is exercised? If so, this form of non-judgment seems unlikely to live up to our aspirations for practices of good legal judgment. But this may not be a complete picture of the judgment practices engaged by Abella J. in this case. To draw out different aspects, I turn to how this issue is negotiated by the Federal Court of Appeal (FCA).

2.2 No law: not-judging?

Faced with the complex set of problems about facts, evidence, and social context that arise in *Kahkewistahaw*, the Federal Court of Appeal takes a markedly different approach than the Supreme Court of Canada. To provide adequate factual context for his analysis, Mainville J.A. takes judicial notice of 2006 census information available from Statistics Canada.[17] He writes:

> The education gap within the on-reserve aboriginal population of Canada is well-documented ... Moreover, the education gap between older and younger Canadians is also well-known... [Therefore] the impugned provisions.... create a distinction that discriminates on the basis of both age and of Aboriginality-residence (*Taypotat v. Taypotat* 2013 FCA 192 para 48).

Thus, the judgment of the FCA in this case does seem to disclose a more active approach to the task of judgment, a willingness to put together a more robust picture of the context and to try and understand what this issue might mean to the people in the communities in question. For example, the court raises the possibility that 'elders who may have a wealth of traditional knowledge, wisdom and practical experience, are excluded from public office simply because they have no "formal" (i.e. Euro-Canadian) education credentials. Such a practice would be founded on a stereotypical view of elders' (*Taypotat* para 59).

[17] Statistics Canada has been endorsed by Canadian courts as a so-called "readily accessible source of indisputable accuracy" and thus a suitable source for information to be judicially noticed – see *R. v. Find*, 2001 SCC 32.

However, when it comes to the meaning and consequences of not-judging, there are further questions to raise. Perhaps most importantly: To what extent might the SCC be deferring, not to a constrained or formalistic view of impartiality and the judicial role, but *to the political processes undertaken by the Kahkewistahaw First Nation*? Viewed from this perspective, Abella J.'s moment of non-judgment looks less like an abdication, and more like an act of making space for the political judgment of a marginalized community.

For example, regarding the FCA's resort to judicial notice, Abella J. writes:

> Census data can certainly be a useful evidentiary tool to demonstrate that a law has a disadvantaging impact. But this case is about a particular Election Code in a particular First Nations community. I find it difficult to draw even a weak inference about the correlation between age and education among the almost 2000 members of the Kahkewistahaw First Nation from census data about the Canadian population generally (*Kahkewistahaw* para 31).

More importantly:

> I think intuition may well lead us to the conclusion that the provision has some disparate impact, but before we put the Kahkewistahaw First Nation to the burden of justifying a breach of s. 15 in its Kahkewistahaw Election Act, there must be enough evidence to show a prima facie breach. While the evidentiary burden need not be onerous, the evidence must amount to more than a web of instinct (*Kahkewistahaw* para 34, emphasis added).

The trial court and appeal decisions reveal that the process leading up to the adoption of the *Kahkewistahaw Election Act* was a disputed one. It is not at all obvious to an outsider if and how the process is related to legitimate political engagement by the community. The facts are complex and, on their face, point to opposite conclusions. For example, the referendums leading to the ultimate approval of the election code were plagued by low voter turnout. However, the turnout for those referendums was actually higher than usual participation in the band council election processes (*Taypotat* FC para 41). The parties to the dispute raised issues about voter disengagement and the degree to which the formal procedure reflected genuine community debate. There were people who voted in favour of the new Act, but then later signed a petition to oppose it (*Taypotat* FC para 43). There is the issue of Mr. Taypotat's longstanding position as Chief, and the possibility that a new generation of leaders was trying to take power, either legitimately or illegitimately; in the most recent election for Chief, Mr. Taypotat lost to his nephew by just four votes (*Taypotat* FC para 3). There is a sense that a generational shift was afoot, with both positive and negative

connotations being attached to that: there was a recognized need for new leadership, and recognized fears about the mistreatment or marginalization of elders (*Taypotat* FC para 7). And finally, the Court faced a moment in which an Indigenous community has engaged in a political process, but some members have called upon the Canadian state to intervene in that process to protect their right to equality.

The Federal Court of Appeal grapples quite directly with the question of the role of Canadian courts with respect to individual citizens of the Kahkewistahaw First Nation. For example, the FCA finds that the education requirement breached, not only s. 15 of the *Charter*, but also the anti-discrimination provisions included by the First Nation in their own *Election Act*. In order to make this finding, Mainville JA has to bring the Council of the Kahkewistahaw First Nation into the Federal Court's jurisdiction – and under *Charter* scrutiny – by describing it as 'government' (*Taypotat* para 36). Mainville JA writes that 'to decide otherwise would be to create a jurisdictional ghetto in which aboriginal peoples would be entitled to lesser fundamental constitutional rights and freedoms than those available to and recognized for all other Canadian citizens' (*Taypotat* para 39).

Thus, Mainville JA takes an active and encompassing posture when undertaking the task set before him, and this affects both his treatment of facts and law. Tested against criteria for good legal judgment, concerns arise, not about a failure to fully engage, but a potentially overly ambitious mode of incorporation, with the risk of universalizing the partial laws of the settler state.

All of this discussion underscores the complexity of this case as a whole, and the difficulty of identifying the structure of the legal judgment that must be exercised in this case in order to rise to the demands of justice and reconciliation. In some respects, this is a dilemma that is very familiar to the Canadian common-law tradition. There are a variety of concepts and doctrines that have developed to provide resources for thinking about the legitimate scope of legal judgment: jurisdiction, conflicts of laws doctrines, constitutional division of powers, and judicial review of administrative action. Many of these concepts can provide guidance on the question of how far judging can or should go. (Put in the terms used by the FCA and SCC in *Kahkewistahaw*: judges should be cautious when they consider compelling a government to justify its actions legally, but they must not create jurisdictional ghettos).[18]

[18] The concept of "jurisdiction" is also a fruitful locus for discussion of legal pluralism and relational justice. In this paper, exercises or assertions of jurisdiction are read through the lens of "judgment" and characterized as "judging" or "not-judging." The particular value of the present approach has to do with focusing attention on relationships, but there may also be a loss of the concretely *territorial* components of legal authority. For discussion of "jurisdiction" as a concept that creates relationships between land and authority in a settler colonial state, see Pasternak 2017; Dorsett & McVeigh 2012.

For example, an approach focusing on the "rule of law" might insist, with Mainville JA, that a rights documents such as the *Charter* must be applied universally in Canada. This claim might decide certain legal outcomes. But it does not really address – or even make visible – some of the questions that sit at the heart of not-judging. For example, the rule of law may draw a matter into a court's jurisdiction on the grounds that the court cannot refuse to decide an issue that falls within its purview, and to do so would be to undermine the essential idea that the law be applied equally to everyone. This is, to be sure, about drawing the boundary of the court's jurisdiction, but it also adds an element of obligation; a judge cannot escape the responsibility to judge in these circumstances. This is not only about the *scope* but the *character* of judging and not-judging.

Further, many well-developed intellectual and doctrinal frameworks focus primarily on the capacity of the court to bring its own standards to bear on the facts at hand. Given the contested processes leading up to the creation of the *Kahkewistahaw Election Act*, one might ask, is it the Canadian court's role to inquire into and judge the legitimacy of this process? There is a sense that where the court sees itself on shaky ground, it should proceed with caution; the idea that non-judgment, in the face of difference or dispute, is a way to create space for pluralism.

However, here too we seem to step around certain crucial questions. Most importantly, the call to restrain or suspend judgment can leave unscrutinised the practices of the judge and their judging community. We attend to the contested legitimacy of the Kahkewistahaw First Nation government, but not the contested legitimacy of the Canadian state. We risk assuming that non-judging leaves space for pluralism, without thinking through the relationships that are created, maintained, undermined or consolidated through that non-judgment. While not rejecting any other approaches as possible sources of wisdom on the question of not-judging, I am offering a reading of the *Kahkewistahaw* case that is oriented to a specific set of questions about judgment and relationships. Returning to the paradoxical tension between jurisdictional hubris and the abdication of responsibility to judge, I think that the usefulness and dangers "not-judging" are at the heart of the challenges for Canadian constitutional law in the context of justice and reconciliation. To aid in this endeavour, I turn to the writings on reflective judgment in the work of political theorist Hannah Arendt.

3. Hannah Arendt, the community sense, and responsibility for judgment

The concept of judgment plays an important role in Hannah Arendt's political theory. For Arendt, *judgment* is a form of reflective practice, distinct from thinking, acting or willing, in which a person develops an

evaluation of a particular thing (Arendt 1982, 66). To develop this account of judgment, Arendt draws on the work of Immanuel Kant and his concepts of aesthetic judgment and taste. Arendt's interpretation of Kant is controversial, both among those who think Arendt wrongly construes Kant's ideas, and among those who argue that the incorporation of Kantian transcendentalism undercuts other elements of Arendt's own work.[19] For present purposes, these debates will be mostly set aside. Instead, I will focus on drawing out those aspects of Arendt's concept of judgment that I think are helpful for understanding and evaluating practices of *legal judgment*. In this endeavour, I rely on writings of feminist and democratic interpreters of Arendt, and in particular, the work of Jennifer Nedelsky and Linda Zerilli (Nedelsky 2012; Zerilli 2016).

At the heart of Arendt's appropriation of Kant is the notion that judgment essentially involves a subjective component. My judgment is *mine* in important senses: it arises from feelings, preferences, and evaluative impulses that I have when encountering something (Arendt 1982, 66). This can be contrasted with other practices such as purely rational rule-following or deduction. Claims arising from practices such as logical deduction make claims to universal validity; they claim to be *true* in some sense, in a way that applies beyond the experience of any individual person doing the reasoning. In Arendt's language, these kinds of rational practices "compel" agreement.

At the same time, *judgment* does not collapse into preference, identity or arbitrariness; while it is essentially subjective, judgment does not stop with these feelings or preferences. Indeed, Arendt argues that unlike taste, *judgment* can possess a certain kind of validity (Arendt 1982, 72). It is not the compulsory, universal validity of rational truth claims. Instead, judgment claims validity grounded in the reflective engagement of the judge with her or his community. Arendt argues that judgment is valid to the extent that the judge has imaginatively engaged with a community of judging others (Arendt 2001, 20). Arendt calls this the achievement of an "enlarged mentality." I may begin with a subjective preference, feeling, or instinct, but this does not transform into a valid judgment until I think about how I could communicate my view to others, whether they would agree with me, and what reasons I could offer that might persuade them. If I say I think the action someone has taken is *right*, it may be that the action made me feel a certain way, but it's not just that. I have *reasons* to support my judgment. And while it wouldn't make sense to say my judgment is "true" or universal, I do think there are some other people who would agree me with, who would be persuaded by my reasons. In this way, the act of judgment allows me to gain critical insight into the value of my own initial preferences, and

[19] For discussion and critique from several perspectives see Garsten 2007; Marshall 2010; Beiner 2001; Zerilli 2016.

to move the standards of my own judgment into the space of a common world (Arendt 2001, 22).

Bringing this perspective to bear directly on the validity and impartiality of *legal* judgments, Nedelsky argues that it is the enlarged mentality that makes good judgment possible. In a passage cited by Justices McLachlin and L'Heureux-Dubé in their concurring judgment in Canada's leading case on judicial impartiality, Nedelsky writes:

> What makes it possible for us to genuinely judge, to move beyond our private idiosyncracies and preferences, is our capacity to achieve an "enlargement of mind". We do this by taking different perspectives into account. This is the path out of the blindness of our subjective private conditions. The more views we are able to take into account, the less likely we are to be locked into one perspective [...] It is the capacity for "enlargement of mind" that makes autonomous, impartial judgment possible. (Nedelsky 1997, 107.)

On this view, the validity of judgment is intersubjective and requires engagement with a community of other judges. In order to make my judgment valid, I have to think about the scope of the community with whom I am engaged through my judgment. I have to think about whom I imagine persuading by my reasons, and to whom I think I am obliged to listen.

When bringing this approach to bear on questions of legal judgment – especially those made visible by the injustices of Canadian colonialism – there are three fundamental requirements for judgment that I think provide aspirational but concrete guidance for assessing practices of judging and not-judging in law. First, judgment essentially requires engagement with others. It is other-directed in the sense that it requires judges to think about others in the community across which they claim validity, and the kinds of reasons that would persuade fellow judges in that community. Valid judgment can never happen without consideration of views and values that go beyond what I know already; in order to judge well, I have to take active steps to ensure my knowledge and perspective are adequate to the task at hand. Without this full context, my judgment can only be partial, not impartial (Nedelsky 1997; Matsuda 1989).

Among interpreters of Arendt and those who debate the merits of her approach for political or legal judgment, there is disagreement about whether the process of developing an "enlarged mentality" necessarily entails actual communication between real people, or whether it is something that takes place solely in the imagination of the judge. Arendt's own writings can support both approaches, but in this paper I accept that this actual communication is both essential for the

usefulness of the concept of judgment, and also possible on the best reading of Arendt (Young 1986; Nedelsky 2011).

The question of communication is important for good *legal* judgment because judges in a court of law are constantly presented with this kind of difficulty about the sources of their knowledge. For example, when should a judge require that parties present admissible evidence on a factual question? In what circumstances is the judge's own knowledge a source of adequate or legitimate information? This requirement of judgment demands the active and rigorous engagement with the views and knowledge of others. Such engagement may well be difficult to achieve in the context of the institutional constraints facing a judge on the bench of a common law court. However, Arendt's notion of judgment demands that we try.

The second requirement that helps elaborate the consequences of non-judgment is the idea that judgment requires critical self-reflection. As a judge, I cannot ignore my subjective feelings and mental defaults; instead, I have to engage with them and test them against the judgments of others. This exercise requires that I view my own preferences and initial views with a certain kind of objectivity; in Arendt's language, I adopt the view of a spectator.[20]

For Arendtian reflective judgment, the idea of the spectator is very important. It is the aspect of her notion of judgment that is uncompromising in its demand for accountability. Good judgment requires that I *judge*, that I make an evaluative assessment, and that I not simply accept what I (or others) think at the outset. Like an audience member at a dance performance, a person making a legal judgment has to assess what they see in front of them, to think about what criteria are important and whether the rest of the audience shares that sense.

For Arendt, these aspects of judgment tied to self-reflection and critical assessment are measured against her thinking about the trial of Adolf Eichmann (Arendt 2006). Arendt's fundamental assessment of Eichmann was that he had failed to think or judge for himself. Philosopher Brian Garsten summarizes his interpretation of Arendt's view:

> What Eichmann lacked, on Arendt's account, was the interior space in which that imaginative work could occur, the internal space that judgment requires. Too satisfied with his own identity, too comfortable in his own private life, his banality consisted in a lack of imagination. His failure did not lie, she thought, simply in choosing the wrong standards to use when judging. Nor did his failure lie in not knowing which standards to use. Instead, he failed by not judging at all, by not being able to see himself from a spectator's vantage point, and by not creating within

[20] For discussion drawing out the significance of the spectator role in judging, see Etxabe 2012; Bilsky 2001.

> himself the plurality and capaciousness that judging-spectatorship requires (Garsten 2007, 1097).

Thus, for Arendt, the failure of critical reflection and the failure to critically assess the content of one's own thoughts and feelings is an abdication of responsibility.

It is in this sense that the failure to judge is *not itself a judgment* in Arendtian terms. It may be a choice or a decision in some way, but it is not a *judgment*.[21] Further, for Arendt, the absence of genuine judgment is always a negative; non-judgment or the suspension of judgment is a failure to take on the responsibility for reflecting critically on one's views and actions and to take one's perspectives into a public world that is shared with others. Thus, the failure to judge is not just a problem because it compromises the quality or validity of the decisions we make. It results in the absence of a common space in which decisions can be made collectively and validly at all, and thus heralds the death of political life (Zerilli 2016).

Placed in the context of *legal* judgment, this criterion – critical self-reflection – calls for scrutiny and, where necessary, critique of existing legal concepts and norms. Moreover, it calls for judges to make the evaluative assessments that are the hallmark of *judgment*, not deference to rules. Where judges in a court of law engage in non-judgment that results from the technical application of rules, we should be concerned about the possibility of the abdication of responsibility and the avoidance of responsibility. On my account, for Arendt's reflective judgment, accountability is the heart of judgment.[22]

The third aspect of Arendt's judgment that is constructive for the purpose of thinking about good legal judgment is its focus on the creation and maintenance of relationships. The consequences of reflective, intersubjective standards for judgment are that people must engage with themselves and with each other in order to make valid judgments. In this way, Arendt argues that practices of judgment are constitutive of political life and the relationships that attend it: Judgment is world-creating.[23] Judgment, Arendt says, is like a table in that it both connects and individuates (Zerilli 2016, 279). Placed against this theoretical context, *not*-judging, whatever else it is, becomes a practice that fails to contribute to the building of a common world.

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[21] Etxabe arrives at a different conclusion, though I share his views with respect to accountability for the consequences of both judging and not-judging in law. See Etxabe 2012, 81.

[22] Zerilli argues that what relativism and objectivism share is a rejection of responsibilities for knowledge claims, and she develops a theory of judgment to meet this requirement (Zerilli 2016, 174).

[23] For a sustained engagement with this idea for democratic societies, see Zerilli 2016.

4. Judgment, reconciliation and just relationships

How can we know whether not-judging supports or undermines the creation and maintenance of just relationships between Canadian and Indigenous people and laws? In the face of the Arendtian claim that the failure to judge undermines the very conditions on which shared life may be possible, what should we make of the need to prevent or slow down the overreaching, over-confident reach of colonial law?

Returning to the *Kahkewistahaw* case, these questions become more specific. For example, when Abella J. holds that there is insufficient evidence to support the claim that the educational requirement disproportionately affects older residents on reserve, is this a moment of deferral to a set of rules about evidence, and thus not judgment at all? Or does it disclose a self-critical assessment of the limited impartiality that is possible under the circumstances? Is this an example of courage or hubris? Abdication or space-making?

Arendt's concept of judgment and the criterion of the enlarged mentality do not necessarily answer these questions in a straightforward way, but they do provide a rich ground for determining what is important as we go about addressing them. Specifically, I suggest that adopting the standards of reflective judgment compels attention to relationships and the quality of those relationships.[24] I suggest that these relationships are both personal and institutional, such that judges in Canadian courts can constructively attend to them when deciding how to meet the demands of their institutional role.[25]

On its face, the Supreme Court of Canada's judgment in *Kahkewistahaw* is not about reconciliation in a broad and aspirational sense. Indeed, it could be characterized as being merely about the application of Canada's state-based individual rights instrument to Canada's state-based colonial legal ordering of Indigenous people as "Indian Bands."[26] However, I suggest that even this characterization reveals that Canadian judges are unavoidably entangled in a multi-juridical constitutional order. Deciding whether and how Canadian courts should apply the *Charter* to legislation created under the *Indian Act* does provoke some of the core questions of constitutionalism in a settler state, and makes visible the complex and paradoxical consequences of not-judging.

Understanding the role and obligations of judges through this lens means that the Canadian judges in *Kahkewistahaw* are involved in the

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[24] For analysis of Canadian equality law, including the *Kahkewistahaw* case, in relational terms, see Eisen 2017.

[25] The idea of judgment as helping to build a common space for legal contestation resonates with theories of constitutionalism developed by scholars such as Webber (2015) and Borrows (2010).

[26] For an exploration of the potential of *Indian Act* by-laws to advance Indigenous self-governance, see Metallic 2016.

construction of Indigenous-settler legal relations, regardless of how they decide. It means that the quality of this relationship is made central to how we should assess judicial conduct and the adequacy of the ideas and institutions that exist to support judges in the Canadian legal order.

A model of reflective judgment that takes seriously Arendt's ideas of validity and the enlarged mentality demands that a judge attend equally to self and other. This focus provides one way to think (and act) through some of the familiar dilemmas of relationality in the context of colonial inequality and power. When articulating the demands of good judgment in the service of reconciliation, there is often a focus on the extent to which settler legal actors must open their minds to new knowledge and ways of being in the world.[27] And this is surely a crucial part of developing an enlarged mentality in the support of good judgment. This is the perspective that might generate a call for suspension of judgment.

However, without equally attending to the way *Canadian* law is shaped by the relationship in question, there is a risk that crucial aspects of legal relations may escape critical attention. For example, in *Kahkewistahaw*, Justice Abella articulates a standard for s. 15 which leaves open the possibility for the First Nation to exercise its lawmaking authorities with less intervention from the Supreme Court of Canada. It is possible for this to help build discursive and political space for the development of legal and political debates in the Kahkewistahaw community. However, it is also possible for certain critical aspects of Canadian law to fall out of view, and their role in maintaining unjust legal relations may escape critical scrutiny.

Without *judging* the law and the inter-societal relationships that flow from it, focus remains on questions about, for example, whether the *Kahkewistahaw* election code might unjustly discriminate against residential school survivors, and not how Canadian law might work to support the participation of those survivors in all democratic processes. Moreover, while the outcome of the decision potentially creates lawmaking space, it also upholds or is at least consistent with a more formalistic approach to Canadian equality law. It might work to naturalize the justice of s. 15 anti-discrimination norms as distinct only from injustice or inequality. Are these approaches to state law more or less useful in the creation of just relations?

The question of judgment in this context should not only leave practical and rhetorical space for Indigenous governance, it should also leave Canadian law transformed in some way. There is no doubt that *judging* carries risks of overconfidence and domination, and Justice Mainville's decision in the Federal Court of Appeal invokes some of these risks by endorsing a monist image of law in which the absence of Canadian state law results in "jurisdictional ghettos." But *not-judging* also carries with it a lack of inward-directed critical attention, and a potential lack of commitment to building a common world.

[27] For an example of legal actors taking up this challenge, see Finch 2012.

This requirement – to leave the judge transformed and a common world disclosed – means that the idea of judgment can provide a way to understand and evaluate what judicial decision-makers do and saw when presented with constitutional challenges. But it also works more broadly to provide a way of engaging with law that allows us to practice skills of learning and analysis that are attuned to relationships in the relevant ways, and that have the potential to generate accountability. That is: good judgment requires me, a settler Canadian scholar researching the core institutions of the colonial legal system, to learn about Indigenous communities and listen actively to a wide variety of views. But, equally, I must make space within myself for the possibility of better relationships. The rhetoric of non-judgment is sometimes too close to the rhetoric or closure or disengagement; strategies that can leave the dominant party in a relationship too comfortable and the status quo too untouched.[28] If I am allowed to set aside – to not judge – there is the potential that this lets me off the hook, because it is settler institutions and principles which require active transformation, in order to create a new relationship with Indigenous peoples.[29]

Arendt's approach provides ways to distinguish between, on the one hand, legal decisions that allow pluralism to flourish, and, on the other, the refusal to see multiple norms as occupying a shared space for contestation. The refusal to judge across communities can reinforce the neutrality of the dominant norms themselves or, like the absence of Indigenous history from Canadian school textbooks, deny that there is anything worthy of judgment at all. Arendt's criteria for judgment are, indeed, about relating to others. But they are also about relating to one's self. Addressing this same theme, the TRC writes:

> Aboriginal children and youth, searching for their own identities and places of belonging, need to know and take pride in their Indigenous roots....Of equal importance, non-Aboriginal children and youth need to comprehend how their own identities and family histories have been shaped by a version of Canadian history that has marginalized Aboriginal peoples' history and experience.....This knowledge and understanding will lay the groundwork for establishing mutually respectful relationships (TRC 2015, 185).

In negotiating the problems of not-judging, I suggest that the three requirements of judgment described above – intersubjectivity, critical self-reflection and relationality – assist in generating new and useful ways for thinking about the challenges faced by Canadian

[28] For explorations of ignorance and privilege from a philosophical perspective, see Sullivan and Tuana 2007.
[29] For discussion of responsibilities and knowledge from a pedagogical perspective, see Regan 2011.

constitutionalism with respect to justice and reconciliation. I think that these requirements invite the possibility that in the face of jurisdictional hubris, the suspension of judgment is not inevitably space-making or pluralistic. Not-judging can also facilitate wilful blindness and a sense of neutrality with respect to colonial standards and categories. And most important, not-judging can undermine the disclosure of a common world in which we might build the respectful relations that justice requires. In the context of the demands of reconciliation, we need the defamiliarization that is valued as part of judgment and concomitant with attempts to judge well as a community (Zerilli 2016, 180).

By centering judgment as a practice of constitutionalism, it is also possible to see how practices of state legal decision-makers can contribute to (or undermine) the work of building a common world in which legal norms can be debated and judged. This approach has quite practical aspects: judgment is not only an aspiration ideal we can use to measure our conduct. Rather, it demands that we take action to create the conditions that make the practice of good judgment possible. It is a *practice* in the sense that it takes work to achieve, and this work can be made harder or easier by its surrounding context.[30] Calls to suspend judgment risk endorsing the idea that changing that context, or doing the work needed to *practice* good judgment, is either impossible or otherwise not worth attempting.

In this way, uncritically valuing non-judgment also carries the risk of a further loss. It is the risk that the Canadian legal order might remain limited by its unwillingness to relate justly to other legal orders.[31] The risk that the Canadian legal order may continue to rely on power – not-judging – to cover over the paradoxes in its foundations. I take guidance from the TRC and constitutional scholars who show that there are other ways that legal relationships based on respect and justice are possible (Borrows 2010). In the context of Canada's pluralistic constitutional order, set against the enormous justice demands of reconciliation, *judgment* is necessary and necessarily difficult, and should be taken up as a framework for *resisting* jurisdictional hubris in favour of a practice that can help build a shared legal world.

[30] The importance of structural context for enabling certain kinds of critical judgment is also central in the work of Antonio Gramsci, particularly with respect to freedom of speech and of the press (Gramsci 1971).
[31] For a related argument about relational legal authority, see Roughan 2013.

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Book Review

Bruno Latour: *Down to Earth: Politics in the New Climatic Regime*, Polity, Cambridge 2018.

Jared Del Rosso*

I read Bruno Latour's *Back to Earth: Politics in the New Climatic Regime* amid a government shutdown in my country, President Donald Trump's demand for a border wall grinding the U.S. to a halt. Not long after I finished the book, and with the government still closed, the Rhodium Group reported that U.S. carbon dioxide emissions increased by nearly four percent in 2018 (Plumer 2018).

The times, it seemed, would make Latour's point for him. Here was the U.S. receding into itself, with talk of walling up the country's southern border and a faded government fading further still. Meanwhile, the nation remained global in the most consequential of ways, exhaling itself into an atmosphere with no room left for the carbon-laden breath.

Back to Earth opens by making sense of this seeming contradiction, explaining the former by the latter. According to Latour, the undeniably global nature of our lives is leading more and more of us to retreat to the local. Global climate change, in other words, is driving nationalistic and isolationist movements in the U.S. and Europe. It has done so by depriving us – all of us – of a home and a future on the earth. We realized this, Latour tells us, in 2015 with the Paris Agreement, which forced nations to confront simple, but shattering truths. The earth had rejected the modernization of the human world. It could not accommodate our present. And it would not promise us a land for the future that we had planned and indeed believed we deserved.

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But there is the fact, there is awareness of the fact, and there is the response to it. Officially, the Trump administrations and its supporters deny climate change and its human causes. But the administration denies something else, too; it rejects that the earth now refuses us and our projects. Trumpist America, rejecting global politics and the Paris Agreement, doubles down on the old ways: 'We strongly believe that no country should have to sacrifice their economic prosperity or energy security in pursuit of environmental sustainability,' Wells Griffith, the administration's international energy and climate adviser, said during a UN panel discussion of fossil fuel in December 2018 (Plumer and Friedman 2018).[1]

According to Latour, the ensuing inward turn – the walls, the rejection of immigrants, nationalism walking hand-in-hand with xenophobia – is but the next step in this denial, an effort at impossible belief: the earth, at least here, within these borders, remains for us.

To be clear, *Back to Earth* doesn't merely diagnose the U.S.'s pathologies. Latour sees these tendencies elsewhere, but particularly in the U.K., where Brexit reveals many of the same insecurities about borders, immigration, and the future of a homeland. But his analysis is most pointed and most political when aimed at the U.S. By the end of his brief book, he reaches a conclusion that ought to paralyze his U.S. readers: 'no one will be able to count on the belated support of the United States' (2018, 99). *Back to Earth*, it turns out, is not a book for this reviewer.

As an explanation of the rise of the Trumpist worldview, *Back to Earth* is unsatisfying. On one hand, all such explanations are. Trump's presidency is predicated on, among many, many other things, the contingent and the idiosyncratic – Russian interference in the U.S. presidential election and the U.S.'s Electoral College system. Without both – perhaps even just one – of those, there might be no presidency, no inward turn, and no official rejection of climate change for commentators to explain. On the other hand, the populism, xenophobia, and racist ideologies undergirding Trump and his allies' turn toward nationalism are not new to U.S. politics. They predate Trump, the Paris Agreement, and the recognition of climate change. Even the more proximate forces that lifted Trump can be traced at least to the earliest years of the Obama presidency, when Trump led efforts to convince the U.S. public that Obama was born in Kenya and, later, when assertions of white identity and power answered calls that 'Black Lives Matter.' This all predates the December 2015 recognition of earth's rejection of modernization.

So as a manifesto, *Back to Earth* does not quite work; its political analysis is not quite political enough. It is also rather allusive, which probably explains why Jennifer Szalai (2019), reviewing it for the *New York Times*, says that many readers may find it 'too philosophical and

[1]A Twitter account associated with Bruno Latour tweeted this quote in late-December 2018.

too French.' Indeed, the Latour of *Back to Earth* surrenders his secrets more readily if the reader spends time first with another brief, polemic Latour, that of *We Have Never Been Modern* (1993). In fact, a sentence in that earlier book's final paragraph portends *Back to Earth*: 'If we do not change the common dwelling, we shall not absorb in it the other cultures that we can no longer dominate, and we shall be forever incapable of accommodating in it the environment that we can no longer control' (1993, 145). We changed, but not in the way Latour then hoped. We surrendered our belief in a common dwelling, some citizens play acting their lives on a different earth than the rest, an earth still not torn asunder by climate change. (And still others imagining extra-terrestrial lives, trading life on this planet for life on Mars.)

But if *Back to Earth* stumbles on the familiar politics – the politics of parties, ideologies, and interests – it is because its gaze is elsewhere. The book calls out to its readers, asking them to reimagine, even re-describe, their relations with their allies, their opponents, non-human life, and the very soil itself. This is a much needed challenge, affirming, as it does, a social good as precarious today as the climate: pluralism. Though that word – 'pluralism' – does not quite do justice to Latour's analysis, it's the best I've got. *Back to Earth* demands that its reader recognize and come to appreciate the local, but not in Trump's way. Not as a site of racial and ethnic purification and ecological denial, but as sites of lives living, teeming lives, lives dependent on one another and the earth too.

Latour has long been a pluralistic thinker. He wishes the world to be more complex, filled with human and non-human agencies alike. This is, first, a philosophical, anthropological, and sociological urge. In his earlier works, but especially *We Have Never Been Modern* and *Reassembling the Social* (2005), Latour argues that social theorists and scientists cannot explain the organization and structure of social life without acknowledging the role of non-human things. In this sense, Latour's social theory aspired to diversify the agencies of the social sciences, to include '*any thing* that does modify a state of affairs by making a difference' (2005, 71).

In *Back to Earth*, Latour's pluralism – joyfully written with exclamations and their marks – is primarily a political project. This project contrasts sharply with what he calls Globalization-Minus and the Local-Minus. Both of these modernist urges tend to purify, or even cleanse, reality of complexity and diversity. Globalization-minus involves the effort of the relatively few, usually western elites, to remake the globe in the west's image of capital and culture. Its consequence is climate degradation, global inequality, and the erasure of the needs and interests of those who could or would never be 'global' in this sense. These consequences, in turn, drive global crises, particularly mass migrations from failed states, war, and environmental disasters. Local-minus – a reassertion, through discourse and policies, of a purified, nationalist identity – is one response, particularly in the west, to these crises. This is the politics of walls, closed borders, and child separations.

It is the politics that conjures the 'other.' For Trump, these are the 'rapists,' 'coyotes,' and 'terrorists' associated with 'caravans' of immigrants from Mexico, Central America, and South America.

Against purity, Latour seeks diversity, characterized by his notions of Globalization-plus and the Local-plus. The former seeks an expansion of worldviews, cultures, people, and living things. It also requires us to recognize that we are not only constituted by the local, but by social-ecological agencies and systems stitching a global across locals: CO2, aquifers, antibiotics, epidemics are a few that he names (2018, 93). But if we exceed the local, we are never detached from it. The Local-plus engenders life in its place, the very soil itself. This is not the soil of purification, of calls of 'blood and soil' (Latour 2018, 16). Nor is it the soil of the state and Globalization-minus, a surveyed, assessed, marketable, exploitable resource. Rather, it is the soil of matter – organic and inorganic alike: 'materiality,' Latour writes, and then, 'heterogeneity, thickness, dust, humus, the succession of layers, strata, the attentive care it requires' (2018, 92). It is the soil that we work, turn over, adding compost, covering in mulch. It works us too, following us home in the treads of shoes, cuffs of pants, beneath fingernails. And it is a 'local' that exceeds any calls for property lines, city limits, or national borders. The soil on which I stand runs toward yours, giving way gradually, its composition changing though its essence, as a precarious provider of life, holds.

Latour's is an expansive view of reality, with room enough to allow the social and the ecological to both overflow with life. But what, though, of politics? Near the end of *Back to Earth*, Latour describes a politics of description. '*Generate alternative descriptions*' of the 'dwelling places' of life, he proposes (2018, 94). Recover, in other words, the Local-plus from the purifying vision of the Global-minus by describing the human and non-human lives that depend on the former. Ultimately, this descriptive question pushes into politics, forcing us to confront the central questions of coexistence: 'With whom can you live? Who depends on you for subsistence?' I'd add: on what do you depend? Also, 'Against whom are you going to have to fight? How can the importance of all these agents be ranked?' (Latour 2018, 96).

This, too, seems like a continuation of the work of *We Have Never Been Modern*. Then, Latour called for the establishment of a 'Parliament of Things,' a new politics that better represents the complexes of actors, human and non-human, that make up our world. For Latour, politics appears to mean representation of actors, a composition, through representation, of those actors' live and interests, and, then, an attempt to build common worlds that provide for the co-existence of people, their cultures, and the things with which we live. Here is that Parliament, imagined

> Natures are present, but with their representatives, scientists who speak in their name. Societies are present,

> but with the objects that have been serving as their ballast from time immemorial. Let one of the representatives talk, for instance, about the ozone hole, another represent the Monsanto chemical industry, a third the workers of the same chemical industry, another the voters of New Hampshire, a fifth the meteorology of the polar regions; let still another speak in the name of the State; what does it matter, so long as they are all speaking about the same thing, about a quasi-object they have all created, the object-discourse-nature-society whose new properties astound us all and whose network extends from my refrigerator to the Antarctic by way of chemistry, law, the State, the economy, and satellites. (Latour 1993, 144.)

So much depends on the qualification here: "what does it matter, so long as they are all *speaking about the same thing*." Latour, like many of us, no longer believes we are talking about the same thing. How could we be, if here, in the U.S., fossil fuels will make us great again and the climate will hold? And so the work he proposes in *Back to Earth* must precede the establishment of a "Parliament of Things." We must, in other words, re-represent our world, so we can, someday and hopefully soon, begin speaking of those same things again.

It is tempting to read Latour's descriptive project as an ecological one only, as a demand that we all must become amateur naturalists. This work, after all, seems to begin with soil. And this is also where the descriptive project that Latour has in mind already seems the most fully-formed. Across the globe, descriptions of fauna and flora pour in through apps like eBird and iNaturalist. In Europe and the U.S., amateur entomologists drive with nets attached to their vehicles to catch flying insects or else fill and weigh traps of insects, documenting local – and global too – changes in populations (Jarvis 2018). Bird-watchers, in turn, conduct their annual surveys, contributing immense amounts of data about bird populations and migrations (Kimberling 2013).

Everywhere, it seems, 'citizen-scientists' are establishing with whom us humans live and on what those other lives depend. Everywhere, it seems, these actors are agitating for the restoration of habitats, the protection of local wildlife, down, even, to the seemingly problematic – wasps, spiders, and beetles (Weintraub 2018). More than one commentator believes that citizen-scientists – a Latourian, hybrid-actor existing at the intersection of amateur and professional, the natural and social, discovering the global in their tiny patches of local – are well-equipped to confront climate change. Mary Ellen Hannibal, author of *Citizen Scientist* (2016), believes that 'the collective brainpower and data gathered from legions of everyday citizen scientists is critical to combating climate change and understanding natural global events, because all this information would take colossal amounts of time and money to gather through other methods' (quoted in McElhatton 2019).

To salvage what is left of this world, perhaps we all do indeed need to learn how to describe the soil of grubs and growth. But what of the soil of human culture, history, and borders? Here, Latour offers a centuries' old example, the construction of a 'ledger of complaints' in pre-revolutionary France. This ledger attempted to construct a common political world out of the description of the 'living environments, regulation after regulation, plot of ground after plot of ground, privilege after privilege, tax after tax' by the entirety of France (Latour 2018, 97).

If we all must be citizen-scientists to salvage our earth, Latour would also have us as citizen-ethnographers to salvage life with each other. He sees this work as an antidote to the Global-minus, which hollows out the local by stamping it with its own image of the global. The descriptive project would represent the lives of humans, those who Latour, writing with great empathy, describes as feeling 'disoriented and lost, for want of such a representation of themselves and their interests' (2018, 98). This includes,

> those that move and those that stay put, those that emigrate and those that remain behind, those who call themselves 'natives' and those who feel like foreigners, as if they have no lasting inhabitable ground under their feet and have to find refuge somewhere. (Latour 2018, 98.)

Latour's willingness, in *Back to Earth*, to extend understanding to the self-described 'natives', those who drive the populism of the Local-minus, is one of the more surprising features of the book. Latour argues that those drawn to the Local-minus have been misled, indeed betrayed, by a relatively few elites. Here, he goes deeper into recent history, highlighting how Exxon-Mobil (Latour 2018, 19) and, in his earlier work, *Facing Gaia*, Republican strategist Frank Luntz (Latour 2017, 25) intentionally and in bad faith obscured climate change.

These 'obscuranist elites' (Latour 2018, 21) realized earlier on than most of us that the earth could no longer accommodate modernization for all. So, seeking to protect their own interests and future, they attempted to hide this fact. Latour describes this as a profound betrayal and one that has conditioned politics and its people. 'The issue of climate-change denial organizes all politics,' Latour writes (p. 24). Having shattered a common culture of fact, as well as our common world, climate change deniers set the conditions for the contemporary politics of disinformation, propaganda, and 'fake news.' But, Latour cautions, 'before accusing "the people" of no longer believing in anything, one ought to measure the effect of that overwhelming betrayal on people's level of trust' (Latour 2018, 23).

This analysis may let down readers who wish to hold, and rightfully too, the populist followers of populist leaders accountable. It seems, to be sure, ill at ease with much of what we now take for politics in the U.S.: fractious polarization, incivility, and cycles of performative outrage,

shaming contests, and degradation ceremonies. Perhaps Latour senses this. *Back to Earth* seems to sputter near its close: 'There, I've finished,' he seems to sigh (2018, 106).

That sentence returned me to the book's epigraph, a quote from President Trump's son-in-law, Jared Kushner: 'We've read enough books.' I first thought Latour's inclusion of this quote meant only irony and attack: 'And here's another,' I took Latour to be communicating, 'aimed at you, your family, and your allies.' But perhaps it means something else. Perhaps it is an affirmation of writing-as-politics; perhaps it is an explicit statement that this slim book, too, is not simply about politics, but the essence of politics.

Latour's politics of representation and composition are necessarily literary, albeit his are a literary politics engendered by the world. 'More representation, more composition,' might be Latour's rallying call. These before another dwelling place is stamped out, paved over, build up and out, the lives that claim it displaced, other lives – fewer in number and less diverse – moving in. 'Any politics that failed to propose redescribing the dwelling places that have become invisible would be dishonest,' Latour writes. 'We cannot allow ourselves to skip the stage of description. No political lie is more brazen than proposing a program' (2018, 94).

Back to Earth is, in the end, Latour's politics, his offer of an 'alternative description.' It is, in other words, his answer to the question of with whom he agrees to share a dwelling place. It does not prescribe what world we ought build. It does not answer the question of with whom *you* or I agree to share a dwelling place. But it is a beginning of politics in the new climatic regime.

And so then, after the sigh, comes the invitation with which Latour closes: 'Now, if you wish, it's your turn to present yourself, tell us a little about where you would like to land and with whom you agree to share a dwelling place' (2018, 106).

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Book Review

Jeanne Gaaker, Judging from Experience: Law, Praxis, Humanities, Edinburgh University Press 2019.

Ukri Soirila*

Jeanne Gaaker's impressive *Judging from Experience: Law, Praxis, Humanities* is difficult to define. As the title suggests, the book, coloured by insights from and references to the author's experience as a criminal law judge in the Netherlands, is about the act of judging, and about being a good judge. But at the same time, *Judging from Experience* is also a passionate yet mature defence of "law and literature" as a research field, and in particular of the relevance of literature for the judge. Further yet, the book is in itself also a work of law and literature – or at least law and literature 'lite' – its 13 chapters developing Gaaker's argument partly through a reading and discussion of literary works.

At the heart of *Judging from Experience* is the notion that "judges should read fiction, because the lessons it teaches can be applied directly to decision-making" (Gaaker 2019, 138). Divided into three parts, the book argues the point in detail, although it takes several detours in so doing. Part I is about the enchantment of knowledge in law. Chapters 1 to 3 provide a brief historical view of legal thought, discussing different legal trends and the historical context which gave them birth. The aim of these chapters is to provide a map of how we got to the current stage of legal theory and practice, whereas Chapter 4 and 5 provide literary counterparts to these trends.

Part II is where the book really springs to life, in my opinion. It is here that the aforementioned detailed defence of law and literature can be found. In Gaaker's (2019) own words, Part II "provides the building blocks for a humanistic model for doing law" (6). Chapter 6 focuses on practical knowledge, or phronèsis; Chapter 7 on metaphor; Chapter 8 on empathy and mimesis (imitation or representation of the world); and Chapters 9 and 10 on legal narratology. As Gaaker convincingly argues,

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not only are phronèsis and empathy, as well as the understanding of metaphor, mimesis and narratology, necessary attributes of a good judge, but literature plays a crucial role in cultivating these capabilities

Part III deals with "the perplexities of judges that become the scholar's opportunity" (Gaaker 2019, 7). Its three chapters provide for a fascinating read, although at times I found it a bit challenging to grasp how they fit the overall structure of the thesis. Chapter 11 returns to the topic of empathy and asks what the cognitive turn in narratology may offer to judges who deal daily with the narratives and emotions of others. Chapters 12 and 13, on the other hand, move the discussion to a very different theme, namely new technologies and the challenges they pose. Drawing from Heidegger (1977), Gaaker seems particularly concerned about the issue of instrumentality, suggesting that it may increasingly be human beings who "stand by" for technology in a world dominated by digital technology (instead of technology acting as a tool for humans). Moreover, Gaaker draws the reader's attention to the fact that, despite their apparent neutrality, technological vocabularies and narratives tend to legitimate certain type of knowledge and have their own strategies of exclusion and inclusion.

As this short synopsis demonstrates, *Judging from Experience* is a rich book which touches on many fundamental questions of law and is bound to provide something for everyone interested in legal theory, law and literature, and/or practicing law. As it is impossible to do justice to all parts of the book in a short review, I will here focus on the two interlinked themes that I see as its most important contributions, namely the discussion on how to be a good judge and the defence of law and literature.

Gaaker's analysis of judging starts from a humanistic/sociological perspective of judges as concrete individuals, shaped by their background and past experiences, no matter how impartial they seek to be. Closely interlinked with this humanistic approach is an emphasis on the narrative nature of law, as well as on the fact that narratives are always constructed – by the parties to the dispute, but also by the judge who, in making a decision, selects from a vast material of facts in order to structure the world, the case, and the decision she takes. Language is therefore not neutral for Gaaker but always a process of inclusion and exclusion, showing things in a specific light.

A good judge therefore has to have at least a rudimentary understanding of how language and narratives operate, and what kind of constraints they pose on us. But in addition to this, Gaaker discusses at length four other skills which are necessary for the judge. The most important one, and the one which all the others together, is practical wisdom, or phronèsis. Practical wisdom is not simply a matter of knowledge and technique, but most of all a matter of character and morality (Gaaker 2019, 103–104). It is not about knowing eternal truths but about the capacity to sense what the situation demands and to act upon it. It is therefore about deliberation, balancing and dialectical

reasoning (Gaaker 2019, 109–111). Inspired by Paul Ricoeur's (1992, 2000, 2007) work on justice and law, Gaakeer writes that each decision is a process of hermeneutic movement between our ideas of good life and the decision to be made, taking into consideration all the facts and background of the case. This requires imagination, awareness of the pitfalls of the linguistic framework of law, and self-awareness of the judge's private and professional biases.

Another important skill which can be enhanced by reading literature is the understanding of metaphor. As Gaaker emphasizes, *how* things are said in law is almost as important as *what* is being said. A lot of this has to do with how likeness and difference are presented. Law is therefore intricately connected to metaphor, which is a tool for helping to convey and produce new meaning in law. Indeed, metaphor is in play in the formulation of legal concepts, in the development of legal doctrine, as well as in legal practice (Gaaker 2019, 121). Furthermore, understanding metaphor is also important because "the novelty of a word and its initial meaning wear off through our continued usage of it, up to the point we no longer actively consider how the word came into being in the first place" (Gaaker 2019, 127). Yet, metaphors frame decisions and influence our reasoning. This again calls also for self-reflection on the part of the judge as it is important for the judge to consider to what extent her background and worldviews influence her legal thought.

In addition to understanding metaphor, a good judge should understand mimesis. This, then, is the third skill required of the judge. Here, too, Gaaker's view is heavily influence by the work of Ricoeur (1983, 1985, 1988), who distinguishes between three stages of mimesis. The first is prefiguration, or the pre-narrative quality of human experience. A law-related example could be the understanding of what is robbery and how it usually takes place as an event. The second is configuration, or the narrative emplotment of events. This goes back to the insight that there are no pre-existing legal truths, but legal knowledge is brought about by actively and creatively bringing together rules and connecting them to contexts which differ from case to case. Any story, including a legal one, is actively created by organizing a series of facts into an intelligible whole. Finally, the last stage of mimesis can be called reconfiguration, referring to the moment when the reader appropriates the text into her own world, thus bringing together the two former stages of mimesis. This occurs for example when the judge makes a decision and may sometimes lead to unexpected judicial paradigm shifts, changing our previous pre-understandings.

Closely related to mimesis is the fourth capacity required of the judge, namely empathy and need to understand emotions. Judicial disputes are usually triggered by emotions and the judge therefore has to be aware of the stories important to the litigants, filtered away as they often are in judicial thinking. Moreover, the judge has to be aware of the

emotions her decisions will trigger, as well as of her own emotions, which may impact her decisions (Gaaker 2019, 211).

One cannot therefore be a good judge without empathy. By empathy, Gaaker means feeling *with*, rather than feeling *for*, which dominates sympathy. Particularly important for the judge is narrative empathy, which has to do with the perspective-taking induced by reading and hearing narratives of another's situation, and is necessary for enabling the judge to give meaning to the emotions of a representation (Keen 2013). This kind of narrative empathy requires imagination and is at play in every decision, as judges must imagine to the best of their capabilities the other's situation before delivering a judgment. They are also at play in reading the case file and selecting relevant facts, for words alone can never describe the emotions at work.

A key point that Gaaker develops through her discussion of these skills is that being a judge is about much more than simply knowledge of legal rules. Although such knowledge of law is of course an absolute minimum requirement for acting as a judge, it is insufficient for being a *good* judge. Improving as a judge is therefore not only about developing one's legal knowledge but most of all about developing one's Aristotelian virtues and understanding of life, society and the world. It is here that reading literature becomes necessary. As Gaaker (2019) declares, "judges should read fiction, because the lessons it teaches can be applied directly to decision-making" (138). In particular, it can help the judge understand the complexity of the human condition and the ways in which narratives construct reality. Furthermore, as both law and literature are about capturing the world in word, literature can help the judge understand the legal adages of interpretation, namely "different but not contrary" and "the same but differently".

In a similar vein, it is also important for the judge to have at least some knowledge of humanities in general, and the dialectical method in particular. Deciding or arguing a legal case is always about constant movement between the fact of the case and legal norms, between the unavoidable generality of the rule and the particularity of the situation (Gaaker 2019, 95–96). Similarly, law as a more general phenomenon develops through dialectics between practice and theory, practice turning to theory for justification and theory drawing from practice. Not only must those working in law therefore be both theorists and practitioners, but the whole process of interpretation and application of law takes place within a constantly shifting framework, shaped by new judicial decisions and theoretical insights.

Gaaker does not however endorse law and literature uncritically. By contrast, she seems to worry that unless the research community remains self-reflective, much of law and literature research is doomed to remain irrelevant; or worse, unnecessarily limit the scope and potential of the field. There are two reasons for this. The first is common to all interdisciplinary research, in particular in the current context in which even universities are increasingly dominated by an economic

mindset. As Gaaker (2019) acknowledges, economic rationale tends to result to the outcome that "the discipline whose language is victorious determines the form of cooperation" (58). Yet, there is no avoiding interdisciplinarity in law and literature. Hence, the solution is not to downplay the interdisciplinary nature of one's work but the embrace it even more fully. In this regard, law and literature has the advantage over some other interdisciplinary fields that its two components – law and literature – are so strongly connected by the element of language. Indeed, law and literature are both "wider linguistic systems of cultural significance" (Gaaker 2019, 62). Moreover, the field of law and literature may include within itself the cure to the problems of interdisciplinary research. As Gaaker (2019) explains, by drawing the judges's attention to the fact that interpretation is a "process that demand our active participation and helps promote awareness of our own role in the creation of meaning", reading literature may help judges to operate in a world where institutional languages fight for hegemony (90).

Secondly, there are certain special characteristics which have to be accounted for when conducting interdisciplinary research involving law specifically. First, such interdisciplinary research has to be able contribute to legal practice, or it will remain a self-contained academic discourse, destined to wither away. This has to do with the practically-oriented nature of law – although it must be stated that it is probably heavily influenced by Gaaker's experience as a judge and does not reflect the view of all academics. Secondly, and interconnectedly, interdisciplinary research must respect the multipolarity of law; in other words, the fact that there are always at least two separate texts in play. Whereas in literary theory the primary object of research is the literary text, law is a matter of constant movement between legal rules and the narrative construction of the facts of a case. Furthermore, the legal text is always authoritative in a way that cannot be compared to the literary text.

Overall, *Judging from Experience* is an impressive piece. With a very wide scope, the book touches on issues from virtue ethics to Robert Cover's (1986) violence of law, and from critical legal studies style indeterminacy and fragmentation arguments to literary theory, to name just some arbitrarily selected examples. This is both the book's strength and its weakness. At times the book takes turns which I found slightly difficult to follow or pin down. I was not for example entirely sure what were the functions of the history of law or the discussion of contemporary technology for the overall argument of the book. At the same time, it is the breadth of the book that makes it such an enjoyable and fascinating read. Not all the points raised are novel, of course, but they are assembled together in a lucid, novel and fresh way which reflects the author's impressive background in both literature and law, and in particular her experience as a judge. In short, *Judging from Experience* is a mature text which can be recommended to anyone interested in law and literature, legal theory or legal practice.

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