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Section Four, Micro and macro-reflexively managed emotions

Chapter Seventeen, Impartiality and emotion in everyday judicial practice

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Abstract

The conventional, abstract image of judicial authority in an adversarial legal system casts the judicial officer as impersonal, objective and detached adjudicator. Impartiality is upheld as a core legal value, essential for judicial legitimacy. Emotion is disavowed as inconsistent with the rationality central to judicial practice. However, impartiality and emotion are not mutually exclusive. Drawing on empirical research, in particular in-depth interviews, the chapter highlights the work practices judicial officers undertake to manage emotion – theirs and others – while simultaneously remaining committed to the ideal of impartial adjudication.

Introduction

Impartiality[1] is a foundational legal value. It expresses the judicial obligation to be unbiased in relation to any party or issue, and to be independent, especially of the government, in rendering a decision (American Bar Association 2011; Geyh 2013; 2014; Judiciary of England & Wales 2013; Lee 2014; The Council of Chief Justices of Australia & New Zealand 2017). These obligations of judicial attitude, role and practice (Lucy 2005) are central to law as a modern institution. Despite the myriad changes prompting many to cast the present era as late modernity, the legal system remains ambivalent about emotion and continues to aspire to entrenched modern values of rationality, objectivity and impersonality (Weber 1978; also see Chapters 1 & 2).

The conventional judicial role casts impartiality as requiring judicial practices to be without emotion. Emotion is assumed to be political, unstable, personal and irrational, therefore jeopardising the impartial exercise of judicial authority (Bandes 2009; Bandes & Blumenthal 2012; Conway & Stannard 2016; Maroney 2011; 2012). The exclusion of emotion is implicit in the judicial oath of office that provides for the administration of the law: "without fear or favour, affection or ill-will" (Campbell 1999, p. 146). This parallels the dominance of impersonality in Weber's ideal type bureaucracy, which expects officials to act "without hatred or passion, and hence without affection or enthusiasm" (1978, p. 225). As emotion and feelings are associated with particular, personal and private relationships, they are thought to result in bias (positive and negative), and are thus inconsistent with disinterested, detached decision making and legal process (Conway & Stannard 2016; Dixon 2012; McKenzie 2016; Wettergren 2010).

Even so, impartiality must be realised in practice. Judicial officers[2] must embody and perform impartial legal authority as part of their everyday judicial work, often in circumstances of considerable emotion. Research involving in-depth interviews with judicial officers finds that, when defining impartiality, they stress their obligation to listen to both sides and their limited role: to wait until the evidence has been heard and then apply law to the facts. They describe putting aside excluded evidence or a personal attitude that might amount to bias or prejudice or an emotion in order to make a legal, rational non-emotional decision. While some judicial

officers use the language of emotion and feelings, or identify particular emotions, many do not. Several individual judicial officers see emotion work as a necessary, albeit circumscribed, component of their judicial work which includes reflexively monitoring and self-regulating their own feelings (Holmes 2010). It also entails adopting an emotional state compatible with the conventional model of judicial authority. Emotionlessness - or non-emotion - can entail considerable emotion work (see Wettergren Chapter 2).

This chapter examines how contemporary judicial officers articulate impartiality, and investigates the ways they frame and perform it in light of the emotional demands that need management in their everyday judicial practice. The conventional judicial role that disavows emotion is the touchstone for judicial officers' reflexive monitoring of the myriad of emotions they experience. Their emotion management strategies entail recognising, not denying, a place for emotion apart from the logical reason of law.

The performance of impartiality

Despite the disavowal of judicial emotion, recent scholarship and institutional changes point to the important role of emotions and emotion management (Bandes 2009; Bandes & Blumenthal 2012; Bergman Blix & Wettergren 2016; Maroney 2011; Maroney & Gross 2014; Roach Anleu & Mack 2005). In some circumstances, judicial officers must be more emotionally engaged and expressive than anticipated by the conventional model. However, these developments do not appear to displace impartiality conventionally understood as dispassionate, detached, and impersonal. While emotion, in and of itself, may not be inconsistent with impartiality, the incursion of certain emotions into the judicial decision making process can be experienced as a marker or signal of bias against or partiality for a party or a claim.

After a description of the research design and interview research method, the ways judicial officers articulate, understand and perform impartiality are discussed in light of several overlapping themes which emerge from the interviews. Themes include: reliance on the terms of the oath itself; the concept of an open mind; and the need and capacity to put aside information, attitudes, or emotional thought to be inconsistent with achieving impartiality. A

few interviewees reflect on the practicality of maintaining impartiality, whether understood as putting aside feelings or attitudes, or keeping an open mind. While not all judicial officers interviewed explicitly mention emotions or emotion management, the consistent image of impartial judging they describe is one where emotion can and should be excluded from the judicial process.

Research design

Interviews were undertaken with 38 judicial officers throughout Australia, between August 2012 and December 2013, ranging in length from 25 minutes to 1 hour and 33 minutes. Most were conducted in the judicial officer's chambers. Table 17.1 describes characteristics of the 38 interviewees.

<TABLE 17.1 HERE >

Interview questions were open-ended, allowing interviewees to discuss a full range of issues from their own perspective and in their own words, based on their experiences and knowledge. Judicial officers were asked what they understand by the concept of impartiality and how they would describe this in lay person's terms. As the aim was to conduct the interviews more as a conversation than a question and answer process, there was ample scope for probing responses and seeking further information (Silverman 2011).

During the interview, consent was sought from the interviewee to audio record and to write notes. All but two interviewees consented to being recorded, and all interviewees agreed to note taking. After each interview, handwritten notes taken during or after the interview, including observations about the court building or location of the interview, were more fully written up. Interviews that were audio-recorded have been fully transcribed within the Project to maximise accuracy and confidentiality. The computer software package NVivo was used to organise, analyse, and examine relationships in this rich text-based, non-numerical data.

Judicial officers' understanding(s) of impartiality

Several strong, overlapping themes emerge from the ways judicial officers explain their understanding of impartiality. First, many rely primarily on the words of the judicial oath. Second, several refer to their duty to decide on the facts or the evidence, being open-minded and not pre-judging, in line with the adversarial model of legal decision making (Gillman 2001). Third, some mention experiencing specific emotions and feelings in response to features of the substance of a case or qualities displayed by the participants—defendants, litigants, counsel, victims—especially when experienced face to face in the courtroom. They emphasise their understanding of the need to put these attitudes, emotions, or feelings aside, and their capacity to do so, drawing an image of judicial practice uninfluenced by emotion (Maroney & Gross 2014).

The judicial oath

When asked to define impartiality in lay terms, several responded by referring to or quoting the judicial oath:

> I'm sure I've thought about this from time to time or I've had to give myself a good talking to but I, look I think we all and I certainly do strive to do it, umm, you know it's what our oath of office is all about, umm, so look I'm sure from time to time I've had to really, you know, think it through, umm, but you know I certainly think I've always managed to come to a matter genuinely impartially as much as I, you know, conceive that to be. (I 33, female judge)[3]

This comment implies that impartiality is not necessarily a fixed state, but rather a goal, something that she 'strive[s]' to achieve, and may entail some degree of self-talk (Goffman 1981). This judicial officer concludes that she has "managed to come to a matter genuinely impartially', in terms of how she 'conceive[s] that to be", acknowledging that other judicial officers might conceive of impartiality somewhat differently.

Interviewees who associate their understanding of impartiality with the oath often do so as part of identifying other elements of or ways of achieving impartiality:

> Oh I would explain impartiality as meaning that the judicial officer cannot take or even appear to take sides or I was going to say appear to favour one side over another but that's probably not lay language, um, must decide the case without, again I'm erring on the side of the judicial oath, fear or favour affection or ill-will, which translates into giving both sides a fair go – that's the very base [sic] lay language if I can put it like that. (I 01, female judge)

This judge restates parts of the judicial oath by describing impartiality as "meaning that the judicial officer cannot—or even appear—to take sides", translating the requirement into very ordinary Australian language: "giving both sides a fair go".

Keeping/maintaining an open mind

Some judicial officers concretely frame their understanding of impartiality in terms of legal method, and their central judicial role of applying law to facts, emphasising keeping an open mind while hearing all the evidence. Some interviewees recognise that impartiality can be understood as a practice or process, rather than solely or exclusively as a static or achieved mental state. Interviewees also comment on the relative ease or difficulty of achieving impartiality. One magistrate points to legal process as central to accomplishing impartiality:

> I 26: Umm, you're nobody's friend. You're not there to serve the police or the plaintiff. You're there to apply the law. That sounds simplistic. It's hard to –
>
> Interviewer: Is it difficult at times to do that?
>
> I 26: Yes it is. Absolutely. It is very difficult because applying the law is determining what the facts are and then applying the law to the facts. (I 26 male magistrate)

The emphasis on a limited judicial role aligns with the adversarial model of judicial decision making. However, this magistrate, along with other interviewees, finds doing this "very difficult". A judge describes being impartial as requiring waiting to hear both sides and all the evidence; she also finds this difficult:

> I think it would be having an open mind. Not making a decision until you've heard all of the material to be placed before you, umm, and having an enquiring mind. … I found it the most difficult part – to, umm, not want to rush ahead and get to the point and to be able to sit there and to let others develop the point … To be impartial and to listen and to consider what's put rather than the assumptions you have. (I 35, female judge).

Some judicial officers describe keeping an open mind as easy, straightforward, and natural, even intuitive, or an automatic consequence of legal training and socialisation:

> Well that at its core is, umm, the ability not to pre-judge issues. Keeping an open mind. Umm, and I think you know even if you do have some sort of view, I mean you often have the papers about a case before you actually go into court, umm, to have the ability to put that aside. Now there's no doubt being I suppose both a lawyer and judicial officer for some time, you do develop, umm, the ability to do that. I mean as a magistrate you have cases where you rule on confessions and they go out the window and then you still have to judge the case, umm. Interestingly it's easier to do than perhaps a lot of people think, you know, because in fact you don't want your mind clouded by other issues. It's hard enough just dealing with the technical/legal matters that you need to deal with so you know it's quite, you have to put something out of your mind and I really do think you do do it. (I 33, female judge)

This judge describes impartial judicial decision making as keeping an open mind, not "clouded", and identifies the obligation to ignore information that has been legally excluded, of which she is aware. Many interviewees identify the need to set aside or put aside material, including attitudes or emotions, so that the judgment is restricted to the law and the facts presented in court.

Putting aside bias and emotion

Several judicial officers elaborate on their understanding of an open mind as setting aside biases and emotions. Interviewee I 01 (quoted above) elaborates her approach to impartiality by continuing:

> You know you are to put out of your mind, when dealing with the case before you, any personal prejudices or beliefs or sympathies or hostilities you may have of a preconceived nature but just to decide the case on the factors and on the evidence as presented to you. (I 01, female judge)

This judge operationalises the normative and practical requirements of the judicial oath: "to put out of your mind … any personal prejudices or beliefs, or sympathies or hostilities". This list of elements includes emotions, which are characterised as internal, individual, personal, and removable. She also elaborates on the importance of deciding on the evidence, reflecting

the formal judicial role of applying the law to the facts to reach a legally valid result. Another judge pinpoints practical steps in achieving impartiality in the face of pre-existing attitudes, which may be emotionally driven:

> It's the quality of being able to identify and overcome, umm, your biases and prejudices. … we all as judges come to umm a decision making with biases and prejudices but umm so long as you come willing to change your bias to recognise what it is and to change it or to make a decision despite it then you have that quality of impartiality. So far from denying the biases it's best to identify them to yourself and by identifying them and putting them aside as best you can. I'm not suggesting it's easy or that we do it well always but that's what impartiality is, impartiality is identifying it and putting it aside. (I 23, male judge)

This judge elaborates on the considerable effort involved in seeking impartiality: first recognise any bias or prejudice and second, change it or make the decision "despite it". Impartiality is the capacity to 'overcome' biases and prejudices which has to be done "as best you can", implying that it may not be possible to achieve completely: "I'm not suggesting it's easy or that we do it well". The quest for impartiality, for this judge, requires considerable and difficult emotion management (see Wettergren Chapter 2).

Impartiality and emotion management

Emotions emerge in the interactive context of the courtroom, for example annoyance or anger at a lawyer or litigant, distress stemming from the nature or facts of a crime, or a response to the grief or sadness of others (Baillot, Cowan & Munro 2013; Booth 2016). Many judicial officers interviewed explicitly identify emotion as inconsistent with the demands of impartial decision making, which requires keeping an open mind. They deploy specific strategies to limit what they describe as the impact of emotion in their daily work. These strategies are examples of emotion work, emotion regulation or emotion management (Hochschild 1979; Lively 2008).

The next judge explicitly links being impartial and keeping an open mind as entailing management of her own emotions. This involves "being self-aware", practicing "self-reflection"—a kind of auto-correction—as part of emotion work, both of the experience of emotion and the outward display.

> Well, umm, you have to start with an open mind. So to start with an open mind you have to listen, umm, you have to you know, look at and listen to everything that can properly be put before you and if you're not going to look at something you've got to explain why, umm, and umm, you have to be clear in your reasons for decision as to why you have gone one way or the other particularly, not so much on the law but particularly in factual findings where you're having to rely upon umm, well you're drawing conclusions umm as to whether you should accept the evidence of one person rather than another, that's very challenging to explain that, umm, carefully. Umm, something that I don't think is immediately obvious to, umm, the reader of a decision or somebody watching you do your job is self-awareness … of how you're responding to people in your process and to, if you're finding that the way a particular person is behaving makes you feel a little hostile or prickly about them, you know, what is that, what's that trigger, is it actually them or is it something else about you. So that self-reflection, umm, I think is helpful. … That's the essential aspect of impartiality is that you're focussed on your, your process of decision making and being self-aware in that of your, umm, umm, any inherent bias or emotional response or whatever it is. (I 37, female judge)

This comment underscores listening as part of an open mind especially as "factual findings" are "very challenging to explain". Perhaps she is implicitly aware that findings of fact can entail judgment which can be perceived by others as lacking objectivity or impartiality. She proposes that "you have to be clear in your reasons for decision". Giving reasons can be an important opportunity for the performance of impartiality, including the suppression of some emotions on the part of the judicial officer. Thomas suggests that requiring a statement of reasons would avoid "[t]he danger of sentences based on an immediate emotional reaction to some particular feature of the offence" (1963, p. 247). This could be especially important in lower courts, where sentencing decisions are often given *ex tempore*, as part of interacting directly with the defendant. The judge above (I 37) also refers to "self-awareness" and "self-reflection", both of which relate to emotion regulation and management of own emotions including identification of emotion as a trigger: feeling "a little hostile or prickly". Such an 'emotional response' might be an indicator that a judge is not being impartial, and locating the source or trigger can facilitate regulating the emotion experience and expression.

One magistrate describes a more active method of emotion management to maintain the ability to hear both sides and decide impartially, in the face of an emotion such as anger:

> I know sometimes you can feel sometimes the anger or something coming up and you just have to go okay this is the time to get off the bench and just walk around for five

> minutes because of what's been said or the manner in which something's been said and I think most colleagues are aware of those issues. (I 12, female magistrate)

This is an example of situation modification (Maroney & Gross 2014) where the judge attempts to manage her own emotions by leaving the bench for a few minutes. Such a strategy is limited. The exigencies of a busy courtroom reduce the opportunities for a judicial officer to adjourn matters or to leave the bench for lengthy periods (Mack & Roach Anleu 2007).

A more commonly expressed approach is to put aside whatever emotion is thought to be inconsistent with the central legal method of deciding cases, and focus on this judicial obligation. As the following judicial officer explains:

> I think in terms of impartiality, I think, it is picking up that case and looking at, looking at the facts that come before you and deciding it on nothing but the evidence that you have before you and not what the person looks like, is wearing, or whether their lawyer is good or bad, and I think often we would not be human if we didn't pre-judge people and make an assumption … It's about putting all of that to one side as well and no matter how dreadful or unpleasant their lawyer is or they are – it's about looking at the facts that you have before you and making a decision on the facts and as they apply to the law. … maybe it's different in the higher courts because you don't, you do more law than, we're not really doing a lot of law, we're doing really more fact finding and maybe you're doing more law and so you have the longer cases and maybe you don't experience it as much, I would be surprised if any magistrate didn't have to remind themselves because you get some so seriously unpleasant people and doing dreadful things that you've got to go stop. (I 03, female magistrate)

This magistrate views decision-making as founded on objective facts and legally determined evidence, and so she excludes emotion and feeling from the process. If case details evoke or trigger emotions, these must and can be put aside. This magistrate also highlights feelings—negative and positive—that can emerge in interchanges with "accused persons … and their lawyers". She distinguishes the magistrates courts from higher courts which "do more law … we're [magistrates] doing really more fact finding". This resonates with Abbott's (1981) concept of professional purification: In Anglo-American legal systems, higher courts typically deal with problems or disputes translated into legal argument by legal professionals (barristers), where emotion and human complexity are removed, whereas lower courts do not deal with this level of purification but with cases where legal, social and human issues meld.

By characterising their practices as having an open mind, judicial officers associate their work with thinking, as a cognitive process, rather than as an emotional or affective experience. However, thinking and feeling are not completely separate processes or practices, but can interact:

> Well I mean impartiality means that you are deciding the case, you know, without fear or favour to one party or another … and you know I mean I think this often comes to – well this should come to lawyers and judges almost instinctively. … I see people who I feel sorry for, I occasionally see people who I think you know are really not very deserving, you know you do feel some antagonism towards them either because of what they've done or sometimes how they conduct themselves but I think, you know, I know for myself that if ever I begin to sort of feel that way I consciously say look just, forget it, put it out of your mind because if, you know I'm mindful that it's just folly, just gets you into so much trouble. (I 06, male judge)

Beginning to feel certain emotions, such as anger or frustration, might signal that the quest for impartiality and adherence to the conventional mode of judicial authority could be at risk. The capacity for self-regulation, including managing one's own emotions, comes from a judicial officer's legal training, enabling self-talk as an emotional management strategy: "I consciously say look just, forget it, put it out of your mind". This internal self-talk is a conversation between the judge as ordinary person and the judge *qua* judge.

The following female magistrate also describes the ways evidence can trigger emotional responses and the importance of managing her own emotions.

> I can remember when I did my first Care List, I had no concept that parents did such atrocious things to their children in this day and age, and I can remember one of the first files I looked at, the house was just appalling, the fridge I thought I was going to be sick, umm, and my, looking at it in chambers before I went on the bench, my blood pressure, anger, everything was just running rife … and so I had to pull myself back and walk on the bench and think you're not here to judge this person on your own standards, you're here to deal with it on the evidence and only the evidence, umm, and I find it easy when you do that. If you don't look for what might be behind something else or speculate on why they're doing this, you just go straight down the line, there's the evidence. … If you start to find people guilty or not guilty based on your personal views of things well the justice system's going to go to rack and ruin and you know, umm, so I haven't found it that hard actually. Sometimes I find it hard, the decision I have to make, but actually just dealing with it on the evidence I haven't found – as hard as I thought I might. (I 19, female magistrate)

In this excerpt the magistrate describes her emotional reaction to the facts of a case and refers to the physical manifestation of emotion: "I thought I was going to be sick … my blood pressure, anger, everything was just running rife". The evidence—the things she saw and heard during the case—triggered an emotional response. She describes managing her own emotions: "I had to pull myself back". This is a specific example of the "kinds of transitions involved in emotion work" (Lively & Heise 2004, p. 1112). This reflection also suggests the idea of a performance: she had to "walk on the bench" (the stage) and put her feelings into the personal realm (offstage) reminding herself of her judicial role (part) and responsibilities: "you're not here to judge this person on your own standards". She invokes the conventional model of judicial authority, through talking to herself: "you're here to deal with it on the evidence and only the evidence". Importantly, the issues are institutional not personal: "if you start to find people guilty or not guilty based on your personal views of things well the justice system's going to go to rack and ruin". The judicial officer reframes the way she assesses information, shifting from a personal reaction to a professional, dispassionate stance. "[C]ompetent judges learn to treat vivid stimuli as professionally relevant rather than personally provocative" (Maroney & Gross 2014, p. 146).

Conclusion

Although Patulny and Olson (Chapter 1) argue that late modernity is ushering in a new emotional regime, the emotional legacy of modernity continues within the judiciary. The notion of emotion-free rational action underpins the conventional model of judging (Weber 1978). "[I]nsistence on emotionless judging—that is on judicial dispassion—is a cultural script of unusual longevity and potency" (Maroney 2011, p. 630). The focus on putting emotions aside, before turning to reasoned (rational) decision making based on the facts and the law, requires internal human processes such as self-awareness, or self-talk, or 'setting aside'. These are all forms of emotion management (Hochschild 1979). Some judicial officers find meeting these expectations relatively easy, learned as a part of legal training and practice as well as a formal judicial obligation. Others are more challenged by these demands. Considerable research establishes that cognitive and emotion processes are difficult, even impossible to disentangle in practice (Barrett 2006a, 2006b; Reddy 2009). More significantly: "Emotion and reason are mutually dependent and informed by one another in ways that blur the distinction" (Wettergren & Bergman Blix 2016, p. 22), so that the claimed absence of emotion, or the suppression of all emotions anticipated by the conventional understanding, is somewhat illusory. The question

becomes: In everyday judicial practice in court "which particular emotions are implicated in distinct types of social interaction or processes?" (Barbalet 2011, p. 41).

Understanding impartiality and emotion in judicial work requires deeper understanding of emotions and emotional processes, including those that tend to have low expressivity. "[T]he majority of emotional experiences, and certainly some of the most important for social interactions and outcomes, are had without the emoting subjects being consciously aware of them" (Barbalet 2011, p. 39); these are background emotions. While observable states associated with emotion that are seen as "spontaneous, unruly and disorganising" (Barbalet 2000, p. 336) might threaten rational action and judicial impartiality, background emotions might facilitate or advance the performance of impartiality.

In the context of the judiciary, collateral or background emotions might include a sense of loyalty to the judicial role, feeling ready to decide and deliver a sentence, or feelings of satisfaction that they are implementing legal or social values, such as justice, fairness, and impartiality. While some judicial officers identify some emotions they put aside (e.g. anger, frustration, sympathy) deemed as inappropriate for the judicial role, many do not explicitly recognise other emotions they may rely on when they invoke the rule of law or the oath of judicial office to describe their practices. In this sense, the judiciary can be understood as being part of an emotional community (Rosenwein 2006) or having an emotional style (Gammerl 2012), which entails distinct feeling rules acquired through training and experience.

The quest to accomplish impartiality—to be impartial—requires judicial officers to undertake considerable emotion work. In this sense, the script of judicial dispassion (Maroney 2011) "is emotionally sustained" (Wettergren & Bergman Blix 2016, p. 31). Yet these norms of judicial practice and institutional requirements are not completely determinative. Not all judicial officers approach or think about their work in the same ways, they do not understand impartiality identically, nor do they experience and display the same emotions. Emotion work undertaken by judicial officers entails reminding themselves of their judicial role—what they are there for—and its requirements: to decide cases on law and facts. In late modernity, judicial officers may have to be more emotionally engaged, departing from the conventional model of

judicial authority, though this does not appear to shift the dominant conceptualisation of impartiality as dispassionate, detached and impersonal. The continuing quest for impartiality, whether understood as detached impersonality or entailing some emotion engagement, inevitably requires emotion work and reflexivity on the part of individual judicial officers, demonstrating the complex intersections between rationality and emotion in the legal system.

Notes

[1] Impartiality and objectivity are associated concepts; both are aspirational ideals, values, processes, as well as practical accomplishments. Specifying the relationship between the two is beyond the scope of this chapter (see Jacobsson 2008).
[2] In this chapter, the term 'judicial officer' refers to any member of the judiciary, regardless of court level or type. Generally, in Australia, the term magistrate refers to judicial officers in lower courts and judge refers to those who preside in the higher (intermediate and supreme) state and territory courts or national courts.
[3] The interview are are labelled by the code "I ##," in which I indicates this is interview data and ## refers to an individual interviewee. Quotes are given verbatim, with any identifying details deleted. For more information, see Roach Anleu and Mack (2017).

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