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EDITORIAL NOTE

SHAPING LEGAL REALITY: GENDER AND EMOTION

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I. INTRODUCTION

In 1533, Anne Boleyn, a lady's maid to Catherine of Aragon became the Queen of England. This was quite peculiar given that Boleyn was succeeding Catherine of Aragon, who had only just been divorced from the King of England, Henry VIII. Later infamous for beheading two of his wives, Henry VIII was deeply unhappy that Catherine of Aragon had been unable to produce him a male heir. This, in addition to his love and devotion for Boleyn made him extremely frustrated that he was not permitted a divorce under the Church of England. As his frustration and keen desire to marry Boleyn grew, it led him to make several political changes that would eventually allow him a divorce. These changes also furthered the Act of Supremacy, 1534 which cemented the break from the Catholic Church and made the King of England, the Supreme Head of the Church of England. Historians consider the divorce a key component of the Reformation that would ensue in England in that period; which would later change the trajectory of European history.¹

¹ Sarah Pruitt, 'How Henry VIII's Divorce Led to Reformation' (*History* August 11, 2023) <<https://www.history.com/news/henry-viii-divorce-reformation-catholic-church>>; 'Reformation Parliament' (*UK Parliament*) <<https://www.parliament.uk/about/living-heritage/evolutionofparliament/origin-sofparliament/birthofparliament/overview/reformation/>> last accessed on 9 February 2024; Philip Edwards, 'The Henrician Reformation' in *The Making of the Modern English State* (British Studies Series 2001); Alexandra Elise Deselms, 'A "Princely Lady": The Religion, Power and Identity of Anne Boleyn' (2014) 3 *Ursidae: The Undergraduate Research Journal at the University of Northern Colorado*

Even with the evolution the world has witnessed in the centuries since, the people of today would find their behavior resembling that of King Henry VIII—their actions rooted in deep sentiment shape legal decisions. Precisely as Henry VIII's decisions found motivation in his emotional sensibilities, so does the present day legal and political order. The deduction may not be as overt, since emotion has been kept at the margins as an enemy of logic and reason, especially within the law. In support of doing so, rationalists argue that an entity like emotion undermines the rule of law.² Its dynamic nature threatens dangerous results for the black letter of law. While their fears might be partially valid, this has greatly held back the investigation into the role of emotions and how it can be relied on to supplement, and not hinder the legal system.

Nevertheless the interdisciplinary studies of law and emotion (“the study” or “the scholarship”) have made great strides over the last few decades. A key shift was prompted by the publication of *Passions of Law* by Susan Bandes which exposed the cracks of the rationalist approach to law and illustrated how emotion can be vital to our good judgment in the legal system. It was the forebearer of law and emotion jurisprudence as we know it today. Subsequently, flourishing study in the field has extended this inquiry from more obvious domains like criminal policy and jury selection to inconspicuous areas of law like bankruptcy,³ constitutional law,⁴ legal education among many others.⁵ The burgeoning literature and scientific reliance on neuroscience, psychology and similar disciplines has garnered approval and endorsement from many in the legal fraternity as well.⁶

At its core, the study rebuts the rationalist premise of safeguarding law from emotion by illustrating how our emotional sensibilities form part of our interactions with the legal system, whether we acknowledge them or not. This claim is bolstered by relying on neuroscience and cognitive psychology which has assisted us in grasping the interrelationship between emotion and reason.

² Owen M Fiss, ‘Reason in all its Splendor’ (1990) *Brooklyn Law Review* 56; P Schlag, *The Enchantment of Reason* (Duke University Press 1998); See generally J Harvie Wilkinson III, ‘Subjective Art, Objective Law’ (2010) 85 *Notre Dame L Rev* 1663—Here Wilkinson III makes an interesting argument about judicial overreach through judges’ emotions. Treatment of emotions in the judicial realm might institutionalize the emotions of judges since this exercise relies on the creative imagination of judges, transforming them from adjudicators to artists and destabilising the power of the law. Presently, we take the essence of this argument into a different direction and highlight the dangers of not acknowledging judges’ emotions altogether.

³ Pamela Foohey, ‘Debt’s Emotional Encumbrances’ in *Research Handbook on Law and Emotion* (Edward Elgar Publishing 2021).

⁴ Terry A Maroney, ‘Emotional Common Sense as Constitutional Law’ (2009) 62(3) *Vanderbilt Law Review* 849.

⁵ Gillian Calder, “Whose Body is this?” On the Role of Emotion in Teaching and Learning Law’ in *Research Handbook on Law and Emotion* (Edward Elgar Publishing 2021); See Generally Susan Bandes, *The Passions of Law* (1999).

⁶ Dan M Kahan and Martha C Nussbaum, ‘Two Conceptions of Emotion in Criminal Law’ (1996) 96 *Columbia Law Review* 269; Eimear Spain, *The Role of Emotions in Criminal Law Defences: Duress, Necessity and Lesser Evils* (Cambridge University Press 2011); Susan A Bandes and others, *Research Handbook on Law and Emotion* (Edward Elgar Publishing 2021).

As will become clear in upcoming sections, law is not the lone and unfazed objective arbiter of truth but an amalgamation of many individual truths coming together. These truths take root in different belief systems, intermingling with emotions and sometimes leaving an unpredictable effect on the legal system. Therefore, these claims about emotion are not read alone but along with another all-pervasive metric that has an equally profound impact on the functioning of the legal system-gender. While intersections like caste, queerness or race can be examined along with emotion in a similar manner, this paper limits itself to gender for the sake of being concise.

This paper draws from cognitive psychology and lay theories of emotion as they are understood in legal decision making, and connects them with gender to argue that the emotional common sense, as embodied in the law, is gendered in nature. It is argued that not acknowledging emotion in legal processes when it already exists, allows for this gendering to continue and leads to an inequitable and non-inclusive system. Here, Part II establishes the basis for the inextricable link between law and emotion. It explains lay theories as they exist within psychology and clarifies what they mean within legal contexts. Of note is the understanding of “emotional common sense” that forms an inherent part of law. Part III interlinks this with the gendered nature of emotional common sense, through literature on the subject and judicial decisions that confirm the same. Part IV concludes.

II. EMOTIONAL COMMON SENSE IN THE LAW

A. RECOGNISING LAY THEORIES OF EMOTION

The study of emotion is rather complicated but its implication for the law at present can be put forth very simply-the role of emotion does not simply disappear because it is not recognised. Instead, not doing so allows its improper use to go unchallenged and creates existential problems in the law.

The most important point of neuroscientific inquiry for our field is the untangling of emotion and reason, the finding that they are not opposed to each other, or in conflict anymore.⁷ It has been established that emotions have cognitive roots and emotions are capable of exhibiting coherent rationality.⁸ When the cognition of an emotion has its roots in a particular belief or motivation, a change in such belief or motivation is reflected in the change in emotion.⁹ For instance, if X is working hard to get a job, then success on the job market will lead to happiness, or feeling joy but inability to land a job would mean sadness

⁷ Antonio R Damasio, *Descartes' Error: Emotion, Reason and the Human Brain* (Vintage Books 1994); Phoebe Ellsworth, 'Appraisal Theory: Old and New Questions' (2013) 5 *Emotion Review* 125; Lisa Feldman Barrett, *How Emotions are Made: The Secret Life of the Brain* (Macmillan 2017).

⁸ Bennett W Helm, 'Emotions as Evaluative Feelings' (2009) 1 *Emotion Review* 248.

⁹ *ibid.*

or anger. Accordingly, the cognitions in the situation manifest in my emotional reaction. Though emotions could be taken to an irrational degree, it has been argued that emotions occur in rational patterns related to the objects that hold importance for the agent of those emotions.¹⁰ As evident in the above example, the object that holds importance for agent X is the job they are seeking, and the patterns of their emotions and behaviour will relate to the outcome of their desired goal. While their emotional response could reach an irrational conclusion based on several factors, a discernible pattern would more often than not could be deduced. Interestingly, this challenges the hierarchy of reason and emotion and calls upon us to reconsider rationality's claim to the law, as its only truth.

Even besides neuroscientific study, the role of emotion in justice and morality is well explored by scholars. Kant's philosophy on emotions and moral agency,¹¹ Durkheim's portrayal of the relationship between emotion and belief,¹² Adam Smith pondering about 'moral sentiments' in the law,¹³ later rejected by Posner as unnecessary,¹⁴ Nussbaum's reflections of emotion and ethical reasoning among many others.¹⁵ They all form an interesting and intricate web of ideas for what it means to consider emotions as an entity in the legal space.

The most fundamental question to gauge where we are headed is 'What is emotion?'

At the outset, emotion is considered an amalgamation of mental and physical responses, largely containing some core elements.¹⁶ These elements are mental, physiological, behavioral, expressive and phenomenological.¹⁷ For example, if one is in a situation of fear, crossing paths with a lion, waiting for a dreaded outcome or the like, these elements would form part of their experience. On evaluating that they are feeling fear, their bodily fight or flight responses would be triggered leading to a quicker heart rate, etc (physical element). This would also manifest in the form of sweating or fidgeting (expressive element), an unpleasant feeling or perhaps anxiety (phenomenological element), the inclination to stay or fight (behavioral element) and attention to the situation (mental element). Psychologists and neuroscientists debate which of these elements form a core part of emotion.¹⁸

¹⁰ *ibid.*

¹¹ Mariannina Failla and Nuria Sánchez Madrid, *Kant on Emotions* (Gruyter 2021).

¹² Émile Durkheim, *The Elementary Forms of Religious Life* (Oxford University Press 2008).

¹³ Adam Smith, *The Theory of Moral Sentiments* (1759) DD Raphael and Alec L Macfie (eds) (Oxford: Clarendon Press 1976).

¹⁴ Richard Posner, *The Economics of Justice* (Harvard University Press 1983).

¹⁵ Martha Nussbaum, *Upheavals of Thought: The Intelligence of Emotions* (Cambridge University Press 2001).

¹⁶ Jesse J Prinz, *Gut Reactions: A Perceptual Theory of Emotion* (Oxford University Press 2004); Andrea Scarantino, 'The Philosophy of Emotions and Its Impact on Affective Science' in Lisa Feldman Barrett and others (eds), *Handbook of Emotions* (Guilford Press 2016).

¹⁷ *ibid.*

¹⁸ Jesse J Prinz, *Gut Reactions: A Perceptual Theory of Emotion* (Oxford University Press 2004); Andrea Scarantino, 'The Philosophy of Emotions and its Impact on Affective Science' in Lisa

Divergence on the matter and the label under which emotions fall—whether they are judgements, perceptions, feelings or something else has led to the formation of different traditions or schools of thought.

While the study of emotions is very thrilling, a key finding for law is the lay theories of emotion and their manifestation in the law's emotional common sense. Lay theories of emotion are abstract frameworks that individuals use to observe and reason out other people's emotions and actions.¹⁹ Using their structural knowledge and personal experiences, a lay individual attempts to understand the emotions and motivations of those around them. In doing so they rely on certain assumptions to make sense of the world they live in. For example, if we see an individual crying at a funeral we would deduce that the death of another has caused them sorrow and resulted in their sad state. Here, we would be using our pre-existing knowledge as a theory to reason with the behavior we see around us.

Framing a lay theory in one's mind to understand and reason with the emotions of others is a combined result of one's own internal states, personality, beliefs and attitudes, cultural norms and intentions.²⁰ The globalised world has also exposed us to lay theories in different cultures and given us insight into their emotional assessment.²¹ Today, not just the behaviour of those around us, but also the extensive media usage²² including the internet, television, movies and books impacts our structural understanding of other's emotions.

Broadly, an observer relies on the evidence in front of them and their own assumptions about emotions and the world to arrive at the conclusion they do.²³ Two simple points of study here are attention worthy.

Feldman Barrett and others (eds), *Handbook of Emotions* (Guilford Press 2016).

¹⁹ Desmond C Ong, Jamil Zaki and Noah D Goodman, 'Affective Cognition: Exploring Lay Theories of Emotion' (2015) 143 *Cognition* 141.

²⁰ Chi-yue Chiu, Ying-yi Hong and Carol S Dweck, 'Lay Dispositionism and Implicit Theories of Personality' (1997) 73 *Journal of Personality and Social Psychology* 19; Alison Gopnik and Henry Wellman, 'Why the Child's Theory of Mind Really is a Theory' (1992) 7 *Mind & Language* 145; Toby Epstein Jayaratne and others, 'White Americans' Genetic Lay Theories of Race Differences and Sexual Orientation: Their Relationship with Prejudice Toward Blacks, and Gay Men and Lesbians' (2006) 9 *Group Processes & Intergroup Relations* 77.

²¹ Maruška Svašek and Zlatko Skrbiš, 'Passions and Powers: Emotions and Globalisation' (2007) 14 *Identities: Global Studies in Culture and Power* 367; Simon Ozer, 'Towards a Psychology of Cultural Globalisation: A Sense of Self in a Changing World' (2019) 31 *Psychology and Developing Societies* 162; Paolo Boccagni and Loretta Baldassar, 'Emotions on the Move: Mapping the Emergent Field of Emotion and Migration' (2015) 16 *Emotion, Space and Society* 73.

²² Robin L Nabi, Jiyeon So and Abby Prestin, 'Media-Based Emotional Coping: Examining the Emotional Benefits and Pitfalls of Media Consumption' in *The Routledge Handbook of Emotions and Mass Media* (Routledge 2011).

²³ David Marr, *Vision: A Computational Investigation into the Human Representation and Processing of Visual Information* (San Francisco: WH Freeman 1982); WS Geisler, 'Ideal Observer Analysis' in *The Visual Neurosciences* (The MIT Press 2003).

First, the assumptions we rely on to arrive at such conclusions sometimes unintentionally form part of our understanding.²⁴ For instance, we may not realise how race forms a part of the stereotypical assumption that a mind makes when trying to understand another person's behaviour. Second, a person's actual emotions may be misread or misconstrued by the observer because of the assumptions that form part of the observer's lay theory.²⁵ For example, one could very easily misunderstand tears of joy as tears of sorrow, or mistake any unpleasant emotions as another-introversion or shame as hatred or arrogance.

While it is our emotional makeup that separates us and bolsters our individuality, it is common for one to believe that their emotional experiences are common, even universal-it is this aspect that poses a problem for the law.

B. EMOTIONAL COMPETENCE OF THE LAW

The legal system, like any other institution, is subject to the lay theories of emotion since it helps shape our basic understanding of the world. Thus, an emotional assessment inadvertently becomes a part of many legal assessments. Since one's emotional common sense forms a part of one's larger common sense this is unavoidable. When a judge is presented with a complex medical question they can try to guess how a wound occurred or the effect it had on the victim, but they defer to the wisdom of a doctor or medical expert because their experience and knowledge is wholly insufficient to answer the question. Whereas when a legal question contains an emotional component or relevance, a judge does not defer it to anyone because their lay theories fill the gap and form their understanding of the matter.²⁶ This can prove disastrous in complex situations, because it may rely on an overgeneralised, universalised assumption of emotions that may lead to an incorrect conclusion.

Because the law does not recognise emotion, any question with emotional relevance falls into what Mahoney calls an 'epistemological blank space'.²⁷ The law turns to no bases for the emotional assessment it is about to make. Instead it becomes the arbiter of emotions, attributing emotions where it deems fit, omitting it where it does not. This leads to an uneven approach and undermines legal conclusions.

²⁴ Ong (n 19).

²⁵ Ong (n 19).

²⁶ Terry A Maroney, 'Emotional Regulation and Judicial Behavior' (2011) 99 California Law Review 1485.

²⁷ Terry Mahoney, 'Lay Conceptions of Emotion in Law' in *Research Handbook on Law and Emotion* (Edward Elgar Publishing 2021); As clear from a subsequent example in this section, Justice Venkatesh of the Madras High Court avoided this epistemological blank space in *S Sushma v Commr of Police* 2021 SCC OnLine Mad 2096, by educating himself on same sex couples and the queer community.

This is not to say that emotional common sense should not exist within the law, it is impossible to function without it. However, when it goes unacknowledged we cannot control its shortcomings. Modern legal realists understood this too—Justice Cardozo opined that emotions are inevitable, they prove that judges are humans.²⁸ This observation, while treated with skepticism in the previous century has now become a more familiar notion.

In stable situations, emotional common sense from judges may very well prove accurate. Time and again lay theories of emotion prove successful when making deductions in legal situations.

For example, in cases of state's unnecessary censure of art and film, courts while holding in favour of the artist have been able to delicately deal with the matter of intolerance of art. Intolerance is a reaction, stemming from sensitivity and emotional distress or disapproval.²⁹ Like any other emotional response in a legal matter, courts along with the legal standards apply their emotional common sense to gauge whether a film or book actually runs the risk of being obscene or inflammatory or whether the objection is a result of emotional intolerance. In *Indibly Creative (P) Ltd v State of W.B.*, while the film in question had been released, the government was obstructing public exhibition of the film.³⁰ When reprimanding the state government for doing so, the Supreme Court held that intolerance towards art and literature should not be permitted. Here, while intolerance towards rights of others or free expression is a legal issue, intolerance itself is an emotional response when one is sensitive to a certain subject matter, producing reactions of disdain or disapproval. The sensitivity in the legal system itself is a good thing—the very same type of disapproval is projected (by society and subsequently judicial institutions) onto obscene material like child pornography, but courts decide at what point the emotional response of intolerance is a valid one. In doing so they rely on their emotional common sense.

Conversely, a good example of when lay theories were acknowledged and avoided was witnessed in the Madras High Court when a lesbian couple moved the High Court seeking protection from the harassment they could possibly face from the police, especially because their parents were unhappy with the idea.³¹ While the Supreme Court has several times highlighted the need to protect same-sex couples and uphold their privacy, lower courts and societal institutions have struggled with doing so.³² Resultantly, ignorance and/or bigotry is the unfortunate reality of queer persons in India. Even though their rights have been recognised, they exist only on face-value—traditional notions constantly influence how legal actors and enforcement agencies treat them. In the present case, granting

²⁸ Benjamin N Cardozo, 'The Nature of the Judicial Process' (1922) 20 Michigan Law Review 688.

²⁹ M Verkuyten et al, 'The Psychology of Intolerance: Unpacking Diverse Understandings of Intolerance' (2020) 29(5) Current Directions in Psychological Science 467.

³⁰ *Indibly Creative (P) Ltd v State of W.B.*, (2020) 12 SCC 436.

³¹ *S Sushma v Commr of Police* 2021 SCC OnLine Mad 2096.

³² *ibid.*

protection to the couple from their parents, and curbing police harassment would be a legally sound decision-routed through Article 14 and 21 of the Constitution and several dictums of the Supreme Court. However, in addition to doing this, Justice Venkatesh of the Madras High Court employed a method he himself calls 'out-of-the-box'.³³ After acknowledging that he does not know enough about same-sex couples, Justice Venkatesh engaged a psychologist to understand same-sex couples and the queer community better, this helped him acknowledge prejudices and common stereotypes that may exist in his understanding. The judge further sought a report from the psychologist and directed the parents of the couple to attend sessions with the psychologist as well-this would better help them understand their children. Later, the court issued guidelines for protection of same-sex couples and Justice Venkatesh urged the elimination of discrimination against the queer community.³⁴

Here, a number of important questions and observations arise. At one point Justice Venkatesh stated that his decision on the matter should come from his heart and not his head-a sentence that would make rationalists burst a blood vessel. And while there is a very perceptible danger of overreliance on emotions in the legal system, which should itself be critiqued, the direction taken by the court was a welcome one. Instead of allowing his lay theories to dominate the decision of the court, Justice Venkatesh relied on an expert and more wholesome understanding in a legal situation with complex emotional stakes to guide him to make the decision. This can be contrasted with the recent treatment of a queer petitioner by the Punjab and Haryana High Court.³⁵ Here, a judge refused to entertain a matter concerning protection of same-sex couples by calling it 'immoral' and stating that morality and constitutionality are not different, clearly allowing his emotional instincts about the subject to cloud his legal decision-making.

A number of issues could arise if judges use legal procedure for judicial activism constantly, and this itself needs to be understood, but the same is not possible without acknowledging the connection between law and emotion.

Further, courts are not always up to the mark in gauging emotional responses. Legal actors often pass off their lay theories as truths instead of beliefs, in complex and multifaceted situations-this may lead to unjust and inconsistent conclusions.

One of the ways in which it makes itself apparent is discretionary power granted to judges and legal actors under a common law system. Discretionary

³³ *ibid.*

³⁴ *ibid.*

³⁵ Aiman J Chishti, "Take this Immoral Thing Back": Punjab & Haryana High Court Judge on Habeas Corpus Plea Moved by Woman in Same-Sex Relationship' (LiveLaw 12 January 2024) <<https://www.livelaw.in/high-court/punjab-and-haryana-high-court/punjab-haryana-high-court-same-sex-relationship-queer-discrimination-justice-pankaj-jain-246584>> last accessed on 23 February 2024.

power gives judges the capacity to make individual evaluations based on the facts and circumstances of the case.³⁶ The determinations made as part of discretionary power are assumed to follow the logical coherence of the case at hand. However, there is no express guidance for judges when it comes to discretion. Several times this discretion is couched under broad and generic words like ‘public policy’,³⁷ ‘law and order’³⁸ ‘public order’³⁹ ‘morality’⁴⁰ ‘national interest/security’⁴¹. And while granting discretion has its own merits, the fact that there is little to no guidance when it comes to discretionary power, it becomes a ground ripe for lay theories of emotion to form part of reasoning. In such cases, legal actors may rely on more arbitrary factors like their experience as well. For instance, in 2018, the Indian Patent Office rejected a patent application for a vibrator (or sexual stimulation device) on the basis of public order and morality, to the extent of toutting them as morally degrading.⁴² And while courts have held vibrators to not be obscene, the Patent Office deemed them so, without reason.⁴³ This presents a clear case of an adjudicating authorities’ legal decision being marred by their emotional belief on the matter, without being compelled to give adequate reasoning.

Apart from administrative law matters which rely on a high use of discretion, there are several examples of judicial discretion susceptible to emotional reasoning, sometimes even opaque. For instance, the Chief Justice’s discretion as master of roster in assigning matters and creating benches.⁴⁴ Further, even the Supreme Court’s discretion under Article 142 of the Constitution grants it the judicial power in any matter, to pass a decree or order that it deems necessary to do ‘complete justice’.⁴⁵ The scope of Article 142 has been restrained and the Apex Court cannot use it to create a new edifice of law that does not already exist—it is a supplementary provision that should not create conflict with existing statutory provisions.⁴⁶ However, the court has at certain points ignored this caveat to pass judgements, and it is unclear at what point the Supreme Court deems it necessary to invoke Article 142. In the past year, the court held that it can invoke

³⁶ Etcheverry, Juan B, ‘Rule of Law and Judicial Discretion: Their Compatibility and Reciprocal Limitation’ Archives for Philosophy of Law and Social Philosophy, ARSP: Archiv Für Rechts-Und Sozialphilosophie 104, no 1 (2018) 121-34 <<http://www.jstor.org/stable/45175255>> last accessed on 23 February 2024.

³⁷ The Arbitration and Conciliation Act 1996; The Indian Contract Act 1872. Plz chk if this will be deleted

³⁸ Use of ‘law and order’ is common in s 144 CrPC cases, *Ram Manohar Lohia v State of Bihar* 1965 SCC OnLine SC 9 : AIR 1966 SC 740; *Madhu Limaye v SDM, Monghyr* (1970) 3 SCC 746 : AIR 1971 SC 2486; *State of Karnataka v Praveen Bhai Thogadia* (2004) 4 SCC 684; *Anuradha Bhasin v Union of India* (2020) 3 SCC 637 : AIR 2020 SC 1308.

³⁹ Constitution of India 1950, arts 19(2) and 25.

⁴⁰ The Patents Act 1970, s 3(b).

⁴¹ The Unlawful Activities (Prevention) Act 1967, s 15.

⁴² ‘India Rejects Patent Plea for “Immoral” Sex Toy’ (BBC 14 August 2018) <<https://www.bbc.com/news/world-asia-india-45179057>> last accessed on 23 February 2024.

⁴³ *Kavita Phumbhra v Commr of Customs* (Ports) 2021 SCC OnLine Cal 2378.

⁴⁴ *Shanti Bhushan v Supreme Court of India* (2018) 8 SCC 396 : (2018) 5 ABR 663.

⁴⁵ Constitution of India 1950, art 142. Plz chk if this will be deleted.

⁴⁶ *Supreme Court Bar Assn v Union of India* (1998) 4 SCC 409.

Article 142 to grant divorce basis irretrievable breakdown of marriage. The court supported its ruling by arguing that Article 142 only prohibited the court from supplanting an existing law through the establishment of new law, or from issuing an order that violated specific substantive law requirements.⁴⁷ Because power may be exercised in a novel domain, and since divorce under irretrievable breakdown of marriage was a novel area, the Supreme Court could make decisions on the subject until necessary laws were enacted by Parliament.⁴⁸ This power, especially in a complex marriage or family law dispute, can be arbitrarily used based on the emotional common sense and experiences of the judge.

The law assumes that judges are rational and logical actors, unfazed by emotions and capable of setting them aside, or even controlling them when they show up, but there is no reason this should be the case, other than the fact that the law has willed it so. The everydayness of life affects how one understands legal issues—even judges. And while basic emotional deductions might be reliable, legal actors might overestimate their ability to engage with complex emotional manifestations in legal situations. Very often, value judgment passes off as legal dictum. This ignores different cultural norms, diverse viewpoints and leads to a non inclusive legal system.⁴⁹

As a result there is a need to question and challenge our emotional common sense and keep in check our reliance on lay theories of emotion in the legal system. The next section adds another layer to this conception to elaborate on the issues faced.

III. GENDER AND EMOTION

Gender plays a central role in understanding society. The pervasive differences it brings to all aspects of life and culture has become a major research focus.⁵⁰ In terms of law this has led to protection of and furtherance of rights, move towards equitable approaches and generally a more inclusive system. However, nowhere has this been close to enough for achieving desired status and goals for gender minorities.

Feminists have long argued that the law is ‘male’.⁵¹ The assumptions law is based on do not imagine a world with equal rights, or envision a public space

⁴⁷ *Shilpa Sailesh v Varun Sreenivasan* 2023 SCC OnLine SC 544.

⁴⁸ *ibid.*

⁴⁹ Gita Mittal and Dipika Jain, ‘Women’s Equal Representation in the Higher Judiciary: A Case for Judicial Diversity in India’ (2023) 47(2) *International Journal of Comparative and Applied Criminal Justice* 185; Christina L Boyd, ‘Representation on the Courts? The Effects of Trial Judges’ Sex and Race’ (2016) *Political Research Quarterly* 69.

⁵⁰ Mary Zaborskis, *Gender Studies: Foundations and Key Concepts* (29 November 2018) <<https://daily.jstor.org/reading-list-gender-studies/>> last accessed on 23 February 2024.

⁵¹ Carol Smart, ‘Quest for a Feminist Jurisprudence’ in *Feminism and the Power of Law* (Routledge 1989).

where women and queer persons occupy the berth in equal measure to a cis-heterosexual man.⁵² This holds true for most intersectional identities. Race, gender, caste, or class lines which are drawn in society are not simply erased by law's claim to truth and justice. However, attempts have been made to tackle the biases within the legal system from several different perspectives including representation, equity, reparations among others. Here, I suggest that we tackle it from the perspective of emotional common sense within the law.

It is no surprise that gender impacts how one perceives and witnesses emotions. There are many factors that influence this difference, including biological attributes, physical well-being and socialization.⁵³ Such differences strike at the heart of most experiences granting a unique grounding of it to different genders. This is not to generalise based on gender but draw from existing research that points towards homogenous experiences within gender communities, which are altered by culture, race, caste, etc. For instance, male and female infants respond differently to stimuli presented to them, this being a result of rules that have been displayed to them.⁵⁴ A most prominent and similar occurrence was observed in *Brown v Board of Education of Topeka* when it came to race.⁵⁵

Research shows that these differences only grow as individuals age. They are evident in non verbal communication, smiling, crying, anger, depression, anxiety, positive and negative experiences, processing of trauma among many other things.⁵⁶

Yet, the value of these differences is often reduced to one simplistic notion or another. Gender studies suggest that the complex connection between gender and emotion is often affected by popular beliefs about the emotional experiences of men and women.⁵⁷ Generalisations and stereotypes about others' inner lives, especially when they may be different than ours, are extremely common. This is

⁵² *ibid.*

⁵³ Stephanie Shields, 'Thinking about Gender, Thinking about Theory: Gender and Emotional Experience' in Agneta H Fischer (eds), *Gender and Emotion: Social Psychological Perspectives* (Cambridge University Press 2000).

⁵⁴ Tara Chaplin, 'Gender and Emotion Expression: A Developmental Contextual Perspective' (2014) 7 *Emotion Review* 14; LR Brody, 'The Socialization of Gender Differences in Emotional Expression: Display Rules, Infant Temperament, and Differentiation' in Agneta H Fischer (eds), *Gender and Emotion: Social Psychological Perspectives* (Cambridge University Press 2000).

⁵⁵ *Brown v Board of Education of Topeka* 1954 SCC OnLine US SC 44 : 98 L Ed 873 : 347 US 483 (1954)— In this milestone decision, the Supreme Court of the United States ruled that separating children in public schools on the basis of race was unconstitutional. It signaled the end of legalized racial segregation in the schools of the United States, overruling the "separate but equal" principle set forth in a previous decision. The arguments and judgment relied on Mamie and Kenneth Clark's "Doll's test". In this experiment a majority of African American children showed a preference for dolls with white skin instead of Black ones— a consequence, the Clarks argued, of the pernicious effects of segregation.

⁵⁶ Agneta H Fischer (eds), *Gender and Emotion: Social Psychological Perspectives* (Cambridge University Press 2000).

⁵⁷ Shields (n 53).

furthered by our gender and cultural norms, due to which we expect people to feel and act a certain way because of their attributes.

This can be extended to the lay theories of emotion too. Men and women perceive and express lay theories differently and may have contrasting approaches to situations.⁵⁸ However, when lay theories of emotion meet the lay theories of gender, universalised assumptions about both may kick in, leading to gendered beliefs about emotions. Resultantly, we expect certain genders to behave in certain ways-and this arises across identities and is directed towards men too. While it is more naturally expected for women to be emotional and express warmth, sadness or fear, emotions like anger, disappointment and surprise are expected from men and not women.⁵⁹ This contrasting socialisation of men and women impacts how we see them-for instance, control and power from a man is viewed as more natural than control from a woman-based on the emotions they are encouraged to display.⁶⁰ These assumptions may support or reject the reality of a case but not recognising them at all allows them to go unchecked. For instance, in an experiment, the sample size viewed two videos.⁶¹ The first one was an angry closing statement from a male attorney in a trial. The second video was the same, except this time instead of a man, it was a woman attorney delivering an angry closing statement. As per results, participants of the study appraised the angry male attorney as the most competent, attributing his emotions to the situation, while rating the angry female attorney as the least competent.⁶²

The above stereotyping about gender and emotions is amplified within the law. Because judges and legislators rely on their lay theories to arrive at conclusions, they may inadvertently form part of their legal reasoning. Therefore, emotions create lay theories (i.e., ideas) which shape our assumptions and influence our preferences, legal reasoning and human action.

An intriguing example is the relationship between shame and law. Shame is conceptualised differently by individuals depending on their position in society, and it is even contended that shame has a correlation with oppression.⁶³ Stereotypically, women are considered more prone to shame than men are. Even though there exists research to disprove this, societal objects put much emphasis

⁵⁸ VL Zammuner, 'Men's and Women's Lay Theories of Emotion' in Agneta H Fischer (eds), *Gender and Emotion: Social Psychological Perspectives* (Cambridge University Press 2000).

⁵⁹ Ann Kring, 'Gender and Anger' in Agneta H Fischer (eds), *Gender and Emotion: Social Psychological Perspectives* (Cambridge University Press 2000).

⁶⁰ The socialization of gender differences in emotional expression: Display rules, infant temperament, and differentiation in Agneta H Fischer (eds), *Gender and Emotion: Social Psychological Perspectives* (Cambridge University Press 2000).

⁶¹ Christian B May, 'Anger in the Courtroom: The Effects of Attorney Gender and Emotion on Juror Perceptions' (2014) Honors College Theses 29.

⁶² *ibid.*

⁶³ Raffaele Rodongo, 'Gender and Shame: A Philosophical Perspective' in Ioana Latu, Marianne Schmid Mast and Susanne Kaiserm (eds), *Gender and Emotion* (Peter Lang 2013).

on it.⁶⁴ For example, women are socialised to feel more shame through their menstruating experiences. The taboo on period conversation, ostracization of women from regular activities, or engaging in religious activities during menstruation is one of the many examples.⁶⁵

Within the law, the connection between shame and rape is strong. In a male-constructed legal system, the treatment of rape is starkly different than that of any other violent or bodily crime like robbery or murder. Instead, the dominant emotion is shame. The shame which is usually cast by the criminal justice system on the perpetrator for retribution and deterrence, is instead projected on the survivor. Resultantly, the burden of proving lack of consent falls on the survivor. Even if such non-consent can be proven, many times other factors substitute consent. Stereotypical factors like clothes, age, behavior often form part of legal analysis. Gendered lay theories of emotion are a subset of such stereotypical factors-judging the behavior of the survivor, expecting crying, sadness, immediate reporting, interactions with the perpetrator. If any of these do not live up to the expected emotional response, the veracity of the survivor is thrown into doubt. This is illustrated through several cases across High Courts and the Supreme Court, wherein judges expect immediate shame and emotional trauma from survivors.⁶⁶

Several instances of such shaming have been observed in Indian courts. It is very common for judges to push accused or perpetrators to marry the survivor in order to receive the Court's reprieve.⁶⁷ This is rooted in the idea of shame ascribed to the victim, by marrying her the perpetrator would somehow take away from this shame as though the act of marriage would legitimise the woman in the eyes of society again.⁶⁸ Another instance was when a Court made tying of rakhi to the perpetrator a condition of bail, once again trying to humanise the man and attributing responsibility of the situation on the woman.⁶⁹

The interconnection between law, emotion and gender so far has helped us establish that cognizance of emotions by judges and legal actors becomes

⁶⁴ *ibid.*

⁶⁵ Mukta Gundi and Malavika A Subramanyam, 'Curious Eyes and Awkward Smiles: Menstruation and Adolescent Boys in India' (2020) 85 *Journal of Adolescence* 80.

⁶⁶ Mrinal Satish, *Discretion, Discrimination and the Rule of Law: Reforming Rape Sentencing in India* (Cambridge University Press 2017).

⁶⁷ *ibid.*

⁶⁸ Megha Katheria and Megha Katheria, 'Is Tying a Rakhi or Marrying the Sexual Assaulter Justice for the Victim?' (*The Leaflet* 15 November 2020) <<https://theleaflet.in/is-tying-a-rakhi-or-marrying-the-sexual-assaulter-justice-for-the-victim/#:~:text=Last%20week%2C%20the%20Madras,condition%20of%20his%20bail%20order>> last accessed on 12 February 2024; A Vaidyanathan, "'Will You Marry Her?' Supreme Court asked Government Worker in Rape Case' (NDTV 1 March 2021) <https://www.ndtv.com/india-news/supreme-court-asked-government-employee-accused-of-rape-will-you-marry-her-2381025?pfrom=home-ndtv_bigstory> last accessed on 12 February 2024.

⁶⁹ *ibid.*

important. Given that emotional common sense is often gendered, the ability of judges to see clearly their own emotions and that of the parties offers a clearer path to justice. To this end, the elimination of gendering within the law itself has been tackled from various angles. For instance, in *XYZ v State of M.P.*⁷⁰ the Supreme Court acknowledged that courts have an entrenched patriarchy and there is a need to eliminate misogynistic attitudes. The top Court to this end has also released a Handbook on Gender Stereotypes.⁷¹ The handbook is an acknowledgement of how judges may project their own stereotypes and biases onto women and gender minorities when deciding matters. However, it remains an incomplete endeavor without noting the emotional nature of decision making.

IV. CONCLUSION

The legal system is an intricate web, held together by complex but flawed ideas—it is a human creation after all. Centuries have been spent in improving it, in arriving at a model that embodies our fluctuating ideals and accomplishes justice. Law and emotion jurisprudence attempts this very herculean task too. By questioning the very foundations of the rationalist premise the law is based on, it exposes the truth hiding in the shadows. It does so not in an attempt to undermine the law but employ its powers more effectively.

This paper attempts to show that we are taking the knowledge that emotions permeate our legal reasoning regardless of consciousness, and allowing it to enrich our legal decisions. Instead of ignoring them and letting this ignorance harm legal conclusions, a more valuable approach is being suggested. Emotional considerations which are implicitly present will make judges self-conscious of their lay theories and nourish legal decision making.

Another important aspect of legal decision making has been discussed by accounting for the gendered nature of emotions and the chaos it can create when witnessed in the legal system. Here it is argued that one way of tackling gender prejudice in the law is understanding and eliminating gendered emotional common sense. This would require, first recognising the role of emotions in the law and accepting that legal actors may not already have the answers to everything. Instead of presuming the emotional states of others, based on their lay theories, legal actors should be trained and sensitized otherwise. A heightened emotional intelligence will prove an effective tool in improving legal reasoning and is more likely to reduce its gendered undertones.

⁷⁰ *XYZ v State of M.P.* (2021) 16 SCC 179 : AIR 2021 SC 1492.

⁷¹ Supreme Court of India, *Handbook on Combating Gender Stereotypes* (2023) <https://main.sci.gov.in/pdf/LU/04092023_070741.pdf> last accessed on 23 February 2024.