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Law, Reason and Emotions

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Dominant paradigm and its influence on law

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- Standard conception
 - (i) reason and emotion (and, similarly, law and emotion) belong to intrinsically different spheres and
 - (ii) reason being superior to emotions, needs to manage and govern them (and, by extension, so must law).
- This presentation: how have the twin presuppositions shaped our understanding of law and its operation.

(Selected) topics

- Three illustrations:
 - Theoretical level: different **conceptions of law**.
 - Practical level:
 - the **architecture of judicial proceeding**,
 - the **nature or judicial reasoning**.
- How does the Standard Conception influence our understanding of law?

The concept of law

Aristotle on law

- He who commands that **law should rule** may thus be regarded as commanding that **God and reason alone should rule**; he who commands that a man should rule adds the character of the **beast**. Appetite has that character; and high spirit, too, perverts the holders of office, even when they are the best of men.⁶ Law [as the pure voice of God and reason] may thus be defined as ‘Reason free from all passion’.

(Politics 1287a 25-30, trans. E. Barker)

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Natural law and the Stoics

- Again, living virtuously is equivalent to living in accordance with the experience of the actual course of nature, as **Chrysippus** says in the first book of his *De finibus*; for our individual natures are parts of the nature of the whole universe. And this is why the end may be defined as **life in accordance with nature**, or, in other words, **in accordance with our own human nature** as well as **that of the universe**, a life in which we refrain from every action forbidden by the law common to all things, that is to say, **the right reason** [*orthos logos*] which pervades all things, and is identical with Zeus, lord and ruler of all that is. And this very thing constitutes the virtue of the happy man and the smooth current of life, when all actions promote the harmony of the spirit dwelling in the individual man with the will of him who orders the universe.

(Diogenes Laertius VII, 87, trans. J. Garrett)

Cicero and the right reason

- True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions.

(Republic III, 22, trans. C. W. Keyes)

Aquinas: natural law as participation of intelligent creatures in the Eternal law

- Among them **intelligent creatures** are ranked under divine Providence the more nobly because they take part in Providence by their own providing for themselves and others. Thus they join in and make their own **the Eternal Reason** through which they have their natural aptitudes for their due activity and purpose. **Now this sharing in the Eternal Law by intelligent creatures is what we call 'natural law'.**

(Summa Theologiae Ia IIae, qu. 91, 2, trans. T. Gilby)

Grotius: natural law as a dictate of right reason

- The law of nature is a dictate of right reason, which points out that an act, according as it is or is not in conformity with rational nature, has in it a quality of moral baseness or moral necessity; and that, in consequence, such an act is either forbidden or enjoined by the author of nature, God.

(Grotius, On the Law of War and Peace I, 1, 10 , trans. S. C. Neff)

Hobbes: laws of nature suggested by reason

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- The **passions** that incline men to peace are fear of death, desire of such things as are necessary to commodious living, and a hope by their industry to obtain them. And **reason** suggesteth **convenient articles of peace**, upon which men may be drawn to agreement. These articles are they which otherwise are called **the Laws of Nature** [...]

(Leviathan, I, 13, 14, trans. E. Curley)

Locke: reason needed to discover natural law

- [...] **reason** does not so much establish or pronounce this **law of nature** as search for it and discover it as a law enacted by superior power and implanted in our hearts. Neither is reason so much the maker of that law as its **interpreter**, unless, violating the dignity of the supreme legislator, we wish to make reason responsible for that received law which it merely investigates; nor indeed can reason give us law [...]

(Essays on the Law of Nature I)

Pufendorf: mind and law controlling passions

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- [...] the mind should take every care that it keeps its motions and affections in control, since most of them do not only entirely destroy the strength of the body and vigour of the mind, but becloud and distort the judgement of the intellect, and turn it with great force away from the path of duty and reason, so that the coldness of passions is, as it were, the natural source of prudence and probity among men. Quintilian, *Declamations*, ccxcvi: 'Profound emotions pay no attention to laws.'

(On the Laws of Nature and Nations II, 4, 12, trans. C. H. Oldfather and W. A. Oldfather)

Emotions as the basis of law: Leon Petrażycki

- **Legal phenomena consist of unique psychic processes** [...] expressed, incidentally, in the unique form of ascribing to different beings [...] or to certain classes of such beings „duties“ and „rights“; so that these beings, so conceived of, are seemingly found in certain peculiar positions of being bound or possessing special objects („rights“), and the like.

(Law and Morality: Leon Petrażycki, trans. H. W. Babb, p. 8)

- Our concept of law [...] starts from a wholly different point of view, which in terms denies the real existence of what is held by jurists really to exist in the legal field, and reveals real legal phenomena as **a special class of complex psychic processes** in a wholly different sphere, that is to say **in the mind of the individual** [...]

(Law and Morality: Leon Petrażycki, trans. H. W. Babb, p. 63)

Judicial process

The place of emotions in modern court proceedings

- Basic assumption: *the centrality of judicial decision-making*;
 - discover relevant facts;
 - determine applicable law.
- **Judge**
 - disinterestedness (acting *sine ira et studio*),
 - Hobbes: “divested of all fear, anger, hatred, love, and compassion” (Leviathan II, 26, 28)

Judicial detachment

- One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant I should wholeheartedly associate myself with the general libertarian views in the Court's opinion, representing as they do the thought and action of a lifetime. **But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution and are equally bound by our judicial obligations whether we derive our citizenship from the earliest or the latest immigrants to these shores.**

(West Virginia State Board of Education et al. V. Barnette et al. 319 U.S. 624 (1943) (Frankfurter, J., dissenting))

Architecture of judicial proceedings

- Written submissions.
- Adversarial procedure: *audiatur et altera pars*.
- Representation by (disinterested) lawyers.
-
- Temporal distance from the actual dispute.

Legal reasoning

Montesquieu's division of powers

- In each state there are **three sorts of powers**: **legislative power**, **executive** power over the things depending on the right of nations, and executive power over the things depending on civil right. By the first, the prince or the magistrate makes laws for a time or for always and corrects or abrogates those that have been made. By the second, he makes peace or war, sends or receives embassies, establishes security, and prevents invasions. By the third, he punishes crimes or judges disputes between individuals. The last will be called **the power of judging** [...]

(The Spirit of Laws II, 11, 6, trans. A. M. Cohler, B. C. Miller, H. S. Stone)

The role of the judge

- But the judges of the nation are, as we have said, **only the mouth that pronounces the words of the law, inanimate beings who can moderate neither its force nor its rigor.** Therefore, the part of the legislative body, which we have just said is a necessary tribunal on another occasion, is also one on this occasion; it is for its supreme authority to moderate the law in favor of the law itself by pronouncing less rigorously than the law.

(The Spirit of Laws II, 11, 6, trans. A. M. Cohler, B. C. Miller, H. S. Stone)

- Among the three powers of which we have spoken, **that of judging is in some fashion, null.** There remain only two [...]

(The Spirit of Laws II, 11, 6, trans. A. M. Cohler, B. C. Miller, H. S. Stone)

Beccaria's textualism

- The judge should construct a perfect syllogism about every criminal case : the major premise should be the general law; the minor, the conformity or otherwise of the action with the law; and the conclusionm freedom or punishment. [...]
- Nothing is more dangerous than the popular saying that we ought to consult the the spirit of the law. This ia a bulwark which, once breached, sets loose a flood of opinions. This truth, which seems paradoxical to common minds, which are more struck by a trival present disorder than by the atrocious but remote consequences, which grow out of a false principle's taking root in society, seems self.evident to me. [...] The spirit of the law, therefore, would be the upshot of good or bad logic on the part of the judge, and of the state of his digestion, and would depend on the turbulence of his emotions, on the weakness of the aggrieved party, on the judges relations with the plaintiff and on all those tiny pressures which, to the wavering mind of man, change the appearance of every object.

(On Crimes and Punishments 4, trans. R. Davies)

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Savigny: reasoning as a geometrical exercise

- In every **triangle**, namely, there are certain data, from the relations of which all the rest are **necessarily deducible**: thus, given two sides and the included angle, the whole triangle is given. **In like manner, every part of our law has points by which the rest may be given: these may be termed the leading axioms.** To distinguish these, and deduce from them the internal connection, and the precise degree of affinity which subsist between all juridical notions and rules, is amongst the most difficult of the problems of jurisprudence. Indeed, it is peculiarly this which gives our labours the **scientific character**.

(Of the Vocation of our Age for Legislation and Jurisprudence, pp. 38-39, trans. A. Hayward)

„Calculation with notions“

- It has been shown above [...] that, in our science, every thing depends upon the possession of the leading principles, and it is this very possession which constitutes the greatness of **the Roman jurists**. The notions and axioms of their science do not appear to have been arbitrarily produced; these are actual beings, whose existence and genealogy have become known to them by long and intimate acquaintance. For this reason their whole mode of proceeding has a certainty which is found nowhere else, except in mathematics ; and **it may be said, without exaggeration, that they calculate with their notions (*mit ihren Begriffen rechnen*)**.

(Of the Vocation of our Age for Legislation and Jurisprudence, p. 45, trans. A. Hayward)

Echos in jurisprudence ...

- The approach [to drafting an opinion] should always be measured, temperate, and objective. Rhetoric is best suited for the advocate; an opinion expresses a decision **above the individual passions in the case.**

(Robert A. Leflar: Quality in Judicial Opinions, Pace Law Review 3 (1983) 3, p. 584)

The judge is trying to decide what is just; his judgment is a "value judgment" and most value judgments rest upon obscure antecedents. We cannot, if we would, get rid of emotions in the field of justice. **The best we can hope for is that the emotions of the judge will become** more sensitive, more nicely balanced, more **subject to his own scrutiny**, more capable of detailed articulation.

(Jerome Frank, Law and the Modern Mind (1930), p. 153)

... and judicial opinions

- The jury system is premised on the idea that **rationality** and **careful regard for the court's instructions** will **confine and exclude jurors' raw emotions**. Jurors routinely serve as impartial factfinders in cases that involve sensitive, even life-and-death matters. In those cases, as in all cases, juries are presumed to follow the court's instructions.

(CSX Transp., Inc. v. Hensley 556 U. S. 838 (2009)
(*per curiam*))

- [...] it is not disputed that a jury award may not be upheld if it was the product of bias or **passion**, or if it was reached in proceedings lacking the basic elements of fundamental fairness.

(BFI, Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989))

... and judicial opinions

- **Community passions**, often **inflamed** by adverse pretrial publicity, **can call the integrity of a trial into doubt**. In some instances, this Court has observed, the hostility of the community becomes so severe as to give rise to a “presumption of [juror] prejudice.”

(Patton v. Yount, 467 U. S. 1025, 1031 (1984))

- Much harm is done by the **myth** that, merely by **putting on a black robe and taking the oath of office as a judge**, a man ceases to be human and strips himself of all predilections, becomes a **passionless thinking machine**.

(In re J. P. Linahan, 138 F.2d 650, 651-53 (C. C. A. 2d 1943)
(Frank, J.))