Judge and Emotion in Civil Law countries, the French Example

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How can one reconcile law and emotion and how can one reconcile the judge and the emotion? It seems to have been admitted, notably following the discoveries of the neurosciences, that Descartes was mistaken in distinguishing between body and mind, reason and emotion[1] . A reason without emotion leads to bad decisions, badly contained emotions lead to bad intuitions. A Law and Emotion movement developed in the United States to deepen the importance of emotions in legal and judicial reasoning[2]. In Germany, in the 19th century, there was a doctrine of legal feeling coming from Savigny[3] and part of the free law movement[4]. However, it was severely criticized because it risked leading to arbitrariness[5]. However, basing a rule of law on reason alone does not seem satisfactory either.

How to think of the relationship between law, judge and emotion in Descartes' country[6]. Without entering into a philosophical debate on Descartes' famous mistake, which is perhaps not a mistake at all (see below), it is important to articulate law and emotion in a judicial reasoning of civil law. It is a question of not succumbing to the "emotional turn" without saving the rational approach through the formal application of a legal rule. This research

[1] A. Damasio, *Descartes' Error: Emotion, Reason, and the Human Brain*, (1994) Putnam (revised Penguin edition, 2005).

[2] T. A. Maroney,Terry (2011a), "The Persistent Cultural Script of Judicial Dispassion", in: California Law Review 99,2, 629–681.

[3] With authors such as Rumelin or Ihering See recent research in Germany: S. Schnädelbach,(2015),The Jurist as Manager of Emotions: German Debates on Rechtsgefühl in the Late 19th and Early 20th Century as Sites of Negotiating the Juristic Treatment of Emotions, in: InterDisciplines: Journal of History and Sociology 6,2, 47–73 : Rechtsgefühl was one of the most debated juridical notions of the period because the social status was at the stakes : the judge had to show that he was a man of character able to manage his emotions (women were not accepted as judges at that time), but this trend was criticized during the Weimar Germany in a period of uncertainty.

[4]P. Vasilyev, Beyond Dispassion: Emotions and Judicial Decision-Making in Modern Europe, Rechtsgeschichte - Legal History. Journal of the Max Planck Institute for European Legal History. 2017. Vol. 25. P. 277-285. https://publications.hse.ru/en/articles/308976755, accessed 11/11 :2020.

[5] P. Roubier, *Théorie générale du droit,* (1946) réed. Dalloz, 2005, n°19, p. 165 s.

[6] About Russia and Italy : P. Vasilyev (see above) quotes unpublished research made by Vidor, GianMarco(2015), Debating the Role of Emotions in the Administration of Justice in the Post-Unification Italy (1861–1930), unpublished paper delivered to the International Society for Research on Emotion (ISRE) annual conference, Geneva, July 8–10 2015 « In particular, the »modern« judge increasingly came to be seen as someone possessing « a deep knowledge of the heart of human beings » and a thorough understanding of the new scientific discipline of psychology, including the knowledge of human emotions and the embodied "sentiments of justice and duty" (dai sentimenti della giustiziae del dovere). Importantly, in the specific historical context of post-unification Italy, it also involved understanding local cultures and being sensitive to the different « emotional styles » of various Italian regions (propri sentimenti particolari).

based mainly on the French system can help to better discern the difference between a judge and a mediator and also to better understand the limits of predictive justice based solely on reason and algorithms.

During a seminar in the university of Nanterre[7], we collectively asked ourselves several questions in this regard: does a judge remain a judge in his private life, so that the emotion of being faced with someone he knows does not alter his capacity for judgment and impartiality? Can we say that anger, irritation, fear, the beginning of a laugh are subjective elements related to the personality of the judge? Personality refers to subjectivity but not necessarily to the relativity of the decision; indeed, in a singular situation, one needs a judge who expresses himself through emotions linked to his personality. During deliberation, has the judge really forgotten his/her emotions during the hearing in order to make a cold reasoning? If there is no continuity, emotions do not really play a role in the judgment which is essentially based on reason. Should jury in criminal procedure with a reputation for being more emotional than professional judges be maintained and should emotion be valued in judgment? Should emotions be made a prescriptive element that would sometimes lead to favoring the litigant who is more emotional than another? In a judgment, is emotion only channeled, or is it used to arrive at the most balanced judgment possible? Does the judge not have tools at his disposal to translate his emotions such as the assessment of damages or fees?

A judge present at the Nanterre seminar told us that nothing is said about emotions at the National School of Judges, except that one should not deny them, but rather distance oneself from them[8] . A toll-free number is distributed to all judges in case of psychological problems and there are discussion groups in certain courts. But isn't it dangerous to put one's emotions at a distance and to cut oneself off from them in order to reach judgment? Is intuition cognitive or emotional? It is maybe the fastest reason, which goes directly to the solution. Is it necessary to "manage" one's emotions in order to get out of a binary situation, to put some nuance, especially by meditating, and to reach a better judgment? Is it a question of managing one's emotions or of using them to best advantage, by articulating them with reason? Does the procedure serve to channel emotions to enable them to make the best judgment? This seems to be the case when the presiding judge, using his power to police the hearing, puts an end to an overly passionate intervention or plea. Similarly, the rules of impartiality ensure that the judge feels emotions without bias or conflict of interest. As for reasons of the judgement, should it take into account the emotions that are at the origin of the adjudication? This might make sense in a prescriptive version of the Law and Emotions movement; moreover, the judge's emotion can be translated into adjectives and adverbs (for example: "dangerously" for driving on a road leading to an offence) but is it to allow the judge to express his or her emotion or to subtly explain to the parties the solution of the dispute? Do the reasons of the judgment dress unmentionable emotions, or does it discreetly let the expression of such emotions slip through to make the parties understand the solution? Is it necessary to be interested in the judicial rite in order to understand the emotions? The American founder of the psychoanalytical approach to law believed that in reality judges rely essentially on their

[7] Organized by Éric Millard, the 2nd of February 2017 with in particular X. Lagarde, J.-L. Halpérin, M. Nioche and V. Champeil-Desplats.

[8] Judge Jean-Louis Gillet emphasizes "One of the constant apprenticeships of the judge, the work that he must constantly put back on the profession, are the ways and means of good resistance to emotion, of hardening, of strength (in the right direction) with regard to emotion... with the awareness that hardening must never degenerate into insensitivity" (free translation) in “Le droit se livre : les émotions dans les prétoires”, Les Cahiers de la Justice, Dalloz, 1, 2014, Interview with Jean-Louis Gillet, editor of this magazine http://www.justice.gouv.fr/art_pix/script_itw_gillet.pdf (2015) accessed 11/11/2020.

prejudices and emotions to render a judgment, which would be the counterpart of the excesses of taking into account affects in politics[9].

To answer these questions, we will formulate a hypothesis. If we consider that the law is, above all, a set of legal relationships, the system of justice, which can also be called the procedural framework, allows for the reception of emotions (the framework is a container in both senses of the term that contains emotions and procedural acts) and, as for any emotion, to allow for a response time. The factual relationship is an element of the legal relationship, it is an emotional interaction. The legal relationship has a second element which is the symbolic representation of this interaction by symbols in the strict sense, a virtual space between the parties which becomes real in the courtroom on the aegis of the judge. If we consider the legal relationship as a symbolic device, i.e. a space between two persons under the aegis of an impartial third party, there is, therefore, a relationship to be made between emotion and symbol. However, the symbolic is faster than words because symbols can be seen as emotional analogies. The judge's emotion must be designed in such a way that it maintains the balance of the legal relationship between the parties. It must be integrated into judicial reasoning without ever favoring one of the parties. The legal framework also includes a rule or principle of substantive law applicable to the case. The civil law judge is therefore immediately put at a distance from his emotions by this framework, but he must nevertheless be aware of his emotions and possible biases. His relationship to emotions is therefore different from that of the English judge for whom the framework is first composed of precedents, a procedural framework that makes it neutral and not very active and only then of rules derived from legal texts. Training at the National School of Judges in France now largely takes into account the management by judges of their emotions, in particular by means of trial simulations.

Nevertheless, it is advisable to consider that the management of emotions by the judge is insufficient if we do not take into account what the psychoanalyst Christophe Dejours calls a true etiology of suffering at work[10], that is to say a study of collective causes referring in particular to the "managerialization" of justice (implementation of management using objectives, assessment and indicators in the private or in the public sector without paying any real attention to the professions involved and to the acquisition of an art of doing). As a result, the procedural framework may also not be sufficient. In some courts, discussion groups are being set up between judges and clerks to discuss this suffering in judicial work, which has been brought to light in particular by a survey - albeit unscientific - by a French magistrates' union (30% of the 800 judges who answered the questionnaire consider themselves to be suffering at work, working 10 hours a day and working at weekends)[11]. Beyond the procedural framework, we must therefore also think about a managerial approach based more on coordination than on performance figures (mailing lists of judges of the same specialty play a role in jurisdictional matters and can also restore a form of collegiality that makes it possible to escape from a solitude in which emotions sometimes become difficult to control). To put it another way, it appears that the "managerialization" of justice creates a new "emotional regime"[12] after the traditional one of emotional hardening having in mind that the stereotype of the dispassionate judge is probably in France a historical result of the post-

[9] J. Frank, *Law and the Modern Mind*, (1930), republished 2017, Routledge.
[10] Seminar at the Paris Psychoanalytic Society, October 2019 (Thank you to Mrs de Maximy for the invitation).
[11] During international conferences on court management a Chilean colleague (2020) and a Chinese judge (2018) told me that judges were overburdened and were suffering as well.
[12] As a way of expressing and sharing emotions in a society v. W. Reddy, *The navigation of feelings 2001,* Cambridge University Press *(*French translation 2019, Les presses du réel).

revolution period[13] . The new management, based on objectives, indicators and evaluations, encourages judges caught in an emotional conflict between efficiency and quality of judgments to "manage" their emotions individually (through relaxation exercises for example) while trying to recognize them in order to write better judgements. It is important to overcome this situation of emotional suffering (linked to a conflict of objectives) by considering justice as the framework of a collective navigation[14] of emotions allowing their recognition, their consideration and their dialectical channeling (channeling of the diverse and contradictory emotions of the parties, lawyers, clerks and judges, sometimes experts). We must not be satisfied with managing our emotions, but we must also make room for emotional freedom, which leads to shifts, moments of rupture and new caselaw.

To demonstrate this position, it is first of all necessary to study the Law and Emotion movement that has developed in common law. It will appear that the prescriptive approach of emotions (the injunction to take them into account) may be adapted to the common law system, but that it is quite dangerous for a civil law system such as France. It is, moreover, quite factual and does not take into account the relationship between emotions and symbol (chap. 1). It will therefore be appropriate to consider emotions in a relationalist approach to law - which is not psychological or sociological - which might suit the civil law judge who remains a civil servant, or at least leads to the use of a legal methodology involving putting emotions in the background while being aware of them within a procedural and substantive law framework (chap. 2).

Chapter 1- The judge in the Law and Emotion movement

Before examining the Law and Emotion movement (1), it is appropriate to question the notion of emotion independently of law (2).

1. The Concept of Emotion.

Emotion has given rise to numerous studies in relation to reason and also to literary works (see tragedies). It can be studied from many angles and disciplines. It is important to cross the glances. This is why it is important to have a neurobiological approach (a) and a philosophical approach (b).

a.- The Concept of Emotion in Neurobiology.

Without going into the in-depth study of the brain with regard to emotion[15], it is important to note that the thalamus receives sensory messages and sends them mainly to the neocortex, the place of reason and complex thought (the most recent in evolution). The amygdala receives information from the thalamus which triggers emotions that can as signals be processed by the neocortex. The prefrontal lobe receives rational signals from the neocortex or directly emotional signals when there is urgency to make decisions and act. The limbic brain (a

[13] T. A Maroney, J. J. Gross (2014), "The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective", in: Emotion Review 6,2, 142–151.
[14] Term used by W. Reddy (see above) who criticizes the idea of "emotional management" since this expression leaves is no room for emotional freedom and dramatic changes of situation (new caselaw for example).
[15] J. Pampler, *The History of Emotions*, (2012) Oxford University Press, this British historian considers that social sciences should not stick to the last neuroscience theory since the temporality of neuroscience is quicker than the one of social sciences.

contested concept), the oldest part of the brain in evolution, generates automatic reflexes from the signals it receives from the outside.

Neuroscience thus confirms the existence of two distinct processes, emotional and rational, which combine[60]. Decision-making involves both mechanisms. However, there is no single center of emotion or reason. There are structures composed of several connected brain units. For the same emotion, fear for example, there can be two processes: a thalamic-amygdala pathway of fear (short route) and a thalamic-cortico-amygdala pathway (long route) that eventually leads to the cessation of fear after analyzing the object of fear. There is also a "pleasure circuit" that releases dopamine into a structure in the brain called the *accumbens*. Emotions facilitate the encoding and consolidation of information through an interaction between the hippocampus, one of the places of memory, and the amygdala. The hypothalamus below the thalamus is involved in the secretion of hormones and in certain bodily behavioral functions. All these mechanisms can even have an impact on DNA. We can speak of emotional reasoning because a decision that involved anticipatory and anticipated emotions is more rational than a decision that did not take these emotions into account. If someone is swept away in a river before my eyes, I may decide to jump into the water to rescue him after facing my fear and the risk of drowning - anticipatory emotions - and eventually the joy and pride of saving someone - anticipatory emotions. If I decide to jump into the water without considering these emotions, I just risk drowning too. So, it wouldn't be a rational decision at the end of the day.

The word “stress” comes from an old French word; it is the largely hormonal response of an organism to perceived environmental pressures that create positive or negative emotions. The notion of trauma is still poorly understood: we can assume that it is a blockage in the process of forgetting, which would explain why the trauma constantly rises to the surface. With the mirror neurons (contested concept) we share, in our body, the pain of others. The brain processes briefly described above take place in constant interaction with other people. The other becomes another self as in the mirror stage. One cannot conceive of an "I" without an "us": "The relationship is expressed through the non-verbal, the analogical and the emotional" ... Rizzolatti and Sinigaglia, the Italian discoverers of mirror neurons[61], write: "The storytelling that we are confronted with from birth probably plays an important role in this long learning process that leads us to become competent in the use of positive attitudes towards the other". These mirror neurons allow empathy which can take three dimensions: a dimension of synchronization by the waves we share with many living beings which leads to emotional contagion; a dimension of mutual help when a fellow human being suffers which exists in dolphins and primates and a concern for the other which supposes to have recognized oneself as oneself (and implies to have gone beyond the stage of the mirror which is only possible to great apes, elephants and humans) .

By analogy, one could say that there are short and long circuits of the treatment of emotions in justice. News items or imminent perils, especially in summary proceedings, which arouse emotions for the parties and the public call for quick responses, especially to avoid emotional contagion. The long circuit, on the other hand, channels emotions and can use them to reach the best possible solution in the first instance, in mediation, homologation or after appeal. Likewise, in the brain, emotions, perceptions and reason are never completely detached from each other but constitute dispute resolution processes that combine. Following the model of J.

[60] In fact, some recent theories in neuroscience believe that reason and emotion can hardly be distinguished v. J. Pampler, supra.
[61] Quoted by Onnis (dir.), *Psychothérapie et neurosciences : une nouvelle alliance*, (2015), France, Fabert.

Ledoux's book "The Emotional Brain"[62], it seems possible to speak of "justice of emotions", not in the pejorative sense that is retained in the expression of politics of emotions or society of emotions, but in the positive sense of a justice that welcomes, channels and uses emotions according to different circuits. It is also necessary to take into account the stress of magistrates in their work, especially since new public management, involving indicators, objectives and assessments, has become a reality in the courts.

However, we must not give in to cognitive reductionism. These are neural and chemical processes, but there are still many questions. The passage to consciousness and to the freedom of the subject is a leap that no one really knows how to make yet from the neurosciences. It is not enough to say that, like any living organism, humans must manage and adapt their emotions to their environment.

b.- The concept of emotion in philosophy.

Two French philosophers, J. Deonna and F. Teroni, have presented a synthesis of the philosophical concept of emotion by retaining five elements[63] to which a sixth social element should be added:
- An emotion has a certain duration, from a few seconds to a few hours. If it exceeds a few hours, it becomes a feeling and a character trait (e.g. a permanent angry person).
- An emotion is felt physically. It is conscious and is expressed physically by redness, palpitations, stomach pain or a surge of adrenaline. The emotion therefore involves physical, chemical and organic elements. Guilt that unconsciously eats away at a person is not an emotion. If a person does not consciously feel an emotion that someone else would feel in his or her place, it can be said that he or she is repressing that emotion.
- An emotion has an object. We are angry at someone or something. We are afraid of something, such as a dog. A diffuse anguish is not an emotion because it is defined precisely by a lack of something that cannot be defined.
- An emotion implies an element of knowledge. Emotion is a signal: fear signals danger, disgust with a food can signal that it is spoiled or dangerous for a person. An animal, in this sense, can have emotions. It is not a simple perception.
- A correction of the emotion is possible, not necessarily an *ab initio* control because it is a rather irrepressible physical phenomenon, but a progressive control. This is the case, for example, of a person who is afraid of a dog, his owner tells him that he is not dangerous and the fear stops. Emotion is linked to intention and therefore also in a complex way to reason. An emotion is a form of energy that carries information and sets us in motion, it disappears if we welcome it. We go from a physical phenomenon to mental information and physical action: fleeing from danger or no longer being afraid of it, getting angry or calming down, etc.
- a collective framework. Emotions are expressed towards others - a child alone, in danger, does not cry out. One understands the emotions of the other - even if the mirror neuron hypothesis is discussed, there is a construction of emotions and natural neural circuits. We therefore oscillate between universalism and constructivism. The expression of emotions has a performative effect (e.g. in some funeral cultures, mourners make people sad). The American historian W. Reddy talks about “emotives” (to conceptualize the idea that the expression of emotions has an effect on emotions; for example, saying that judges must keep their distance from their emotions has the effect of hardening them over time). Emotional

[62] The Emotional Brain, (1996), New York: Simon and Schuster.

[63] *Qu’est-ce qu’une émotion ?* Vrin, réed. 2016, p. 13.

freedom may change the emotional regime; emotions are channeled by rites that can be judicial).

Emotion is therefore a process. However, even though there are universal biological elements in the emotional process that have been uncovered by neuroscience (as distinct from rational processes), emotions vary greatly across cultures and history and should be seen as a constructed cultural reality. A debate persists concerning the classification of emotions, which can vary from one culture to another. We can say that there are four primary emotions: anger, fear, joy and sadness. But there are many nuances for each of them and some authors believe that they are western labels. Some emotions are accepted by everyone (anger or fear), others are more controversial (joy, satisfaction, etc.). According to different authors, it is possible to distinguish between 4 and 10 families of basic emotions. From antiquity to the present day, many philosophers and researchers have studied the families of emotions. Aristotle (384-324 B.C.) cites anger, pity, fear and desire and their opposites and specifies that they are followed by pleasure or pain. Descartes (1596-1650) lists six "primitive passions" (admiration, love, hatred, desire, joy and sadness) and 34 other passions, which arise from or flow from combinations of the first six. Darwin identified 7 families of emotions that he believed shared a universal facial expression: happiness (or joy), sadness, anger, disgust, fear, surprise and contempt. In the Middle Ages, shameless emotion mixed fear and modesty. In China, the inner rumination of a worry is classified as an emotion.

There are several theories about secondary emotions. Some authors claim that secondary emotions are mixtures of two primary emotions, others use the cognitive approach to state that a secondary emotion is the combination of a basic emotion and mental representations. For Damasio, secondary emotions are developed in adulthood on the basis of the child's primary emotions and life experiences.

The relationship between emotions and values is discussed. For example, do we get angry because someone has hurt our values of honesty? Are we happy because an event corresponds to our life values? This analysis cannot work for the animal and therefore we lose the naturalness of emotion by admitting the relationship between emotion and value. One also loses its universalism because values vary. In addition, one can wonder about the value which is expressed when one is afraid of a spider, except perhaps a vague value of life which would come from the bottom of the ages and from a time when spiders could be dangerous.

The consideration of emotion remained rather negative until the 1980s: it was seen as a limitation of reasonable actions. One finds this conception pell-mell in the philosophers of antiquity (in particular Plato who considers emotion as a "disease of the soul"), in most religions (emotions push to the sins in the Christian religion; emotions parasite the access to Nirvana according to the disciples of Buddha), but also in the modern philosophers such as Descartes. Nevertheless, Descartes introduces the innovative idea that emotions do not drive us to blame, but to satisfaction. It is then up to the soul to "manage" these emotions in such a way as to make them reasonable and therefore socially acceptable. This Cartesian conception of emotions is the one we spontaneously have in mind in France.
For Descartes, the soul is the thing which wants and which deliberates, whereas the passions coming from the body, move the soul[64]. For him, passions belong to the soul, but they do not depend on it. This is why Descartes and his successors will cease speaking about passion to prefer the term "emotion" as what is caused by a movement of the body. Emotions cannot be

[64] V. *Méditations métaphysique*, (2011) Garnier Flammarion.

intellectual, because they come from the body and act without mediation on the person. In the Cartesian philosophy, it is necessary to put at distance one's emotions in order to make the most objective evaluations possible. Descartes is dualistic in that he opposes body and soul, but he does not radically oppose rational thoughts and emotions. Emotions are, for him, part of the process of knowledge. It is, however, a rather confused knowledge which takes its origin in the body and which does not have a great value. One can wonder if the error of Descartes was not somewhat exaggerated by Damasio. Descartes considers the union of soul and body, emotions and reason to be essential. His dualism has often been caricatured as necessary to establish the union of body and soul and the influence of the body on the soul. However, part of neuroscientists confirms the existence of two distinct processes, emotional and rational, which combine.

The American psychologist, William James (1842-1910), reversed Descartes: according to him, the body imposes itself on the mind. Emotion is linked to a physiological reaction in the perceptive situation. It is thus necessarily quite brief. If I see a bear (perception), I start running (physiological reaction), then I get scared by becoming aware of my body (emotional reaction).

You don't manage your emotions like a business. You can't easily subject them to reason. Reason and emotions work together. Damasio showed that a person who is rational but unable to feel emotion ends up making aberrant decisions. Descartes would not, it seems, have said otherwise.

2. Introduction to the Law and Emotion Scholarship.

The Law and Emotion scholarship has its roots in American Realist approach, Critical Legal studies, feminist legal theories and in a way in Law and Economics[65]. As soon as law and the judge are no longer seen as objective and neutral, it became necessary to be more realistic and to take into account the emotions of the legislator and the judge. This movement has already gone through three periods[66]. In the 1990s, the authors showed that it was no longer necessary to oppose reason and emotion in law and to consider them as complementary (Goodrich[67], Nussbaum[68], etc.). In the 2000s, various studies were conducted either on each emotion in law (fear, disgust, anger, joy, hope), or on different areas of law (contract, family, criminal), or on each participant or judicial profession (jury, witness, judge, lawyer, prosecutor, etc.). Since the beginning of 2010, the movement has become normative or prescriptive by inciting lawyers and therefore the judge, no longer to manage his emotions, but to use them in legal and judicial reasoning. The judge should not only distance himself or herself from his/her emotions and adjudicate coldly (the discourse traditionally held at the French National School to young magistrates): today, it is necessary to consider that reason is not detached from emotion, that they go together and that emotion is an element contributing to finding the right solution to a legal difficulty.

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[65] *Terry A. Maroney, "*Angry Judges", Vanderbilt Law Review [Vol. 65:5:1207, 2012.

[66] R. Grossi, "Understanding Law and Emotion", *Emotion Review*, 2015 January 55-60; S.-A. Bandes and J.-A. Bluementhal, "Emotion and the Law", *Annual Review of Law and Social Science*, 2012, 8 :161-181 ; M. Nussbaum, "Emotion in the Language of Judging", *St John's Law Review*, 1996, 70, 23-30; S. A. Bandes, "What Roles do Emotions Play in the Law ?" emotionsresearchers.com.

[67] *Law in the Courts of love: Literature and other minor jurisprudence*, (1996) London, Routledge.

[68] Poetic justice, see above.

A few major articles mark out the Law and Emotion movement. In 2000, Éric Posner, son of Justice Richard Posner, co-founder of the Law and Economy scholarship, approached the question of emotions in law according to an economic analysis grid[69]. He notes that, traditionally in law, there is little reflection on emotion because of normative approaches that do not lend themselves to it. However, a philosophical-moral and constitutional analysis is based on methodologies that are not adapted to the analysis of emotions. He proposes to consider emotion as a distorting element in the rational analysis of choice, which is a cold analysis. He reintroduces emotions in law, but to better control them.

J. Blumenthal reacts by noting that the market approach implies considering emotions as predictable and controllable[70]. Thus, for example, in the case of a strong emotion, there would be no irresistible change of circumstances leading to a change in a contract. However, there is, according to him, a bias because emotions are unpredictable both in their occurrence and in their intensity. Thus, in the surrogacy contract, which is legal in the United States, a future mother cannot predict the strength of the emotions she will feel when the embryo grows. A classically economic approach considers that a strong emotion towards the child at birth is not an unpredictable event. Therefore, there is no excuse for the non-execution of the surrogate mother contract. This mother could, at best, obtain an upward price revision. This explains why some U.S. states limit the legality of this contract to mothers who have already had a child; others carry out an evaluation of the mother at the time the contract is signed. According to Blumenthal, the emotion felt by the mother is an unpredictable event that may justify questioning the obligations, even if only one mother in a hundred refuses to leave her child to her new parents. This is a question of an emotional bond with the child, an unbreakable bond.

K. Abrams and H. Keren are also in line with those who criticize the hierarchy between reason and emotion[71]. Emotion is not irrational, but a positive mode of response to a legal difficulty. Emotion must therefore be integrated into the preparation of bills and judgments. These authors are pragmatic and are opposed to the economic analysis of the law of the question of emotions.

The Law and Emotion movement is understood in an Anglo-American tradition based on Hume's empiricism and sensualism. All the difficulty in civil law countries is to reflect on the relationship between law and emotion in a Cartesian tradition that implies doubting any truth by experimenting or in Kantian tradition which takes into consideration *a priori* concepts such as reason and will (contrary to the pure empiricist approach).

Martha Nussbaum has reflected throughout her work on the articulation between law and emotion. In one of her books, she writes that emotions describe human life as something incomplete and fragile. Ties to children, parents, loved ones, fellow citizens, one's country, one's body and one's health: this is the material of emotions; and these ties make human life a vulnerable affair, where total control is impossible, and is not even desirable, given the value of these attachments to the person who cultivates them[72]. The materials of emotions are

[69] Éric Posner, "Law and the Emotions", *89 Georgetown Law Journal* 1977 (2001).

[70] "Law and the emotions the problems of affective forecasting", *Indiana Law journal*, 2005.

[71] "Who's afraid of Law and the Emotion?" *94 Minesota Law Review*, 1997, 2009-2010.
[71] *Poetic Justice: The Literary Imagination and Public Life* (1997), Beacon Press.
[72] *Op. cit.*

human bonds, or more precisely the human bond is the material through which emotion flows. However, as we will see later, she can be criticized for considering the human bond only as a fact and not as a legal-symbolic construction, which has the effect of seeing emotions and bonds only as natural elements. Like Goodrich, she considers that it is necessary to refer to literature and cinema to access this particularism which is the life of emotions and which is not relativism. She rethinks the relationship between emotion and reason, noting that there are two possible approaches: "According to the first perspective, emotions are unstable because of their internal structure that is foreign to thought; according to the second, because they are thoughts that attach importance to unstable external things"[73], characters and plots, they are subversive "for philosophy that strives to teach the self-sufficiency of reason". The emotional turn marks the end of philosophy based on logos alone. It relates to the second perspective: emotions are thoughts attached to unstable things and relationships with other beings. This approach is awkward because it means that there are rational emotions. To say that all emotions are irrational is to make a reason detached from emotions a norm, for example the advice given to jurors in California to cut themselves off from their emotions and not to have "sympathy" for one of the parties. In order to achieve this particularism, one must go through the novel: "All human life consists in going beyond facts, in accepting generous fantasies, in projecting our own feelings and inner activities in the forms we perceive around us (and in receiving, through this activity, images of ourselves and our inner world)"[74]; "the novel affirms and demonstrates that it is also the saving of a morally essential capacity, without which both social and personal relationships are impoverished". It is necessary to come to the "Reason through the soft light of the Imagination" "the emotions of the reader are implicitly evaluative", there is a deep link between "fantasy" and "democratic equality". Literary imagination "asks us to be interested in the good of foreigners", and therefore implies a moral attitude.

This approach poses the problem, which it does not evoke, of the relationship between the imaginary and the symbolic. If the legal bond is constructed symbolically and the imagination helps to understand the particularity of the bond, then the symbol is grasped by the imagination, for example the reference to grass in Dickens' novel that Nussbaum quotes: "He tells the child that the grass is like him, a young shoot of vegetation, he asks the child to see it in his image. He then shows the child that grass can also have social significance: it can be seen as the equal vitality and dignity of all Americans". Thus, we move from imagination to symbolism. With the images, a new world is created that leads back to one's own world. Symbolization is the passage from the imagined world to the symbolized real world. If the legal and symbolic link (the legal link such as the bond of filiation, nationality or obligation) is the channel of emotion, it means that emotion circulates only because there is a symbolic construction. The symbolic arrangement does not channel unstable emotions, on the contrary, it makes emotions possible. If they are thoughts, they need to be installed in a symbolic space. The fact that these emotional thoughts are about unstable elements makes this material base all the more necessary. Therefore, procedural law not only channels emotions, it makes them possible. Without this, emotions are not expressed and are repressed. It is not a question of preventing emotions from spilling over into the procedure, it is a question of using them to better reach the truth of the dispute.

[73] *Op. Cit.*

[74] *Op.cit.*

The risk of Martha Nussbaum's approach is to impose the consideration of emotions and to be led to question a more classical rational approach. It should also be noted that this approach to the novel as a means of educating the future judge is a little too idyllic. The novel is not always moral and can also be used to question acquired situations and to show the impasses of a society.

In short, the Law and Emotion movement does not consider human links as strictly legal links, it is about factual links. It hardly allows formal and positivist theories to be articulated with emotions. This movement is also situated in an Anglo-American perspective involving a judge creator of law with a strong authority that he takes from his election. To reflect on the relationship between judge and emotion in a civil law perspective, it is necessary to be able to build a bridge between the two traditions.

Chapter 2.- Legal Relationism and Emotion

The traditional conception of the legal relationship since Savigny is rather dry in that it aims at the union of two parties having a free will for a given reason (the cause) by aiming at a certain (legal) object. The relationalist approach to law takes into account the place of emotion in legal relationship and particularly in judicial reasoning while maintaining the need for analytical rigor in the application of texts. There has thus been an evolution in the conception of the legal relationship (1) which implies taking emotions into account (2).

1. Legal relationalism

The relationalism considers the law from the legal relationship’s point of view and not from the norm’s or the institution’s angles. The norm does not pre-exist the legal relation, it is second in logic. Thus, the area of the court is delimited before finding a solution to a dispute. The procedural relationship is put in place before the judgment is rendered. It is a symbolic situation involving a third party of reference (the judge, the arbitrator, the mediator), a particular space-time and often a fourth participant (witness, clerk, expert). The norm is interpreted in this framework by the debate between the parties before a judge who is not bound to the parties and therefore impartial. The judge is not without emotion, but must be free of conflict of interest. There are norms to create the legal relationship, procedural norms, but it is necessary to reason from the legal relationship and not from the norm. The procedural situation is not factual but legal, it is a procedural relationship and not a factual relationship or a power relationship (which is nevertheless underlying). The juridical space of the trial is a symbolic space that allows the overwhelming emotions to fall back. From then on, the judge can direct the judicial reasoning. Emotions that are not neutral and impartial are put aside in application of the rules of procedure (for example, by recusing the judge). One must not fall into the tyranny of emotions according to a prescriptive approach existing in the Law and Emotion movement.

Jennifer Nedelsky draws inspiration from feminist theories of law (themselves partly influenced by the so-called French Theory) and has an anti-Kantian conception of autonomy. She criticizes liberal individualism and considers that a subjective right is part of a relationship. She criticizes Rawls for retaining an abstract equality. For her, reason and affect are not separated and the body is concerned by the relationship, hence the importance of care in her thinking and a consideration of emotional reason.

The notions of emotion and relationship are part of a symbolic construction. Neuroscientists today consider, like sociologists and historians, that emotions are constructed. With mirror neurons (contested concept among neuroscientists) we share, in our bodies, the pain of others. The other becomes another self as in the mirror stage. One cannot conceive of an I without an us: "The relationship is expressed by the non-verbal, the analogical and the emotional" ... "in addition, compassion depends on other factors related to the recognition of pain, such as who the other is and what relations we have with him; it is influenced by our possible capacity to put ourselves in his place, our motivation to take charge of his emotional experiences, his wishes and expectations towards the other"[75].

Somek, an Austrian author defending a relationalist position, relates to Kant, Fichte and Kelsen and the authentic interpretation of norms by the judge. According to him, law and morality are not separated in the sense of Hart. Law generates a legal relationship that allows irreconcilable moral positions to be opposed. The very essence of law is therefore to construct this relationship in order to allow us to emerge from the impossible search for a consensus in moral matters. The law is therefore not outside of morality; on the contrary, it integrates moral positions in order to be able to make a legal relationship viable. It is necessary to make room for others in order to have room for oneself: "*Make room for others to have room*". Instead of leading to a desperate irony of the weakest who undergoes a solution (saying "it's always the richest who wins") in the face of legal solutions, this approach leads to what he calls a serene irony. He criticizes authoritarian approaches in which a judge chooses the moral position he prefers. If an authority decides how to build the good citizen, it is in an authoritarian position. On the contrary, "*The authority of law that emerges from the legal relation is an authority of right*"[76]. It guarantees a pluralist approach taking into account the positions of Ego and Alter. According to him, reason is intersubjective and guarantees universality by passing through the particularities of each citizen. There is a reasonable dispute (irreconcilable in the sense of Lyotard, whom he quotes). The two people in relation will "*be able to put themselves in the shoes of the other*" to be able to think without emotion the reason of the other. He may write: "*Legal relation emerges from moral relation. It emerges by necessity on moral grounds. The reasons for choosing a solution are often impossible to know, there is a kind of transcendence of oneself*"[77]. It is therefore necessary to organize a debate to reach the best solution: "*The transcendence vis-à-vis morality is symbolized in the abstractness with which legal persons encounter one another on the level of legal relation*"[78]. These persons are then freer in the legal relation than in the moral relation, since each one can keep his moral position. He then develops a conception of equality as being the prohibition of discrimination in legal relations because it leads to the denial of the presence in the world of discriminated persons. He concludes by saying that there must be an articulation between legal relations: "*The structure of the legal relation has to be expanded into a web of relations of social freedom*"[79]. It is therefore necessary to defend human rights to prevent situations of dependency. He is thus, as he himself says, more on the side of rights and obligations than on the side of norms and rules[80]. The relationship is more central in law than the norm. He wants to lead to: "*Changing the conception of Law from viewing it as a system of norms to a specific relation among people"*[81]. He also writes: "*The legal relation is*

[75] Onnis (dir.), *Psychothérapie et neurosciences : une nouvelle alliance*, (2015), Fabert, p. 161 (free translation).
[76] *Legal relations*, (2016) Cambridge University Press, p. 125.
[77] *Op. cit.,* p. 121.
[78] *Ibid.*
[79] *Op. cit*., p. 157.
[80] *Op. cit.*, p. 182
[81] *Op. cit.*, p. 22

a relation among choosers who choose within limited sphere" (private property)[82]. He does not deal much with emotions, but his thought can be used to deepen the articulation between legal relation and emotion. The legal relationship as a symbolic arrangement leads to an understanding of the position of the other based on emotions that one may not have grasped before (the mirror neurons of Ego allow him to put himself in Alter's place to better evaluate his position). The spouses in a divorce can thus understand, without adhering to them, the positions of the other with the help of taking into account the emotions.

A Polish-Russian author, L. Petrazycki (1867-1931)[83], has a realistic and psychological approach to law: duty is linked to an emotion of imperatives and the right to an emotion of attribution. There is a right when there is reciprocity between two persons and there is a moral when there is only an imperative without attribution. The legal relationship that is merely a projection of these psychological phenomena does not exist, but rather reflects the reciprocity that is at the heart of his theory. Law whose origin is psychological can be positive if there are normative facts or intuitive in the absence of an external norm. Friendship is part of intuitive law. There is no de facto relationship, the human relationship is constructed by law as a projection of the reciprocity of attribution-imperativity. A creative author, he rethinks the law of his time in the light of the psychological knowledge of his time. He has many disciples who will develop the sociological analysis of law. His approach is subjective and individualistic and he does not explain how the two individuals communicate to project, like a fantasy, the legal relationship. To actualize it, we can consider that there is not only an emotion of imperative perhaps linked to fear and an emotion of attribution linked to joy, but there is a process that, starting from an encounter between two people, will transform emotions into images, images into symbols, symbols into memories. Is it a material, physical or psychic reality in Freud's sense? Is it only a game of ideas? It is enough to consider that this process has a strength-weakness in that it generally leads to the fulfillment of obligations and sometimes to resistances that will be resolved by institutions such as jurisdictions in charge of putting right distances between two people. The legal bond "exists" moreover as a symbolic device (which Petrazycki also recognizes) independently of its subjects. No doubt the "mirror neurons" and other physical elements (DNA in particular), at work in an encounter, cause the link to be built in two persons and to subsist even if one of them dies or begins even before the birth of one of the persons, the bond of filiation for example. The legal relationship is created from the outset in a group of legal ties and has a social as well as a psychological character (example of the bond of filiation, another example: the bond born of cohabitation). According to M. Antonov[84] , for Petrazycki, if emotions are reciprocal between two people in the form of imperative-attribution, we are in the sphere of law; if the emotion is unilateral and only imperative with respect to oneself, we are in the sphere of morality. It passes from the legal relationship implying a reciprocity of emotions to the sociological level by connection between the different legal relationships. It poses a principle of adequacy of the emotions in reciprocity to adapt the behaviors of the parties to the evolution of the society. The passage from the psychological level to the legal and social level is not so clear, there is obviously a lack of organization. Why do we need legal bodies and especially judges? The evolution of psychology leads today to link emotion, the double symbolization of emotions (first symbolization by objects and gestures; second symbolization by verbal language) and memory by images and words. It is through this complex process that legal relationships are

[82] *Op. cit.*, p. 158.
[83] *Law and Morality,* trad. 1955 (from two books in Russian 1906 and 1907), Harvard University Press, reprint Transaction publisher, 2010.
[84] "E. Ehrlich and Leon. Petrazicki, Are Emotions a Viable Criterion to Distinguish Between Law and Morality?" In B. Brozek, J. Stanek and J. Stelmach, Russian Legal Realism, Springer, 2018, p. 127.

formed. Rather than a principle of adequacy, it is appropriate to establish a principle of substitution in order to move from one relationship to another and see the formation of institutions and transformations of legal relationships, thanks in particular to judges. The method is therefore not so much introspection as Petrazycki suggests. Nor is the appropriate method the observation of the parties to see how facts become legal facts (use, possession, practice, etc.), but rather interviews or observations of the parties concerning their practice involving emotions and therefore discourse analysis. According to François Ost[85] , there is no legal concept *per se*. Legal notions are already the result of symbolization.

In J. Nedelsky's work, emotion becomes important because the relationalist approach is contrary to the liberal approach of the rational, independent, free and equal agent. This liberal approach leads to an individualistic and separate conception of the individual. The relational approach which bases the self on the relationship implies the consideration of emotion as well as reason. However, the symbolic link is still missing.

Thurman Arnold (1891-1969) had a symbolic approach to law[86]. He criticized formal law that claimed to be rational while using irrational symbols. Thus, the jury, which is a symbol of justice and democracy, was, according to him, unpredictable and subject to emotions. What matters to him is the judicial ceremony more than the truth of the verdict. He considered that the trial of Joan of Arc, which took place in the castle of Rouen in front of professors from the Sorbonne, had all the symbols and finery of good justice, whereas the goal from the outset was to condemn the young woman. The law, therefore, uses the symbolic form to make the will of the ruler predominate (Bourdieu expresses the same idea). However, Arnold did not clearly define the notion of symbol, which he seemed to understand as a mask or personification of politics (for example, Roosevelt was, for him, the symbol of the New Deal). He did not propose anything to improve the criminal trial. He even seemed to have undemocratic tendencies and favored an approach in terms of technocratic management that would be effective without hiding behind symbols. It is interesting to note that Thurman Arnold articulated the symbolic and the ritual through the judicial ceremony. He thought, in other words, of symbols within a conception of law as ritual and as action. It led to a managerial conception of normativity, seeking only efficiency, therefore action, and excluding symbols and, consequently, law.

However, the legal relationship is a symbolic arrangement, which in the past implied symbols in the traditional sense of the term (e.g. symbols of the courthouse and in the courtroom such as the scale). A legal relationship is a symbolic arrangement, which in the past involved symbols in the traditional sense of the term (e.g.: a clod of land symbolized a contract of sale of land under the Ancient Régime), but which has become abstract (e.g.: the contract of sale in duplicate, the contemporary judicial architecture) while remaining symbolic thanks to the third person having authority and a fourth, more changing person contributing to form a symbolic quadrilateral around the two parties (e.g.: a witness in a trial). In this framework, emotions are conscious, enable action and can be rectified. The symbolic arrangement also makes it possible to confine and channel them (e.g. anger in the trial). Procedural time helps to calm down parties involved in a lawsuit.

According to J. Nedelsky, a relationalist approach requires four steps: identifying the legal relationships, assessing the interests of each person, then looking for the values involved, and

[85] "Taking stories seriously: the place of narrative in legal interpretation", in S. Glanert and F. Girard, Law's Hermeneutics: Other Investigation, Routledge, 2017, p.118.
[86] *The Symbols of Governance*, Yale University Press, 1935.

trying to find the best solution for the entire network of legal relationships considered in order to ensure the autonomy of individuals or, if they are dependent, aiming for their return to autonomy. Every person is always a little dependent. Similarly, the Danish philosopher Logstrup develops a concept of interdependence close to J. Nedelsky's theory of care (which is not infantile or paternalistic). Another example is the three-dimensional theory of law which, with its founder Miguel Reale, a Brazilian legal philosopher, takes into account facts, values and norms. A Spanish legal philosopher developed this theory by distinguishing three perspectives of legal theory: the theory of the norm, the theory of the legal order and the theory of the legal relationship[87]. It would no doubt be appropriate to add a fourth dimension (as proposed by M. Novak, see below), to arrive at four notions: fact, value, norm and relation (making it possible, through a process of symbolization, to construct emotions).

Institutions such as the State are not at the first place in terms of legal relationships. Rather, they are organized and organizing sets of legal relationships, sets that can be fragile and sometimes deadly. Institutions must constantly be perfected to ensure the objective of autonomy for individuals without separating them from one another. This could be the difficulty with subjective rights, even social rights, which are likely to isolate their holders.

If we lose sight of the relationalist approach to law, we may be confronted with many problems. For example, in the guardianship procedure, the weak person is generally not considered a true subject of law. The incapable person is not heard in application of the adversarial principle, a bit like the medical patient whose point of view is not always heard. However, if the goal of a guardianship procedure is the return to autonomy, however precarious, all fundamental rights must be respected. It is the same situation in relations with social institutions that operate with a logic of efficiency (e.g. the social security for the self-employed, which is so criticized since it has become harassing for small businesses). American-style and sometimes French-style care, when misunderstood, has something mothering about it, even if J. Nedelsky and other authors criticize this tendency. In a Scandinavian approach, care is based on the interdependence between the caregiver and the cared-for, the cared-for also allowing the caregiver to be more autonomous. Contemporary philosophical reflection on the relationship even suggests that the relationship may precede its terms and thus, in law, the subjects[88] . The emotion shared between two entities (at least one of which may not be a conscious subject, e.g., an infant or an animal) could thus give rise to a symbolization leading to a legal relationship that could itself allow the recognition of a legal subject. Armed with these analyses of relationalism and autonomy in interdependence, it is possible to consider relationalism and emotions together.

2. Emotion and relationalism

An emotion can lead to the creation or destruction of a legal relationship: disgust for a food prevents its consumption and purchase; contempt can prevent the construction of a relationship; sadness can lead to a rupture, not necessarily to a legal relationship. Legal acts (such as a will or a contract) may be reactions to an emotion and lead to a legal relationship

[87] M.-J. Falcon y Tella, *Three-Dimensional Theory of Law* (2010), Martinus Nijhoff publishers.
[88] A. Marmorodo and D. Yates (ed.), *The Metaphysics of Relations,* (2016), Oxford University Press, p. 181 "Relationalism seems to have won and while spatiotemporal relations may not exist without material things there are not reducible to the intrinsic properties (locations in absolute space) of the latter" and p. 196 : "there may well be no simples, but rather entities that are fundamentally relational in nature".

(e.g. angriness may lead to disinherit someone). Emotion is part of a rational process: it gives information about what leads to a reaction, but can sometimes lead to irrational reactions. The judge is the impartial third party who must be able to feel emotions without conflict of interest, get angry at the behavior of a party[89], feel disgusted, be afraid or be surprised in a good or bad way without prejudice. This rational emotion framed by procedural norms will lead to the judgment that transforms a contentious relationship into a viable one.

In the arrangement of the legal relationship, between the emotion of the judge and the parties, a process of symbolization keeps emotions at a distance, avoids deadly mergers between two persons and provides safeguards against anger and fear. Emotion appears to be constructed in relation to primary (before the acquisition of language) and secondary (with language) symbolization in the space-time of the trial. These emotions are constructed in such a way that the judge remains impartial and the parties are channeled in their expression. The awareness of an emotional reason forces to rethink the construction of the trial by allowing the judge to better identify and know his/her emotions in order to help him/her in his/her judgment without being a prisoner of them. It is by no means a question of placing reason after emotions, but of taking better account of the way reason and emotion are articulated in order to get closer to the truth and thus to the good judgment.

There is a proximity between emotion and symbol. The exchange of rings in marriage triggers joy; mourners in some cultures trigger sadness; prison is scary with its doors and bars. The symbolization of the legal relationship does not only serve to distance the parties who thus recognize themselves as different under the aegis of an impartial third party and a fourth participant in the role of witness. It does not only channel or give shape to emotions, it also seems to produce emotions. It may require a symbol or rather a symbolic arrangement to become aware of the emotions and generate the process that leads to the reaction. When emotions produce some effect, one may talk of performative emotion or emotive[90] ; when symbolic arrangements have an effect on emotion, one could talk of performative symbol.

The relationship between emotion and symbol is complex. The symbol is a representation of an emotion experienced; the symbol is generated by the emotion; the symbol is therefore the analogue of an emotion. The emotion is a phenomenon of interaction between agents within a group or institution. Symbolization is a consequence of the emotion which is itself a setting in motion. However, if emotions are constructed with symbolization, they are not constructed in any way. This is why emotional constructions can evolve over time but slowly. The symbolization itself is built on a natural relationship between the symbolizing element and the symbolized element.

Thus, for example, the child psychiatrist, Bernard Golse, told in a colloquium[91] that an orphaned child a few months old, taken in the arms of a nurse, made a gesture with his finger to surround the eye of his/her protector, thus drawing a sort of circle. Then, a few minutes later, when the nurse left, the child made the same gesture around a coffee cup. The emotion of joy felt was translated into a circular movement, and then transformed, at the nurse's probably agonizing departure, into a symbol with the cup. There is a natural relationship of shape between the nurse's eye contour and the cup. The construction of emotion and symbolization is therefore based on natural analogies. Similarly, the emotions of the judge

[89] *Terry A. Maroney, "*Angry Judges", see above.
[90] See W. Reddy above.
[91] Les états du symbolique, Paris, Sorbonne, 2016

and the parties are "constructed" in the judicial area through a process of symbolization that is not arbitrary because it occurs in procedural relationships.

The relationalist theory leads to the integration of emotions in law. One may, however, ask, why one should be independent in the legal relationship? Isn't it better to be inserted in relationships and to be dependent? One can note, in answer to this question, that a negative emotion produces an attack on the independence of persons united in the legal relationship. For example, anger attaches the person who feels it to the person who produced it. In the statutory relationship with the judge, the judge must not feel a personal emotion coming from a personal relationship (e.g. a friendship relationship with a party). If he or she does, he or she should recuse himself or herself or be rejected as the judge of a particular lawsuit[92]. Thus, emotion as a conscious event may only be possible in a symbolic arrangement. It is necessary to be independent to be in a relationship. Independence implies not being in the grip of one's emotions. The legal relationship makes it possible to build and transform one's emotions in order to tend as much as possible to independence in interdependence. One should moreover speak about inter-independence, independence of people linked together by right distances. A person who is disaffiliated (homeless for example) is not, in this sense, independent.

Emotion is conscious; therefore, the symbolic arrangement is capable of welcoming and functioning through emotions. For example, a judge who is at the right distance of the parties and is impartial has no particular emotion a priori towards one of the parties. The legal relationship as a symbolic arrangement can have effect on emotions. Thus, with the duty to act in a reserved manner and the procedural police, the procedure organizes the navigation of passions and in particular anger. Because it is conscious, one can have an action on it.

In the same way that the legal relationship builds the human relationship that does not pre-exist it, it builds the emotions by making it possible to be aware of the sorrows and joys while understanding those of others. This would also mean that the judge constructs his emotions, or rather that his emotions are constructed by the judicial relationships in which he is inserted.

If we think about a judge's emotions, we see that their relationship to emotions is constructed at the National Judicial School or with more experienced judges. Teachers generally told them to channel their emotions and judge coldly. The French National Judicial School (Ecole Nationale de la Magistrature, ENM) recruited psychologists to teach magistrates to better know and react to their emotions. This can take the form of training at the ENM, but it should be plural and non-prescriptive, provided by a psychologist, a specialist in neurosciences, as well as retired judges, etc. The training should also include the use of a psychologist to help judges understand their emotions and how to react to them. However, it would probably not be a good idea to "psychologize legal relationships".

We can thus see that the process of emotion, which obviously involves a biological part, is constructed in the legal relationship (here within the profession of magistrate). It is possible, therefore, that in all professions, one can learn to "manage" or “navigate” in one's emotions without realizing it. Thus, the musician must undoubtedly learn to express his/her emotions, it is not innate. Emotions felt and expressed outside of legal relationships would be characterized precisely by their lack of restraint, lack of consideration of codes and therefore their explosive aspect (which can lead to violence).

[92] See the French movie « Toutes nos envies » de Ph. Lioret, 2010.

It would then remain to be understood how the symbolic arrangement of the legal relationship functions with respect to emotions. It is clear that the impartial third party can in a way police behavior, particularly during a trial. The symbolic structure putting the parties at the right distance can also lead each one to put himself/herself in the place of the other to hear his/her position. For example, anger may be expressed in the form of a statement of claim or a criminal complaint. One thinks, however, of emotional bills that are caught in the heat of the emotion caused by a miscellaneous event, such as the one that was supposed to put an end to the investigating judge in France[93]. In this case, the emotion is biologized and diverted of the legal realm. It is seen as a natural collective phenomenon to which the law must respond. However, it is not impossible that this famous collective emotion was itself constructed by the complex interplay of legal relations between justice, media and politics. The making of law could well obey emotions mixed with reasons that are themselves already legally constructed.

A procedural bond is thus, unless we maintain a formalistic and positivist approach to law, an arrangement that takes emotions into account. This then leads to a conception of judicial reasoning that is not formal. It is not only an argumentation (Aristotle already associated emotions with rhetoric), but an approach that takes into account an emotional reason through the appreciation of evidence and the characterization of facts. It is thus advisable to integrate into the judicial syllogism (still in favor in civil law countries) stages of evidence taking, characterization of facts and assessment of damages that involve emotional intelligence[94].

The legal relationship does not have a purely ternary but quaternary structure. There is an impartial third party (e.g. the judge in the courtroom) and always a fourth participant: the expert and the witness in many trials or the clerk of the court. There is no universality of emotions, they are not objective. There is a cultural construction of emotions. It is important to recognize these emotions (because they are in principle conscious) in order to better distance them and use them to write the judgment. The space of the legal relationship thus structures the emotion. The mother teaches the child to control her/his emotions by giving reassuring signs. The symbolic framework puts the emotions at a distance by itself. One remains in the field of law, the emotion is constructed there, in particular that of the judge who must feel emotions equally towards both parties in order not to be in a situation of partiality; those of the parties who are in a position to understand the emotions of the other - at least to accept that they exist - probably with the help of mirror neurons (discussed concept).

This approach makes it possible to criticize the drifts of judicial management, the government obsession for mediation and predictive justice. Management by objectives often borders on sophistry, i.e. a single thought that claims to tell the truth and which is often false (a measure that appears to be efficient and economical can prove to be very costly in the long term. For example, who can say what the human and social cost of diverting divorce in France will be?), based on a reason without emotion and without symbol and analogy. Management by objective tends to govern emotions without a third party to contain them. Conversely, a relational and coordinated management (involving meetings, exchanges of information, etc.) is possible by taking into account emotions and allowing people of justice to face emotionally

[93] Statute of the 5th of March 2007 triggered by the Outreau case in which several children falsely accused adults of pedophilia.
[94] N. Paulo, « Law, Reason and Emotion? The Challenge from Empirical Ethics », Archiv für Rechts – und Sozialphilosophie 103, 2017/2, 239-258.

difficult situation[95]. Mediation may be based on negotiation or/and on emotion. The risk is to find oneself in an emotional situation without a symbolic framework. Finally, predictive justice based on algorithms can certainly predict ranges of numerical results that may be useful, but can hardly integrate emotions into the judicial process.

Therefore, it remains difficult to take emotions into account in the work of the judge. Their effects and intensities can hardly be measured. It cannot be said that there are express norms directly applicable to emotion even if there are underlying norms and emotional regime (staying away from one's emotions, managing one's emotions, taking one's emotions into account). Emotions can only be approached obliquely in law. Procedural rules are used to channel and use emotions, but implicitly. Goodrich and Nussbaum advise reading novels and watching films to learn about the play of emotions in trials. Goodrich and Weisberg go so far as to say that fiction is a source of law in that it can be thought-provoking and even serve as a model or counter-model for the judge and trial participants. Emmanuelle Bercot's movie "Tête haute" (2014) can thus be considered as a source of law for the procedure followed before the juvenile court. A judge, played by Catherine Deneuve, follows the chaotic journey of a teenager, Malony, who becomes a delinquent and finally gets away with it. The theme of emotion is explicitly addressed twice. The first time the adolescent, after a stay in a re-education center, appears before the judge who asks him if he is "better able to manage his emotions". A second time, the educator played by Benoît Magimel, who laid his hand on Malony, admits before the judge that he "did not control his emotions". More implicitly, the space of the judge's office is filmed as a symbolic device with the lawyer next to his client, wearing a dress, and the prosecutor appearing at the corner of the table. However, the decision to put in jail is made in the solemn courtroom. The very unstable teenager thanks the judge when he learns that he is going to jail, as if he is asking to be punished. Thus, the slow learning of emotion control goes through a process of symbolization. Malony, in a re-education center, will ask the educator to send a pebble to his judge. The educator reacts by telling him that he hopes it is not to throw it in the judge's face. On the contrary, Malony's denial and calm show that he symbolizes his relationship with the judge and the distance he takes with violence. Later in the film, we see the pebble on the judge's desk that has become a paperweight, and we catch the joy on Malony's face. On the other hand, he steals a scarf belonging to the judge and it is more a fetish than a symbolization. There is a very moving moment when the judge asks him above her desk to give his hand. He finally gives it to her and the judge says: "You must accept the hands that are offered to you". In this way, she symbolized the possibilities available to Malony, while perhaps at the same time being at the limit of the procedural framework. This movie therefore not only illustrates our hypothesis that emotion is constructed (or let's say modelled) within the procedural framework, but also demonstrates, through the image, that emotion is formed within a symbolic framework[96].

The consideration of emotion in law must be mastered and taken seriously; it leads to enriching the theory of law by giving it a fourth dimension (with reason, intuition and sensation). Taking inspiration from a Slovenian author, Marko Novak, one can classify lawyers and even theories of law according to the types of character (himself inspired by Jung)[97] . Certain personalities privilege the reason by taking into account their emotions only secondarily. The theory of law which corresponds to them is undoubtedly normativism which

[95] E. Jeuland et C. Boillot, *La qualité dans la mesure de la performance judiciaire, une approche relationnell*e , *IRJS* 2016.
[96] See as well the French movie « Polisse » directed by Maïwen in 2011 in which the head of a juvenile police squad tells an angry policeman (because a mother had to be separated from her child): “no affect here”.
[97] *Type Theory of Law, An Essay in Psychoanalytic Jurisprudence*, Springer, Switzerland, 2016.

makes it possible to deduce a legal solution from determined facts. The personality that privileges intuition before constructing a reasoning in a judgment takes into account values and is a little less interested in strict legal characterizations. The corresponding theory of law is the natural law theory, which has become the human rights theory. The personality privileging the sensation of facts before reasoning, intuition and emotion has a realistic and pragmatic approach to law. The one who starts from his/her emotions and then takes into account facts, intuitions and reasons is undoubtedly close to the relationalist theory of law (but Marko Novak does not clearly refer to a relationalist theory of law). These are obviously standard categories, and a judge's theoretical conception of law may be different from his practical approach to law. This does not mean that judges should be categorized by passing a personality test (inspired by Jung), especially as each person evolves. It does, however, indicate that each judge may have a different approach to his or her relationship to emotions in constructing judgments. Of course, none of these theories of law is false in itself, they are complementary approaches. Moreover, these remarks justify a little more collegiality in court proceedings at a time when the single-judge procedure is still developing in civil law countries (one has to recall than in civil law countries a person maybe a judge at 24 or 25 years old, rather an unexperienced age, whereas the average age in common law countries is close to 45) . They may also contribute to the view that predictive justice will only be able to retain a place as an aid to judgment and will never be able to replace the judge.

Emotion is necessary and beneficial to the judge as long as it does not go beyond the "framework" (which is a concept dear to the psychoanalyst[98]), i.e in matters of justice, the symbolic device put in place by the rules of procedure and supported by the architecture and decor of the court. Two French juvenile judges consider that the frame is first formed by the statutes: "In order not to be overwhelmed by emotion, it is essential for juvenile judges to always keep as their backbone what underpins their legitimacy to intervene, namely the law ("la loi") and the various legal texts"[99]. If the juvenile judge is led to enter into the intimacy of families, to separate parents and children, it is on the basis of the Civil Code and in the name of public order. Studying in depth the evolution of the families, searching if there is indeed a situation of danger, notably through multidisciplinary evaluations, respecting the guiding principles governing the educational assistance procedure, being attentive to the needs of the child by working on his environment, will allow the judge to take a right distance from his/her feelings and emotions to look with an objective eye at the situation that is submitted to him/her. He/she then finds an adapted posture, in accordance with the framework of intervention. It is important, however, not to succumb to a form of dogmatic legalism of cult of the "loi". It may well be the French style of the dispassionate judge. W. Reddy[100] considers that the regime of emotions changed in France after the "Terreur" since emotional authenticity had led to the horror. Relying on the civil code was a way to avoid the excess of sentimentalism (started around 1780). The free law movement led by Geny in France does not seem to have change the regime of the dispassionate judge. However, the debate around the judge Magnaud who wanted to rely on equity and not statute may well be explained by the new context of the free law movement[101]. It is preferable to consider the judicial framework

[98] A. de Mijolla, "Framework of the Psychoanalytic Treatment ." International Dictionary of Psychoanalysis. . *Encyclopedia.com.* 16 Oct. 2020 https://www.encyclopedia.com., V° « Cadre de la cure psychanalytique », in Dictionnaire international de la psychanalyse, Pluriel, 2013.

[99] O. Barral and S. Lesineau, "Des juges et des émotions", Les Cahiers Dynamiques 2017/1 (N° 71), p.90 to 96.

[100] See above chapter 5 ff.

[101] Marie-Anne Frison-Roche, « Le modèle du bon juge Magnaud », dans *De code en code : mélanges en l'honneur du doyen Georges Wiederkehr*, Paris, Dalloz, 2009, p. 335-342 https://mafr.fr/fr/article/123-le-modele-du-bon-juge-magnaud-in-de-code-en-co/ accessed 11/11/2020.

as it is constructed by all legal norms, whether it be the statute, the decree, the case law or even legal scholarship ("doctrine"). Ritual and judicial architecture support the procedural framework, which is above all a symbolic device.

Nevertheless, it seems somewhat difficult to combine the question of emotions and that of the unconscious. Indeed, emotions are, by definition, conscious. The idea put forward by Mrs. de Maximy[102], honorary magistrate and psychotherapist, is that a judge's emotions should not be disturbed by traumas or, more generally, by events in the family history. For example, a judge who has experienced conflicts with his father throughout his life may be led in educational assistance procedure to "dislike fathers" in the cases he is in charge of without realizing that this emotion is linked to an unconscious conflict. Becoming aware of one's emotions for a judge implies acknowledging the influence of trauma or family history. According to Mrs. de Maximy, it is recognized that a trauma is absorbed when it no longer erupts into reality. Similarly, a judge should not allow unconscious forces to erupt into reality and produce untimely emotions of anger, fear, sadness or even joy. This does not mean, according to Mrs. de Maximy, that every judge (like every decision-maker) should follow a psychoanalysis, but that every judge, in order to become aware of the content of his/her emotions, must also take into account his/her own history. However, it must be emphasized that it is also thanks to his/her own family history and his/her emotions that he/she will be able to render an adapted, accepted and therefore spontaneously enforced judgment.
Mr. Van Meerbeeck, a Belgian author and judge, also notes the importance, with regard to emotions, of the right to be heard (which allows to doubt and not to uncritically adhere to one of the parties), collegiality, deliberation and reasons of the judgement in this system[103]. He also notes that it is the human relations that are brought into play that prevent emotions from deviating from reason. From a procedural point of view, it can therefore be said that the procedural relationship contributes to constituting these human bonds that provide the "framework" of the lawsuit that can lead the judge to issue a judgment accepted by the parties. In any case, one must avoid taking the emotional turn that, in the United States, leads to the production of "sentencing mitigation video", or "victim impact video" shown during the hearing to convince the jurors of the remorse of the accused or the drama experienced by the victim[104].

The French Council of State's guide on the drafting of administrative judgments also invites judges not to allow the slightest subjective aspect to be expressed in the reasons: "The subjectivity of a judge fades in the face of the impersonality of the institutional word. Judicial decisions are thus characterized by a style imbued with neutrality and restraint. Under no circumstances should they reflect, even in the background, the personal opinions and value judgments of the judges who render them. Nor should they contain subjective assessments and betray the adherence, irritation or irony of their authors. All connotations should therefore be avoided"[105]. This requirement seems to us somewhat excessive and does not reflect the

[102] Interviews, 2017-2018.
[103] J. Van Meerbeeck, "Quelques réflexions sur le rôle de l'intuition et des émotions dans la fonction de juger », Mélanges Fr. Ost, pp. 385-416 (however, this author creates a slight confusion between intuition and emotion) and Eva Salomon, Le juge pénal et l'émotion, Paris II, 2015.
[104] Regina Austin, "Not Just a Common Criminal": The Case for Sentencing Mitigation Videos, Penn Law: Legal Scholarship Repository, Faculty Scholarship, 4-2014, .
https://pdfs.semanticscholar.org/60d5/edb1a9599d14866a5c7dbbbab299e131a65b.pdf, accessed 23 January 2019.
[105] Vade-mecum sur la rédaction des décisions de la juridiction administrative, 2018, p. 17 https://www.conseil-etat.fr/Media/actualites/documents/2018/12-decembre/vade-mecum-redaction-decisions-de-la-juridiction-administrative, accessed the 11th of November 2020.

importance of emotions in judicial reasoning. Not that the reasons of the judgment, which must be as logical and rational as possible, must reflect all the emotions of the judge, but it seems to us that the use of an adverb such as "dangerously" or "unreasonably" reflecting the party's behavior is not useless to explain the decision.

Conclusion. When, in a legal system, the rule is relatively rigid and known in advance, the judge's emotion is said to be put at a distance, perhaps so as not to hinder the judicial process. If the importance of emotion in the production of a judgment were recognized, it would perhaps hinder the precision of the rule from which the logical consequences must be drawn. The share of emotion is then expressed more in the amounts, the taking into account of moral damages and the standard of proof retained. In other words, a new hypothesis emerges which is no doubt difficult to establish: it may be that the exhortation made to the judge at the beginning of his/her career (according to the evidence we have been able to gather from judges) to keep his/her emotions at bay is not so much related to the emotions themselves as to the method used in civil law countries to arrive at a judgment based on a legal rule. In other words, this exhortation is perhaps less a prescription than a description of the emotional state of a judge who applies a legal rule established prior to litigation (unlike the precedent method, which involves a comparison between facts). Basically, the importance of emotions in the judicial process in civil law countries has probably never been ignored, but it was necessary to express the fact that the syllogism had to prevail over other considerations. It is thus understandable that the above-mentioned juvenile judges consider the statute ("la loi") as the main framework within which emotions can be expressed.

The emergence of the theme of the emotion of the judge in civil law countries may thus express the progressive change of judicial method in these countries giving less importance to the syllogism and to rules that may be presented in the form "if...then" than to fundamental principles (fair trial, proportionality, dignity, etc.) and standards (dangerousness, best interest of the child, etc.) assuming that, on the contrary, reason, sensation, intuition and emotion are used together. The development of mediation, at least in speeches and texts - more than in statistics in many civil law countries - can also be explained in part by the need to find modes where emotions are taken into consideration more than the legal rule. The starting point of the civil law judge in his/her relationship with emotions is therefore different from that of the common law judge (also elected or appointed at a later age, around 45 years old, and therefore probably more aware of his emotions). Moreover, a judge who is emotionally affected by a case, or even by a repetition of difficult cases, may end up being disappointed by the law and the procedural framework that do not protect him or her sufficiently. The toll-free number distributed to judges in case of psychological difficulty may also be dialed in the event that a judge is not only emotionally shaken, but also disappointed that he or she does not feel more supported by the legal and institutional framework. Therefore, it is not enough to be aware of one's emotions and possible biases linked to old and family traumas, it is also necessary to work to maintain a legal framework that implies sufficiently stable quality statutes and an institutional framework that does not isolate by the judges, but on the contrary, through coordination, strengthens the relationships between professional of justice (not only through mailing lists between judges of the same specialty, but also through meetings, court planning, etc.)[106]. Thus, it seems that the judiciary has moved from the emotional regime of hardening to the managerial emotional regime without being able to move to a coordinated emotional

[106] E. Jeuland, *Court management, Gestion du tribunal* (2020), In English and French), France, IRJS-Edition.

regime that can limit conflicts of objectives (efficiency versus good judgments) and suffering in judicial professions.