

ST.GALLEN SYMPOSIUM

Global Essay Competition 2024

Title:

How to protect what does not exist: the challenge of the legal protection of emotions.

Essay:

Introduction

While the concept of "law of scarcity" has been widely studied in economics to describe the market functioning in a resource-constrained environment, "scarcity of law" or "legal scarcity" is a much less familiar concept. Few lament the lack of law. Indeed, contemporary legal systems almost all suffer from a common curse: an overabundance of rules. France is a prime victim of this legislative inflation: over the last twenty years, the number of legislative provisions has risen by a staggering 73%.¹ Given this, one might argue that in the legal sphere, available resources exceed human needs. Yet there is one dimension of human life in which all legal systems suffer from the same deficiency: emotions. Nowhere in the world are emotions directly protected by law. Consequently, as things stand at present, only a particularly bold interpretation of laws and court rulings can provide a basis for protecting emotions. A paradox emerges: while human beings often seek to protect and conceal their emotions, the law does not protect emotions. Human needs for emotions protections exceed available legal resources.

With AI-based emotion recognition systems now able to identify and use our emotions, now more than ever has come the time to adopt a law of emotions. To my knowledge, such a call for a law of emotions has never been made before. Admittedly, a quick Internet search will reveal that the concept of a "law of emotion" was popularized almost twenty years ago by Dutch psychologist N. Frijda.² However, he uses the notion of "law" not in the legal but scientific meaning. Thus, N. Frijda does not investigate the legal rules applicable to emotions, but the psychological principles governing emotions. One might have expected the introduction of the notion of "laws of emotion" in psychology to lead lawyers to transpose this notion into law. This never happened.

Although not going as far as to advocate the adoption of a law of emotions, the "Law and Emotion" movement in the United States has been calling since the beginning of the 21st century for an end to the legal fiction that emotions do not exist. Scholars rightly claim that "emotion is everywhere in law".³ Emotion may affect law twofold: on the one hand, emotions such as anger may lead to the adoption of a law in reaction to an event, and on the other, a law may generate emotions as some individuals may be saddened or pleased by the adoption of a law. In addition, the Law & Emotion movement highlights the crucial role played by emotions in the justice system, analyzing the empathy of judges, the shame

¹ Januel, P. (2022). 2021, année record de l'inflation normative », *Dalloz Actualités*. <https://www.dalloz-actualite.fr/flash/2021-annee-record-de-l-inflation-normative>.

² Frijda, N. H. (1988). The laws of emotion. 43 *American Psychologist*. 349–358. <https://psycnet.apa.org/record/1988-28577-001>.

³ Bandes, A. S. (1999). THE PASSIONS OF LAW, 311.

of defendants, the suffering of victims, and the bitterness of witnesses.⁴ In short, “emotions already infuse decision-making whether or not they are recognized by legal actors”.⁵

While the emergence of the Law & Emotion movement has led to a growing awareness of the role of emotions in the law, it has not been accompanied by a debate on the need to adopt a law of emotions.

Challenge: The law feels no emotion

Observation: the law ignores and scorns emotions

The law is presented as an “emotionless activity”⁶: the law “does not speak the language of emotions”⁷ and ensures emotions are restrained, for example by the use of gowns by judges and attorney in numerous countries. In addition to ignoring emotions, the law is wary of emotions. In Roman antiquity, women were only granted “diminished” rights due to their emotions. Indeed, women were reputed to be governed by their emotions, and therefore incapable of binding themselves by contract. Nowadays, eminent lawyers continue to denigrate emotions. For instance, one can read on the website of one of France's leading law universities a statement from the dean entitled “do not legislate under emotion”.⁸ The point here is not to criticize the substance of the dean's statement, but simply to note that the only mentions of emotions by French lawyers use the term “emotion” in a critical way. In the same vein, another law professor warns against succumbing to the “tyranny of emotions” and “psychologizing legal relationships”.⁹

Because of the law's ignorance of and scorn for emotions, the word ‘emotion’ seems to have been banned from universities in France. In addition, judges are told to never let their emotions be perceived. A vade mecum issued by the *Conseil d'Etat* - France's supreme court for public law - states that “the subjectivity of the judge must be set aside to ensure the impersonality of the institutional word. Judicial decisions are characterized by a style of neutrality and restraint (...). They must not contain subjective assessments or reveal the adherence, irritation or irony of their authors”.¹⁰ By demanding from judges not to express any emotion, or at the very least to allow no emotion to transpire, the *Conseil d'Etat* is asking judges to deny their humanity. Indeed, emotions are the manifestation of our humanity. American judges long ago distanced themselves from this archaic perception of emotions. As early as 1988,

⁴ *Ibid.*

⁵ Harris, A.P. & Schultz, M. M. (1993). A(nother) Critique of Pure Reason: Toward Civic Virtue in Legal Education. 45 *STAN. L. REV.* 1773-1774. <https://www.jstor.org/stable/1229127>.

⁶ Papaux, A. (2009). Un droit sans émotions. *Iram non novit jus : esquisse des rapports entre sciences et droit. Revue européenne des sciences sociales*, 105-119. <https://journals.openedition.org/ress/70>.

⁷ Lagarde, X. (2021). La légitimité des émotions. 4 *Sorbonne Law Review*. 224-231. <https://irjs.pantheonsorbonne.fr/sites/default/files/inline-files/RJS.4.12.2021.pdf>.

⁸ Kenfack, H. Ne pas légiférer sous l'émotion. Université Toulouse Capitole. <https://tls-droit.ut-capitole.fr/accueil/presentation/ne-pas-legiferer-sous-lemotion>.

⁹ Jeuland, E. (2019). Le juge et l'émotion. https://hal.science/hal-01790855v5/file/Jeuland_le_juge_et_l_emotion_revu_EJ9.pdf.

¹⁰ Conseil d'Etat. (2018). Vade mecum sur la rédaction des décisions de la juridiction administrative. <https://www.dalloz-actualite.fr/sites/dalloz-actualite.fr/files/resources/2018/12/vade-mecum.pdf>.

Justice William Brennan emphasized the role played by emotions in his opinion in *Goldberg v. Kelly*.¹¹ This demonstrates the gap that exists between the USA and France. However, even in the USA, "students learn how to think like lawyers by adopting an emotionally remote, morally neutral approach to human problems and social issues, distancing themselves from the sentiments and suffering of others, avoiding emotional engagement with clients and their causes, and withholding moral judgment".¹²

It is worth remembering that the inability to feel emotions and express empathy is a symptom of many mental illnesses¹³ ...

Justification: the law is based on the opposition between reason and emotion

The reason for law's blindness to emotion is easily identifiable: law is rooted in the opposition between emotion and reason. Law sees reason as a vector of stability, and emotion as a vector of instability. Accordingly, law perceives emotion as "subjective, prejudicial, irrational, intangible, partial, and impervious to reason".¹⁴ This perception, which is today confined to the law, was held by mankind for many centuries. In antiquity, Plato described emotion as a soul disease. The Christian religion claims that emotion leads men to sin. In the 17th century, French philosopher Descartes formally theorized the opposition between emotion and reason.

All social sciences share this history with law. However, it is now more than thirty years since the other social sciences abandoned the cult of perfect rationality - as evidenced by the award of the Nobel Prize in Economics to Daniel Kahneman in 2002 - and embraced emotions as a new object of study. This recognition of emotions in economics, sociology, philosophy, and psychology is rooted in the discovery by neuroscience that Descartes' opposition between reason and emotion was a mistake. In *Descartes' Error*¹⁵, neuroscientist Antonio Damasio demonstrates that making decisions without emotions leads to bad decisions. In other words, emotion is not opposed to reason, but combines with it to optimize the decision-making process.

Why is law the only social science that fails to incorporate emotions, when neuroscience has shown this to be a mistake? The answer probably lies in Tocqueville's assertion that "all the members of the legal profession are at all times (...) the opponents of innovation".¹⁶ It would appear that it is because lawyers

¹¹ Brennan, W. J. (1998). Reason, Passion, and "The Progress of the Law", 10 *CARDOZO L. REV.* 3, 21.

¹² Aiken, J. H. (2012). The clinical mission of justice readiness, 32 *B.C. J.L. & Soc. Just.* 231-246. <https://scholarship.law.georgetown.edu/facpub/1639/>.

¹³ Christelles, M. (2020). « Un peu de philo du droit: « L'émotion dépasse les règles juridiques » (C. Castaner). Brève perspective sur la place des émotions en droit. <https://www.lesurligneurs.eu/un-peu-de-philo-du-droit-lemotion-depasse-les-regles-juridiques-c-castaner-breve-perspective-sur-la-place-des-emotions-en-droit/>.

¹⁴ Bades, S. & Blumenthal, J. (2018). Emotion and the Law », *Annual Review of Law and Social Science* 2012 8:1, 161-181. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2169180.

¹⁵ Damasio, A. R. (1994). *Descartes' error : emotion, reason, and the human brain*. New York :G.P. Putnam.

¹⁶ De Tocqueville A. (1835). *Democracy in America*. Book I. Chap. XVI, "Causes which Mitigate the Tyranny of the Majority in the United States.

are inherently conservative and therefore resistant to change that they have refused to integrate neuroscientific findings, preferring instead to preserve their traditional opposition to emotions.

Consequence : Inexistence of legal rules on emotion

The law's inability to abandon the opposition between law and reason leads to the non-existence of legal rules on emotion and the profusion of laws referring to reason. French law is particularly emblematic of this phenomenon: the word "emotion" does not appear once in a French legal code. On the other hand, the word "reason" appears repeatedly in virtually all French legal codes. For example, the French Civil Code alone includes 29 direct references to reason. The Civil Code mentions "reasonable" 16 times¹⁷, "reasonably" 8 times¹⁸ and "*en tant que de raison*" 5 times¹⁹. Two points are worth noting. Firstly, the notion of "reason" is not defined by the legislator, making it impossible for French lawyers to know exactly what reason is, and how provisions containing the word "reason" are to be interpreted. Secondly, the expression "en tant que de raison" does not make sense in French (and therefore cannot be translated). In short, in addition to failing to mention emotions, French law inadequately refers to reason.

Not only do emotions not appear directly in any French code, but when they do appear indirectly, they are used in relation to... animals. Indeed, a provision states that "animals are living beings endowed with sentience [*sensibilité*]"²⁰. The French legislator never defines the notion of sentience. But it seems to be understood that sentience is a reference to emotions. Beyond this uncertainty as to the meaning of the word "sentience", there is one certainty: this provision was introduced into the French Civil Code in 2015 to protect animals. Consequently, the obvious conclusion seems to be that it is because animals feel emotions that they benefit from protection under French law. Feeling emotions therefore justifies greater protection under the law. For animals. For human beings, however, things are not as clear.

French Law is therefore perfectly able to acknowledge that animals feel emotions, but still fails to acknowledge and protect the emotions felt by human beings.

Recommendation : Enshrining emotions in the law

The law's inability to protect emotions is all the more problematic with the recent rise of AI systems capable of identifying the emotions felt by individuals by analyzing, for example, their facial expressions or variations in their voice. A large number of companies are already using these emotion recognition systems²¹, in particular to "influence" consumer choice through targeted advertising.

¹⁷ French civil Code, art. 1116, 1117, 1123, 1158, 1188, 1195, 1197, 1211, 1222, 1226, 1231, 1252, 1307-1, 1806, 1962, 2315.

¹⁸ French civil Code, art. 601, 627, 1218, 1245-3, 1728, 1729, 1766, 1880.

¹⁹ French civil Code, art. 724-1, 815-6, 1100-1, 1578, 1871-1.

²⁰ French civil Code, art. 515-14.

²¹ Markets and Markets. (2023). Emotion Detection and Recognition Market Size, Share and Global Market Forecast to 2027. <https://www.marketsandmarkets.com/Market-Reports/emotion-detection-recognition-market-23376176.html>.

In this context, only two options remain to avoid the collection of emotions: either stop feeling emotions or embrace law of emotions. In other words, we have no choice but to legislate.

Acknowledging the existence of emotions: adopting a fundamental right to feel and express emotions

Article 8 of the Universal Declaration of Human Rights states that "everyone has the right to freedom of thought". While our thoughts are thus protected by a fundamental right, emotions enjoy no such protection. Against this backdrop, I recommend the adoption of a fundamental right to feel and express emotions. In other words, I recommend acknowledging by fundamental rights that emotions exist.

As we cannot protect what we do not understand, the consecration of such a fundamental right will require the formulation of a legal definition of the notion of emotion. Establishing such a definition will be complex, given that there is no consensual definition of emotions in psychology and neuroscience.²² The result of this is disagreements over the classification of certain affective states as emotions. The European regulation on artificial intelligence (AI Act) - adopted in December 2023 - provides a good illustration of this issue. The AI Act does not create a law of emotions but regulates AI systems for recognizing emotions (this regulation is largely insufficient, however, as the use of these AI systems for commercial purposes to "influence" consumer behavior remains lawful). The AI Act does not define the notion of emotion but gives examples of affective states that constitute and do not constitute emotions.²³ The AI Act excludes "pain" from the category of emotions. Yet the International Association for the Study of Pain claims that "pain is an unpleasant sensory and emotional experience".²⁴

It is therefore essential to adopt a broad definition of emotion, and above all not to exclude certain affective states from the field of emotions. A broad definition of the notion of emotion will enable the law to adapt without difficulty to future findings of neuroscience and psychology regarding emotion. The definition formulated by S. Bandes may be considered: "emotions are a set of evaluative and motivational processes, distributed throughout the brain, that assist us in appraising and reacting to stimuli and that are formed, interpreted, and communicated in social and cultural context".²⁵

Protecting emotions: adopting a fundamental right to emotional privacy and protection of emotional data

Recognizing the existence of emotions is necessary, but not sufficient: it is only a prerequisite for the protection of emotions. You cannot protect what does not exist. The real purpose of the law of emotions

²² Posner, E. (2001). Law and the Emotions. 89 *Georgetown Law Journal* 1977. https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1013&context=occasional_papers.

²³ AI Act, recital 8a.

²⁴ Amaro-Díaz, L., Montoro, C. I., Fischer-Jbali, L. R., Galvez-Sánchez, C. M. (2022). Chronic Pain and Emotional Stroop: A Systematic Review", 11 *J Clin Med* 12. <https://www.iasp-pain.org/publications/pain-research-forum/papers-of-the-week/paper/200422-chronic-pain-and-emotional-stroop-systematic-review/>.

²⁵ Bandes S. & Blumenthal, J., *op. cit.*

is therefore to protect emotions by means of the law. Concretely, I recommend the adoption of a fundamental right to emotional privacy and the protection of emotional data.

Fellow lawyers, the time has come to set aside our conservatism and to embrace the revolution of emotions.

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