

Positivist Law and Emotional Intelligence: The Need to Reconcile

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While law and emotions have traditionally been understood as mutually repugnant ideas, closer inspection reveals that emotions are not entirely absent from the positivist legal framework; and our legal system stresses upon shoring up against its influence thereby skewing response to emotions in the administration of justice. Restructuring of the administration of justice to make it more emotionally coherent and accommodative besides incorporation of emotional intelligence studies in the curriculum of legal education as also in judicial training and sensitization to enable thoughtful response to emotions shall not only be more fulfilling but also serve the ends of justice and equity better.

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I. Introduction

Law and emotions have traditionally been understood as mutually repugnant ideas that have diametrically opposite connotations. The former is perceived to be premised upon ‘rationality’ while the latter on the vague concept of ‘feelings.’ However, closer inspection reveals that emotions are not entirely absent from the positivist legal framework. From criminal culpability to contractual negotiations, the emotional component seeps into the legal system in various forms – the defence of ‘grave and sudden provocation’ that gives legal recognition to the human emotion of murderous rage¹ as under section 300 of the Indian Penal Code, 1860 [hereinafter ‘IPC’]; the factors that vitiate free contractual consent like ‘coercion’ acknowledge human frailties like gullibility and intimidation;² mental distress factor plays into the damages rule in the law of contracts;³ and, the law of evidence is itself structured to check the emotional prejudices of judges.⁴

The most visible impact of emotions in law is to be found in the realm of judicial decision making. Legal realism has made the notion of adjudication of a dispute based on legal norms, rules and facts of the case untenable as it exposes the human nature of judges who can seldom be free from ideological biases and pre-conceived notions that form a part of who they are and, thus, invariably reflect in their decision making.⁵ In fact, Mr. Justice P.N. Bhagwati, going public with his emotions, in his self-confessed apology for the pro-emergency stand in *ADM Jabalpur*⁶ case became the very crusader

of Public Interest Litigation (PIL) in India – a stance perhaps motivated by a desire to atone for what he himself labelled as ‘weakness of conscience.’⁷

However, not all instances of legal realism have a positive impact – overwhelming public sentiment and jury sympathy led to acquittal of the accused in the notorious *Nanavati*⁸ case; the treatment of law courts as syllogism machines resulted in an extremely unfortunate remark by the presiding judge in the infamous *Priyadarshini Mathoo*⁹ case who said:

Though I know he is the man who committed the crime, I acquit him, giving him the benefit of doubt.

Hence, emotions factor into judicial decision-making either explicitly or implicitly. But the insiders of the legal system continue to shy away from an overt and explicit acknowledgement of emotions in the study, drafting and application of laws. The lack of recognition of the role of emotions is in complete disregard of modern psychological findings that reveal that emotions, instead of being antithesis to reason, actually inspire action towards the service of reason.

II. Positivist Law and Emotional Regulation

Men decide far more problems by hate, love, lust, rage, sorrow, joy, hope, fear, illusion, or some other inward emotion, than by reality, authority, any legal standard, judicial precedent, or statute.¹⁰

But, orthodox legal scholarship understands emotions as dangling, disembodied psychic entities, unrelated to intentions in the interior psyche or to provocations in the objective reality. However, this view of emotions and law as two stark contrasts based on ‘passion’ and ‘reason’ is nothing but a false dichotomy in a number of respects – it is not an accurate indication of the way law is structured and administered,¹¹ the way emotions work¹² or even the way human beings live.¹³ The truth is that law and emotions intersect at various points.

For instance, a murder committed upon ‘grave and sudden provocation’ merits a lesser charge and punishment rather than the one committed in the state of ‘pre-mediated calm.’ However, the verdict changes again if the cause of murderous rage was ‘hatred’ rather than ‘shame.’ Also, emotions like love and similar feelings resulting from closeness, affinity or trust affect rational thinking and hence, have important implications in terms of contract law remedies as made available in situations of undue influence and the likes of it.¹⁴ These legal frameworks essentially prove that such is the influence of emotion on human behaviour that the relevance of emotion to law has been considered as ‘a point so obvious as to make its articulation seem almost banal.’¹⁵

Media trial, such as the one seen in Arushi Talwar’s murder case¹⁶ is a contemporary example in place. There have been countless instances in which media has been accused of conducting the trial of the accused and passing the ‘verdict’ before the court delivered its judgment or even before trial commenced. Trial is essentially a process to be carried out by the courts and trial by media is an undue interference in the justice delivery process. Conviction, if any, should be based not on media reports but on the plain facts placed on record. It is

mandated that pending litigation before a Court, no one shall comment on it in a manner which undermines or prejudices such litigation by casting an influence either on the judge, or the witnesses or even mankind in general against a party to the cause. In fact, even if the person making a comment honestly believes it to be true, it might amount to contempt of court if such comment prejudices the truth before it is ascertained in accordance with due process of law. Most certainly, the fact that media trial has been subject to such opprobrium from all quarters is *per se* testimony to the fact that judges are not beyond emotional sways.

Despite strong denial by the standard understandings of judiciary, while hearing cases judges inevitably experience emotions – an inherent human nature it is! Legal realism has created a space where the emotional side of judges and its pervasiveness in their word can be acknowledged but our legal culture continues to hold firm that a ‘good judge’ would hold it within. Thus, our legal system seeks that judges regulate their emotions, either by keeping it inside or by shoring up against its influence. But judges are given virtually no direction as to how to engage in such emotional regulation. Judicial emotional regulation should go beyond a blanket admonition to ‘put emotion aside.’ Though the legal discourse on judicial emotion has been pitifully less, scientific perspectives on the processes of emotion regulation have been prolific. By intersecting the advancements made on either side, we can see that our legal culture does close to nothing to promote intelligent judicial emotion regulation but does a lot to discourage it.¹⁷

Judges need to be realistically prepared to handle emotional situations they inevitably encounter and must have the ability to respond thoughtfully to

emotions they cannot help but feel by employing such emotions in their judicial behaviour. A relevant case in point is the common practice in the medical community of nurturing emotional intelligence in doctors. Preparedness to cope up with emotional responses is a better approach than attempts at avoidance that would in essence be incompatible with judges' professional responsibilities. Suppression of emotion has huge costs and it is not normatively preferable since it impairs memory and it can paradoxically increase emotion's influence under a garb of false transparency. Hence, the answer lies in effective emotion management and the development of the emotional intelligence in the judiciary.

III. Inculcating Emotional Intelligence in Legal Curriculum

Emotions are educable.¹⁸ Our present structure of legal education inculcates core logical and linguistic abilities, traditionally perceived essential for passing the bar but is strangely silent on interpersonal and relational skills needed to garner a more sympathetic understanding of the client's problems and for developing a strong moral compass in tune with the sensitivities of the judicial process.¹⁹ Thus, it prepares students more for entry into the profession and 'thinking like a lawyer' which often entails engaging in more adversarial and litigative roles,²⁰ treating the whole process as a win loss game and in general looking at the dark side of life.²¹ Such thinking not only minimizes the empathetic understanding of the need to be lawyers but is also detrimental to their emotional well-being²² leading to a pervasive pessimism that contributes to high levels of depression and drug abuse within the profession.²³

Most of what is wanting in the field of legal education can be located in the domain of emotional intelligence – an aptitude that assumes

increasing importance over one's career and entails both identifying and managing emotions.²⁴ It encompasses such skill sets such as those concerning stress reduction, cultivation of self-awareness, improving mood, optimization of performance levels, and so on.²⁵

Law students, lawyers and judges who are typically taught to 'suspend' their emotions instead need to cultivate the following crucial components of emotional intelligence – *emotional perception and expression* which includes the ability to correctly identify how people feel; *emotional facilitation of thought* which encompasses the ability to create emotions and to integrate one's feelings into one's thinking; *emotional understanding* that circumscribes the ability to understand the causes of emotions; and, *emotional management* which is the ability to discover and implement effective strategies that capitalize on the role of emotions in goal achievement. Our court processes, so intensely focused on fact-finding, determination of the law, application of laws to the facts in accordance with the rules of evidence, court procedure and statutory interpretation, need to be sensitized to the emotional implications of the judicial processes.

Legal problem-solving is not a mere dispassionate, detached intellectual analysis involving determination of the legal principles. A deep understanding of what human beings justifiably care about is required of the law if it is to protect those things which does and should matter to humans.²⁶ Thus, it is high time that legal education and judicial training programs integrate emotional intelligence and non-adversarial modalities into the teaching of core legal subjects to usher a new dawn of therapeutic jurisprudence and restorative justice. The law needs to be restructured to make way for psychological perspectives. Legal writers have often assumed certain aspects of human nature and

structured their theories accordingly. Such assumptions are more often than not either simplistic claims (for instance Bentham's hedonistic utilitarianism) or simply a legal fiction (for instance theories of corporate personality), but in no case are they based on the psychology of the actual persons who make and live under the law. Even when they do acknowledge human nature, legal scholars tend to ignore the centrality of emotions, dispositions, fantasies, and wishes to human psychology.²⁷ The time has come when our laws must be systematically overhauled to incorporate the neurological and scientific theories of human emotions. The legal framework which is essentially focused on human behaviour makes assumptions about the mind, malice, emotions, motives, and capacities that underlie and propel acts. It must accommodate the theories of psychology which systematically study such behavioural attributes to create a more balanced legal understanding of emotions.

It is insisted that the law of self defence in criminal jurisprudence conveniently ignores the feminist perspective – phenomenon like battered woman syndrome and its associated symptoms of depression and learned helplessness.²⁸ Another neurological study indicates that the defence of 'grave and sudden provocation' that dilutes crimes of 'heat of passion' is essentially a masculine phenomenon.²⁹ Men are generally more prone to respond to external stimulus with such murderous rage than their female counterparts. Such inconsistencies, inherent biases and psychologically incongruent prejudices which have crept into our legal domain need to be rooted out.

IV. Conclusion

While law struggles to evade the truth of emotion, feelings persist. Emotions cannot be reduced to lofty abstractions since they are the essence of daily life. They endure and make us human in our everyday suffering and in our illogical hope. Commonplace and transcendent, emotions are as universal as our capacity to name and claim love and hate, whether or not these sentiments can be captured in statutes and verdicts. Feelings are what bind all of us when our collective and individual masks are removed. The power of authentic emotion, as much as and perhaps even more so than the authority of law, holds out the promise of shared humanity.

Thus, instead of giving in to the age old fear that leaving the door of emotions ajar in the realm of law will lead to loss of the notions of consistency, fairness and equity, we need to work towards the acceptance of an emotionally intelligent system of judging, drafting and sentencing which will strengthen therapeutic justice and improve the quality of overall decision making. In this context the crucial role of emotional intelligence in legal education and judicial training can no longer be ignored.

Notes

¹ Daniel Goleman, *Emotional Intelligence* (Bloomsbury Publishing Plc, London, 1996).

² Terry A. Maroney, "Law and Emotion: A Proposed Taxonomy of an Emerging Field" 30 *L. & Hum. Behav.* 119 (2006).

³ Jeremy Horder, *Provocation and Responsibility* (Oxford University Press, Oxford, 1st edn., 1992).

⁴ Harvey Teff, *Causing Psychiatric and Emotional Harm: Reshaping the Boundaries of Legal Liability* (Hart Publishing, Portland, 1st edn., 2008).

⁵ Nelson Enonchong, "Breach of Contract and Damages for Mental Distress" 16:4 *Ox. J. Legal Stud.* 617 (1996).

⁶ *ADM Jabalpur v. Shivkant Shukla*, AIR 1976 SC 1207.

⁷ P.N. Bhagwati, "Fading Hope in India" *The New York Times*, April 30, 1976.

⁸ *K.M. Nanavati v. State of Maharashtra*, AIR 1962 SC 605.

⁹ *Santosh Kumar Singh v. State through CBI*, (2010) 9 SCC 747.

¹⁰ Markus Tullius Cicero, *De Oratore II* (Franklin Classics Trade Press, London, 2015).

¹¹ K. Abrams, "The Progress of Passion" 100:6 *Mich. L. Rev.* 1602 (2002).

¹² Nussbaum, *Upheavals of Thought: The Intelligence of Emotions* (Cambridge University Press, Cambridge, 2001); Robert C. Solomon, *Not Passion's Slave: Emotions and Choice* (Oxford University Press, New York, 2003).

¹³ *Supra* note 1.

¹⁴ Rachel F. Moran, "Law and Emotion, Love and Hate" 11 *J. Contemp. Legal Issues* 747 (2001).

¹⁵ *Supra* note 2.

¹⁶ *Dr. Mrs. Nupur Talwar v. CBI Delhi & Anr.*, Cri. App. No. 68 of 2012 (SLP (CrI) No. 2982/2011).

¹⁷ Terry A. Maroney, "Emotional Regulation and Judicial Behaviour" 99:6 *Calif. L. Rev.* 1485 (2011).

¹⁸ Jerome Frank, *Law and the Modern Mind* (Routledge, New York, 2017); See also Terry Maroney, "The Persistent Cultural Script of Judicial Dispassion" 99:2 *Calif. L. Rev.* 629 (2011).

¹⁹ Howard Gardner, *Multiple Intelligences: New Horizons* 12 (Basic Books, New York, 2006).

²⁰ Leonard L. Riskin, "The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and Their Clients" 7:1 *Harv. Negotiation L. Rev.* 1:17 (2002).

²¹ Martin E.P. Seligman, *Authentic Happiness: Using the New Positive Psychology to Realize Your Potential for Deep Fulfilment* 178 (Nicholas Brealey Publishing, London, 2003).

²² *Ibid.*

²³ Susan Swaim Daicoff, *Lawyer Know Thyself: A Psychological Analysis of Personality Strengths and Weaknesses* 8-13 (American Psychological Association, Washington DC, 1st edn., 2004).

²⁴ See Cary Cherniss and Daniel Goleman (eds.), *The Emotionally Intelligent Workplace* 27-44 (Jossey-Bass, San Francisco, 2001).

²⁵ For the list of emotional intelligence skills, see David R. Caruso & Peter Salovey, *The Emotionally Intelligent Manager* 25-26 (Jossey-Bass, San Francisco, 2004); Also see Reuven Bar-On, "The Bar-On Model of Emotional-Social Intelligence" 18:1 *Psicothema* 13:23 (2006).

²⁶ Justin D'Arms, "Empathy and Evaluative Inquiry" 74:4 *Chi.-Kent L. Rev.* 1467 (1999).

²⁷ Eric A. Posner, "Law and the Emotions" 89 *Geo. L.J.* 1977 (2001).

²⁸ Norman J. Finkel and W. Gerrod Parrott, *Emotions and Culpability: How the Law is at Odds with Psychology, Jurors and Itself* (American Psychological Association, Washington DC, 2006).

²⁹ Katherine K. Baker, "Gender and Emotion in Criminal Law" 28 *Harv. J.L. & Gender* 447 (2005).