G. Conclusion

There is no doubt that the EU legislation on driving licences is of paramount importance for those EU citizens who are involved in cross-border migration, irrespective of what the reason of that migration is. On the ground of that legislation, a person who has obtained a driving licence in one Member State is entitled to make use of his/her right to drive power-driven vehicles also in other Member States while travelling, working, studying, or conducting an economic activity there. A driving licence issued in one Member State is fully recognized in another Member States, and a holder of that licence, as a principle, cannot be subject in a host Member State to any formalities or requirements imposed solely due to the fact that he/she has obtained that licence not in the host State, but in another Member State. In such a way the EU legislation on driving licences meets the expectations of migrant drivers and significantly facilitates the free movement of persons between Member States.

On the other hand, however, both the migrating drivers and the other drivers, as well as the whole society expect that the individual skills and health condition of holders of driving licences in the EU achieve such a level that those holders do not increase the risk for road safety. That latter value is by no means merely a slogan, because human life and health are at stake here (not to mention the huge budgetary expenses that are incurred due to road accidents), and those drivers who do not have sufficient capabilities or capacities to drive may endanger the life and health of others. Therefore, the EU legislator has very extensively harmonised the conditions for the issue of driving licences and obliged Member States issuing licences to apply due diligence to ensure that the persons obtaining the licences indeed fulfil the requirements set out in the relevant EU legislation. Moreover, on the ground of EU Directives on driving licences, road safety is a value that in many instances is capable of outweighing the interests of driving licence holders in effectuating free movement. Namely, it is the value which under some circumstances justifies the competence of a host Member State to refuse to recognize a licence issued by another Member State, and to interfere with the binding power of that licence by restricting, suspending or even withdrawing it. In turn, all those latter sanctioning measures must be duly recognized and respected by other Member States, including the Member State of issue.

The mutual recognition of driving licences and of the above-mentioned sanctioning measures is strongly based on mutual trust between Member States. However, this mutual trust must be continuously built and strengthened, and it cannot be ordered solely from above. It is submitted that nothing will develop this mutual trust so effectively as the actual compliance by Member States with their obligations stemming from EU Directives, or their close cooperation within the EU driving licence network.

Emotion and Law: How Pre-Rational Cognition Influences Judgment

By Julia Haenni[*]

A. Introduction

This short essay seeks to introduce the *phenomenological approach* to law and legal decision-making, and to show the role of emotion in guiding the person applying the law. The peculiarity of the phenomenological approach—which substantially refers to the principles of Kantian epistemology—is found in the philosophical analysis of perception: Perception itself contains a specific emotional competence for evaluation, which will be disclosed to the legal context. In this context, *phenomena*,[1] i.e., the contents that we perceive through our acts of perception, will be exposed as a basis for ethical decisions. Typically, when questions of legal interpretation call forth conflicts between core ethical values, it appears that the competence of a primary, intuitive judgment strongly forms our decision-making process. The phenomenological approach[2] will thus point out the openness of a legal system towards criteria of extra-legal value judgment. Furthermore, this approach will reveal legal practitioners' emotional competences for judgment as a source of normativity. An emotional ability to judge will finally be—in a series of examples—referred to as the last instance on our quest for justice.

B. Phenomenology of Value Judgments

I. Overcoming the Strict Separation of Reason and Emotion

Phenomenologists emphatically draw attention to the inadequacy of the strict separation of reason and emotion. According to phenomenologists, it is inappropriate for the human mind to simply attribute any reaction to affective emotion that is not imputable to reason. To clarify this inadequacy, phenomenologists such as Max Scheler draw up a classification

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[1] From Greek *phainómenon,* "that which appears."

[2] The phenomenological method examines and demonstrates the perception of given circumstances and considers acts of consciousness as the inducement for ethical decisions.

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of emotions. For instance, Scheler argues that emotions are *intentional*, that is to say, they are directed towards objects of perception. The same basis—the intentionality of emotional acts—can also be found in the works of Franz Brentano,[3] Christine Tappolet,[4] and Robert C. Solomon.[5] According to these philosophers, emotion does not represent an inflexible state of mind; to the contrary, emotional acts are related to situations and experiences and carry an active, targeted potential.[6] It is therefore adequate to point out the role of emotions in guiding our judgments throughout our daily lives as an original, primordial *faculty of differentiation*. By perceiving emotions, the human being attains a genuine certainty, an intuitive comprehension that leads him or her to be able to distinguish:[7] No-one will mistake love for hate, sympathy for resentment, or awe for enragement.[8]

Phenomenologists attest a certain *a priori* character to this affective ability to distinguish, claiming that such ability is aligned with values. An example is illustrative of both the empirical and the *a priori* character of the *perception of values*: To be able to judge an action as unjust, the previous knowledge of what justice actually and basically means, is crucial. Yet, this knowledge cannot merely be deduced from legal terms. This previous knowledge contains the ability for evaluation, which builds up the basis for the subsequent juridical decision-making process.[9] But how can this often intuitive basis of judgment be described?

II. Intentional Feeling

Phenomenologists, especially Brentano but also Scheler, pursue a concept based on Kant which is composed of *a priori* and empirical abilities of the human being. According to Kant, whatever we call "experience" is something that is already composite: on one side consisting of the–a posteriori perceived–sensory inputs; and on the other side, our faculty

[3] FRANZ BRENTANO, PSYCHOLOGIE VOM EMPIRISCHEN STANDPUNKTE (Thomas Binder & Arkadiusz Chrudzimski eds., 2008).

[4] CHRISTINE TAPPOLET, ÉMOTIONS ET VALEURS (2000).

[5] ROBERT C. SOLOMON, TRUE TO OUR FEELINGS: WHAT OUR EMOTIONS ARE REALLY TELLING US (2007).

[6] *See* MAX SCHELER, DER FORMALISMUS IN DER ETHIK UND DIE MATERIALE WERTETHIK: NEUER VERSUCH DER GRUNDLEGUNG EINES ETHISCHEN PERSONALISMUS 266 (Manfred Frings ed., 2000); Robert C. Solomon, *Emotionen, Gedanken und Gefühle: Emotionen als Beteiligung an der Welt*, *in* PHILOSOPHIE DER GEFÜHLE 150 (Sabine A. Dörig ed., 2009).

[7] Heinrich Hubmann, *Naturrecht und Rechtsgefühl 320*, *in* 153 Archiv FÜR DIE CIVILISTISCHE PRAXIS (AcP) 297 (1954).

[8] PAUL GOOD, MAX SCHELER IM GEGENWARTSGESCHEHEN DER PHILOSOPHIE 21 (1998).

[9] *See infra* Part C.

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of perception also includes an a priori cognition which we possess prior to experience, a cognitive faculty which permits the ability to experience.[10]

For the purpose of illustration, we can use the notion of "space:"[11] "Space" is the form of appearance in which sensory inputs—for example, a tree—are given. However, a concrete conception of space is only possible once the presupposition or idea of "space" is already given to us.[12] It is therefore our *cognitive faculty* which brings the conception of "space" to experience. This leads to the formulation of the epistemological basic principle that our perception is not directed toward the contents to perceive; rather, these contents (percepts) are given on the premises of our perception.[13] In other words, all objects of experience constitute themselves according to each person's *a priori* knowledge of rules of understanding.[14]

Scheler takes up the idea of *a priori rules of understanding* from Kant. However, he considers these rules as the consciousness' faculty of original emotional acts of perception[15] and transfers this idea to the realm of experience.[16] Much like Kant, Scheler considers all moral discernment as autonomous, but—and this is the essential enhancement—according to Scheler all autonomous moral discernment is based on primary acts of feeling.[17] As such, Scheler posits that the *a priori* character of judgment and thought is accompanied by the *a priori* character of a sentient, primordial involvement in the world, termed *intentional feeling*.[18]

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[10] IMMANUEL KANT, KRITIK DER REINEN VERNUNFT 47 (Wilhelm Weischedel ed., 1956).

[11] Analogue categories are time and causality. See *id*. at 86, 103, 231, 289.

[12] So as to be able to represent an object in space, the idea of space must be—*a priori*—inherent to the faculty of cognition. *See Id*. at 48.

[13] *Id*. at XIII, 23.

[14] *Id*. at XVI, 25.

[15] It has to be pointed out that Kant himself—also against a general prejudice—attributes an essential significance to emotion: The feeling of respect (*Gefühl der Achtung*) before the moral law is described as morality itself. *See* IMMANUEL KANT, KRITIK DER PRAKTISCHEN VERNUNFT 196 (Wilhelm Weischedel ed., 1956). Kant further states that respect is "*das Gefühl der Unangemessenheit unseres Vermögens zur Erreichung einer Idee, die für uns Gesetz ist*" (respect is defined as "the feeling of inadequacy of our capability to achieve an idea, which will be our principle"). *See* IMMANUEL KANT, KRITIK DER URTEILSKRAFT 344. For a representative overview on the whole emotional aspects of the Kantian ethics, see Joachim Lege, *Abscheu, Schaudern und Empörung. Die Emotionale Seite von Recht und Sittlichkeit bei Kant*, *in* 14 JAHRBUCH FÜR RECHT UND ETHIK 447 (2006).

[16] MARIA SCHELER & MAX SCHELER, ZUR ETHIK UND ERKENNTNISTHEORIE 433 (Max Scheler & Manfred Frings eds., 3rd ed. 1986).

[17] Rosemarie Pohlmann, *Autonomie*, *in* 1 HISTORISCHES WÖRTERBUCH DER PHILOSOPHIE 707 (Joachim Ritter ed., 1971).

[18] SCHELER, *supra* note 6, at 266. *See also* NICOLAI HARTMANN, ETHIK 117 (1962).

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Intentional feeling describes an intuitive faculty of understanding. It is based on our perception's capacity for emotional "pre-valuation,"[19] the faculty of a primarily favorable and adverse response that enables us to assign significance to the world and its proceedings and thus allows us to experience peculiarity.[20] As such, the emotional pre-valuation is our intentional access to the world through our own sentient position and a part of every instance of perception: Every cognitive act is already pervaded by those intuitive value judgments; and experience, which seems to be first in reflection, turns out to be secondary compared to the evaluating acts of perception.[21]

For phenomenologists, the ability of emotional differentiation so adheres to—or even founds—the cognitive faculty of human beings. Acquired behavioral patterns may be built on this basis. However, an empirical incentive—e.g., a clash of opposing values—is required to activate this faculty to a conscious level. The process of learning to constantly interlock the empirical experience with the *a priori* level of perception equally turns out to be a basis for communication: The mode of perception as an initial emotional response is a pre-condition for the understanding of others as well as for our own personal experiences, and is therefore part of a *universal grammar.*[22]

C. Sense of Justice

I. Terminology

Hence, the question arises as to how an emotion-based ability to judge can be connected to law in action. Contrary to Kantian ethics, the phenomenological approach does not lead to the anchorage of one specific state system that is implemented by an entity comprised of individuals.[23] Rather, the implication of cognitive feeling in a juridical context is greatest when it comes to legal interpretation, a phenomenon referred to as the *sense of justice*.

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[19] *See also supra* Part B.I.

[20] A primary emotional disclosure of the world and its proceedings has also been suggested by empirical research. *See* MARC D. HAUSER, MORAL MINDS. HOW NATURE DESIGNED OUR UNIVERSAL SENSE OF RIGHT AND WRONG 163 (2007); Joseph E. LeDoux, *Emotional Memory Systems in the Brain*, *in* 58 BEHAVIOURAL BRAIN RESEARCH 69 (1993); s*ee also* DANIEL GOLEMAN, EMOTIONAL INTELLIGENCE 19, 35 (1995); *infra* note 44.

[21] The intentional access to the world and its proceedings through its own sentient position is described as "emotionally engaging with the world" as a primary mode of cognitive involvement with the world. *See* Solomon, *supra* note 5, at 150, 168; *see also* Helmuth Vetter, *Emotion*, *in* WÖRTERBUCH DER PHÄNOMENOLOGISCHEN BEGRIFFE 138 (Helmuth Vetter ed., 2004).

[22] *See* Max SCHELER, ZUR PHÄNOMENOLOGIE UND THEORIE DER SYMPATHIEGEFÜHLE UND VON LIEBE UND HASS (1913).

[23] Lothar Eley, *Rechtsgefühl und materiale Wertethik*, *in* DAS SOGENANNTE RECHTSGEFÜHL, 10 JAHRBUCH FÜR RECHTSSOZIOLOGIE UND RECHTSTHEORIE 136, 156 (Ernst-Joachim Lampe ed., 1985).

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The term *sense of justice* has undergone different interpretations. According to Ruemelin, the *sense of justice* is an inborn drive to organize and order incoming information. In contrast to this view, it was Jhering who postulated the origin of the sense of justice through the experience of positive law. Some, such as Adler, understand the term *sense of justice* as an expression of solidarity.

However, if the *sense of justice* is interpreted as an *intentional feeling*, it incorporates the character of emotion in the sense of an *a priori*-intuitive evaluation as outlined before,[24] and expresses a specific emotional cognition based on value judgments.[25] The intentional aspect of the sense of justice exists as far as it is directed at matters that are core values of a legal system, such as liberty, justice and equality before the law.[26]

To illustrate what the intentional sense of justice is, it will first be necessary to explore how law and values are interrelated. Next, I will provide examples from different jurisdictions to explain how the *intentional sense of justice* serves as a tool of legal interpretation.

II. Extra-Legal Measures of Value and the Necessity to Evaluate

The first question concerns the relationship between law and values. According to Scheler, a legal system is, in various aspects, unable to state what is considered right or just. Rather, it will primarily state what is not right or just and therefore concretizes ethical values in the form of negative provisions (prohibitions).[27] If law addresses ethical values, it may be that corresponding provisions are designed as defensive rights or material criterions, which would clarify their application in a defining manner, as only stated in a vague form.[28] In order to make legal provisions applicable and sensible, an evaluating interpretation is required.

This can be well demonstrated with an example: According to the judicature of the Swiss Supreme Court concerning Article 8 of the Swiss Federal Constitution, the principle of equality before the law requires that "equal circumstances must be treated equally according to their equality and unequal circumstances must be treated unequally

[24] *See supra* Part B.II.

[25] *See* Hartmann, *supra* note 18, at 116; JOHANNES HESSEN, 2 LEHRBUCH DER PHILOSOPHIE 210 (1948); MARTHA C. NUSSBAUM, THE UPHEAVALS OF THOUGHT. THE INTELLIGENCE OF EMOTIONS (2005); SCHELER, *supra* note 6, at 85, 88.

[26] *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 400/51, 15 Jan. 1958, 7 BVERFGE 198 [hereinafter *Lüth*] (Ger.); ULRICH MATZ, RECHTSGEFÜHL UND OBJEKTIVE WERTE 124 (1966).

[27] SCHELER, *supra* note 6, at 216; Eley, *supra* note 23, at 136, 155.

[28] At this point the distinction between positive law and morality appears.

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according to their inequality."[29] Legal practice requires a determining criterion to differentiate the application of the cited provision in a concrete case. The interpretation of the law which is called thus requires an evaluation.[30]

This example shows how a legal system is open towards extra-legal measures of value, it is by no means yet an exception. There are further starting points for the integration of extra-legal measures of value into a legal system when it comes to the weighing of interests, undefined legal terms, or general clauses. Essential connectors between a legal system and extra-legal measures of value are the legal, and especially the constitutional axioms,[31] e.g., the principle of proportionality.[32] To concretize legal provisions in a specific case, an evaluation is therefore very often, and even typically, included. This necessity to evaluate can similarly arise from a small linguistic inaccuracy in the wording of a provision.[33] But even when the wording is fully accurate, there may be evaluation requirements: Modern linguistic analysis shows that evaluation requirements already derive from language itself.[34]

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[29] The translation is by the author. Bundesgericht [Bger - Federal Supreme Court] Oct. 9, 1991 117 BGE 257 (Switz.) (*"Gleiches nach Massgabe seiner Gleichheit gleich, und Ungleiches nach Massgabe seiner Ungleichheit ungleich behandelt wird."*) *See, e.g.*, Bundesgericht [BGer - Federal Supreme Court] May 23, 1962, 88 BGE 149 (Switz.); Bundesgericht [BGer – Federal Supreme Court] 18 Mar. 1964, 90 BGE 159 (Switz.); Bundesgericht [BGer - Federal Supreme Court] 11 Dec. 1996, 123 BGE 9 (Switz.) (concerning the taxation of individuals); Bundesgericht [BGer – Federal Supreme Court] 10 June 2010, 136 BGE 231 (Switz.) (concerning social welfare benefits).

[30] *See* THOMAS GÄCHTER, RECHTSMISSBRAUCH IM ÖFFENTLICHEN RECHT 380 (2005).

[31] *Id.* at 400.

[32] *See* BUNDESVERFASSUNG [BV] [CONSTITUTION] Apr. 18, 1999, SR 101, art. 5 para. 2 (Switz.); BUNDESVERFASSUNG [BV] 18 Apr. 1999, SR 101, art. 5 para. 3 (stating the axiom of good faith).

[33] According to Venzlaff, the majority of legal terms are undefined and require interpretation. *See* FRIEDRICH VENZLAFF, ÜBER DIE SCHLÜSSELROLLE DES RECHTSGEFÜHLS BEI DER GESETZESANWENDUNG 32 (1973).

[34] A text cannot explain itself, only further factors as the practicing use of language can help to evaluate and determine its meaning; "[t]he meaning of a word is its use in the language." *See* LUDWIG WITTGENSTEIN, WERKAUSGABE IN 8 BÄNDEN (1989); LUDWIG WITTGENSTEIN, 40 PHILOSOPHICAL GRAMMAR 60; *cf.* LUDWIG WITTGENSTEIN, 1 PHILOSOPHICAL INVESTIGATIONS § 43 (1953). For Wittgenstein's thought applied to juridical contexts, see OTTO DEPENHEUER, DER WORTLAUT ALS GRENZE (1988); MANFRED HERBERT, RECHTSTHEORIE ALS SPRACHKRITIK: ZUM EINFLUSS WITTGENSTEINS AUF DIE RECHTSTHEORIE (1995); EDUARDO SILVA-ROMERO, WITTGENSTEIN ET LA PHILOSOPHIE DU DROIT (2002); Andreas Kley, *Wittgenstein und die Moderne Juristische Methodik*, *in* 14 RECHT: ZEITSCHRIFT FÜR JURISTISCHE WEITERBILDUNG UND PRAXIS 189 (1996); *see also* Marc Amstutz & Marcel A. Niggli, *Recht und Wittgenstein I. Wittgensteins Philosophie als Bedrohung der rechtswissenschaftlichen Methode*, *in* GAUCHS WELT: FESTSCHRIFT FÜR PETER GAUCH ZUM 65. GEBURTSTAG 3 (Pierre Tercier et al. eds., 2004); Julia Hänni, *Ludwig Wittgenstein und die Juristische Hermeneutik: Zur Korrelation von Welt, Sprache und Ethik*, *in* RECHTSWISSENSCHAFT UND HERMENEUTIK. KONGRESS DER SCHWEIZERISCHEN VEREINIGUNG FÜR RECHTS-UND SOZIALPHILOSOPHIE, 16. UND 17. MAI 2008, UNIVERSITÄT ZÜRICH, ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 209 (Marcel Senn & Barbara Fritschi eds., 2009).

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Juridical decisions therefore regularly turn out to be decisions between alternative evaluations[35] in which the selection must be made in an accurate, sensible, and appropriate manner.[36] Thus, there is a need for guidance within the course of interpretation, which will finally sustain the judgment.[37] A human competence to evaluate will therefore be of absolute necessity for a legal system. But how can this competence be integrated in the application of law?

III. Previous Knowledge and Pre-Valuation

In the view of phenomenologists, the *sense of justice* and extra-legal measures of evaluation unfold their full significance exactly at the above (II.) described evaluation requirements of legal systems. At that point, the *intentional sense of justice* will typically expose itself in the form of previous knowledge and understanding, or "pre-knowledge."[38]

An example illustrates how decision-making is based on previous knowledge: If a lawyer charges fees in an absolutely disproportionate way—in other words, in a way that offends the common sense of justice—the Swiss Supreme Court will declare the fee void and arbitrary according to Article 9 of the Swiss Federal Constitution.[39] The Supreme Court's ruling therefore presupposes a certain awareness of what justice actually is, or what can be considered as just, and when this justice is violated. To guarantee public legitimacy, the sense of justice has to revert to pre-knowledge, which allows an evaluation in a given case.[40]

Whenever the consequences of an applied provision are contrary to the sense of justice, the emotional rejection is result-orientated, e.g. in cases of abuse of law. This becomes particularly obvious when there is a need for an adjustment of a provision.[41] In these cases, the intentional feeling has the power to reverse doctrinal considerations and the wording of the provision.

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[35] *See, e.g.*, ROBERT ALEXY, THEORIE DER GRUNDRECHTE 23 (2001).

[36] CHRISTOPH MEIER, ZUR DISKUSSION ÜBER DAS RECHTSGEFÜHL 57 (1986).

[37] MICHAEL BIHLER, RECHTSGEFÜHL, SYSTEM UND WERTUNG 19 (1979); REINHOLD ZIPPELIUS, DAS WESEN DES RECHTS 72 (1978).

[38] *See* Eley, *supra* note 23, at 136, 146. According to Hubmann, the sense of justice takes mainly effect in the weighing of interests. *See* Hubmann, *supra* note 7, at 323.

[39] Bundesgericht [BGer – Federal Supreme Court] Apr. 1, 2004, [BGE] 1P. 624/2003 (Switz.) (concerning public defenders).

[40] References to the intellectual sources of previous knowledge in Greek Philosophy can be found in Eley, *supra* note 23, at 136, 150.

[41] CLAUSDIETER SCHOTT, RECHTSGRUNDSATZE UND GESETZESKORREKTUR: EIN BEITR. Z. GESCHICHTE GESETZL. RECHTSFINDUNGSREGELN (1975); GÄCHTER, *supra* note 30, at 392.

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Furthermore, pre-valuation is not limited to the interpretation of a single term, but can also be significant to ascertain the facts of a case. Very often, a spontaneous and intuitive selection of the legally relevant facts of the case is apparent and the phenomenon of pre-rational comprehension of decision-making appears, as described in literature.[42] According to the phenomenologists' approach, the juridical decision is thus conceived as a two-step process: Initially, it consists of the ascertainment of the facts through affective perception,[43] which is then followed by rational acts of reasoning.[44]

Therefore, the theory of the priority of affective cognition has to be considered as a basis for juridical decisions. The assertion of the priority of affective perception will not lead in any way, including any legal context, to arbitrariness.[45] Rather, a certain judgmental statement is *already inherent* in the process of grasping the facts;[46] our perception of reality is always shaped beforehand by a personal judgment, which orders what we perceive.[47]

Forasmuch as it can be said that the evaluating sense of justice is, although most often implicit, relevant in the process of finding justice or of adjusting and modifying the law in various cases,[48] it can also be an impulse for the further development of legal practice.[49] The function of extra-legal measures of value and their impact on law through the

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[42] Martin Kriele, *Rechtsgefühl und Legitimität der Rechtsordnung*, *in* DAS SOGENANNTE RECHTSGEFÜHL, 10 JAHRBUCH FÜR RECHTSSOZIOLOGIE UND RECHTSTHEORIE 23 (Ernst-Joachim Lampe ed., 1985); MEIER, *supra* note 36, at 28, 114, 147; Robert Weimar, *Rechtsgefühl und Ordnungsbedürfnis*, *in* DAS SOGENANNTE RECHTSGEFÜHL, 10 JAHRBUCH FÜR RECHTSSOZIOLOGIE UND RECHTSTHEORIE 158, 165 (Ernst-Joachim Lampe ed., 1985); ROBERT WEIMAR, PSYCHOLOGISCHE STRUKTUREN RICHTERLICHER ENTSCHEIDUNGEN 110 (1969).

[43] This has been proved by empirical psychology. From a developmental psychology point of view, see, for example, MARTIN DORNES, DER KOMPETENTE SÄUGLING: DIE PRÄVERBALE ENTWICKLUNG DES MENSCHEN 124 (1998); GOLEMAN, *supra* note 20, at 19; see also the research work of HAUSER, *supra* note 20.

[44] *See* MAX SCHELER, SCHRIFTEN AUS DEM NACHLASS 356, 348 (Maria Scheler ed., 1957); *see also* MAX SCHELER, DIE WISSENSFORMEN UND DIE GESELLSCHAFT 109 (Maria Scheler ed., 1960).

[45] GOOD, *supra* note 8, at 27.

[46] Sometimes already when seizing the state of records we refer to our evaluating emotional competences to sort the juridically relevant elements.

[47] *See* HARTMANN, *supra* note 18, at 116.

[48] GÄCHTER, *supra* note 30, at 394; MEIER, *supra* note 36, at 133.

[49] RENÉ A. RHINOW, RECHTSETZUNG UND METHODIK 196 (1979); Erhard Blankenburg, *Empirisch Messbare Dimensionen von Rechtsgefühl, Rechtsbewusstsein und Vertrauen im Recht*, *in* RECHT UND VERHALTEN. INTERDISZIPLINÄRE STUDIEN ZU RECHT UND STAAT 85 et seq. (Hagen Hof et al eds., vol. 1, 1994); Otto K. Kaufmann, *"Oder" . . . oder . . . "und" . . . ?: Bemerkungen zur Bedeutung des Rechtsgefühls in der bundesgerichtlichen Rechtsfindung*, *in* ROBERT PATRY, MÉLANGES ROBERT PATRY 367, 371 (1988).

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intentional sense of justice therefore carries great weight in the process of identifying a just solution, even for the critical examination of the result.[50]

Having said this, it has to be mentioned that the starting points for an evaluating sense of justice are, at the same time, limited to a certain extent: There are many provisions that sufficiently determine their own application. Ordinances, for example, contain clear, technical rules of application and do not require further evaluations by authorities. Furthermore, the sense of justice must never be misused in order to achieve an abusive reinterpretation of the law.[51] The sense of justice should not be invoked for political aims due to the danger of its instrumentalization, either: The genuine juridical competence of intuitive evaluating and the human faculty affective cognition, as defined by phenomenologists, would be alienated.

A further specification in classifying the intentional sense of justice from the perspective of legal methodology must therefore be considered.

D. Decision-Making and the Giving of Reasons

I. Competence of Decision-Making and Argumentative Development

In order to classify the competence of intuitive evaluating from the perspective of legal methodology, it is important to point out the distinction between *decision-making* on the one hand, and of the courts' reasoning to justify its decision, on the other. The phenomenon of spontaneous intuitive juridical decision needs to be separated from the subsequent justification in rational arguments of that decision.[52] Because neither a spontaneous affinity nor subjective evidence is able to justify a decision.[53] Furthermore, a general reference to the obvious injustice of the accused's act, for example, will not fulfill the requirements of a fully motivated judgment;[54] any contestant always has the right to obtain plausible, understandable, and argumentative grounds for a judgment.

The theory that juridical decision-making is strongly influenced by elements of intuitive emotion is thus never opposed to allowing argumentative access to the decision;[55]

[50] GÄCHTER, *supra* note 30, at 400; Kaufmann, *supra* note 49, at 367, 372 ; MEIER, *supra* note 36, at 133.

[51] GÄCHTER, *supra* note 30, at 398.

[52] *See* WEIMAR, Rechtsgefühl und Ordnungsbedürfnis, *supra* note 42, at 164; MEIER, *supra* note 36, at 57.

[53] The experience of the sense of value is therefore not suitable to justify juridical decisions. To do so, rational reasons are necessary. *See* Hubmann, *supra* note 7, at 328.

[54] GÄCHTER, *supra* note 30, at 400.

[55] VENZLAFF, *supra* note 33, at 59. The duty to justify juridical decision is not questioned by this in any way; it is indisputable that juridical decisions and decision making must be accessible, comprehensible and reasonable.

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emotional elements that shape decision-making will be *prior but not adverse* to an argumentative development of this decision-making. In other words, subjective emotional factors do not interfere with the justification of a decision by rational arguments; rather, they enable it.

In consequence, phenomenologists uncover a specific moral competence, which influences juridical decision-making. This competence is expressly called upon by various provisions of the law:[56] The legislator regularly refers to this competence when it comes to appropriateness of decisions in cases of good faith and in other general clauses.[57] All in all, in view of a phenomenological approach, a legal system turns out to be essentially based on the proper moral competence of the legal practitioners.

II. Taking Society's Values into Account

Simultaneously, the judge should endeavor not to lose touch with the legal subjects. The judge should constantly check his or her sense of justice against recent cultural and social developments and attitudes of a defined community, the approved doctrine, and the relevant judicature.[58] By doing so, the sense of justice is regulated through the influence of the society, or more precisely, by a defined community based on the law.

When the moral competence of every individual serves as the basis of an evaluating statement, it means that every individual incorporates an equal moral instance; thus, in the domain of the state and its law, this conception of equal moral competence of every individual leads to the precept of democratic participation and empowerment.[59]

Therefore, in democratic societies, procedures, which allow the review of individual value propositions and which have the function of setting a barrier in order to ensure the necessary consensus of a society on common rules, should be foreseen.[60] Within these

[56] A subjective factor which is called upon when evaluating what is to be considered just and right. According to Venzlaff, the methods of interpretation can only be used in an appropriate manner, when the practitioner is aware of the fact that his or her personal approach or attitude will play an essential part in the decision-making process. *See* Venzlaff, *supra* note 33, at 59; *see also* HANS WIPRÄCHTIGER, RECHT 1995, 143, 145 (1995).

[57] GÄCHTER, *supra* note 30, at 397. *See also* the examples above.

[58] VENZLAFF, *supra* note 33, at 59.

[59] Reinhold Zippelius, *Rechtsgefühl und Rechtsgewissen*, *in* DAS SOGENANNTE RECHTSGEFÜHL, 10 JAHRBUCH FÜR RECHTSSOZIOLOGIE UND RECHTSTHEORIE 12 (Ernst-Joachim Lampe ed., 1985).

[60] *See id*. at 74; MEIER, *supra* note 36, at 58. Structural and organizational factors of courts form a barrier hereto such as the stages of appeal and the system of the election of judges as well as the authorities of administration. *See* HANS MICHAEL RIEMER, DIE EINLEITUNGSARTIKEL DES SCHWEIZERISCHEN ZIVILGESETZBUCHES 107 (2003); WIPRÄCHTIGER, *supra* note 56, at 143, 150.

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barriers, emotional competence comes to its significance within a legal system: It is a genuine competence of evaluation that takes society's values into account.[61]

E. Conclusion

To conclude, the main results drawn from the phenomenological view on law can be summarized with two questions: (1) Why are the intentional sense of justice and the phenomenology of emotions important to understand law? (2) How does the discussion about the intuitive moral competence pertain to the normativity of a legal system?

First, it is important to be aware of the influence and impact of extra-legal measures of value on decision-making in order to make it accessible to rational debate.[62] A better understanding of the central functions of the intuitive grasp of the situations with which we are confronted is helpful to establish a realistic normative theory of law.

A classification is helpful to comprehend legal methodology: The display of intuitive evaluation becomes clearer when decision-making itself on one hand, and the presentation of a decision, its reasoning, and the grounds provided to justify it, on the other hand, are distinguished, as phenomenologists propose. Scheler furnishes a standard model for this. There is an element of intuitive evaluation that influences the process of decision-making; at the stage of presentation of a decision—the substantiation—this element needs to be fully supported by rational arguments.[63]

Moreover, comprehension of a decision which contains subjective elements of intuitive evaluation is necessary. Juridical decisions are not influenced exclusively by codified law, precedents, and juridical methods of interpretation; they are in various cases also influenced by a specific *moral competence* by the person applying the law. In a positive sense, this statement recalls the idea that all those who apply the law—by giving to each one his due (suum cuique[64])—contribute to the identification of just solutions.

The phenomenologists' approach similarly shows that the original access to principles of ethics neither builds upon proceedings of rational explanation, nor will it only follow

[61] Scheler describes that one component of conscience based on the intentional feeling is learned and bound to culture and tradition in the conscious mind of the human. *See* SCHELER, *supra* note 6, at 324. The conscious mind is defined differently by Hartmann. For him, it is a primary sense of evaluation that naturally inherits every human being. *See* HARTMANN, *supra* note 18, at 134.

[62] GÄCHTER, *supra* note 30, at 399.

[63] MEIER, *supra* note 36, at 62. We must distinguish between normative justification and normative enforcement. *See also* Eley, *supra* note 23, at 136, 142. *See also* WIPRÄCHTIGER, *supra* note 56, at 143, 148.

[64] PLATON, POLITEIA 433; PLATON, SÄMTLICHE WERKE IN ZEHN BÄNDEN (Karlheinz Hülser ed., 1991); ANNIUS ULPIANUS (ULPIAN), *Digesta* 1.1.10.

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factual power of conviction. On the contrary, rational justification *presupposes* cognitive emotional evaluating acts, which cannot be supplied in a satisfactory way by exclusively rational-argumentative theories of law.

The *origin of normativity*[65] of our legal systems therefore has to be applied in a more fundamental manner; it must be founded upon evaluating acts of perception, which reveal our initial emotional response that leads to an appropriate decision. These acts define and form as pre-rational acts of understanding the grasping of juridically relevant facts. Therefore, they create the basis for the determination of evaluative considerations, which are necessary when applying provisions whose wording is open to interpretation; but also to specify the significance of, for example, equality before the law, proportionality, or good faith in an individual case .[66]

The phenomenon of intuitive evaluation is therefore not to be understood as a factor interfering with the application of the law, but as an insight into the interaction of rational and emotional factors in the emergence of a moral, but also juridical, decision.[67]

[65] Angelika Sander, *Normative und deskriptive Bedeutung des Ordo amoris*, *in* VERNUNFT UND GEFÜHL: SCHELERS PHÄNOMENOLOGIE DES EMOTIONALEN LEBENS 75 (Christian Bermes et al. eds., 2003).

[66] *See supra* Part C.

[67] Rational and emotional elements often collaborate in juridical decisions. This partly corresponds with the postmodern philosophical understanding of an unalterable component of emotion within cognition resp. reason. *See* Brigitte Scheer, *Gefühl*, *in* 2 ÄSTHETISCHE GRUNDBEGRIFFE. HISTORISCHES WÖRTERBUCH 628 (Karlheinz Barck et al. eds., 2003).

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