Between passion and senses?

Emotional dimensions of legal cultures in historical perspective

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Does passion influence law making? Are senses part of the juridical process? Do emotions have anything at all to do with law?[1] Law regulates emotional behavior and legal procedures often arouse emotions (Posner 1999). But are passions and emotions innately woven into the texture of law? This special issue argues that understanding the debates on, and concepts and perceptions of, emotions is essential to comprehending law in a fundamental and multifaceted manner.[2]

Law and emotions share a complex, reciprocal relationship. Only recently have scholars started to explore their various interactions (Maroney 2005; Abrams and Keren 2007; Bandes and Blumenthal 2012) and emphasize the significance of emotions for deeper insights into juridical practices as well as into conceptions of justice. These studies follow a contemporary approach and aim at, among other things, a better understanding of or even improvement of current legal doctrine, juridical decision-making or policies. The results of this research are an important starting point. Their

1 Passions and emotions are not used here in a distinctive way. For a study of the historical semantics of these concepts, see Thomas Dixon (2003).

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perceptions cannot be overrated, since they have proven that emotions are an important factor influencing the framework and notion of law as well as the application and legitimation of legal practices (Bandes 1999). The legal system, as regards its conceptual dimension and its actors—judges, lawyers, defendants and deponents, politicians and experts, citizens and public—is deeply intertwined with emotional norms, rules, experiences, and expectations.

It has now been recognized, in contrast to former self-conceptions, that legal cultures are not an emotion-free, rational space, but an area deeply affected by emotions (Nussbaum 2008; Posner 1999). Consequently, a historical perspective is indispensable to fully understanding the dense connections between passions and law as well as the transformations these correlations have undergone over the last 200 years. Analyses of historical developments offer an opportunity to understand changing concepts, meanings, and actions over time.

Current legal research meanwhile goes beyond the mere statement that »emotion is everywhere in law« (Abrams and Keren 2007, 2009) and explores its various manifestations and functions. This issue of InterDisciplines applies this understanding to historical contexts. To this end, emotions are understood as bio-social phenomena (Engelen et al. 2009; Scherer, Schorr, and Johnstone 2001; Hopkins et al. 2009; Chiao 2015). What does this mean? Grounded in the body and connected to innate processes of reactions, emotions are necessarily shaped by social interpretations and social interactions. Emotions in this sense combine affective, corporeal dimensions and socio-cultural elements (Ortony, Clore, and Collins 1999; Reddy 2001; Solomon 2003, 2004; Demmerling and Landweer 2007) and bring together feelings based in the body with socio-cultural meanings (Frevert and Wulf 2012). It is the interplay between these distinct dimensions that constitutes emotions. Though the body-based dimension is an indispensable part of emotions, this issue focuses on the social facet of emotions, since this is the element that is variable in time and across cultures (Rosenwein 2002; Frevert 2013).

With reference to law, »all previous attempts to establish an exact definition […] have reached no generally accepted agreement« (Otto 2011; Abrams and Keren 2007). This is partly due to the fact that several classifications (using different criteria) are possible and that these concepts have in addition changed over time. Objective law can be distinguished from subjective rights, natural law from statute law, and positive law from customary law. Furthermore, legal areas have been divided into realms of public law, criminal law or private law.

Though emotions matter in all these areas, they have as yet received varying levels of attention by (legal) historians. Their significance has recently been studied with regard to the mobilization of rights, notably during the second half of the 20th century and in conjunction with social movements (Abrams 2011). Since the 1970s, the expanding research on the history of human rights and on human rights activism also refers to emotions. Lynn Hunt has argued that the very existence of human rights »depends on emotions as much as on reason« and traces their genesis, based on changing emotional regimes, back to the second half of the 18th century (Hunt 2008). Whereas emotions have entered international history in general and the history of international relations in particular, for example with regard to fear (Bormann, Freiberger, and Michel 2010; Ariffin 2015), international law has seldom been looked at against this backdrop (Emotions and International Law 2011). Recently, Martha Minow has stressed the impact of emotions in legal procedures redressing mass violence (Minow and Rosenblum 2002; Minow 2004).

Aside from these rare pioneering studies, historical scholarship (at least in Germany) has seldom systematically addressed the affiliation between emotions and law and refers to it only *en passant*. To overcome this desideratum, this special issue will explicitly conceptualize the many-sided relationship in order to understand how and where law and emotions were connected and what this means for the historical development of legal cultures and juridical practices. It thereby sheds light on the intricate as yet unanalyzed ways in which emotions help to structure legal cultures. Additionally, this point of view allows the study of the relation between law and emotions in specific settings and contexts.

To exemplify that, the special issue brings together seven case studies from 19th and 20th century European history, including colonial history. These papers highlight the potential of studying the past to conceptualize, on the one hand, the relationship between law and concepts of emotions and add, on the other hand, important previously neglected dimensions to the historiography of both fields. The introductory remarks in the following will combine these two viewpoints by pursuing systematic questions on the basis of the individual articles' findings. This issue thereby expands the current state of research in two ways: it analyzes the diverse entanglements between emotions and legal cultures in their historical genesis and variations and it focuses on European case studies which were not before touched by the emotional turn in legal research (Gregg and Seigworth 2010; Frevert 2011; Weber 2008).

The case studies offer a coherent spatial frame since they focus on continental Europe, in the main Germany. Hence the articles draw attention to related civil law cultures distinct from the Anglo-American common law system (Röhl 2001, § 70), which up to now has received particular attention in English-language research on law and emotion. The oft-stated differences between legal cultures in civil law and in common law—for example in the perception, creation, understanding, and application of law (Peters 2010, 381–429, esp. 413–15)—exerts substantial influence on the relation between the two.

That applies first and foremost to the perception and presentation of law as an arena of rationality, opposed to emotions as a »catchall category for much of what law aspires to avoid or counteract« (Bandes and Blumenthal 2012, 162). This dichotomy was particularly pronounced in continental Europe with its more theoretical, abstract approach to law, a tendency to codification and a high esteem of general principles. Germany especially experienced a scientification of jurisprudence from the beginning of the 19th century onwards, which added to the appreciation of reason and shaped the self-perception of legal experts. These viewed themselves as impartial and autonomous, dissociating law from, for example, politics, conceived as a completely different sphere connected, inter alia, with passions (Kesper-Biermann 2009, 71–72; Kästner and Kesper-Biermann

2008). The strong emphasis on the scientific nature of law, which promised prestige and was understood to be free from emotion, proved to be the lasting and prevailing image throughout the 19th and 20th centuries.

The above underlines the necessity to historicize the relationship between law and emotions and to show the emergence as well as the alteration of individual features. Since important foundations concerning both areas were laid around 1800, the 19th and 20th centuries constitute a useful timeframe for historical analysis, as the contributions to this issue show. Furthermore, some research has already been conducted on the medieval and early modern eras (Smail 2003), during which the strict dichotomy of law and emotion was not assumed from the outset. This is all the more reason why a thorough examination of the modern period is necessary. Moreover, in view of geographical coverage and/or legislation, international, national, regional and local law should be mentioned.

The legal area most commonly associated with emotions is criminal law, where, among other sentiments, honor, shame or remorse figure prominently. Recent studies also focus on the relationship between punishment and emotions, examining for example changes in the execution of the death penalty or analyzing »shaming sanctions,« which aim directly at the emotions of the perpetrator (Martschukat 2010; Karstedt 2011; Frevert 2014; Wettlaufer 2010). Hence, it is not surprising that many of the case studies in this issue also deal with this field.

Contrary to the above-mentioned categories, we suggest a systematization in four domains to delineate historical relationships between the law and concepts and perceptions of emotions during the 19th and 20th century. These focus on the »intellectual reality« of, first, legal doctrine and legal thought; second, legal norms and legislation in the strict sense—which are basically identical with legal texts in the 19th and 20th century; third, the field of legal institutions, procedures, and decision-making, e. g. courtrooms; and finally fourth, public negotiations and perceptions of law, for example in the media, including legal policies. As a matter of course, this analytical distinction does not deny multiple reciprocal influences or interdependencies between the four.

(1) In the area of legal doctrine and legal thought, the 19th and 20th century self-presentation of jurisprudence as a dispassionate science consisting mainly of rational reasoning has already been mentioned. But this did not prevent the law from dealing with concepts of emotions, not only as a particular object of legal thought but as the very foundation of law itself, »the genesis of law out of emotion.« As **Sigrid G. Köhler and Florian Schmidt** show in their contribution, reflection on this relationship was closely intertwined with the emergence of a very influential branch of modern legal doctrine in Germany during the late 18th and early 19th century: the German Historical School associated with Friedrich Carl von Savigny. The concept of *Rechtsgefühl* (sense of justice) proved to be of particular importance not only to Savigny and has formed parts of scholarly discussion since that time. These debates again culminated between the 1870s and 1920s, **Sandra Schnädelbach** argues, when numerous jurists published texts on the subject and attempted to adjust the concept to new patterns for the definition of law and new ideas about emotions adapted from the developing natural sciences. At the same time, writers tried to define the functions attributed to *Rechtsgefühl* in legal practice. Further changes occurred slightly later when Nazi jurisprudence invented the *Rechtsempfinden der Volksgemeinschaft* as a modified concept of Savigny's *Rechtsgefühl*, declaring Hitler to be the ultimate embodiment of the people's sense of justice and therefore the only source of law (Mertens 2009). Hence, West German legal thinkers evaded term and concept for some time until it was reconsidered in the late 1970s and 1980s (Meier 1986; Lampe 1985; Oestreich 1984).

(2) Various theories of emotions also played a prominent role in 19th and 20th century *legal norms* and *legislation*, especially in criminal law. Legal norms are closely related to the social and moral norms of a given society. Whereas the boundaries between law and morality have been widely discussed since the Enlightenment (Smith 1761; Reeder 1997), recent studies have rediscovered the role of emotions in moral settings (Nussbaum 2008; May 2013; Kelly 2011; Haidt 2003; Kim and Stocker 2001; Ortony 1991). Disgust and/or compassion for example have recently been widely discussed regarding their productive effects on social and

legal norms (Schnall et al. 2008; Nussbaum 2004; 1999). Furthermore, the role played by concepts of emotions in European legal codes in legitimizing and eventually discarding practices of so-called honor killings have also been examined (Frevert 2014).

Criminal law covering sexual offences constitutes a field in which the convergence of emotions, (moral) values and legal order is most obvious. Plans to reform the Penal Code of 1871, partly revised during the Nazi era, towards a decriminalization of homosexuality, argues **Philipp Nielsen**, show the conflict of supposedly »emotional« versus »rational« arguments in West Germany during the early 1960s. At this time, he concludes, a general shift of criminal legislation could be noticed; from the protection of collective moral emotions to the protection of subjective/individual rights and feelings.

(3) *Legal decision-making*, *judicial proceedings* and *institutions* are additional arenas in which emotions become relevant, especially those of the various legal actors. It has been shown that integrating affect extends the understanding of juridical decision-making (Müller-Mall 2014; Hänni 2011, 2014; Nussbaum 2008). **Sandra Schnädelbach** takes us further along this path by analyzing the historical dimensions of the emotional elements of judging.

Niklas Luhmann has pointed out that institutions are in need of and at the same time produce trust (Luhmann 1989). »Trust« therefore can be understood as an emotion essential to modulating social interactions and vital for individuals as regards insecure future outcomes (Frevert 2003; Hartmann and Offe 2001; Welz 2010). With respect to legal cultures, one can argue that the working and acceptance of the judicial system requires and at the same time produces trust. If it is missing the legitimacy and stability of the political order will be seriously jeopardized, at least in some parts of the population, as occurred during the Weimar Republic (Ellerbrock 2003). The so-called *Vertrauenskrise der Justiz*, the crisis of confidence in courts and judicial authorities during the late 1920s, although well-studied (Siemens 2005), still demands an examination that systematically takes emotions into consideration. **Warren**

Rosenblum in his contribution shows how this topos figured prominently both in contemporary judicial professional circles and in public debate.

The *Vertrauenskrise* discourse focused on the role of judges. The ideal of the jurist as »manager of emotions« drafted in the discussions about *Rechtsgefühl* in the early 20th century and explicated by **Sandra Schnädelbach**, was an influential conception of one key figure in legal proceedings. But desired, unwanted or expected displays of emotion were also ascribed to the accused, to witnesses, and to courtroom audiences. These depended heavily not only on time-bound emotional regimes, but on the legal framework that assigned expectations for the respective groups' performance. This becomes obvious with regard to the significant differences between common law and civil law systems. Many problems and characteristics discussed in English-language research on law and emotion, for example concerning victim impact statements, jury decision-making, or immigrant policy (Ahmed 2014) are also relevant for continental European proceedings. **Bettina Severin-Barboutie** examines the impact of the specific settings and »hidden scripts« of police interrogations in Stuttgart from the 1950s to 1970s with regard to various emotional strategies established for and by suspects, witnesses and police officers.

Focusing on Italian immigrants in Germany, her findings, too, shed light on the connection of national stereotypes—expressed for example in the attribution of certain feelings—to their consideration in legal proceedings. The relevance of emotions was conceded especially for perpetrators who committed particular offences, for example so called crimes of passion. This concept had a long history and was well-established as early as the beginning of the 19th century. Others, as **Ulrike Schaper** shows in her contribution, emerged with the rise of colonialism. *Tropenkoller*, understood as excitement produced by nervous reactions to the medical, social, and climate conditions in the German colonies, were—like other extraordinary emotional states—conceived as interfering with otherwise rational conduct. This reflected the general idea of human behavior underlying law during the 19th and 20th centuries in which »human« was implicitly equated with »male.« As a matter of course, gendered beliefs

of emotional conduct were also inscribed in legal decision-making and proceedings (Ortmann 2014).

(4) Finally, emotions shape *public perceptions* and *negotiations* of law. In this area of study, the relevance of emotions has long been acknowledged, although mainly in global terms, for instance the power of the media to »emotionalize« debates on crime and punishments. Media coverage of spectacular murders, especially during the Weimar Republic, has repeatedly been analyzed, hinting at all sorts of emotions from pleasure to revulsion. In this issue, **Warren Rosenblum** elaborates on the »passions of the public sphere« in connection with the Ebert trial and the Haas-Helling affair. **Susanne Krassmann**, on the other hand, looks at the absence of a broad public debate accompanying the 2012 German Federal Constitutional Court decision on employing military forces on national territory. She conceptualizes the public security discourse as a practice with emotional scripts in which fear figures prominently, providing an analytical framework for investigations of legal policy making.

To sum up, understanding the deep impact of passions on law, and reflecting on the emotional effects of legal cultures as well as on the impact of juridical procedures on the acknowledgment of (in)justice contributes to comprehending the moral foundations of society, social interactions between individuals and even individual self-conceptions regarding self-respect and self-efficacy (Minow 1999; Posner 1999).

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