

Between Rationalities and Emotions

Modes of justifications of criminal law reforms around 1800

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1 An introductory reflection

Emotions are a part of law in general, and of criminal law more specifically. But in the historical interpretations of the acts and texts of past legislators, rational behaviour seems to get the priority. To identify the rational arguments and rationality of legislative acts perhaps connects with our own contemporary expectations to law and politics. This attitude has a complex background. As to law and legal history this attitude might have been seen in connection with the fact that current legal use of past legislation favours a rational interpretation and that the legal reconstruction of the past often is formed in order to serve the present and future. Also, this might have to do with the historiography of modernity, which to a large extent has grouped historical causes as rational entities, like class, power, political need and legal structures. In analysing the historical background of a past legislation, there are many underlying reasons to make us believe that it was the rational conducts of the past that produced law. My claim is very simplified, and there are a number of exceptions to this line of thought. Still both as lawyers and as legal historians, we tend to look for rationality in legal history; rationality in the sense that we can reconstruct past legal and social processes as understandable lines of events and acts in a contemporary way.

To exchange this attitude with the opposite, that of searching for irrationality in the past would however be an implausible conclusion. My sole argument in this article is to focus on what I would call a wider understanding of the character of rationality in the actions and thinking of legal pasts. First of all I would emphasise on emotions as a dimension of legal pasts, both as to legal thinking and formal legislative acts. By doing this, I

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also respond to new contemporary concerns about the tendency to exclude emotions and feelings from the rationality of political actions. There is new interesting research within social sciences that pays attention to the fact that emotions, contrary to what would be expected, contribute to political rationality, and that emotions bring forth a wider set of arguments that are relevant for a sound political decision.¹

In some way this seems obvious, and my main point then is to highlight this obvious aspect by bringing it into legal historical interpretations of some moments of criminal law reforms around the year 1800. I underline the word ‘moments’ as I have no ambition to carry this through in a systematic way, rather then, only to give some examples. My claim is not to bring forth any new historical material or pursue new lines of research, but only to combine this wide understanding of rationality, by including emotions and feelings, with some issues of criminal reforms: I begin with the discourse on the guillotine during the French Revolution (1789-1793); then I continue with the concept of empathy in Adam Smith’s argumentation against torture (1759), before I study the Danish Kantian lawyer J.F.W. Schlegel’s concept of rationality as part of his understanding of public debate; his arguments were made in his legal interpretation of the legislation concerning the freedom of the press (1797). At last I point to some examples where emotions are being used as an argument in the preparatory works (1832) of the new Norwegian criminal code of 1842.

2 Talking heads? The problems of Joseph-Ignace Guillotin

So I start with the French Revolution.² A rather prominent member of French National Convention of 1789 was the medical professor Joseph-Ignace Guillotin (1738-1814). As the debate on the reforms of criminal law began at the end of that year, in 1789, Guillotin outlined some principles for the future criminal reform. Firstly, he said, all crimes should be punished equally whatever social rank of the criminal; secondly, as the criminal is an individual, the family is exempted from punishment; thirdly, the law should prohibit confiscations. Furthermore, by capital punishment the corpse belongs to the family and nobody may insult a citizen who is in family with the executed; and finally, the guillotine. In case of capital punishment “the criminal shall be decapitated; this will be done solely by means of a simple mechanism.” The “mechanism” was defined as “a machine that beheads painlessly”. On the whole, these typical Enlightenment principles – albeit with a heavy weight on capital punishment – were absorbed by the French Criminal code of 1791.

¹ *Between enlightenment and disaster. Dimensions of the political use of knowledge* (ed. Sangolt), Peter Lang International Academic Publishers 2010.

² For the following text on Guillotin and the capital punishment I rely solely on two major historical works: Arasse, *The guillotine and the terror*, translated by Miller, (Allen Lane 1989) and Manow, *Im Schatten des Königs* (Suhrkamp Verlag 2008). Cfr furthermore, Beccaria, *On crimes and punishments* (1764), Book XXI.

Within a short space of time the instrument now bearing Guillotin's name was produced, (although with a number of predecessors), and there was a general consensus that the guillotine had solved some of the perils of uncivilised criminal law of the past.

Firstly, the individual moral burden of the executer who just then also had joined the ranks of citizens. Secondly, the immediate death that excluded the possibility of prolonged physical pain that had been an intended dimension of executions in the ancient regimes. Thirdly, the logic of social equality attained by the instrument of a new industrialised age. In this very instrument, the structure of the late 18th Century criminal law was embodied: The republican constitutional concerns of equality and citizenship; the scientific approach to the criminal body, ending religious connotations in the old system of rituals; the political role, yes, the responsibility of citizens' emotional response to the pains of others. I will come back to these features in a moment.

But there were troubles ahead. In January 1793 the King was beheaded, thus opening up a flood of executions.³ Almost instantly – as Daniel Arasse has shown - this Enlightenment invention was targeted at its very heart. A medical debate began about whether it in fact was medically correct that death occurred immediately after the beheading or whether the decapitated head still was conscious, that it still, in the words of Arasse, “had the capacity for sentiments, still had the feeling of the I of a person.” This was truly a nightmare for the defenders of the guillotine. If this was true, the guillotine did not produce rational egalitarian deaths. Rather it had created, again in Arasse's words, “a feeling head without a body, a head which only can grasp one thought: ‘I think, but *I am* no more’”. There were medical and constitutional issues at stake: Did the seat of emotions and consciousness sit in the head or was it divided equally around the body? The debate was also a constitutional one as the defenders of the head model were monarchists arguing in favour of the necessity of real heads of states, whereas the defenders of the body model were republicans arguing against the hierarchical model and in favour of a democratic political body. In this manner the combining roles of science, emotions and constitutions were integrated in the discourses on the guillotine, and ultimately, the justifications of criminal law reform.

3 Two natural law models: Reason and emotion

This debate presupposed a particular argumentation that had been going on since the mid 18th Century. By paying attention to this argumentation, I want to broaden the scope of my theme by focusing on two different lines of natural law theories running through the second half of the 18th Century. They are often being called the rationalistic

³ Arasse, *The guillotine* pp. 52-66.

and the sentimentalist one.⁴ Simplifying the matter somewhat here, the rationalist natural law theories justified moral obligations and natural law norms in an *a priori* way with a priority of reason over empirically founded facts; in the extreme version of Christian Wolff, the rational natural law begins with moral principles of reason and deduces from there what is to be the true moral judgment. On the other side, the sentimentalist version of, for example David Hume and the empirical tradition, employed what was called an *experimental* method. This meant doing an empirical investigation into the causes and processes of normative behaviour; then, identifying what they called man's faculty of sympathy, which they saw as the organ that man uses to collect empirical data on which moral judgments are formed and elucidated. In fact then, the sentimentalist natural law partly justifies moral obligations in the form of analytical introspections into the inner self, partly through investigation of public utility. Both models of natural law imagine a vision of a human right-based society, but they differ as to the priority of emotions and a priori of reasons.

No one followed the sentimentalist line of thought more thoroughly than Adam Smith in *Theory of Moral Sentiment* published in 1759.⁵ The subsequent quotation shows Smith going to the heart of the matter – if your moral judgment is not based upon a priori reasoning and you are left with the empirical world – how do you then arrive at a moral obligation? It seems that we may call this *the law of empathy*: Adam Smith opens his book with an analysis on the concept of sympathy. He sets out to study the mental effects of somebody watching a man being tortured; Smith called this observer the impartial spectator:

As we have no immediate experience of what other men feel, we can form no idea of the manner in which they are affected, but by conceiving what we ourselves should feel in the like situation. Though our brother is on the rack, as long as we ourselves are at our ease, our senses will never inform us of what he suffers. They never did, and never can, carry us beyond our own person, and it is by the imagination only that we can form any conception of what are his sensations. Neither can that faculty help us to this any other way, than by representing to us what would be our own, if we were in his case. It is the impressions of our own senses only, not those of his, which our imaginations copy. By the imagination, we place ourselves in his situation, we conceive ourselves enduring all the same torments, we enter as it were into his body, and become in some measure the same person with him, and then form some idea of his sensations, and even feel something which, though weaker in degree, is not altogether unlike them.

⁴ For what follows see in particular now Frazer, *The Enlightenment of Sympathy* (Oxford University Press 2010) pp. 5-10 and Forman-Barzilai, *Adam Smith and the Circles of Sympathy* (Cambridge University Press 2010) pp. 56-71.

⁵ For the following quotation, see Smith, *The Theory of Moral Sentiments* (ed. Glasgow Liberty Fund 1976) pp. 9 sq.

One person is witnessing the torture of another. But what can make him a moral person in that situation? It is the combination of the ability to sympathise with another and then consolidate his or her inner moral autonomy. Both the ability to *observe* the sufferings of your brother and the ability to *identify* yourself with those sufferings enable you to legislate in the moral domain and hence form a judgment. Reason alone however, cannot form any moral judgment; it takes the whole body. For Smith, human rights cannot just be assumed to be part of human nature; it must rise from our systematic analysis of all the injuries inflicted upon man.

Comparing Adam Smith's text of 1759 and Cesare Beccaria's famous book from 1764 brings out interesting differences. Beccaria sees the foundation of moral obligation in certain deductions from the social contract, whereas Smith, who did not care much about the idea of social contract, whether in its real or hypothetical version, resorts to the individual interaction with others; what we call the obligations coming out of the process of social intersubjectivity. On the other hand there were similarities in their tendency to see commitment to justice coming from the emotional sympathy with particular individuals, "sympathy with the resentment felt by individual victims of injustice".⁶ The difference between philosophy and science was then rather vague; perhaps therefore the two of them arrive at the same conclusion as to the content of natural law on torture, whether following the empirical method of Smith or the rational political one of Beccaria.

In the public opinions of the late 18th century these learned debates between rationalists and sentimentalists, or those many combinations of the two, became part of new patterns of understandings of man in society, blending reason and emotions.⁷ In the late 18th century literature, the claim that you *felt morally* that human rights existed could be based upon the ability to universalise your own empathy. That ability was seen as a key characteristic both as to that of being man and as to being a citizen. In literature, in music, in science, there was this dominant theme of the individual's experience of being a moral individual: how am I morally in relation to others? This complex I-experience was not only reserved for the elite of society. The novel emerged around 1750 as a literary genre in which ordinary people's inner life was shown, both women and men; and on the opera stage, maids appear with an equally rich inner life as that of counts, as in Mozart's *Marriage of Figaro* (1786). Of course one cannot conclude anything about rights, but one can infer something about the conception of human nature's inherent equality based upon the universal display of emotions. And without this cultural shift it is difficult to imagine the idea that individuals - regardless of status - could be a carrier of enforceable legal rights. Thus, the idea of human rights also seems to be a question of the understanding of the human anthropological characteristics in terms of not only reason, but of both

⁶ Frazer (2010) p. 12.

⁷ See for what follows in particular Hunt, *Inventing Human Rights: A History* (W. W. Norton & Company 2007) p. 35 sq.

reason and emotion. As Condorcet stated in 1790: “What is the basis of the human rights, if not the fact that humans were feeling individuals, with the ability to assimilate moral ideas and to argue about these?”⁸

4 J.F.W. Schlegel and the limits of freedom of expression (1797): The judgment of reason or public opinion?

In a slight shift of scenery I will now move the scene to Copenhagen. In 1797, the professor and Kantian philosopher Johan Frederik Wilhelm Schlegel published an extensive article on freedom of expression where he dealt both with natural law and Norwegian-Danish law.⁹ He concluded that as to both of these legal systems there were some specific limits for the use of freedom of expression: What fell outside that freedom was thus subject to criminal law. In that sense his argumentation for those limits makes up what justifies the criminalisation of a particular offence, being slander or revealing state secrets or whatever. As he was an outspoken Kantian lawyer, he took into account the Kantian model of natural law and moral philosophy. On the whole Kant rejected that sympathy had any moral value, and instead he laid emphasis on the person’s moral autonomy understood as rational self-control. Schlegel’s article also consisted of an interpretation of the relatively liberal Danish-Norwegian legislation of 1790, which opened up for a considerable degree of freedom of expression. The legislation itself was however not without a number of ambiguous points making the boundaries of expression of freedom quite liquid, which created a number of competing interpretations.

Here I will focus on one particular issue. Given the fact that freedom of expression had some limits, the question arose how one should decide these limits. Shortly before the publication of Schlegel’s text, a well known author, Michael Gottlieb Birckner (1756-1798), had maintained that cases involving freedom of expression should be laid open to the *verdict of the public opinion*, and not to be subject to legal proceedings in court. The public opinion, he said, was more reasonable and unbiased than the rulings of the court, as the public opinion constituted itself in complex social processes allowing attacks and counterattacks. To Schlegel however, this was to abandon rationality in the public domain. In a Kantian vocabulary, he stressed that the formation of public opinions always would be dominated by passions of the crowds, which were irrational and dangerous, there were experiences from the French Revolution to draw on. Thus only the authority

⁸ The argument was set forth in favor of political rights for women in *De l'admission des femmes au droit de cité* (1790), cfr. Williams, *Condorcet and Modernity* (Cambridge University Press 2004) pp. 158 sq.

⁹ For what follows: Schlegel, ”Erindringer imod Hr. Birckners Skrift: om Trykkefriheden og dens Love; til lige med et Forsøg paa at bestemme Grændseskiellet imellem Trykkefrihed og Trykkefrækhet” in *Astræa* 1 (1797) pp. 345-488 cfr. Michalsen, ”Grændseskiellet imellem Trykkefrihed og Trykkefrækhet – Johan Frederik Wilhelm Schlegel, Astræa og trykkefrihetens grenser” in *Demokratisk teori og historisk praksis* (ed. Sandvik), Spartacus/Scandinavian Academic Press 2010 pp. 197-221.

of the court would ensure that it was the *judicialisation* of man's freedom that would secure the unfolding of rationality in society. Public opinion could never attain the rationality of the court and hence it was unacceptable to leave the boundaries of law to the self-regulating mechanism of public opinion. In particular, in cases of slander and defamation, the public opinion was not capable of protecting the border of rationality in a public debate.

So what was at stake here? Around 1800 the field of science is dominated by the accelerating process of 'scientification' of science, in particular the Kantian and post Kantian models of science. This was also the case of legal science with its emphasis on notions of necessary connections and systematic entities. To Schlegel this is shown in the particular concurrence between what is scientifically and constitutional valid. Here the legal expert speaks the voice of both science and reason. The two categories of justifications are here much more intertwined than as usually presented: What was constitutionally correct was almost by definition scientifically acceptable. The exclusion of emotions is combined with the inclusion of the court, paralleling the Kantian notion of law as abstract and rational. The law of empathy could only exist as far as the general principles of reason would allow. But the very existence of this law also makes clear the boundaries of rationality.

5 Types of arguments in the preparatory work of Norwegian Criminal law, 1835

Leaving the 18th century and entering the world of early 19th century Norwegian criminal legal thinking, some of the effects of these discourses become apparent. The historical source for what follows is the preparatory work of the Norwegian criminal law code of 1842, published in 1835. This 1835-text was written by two legal experts, Jørgen Herman Vogt (1784-1862) and Jens Christian Berg (1775-1852), both being educated in the Copenhagen Enlightenment spirit;¹⁰ Berg was moreover a kind of pupil of Schlegel. Here I just want to draw attention to the pattern of argumentation concerning corporal punishment; once again I am interested in the blending of emotions, science and reason; the last concept covering both reason as an argument, and more specifically, reason in the form of a constitutional argument.

In accordance with the trends of European modern criminal laws of the 1830s, the law committee proposed abolition of corporal punishment.¹¹ Given the fact that they build their criminal theory upon a vague combination of deterrence and rehabilitation, one expects some references to more or less scientific arguments about the causal relationships between punishment and social action. A dominating feature however is how assump-

¹⁰ For what follows: *Motiver til det i Aaret 1832 udgivne Forslag til en Lov for Kongeriget Norge angaaende Forbrydelser* (1835). Cfr. Michalsen 2010.

¹¹ *Motiver* (1835) pp. 20 sq.

tions of that kind are being absorbed by arguments based upon reason and constitutional conjectures. One example is the division of criminal offenders as either morally sound or morally decayed; on that basis, corporal punishment is being analysed as having terrible consequences for the morally sound, but no consequences for the decayed. In addition to this rather vague scientific assumption, the committee showed a general scepticism as to the effect of corporal punishment on the basis that it was contrary to constitutional historical assumptions like ‘progress of culture’.

Eventually there were emotional-scientific arguments, which were evident in their argumentation in favour of capital punishment. As those countries that had abolished capital punishment, like Russia, Austria, and the U.S. state of Louisiana, at the same time had introduced heavy corporal punishments, such as rigid isolation or even physical inflictions. The dilemma that arose for the committee was whether capital punishment or punishment in form of imprisonment and corporal punishment was to be chosen: The answer was structured by reason and emotion: “Such punishments that are offensive to humanity, will not be tolerated in Norway”. In the option between torturous sufferings and capital punishment, the last was by far to be preferred, as sufferings “shudder our feelings to such a degree that they cannot be proposed in our age”.¹² But the option of capital punishment was, they maintained, simple and clear. And – in the spirit of Guillotine, the execution was to be fulfilled according to “Humanity ... and with no unnecessary increase of pain”.¹³

6 Conclusion

My main aim has been to say the obvious: that the modes of justifications of criminal law reforms in the decades around 1800 consisted of a blend of constitutional, rational-scientific and emotional arguments. One possible explanation for this blending is the double foundation of natural law theories, namely the rational and the sentimental. Regarding both of the models, the connection to science was a flexible one, as science itself is. A more systematic research into the emotional side of the argumentation in legal discourses in general, and in criminal law more specifically, might reveal the subtle strategies of arguments reflecting the ineradicable factor of feelings and emotions purified in the language of science.

¹² Motiver (1835) p. 28.

¹³ Motiver (1835) p. 30.