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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provide dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

WHITE BLACK LEGAL: THE LAW JOURNAL

EMOTIONS - A TRESPASSER IN THE LEGAL REALM OR A PREVAILING RELATIVE? ¹

(By Sujana Suresh & Jhanavi. M)

INTRODUCTION

Emotion is universal and ubiquitous. It is that much a part of a person's life as is breathing. On a day-to-day basis, we course through a variety of emotions ranging from anger and greed to joy and compassion. Every reasonable decision we take in our lives is influenced by a pinch of emotion we feel in relation. In fact, scholars of psychology have stated that emotion is integral to intelligence and rationality. Emotions not only affect individual actions but they are also a part of communal and societal actions. Like many other disciplines of studies, law has also begun to explore the role of emotion within its system. However, the study of emotion in law is more challenging in nature simply because, for decades, emotions have been strictly prohibited in the legal assessment arena. Traditional legal thought holds that reason prevails over emotion. The field of law and emotion addresses the disconnect between legal assumptions regarding the dichotomy between reason and emotion, and in the process it applies the findings of other disciplines like psychology, sociology, etc. Through this paper, we try to understand and analyze the impact of emotion in criminal and civil law, particularly in the Indian context.

EMERGENCE OF LAW AND EMOTION AS A FIELD OF STUDY

Emotion has always played a big role when it comes to law. Be it differentiating between manslaughter and murder or declining to consider gruesome evidence because it may provoke the juror's ability to decide without a bias. It is however, the unsaid rule of modern legality that the sphere of law should not accept emotion but reason, and strict vigilance is required to keep emotions at bay. This theory has persisted through the times despite its implausibility. It was while this thought prolonged that the concept of emotion gained traction in other social fields like psychology, philosophy, sociology or neuroscience during the late 20th century. At about the same time, legal scholars began studying the law in connection with other fields of study. It was at this juncture that emotion and law gained a foothold and was recognized as a subject

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of study. Feminist jurisprudence was an important force behind the emergent law and emotion scholarship. Their argument was that, law tended to lean towards arguments that lacked qualities like empathy and compassion - qualities that were traditionally dismissed as feminine and therefore not sufficiently rigorous.² In the past two decades, the law has become far more receptive to insights from other fields but has also begun engaging deliberately with understanding human emotion. By the early nineties, fewer scholars viewed emotion as “trespassing on territory, such as the judge’s mind, that is owned by reason”³; Mainstream legal scholars increasingly began to acknowledge that emotions were not wholly alien to judicial decision making, and emotions such as empathy could conceivably contribute to judicial reflection on cases.

Once it gained attention legal scholars focused on the legitimacy of the concept, the question became not whether emotion can have a role in law, but what kinds of emotions operate in particular contexts and what sort of a role do they play? Legal scholars began to study the emotions, often drawing on the research of other disciplines, to answer this question. When the scholars further resorted to studying other disciplines they examined the possibility of the role of singular emotions in law or the appropriateness of specific emotions in particular legal contexts. Most of this research turned towards the negative emotions involved in criminal law. The study of emotion in the administration of criminal justice helped law and emotion scholars to further expand the scope of emotion to pronouncement of judgments, formulation of legislation and appointment of legal officials. The late Justice William J. Brennan, Jr. denounced in a 1987 speech that, “formal reason severed from the insights of passion,” and asserted that passion— defined as “the range of emotional and intuitive responses to a given set of facts or arguments, responses which often speed into our consciousness far ahead of the lumbering syllogisms of reason”—could enhance legal reasoning.⁴ Emotion and law has emerged as a result of a confluence of insights from various trajectories of study. The aim at first was to challenge the prevailing strict dichotomy between the application of reason and emotion in a legal narrative. In the recent years however, the field has grown massively while answering pertinent questions as to the nature of emotion and its role within the law. This more

² Emotion and Law, 2012, *The Annual Review of Law and Social Science*, Susan A. Bandes and Jeremy A. Blumenthal.

³ Passion for Justice, Minow & Spelman, note 36, at 37.

⁴ Brennan, W. J., Jr., (1988). Reason, passion, and “The Progress of Law.” *Cardozo Law Review*, 10, 3, 9, 11.

recent work has significantly expanded the scope of law and emotions scholarship. It encompasses doctrinal areas beyond the criminal field, moving into areas such as family law, education policy, and corporate and securities law. It comprehends both, negative emotions such as fear and disgust, and positive emotions such as love, forgiveness and hope.

CONVERGENCE BETWEEN LAW AND EMOTIONS

The sphere of law intends to influence human behavior. Emotions propel human behavior in any given context, either positively or negatively. The ubiquity of emotions in law is so apparent that it led to a coalescence of law and emotions, to the extent where emotions have become an inevitable aspect of the law. Typically, law was viewed as an epitome of reason and rationality, regarding emotions as peripheral. Gradually, it became evident that emotions permeate the legal framework, whether explicitly in statutes and legal precedents or implicitly in the minds of victims, offenders, judges and advocates. Courts do not have the ability to evaluate this phenomenon, which is why it is essential to assimilate knowledge regarding the same from psychology. Emotions influence the way we interpret information and motivates us towards a particular course of action. For long, people have placed a rigid dichotomy between ‘thinking’ and ‘feeling’, failing to realize that both occur concurrently. Is it necessary to draw a line between the way we feel and the way we think when it pertains to the field of law? Emotions and rationality have an interconnected relationship; emotions provide direction to the process of reasoning and hugely influence decision-making, ultimately having an influence on judgment. This relationship is complex and elusive as emotions can hinder reasoning whilst also enhance it depending on the circumstances. In this view, humans are not by default rational, but are irrational in consistent and patterned ways as a result of cognitively bound decisional heuristics.⁵ Emotions, in this framework, are often characterized as a constant, predictable source of interference or bias with rational choice.⁶ The proximity between emotions and rationality regulates pivotal dimensions of human behavior, aiding in eliminating unconscious human bias.

Our conscious mind allows reasoning whereas our emotions find place in our subconscious mind. Earlier, emotions were considered as “distorting perceptions of rationality”, however this view proved incorrect from an evolutionary point of view which held emotions as an affirmative way of responding to stimuli. Although there was a great deal of skepticism about

⁵ Christine Jollset al., A Behavioral Approach to Law and Economics, 50 STAN.L.REV.1471, 1488 (1998).

⁶ Cass R. Sunstein, Probability Neglect: Emotions, Worst Cases, and Law, 112 YALE L.J.61 (2002)., at 62–63.

the role of emotions in law, the presence of emotions has become definite in the field of law but there is still uncertainty regarding the value of scrutinizing and responding to that presence. Historically, law was considered a “quasi-science” which utilized a process of derivation from statutory mandates of legal principles to pass judgments. Over the years, the relevance of emotions in law was recognized and perceived as a way to modify legal doctrines and statutes. It has allowed the court to focus attention on particular respects of a case and analyze various stakes of the court’s decision for the parties in dispute. It is thus necessary that courts comprehend the psychology of human emotions in order to bring about a paradigm of the law which accounts for the intricacies of human psychology. The dynamics of legal institutions encompasses emotion as a vital component in decision-making. How does the nature of an emotion play a significant role within the domain of law? How is an emotion reflected in law? Legal opinions based on shared moral intuitions should not be held at high regard, but should be subjected to the principles of the legal system. For example, a majority of the Indian society disapproved of the decriminalization of consensual homosexual relations, but the Supreme Court struck down Section 377 of the Indian Penal Code which criminalized homosexual conduct in the Navtej Singh Johar case⁷ on moral considerations that the existence of the provision bolstered the social ostracism and cruel treatment of the gay community. Emotions in concert with cognition allow for a more just and accurate decision. By delving into the many facets of an emotion, courts will be able to determine the reasons that motivated a particular action by the offender or add a deeper layer of understanding towards the feelings of the victims.

EMOTIONS IN CRIMINAL LAW

Although it has been dismissed, emotions have always been an integral part of criminal law. The very basic requirement for an act to constitute a crime is the guilty mind behind the crime i.e. mens rea, which is nothing but a compilation of ill emotions or ill feelings towards someone which provokes you to do some harm to that person or their property. Emotion in substantive criminal law is studied through the two conceptions of emotion. Before analyzing criminal law, it is imperative to apprehend these two conceptions of emotion, namely, the mechanistic and evaluative conceptions.

Mechanistic conception claims that emotions are energies or impulses that compel a person to action without giving way to a thought process or perceiving objects, and it responds to social

⁷ Navtej Singh Johar v. Union of India, AIR 2018 SC 4321.

cultivation only to some degree. They are not even very reliably hooked up to these ways of thinking and seeing: they follow laws of their own.⁸ The mechanistic thought states that emotions are a part of human's innate nature and must be studied from the psychological or physiological angle rather than the political or ethical one. The emotions may have an object but that object is a mere trigger to the emotion than something that is focused within the emotion itself. Although the mechanistic view captures the essence of emotional experience, it fails to explain the way in which humans differentiate emotions and what causes the urgency and the heat to react.

Evaluative conception seeks to explain its theory through a couple of backtracking questions. Are views and thoughts of an object integral to the experience of an emotion? Yes, they are. So how do these thoughts arise? These thoughts arise through appraisal or evaluation of the object and that is the basis of evaluative conception. Appraisal is part of the belief set in terms of which the emotion is defined and this way of seeing the world is a part of what emotional experience includes. This conception believes that the emotional experience of a person reveals the pattern of evaluation, for example, reaction to the loss of person reveals importance that the person carried.⁹ Evaluative conception explains the intuitive phenomena behind the urgency and heat of emotions through the type of evaluation or appraisal.

Eminent authors, Dan Kahan and Martha Nussbaum, applied these two concepts of emotions to influence the interpretation and application of various doctrines of criminal law. Substantive criminal law is primarily based on blame. Many interesting questions of responsibility, and in particular, explicit consideration of emotion, are raised in the construction and application of criminal defenses. The way in which the legal model of liability is constructed, how the law excuses reveal most clearly what the law punishes. Doctrines of sudden provocation, self-defense and duress will help us understand how the Indian legal system has incorporated emotion in criminal liability.

A) PROVOCATION

The Indian Penal Code classifies murder as a heinous crime under Section 300 where culpable homicide amounts to murder. The first exception to this Section however provides that an act caused due to sudden and grave provocation, if it leads to death, does not amount to murder

⁸ Nussbaum, Poetry and the Passions, note 9, at 105.

⁹ Marcel Proust, Remembrance of Things past, 425.

but only culpable homicide. The wording is as follows, “Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.”¹⁰

A criminal appeal wherein the conviction of the appellant-wife under Section 302 of IPC for the murder of her husband was altered to culpable homicide not amounting to murder under Section 304(II).¹¹ The punishment was hence reduced to life imprisonment from death penalty. The section makes specific reference to emotion and uses expressions describing it in terms of time, temperature and control which are characteristics of a mechanical understanding of emotion. Emotion is relevant in the defense because of its relationship to the capacity for self-control. Phrases used in consonance with provocation like ‘heat of the moment’ and ‘time to cool’ are all based on the emotional experience, be it anger, fear or hurt, of the accused. Consider the most common scenario giving rise to claims for the defense of provocation: the loss of self-control by the jealous man in the face of infidelity by his wife (or female sexual partner). Although since the status of women in relationships has changed significantly, the law has not withdrawn the defense of provocation but it has reformulated in such a way that it avoids negative social implications. It does this by understanding anger, not as outrage which leads to righting the wrong but as loss of self control which is grounded in effect.

B) SELF-DEFENSE

From a mechanistic perspective emotion has no consideration in self defense. The law only looks at the apprehensions caused. In the historical *R v. Lavellee* case¹², the United States Supreme Court held that, “The mental state of the accused at the critical moment she pulls the trigger cannot be understood except in terms of the cumulative effect of months or years of brutality”. The accused in the present case had shot her husband in the back of his head when he threatened to kill her. Emotion is important in making out a defense because it affects the reasonableness of the relevant beliefs and apprehension. The IPC states that- Nothing is an offence, which is done in the exercise of private defense.¹³ To exercise the right of private

¹⁰ Exception 1, Section 300 of Indian Penal Code, 1860.

¹¹ Suljina Dhan v. State of Assam, 2018 SCC OnLine Gau 645

¹² [1990] 1 S.C.R. 852, 76 C.R.(3d) 329

¹³ Section 96, Indian Penal Code, 1860.

defense, the IPC mandates that there must be reasonable apprehension caused. The private defense doctrine does not require proof of the emotional experience undergone by the defendant, but nevertheless contours of the doctrine reflect what kind of emotions does a “reasonable” person experience in particular situations. The private defense law accommodates not only the fear, but also the pride of the person who is confronted by wrongful aggression which induces them to commit any act.

C) DURESS

The defense of duress is explained under the English criminal code which states that, “A person who commits an offence under compulsion by threats of immediate death or bodily harm from a person who is present when the offence is committed is excused for committing the offence if the person believes that the threats will be carried out”¹⁴. As with self-defense, under the statutory defense of duress, the discussion of emotion is in the context of the actor’s beliefs. The defense of duress is available to excuse actors who face threats to their life, and succumb to those threats and commit illegal acts. However, as with self-defense, although fear is a central element to the availability of the defense of duress, it is not an explicit consideration. The Indian criminal law does not explicitly recognize duress, but Indian courts have time and again meted out judgments taking duress of the accused into consideration.

All our actions are propelled by emotion, criminal acts are no exceptions. The perpetrator’s urge to commit a crime is fueled by hatred, anger, greed, fear, jealousy, envy and it results in producing grief, sorrow, remorse and vengeance in the victims. These emotions are channeled by the conduct of the police, prosecutors and the judges. That law must take only context into consideration is inane. Emotion in various instances discredits context. Emotion operates as grounds for excuse despite what context suggests as to what should be the personal responsibility of the person. The social constructionist approach to understanding emotion, on the other hand, challenges the law to incorporate emotion in a deeper contextuality which makes for a more transparent application of the rules of criminal liability and provides for a more satisfactory basis for criminal responsibility.¹⁵

¹⁴ Section 17, Criminal Code.

¹⁵ The Heart of the Matter: Emotion in Criminal Defences, Alexander Reily.

INVOLVEMENT AND IMPACT OF EMOTION IN CIVIL LAW

The realm of civil law governs disputes between private individuals or organizations. It deals with issues that concern contracts, torts, property, personal injury and family law. Civil law places increased emphasis on providing compensation to the victims rather than awarding punishment to the offenders. It involves interplay of monetary and emotional variables to compensate the victims for damage sustained by them, either in physical or emotional capacity. Emotions have become ensconced in civil law as the court has to take into account the feelings and sentiments of the victims in order to compensate for their pain and suffering. What is the role of emotions in how and why we punish? Scholars have used an evolutionary approach to conceptualize emotions including, for example, shame as a way to alleviate the costs of reputational damage or love as a solution to foster commitment. Such physiological mechanisms that govern an individual's emotions answer the 'how' and 'why' questions of emotions. Litigants involved in a civil suit seek emotional satisfaction by availing legal mechanisms.

The impact of emotionally-charged statements or photographs tends to evoke a certain frame of mind in the jurors which allows them to carefully process testimonial irregularities. Since the inception of law, it has always had an objective standard for measuring liability and damages. However, the evident need to understand cognitive psychology gained prominence in order to exhibit how these standards and theories of judgment incorporate the judge's intuitive responses in a legal context. In the recent past, legal scholars used the efficiency principle to suggest similarly that tort and other civil law claims achieve settlements that favor those for whom the gains are most valued, and disfavor those who value the gains least.¹⁶ Judges, victims, offenders, witnesses and citizens encounter emotional consequences as a result of their decisions and choices. The jury is well aware of the impact of their judgments, not only on themselves but on other significant legal factors as well. This suggests that judges anticipate the emotions that eventually influence the effect of evidence and facts of the case on their final judgment.

The terrain of family law requires a thorough understanding of the operation of emotions since it deals with emotional harm within intimate relationships that the law might have previously neglected. For instance, in cases of divorce or custody, it involves a great deal of emotional distress on the parties in dispute. Courts seek to mitigate the intensity of negative emotions or

¹⁶ Landes & Posner, *The Economic Structure of Tort Law* (1987).

stimulate the development of positive emotions. Since family law is a private domain, it tends to be concealed from the standpoint of the public. Owing to this fact, many feelings that actively engulf family life such as jealousy, guilt, despair or fear are correlated to intimacy and shame, thus making it difficult for these emotions to engage with law. It is the need of the hour to bring particular emotions to the attention of legislators to facilitate legal intervention in an attempt to expand the scope of the relation between law and emotion in the family domain.

The tort law acknowledges emotional or psychological harm as a distinct form of personal injury which can be intentional or negligent in its core nature. Certain human behavior might be regarded as deeply offensive to the extent that it causes mental injury or emotional distress. Since these emotions are interpreted in a subjective manner, courts have set high standards for a plaintiff to claim damages for infliction of emotional harm. To recover for intentional infliction of emotional distress, the conduct must be “regarded as atrocious, and utterly intolerable in a civilized community.”¹⁷ Even in cases involving reckless disregard for the risk of harm, the court will analyze if the defendant owed a duty of care to the plaintiff. In any case claiming damages for emotional distress, the injury caused should be extremely severe in nature for the court to award compensation. If the defendant assaults the plaintiff, the plaintiff can recover damages for emotional distress even if no other damages exist.¹⁸ Critics have argued that determining what constitutes “outrageous” conduct and “severe” distress is primarily a subjective question that has led the tort to be applied inconsistently among jurisdictions.¹⁹ Evidence of outrageous conduct on part of the defendant should be established for the plaintiff to maintain a suit for emotional distress. To get a deeper understanding of the ‘severity’ of damage sustained by the victim, courts have to shift to psychological means of studying such emotions to ease the entire legal process of awarding compensation.

Emotions introduce a degree of imbalance in contractual remedies. This is primarily due to the reason that on the breach of a contract, only one of the parties experience feelings of anger or resentment towards the other who failed to perform his/her promises. The remedies available on breach of contract which can be broadly classified into expectation damages and specific

¹⁷ Restatement (second) of Torts § 46 cmt.d (AM.LAW INST.1965).

¹⁸ David Crump, Evaluating Independent Torts Based Upon “Intentional” or “Negligent” Infliction of Emotional Distress: How Can We Keep the Baby from Dissolving in the Bath Water? (1992).

¹⁹ Daniel Givelber, The Right to Minimum Social Decency and the Limits of Even handedness: Intentional Infliction of Emotional Distress by Outrageous Conduct, 82COLUM. L. REV. 42,42 (1982).

performance provide satisfaction to only either one of the parties. Expectation damages allow the property title to remain with the party that breached the contract, whereas specific performance allows the non-breaching party to claim property rights. Emotions tend to subside when the agent realizes that act was unintentional or justified. Specific performance is more appropriate for less willful breaches while expectation damages are apt for unreasonable breaches. Monetary damages are considered more befitting when the breach leads to cultivating anger and hard feelings among the parties.

The field of civil law, though penetrated by emotions on a large scale, needs to place more emphasis on analyzing the role of emotion and how it impacts judgments while considering various criteria of normative analysis.

CONCLUSION

Emotions have a complex relationship to the sphere of law. The reality of human emotion should be acknowledged by law in order to be effective in the delivery of justice. Every case, be it civil or criminal in nature, deals with a myriad of detailed emotions which require deep knowledge of the psychology of humans and an introspection into how these emotions go a long way in shaping legal decisions/opinions. Although emotions are no longer treated as intruders in the area of law, there is yet a call for contemplating the role of emotions on a higher comprehension of behavioral norms and various physiological factors.

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