

The Sense of Smell in Brazilian Justice

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Introduction

Studying the sense of smell means exploring an extremely complex form of communication characterised by highly differentiated nuances and pragmatic, semantic and syntactic attributions of senses.¹ The olfactory sense is triggered by molecules possessing special attributes in the outside world; these interact with sensory receptors in the nose, sending specific nerve impulse patterns to the brain, which then compares the incoming signal with other memorised signal patterns and, based on whether or not it finds a matching pattern, assigns a meaning to the signal and decides on the most appropriate response.²

¹ An earlier version of this chapter has been published in the journal *Revista de Direito Brasileira* 23 (2020) as ‘The Smell of Law Decisions: Olfaction in Brazilian Superior Justice Court’. It is reproduced here in accordance with the Creative Commons licence CC BY-NC-SA 4.0.

² Robert H. Wright, *The Sense of Smell* (Boca Raton: CRC Press, 1982).

Almost every productive human activity involving even a minimal chemical reaction or physical phenomenon will produce some aroma – industrial and agricultural production, mining, trading, crafting, etc. Several living species communicate intentions and behaviours through smell, emitting pheromones to produce certain hormonal or behavioural reactions in others (such as marking territory or signalling a readiness to mate).³ Humans also produce certain smells as a way of communicating with others. Further, memories evoked by smell are more linked to emotions than consciousness, although the two are not mutually exclusive.

There are relatively few works on smell in legal social theory⁴ – perhaps because Western scholars have, from the eighteenth century onwards, sought to minimise the importance of smell, for example constructing it as animalistic.⁵ However, extensive work has examined the senses in the humanities and social sciences. Howes,⁶ for example has traced the evolution of sensory studies in history and anthropology since the 1980s, proving that

³ Mimi Halpern and Alino Martínez-Marcos, 'Structure and Function of the Vomeronasal System: An Update', *Progress in Neurobiology* 70, no. 3 (2003): 245–318. <https://www.ncbi.nlm.nih.gov/pubmed/12951145>

⁴ Anthony Synnott, 'A Sociology of Smell', *Canadian Review of Sociology and Anthropology* 28, no. 4 (1991): 437–459, 438. <https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1755-618X.1991.tb00164.x>

⁵ Alain Corbin, *The Foul and the Fragrant* (Cambridge: Harvard University Press, 1986).

⁶ David Howes and Constance Classen, *Ways of Sensing: Understanding the Senses in Society* (London: Routledge, 2014), 10–26.

connecting smell and its legal implications more broadly is not only possible but also provides a promising route for the understanding of law in society. Although law has conventionally been associated with reason and considered separate from the realm of the senses, it is undeniably entwined in the regulation and comprehension of sensory experience: 'law, through its conventional association with reason, has been seen as opposed to, or at least situated outside, the realm of senses – although very much involved in its regulation.'⁷

The main objective of this chapter is to explore the significance of the sense of smell in society, particularly in the context of legal interpretations, and to illustrate the tensions between different social systems. To achieve this goal, the chapter is structured in three sections. Firstly, it examines the role of olfaction in the human brain. Secondly, it discusses how olfaction carries historical and cultural significance, and shows that modernity has distorted its meaning in a non-scientific manner. Finally, the chapter examines the jurisprudence of the Brazilian Superior Justice Court (known as the 'Superior Tribunal de Justiça' (STJ) in Portuguese) to demonstrate that modern preconceptions still influence the decision-making process.

The research question that generated this work can be summed up as follows: how do modernity's deleterious conceptions of olfaction manifest within the legal system? The hypothesis guiding this inquiry is that certain

⁷ Ibid., 93.

modern conceptions, despite their outwardly scientific and methodological appearance over the centuries, are biased by social interests. These understandings underlie several knowledge paradigms that have existed through different periods, suggesting that legal reasoning about smell has absorbed these socially constructed conceptions, which have been largely discredited by most research.

The research methodology employed here involved conducting a survey of the STJ website, using the terms ‘cheiro’ (which translates as ‘scent’ in English), ‘odor’ (a synonym for ‘scent’ in Portuguese), ‘olfato’ and ‘faro’ (Portuguese terms that refer to ‘olfaction’ or ‘the sense of smell’; the latter is commonly associated with a dog’s sense of smell).⁸ The study focuses solely on a specific type of decision known as ‘acórdão’, which represents a judgment issued by a collegiate body within the Court, serving as the final ruling on an appeal, and which is typically the last important decision made by the STJ on matters that do not concern the Brazilian Constitution directly.

⁸ Seven decisions of the STJ were found where the word ‘smell’, although it appears in the text of the decision, is not fundamental to the question. These were the described decisions: Recurso Especial 693.172/MG, Rel. Min. *Luiz Fux*; Recurso Especial 840.011/PR, Rel. Min. *Luiz Fux*; Agravo Interno no Agravo em Recurso Especial 389.062/DF, Rel. Min. *Herman Benjamin*; Agravo Regimental no Agravo em Recurso Especial 622.639/SP, Rel. Min. *Herman Benjamin*; Habeas Corpus 379.479/SP, Rel. Min. *Reynaldo Soares da Fonseca*; Agravo Interno no Agravo em Recurso Especial 992.525/SP, Rel. Min. *Paulo de Tarso Sanseverino*; e Habeas Corpus 442.556/RJ, Rel. Min. *Reynaldo Soares Da Fonseca*.

1. The Impact of Smell on the Human Brain and Body

The olfactory bulb is situated in close proximity to brain structures responsible for emotions and long-term memory. This positioning results in the olfactory sense triggering emotions and recalling older memories more rapidly than other senses. Unlike other senses, which must first pass through the thalamus, the olfactory bulb is part of the limbic system. This comprises of a collection of structures that play a role in various aspects of brain functioning, including emotions, behaviour, motivation and long-term memory.⁹ This might explain why smell possesses a unique, unusual evocative quality, and why it induces immediate attraction or repulsion.

There is evidence that smell holds significant meaning. For instance, infants separated from their mothers will cease crying when exposed to clothing worn by their parent.¹⁰ This underscores the idea that the impact of smell extends beyond biological functions, encompassing crucial, formative social interactions, and evident in the profound bond shared between a mother and child, where a sense of safety is transmitted primarily through scent. Further, research dating back to 1983 shows that mothers who have had only brief contact with their newborn babies after undergoing caesarean surgery can identify

⁹ Barney Shaw, *The Smell of Fresh Rain: The Unexpected Pleasures of Our Most Elusive Sense* (London: Icon Books, 2017).

¹⁰ Regina M. Sullivan and Paul Toubas, 'Clinical Usefulness of Maternal Odor in Newborns: Soothing and Feeding Preparatory Responses', *Biology of the Neonate* 74, no. 6 (1998): 402–408. <https://www.karger.com/Article/Abstract/14061>

their scent through a single item of clothing worn by the infant.¹¹

The function of smell extends beyond facilitating recognition and communication from the earliest stages of life. It also serves as a mechanism for establishing cultural boundaries and delineating the concept of the 'other'. Certain smells, which indicate affiliation with a particular group, foster a sense of unity within that community. However, these same scents can also create a sense of separation and alienation of those who do not belong or who are viewed as 'outsiders'. Odour becomes an instrument and a justification for social, racial and moral rejection and exclusion.¹²

In various species, scent – via pheromones – plays a vital role in communicating reproductive availability. Burton¹³ noted that human females exhibit sensitivity to substances with a musky odour, which are also present in pheromones of male mammals of various species, and related to the male hormone, testosterone; moreover, that sensitivity seems to increase during ovulation. Further, research has suggested that women's bodies are perceived as more attractive when their oestradiol levels are at their

¹¹ Richard H. Porter, Jennifer M. Cernoch and F. Joseph McLaughlin, 'Maternal Recognition of Neonates Through Olfactory Cues', *Physiology and Behavior* 30, no. 1 (1983): 151–154. <https://www.sciencedirect.com/science/article/abs/pii/0031938483900513>

¹² Annick Le Geéer, *Scent: The Mysterious and Essential Powers of Smell*, trans. Richard Miller (London: Chatto & Windus, 1993).

¹³ Robert Burton, *The Language of Smell* (London: Routledge & Kegan Paul, 1976), 111–112.

highest and progesterone levels are low.¹⁴ This implies that producing a smell does not solely depend on the intention of its originator; even when a specific meaning is intended, the receiver may experience it in very diverse ways.

Engen¹⁵ has extensively examined the connections between odour and cognitive memory. He suggests that the expression of an odour poses a considerable challenge due to the absence of a 'universal' link or connection between a specific scent and a name. It is difficult to 'name' a scent in a way that it is not with, for example, colour, proving that the naming of smells involves a different semantic system. Engen's research showed that, while we initially prescribe functional meanings to sight and other senses, these evolve as we develop – but smell operates differently. He notes:

[C]hildren define an orange as something to eat. It is not until they are about seven or eight years old that more abstract ways of describing category membership, such as 'an orange is a fruit', become evident in their language. But we continue to name odours according to their functions as adults, when our descriptions of sights and sounds have changed.¹⁶

¹⁴ Janek S. Lobmaier et al. 'The Scent of Attractiveness: Levels of Reproductive Hormones Explain Individual Differences in Women's Body Odour', *Proceedings of the Royal Society B* 285, no. 1886 (2018): 15–20. <https://royalsocietypublishing.org/doi/abs/10.1098/rspb.2018.1520>

¹⁵ Trygg Engen, *Odor Sensation and Memory* (New York: Praeger, 1989), 85.

¹⁶ *Ibid.*, 85.

This is complemented by Degel, who analysed the relationship between odour and implicit memory.¹⁷ In contrast to other senses such as hearing and sight, smell remains primarily 'nominative'. However, this unique aspect does not necessarily diminish the significance of olfactory perception: the immediacy of smell seems to indicate that one of its main functions is to operate as a warning system for detecting potential, dangerous hazards in the environment or in food.

This nominative quality of smell appears to be linked to language. English native speakers, for example, struggle when attempting to abstractly describe a smell, and almost uniquely need to refer to the scent's source. In contrast, native Jahai and Asilan speakers possess a vast lexicon of abstract terms with which to describe smell.¹⁸ Unsurprisingly, the extent of vocabulary used to abstractly define scents appears to be more pronounced in hunter-gatherer societies in comparison with agricultural and industrial communities.¹⁹

Besides this consideration of the purely nominative character of smell, there are several other noteworthy considerations regarding the relationship between olfac-

¹⁷ Joachim Degel, *Implicit Odor Memory* (Utrecht: Universiteit Utrecht, 2000).

¹⁸ Asifa Majid and Niclas Burenhult, 'Odors Are Expressible in Language, As Long As You Speak the Right Language', *Cognition* 130, no. 2 (2014): 266–270. <https://www.sciencedirect.com/science/article/pii/S001002771300214X?via%3Dihub>

¹⁹ Asifa Majid and Nicole Kruspe, 'Hunter-Gatherer Olfaction is Special', *Current Biology* 28, no. 3 (2018): 409–413e2. <https://www.sciencedirect.com/science/article/pii/S09600982217316160>

tion and memory. For example, it has been proven that, unlike hearing and vision, smell does not evoke false memories, only veridical ones.²⁰ This could suggest that olfactory input has direct access to the hippocampus (which is key to the laying down of accurate memories).²¹ False memories tend to originate in the temporal pole, an area associated with the storage of abstract semantic knowledge.²² Further, it has also been proven that olfactory cues are better than visual ones in evoking autobiographical memories.²³

‘The more familiar a person thinks an odour is, the more likable it is judged.’²⁴ This is reinforced by Vroon et al.,²⁵ who argue that there is something obvious about the appreciation of smell: it is used to differentiate

²⁰ Jakke Tammines and Mariam Mebude, ‘Reinstatement of Odour Context Cues Veridical Memories But Not False Memories’, *Memory* 27, no. 4 (2018): 575–579. <https://www.tandfonline.com/doi/full/10.1080/09658211.2018.1513041>

²¹ Anne-Lise Saive, Jean-Pierre Royet and Jane Plailly, ‘A Review on the Neural Bases of Episodic Odor Memory: From Laboratory-based to Autobiographical Approaches’, *Frontiers in Behavioral Neuroscience* 8, 240 (2014): 1–13. <https://www.frontiersin.org/articles/10.3389/fnbeh.2014.00240/full>

²² Martin J. Chadwick et al. ‘Semantic Representations in the Temporal Pole Predict False Memories’, *Proceedings of the National Academy of Sciences* 113, no. 36 (2016): 10180–10185.

²³ Maaïke J. De Bruijn and Michael Bender, ‘Olfactory Cues Are More Effective than Visual Cues in Experimentally Triggering Autobiographical Memories’, *Memory* 26, no. 4 (2018): 547–558.

²⁴ Neil G. Martin, *The Neuropsychology of Smell and Taste* (London: Psychology Press, 2013), 38.

²⁵ Piet Vroon, Anton von Amerongen and Hans de Vries, *Smell: The Secret Seducer*, trans. Paul Vincent (New York: Farrar, Straus and Giroux, 1994), 86–87.

certain kinds of plants or foods from others, and to signal aversion to putrid or faeces-like odours that might pose a risk to health, as well as to identify familiar smells in the environment to aid understanding of one's surroundings.

2. Smell and its Cultural Meanings

The significance of the sense of smell has evolved over time. Classen, Howes and Synott²⁶ in their cultural history of smell describe, for example, the importance of smell to the ancient Egyptians; the pleasure ancient Greeks and Romans took from intense sweet smells that would be overpowering today; the initial repulsion that early leaders of the Christian Church felt towards the burning of incense, due to its association with pagan rituals – a repulsion which was eventually replaced with belief in the sanctity of such aromas; the relationship between the miasma of illness and pleasant smells in the Middle Ages; and the transformation in sanitation and smell that accompanied the industrial and urban revolutions, and new understandings of human and industrial waste as a cause of disease within cities.²⁷ They also discuss how the nineteenth century emphasis on sanitation led to sight surpassing smell as the

²⁶ Constance Classen, David Howes and Anthony Synnott, *Aroma: The Cultural History of Smell* (London: Routledge, 1994), 31.

²⁷ *Ibid.*, 13–92.

foremost sense,²⁸ not least via the development of visual elements and tools such as maps, microscopes and money to the detriment of the olfactory, and the identification of smell with 'savages' and animals – both of which have a history of being disregarded and exploited by Western culture.

While the importance of smell in the West has waned since the 1800s, other cultures consider the meanings of smell very differently and have an alternate appreciation of its significance. The Andaman Islanders in Burma (now Myanmar) constructed their calendar around the cyclic patterns of plant fragrances, and distinguish regions via smells – i.e., the fragrant flowers of inland areas versus the salty scents of the coastline. The Dassanetch (Ethiopia) similarly employ a scent-based calendar that is structured via the scent of burning fields (the dry season) and of blossoming plants (the wet season). In New Guinea, the Umeda calculate distance not by sight but by the distance of a smell, as great emphasis is placed on the olfactive sense, making it extremely accurate. For the Desana people of the Colombian Amazon, tribes are characterised according to their dietary habits, with foods emitting particular smells. This means that the territorial boundaries of a tribe can be delineated by the location of particular odours. They also have moral, botanical and zoological systems based on smell. The Suyá and the Bororo (from Brazil) and the Serer Ndut (of Senegal) structure

²⁸ Ibid., 84.

classification systems (of human, plants and animals) on different types of smell.²⁹

The language of the Maniq, a nomadic hunter-gatherer community residing in southern Thailand, is strongly based on smell, and it is an important reference point for various aspects of life, including medicinal practices and rituals, hunting, and risk prevention. They have a broad lexicon in relation to smell and would not, as in English, simply refer to smell by its source.³⁰ This capacity for abstract expression in relation to smell is also evident within the Jahai, hunter-gatherers based in the Malay Peninsula.³¹

Many cultures use odour as symbolic markers for classifying human beings. The interplay of attractiveness/repulsiveness in the olfactory experience turns smell into a useful symbolic vehicle for categorising according to cultural values, as well as investing classificatory systems with emotive power. The repugnance of a kind of odour, for example, can produce the immediate physical repulsion a society/community demands for a specific class or group of people. Thus, designating a particular group as one that 'smells bad' is to make it repulsive on multiple levels, classifying them at a very basic physical and

²⁹ Constance Classen, *Worlds of Sense: Exploring the Senses in History and Across Cultures* (London: Routledge, 1993), 91–105.

³⁰ Ewelina Wnuk and Asifa Majid, 'Revisiting the Limits of Language: The Odor Lexicon of Maniq,' *Cognition* 131, no. 1 (2014): 125–138, 134. <https://www.sciencedirect.com/science/article/pii/S0010027713002527>

³¹ Asifa Majid et al. 'Olfactory Language and Abstraction Across Cultures,' *Philosophical Transactions of Royal Society B* 373, 20170139 (2018): 1–8. <https://royalsocietypublishing.org/doi/pdf/10.1098/rstb.2017.0139>

emotional level.³² Such culturally constructed parameters of inclusion or exclusion serve as the basis, not only for creating political, but also legal, narratives and norms.

The exercise of olfactory jurisdiction occurs through legal and cultural frameworks of regulatory knowledge, which are based on normative notions of reasonableness. In this way, the normativity of reasonableness reflects cultural expectations that may be communicated through the legal system and the law. While law serves as a mechanism for regulation, control and governance, it also reflects a culture of smell in which certain 'smellers' are more powerful than others, and certain smells are less acceptable than others in public spaces. Smell marginalises through its association with lack of personal hygiene, disregard for community standards, or simply not belonging. In these spaces, smell, or 'the right not to smell', is the extension of personal space to which rights frameworks are attached. In this way, the somatic notion of rights extends beyond the body to that which the body can smell and receive smells that other bodies emit. The experience of smell differs from person to person and is not experienced in a uniform or equal way, and similarly through smell, our encounter with law and inclusion in society is likewise uneven and unequal.³³

Establishing hierarchies based on physical, moral and economic criteria, as well as devising measurements of

³² Constance Classen, *Worlds of Sense: Exploring the Senses in History and Across Cultures* (London: Routledge, 1993), 95–105.

³³ See Sarah Marusek's chapter in this volume entitled 'Law and the Odour-ing of Order: Smell, Air and the Public Forum'.

time and space, form an important basis for legal culture. In Western societies, although moral judgements and prejudices concerning smell are linked with certain groups – the working class, the poor, migrants, those of different ethnic groups (or as George Orwell³⁴ phrased it, ‘four frightful words ... the lower classes smell’) – this may appear to arise from a lack of attention to smell within legal cultures. In Britain, during the eighteenth and nineteenth centuries, smell was used to assign certain attributes to particular cultures and races, including Native Americans, Africans, Chinese and, in particular, Jewish communities:³⁵ ‘there was a shift in the way that smell, beginning in the late nineteenth century, was used to not simply demarcate groups but, in addition to supposedly detect “race” and “ethnicity”’.³⁶

Sovereignty is based on territory and on the ownership of property. The measurement of life expectancy is quantified in years, months, hours, seconds: clockwise. Payment for labour is structured by time or by the completion of specific tasks: ‘formerly power was personal, and therefore imbued with the smell of those who wielded it; now it has become impersonal and abstract, and therefore odourless’.³⁷

³⁴ George Orwell, *The Road to Wigan Pier* (London: Victor Gollancz, 1937), 159.

³⁵ William Tullett, ‘Grease and Sweat: Race and Smell in Eighteenth-Century English Culture.’ *Cultural and Social History* 13, no. 3 (2016): 307–322. <https://tandfonline.com/doi/full/10.1080/14780038.2016.1202008>

³⁶ Mark M. Smith, ‘Transcending, Othering, Detecting: Smell, Pre-modernity, Modernity.’ *Postmedieval: A Journal of Medieval Cultural Studies* 3 (2012): 380–390, 381.

³⁷ Classen, Howes and Synnott, *Aroma*.

The decline of the importance of smell (and the other non-visual senses) in modern Western culture reveals more than just a shift in sensory preferences. It signifies a transformation in cultural and conceptual paradigms brought about by the Enlightenment.³⁸ John Locke's *Essay on Human Understanding* emphasises the visual basis of mental activity;³⁹ Descartes also endorsed sight as the most important sense for science and technology.⁴⁰ Condillac noted of smell: 'of all the senses it is the one which appears to contribute least to the cognitions of the human mind'.⁴¹ Darwin considered it to be 'of extremely slight service',⁴² and for Kant, it was 'the most dispensable' of the senses.⁴³

Even the scientific belief that posits human olfaction as inferior to that of other mammals is, in fact, a misconception. It stems from a non-empirical hypothesis advanced by the French anatomist and anthropologist, Paul Broca, whose work was influential during the nineteenth

³⁸ Classen, *Worlds of Sense*, 27.

³⁹ Walter Ong, *The Presence of the Word: Some Prolegomena for Cultural and Religious Story* (New Haven: Yale University Press, 1967), 66–68.

⁴⁰ Anthony Synnott, 'Puzzling Over the Senses: From Plato to Marx', in *The Varieties of Sensory Experience: A Sourcebook in Anthropology of the Senses*, ed. David Howes (Toronto: University of Toronto Press, 1991), 70.

⁴¹ Etienne. B. de Condillac, *Condillac's Treatise on the Sensations*, trans. Geraldine Carr. (London: The Favil Press, 1930 [1754]), xxxi.

⁴² Charles Darwin, *The Descent of Man, and Selection in Relation to Sex* (London: John Murray, 1874), 17.

⁴³ Immanuel Kant, *Anthropology from a Pragmatic Point of View*, trans. Robert B. Louden. (Cambridge: Cambridge University Press, 2006 [1798]), 50.

century.⁴⁴ His misunderstandings and errors regarding the size of the human olfactory bulb, especially in relation to other mammals, led Broca to conclude that human olfaction was antithetical to free will. Freud subsequently based much of his own work regarding human olfaction and psychoanalysis on these misconceptions.

In contrast, recent studies have shown that human capabilities regarding olfaction should not only be evaluated in relation to the capabilities of other mammals, but according to a broader range of parameters. The primate olfactory system is highly sensitive to many odours and can be highly influential on emotions, physiology, and behaviour when properly tested.⁴⁵ Different species have varying degrees of sensitivity to different odours. In the case of human primates, olfaction exerts a potent impact on our behaviour. Environments can trigger specific memories and emotions, induce activation of the autonomic nervous system, shape perceptions of stress, and prompt both approach and avoidance responses.⁴⁶

⁴⁴ John P. McGann, 'Poor Human Olfaction is a 19th Century Myth', *Science* 356, no. 6338 (2017): eaam7263. <https://science.sciencemag.org/content/356/6338/eaam7263>

⁴⁵ Benoist Schaal and Richard Porter, "'Microsmatic Humans' Revisited: The Generation and Perception of Chemical Signals', *Advances in the Study of Behavior* 20 (1991): 135–199. <https://www.science-direct.com/science/article/abs/pii/S0065345408603216>; Mathias Laska, Alexandara Seibt and Andreas Weber, 'Microsmatic Primates Revisited: Olfactory Sensitivity in the Squirrel Monkey', *Chemical Senses*, 25, no. 1 (2000): 47–53. <https://academic.oup.com/chemse/article/25/1/47/345710>; Gordon M. Shepherd, 'The Human Sense of Smell: Are We Better Than We Think?', *PLOS Biology* 2 no. 5, e.46 (2004): 572–575. <https://journals.plos.org/plosbiology/article?id=10.1371/journal.pbio.0020146>

⁴⁶ McGann, 'Poor Human Olfaction is a 19th Century Myth'.

Yet, in modern architecture, the olfactory dimension of built structures has often been neglected, even though 'the effects created by odoriferous materials, ventilated scents and other wafting perceptions can significantly influence one's experience of a structure'.⁴⁷

The impact of the Enlightenment on legal culture in the West is undeniable. Concepts such as constitutionalism, fundamental rights, the separation of powers, and the central importance of rationality stand as foundational examples. Further, the shift from synthesis to analysis represented in the shift from the importance of smell to sight⁴⁸ may also be seen in the rise of the importance of the written (and published) text of the law, and in the shift in authority, from the individual to the text. Legal decisions can also trigger various sensory experiences, so what metaphorically could be considered the 'smell' of the legal system? It could be said, of course, that law has no physical smell – but there are ways in which it does utilise the olfactory in its propositions and decisions.

3. Smell in Brazilian Justice

In spite of the diminishing significance of smell in Western culture, and including its relevance in law, the legal system can still attribute meaning to smell within its practices. It can serve as an external reference to make a judicial decision possible. An analysis of what can be signified by a law order may clarify – and help critique – the

⁴⁷ Jim Drobnick, 'Volatile Effects: Olfactory Dimensions of Art and Architecture', in *Empire of the Senses: The Sensual Culture Reader*, ed. David Howes. (Oxford: Berg, 2005), 265–280, 265.

⁴⁸ Ong, *The Presence of the Word*, 74.

specific meanings senses have within a social system. As Masurek elsewhere in this volume notes:

[T]he nose is used to distinguish legality from illegality, reasonableness from nuisance, and norm from deviance. In this way, the nose works to embody and instil a social and cultural response to normativity within a positivist framework of smell and polity. The smells of legality and illegality (such as those relating to alcohol, drunkenness, and marijuana smoke) heighten the sensory management of public space (through breathing, bodies, and odour) as legal methods through which social governance and cultural normativity relate to local ordinances and other forms of olfactory-based regulations.⁴⁹

When analysing the jurisprudence of the STJ, it becomes evident that unpleasant smells, along with other unhealthy factors such as overcrowding in prisons, are deemed an affront to the dignity of the human person.⁵⁰ However, expert proof is demanded in Brazilian decisions in order to confirm ‘bad smells’ arising from malpractice within institutions, whether they relate to incarcerated adults, or concern children and adolescents. The state may be considered liable for indemnification of these torts because, in Brazil, their welfare is the responsibility of the state.⁵¹

Expert evidence is also the basis for not only determining areas affected by bad odours as a result of sewage problems, but also for identifying who can legitimately pursue legal action for material and moral damages in

⁴⁹ Marusek, ‘Law and the Odour-ing of Order’.

⁵⁰ Recurso em Mandado de Segurança 46.701/MG.

⁵¹ Recurso Especial 1653359/MG.

such scenarios.⁵² The state can be held civilly accountable for harm caused by the inadequate provision of public sewage treatment services where foul odours and other unsanitary conditions detrimentally impact the wellbeing of individuals. In these cases the role of expert evidence is pivotal in establishing the extent of such unhygienic conditions.⁵³ It is interesting to note that the court does not consider the discovery of a human corpse in a public reservoir to be the basis for civil action if an investigating expert does not detect any changes in odour, colour or microbiology at the site.⁵⁴

It has also been established in law that if expert evidence indicates that a bad smell resulting from the installation of a sewage plant does not devalue a property or cause any other inconvenience, no legal offence is recognised.⁵⁵ Further, this liability is categorised as non-contractual. It is understood that the compensation for such offences must include accumulated interest rates dating back to the inception of the offence or the commencement of the odour-related nuisance.⁵⁶ Specialist evidence is also vital in making judgements in relation to criminal activity and civil liability due to air pollution caused by the emission of noxious fumes from factories.⁵⁷

⁵² Recurso Especial 1693951/RS.

⁵³ Agravo Interno no Agravo em Recurso Especial 1207215/PR; Agravo Regimental no Agravo em Recurso Especial 401.510/RJ; Agravo Regimental no Agravo em Recurso Especial 462.242/RJ; and Agravo Regimental no Recurso Especial 1346198/RJ.

⁵⁴ Agravo Regimental no Recurso Especial 1560641/MG.

⁵⁵ Agravo Regimental no Agravo em Recurso Especial 113.877/MS.

⁵⁶ Recurso Especial 1718176/RS.

⁵⁷ Recurso Especial 32.103/SP; Recurso Ordinário em Habeas Corpus 63.357/PA; Habeas Corpus 409.361/AM.

In relation to drug trafficking investigations in Brazil, it has been established that if a strong odour of narcotic substances, as substantiated by expert evidence and/or police testimony, is discovered in the investigation of a suspect's possessions, then this warrants their temporary detention⁵⁸ or criminal prosecution.⁵⁹ The use of sniffer dogs is also accepted by the STJ in providing valid proof of the presence of illicit substances – this is evident in numerous decisions wherein habeas corpus petitions were rejected.⁶⁰ However, the reliance on expert evidence is mitigated in drink driving cases, wherein a physical on-site evaluation by the police, without the need for a blood test or breathalyser, is deemed sufficient to establish the basis for criminal prosecution.⁶¹

It is interesting to note that the STJ considered accidents that result in the loss of smell to the victim (which is provided, of course, by specialist evidence) a case for

⁵⁸ Habeas Corpus 415.574/MG.

⁵⁹ Recurso Ordinário em Habeas Corpus 34.981/PR; Habeas Corpus 305.308/SP; Habeas Corpus 337.247/SP; Habeas Corpus 364.024/SC; Habeas Corpus 378.323/SC; Recurso Ordinário em Habeas Corpus 87.935/MG; Agravo Regimental no Habeas Corpus 423.838/SP; Habeas Corpus 438.147/SP; Habeas Corpus 461.194/TO; Habeas Corpus 448.036/RS; Habeas Corpus 470.307/SC.

⁶⁰ Recurso Ordinário em Habeas Corpus 29.483/MG; Habeas Corpus 296.256/SP; Recurso Ordinário em Habeas Corpus 52.561/MG; Recurso Ordinário em Habeas Corpus 98.951/PR; Recurso Ordinário em Habeas Corpus 98.397/MG.

⁶¹ Recurso Ordinário em Habeas Corpus 69.856/SP; Recurso Ordinário em Habeas Corpus 73.589/DF; Agravo Regimental no Recurso Especial 1638451/RJ; Agravo Interno nos Embargos de Declaração no Agravo em Recurso Especial 769.140/DF; Recurso Especial 1684544/CE; Agravo Regimental no Habeas Corpus 340.161/PR; Agravo Regimental dos Embargos de Declaração no Habeas Corpus 354.810/PB; Agravo Regimental no Agravo em Recurso Especial 1226785/ES.

civil liability action, particularly in cases of incidents between individuals.⁶² Compensation awarded in such cases varies between 30-80,000 Brazilian reais (USD\$6-16,000).⁶³ Where the loss of a sense of smell is related to compensation claims covered by Brazil's mandatory vehicle insurance (DPVAT), which is managed by a company called Seguradora Líder, which has national capital participation, it is not only the loss of smell that needs to be established, it must also be linked to the victims' permanent incapacity to work.⁶⁴ This is the same in accident aid cases, a benefit provided by Brazilian Social Security. Specialist evidence must not only affirm the loss of smell but demonstrate that it is significant enough to render the plaintiff permanently unable to work.⁶⁵

A Decree (Decreto 8.468/76) enforced by São Paulo State, one of the most significant in the Brazilian Federation, was deemed unlawful by the Superior Court because it had adopted olfaction from authorised personnel as a standard for the measurement of environmental pollution. The court's rationale was rooted in the understanding that an administrative act, such as a decree, cannot impose penalties (in this case financial) based on a norm lacking in objectivity, thus implying that smell is an entirely subjective sense.⁶⁶

⁶² Recurso Especial 404.706/SP.

⁶³ Agravo Regimental no Agravo de Instrumento 1392878/PR; Recurso Especial 1531096/PR.

⁶⁴ Agravo Regimental no Recurso Especial 1308294/MG.

⁶⁵ Agravo Interno no Agravo em Recurso Especial 875.457/SP.

⁶⁶ Recurso Especial 399.355/SP, Recurso Especial 35.887/SP.

Conclusion

Contemporary science has brought about significant changes in our understanding of human olfactory capabilities. This sense, which has been used to draw distinctions between humans and other animal species is, in fact, far more potent and integral to the human body, brain and communication than conventional scientific wisdom has suggested, especially as defined by modernity.

This chapter has demonstrated that scientific and societal perspectives on olfaction have evolved over time, influenced by historical and cultural factors. Perhaps the most profound shift in our understanding of smell occurred with the advent of modernity, an era subject to contextual fluctuations. During this period, smell, as a cultural and social phenomenon, gradually lost its importance and its significance diminished. The Western world sought to rationalise it away, despite scientific evidence of its value, and the Enlightenment established sight as the foremost sense for a modern, rational and reasoned sensibility.

In light of this, several key observations emerge from an analysis of the STJ. Firstly, it classifies olfaction as a vital means of interacting with the world and a significant determinant of human dignity. The STJ consistently interprets tort, environmental and constitutional law in ways that enforces various penalties in relation to olfactory matters, and often views the disregard of smell as a significant form of illegality.

Olfaction is important as a means of providing evidence and used to detect unlawful activity. However, the way it is used within the justice system can vary. For instance, in

the case of illegal drugs, trained dogs and other specialist methods are used for evidentiary purposes; in contrast, regarding illicit alcohol use, the subjective testimony of an authority figure who has inhaled the scent is deemed sufficient evidence.

Smell finds itself relegated to second place by the pre-conceptions of modernity, which elevates sight, written language and reason as the foremost sense, mode of communication and form of knowledge respectively – and all are put to use to assert the authority and validity of a juridical decision. This is not to imply that a return to previous modes of reasoning and expression is inherently superior or more acceptable. The realm of social affairs has attained such a level of complexity that the subjectivity of authority and the search for an innate spiritual essence of things can no longer be regarded as fundamental categories.

The prevailing notion that human olfaction is a lesser sense is now widely discredited by scientific inquiry. The very tenets upon which modern rationality was constructed must be re-evaluated, not only within the realm of hard science, but also within the social and human sciences. Law must be part of this re-evaluation too, and a dynamic, provocative and provoking dialogue between Law and Science should supplant the instrumental authority that characterises contemporary legal systems worldwide.

Obviously, there are limitations to this research. A thorough examination of how other Brazilian courts address smell and olfaction is essential to support the findings presented here. Additionally, these results should be

compared with jurisprudence from other nations in order to verify their consistency. However, these preliminary findings have the potential to inspire future studies in a largely uncharted and unexplored transdisciplinary field – the intersection of law and the senses in court decisions.

Note

AI technology was used to assist in the translation of this chapter from Portuguese to English.

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