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Keynote II: “Emotions in the mechanics of politics and law: Between parliamentary lawmaking and judicial judgment” by Sabine Müller-Mall (Goethe University Frankfurt)

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Thank you so much, Christoph Clar, for this kind invitation and introduction right now. My apologies to everyone that I cannot be in the material space in presence, I would have loved to share it with you. Anyway, I hope it's understandable in an acoustical sense. Thank you so much, Mr. Panhofer, for establishing the technical possibility that I can speak remotely to you.

Anyway, as Christoph Clar announced, I will talk about what I call emotions in the mechanics of politics and law. As we have just heard in Ute Frevert's keynote, despite the dignity of the house, sometimes things can become heated and maybe should become heated in parliament. Emotions – and I don't only mean that in a negative sense – and emotionalisation are closely connected to politics as we understand it.

The collective formation of will and the negotiation of how we shape the future are not merely monotonous exchanges of rational arguments. It is as well a matter of forming alliances, identifying and marking opposing positions and also their representatives. After all, the goal of politics is not just to form an individual, rational political will, but to convince majorities of it so that policy can be shaped accordingly. Emotions are certainly welcome here and are, indeed, indispensable, because – we should not forget that – in politics everything is always at stake. What we have just heard, what Ute Frevert talked about and also wrote about, is that parliaments are simultaneously places for regulating those emotions and containing them within an order and emotional regime. As a complement to that, in what follows, I will seek to uncover the extent to which emotions must not only be contained, but may also be necessary to shift the dynamics of the relationship between politics and law that typically shape democratic constitutional systems of today.

I would like to explore the question of how emotions influence the mechanics of politics and law. In parliament, everything is at stake, as I said, and that is why emotions sometimes run high. Ultimately, however, even the most emotionally charged debate must lead to a political decision. Rules and regulations governing parliamentary procedures and conduct have to channel these decisions. In democracies organised under the rule of law, a political decision reached through such

processes is then cast into legal forms. The result of political struggles is not simply a formulated political will, a formulated political decision; rather, it is a legal formalisation of this decision – not always, but paradigmatically a law.

Because a law must be general – it applies not just to one but to many different situations and constellations – it is typically formulated in an abstract manner, albeit in natural language. This language is legally stylised, and usually not particularly beautiful, as we all know, I guess. That is to say, every word – even if it sometimes appears in other contexts of natural language – refers to a range of specific meanings that cannot be deciphered without specialised knowledge. Laws are thus not only general and abstract, but often inaccessible as well. At the same time, we attribute to them a kind of precision which, combined with their formality, is likely something of a counterpoint to a heated, emotional parliamentary debate.

Unlike parliamentary debates, the procedures for applying laws are not exactly known for being highly emotional. Rather, administrative tasks or the work of judges evoke images of a calm, rational technique. Two images thus stand in contrast to one another when we examine the relationship between politics and law in a completely non-technical way with regard to the question of emotions. We could say that on the one hand, we have emotionalised politics, while on the other hand, we have rational law. I would like to suggest that this image may follow a sound intuition but tells us little about the role of emotions in politics and law. This is because the relationship between politics and law is somewhat more complicated, and just as deeply entangled as the relationship between reason and emotion.

First, I will briefly explain in more detail how I understand what I call the mechanics of politics and law. Then, I will zoom a little into law, which is more or less my research focus, to show what role emotions can play in law. Finally, in a brief third step, I will try to indicate to what extent emotions energise these mechanics of politics and law.

Of course, the image that pictures emotionalised parliamentary politics on one side and rational, dispassionate law on the other is an exaggeration. That is quite clear, I think. However, I am less concerned with the rather trivial observation that politics

too – perhaps even predominantly – operates in the mode of rational argumentation, or that emotions are not automatically irrelevant in law either. Rather, I am concerned with the question of how we can describe the relationship between politics and law more precisely than this juxtaposition allows, and what role emotions can and should play in this picture of the mechanics of law and politics.

Politics and law are not spheres that operate independently of one another; rather, they are closely interrelated – at least in modern Western democratic systems that are governed by what we call the rule of law. A specific form of this relationship between politics and law is ultimately described by the concept of the constitution. The constitution indicates a specific dynamic coupling, in the sense that we are dealing with a simultaneous politicisation of law and a juridification of politics. This concept of a constitution goes back to Niklas Luhmann, but has been taken up and continued by many constitutional theorists to the present day. It means nothing less than that in modern constitutional democracies the idea of legality – that is, the strict binding of political actions and decisions to legal regularity – is complemented by constant deliberation in a wide variety of procedures and forms, which serves as a necessary counterpart linked to that legality.

However, the picture drawn here is not static, but dynamic. In non-technical terms, we could say that politics moves law, and law moves politics. Political decision-making leads to political decisions in the form of law, the implementation of which then takes place through the application of law. Conversely, the law thus created in turn binds the political process of decision-making. To put it in more nuanced terms, we can also describe the mechanics of politics and law as a sequence of formalisations and deformalisations. Herein lies the core of democratic constitutions: organising formalisation and deformalisation. Communicative processes are subject to formalisations, which in turn are directed toward deformalised political actions. For example, while the act of voting is highly standardised – such as the act of checking the box on a ballot – voters remain exceptionally free in their voting decisions. However free parliamentary speech may be in terms of content, the sequence of readings and votes is formalised in the legislative process.

In politics we are dealing with a delicate interplay between formalising arrangements regulated down to the last detail on the one hand, and formations of will on the other hand that are not legally described at all, but merely presupposed. This interplay of formalisation and deformalisation is not a random side observation; rather, it is a core aspect of democracy. Democracy processes the diverse convictions, expressions of will, preferences, and interests of individuals not simply by addition or measurement, but – and herein lies its cultural-technological innovative power – by subjecting them to an alternating process of generalisation and concretisation. This process characterises not only political procedures of decision-making and will-formation, but also the law and its procedures. I will talk more on this in my next step in a very short moment.

Above all, however, the interplay of formalisation and deformalisation also characterises the dynamic connection between politics and law. The juridification of politics means the formalisation of a political decision, while the politicisation of law implies the deformalisation of a legal formulation. At the same time, interplay between formalisation and deformalisation takes effect within both politics and law on different levels. What is decisive for the democratic mechanics of politics and law is that the two are always interrelated. The individual references are always also processes of formalisation and deformalisation. So, my thesis is that these processes of formalisation and deformalisation play out in the relationship between reason and emotion, rather than just on one side or the other. That is, emotions play out in the mechanics of politics and law precisely within these formalising or deformalising references of one to the other, which can have not only a destructive but also a productive effect. Now, I would like to elaborate on this thesis mainly with regard to the law – that is, to the initially rather formalised output of parliamentary legislation.

First of all, I think it is crucial to realise that while the legal norm in its formalised form is always an end point of this parliamentary procedure – it is of course the result of the legislative process – it is, in turn, merely a starting point in the mechanics of politics and law: namely, the starting point of the application of law. A law or legal norm is scarcely adequately described by the concepts of validity or content alone, for

law is always oriented toward application. It must be applied. It must come into the world and take effect within the world in order to be law. Even the strictest normativist, Hans Kelsen – who is, of course, well-known here in Vienna – acknowledged this connection. To apply a law, however, means above all to relate it in its generality to a concrete situation, a concrete constellation, or a concrete case. This application of the law in practice is by no means an automatism that could be carried out mechanically through pure intellectual effort, as rare, purely formalist positions attempt to describe. Rather, it is first and foremost a human practice of judgment. However, it is also neither naive nor ignorant to demand that this practice be carried out independently – or, as we call it in law, neutrally – in short, without the involvement of emotions.

The normative demand that the law connects with the world in an emotionless – or, as it is sometimes called, objective – manner is, of course, rooted in entirely legitimate claims: namely, the idea that law can only provide fundamental safeguards of equality and the rule of law if it at least claims to be free from arbitrariness and personal interests. This is precisely why it's not surprising that we often try to keep emotions out of the law. We will find terms such as sense of justice, sense of right or wrong, or legal consciousness extremely rarely in current court rulings or legal analysis. For emotions or feelings generally have no place in the discourse of legal practice or legal scholarship – at least today; it's not true historically, but it is today. Accordingly, the law insists on a sharp opposition between reason and emotion. The claim that legal decisions must be reached solely through rational means is so pronounced that emotions are even regarded as – this is a quote from the literature – "radioactive" in the law. For example, Terry Maroney – a leading, perhaps the leading, researcher in the field of law and emotion – convincingly demonstrates the extent to which a "cultural script of judicial dispassion" has become established in the law.

However, as normatively plausible as it is to try to keep emotions out of the law, accounts from a wide variety of scholars clearly show that this is precisely what is impossible. I will cite only a few illustrative aspects. For example, studies in the sociology of judges and legal psychology show – based on different methods such as

self-reports and external scientific experiments – that judges draw on what we call hunches, a sense of appropriateness, a sense of justice, or intuitions when determining whether a law applies to a legal case – that is, whether a set of facts can be justifiably linked in a legal sense to a formal abstract law in its generality in such a way that a legal judgment can be based on it. To put it less technically, feelings play a constitutive role when it comes to applying a legal norm to a set of facts in a legal judgment. This does not mean, however, that this is an irrational process. On the contrary, the legal judgment must, above all, remain comprehensible. It must provide a plausible, reasonable justification that can be integrated into the normative system of law without contradiction. This idea is what we call the rule of law.

We can learn from the philosophy of emotion that there is actually no contradiction here – that reason and emotion are not natural enemies, as Ronald de Sousa, one of the field's most prominent proponents, writes in his very important book on this matter, "The Rationality of Emotion." I will quote him: The calculations of reason, once they have become sufficiently complex, become ineffective without the contribution of emotion – and indeed according to their own standards. All that remains of the traditional opposition between reason and emotion is this: emotions cannot be reduced to beliefs or desires. – End of quote.

In law, alongside reason, we need emotional elements precisely where the law enters the world – where we apply a legal norm to a case. For it is precisely here that we cannot simply deduce in a logical sense. In its generality, the legal norm itself cannot determine whether it is applicable to a specific, concrete case. We can interpret this norm and also the case, but whether the two fit together – whether they match – must be decided in the legal judgment. For this, and now I'm speaking with Kant, we need two faculties: imagination and reason. Or, in other words, we need the faculty of judgment, and the faculty of judgment is always already linked to both reason and emotion.

We need imagination to move from the particular to the general, and we need the reason to then apply the general back to the particular and integrate the constellation

into the surrounding legal system. But reason alone cannot bridge the gap between the general and the particular. We need emotions that we can call a sense of justice, a feeling of harmony, as we sometimes hear in law, a sense of appropriateness, or even a sense of proportionality. We cannot fully articulate this step using rational means alone. That is why legal judgments involve not only the connection between the general and the particular, but also the interplay of reason and emotion.

Let us now zoom out again from this legal perspective. What does it mean for the bigger picture of the mechanics of politics and law? We cannot ignore emotions in the law either. They become relevant at any rate when it comes to linking general norms to specific real life situations – or, to put it in another way, when we apply the law. And in doing so, they are productive. They are not destructive. They help to connect the general with the particular. Earlier, I described the mechanics of politics and law as multi-faceted interplay of moments of formalisation and deformalisation. The application of law is no exception here. In order to relate the legal norm formalised in political decision-making processes to the entirely informal life situation of a case, a formalised court proceeding once again encounters a completely deformalised judgment. In order to make a judgment, judges retreat into the darkness of the chambers. There is no procedure and no documentation of what they do there. They only return to the light and the public eye with a finished judgment, when the judgment is done. This judgment along with its reasoning then undergoes a reformalisation intended to make it compatible both legally and politically.

Why this detailed description? – I believe it is necessary to make it clear that even though we often focus our attention on the formalised moments of politics and law – the act of voting, the legislative decision, the court proceedings, or the legally grounded written judgment – all these moments necessarily presuppose informal processes and moments. The act of voting presupposes the formation of individual will, legislation presupposes the formation of parliamentary will, court proceedings presuppose the circumstances of a particular life situation, and the traditional reasoning behind a judgment presupposes the formation of the judicial judgment.

In procedures of deformalisation, emotions regularly play a constitutive role. I have attempted to demonstrate this for the formation of traditional judgments, and I think Ute Frevert previously did so for the parliamentary process. If the interplay of formalisation and deformalisation can be seen as an expression of the link between generalisation and concretisation in the democratic relationship between politics and law, as I have attempted to describe, then emotions – alongside reason – constitute a driving force behind this connection. They are not simply an outlet or channel, but are at play when people come together to collectively shape the future – the function of a political constitution. Translated into the mechanics of politics and law, this means that parliamentary processes produce an abstraction in the form of general legal norms. They must distill arguments and feelings from the political process into a neutral formalisation before the law, in its application, becomes subjective, using emotions again. The abstraction of legal norms must then be reclaimed by emotions in each individual case so that it does not remain empty and can be reconnected not only in legal-technical terms but also politically.

This cycle of formalisation and deformalisation, of generalisation and concretisation – which never stands still and which we can express in the formula of the juridification of politics and the politicisation of law as a democratic constitution – mediates not only politics and law but also, in a manner that cuts across them, reason and emotion.

Thank you very much.