Feelings about Law/Justice: The Relevance of Affect for the Development of Law* – in Jhering's *Struggle for Law* and in Constitutional Democracies

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The current discourse about the relationship of law and affect can be traced back to Rudolf von Jhering, who extensively addressed feelings about law/justice[1] in his own way and for his own purposes in his book *The Struggle for Law* (*Der Kampf um's Recht*).[2] Jhering's work can be read as a fascinating attempt to utilize the idea of feelings about law/justice in terms of (legal political) demands for legislative developments. When read against its pre-democratic historical background, a possible benefit of Jhering's text for today's discourses about law and affect can be found in the differing constitutional context.

Feelings about law/justice are broad phenomena. Where there is law, there are people – in the form of their being affected by law, their legislating law, their applying law, or as people who comment on and research the law. Yet where there are people, there is always affect, as well (I.). Jhering develops his plea for the development of law on the basis of wide-ranging assumptions about the feelings about law/justice of those individuals who are subjected to law. The individual and meta-individual vital importance of subjective feelings about law/justice and the ethical-ide-

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1 See Greta Olson, *The Turn to Passion: Has Law and Literature become Law and Affect? Law & Literature* 28 (2016), pp. 335 ff. [Note by the editors: As noted by Greta Olson in her essay in this volume, "Recht" denotes both "law" and "justice" in German.].

2 Rudolf von Jhering, *Der Kampf um's Recht* (Freiburg im Breisgau: Haufe, 1992 [1872]), trans. in *The Struggle for Law*, trans. John J. Lalor (Chicago: Callaghan and Company, 1915), 5th ed.

al feelings about law, which follow out of the former, are illustrated by way of dramatic images. The empirical and normative implications are up for debate. In what follows, attention will be focused on Jhering's vanishing point (according to this reading of the text): the (empirical) argumentative validation of demanding a thorough reform of the law (II.). This methodological access has to be seen against the constitutional background of its time; however, it evokes questions of whether feelings about law/justice could still be put forth today as legitimate reasons for demanding developments in law. Framing a sense of discontentment with prevailing legal norms as "a feeling of injustice" may look appealing, yet in constitutional democracies, this practice will be met with other factors that have to be taken into account (III.).

I. Connections between Law and Affect

In order to exemplify the omnipresence of feelings about law/justice, some practical connections between law and affect will be illustrated in the following. In doing so, the fifth and last connection which is described here will be the one that Jhering was most interested in in his struggle for law.

1. Law *begets* feelings. These may be hostile, refusing, negative feelings. For example, the so-called 'Notstandsverfassung' (the *crisis constitution*)[3] evoked extremely negative feelings in the late 1960s in large parts of the population. On the other side of the political spectrum, the German Federal Constitutional Court's decision to treat the statement "Soldiers are Murderers" ("*Soldaten sind Mörder*")[4] as an instance of freedom of speech caused large parts of society to react with downright aversion. This decision led not only to a need for temporarily heightened police protection for the ruling jus-

3 17. Gesetz zur Ergänzung des Grundgesetzes (17th amendment of the Basic Law) (24 June 1968, BGBl. I 709). Included are regulations on restrictions of the Basic Law in emergency situations of the, e.g., in case of the need for defense. [Note by translator: This amendment was particularly contested because it broadened the state's right to intervene in emergency situations, thus leading to restrictions of individual rights such as the right to privacy of correspondence, as stated in Art. 10 GG. Given the experiences of the NS regime, both the governing and opposing parties, and particularly the FDP (Free Democratic Party), strongly protested against this strengthening of state powers.].

4 BVerfGE 93, 266 ff.

tices, but also to the establishment of a permanent press office that supports the Federal Constitutional Court's communications regarding its judgements. However, the order to legally recognize the so-called third gender option[5] in official documents seems to have elicited a positive feeling for those affected by the decision, since they appear to feel more validated by this order. Even the mere naming of a law can beget feelings: The naming of the "good-nursery-law" (Gute-Kita-Gesetz)[6] and the "orderly return law" (Geordnete-Rückkehr-Gesetz)[7] specifically aimed to evoke positive feelings. Finally, the formulation of Art. 2 (1) GG[8] ("Jeder hat das Recht auf die freie Entfaltung seiner Persönlichkeit"; "Every person shall have the right of free development of their personality") was chosen not least for the ceremonial tone of these words. It was "a dignified tone" with which one wanted to endow the fundamental rights.[9]

2. Law *considers* feelings. For instance, the protection of family ties, which can be found in multiple legal contexts, can also be understood as deference to emotional states.[10] In the German data protection law, a consideration of "feelings of being permanently monitored" ("Gefühl des dauernden Überwachtwerdens")[11] is the basic reason behind far-reaching protections in that area. This deference to feelings becomes especially apparent in claims under the law of obligation: In the German private law system, the practice of claiming immaterial damages such as compensations for emotional suffering and damage claims due to the loss of enjoyment during one's vacation evidently considers emotional states.

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5 BVerfGE 147, 1 ff.

6 *Gesetz zur Weiterentwicklung der Qualität und zur Teilhabe in der Kindertagesbetreuung* (Law on the further development of quality and participation in child day care) (19 December 2018, BGBl. I 2696). [Note by translator: This law was meant to improve the quality of preschool education and day care by increasing the ratio of caretakers to children amongst other things.].

7 *Zweites Gesetz zur besseren Durchsetzung der Ausreisepflicht* (Second law for better enforcement of the obligation to leave the country) (15 August 2019, BGBl. I 1294). [Note by translator: This law was meant to restructure the deportation process by, for instance, not notifying immigrants about their planned deportation after a certain deadline.].

8 [Note by translator: The *Grundgesetz für die Bundesrepublik Deutschland* is abbreviated as GG (German Basic Law for the Federal Republic of Germany). The *Grundgesetz* is the German constitution and was drafted after World War II. It has been in force since 1949.].

9 *Entstehungsgeschichte des Grundgesetzes*, JöR Band 1, 2nd ed., 2010, p. 61.

10 See especially BVerfGE 136, 382, 388 f. Marginal note 22 f.

11 E.g., BVerfGE 125, 260, 335 m.w.N.

3. In some circumstances, law may also *be conveyed* to those applying the law via feelings. Whether, for example, a judicially false judgment qualifies as "arbitrariness"[12], which is prohibited under Art. 3 (1) GG, or whether an accident can already be perceived as "catastrophic"[13] and therefore – which is relevant for the deployment of armed forces within the country – is to be regarded as a particularly serious accident in the sense of Art. 35 GG, or whether the bad treatment of a person by the state already violates this person's "human dignity" (Art. 1 GG), is difficult to determine precisely on the basis of objective criteria. All of these three legal concepts also call upon the intuition of those applying the law. The standards applied here are probably also conveyed by the fact that they create feelings of and for arbitrariness, catastrophe and dignity in those applying the law.

4. *Legal professionals have* feelings. Professional jurists can have personal emotional relationships and interests. Since these feelings, which may not be repressed completely, can interfere with an objective finding of justice, all rules of court incorporate regulations regarding exclusion and bias.[14] Further, justices and judges articulate "disruptive feelings" and "gut feelings" on their practical daily quest for justice. As a methodologically intermediate step, these phenomena, which are euphemistically called "*Judiz*," may be helpful. Ultimately, the rules of decision-making under the rule of law can only be adhered to when these kinds of feelings are rationally questioned and corroborated or dismissed using normative texts, precedents, and supporting literature.

5. *Legal laypersons* also have feelings about law and justice, which can refer to multiple contexts and to which law responds in different ways. Legal laypersons' feelings about law is Jhering's main focus in *The Struggle for Law*. Jhering discusses two kinds of legal laypersons' feelings about law and extracts from them arguments for his demands for a fundamental (re)development of the law. Feelings about law and the (re)development of

12 See *Willkürgrenze* (Arbitrariness limit) (Art. 3 (1) GG) instead of many BVerfGE 42, 64, 72 f. [Note by translator: The *Grundgesetz*'s equal protection provision is found in Art. 3 GG and states that there shall be no arbitrary unequal treatment of individuals.].

13 BVerfGE 132, 1, 17 Marginal note 43. [Note by translator: Art. 35 of the *Grundgesetz* cites natural disasters and grave accidents as instances of emergencies that warrant the deployment of armed forces.].

14 Exemplary for the members of the *Bundesverfassungsgericht* §§ 18, 19 BVerfGG.

the law are not only the foci of this conference, they are also the central motifs in Jhering's book.

II. *Feelings about Law as Arguments for a (Re)Development of the Law (Jhering)*

In the book's conclusion, Jhering aims at a thorough (re)development of the law. He explains his demands for this (re)development using a three-step analysis of feelings about law: Feelings about law are firstly to be understood as a physical force which pushes towards an enforcement of law (1); secondly, this force works to secure the law as such and thus guarantees the existence of the nation-state both internally and externally (2). Thirdly, for law to be able to create these feelings about justice in the long run and thus to contribute to stability, it must meet certain criteria which the legal reality, according to Jhering, did not satisfy and thus became deficient (3). That is why feelings about law may come across as empirical, yet they are mostly conceptual constructs calling for a (re)development of law. Jhering presents his reasoning as practical and convenient, and his argument tries to take its persuasive power precisely from its (supposedly) empirical point of reference (i.e., from the actual feelings about law and the affectively experienced suffering stemming from the violation of law).

1. *Feelings about Law Due to Personal Affront*

Jhering's line of argumentation starts with an individual's feelings about law, i.e., with the feeling of one's own legal position in relation to other people (private law). Since the violation of one's private rights is experienced as an affront by the affected person, the court proceedings are "the person's assertion of himself and of his feeling of right" (28). Here, it is not necessarily a matter of enforcing objectively valuable positions, it is rather a question of safeguarding one's personality as such: "An inner voice tells him that he should not retreat, that it is not the worthless object that is at stake but his own personality, his feeling of legal right, his self-respect – in short, the suit at law ceases to appear to him in the guise of a mere question of interest and becomes a question of character" (29). Law enters consciousness affectively and painfully in the moment of injury. The experienced affront ignites the fight for justice because now

compensation is sought and has to be sought. In this description, empirical and normative factors mix.

2. *Ideal Feelings about Law*

Apart from this self-centered feeling of having been insulted in light of "personal injustice", there is an ethical ("ideal") feeling about justice and law. In this sense, the main focus is no longer the individual but asserting the law as a duty to the community (55; 69). "In defending his legal rights he asserts and defends the whole body of law" (74). This is one's "contribution towards the realization of the idea of law" (n. pag.)[15]. "What an immense importance does the struggle of the individual for his rights thus obtain! … Every man who sees the law violated and feels indignation at the sight, possesses it. While, in fact, an egotistical motive is mixed up with the painful feeling caused by a personal wrong, this indignation is produced exclusively by the power of morality over the human heart. It is the energy of our moral nature protesting against the violation of the law; it is the most beautiful and the highest testimony which the feeling of legal right can bear to itself" (79 ff.). One needs "this ideal sentiment of legal right, possessed by the person by whom the wounding of the feeling of legal right is felt more sensitively than an attack upon him personally, and who disinterestedly sacrifices himself in the interest of oppressed right as if there were question only of his own rights, is the privilege of highly gifted natures" (n. pag.)[16].

The literary figure of Michael Kohlhaas (Heinrich von Kleist) serves to illustrate this point:

> Here is an honest and good man, filled with love for his family, with a simple, religious disposition, who becomes an Attila and destroys with fire and sword the cities in which his enemy has taken refuge. And how is this transformation effected? By the very quality which lifts him morally high above all his enemies …: by his high esteem for the law, his faith in its sacredness, the energy of his genuine, healthy feeling of

15 Rudolf von Jhering, *Der Kampf um's Recht. Druckfassung des Vortrags* (Wien: Verlag der G.J. Manz'schen Buchhandlung [1872]), lecture from 11 March 1872, available online: https://www.hs-augsburg.de/~harsch/germanica/Chronologie/19Jh/Jhering/jhe_kamd.html (accessed 8 November 2021).

16 Ibid.; Jhering's opinion in the printed version of his lecture differs slightly from the one in his book.

> legal right. The tragedy of his fate lies in this that his ruin was brought about by the superiority and nobility of his nature, his lofty feeling of legal right, and his heroic devotion to the idea of law, which made him oblivious to all else and ready to sacrifice everything for it, in contact with the miserable world of the time in which the arrogance of the great and the powerful was equalled only by the venality and cowardice of the judges. (91 f.).

3. Vanishing Point: Criticizing the Law

By referring to Michael Kohlhaas's fate, Jhering manages to tap into criticizing the law:

> … left in the lurch by the power which should protect it, … the national feeling of legal right raises its protest against such a condition of things" (94). "This idealism of the healthy feeling … knows not only that in defending its own legal rights it defends the law, but that in defending the law it defends its own legal rights. … For the state which desires to be respected abroad, and to be firm and unshaken internally, there is no more precious good which it has to guard and foster than the national feeling of legal right. … In the healthy, vigorous feeling of legal right of the individual, the state possesses the most fruitful source of its own strength, the surest guaranty, from within and from without, of its own existence. The feeling of legal right is the root of the whole tree. If the root be good for nothing, if it withers in the rocks and in the sand, all the rest is but an illusion; the storm comes and plucks it up by the roots. But the trunk and the top have the advantage that they are seen, while the roots are hidden in the ground and veiled from sight. The disastrous influence which unjust laws and bad legal institutions exercise on the moral power of the nation acts under ground, in those regions which so many amateur statesmen do not consider worthy of their attention; they are concerned only with the stately top; of the poison which rises to the top from the root they have no idea whatever. But despotism knows where it must strike to fell the tree; it leaves the top untouched at first, but destroys the roots. Every despotism has begun with attacks on private law, with the violation of the legal rights of the individual; when its work is done the tree falls of itself. (102 ff.).

Then, Jhering equips his readers with some practical pieces of advice:

> The power of a people is synonymous with the strength of their feeling of legal right. The cultivation of the national feeling of legal right is care for the health and strength of the state. By this cultivation and care, I do not, of course, understand schooling and instruction, but the practical carrying out of all the principles of justice in all the relations of life. … The fixedness, clearness, certainty of positive law, the doing away with all those principles at which a healthy feeling of legal right, might take offense in any sphere of the law, not only of private law, but in the police power, the administrative, financial, legislative, the independence of the courts, the greatest possible perfection of legal procedure – this is a surer way to increase the power of the state than the greatest possible increase of the military budget. Every provision which the people feel to be unjust, and every institution which they detest, is an injury to the national feeling of legal right and to the national strength, a sin against the idea of law, the burthen of which falls on the state itself, and for which it has not infrequently to pay dearly. … I am not, indeed, of the opinion that the state should avoid these sins from reasons of expediency simply. Rather do I consider it the most sacred duty of the state to realize this idea for its own sake; but this may be doctrinarian idealism, and I have no word of blame for the practical politician and statesman who refuses such a demand with a shrug of the shoulders. And just on this account have I exposed the practical side of the question to view, the side which he fully understands; for the idea of law and the interest of the state go, here, hand in hand. There is no feeling of legal right, no matter how healthy it may be, which can, in the long run, resist the influence of bad laws; it grows blunted, withers and decays. For the essence of legal right is, as I have frequently remarked already, action. What the air is to the flame, freedom of action is to the feeling of legal right. Refuse it this freedom, and the feeling dies. (106 ff.)

What follows is a blazing attack on private and criminal law (particularly the right to defend oneself), which the people do not understand and which does not understand the people, particularly not their 'healthy' sense of law. Although Jhering mentions this aspect rather on a side note, his whole argumentation seems to aim at this point: "I might stop here, for my subject is exhausted. The reader, however, will allow me to claim his attention for another question closely related to my subject, the question how far our present law, or to speak more accurately, the Roman law of to-day as it obtains here, on which alone I can venture to express a

judgment, comes up to the requirements described in the preceding pages. I do not hesitate to say that it does not, in any way, come up to them. It is far behind the rightful claims of a healthy feeling of legal right …" (109).

Empirical feelings about law as force behind one's motivation to go to court become the prerequisites of a resilient nation-state – because such a state needs the individuals' praxes of claiming what they perceive as justice and as their rights. A state, however, suffocates this powerful force when it fails to offer adequate laws. Feelings about law, presented as empirical factors, evidently serve as reason and legitimation for demanding a reform of codified law.

III. Feelings about Law as Arguments for a (Re)Development of Law Today?

In his third and last argumentative step, Jhering cites affronts against feelings about law as source and motivation behind reforming the law. This argumentative step shall now be applied to today's situation under consideration of current constitutional frameworks. Do feelings about law nowadays qualify as valid arguments for law's (re)development?

1. Feelings about Law as Arguments for a Legislative (Re)Development of Law?

Whether the hypotheses about the relationship between feelings about law and law's (re)development, which were developed in a pre-democratic authoritarian state, are plausible, cannot be analysed directly on the basis of the current situation, in which law can only legitimate itself normatively through those subjected to power ("All state power is derived from the people," Art. 20 GG). Corresponding procedures have been established constitutionally so that legislation can actually be held accountable by "the people." Given these circumstances, demands for reforming the law find other ways of legitimation and, by their very nature, other ways of implementation than in pre-democratic orders. Since there is democratic legislation, one does not need ("canonized") feelings about law to substantiate and legitimize their position; it is sufficient to turn to political will, which needs to be convincing and to find a majority, yet does not need any further legitimation – apart from superior legal ties e.g., to fundamental or human rights – to be reflected in law's developments through legislation.

But to what degree can feelings about justice and injustice be considered and used under this premise? And in how far can demands for

legislating be legitimized and emphasized with feelings about justice and injustice? What are we to think of justifying the need of reforming the law by referring to feelings about law; what are we to think of claims that existing law does not come up to people's feelings about law and should therefore be developed further? These questions are now being approached in the form of propositions.

Emphasizing feelings about justice and injustice as arguments for changes in law is first of all a process of labelling: Instead of referring to a particular change in law as a "political wish", one speaks of feelings about law. This has consequences.

Labelling a political wish as a feeling about *law* tends to erase this demand's negotiability since locating it in the legal domain already adds a validity claim to it. The claim then appears comparatively fixed and inaccessible. Such closure makes a gradual political decision-making process and compromise difficult.

Labelling the demand for reform as a legal issue also marks the existing legal situation as legally deficient and ignores its necessary political origin with its legitimation of the current legal situation. Concrete legal situations are not something that is already present and which may be criticized from a reformist's point of view by law's somewhat external standard, but they are rather the results of political processes of decision-making, which (apart from the non-negotiable constitutional provisions) must be further negotiated in these processes alone.

The linguistic replacement of political volition with feelings about law could unnecessarily stain the former. Jhering concealed his, in today's sense of the word, political desire for reforming the law, and instead used law to make his position more compelling. However, under a democratic constitutional state's conditions, different premises apply. Political volition is legitimate and has its specific ways of enforcement. Existing law is essentially available to political volition, and widely up for debate (although limits are set by the constitution, especially legitimate expectations and certain minimum and minority guarantees). One does not need to prove that the previous legal situation was wrong and contradictory to the right feelings about law. It is sufficient for new law to be desired and that the corresponding desire prevails in the provided procedures. Political will must thus be convincing and it must seek approval.

Political volition does not even need to be rational. It may include not completely justifiable preferences, and this is permissible[17] if supported by a majority – albeit under the premise that constitutional provisions are upheld, especially regarding minority protection. The legitimacy of not completely justifiable political will further demands that it is to a certain extent visibly driven by volition. Yet, precisely by describing such volition as feelings about *law*, a necessary part of the burden to justify and to advertise would potentially be lost.

Of course, political will can be grounded upon visions of justice. As long as the political discourse is not dominated by regulations of individual utility maximization, endeavours to reform will oftentimes be grounded in certain visions of justice. Justice's potential is not exhausted by our existing constitution. There can and may be visions about justice beyond those laid down in the *Grundgesetz*. Apart from constitutional positivations, however, one has to struggle for visions of justice. Political demands do not automatically become stronger when postulated as matters of justice.

Finally, switching from "political wishes" to "feelings about law" could create constitutional tensions. The possibilities for shaping political and legislative spheres are limited by the constitution's guarantees of fundamental rights. Here, the majority's will reaches its limits. Under the *Grundgesetz*, this is basically well established and accepted. However, as soon as a political wish is presented as feelings about law, feelings about law suddenly clash with constitutional guarantees. Whenever political volition becomes a matter of feelings about law and justice, this political volition which feeds on such feelings could endanger constitutional law's supremacy in the long run.

2. *Feelings about Law as Orientation Towards Judicial Development of Law?*

While there is a lot to be said against the reasonableness of trying to substantiate legal reform endeavours with corresponding feelings about law, such feelings can generally gain greater importance in the context of reforming the law via specialized courts. This process of reforming is not

17 For changed legislation on the legal assessment of the acceptability of risks of nuclear energy use see e.g., BVerfGE 143, 246, 347: "The legislator's intention to eliminate any unavoidable residual risk associated with the use of nuclear energy quickly and broadly, – even when it is grounded solely on the political reassessment of the willingness to accept this residual risk – is not objectionable constitutionally."

about a political transformation of the law but about interpreting existing law in the context of judicial decision-making. Here, the feelings about law of those affected are relevant – although feelings about law are understood more narrowly at this point: as the ideas of those affected about what existing law actually and concretely implies.

In principle, judicial reform of the law has to be measured against its compatibility with legislatively codified law. Part of the everyday judicial process of self-regulation is considering in how far a decision is compatible with the feelings about law of those affected and interested. This includes considering whether a decision can be justified in a way that it is able to overcome (not: overwhelm) potentially conflicting feelings about law. In other words: If an interpretation of law cannot be explained plausibly, it is most likely not covered by existing law. The (anticipated) feelings about law of those affected are certainly able to form a mental control standard.

However, feelings about law cannot be made absolute here either. It is even difficult to determine these feelings empirically. But most importantly, law has to occasionally disregard existing feelings about law: For instance, if an existing regulation clearly has a different content than generally perceived, or if there are uncircumventable constitutional imperatives, contradicting feelings about law have to yield. Even if the feelings about law of many others seemingly disagree: Even a person that is likely to threaten public safety could not be deported if the procedural requirements are missing[18]; even the NPD ('*Nationaldemokratische Partei Deutschlands*')[19] could not be prohibited by the *Bundesverfassungsgericht* although it is considered anti-constitutional[20]; without legal basis, even a husband who got cheated on could not force his unfaithful wife to reveal his cuckoo child's biological father in order to evade alimony[21].

18 Case Sami A., VG Gelsenkirchen, resolution from 12 July 2018 (Az. 7 a L 1200/18.A).

19 [Note by translator: The so-called National Democratic Party of Germany is an extreme right-wing political party.].

20 BVerfGE 144, 20 ff. [Note by translator: This decision is remarkable when compared to other German laws that target extreme right-wing parties. For instance, § 86 of the German Criminal Code (*Strafgesetzbuch*) prohibits the dissemination of "propaganda material 1. of a political party that has been declared unconstitutional" (§ 86, 1, no. 1). This includes, for example, displaying the flag of the Third Reich and displaying swastikas publically (§ 86a, 2).].

21 BVerfGE 138, 377, 390 ff. Marginal note 35 ff.

IV. Concluding Theses

1. Feelings about law are omnipresent and diverse phenomena.
2. In Jhering's *Struggle for Law*, the relationship between feelings about law and national welfare, which is partly conceived empirically and partly normatively, serves most of all as an argumentative reasoning for a necessary reform of the law because democratic legislation was not yet available as means and legitimation of legal reform.
3. In a democratic state, the demand for legislative reform of the law can be formulated as a political demand and one can try to realize this demand accordingly. Labelling political volition as feelings about *law* obscures the political character of the legislative wish for change, resulting in potential damage to both the political process of decision-making and the very idea of law in the long run. However, feelings about law are able to provide guidance for judicial reform of the law.