

The Judge Under Pressure: Fostering Objectivity by Abandoning the Myth of Dispassion

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THE INHERENTLY COERCIVE nature of law makes its enforcement the most intrusive form of state power. To secure legitimacy and reproduce trust in the legal system, it is crucial that judicial activities are performed objectively and impartially. Traditionally, the ideal of objectivity has been closely associated with dispassion; a judge that can put her emotions and values, implicitly emotional drives and motivations aside under ‘the veil of ignorance’, as suggested by Rawls, and evaluate the case before her in a rational way.¹ The ideal of the dispassionate judge has a long tradition in Western democracy; 400 years ago, Hobbes argued for such an ideal and it is still as vivid today.²

Two narratives that question judicial independence and the objective judicial process are rapidly gaining ground.³ First, populist movements portray elite decision-making as distanced, alien to, and ‘out of touch’ with, the concerns of the

* The writing of this chapter was made possible thanks to the Swedish Research Council (VR 2016-01218) and the European Research Council (ERC) under the European Union’s Horizon 2020 research and innovation programme (757625, JUSTEMOTIONS).

¹ J. Rawls, *A Theory of Justice* (Cambridge, The Belknap press of Harvard University Press, 1999), T. A. Maroney, ‘The Persistent Cultural Script of Judicial Dispassion’, *California Law Review*, 99 (2011), 629–681. M. Bladini, *I objektivitetens sken. En kritisk granskning av objektivitetsideal, objektivitetsanspråk och legitimeringsstrategier i diskurser om dömande i brottmål. (In the semblance of objectivity – a critical review of objectivity claims and legitimation strategies in criminal trial discourses)* (Göteborg, Makadam förlag, 2013).

² T. Hobbes, *Leviathan* (Oxford, Oxford University Press, 2008). Note the rise and demise of the emotional judge in Europe, especially in German free law and in Soviet Russia during the period of 1880–1930. An in depth discussion on emotions in the judiciary in modern Europe is found in Pavel Vasilyev, ‘Beyond Dispassion: Emotions and Judicial Decision-Making in Modern Europe’, *Journal of the Max Planck Institute for European Legal History*, 25 (2017), 277–285.

³ ‘Introduction’, in this volume.

people they should serve. This narrative has led to the curtailment of judicial discretion in some European countries.⁴ A second narrative that increasingly attracts the interest of governments is the appeal of automation through different forms of artificial intelligence (AI). AI appears to offer a less expensive and more efficacious way of guaranteeing greater predictability and control over legal decision-making.⁵ Legislative measures and more formal responses (*de jure* protections) are one way to meet these challenges. At the same time, research emphasises that other, more informal and cultural factors are crucial to understanding how to deal with the practical challenges of protecting judicial independence.⁶

Both narratives are based on the supposition that legal decision-making is performed by a dispassionate and therefore objective decision-maker. However, research on emotions and rational decision-making from several disciplines show the opposite, that reason and emotion are in fact inevitably intertwined.⁷ One way to approach the challenges of these narratives is to seek to understand and elucidate the reality of decision-making; to identify the subtle emotional processes and emotion management that guide the logical application of abstract principles as well as the everyday interaction of legal proceedings.

This chapter scrutinises the criminal procedure and decision-making processes through an emotion lens and shows how emotions are necessary both for an objective decision-making process as well as for legitimating criminal procedure. By identifying the role of emotions in legal procedure, we aim to show how human, passionate judges can serve as gatekeepers both in relation to the populist portrayal of judges as detached from the reality of everyday life and to the idea of AI replacing judges in legal decision-making.

⁴ Here the UK, Poland and Hungary can serve as examples, although it takes different shapes in the states mentioned. See European Commission, 'Rule of Law: European Commission takes new step to protect judges in Poland against political control', 17 July 2019, online at: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_4189 (last accessed 26 January 2022) and Amnesty International, 'Continued Attacks against the Independence of the Judiciary in Hungary', 23 September 2019, online at: <https://www.osce.org/odihr/431879?download=true> (last accessed 26 January 2022) respectively.

⁵ Several countries have initiated projects on AI taking part in judicial decision-making, some of these will be discussed below. A report from Partnership on AI presents benefit and risk analysis and points out the judiciary as an area of high risk assessment. See Partnership on AI, *Report on Algorithmic Risk Assessment Tools in the US Criminal Justice System* (2019), online at: <https://www.partnershiponai.org/report-on-machine-learning-in-risk-assessment-tools-in-the-u-s-criminal-justice-system/> (last accessed 26 January 2022).

⁶ See the conclusion, 'On Crisis', to this volume. Note that emotions in law, or 'emotionalization of law', has had a specific impact on the change of criminal laws. This chapter, however, has a different focus, emotions in legal decision-making, i.e., in legal procedure, see S. Karstedt, 'Emotions and Criminal Justice' *Theoretical Criminology* 6, (2002) 299–317. Emotions are also fundamental in the populist discourse on criminal law, but will not be discussed here.

⁷ R. de Sousa, *The Rationality of Emotion* (Cambridge, MA, MIT Press, 1987), A. Etzioni, 'Normative-Affective factors: Toward a New Decision-Making Process', *Journal of Economic Psychology*, 9 (1988) 125–150, A. R. Damasio, *Descartes Error: Emotion, Reason and the Human Brain* (New York, Avon Books, 1994), Jack Barbalet, *Emotion, Social Theory and Social Structure – A Macrosociological Approach* (Cambridge, Cambridge University Press, 1998).

Law and emotions

Law and emotions as an academic subject has developed quickly during the past two decades and now covers numerous fields of research, including theoretical as well as empirical studies and a diversity in choice of foci.⁸ While the field of law and emotions in general, and emotions in judicial decision-making in particular, is a fast-developing field, it is less well-known by legal practitioners and legal scholars and hence needs to be properly introduced.

Law and emotion research spans several disciplines, such as sociology, psychology, law, history, philosophy and neuroscience, and the diversity of the field is augmented by the various legal systems concerned, including common law, civil law and mixed legal systems.⁹ The role of emotions in law can also be examined from several perspectives: in relation to victims, offenders, jurors, legal actors such as police officers, prosecutors, lawyers or judges, and the law itself, as well as legal institutions.¹⁰ So far, most research on law and emotion has been conducted within common law traditions.¹¹ In a civil law context, German historians have recently started to explore the field.¹² In the Scandinavian context, the main contributions have been made by primarily Swedish researchers of sociology and criminology.¹³ In this chapter, the authors will focus on the role of emotions in criminal procedure,

⁸ J. E. Stannard, 'How to do Law and Emotion' *Civil & Legal Sciences*, 2 (2013). For a brief history of the field of law and emotions, see K. Abrams and H. Keren, 'Who's Afraid of Law and the Emotions?' *Minnesota Law Review*, 94 (2010), 1997–2074.

⁹ T. A. Maroney 'Law and Emotion: A Proposed Taxonomy of an Emerging Field', *Law and Human Behaviour*, 30 (2006), 119–142, B. H. Bornstein and R. L. Weiner, *Emotion and the Law. Psychological Perspectives* (Springer, New York, 2006) and S. A. Bandes, 'Introduction to The Passions of Law' *The Passions of Law* (New York, New York University Press, 1999).

¹⁰ S. A. Bandes and J. A. Blumenthal, 'Emotions and the Law', *The Annual Review of Law and Social Science*, 8 (2012) 161–181.

¹¹ See, for example, the work by Terry Maroney, Professor of Law and Professor of Medicine, Health and Society at Vanderbilt Law School in USA, Susan Bandes, Emeritus Centennial Distinguished Professor of Law at De Paul College of Law in USA, Sharyn Roach-Anleu, Matthew Flinders Distinguished Professor at the College of Humanities, Arts and Social Sciences, Flinders University in Australia, Bettina Lange, Associate Professor of Law and Regulation at the Centre for Socio-Legal Studies, Faculty of Law, Oxford University in the UK.

¹² D. Ellerbrock and S. Kesper-Biermann, 'InterDisciplines'. *Journal of History and Sociology*, 2 (2015) 1–15, H. Landweer and D. Koppelberg, *Recht und Emotion I. Verkannte Zusammenhänge* (Verlag Karl Alber 2016) and H. Landweer and F. Bernhardt, *Recht und Emotion II. Sphären der Verletzlichkeit* (Verlag Karl Alber, 2017).

¹³ S. Bergman Blix and Å. Wettergren, 'A Sociological Perspective on Emotions on the Judiciary', *Emotion Review*, 8 (2016) 32–37, S. Bergman Blix and Å. Wettergren, *Professional Emotions in Court. A Sociological Perspective* (New York, Routledge 2019), N. Törnqvist, *Att göra rätt. En studie om professionell respektabilitet, emotioner och strikta linjer bland relationsvåldsspecialiserade åklagare (Doing just right: A study on professional respectability, emotions and narrative lines among prosecutors specialised in relationship violence)* (Stockholm, Department of Criminology 2017), L. Flower, 'Doing Loyalty: Defence Lawyers' Subtle dramas in the Court-room', *Journal of Contemporary Ethnography*, 6 (2018) 226–254.

i.e., in relation to legal decision-making in criminal processes, building on two ongoing research projects.¹⁴

Emotion and rationality

*So, emotions are not just mindless; they embody thoughts. Therefore, we cannot dismiss them from judicial reasoning and writing just by opposing them in an unreflective way to reasoning and thought.*¹⁵

The quote from Nussbaum discussing emotions and judicial decision-making from a philosophical perspective illustrates the idea of emotion and reasoning as intertwined in a mutual interplay. Emotions are in general associated with internal reactions that interfere with the activities carried out due to, for example, unreasonable and strong excitement or irrational distraction.¹⁶ There is a strand of empirical research within social psychology where more subtle emotions in legal decision-making have been examined: how jurors' emotions affect their attribution of responsibility,¹⁷ as well as how emotions affect how people understand information.¹⁸ Studies within this field also investigated how police officers were affected by their emotions in investigative processes, showing that sad officers were more thorough when carrying out the investigation compared to angry police officers.¹⁹ All these examples portray emotion in the legal decision-making process as having a biasing effect and being opposite to rationality.²⁰ However, as substantiated by research from several disciplines, emotions must also be understood as a fundament of the human predisposition to act, as the fuel of action. If one had no emotions, one would lack motivation to act (and, in the end, to live).²¹ Thus a fundamental starting point in current theories

¹⁴ Bergman Blix is the principal investigator and Bladini is participating in both the interdisciplinary project *Emotions in judicial decision-making*, carried out in Swedish courts from 2017–2019 funded by the Swedish Research Council (2016-01218), and the comparative interdisciplinary project *Justemotions*, carried out in Sweden, Scotland, Italy and the US during 2018–2023, funded by the European Research Council (grant agreement No. 757625).

¹⁵ M. Nussbaum, 'Emotions in the Language of Judging', *St. John's Law Review*, 70 (1996), 23–30, p. 25.

¹⁶ J. Barbalet, 'A Characterization of trust. And its consequences', *Theory and Society*, 38 (2009), 367–382.

¹⁷ N. Feigenson and J. Park, 'Emotions and Attributions of Legal Responsibility and Blame: A Research Review', *Law and Human Behaviour*, 30 (2006), 143–161.

¹⁸ K. Ask and A. Pina, 'On Being Angry and Punitive: How Anger Alters Perception of Criminal Intent', *Social Psychological and Personality Science*, 2 (2011), 494–499 and J. S. Lerner and L. Z. Tiedens, 'Portrait of The Angry Decision Maker: How Appraisal Tendencies Shape Anger's Influence on Cognition', *Journal of Behavioural Decision Making*, 19 (2006), 115–137.

¹⁹ K. Ask and A. Granhag, 'Hot cognition in investigative judgments: the differential influence of anger and sadness', *Law and Human Behaviour*, 31 (2007), 537–551.

²⁰ Barbalet, *Emotion, social theory and social structure. A macrosociological Approach*.

²¹ Barbalet, *Emotion, social theory and social structure. A macrosociological Approach*. 'For in action the whole person participates, and science, then, requires that 'intellect, will, taste, and passion cooperate just as they do in practical affairs' (James 1987[...]). Quote from J. Barbalet, 'Science and Emotion', *Sociological Review*, 50 (2002), 132–150.

of emotions is that the traditional view of emotion and rationality as mutually exclusive categories is erroneous: emotions rather play a crucial role for rational action.²² Three aspects of the relationship between rationality and emotion have previously been examined within various disciplines.²³ In philosophy, emotions have been discussed as a supplement to reason, and the use of factual knowledge has been scrutinised in relation to emotions, leading to the conclusion that cognition is not enough to decide what one needs to know and what to ignore. Damasio has shown that people who suffered from brain damage and lost contact with the emotional parts of the brain, but with a preserved cognitive capacity, found it difficult to make decisions. They got stuck in the reasoning: ‘on the one hand... but on the other hand, on the one hand...’. Damasio’s conclusion is that the ability to make decisions needs to involve emotions because one needs to ‘feel’ the consequences.²⁴

A second aspect of emotions in rational processes, hence, decision-making, is that emotions guide attention: what to notice, what to attend to and what to inquire about. Emotions might also serve to motivate interest and confidence in a process of gathering information or solving a problem, pride in expertise, and/or aversion to waste of time and efficiency. These emotions work with cognition to further rational action and most often stay outside our conscious awareness, therefore not reflected upon as emotions.²⁵

A third aspect is that the relation between emotions and rationality is culturally embedded; the understanding of the role of emotions for rational action varies across time and space.²⁶ In court, people’s tragedies are often the subject of a trial and hence there are lots of emotions involved. Outside the court, it would seem rational to react emotionally and, for example, comfort someone who was sharing a tragedy. In court, there are other emotional regimes at play. A judge is expected not to seem affected by a crying victim; an unemotional display is considered rational in the context of the judiciary. What would seem like a rational emotional response in one setting can be deemed irrational in another. This last aspect puts focus on the importance of contextualising the role of emotions in court. Emotions might be expressed or displayed in different ways in different situations due to specific emotional regimes or feeling rules, concepts that will be introduced and further developed below.

²² Barbalet, ‘A Characterization of trust. And its consequences’, E. Illouz and S. Finkelmann, ‘An Odd and Inseparable Couple: Emotion and Rationality in Partner Selection’ *Theory and Society*, 38 (2009), 401–422 and Bergman Blix and Wettergren, *Professional Emotions in Court A Sociological Perspective*.

²³ The authors refer to a Weberian definition of *rationality* as pervasive, calculating, reflexive consciousness, as described by Illouz and Finkelmann in ‘An Odd and Inseparable Couple: Emotion and Rationality in Partner Selection’.

²⁴ Damasio, *Descartes Error: Emotion, Reason and the Human Brain*.

²⁵ De Sousa, *The Rationality of Emotion*. A. Morton, ‘Epistemic Emotions’ in P. Goldie (ed.), *The Oxford Handbook of Philosophy of Emotion* (New York, Oxford University Press, 2010), 385–399, J. Barbalet, ‘Emotions beyond Regulation: Backgrounded Emotions in Science and Trust’, *Emotion Review*, 3 (2011), 36–43. These emotions might also be acknowledged as epistemic emotions, and discussed more in depth in the section on background emotions below.

²⁶ Illouz and Finkelmann ‘An Odd and Inseparable Couple: Emotion and Rationality in Partner Selection’.

Emotions and judging

'remember stone face!' (Asta, judge, 60+)

Legal decision-making comprises decisions of procedural character, as well as of substantive law. Hence, the conception of decision-making in the context of criminal law involves a variety of decisions such as questions concerning how to deal with an annoying defence lawyer or a sobbing victim; how best to assess a witness' credibility; and how to decide whether a certain document should be obtained or not. Some of these decisions might not be formal ones, but they are of importance in the process of being objective and displaying objectivity.

The quote above comes from an experienced judge who in an interview explained how to display an objective image of herself as a judge. She told the interviewer that she, as a novice judge, had to put a sticker in her law book to remind herself to 'put on the stone face'.²⁷ A crucial part of legitimating the judiciary is to display objectivity,²⁸ and, as the ideal of the judge is a dispassionate one, the 'stone face' is an important feature of the emotion work judges do in court. Not only is the judge supposed to represent justice showing a stone face, but she is also expected to be just by making rational decisions, hence putting her emotions aside.²⁹ But a vast amount of research has shown that these presuppositions are inaccurate. As we demonstrate below, emotions make a crucial contribution to procedural justice and hence legitimacy.

Judges are, as discussed above, exposed to highly emotional situations on a daily basis and to actively prevent them from taking over is part of their emotional management. The management of emotions in court is three-fold: it includes handling others' emotions, one's own emotions, and the way these are displayed or not.

In the following, four theoretical concepts from sociological emotion theory are presented and described in the context of the judiciary: foreground as well as background emotions, emotion management and empathy.

Foreground emotions

'Sexual assaults, especially when there are children involved... I allow myself to be sad then. And if I become so sad that it affects me, both the way I look and how I think, then I have to take a break.' (Karin, judge, 50 +)

The above quote is a typical example of foreground emotions. Judge Karin discusses a type of case that judges typically find to be emotionally straining and that she knows might affect her so pervasively that she has to deal with her emotions for

²⁷ Quotes used in this chapter come from the ongoing research project *Emotions in judicial decision-making*.

²⁸ Bladini, *I objektivitetens sken*.

²⁹ Å. Gunnarsson, E.-M. Svensson, J. Käll and W. Svedberg, *Genusrättsvetenskap* (Studentlitteratur 2018). Maroney, 'The Persistent Cultural Script of Judicial Dispassion'.

them not to interfere with her professional activities. Strong emotion shifts the judge's focus from the trial to her own internal state. If her sadness threatens her ability to both display objectivity and think objectively, she takes a break to calm down and refocus. What is most often conceptualised as emotions are those that end up in the foreground and interrupt our actions, expressed both cognitively and physically. Foreground emotions force the emotional subject to reflect and react upon them.³⁰

The quote also highlights the situational bearing of feelings rules. In society in general, sexual assault on children is anticipated to instigate strong emotional reactions, but the rules of the court, with their emphasis on professionalism and impartiality, imply that the judge must not experience nor express sadness.³¹ As noted above, one of the strongest constituents of the emotional regime for judges in court is the display of unemotional rationality, i.e., a stone face.³²

Background emotions

'My impression is that both of them have taken this seriously, if I may say so. And spent quite a lot of time, energy and professional knowledge on this case. So, it differs from many other cases, and is kind of a prestigious case.' (Peter, judge, 45 +)

The quote comes from an interview with a judge when a trial was finished in a district court in Sweden. He discusses the other legal actors and praises them for their professionalism in this case. He appreciates their engagement and good work and makes the reflection that it might depend on the fact that it was a prestigious case. What he does is comment on the backgrounded emotions that motivated the prosecutor and defence lawyer to make an extra effort in the case. In contrast to the foregrounded emotions, backgrounded emotions are subtle, cooperating with the actions carried out instead of disrupting them. They are typically invisible and unconscious or on the border of one's consciousness.³³ Pride in the profession is seen as a driving force in legal actors' work. Other background emotions important in the legal professions are curiosity in the facts of the case, a blasé feeling towards non-legally relevant facts, the feeling of uncertainty driving the process of evaluating evidence forwards, and the feeling of certainty that will stop the process of

³⁰ Barbalet, 'Emotions beyond Regulation: Backgrounded Emotions in Science and Trust'.

³¹ E. Goffman, *Frame Analysis: An Essay on the Organizational of Experience* (Boston, MA, Northeastern University Press, 1974). A. R. Hochschild, 'Emotion work, feeling rules, and social structure', *American Journal of Sociology*, 3 (1979), 551–575, W. M. Reddy, *The Navigation of Feeling – A Framework for the History of Emotions* (Cambridge, Cambridge University Press, 2009).

³² Note that this analysis is made in a Swedish context. Even though research shows that the script of rational and unemotional decision-making makes a claim of display dispassion also applies to other Western courts, see Bergman Blix and Wettergren, *Professional Emotions in Court. A Sociological Perspective* and K. Mack and S. Roach Anleu, 'Performing Impartiality: Judicial Demeanor and Legitimacy', *Law and Social Inquiry—Journal of the American Bar Foundation*, 35 (2010), 137–173.

³³ Barbalet, 'Emotions beyond Regulation: Backgrounded Emotions in Science and Trust'.

inquiry. The examples mentioned show how background emotions cooperate with and underpin the cognitive processes one is engaged in and since they are below the threshold of awareness, they might not be named and reflected upon.³⁴

Background emotions are thus necessary to rational action: they inform, guide and support one's focus, help to distinguish important from less important details and do so in a quicker way than a cognitive evaluation would. Hence, background emotions typically operate in knowledge seeking processes and are relevant in a discussion on legal decision-making.

A group of background emotions that are associated with decision-making in particular are epistemic emotions.³⁵ Epistemic emotions are linked to cognitive evaluation by providing information about the quality of one's knowledge and motivating certain kinds of mental action.³⁶ There is an ongoing discussion on which emotions can be considered epistemic, but they most often include feelings of certainty, understanding, curiosity, epistemic anxiety and uncertainty. All of these feelings affect deliberation; 'a feeling of certainty freezes inquiry', while curiosity opens up for further examination.³⁷ As we saw above in the section on foreground emotions, these also influence cognitive processes but are often seen as disruptive of a rational process. However, as we will see below in relation to AI in judging, this contention needs qualification.

Emotion management

Several studies have focused on emotion management in court, scrutinising the professional emotional regimes of the defence lawyer, the prosecutor and the judge.³⁸ Emotional regimes, from a judge's perspective, regulate the task of managing the emotions of others as well as one's own.³⁹ As discussed above, the emotional regime

³⁴ Barbalet, 'Science and Emotion', p. 147.

³⁵ S. Arango-Muñoz, 'The nature of epistemic feelings', *Philosophical Psychology*, 27 (2014), 193–211, R. de Sousa, 'Epistemic Feelings' in G. Brun, U. Doğuoğlu and D. Kuenzle (eds) *Epistemology and Emotions* (Aldershot, Ashgate, 2008), 185–204. Morton, 'Epistemic Emotions'.

³⁶ Arango-Muñoz, 'The nature of epistemic feelings'.

³⁷ de Sousa, 'Epistemic Feelings', p. 191.

³⁸ Criminologist Nina Törnqvist has explored the emotion rules of a trial and the 'emotional ideals' that the professional identity rests on in particular regarding prosecutors. Törnqvist, *Att göra rätt*, p. 297. Flower has explored the emotional regimes of defence lawyers in 'Doing Loyalty: Defence Lawyers' Subtle dramas in the Court-room', and the emotional regimes of judges has been investigated by Bergman Blix and Wettergren *Professional Emotions in Court. A Sociological Perspective*. See also S. Roach Anleu and K. Mack, 'Magistrates' Everyday Work and Emotional Labour', *Journal of Law and Society*, 32 (2005) 590–614, S. Roach Anleu and K. Mack, *Performing Judicial Authority in the Lower Courts* (London, Palgrave Socio-Legal Studies, 2017), K. Jacobsson, "'We Can't Just Do It Any Which Way": Objectivity Work among Swedish Prosecutors', *Qualitative Sociology Review*, IV (2008), 46–68.

³⁹ Management of the judge's own as well as the parties' emotions in the court has been explored by Roach Anleu and Mack, 'Magistrates' Everyday Work and Emotional Labour', P. Darbyshire, *Sitting in Judgment: The Working Lives of Judges*, (Oxford, Hart Publishing, 2011), J. A. Scarduzio, 'Maintaining Order through Deviance? The Emotional Deviance, Power, and Professional Work of Municipal Court Judges', *Management Communication Quarterly*, 25(2) (2011), 283–310, M. Herzog-Evans, *French*

regulating judges in court is the non-expressive, stone-faced one. When practising the display of the stone face, the judge engages in a sort of ‘double agency’: she acts upon emotions while simultaneously observing and regulating their display. To display an emotion other than the experienced one or absence of the same (dispassion) demands that the judge decouples the expression of emotion from the experience of it.⁴⁰ Sometimes it is necessary, or expected, to show or display emotions, even though the judge does not experience such emotion.

Empathy

Empathy is an important part of the judiciary and has been explored and discussed in research on legal decision-making and in relation to the parties.⁴¹ Empathy is not an emotion such as sympathy and compassion, but a capacity.⁴² It is a tool to tune in with others, a crucial resource both in evaluating hearings and other evidence and in emotion management.⁴³ It might be described as the emotional and cognitive capacity to imagine how a situation appears to someone else. Nussbaum argues that Smith’s suggestion of the judicious or impartial spectator would serve as a good example of empathy used by judges in criminal procedures.⁴⁴ The judicious spectator is an artificially constructed person that serves as a role model of public rationality, and he uses the example of reading literature or watching a theatre play to illustrate how one puts oneself in someone else’s position but with a certain distance. When reading literature, one is intensely involved and engaged

Reentry Courts and Rehabilitation: Mister Jourdain of Desistance (Paris, Editions L’Harmattan, 2014), Bergman Blix and Wettergren, *Professional Emotions in Court. A Sociological Perspective*.

⁴⁰ S. Bergman Blix, ‘Professional Emotion Management as a Rehearsal Process’, *Professions and Professionalism*, 5 (2015), 1–15.

⁴¹ W. J. Brennan Jr, ‘Reason, Passion, and the Progress of the Law’, *Cardozo Law Review*, 10 (1988), 3–23, Nussbaum, ‘Emotions in the Language of Judging’, S. Bandes, ‘Empathetic Judging and the Rule of Law’, *Cardozo Law Review De Novo*, (2009), 133–148, K. Abrams, ‘Empathy and Experience in the Sotomayor Hearings’, *Ohio North University Law Review*, 36 (2010), 263–286, T. B. Colby, ‘In Defence of Judicial Empathy’, *Minnesota Law Review*, 96 (2012), 1945–2015, Mikael Mellqvist, ‘Om empatisk rättslämpning’ *Svensk Juristtidning*, (2013), 494–501, Bergman Blix and Wettergren ‘A Sociological Perspective on Emotions on the Judiciary’, and Bergman Blix and Wettergren, *Professional Emotions in Court. A Sociological Perspective* have explored the role of empathy in legal decision-making thoroughly whereas S. Roach Anleu and K. Mack, ‘Judicial Authority and Emotion Work’, *Judicial Review: Selected Conference Papers: Journal of the Judicial Commission of New South Wales*, 11 (2013), 329–347, L. Flower, *Loyalty Work: Emotional interactions of defence lawyers in Swedish courtrooms*, (Lund, Faculty of Social Sciences, Lund University, 2018) and Bergman Blix and Wettergren, *Professional Emotions in Court. A Sociological Perspective*, have examined the role of empathy in relation to the parties in criminal trials.

⁴² Bandes, ‘Empathetic Judging and the Rule of Law’, p. 133. See also M. F. Basch, ‘Empathic Understanding: A Review of the Concept and Some Theoretical Considerations’, *Journal of American Psychoanalytic Association*, 31 (1983), p. 101.

⁴³ Bergman Blix and Wettergren, *Professional Emotions in Court. A Sociological Perspective*, p. 11.

⁴⁴ Nussbaum, ‘Emotions in the Language of Judging’ and Adam Smith, ‘The theory of moral sentiments’, in D. D. Raphael and A.L. Macfie, (eds.) (Oxford University Press, 1976).

in the participants' situations while at the same time aware that it is not one's own situation. Nussbaum argues that Smith in this way shows that 'empathetic identification accompanied with a kind of critical external assessment are crucial in determining the degree of emotion that it is rational for the participants in the case to have.'⁴⁵

In judging, empathy might be used as a tool to understand parties and witnesses, to assess someone's credibility or the defendant's criminal intent. Apart from that, empathy might also serve as a means and approach to legitimate the procedure by treating the victims, witnesses and other persons involved in an empathetic way during the trial.⁴⁶ Empathy thus has two crucial functions in a legal decision-making perspective: the first in the knowledge-seeking process, and the second in the process of legitimization of the judiciary.

Elitism

One of the contemporary challenges that independent judiciary is facing all over Europe is the populist and nationalist narrative depicting judges as elitist and even as 'enemies of the people'.⁴⁷ One way to address the threat of lost legitimacy on these grounds is to explore how judges use and might use emotions in a cognisant and reflexive way to gain the trust of the public. Safeguards should come both from the outside, as formal responses (*de jure* protections) but also from within the judiciary. This response to the threat is thus part of an answer to the question of how to secure judicial independence in practice. It is also part of what the editors call the 'hidden aspects' of judicial independence.⁴⁸ Judges are not dispassionate nor are their actions devoid of emotions. On the contrary, emotions play an important role in legal decision-making. By using empathy and emotion management, judges can display fairness in a sense of being empathetic to resist the public's image of distanced and elitist judges. This line of argument is closely linked to procedural

⁴⁵ Nussbaum, 'Emotions in the Language of Judging', p. 27. Bergman Blix argues that the analogue to reading fiction misses the fact that in contrast to a reader, the judge do have something at stake, the power to decide. A predicament that indeed can influence their empathic capacity. S. Bergman Blix, 'Different Roads to Empathy: Stage Actors and Judges as Polar Cases', *Emotions & Society*, 1 (2019), 163–180.

⁴⁶ L. Henderson, 'Legality and Empathy', *Michigan Law Review*, 85 (1987), 1574–1655, T. Booth, "'Cooling Out" Victims of Crime: Managing Victim Participation in the Sentencing Process in a Superior Sentencing Court', *Australian and New Zealand Journal of Criminology*, 45 (2012), 214–230, M. L. Schuster and A. Proppen, 'Degrees of Emotion: Judicial Responses to Victim Impact Statements' *Law, Culture and Humanities*, 6 (2010), 75–104, Bergman Blix and Wettergren, *Professional Emotions in Court. A Sociological Perspective*, and Blandes, 'Empathetic Judging and the Rule of Law'.

⁴⁷ See for example N. Friedman, *The Impact of Populism on Courts: Institutional Legitimacy and the Popular Will* (The Foundation for Law, Justice and Society, 2019) and N. Lacey, 'Populism and the Rule of Law' *Annual Review of Law and Social Science*, 15 (2019), 79–96.

⁴⁸ Introduction, in this volume.

justice and it will be argued that the role of emotions is an important tool in the enforcement of the procedural justice principles.⁴⁹ The following sections will show examples of how emotion management and empathy can serve or fail the purpose of gaining the trust of the public by legitimising the judiciary.

Procedural justice and its fundamental concepts

In accordance with procedural justice theory, the trust and legitimacy of the judiciary is highly strengthened by procedural justice principles.⁵⁰ People's sense of procedural justice depends on four grounds: voice, meaning that the participants experience that they are allowed to make their voice heard; respect, pointing out the importance of treating the participants with dignity and respecting their rights; trustworthiness, where judges appear sincere and caring; and neutrality, i.e., the court is applying rules in an impartial and transparent way. These grounds, as identified by Tyler, will be used in this section to show the effect of using emotions in court.⁵¹

Voice

The experience of being heard and taken seriously is a fundamental aspect of procedural justice; this can be accomplished by the use of empathy and emotion management.⁵² One important aspect of how to use empathy in an emotion management perspective is how judges treat the laypeople who are present in the court as parties or witnesses. By treating these people in a human and polite way, the judge both prepares for a good hearing and gains legitimacy by decreasing the gap between her and the person entering the court. As a result, the individual experiences respect from the judge and is more willing to cooperate with the court. Second, the judge gains trust and legitimacy by enabling laypeople to experience being seen, listened to and treated with respect. Research shows that the experience of fairness in a trial is decided by the impression of the procedure rather than the outcome of the case.⁵³ The aspect of voice is closely linked to the aspect of respect.

⁴⁹ S. Leben, 'Exploring the Overlap Between Procedural-Justice Principles and Emotion Regulation in the Courtroom', *Oñati Socio-legal Series*, 9 (5) (2019), 852–864.

⁵⁰ T. R. Tyler, *Why People Obey the Law* (New Haven, Yale University Press, 1990) and J. Thibaut and L. Walker, *Procedural justice: A Psychological Analysis* (Hillsdale, Lawrence Erlbaum, 1975).

⁵¹ T. R. Tyler, 'Procedural Justice and the Courts', *Court Review*, 44 (2008), 26–31. And put in an emotional theory context by Leben, 'Exploring the Overlap Between Procedural-Justice Principles and Emotion Regulation in the Courtroom'.

⁵² Leben, 'Exploring the Overlap Between Procedural-Justice Principles and Emotion Regulation in the Courtroom'.

⁵³ S. Bennett, L. Hine and Lo. Mazerolle, *Procedural justice* (Oxford Bibliographies, 2018).

Respect

Cases played out in the courtroom may often be highly emotional, involving parties that burst into anger or tears. In another context, the expected way to handle these emotional persons that share traumatic events in their lives would be to try to console them and express one's compassion and sympathy. But in court, there are other emotional regimes deciding the appropriate way for a judge to meet an emotional party or witness. The emotional regime of objectivity and dispassion is most often met by the display of the 'stone face'.⁵⁴ The professional way to show impartiality and objectivity is thus to be non-emotional, to *not* display any emotions. But, due to the emotional intensity of a horrifying case, this might, by the public, be experienced as both condescending and rude.⁵⁵ If these emotions were seen as not being allowed, this might risk that the public, already caught up in the 'elite judges' narrative, would get grist to their mill. The ability to address and respond to emotions displayed by the parties and witnesses is essential for trust in the procedure.⁵⁶ Research on the experiences and expectations of laypeople shows that to place an expectation on them to leave their emotions out will lead to confusion and a reduced experience of procedural justice while creating the risk of these participants omitting legally relevant material when submitting evidence.⁵⁷

Trustworthiness

Another component of procedural justice is that of trustworthiness, in the sense that the judge appears sincere and caring.⁵⁸ If a witness cries when telling her story in court, the judge might not leave her place to give the witness a hug but can offer her a glass of water or a break, in order to, in a subtle but respectful way, show the witness that she understands that this is a hard time. The judge can keep his or her distance, his or her 'stone face' will still be on, but 'the embodiment of power as a personal responsibility [i]s geared towards empathy'.⁵⁹ This illustrates how delicately a judge must balance the display of his or her emotions in a particular situation not to appear as elitist and as someone who rules by fear.

⁵⁴ Bergman Blix and Wettergren, *Professional Emotions in Court. A Sociological Perspective*.

⁵⁵ Bergman Blix and Wettergren, *Professional Emotions in Court. A Sociological Perspective*.

⁵⁶ Tyler, 'Procedural Justice and the Courts'.

⁵⁷ B. Toy-Cronin, 'Leaving emotion out: litigants in person and emotion in New Zealand Civil Courts', *Oñati Socio-legal Series*, 9(5) (2019), 684–701.

⁵⁸ Tyler, 'Procedural Justice and the Courts'.

⁵⁹ Bergman Blix and Wettergreen, *Professional Emotions in Court. A Sociological Perspective*, p. 119. The reports from the Texas 204th District Court in the US after the conviction of the former police officer who shot her neighbour to death shows the judge hugging first the victim's family members and then the offender is an example of an emotional expression that would be a rare sight, at least in a Swedish context.

Neutrality

Neutrality in the context of procedural justice is primarily explored from a formal perspective; legal rules must be applied in a transparent and impartial way. The idea of neutrality can also be interpreted as requiring that the appearance of the judge be experienced as neutral. This might be done in a stone-faced way or in such a way that the emotional expressions that the judge displays are balanced. So, judges can use emotional expressions actively to display impartiality. In a study concerning Swedish courts, judges described how, if in a court case they got irritated and angry with one of the legal actors (for example, the defence counsel) and failed to hide it, they could manage the situation by compensating this outburst; they would find a moment to display the same anger towards the prosecutor to re-establish the balance between the parties.⁶⁰ This particular strategy is not necessarily a good one, but to think of impartiality/neutrality as a balancing act rather than as a stone face act, can promote an experience of neutrality for those engaged in court proceedings.

Procedural justice is integral to gaining public trust and legitimacy. Its components are strengthened by the active work of emotions. By using emotions in a conscious way, the gap between the judges and the public will diminish, the view of judges as elitist will be refuted and the fundamental elements of procedural justice will be strengthened.

Artificial intelligence in judging

The field of artificial intelligence (AI) in legal decision-making has been discussed for more than 30 years and has developed into a research field of its own.⁶¹ The epistemology is inspired by mathematics, and a crucial aim is to find and develop methods and arguments that reach the ‘best’ or most true result⁶² by building on rational arguments and excluding irrelevant facts.⁶³ AI, it is argued, can be seen as a way to secure legitimate and objective legal decisions by leaving out a decision-making subject as well as subjective components in the decision-making process.

⁶⁰ The situation is recapitulated from a trial observation in the research project Emotions in judicial decision-making.

⁶¹ R. E. Susskind, ‘Expert systems in law: a jurisprudential approach to artificial intelligence and legal reasoning’, *Modern Law Review*, 49 (1986), 168–194, F. J. Bex et al., ‘A hybrid formal theory of arguments, stories and criminal evidence’, *Artificial Intelligence and Law*, 18 (2010), 123–152.

⁶² K. Mancuhan and C. Clifton, ‘Combating discrimination using Bayesian networks’, *Artificial Intelligence and Law*, 22 (2014), 211–238, C. Dahlman, ‘Oacceptabla generaliseringar i bevisvärdering’, *Tidsskrift för Rettsvetenskap*, 5 (2015).

⁶³ Dahlman et al. ‘Är det sant att lekmannadomare påverkas av juridiskt irrelevanta omständigheter, men inte juristdomare?’, *Juridisk tidskrift vid Stockholms universitet*, 2 (2017–18), J.-C. Pomerol, ‘Artificial intelligence and human decision making’ *European Journal of Operational Research*, 99 (1997), 3–25.

In this way, AI research equates judicial decision-making with logical deduction, making emotional dimensions of any kind superfluous.⁶⁴

AI has no set definition and can include many types of techniques, such as different forms of machine learning and robotics. In a legal framework, AI mostly refers to different kinds of algorithmic decision-making using ‘big data’ from previous cases or to logical deduction from new information. By focusing on argumentation strategies and often on Bayesian methodology working on conditional probabilities and correlations, the aim is to find methods to make visible and handle bias.⁶⁵ Some forms of AI are already being tested or implemented in real legal practice. Two encompassing examples refer to the standardisation of sentencing in China and the US.⁶⁶ In the Hainan province in China, courts employ machine learning to identify relevant facts from different types of evidence and ultimately suggest a written judgment.⁶⁷ Both examples build on analyses of big data from previous cases. Within the European Union, ANTAI⁶⁸ in France is an automated system that processes traffic offences,⁶⁹ and in Poland, the courts use an algorithm to allocate cases to judges across the country. The last example is motivated by referring specifically to its avoidance of the biasing effects of emotion: ‘the selection will be made solely by a machine, a computer system that is blind like Themis, and chooses without emotions, without views or biases, and in a manner fully free from possible accusations of corruption’.⁷⁰ Clearly, the use of AI in legal decision-making raises many different issues; here, the focus will be on this last point, the assumption that emotions only have a biasing or disrupting effect in decision-making. This assumption is founded on an understanding of the human decision-maker as biased by default.

This section will take as its vantage point two dimensions of emotions that were introduced above: foreground emotions and background/epistemic emotions.

⁶⁴ See for example Bex et al., ‘A hybrid formal theory of arguments, stories and criminal evidence’; T. Bench-Capon et al., ‘A history of AI and Law in 50 papers: 25 years of the international conference on AI and Law’, *Artificial Intelligence and Law*, 20 (2012), 215–319; B. Verheij, ‘Proof with and without Probabilities’, *Artificial Intelligence and Law*, 25 (2017), p. 127.

⁶⁵ Bex et al., ‘A hybrid formal theory of arguments, stories and criminal evidence’.

⁶⁶ COMPAS (Correctional Offender Management Profiling for Alternative Sanctions) is a machine-learning algorithm software developed by Equivant, which is used in US courts to assess recidivism. The algorithm has been criticised of augmenting racial bias in sentencing by overrating black defendants risk of recidivism while underrating white defendants recidivism risk (see: J. Larson et al., ‘How We Analyzed the COMPAS Recidivism Algorithm’, *ProPublica*, 23 May 2016, online at: <https://www.propublica.org/article/how-we-analyzed-the-compas-recidivism-algorithm>).

⁶⁷ Yuan S., ‘AI-assisted sentencing speeds up cases in judicial system’, *China Daily*, 18 April 2019, online at: http://www.chinadaily.com.cn/cndy/2019-04/18/content_37459601.htm (last accessed 26 January 2022).

⁶⁸ National Agency for the Automated Processing of Offences.

⁶⁹ Agence nationale de traitement automatisé des infractions, online at: <https://www.antai.gouv.fr/?lang=en> (last accessed 26 January 2022).

⁷⁰ M. Spielkamp (ed.), *Automating Society – Taking Stock of Automated Decision-Making in the EU*, Report, (Berlin, AlgorithmWatch, 2019) p. 107; Shenggao, ‘AI-assisted sentencing speeds up cases in judicial system’.

As shall be shown, these dimensions serve important functions in judicial decision-making, thus illustrating how the positivist prerequisite of AI and the practical implication thereof is incapable of questioning law when necessary, disregards the context-bound element of ‘chance’ in decision-making and does not make allowance for the interactive unfolding of decisions in a bounded process.

Foreground emotions as a backstop

As described above, judicial decision-making commonly utilises subtle emotions working with cognition in the weighing of alternatives. However, the most apparent reason for letting a human have the final say in decisions is her ability for strong foreground emotions that alerts the subject if something might be wrong. Even in matters where a computer can make better calibrated propositions than humans, when they are wrong, they are usually very wrong. This can partly be explained by the fact that things that are evident to a human being, such as the ability to distinguish a human from a bicycle, requires vast amount of analysis for a computer, and because a computer lacks the ability to make (good) judgments.⁷¹

As argued by Rt Hon the Lord Thomas of Cwmgiedd, in times of crisis, when lawmakers are dismantling democratic laws and withdrawing human rights, there is an urgent need ‘for constant vigilance’⁷² among lawyers in general and judges in particular. Graver’s work on judges’ opposition towards the transformation into totalitarian states is a case in point.⁷³ Graver analysed German judges’ resistance towards the Nazi regime and found that the judiciary’s embeddedness in the tradition of autonomy to some extent secured deference from the totalitarian regime. He argues that although opposition often were isolated instances, they still serve an important source of knowledge to enhance the possibility of future opposition.⁷⁴ When democracy is under threat, the judiciary and the role of the (human) judge, by being able to act on foreground emotions and good judgment, can be seen as safeguards to the rule of law and human rights.⁷⁵

⁷¹ One example is the self-driving car that run over and killed a pedestrian in Arizona, USA in 2018: This example is interesting for two reasons: first, because the computer had troubles identifying the pedestrian (‘it classified her first as an unknown object, then as a vehicle and finally as a bicycle, each of which had a different predicted path according to the autonomy logic’), something that would have been obvious to a human driver; and second, because the human safety driver sitting in the car apparently trusted the car to be in control and failed to pay attention to the upcoming situation – she relaxed her decision-making ability. Wikipedia, *Death of Elaine Herzberg*, online at: https://en.wikipedia.org/wiki/Death_of_Elaine_Herzberg (last accessed 26 January 2022).

⁷² As reflected in the remarks of the Right Hon the Lord Thomas of Cwmgiedd, ‘Epilogue: Judicial Independence: The Need for Constant Vigilance’, in this volume.

⁷³ H. P. Graver, ‘Why Adolf Hitler Spared the Judges: Judicial Opposition Against the Nazi State’, *German Law Review*, 19 (2018), 845–877.

⁷⁴ Graver, ‘Why Adolf Hitler Spared the Judges’, p. 849.

⁷⁵ See also J. Eekelaar, ‘Judges and Citizens: Two Conceptions of Law’, *Oxford Journal of Legal Studies*, 22 (2002), 497–516, A. W. B. Simpson (ed.) *Oxford Essays on Jurisprudence* (Oxford, Oxford

Foreground emotions can also safeguard decisions in less dramatic situations. A judge in Sweden refused to dispense the public case act containing all the evidence in a criminal case of child pornography.⁷⁶ This was before the law was changed to make these types of documents confidential, so the judge broke the law by acting on her (good) judgment. For a judge to make a decision that goes against the law (but in this case, arguably in line with its intentions since the possession of child pornography was illegal), bundles of motivating and directing emotions are necessary, such as fear and/or shame of the consequences if she were to dispense the acts; pride in maintaining the law's intentions; refuting or managing guilt of breaking the law and so forth. An AI system built on algorithms can determine whether a case file is public or confidential as such, but algorithms cannot make value judgments and therefore cannot 'decide' whether this particular file *should* be released or not.

Background/epistemic emotions in the process of decision-making

The importance of keeping a human judge in charge discussed above actualised the importance of (good) judgment in legal decision-making. In a previous study of Swedish judges we found that 'good judgement' was deemed an important feature by the judges themselves.⁷⁷ Good judgment is a rather vague term that can imply many things, but focusing on decision-making the importance of judgment highlights the fact that decision-making by necessity includes some level of chance.⁷⁸ The proposition $1+2=2$ does not demand a decision, the answer falls out by calculus: '[s]omething that has already been determined in all respects cannot be decided'.⁷⁹ This means that something more than logic is needed to make decisions. Flexibility, creativity, intuition and persuasion are often mentioned here,⁸⁰ features that are embodied, context-bound and demand emotional sensitivity, emotion

University Press, 1973), in line with the remarks of Right Hon the Lord Thomas of Cwmgiedd, vigilance, that is being alert to the need to make decisions, is vital in these situations.

⁷⁶ Decision taken on 16 April 1993 by Stockholm District Court in the case B 5946–92. In Sweden, when a case has been prosecuted, all the case files – including all evidence, e.g., transcriptions of oral interrogations, photographs of injuries, etc., are public and anyone can access them from the court. The Swedish Public Access to Information and Secrecy Act states that as a general rule, all documents held by a public authority are official.

⁷⁷ Bergman Blix and Wettergren, *Professional Emotions in Court: A Sociological Perspective*, p. 164.

⁷⁸ Polanyi famously wrote on expert knowledge: 'We know more than we can tell.': M. Polanyi, *The Tacit Dimension* (Gloucester, Peter Smith Publications, 1983). In AI research, this is expressed as the 'qualification problem': in the messy reality of the real world, we can never fully list all potential conditions necessary for an action or event to have a specific outcome. L. Pettersen, 'Why Artificial Intelligence Will Not Outsmart Complex Knowledge Work', *Work, Employment and Society* (2018).

⁷⁹ N. Luhmann, 'The Paradox of Decision Making' in D. Baecker (ed.), *Organization and Decision* (Cambridge, Cambridge University Press, 2018).

⁸⁰ D. H. Autor, 'Why are there still so many jobs? The history and future of workplace automation' *Journal of Economic Perspectives*, 29(3) (2015), 3–30, p. 6, Pettersen, 'Why Artificial Intelligence Will Not Outsmart Complex Knowledge Work', J. Wajcman, 'Automation: is it really different this time?', *The British journal of sociology*, 68 (2017), 119–127.

management and empathy. We will use two examples that highlight the importance of these features for judicial decision-making: the non-quantifiable core of some of the judicial concepts and legal facts; and the importance of understanding decision-making as an interactive process consisting of many small decisions in a bounded sequence.

First, instead of treating the application of law as something fixed that can be applied onto reality, a context-bound perspective understands law as being made or given meaning every time it is applied.⁸¹ Even though examples can be provided to delineate concepts such as intent, carelessness, concerted action, self-defence or credibility, there are no fixed or measurable definitions of these legal concepts, and they need context-bound interpretation in every instance.⁸² To decide whether a defendant has acted in self-defence, the judge needs to listen attentively to the narratives of the event (epistemic emotion of interest), situate herself in the defendant's, as well as in the plaintiff's, shoes (empathy), and perhaps signal to the lawyer that the court has understood the argument (background irritation when an efficient process is at risk while managing emotional display to keep up an impartial demeanour). So far, these intricate emotive-cognitive adaptations and evaluations are fundamentally human.

The second example concerns the gradual unfolding of decision-making in an interactive case-bound process. Alluding to collaboration might seem odd in relation to the fundamentally autonomous judiciary. However, as argued by Dreyfus, collaboration is essential for learning.⁸³ In relation to judicial decision-making, this learning can be illustrated by the way the decision-making process is organised through a multitude of small decisions unfolding during the move of a case through the system. In our ongoing research, following cases from decisions to prosecute to judgments in lower and appeal courts, we have found that the process where a decision by one practitioner (e.g., prosecutor) is checked by another (e.g., judge) who confirms or rejects that the practitioner is on the right track can be understood as an emotive-cognitive process. For example, if the prosecutor's request for detaining a suspect is granted by the court, it raises his confidence in the prosecution: 'if he is detained I don't have to be ashamed to prosecute' since the court has agreed on reasonable grounds for detention.⁸⁴ These pieces of emotional-cognitive information spur engagement, give rise to pride when succeeding and potential shame or anxiety when being overruled (for example, a lower court judge who sees several verdicts reversed in a higher instance), and thus test the case throughout its journey through the system and secure objective decisions in many small steps.

⁸¹ Bladini, *I objektivitetens sken*.

⁸² The leeway for interpretations within an objective paradigm can be seen in the generally accepted notion that two 'rational' decision-makers confronting the same situation may make two different decisions: Pomerol, 'Artificial intelligence and human decision making'. This is also generally accepted and built into the judiciary through the system of the court hierarchy where a court decision from a district court may be tried in a court of appeal.

⁸³ H. L. Dreyfus, *What computers still can't do: A critique of artificial reason* (Cambridge, MA, MIT Press, 1992).

⁸⁴ Prosecutor Linus, 40+ years, referring to one of the defendants in a large fraud case.

Conclusion: Protecting an independent judiciary by abandoning the myth of dispassion

Two narratives that challenge an independent judiciary have been focused on in this chapter. The first is populist movements' portrayal of judges as elite decision-makers, far away from the reality they are obliged to deal with. The second is the appeal of automation through various forms of artificial intelligence in the judiciary. These narratives build upon the traditional idea of rationality and emotion as being separate. The authors have shown how these threats can be met by a more profound understanding of emotions in judicial decision-making. By the use of emotions in a cognisant and reflective way, judges can gain the trust of the public and diminish the risk of losing legitimacy. The role of emotions contributes to the understanding of judging as something particularly human.

Although the courts are full of emotions, in the sense that the most dramatic life events are dealt with, emotions are traditionally seen as something primarily *not* relevant in legal decision-making. The prevailing objectivity ideal builds on the idea of the separation of rationality and emotion. But the ideal of the dispassionate judge has been questioned from several perspectives, and studies within law and emotions show that emotions play an important role in the process of objective decision-making. The ability to handle others' and one's own emotions in a professional way and the use of empathy is fundamental in the work of a judge.

One aspect of the populist agenda is to point out the people in power as elitist, arbitrary and high-handed, coming from a different societal class, and hence completely negligent and uninformed about people's real lives. That procedural justice can play an important role in diminishing the gap between the people and the judiciary is a well-known fact. What is not as acknowledged is that empathy, as well as emotion management, play an important role in the quest for procedural justice. This is a 'hidden' aspect of the task of refuting the challenges of the independent judiciary. To make visible the emotional aspects of legal procedure is a way to legitimate and secure the independence of the judiciary.

Research on artificial intelligence in judicial decision-making builds upon a traditional view of knowledge where reason, as separated from emotion, has universal qualities. Algorithmic logic quantifies the evaluation of facts as well as the reasons to be used on the assumption that the context, as well as the intuitive processes that build on previous experiences, can be 'put aside'. This line of research disregards the fact that a case, whether criminal or civil, as well as its evaluation, indeed take place within a context. The law builds on the very idea that each case should be evaluated individually and the judge thus needs to understand the specificities of each individual case, including contextual and relational aspects. In sum, this chapter elucidates some crucial human aspects of legal decision-making and argues that emotions drive the objective process towards professionalism, strengthening the experience of procedural justice and operating as an emergency brake when laws are invaded by undemocratic forces.