

Emotion in Criminal Law

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ABSTRACT

This chapter deals with the relevance of emotion in criminal law decision making. It reviews how (moral) emotions are integrated into the decision making process and how they may influence legal reasoning, as well as the role of empathy therein. The chapter also discusses emotions as normative elements of criminal law norms and presents the socio-legal perspective on emotions in criminal justice.

KEYWORDS

emotion, criminal law, legal reasoning, decision making, moral emotion

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1. *Introduction*

In the past decades, a growing body of scholarly work has boldly attempted to explore the intersection of law and emotion. While these explorations are manifold, an important strand of research inquiries into the role of emotion in legal reasoning. It has gained a strong impetus after cognitive (and other) sciences have convincingly overthrown the previously persistent dichotomy between reason and emotion, and established that the gap between them was largely illusionary. This importantly impacted the legal thought. The notion of the realm of law as entirely rational, reason-based discipline that needs to be guarded from the impure and distorting influence of uncontrollable, unpredictable, and overwhelming emotions, has been slowly transformed by the recognition that emotions are in fact part and parcel of both law and legal reasoning¹. Scholars have acknowledged that «the law is [...] imbued with emotion» (BANDES 1999, 2), that legal reasoning cannot be fully comprehended without considering the emotion component, and that emotion and objectivity are in no way incompatible in law (GROSSI 2019).

In criminal law, however, the assumption that emotions do not and should not have any citizens' rights therein was hard to defend even before the described turn. In fact, «criminal law is one of the few areas of doctrine in which an examination or assessment of emotions [...] has been a standard feature of the doctrinal and adjudicative landscape» (ABRAMS & KEREN 2010). Nonetheless, recent scholarly work has both deepened and broadened the understanding of the multifaceted role of emotion in criminal law. This chapter briefly outlines some of the most salient research trajectories in this field. Any attempt of being exhaustive in this pursuit would turn out futile as research in the area of emotions and (criminal) law is extremely interdisciplinary and fast expanding. Moreover, many challenges remain yet unresolved. However, despite being unable to provide definite answers to these questions, it is crucial to spell them out.

The chapter begins with the problem of conceptualising emotions and further focuses on the family of moral emotions as particularly relevant for criminal law. Section 3 deals with the role of emotions in the general and legal decision making. It sketchily summarises some findings on emotions and everyday decision making and introduces more specific research on the impact of emotions in legal decision making. It also identifies and speculates on some crucial but yet not determined problems relating particularly to professional decision makers in criminal law. Section 4 revolves around the ambiguous notion of empathy and its potential when employed by the criminal law protagonists. Section 5 ventures beyond the strictly cognitive context of emotion discourse and explores the many normative traces of emotions in the valid criminal legislation. It provides many examples of emotions being basic normative elements of a multitude of criminal law norms or at least laying implicit foundations for them. The chapter concludes with drawing attention to the burgeoning field of the socio-legal research of emotion

¹ For overviews of the development in the field, see e.g., ABRAMS & KEREN 2010; MARONEY 2016.

in the criminal justice. It provides examples how scrutinising emotion from the sociological perspective can enrich this discourse with fresh and equally indispensable insights.

2. *The notion of emotion*

Delving into the intersection of criminal law and emotion may be quite daunting as different researchers approach this field presupposing different notions of emotion. As a vantage point, authors often assume psychological definitions of emotion², but they may also consider emotions from sociological, philosophical, neurological (see GENDRON 2021) or some other perspective. These various concepts overlap significantly, and their divergence may be simply a consequence of different theoretical, methodological, or research approaches. Moreover, the abundance of emotion-related terms circulating in literature further muddles these discussions. Expression that are sometimes used as synonyms and other times as distinct but related concepts commonly include feeling, sentiment, affect, mood, passion, temperament, affective state etc.³ However, despite the fact that there is no generally accepted definition of emotion within a particular discipline, let alone between the fields (MULLIGAN & SCHERER 2012), there is still a strong consensus on what causes emotions, what are their elements, and what are their effects (SCARANTINO 2016, 5).

Emotions are usually elicited by an event or stimulus that is of relevance to a person. Such event may be external (e.g., a sudden loud noise) or internal (e.g., a memory or a mental representation of an event). Thus, a necessary component of an emotion is a (usually swift) appraisal process evaluating the stimulus as important to the person. Such appraisal informs the individual of the nature of the event and prepares her organism for adaptive behaviour (action tendencies). This coordinated response of the organism results in felt and often displayed physiological changes (e.g., increased heartrate, modified facial expression). Typically, emotions disturb our set behavioural course and plans by creating new goals. Therefore, emotions can have a strong impact on our interaction with the social environment (SCHERER 2005, 700-702).

As subjective experiences, emotions may seem distinctly idiosyncratic phenomena. However, psychology has established that emotions are evoked, operate, and produce effects under universal principles. Frijda calls these principles the laws of emotion (FRIJDA 2007, 1-22). They represent general rules, such as that emotions arise as a reaction to events that the individual appraises as important to her; or that in ambiguous circumstances, people tend to interpret the situation in a way that minimises negative emotional load.

Besides psychological and philosophical takes on the role of emotion in law, sociological approaches also feature strongly in the expanding literature on law and emotion. Sociological research of emotion focuses on emotions' social aspects. Sociological notion of emotion «also assumes that the emotional arousal, cognitive appraisals, expressions, and language that compose emotional experience are constrained by both culture and structure» (LIVELY & WEED 2016, 67). An important concept in the sociology of emotion are the so-called feeling rules (HOCHSCHILD 2012). These are historically and culturally dependent social norms that regulate which emotions should be felt and how they should be expressed in a particular social environment.

Both these commonalities in notions of emotion as well as the divergences among disciplines tackling this subject matter should be considered when illuminating emotions and criminal law from different perspectives.

² It should be noted that there is furthermore a broad diversity between different strands of psychology researching emotions. For example, neuropsychology, evolutionary psychology, social psychology, and clinical psychology, to name just a few, each focus on different aspects of these phenomena.

³ In this chapter, the term emotion will be predominately used and definitional differences between related expressions will not be further discussed. However, when imported from other literature, other terms will be used as well.

2.1. Moral emotions

The entire legal realm is strongly tied to moral emotions⁴, while the domain of criminal law provides a particular arable ground for this family of emotions. Thus, moral emotions deserve a brief introduction. While emotions in general are usually evoked by events and stimuli that directly affect one's self (FRIJDA & MESQUITA 1994), the orientation of moral emotions is less self-centred and more prosocial. Haidt defines moral emotions as «emotions that are linked to interests or welfare either of society as a whole or at least of persons other than the judge or agent» (HAIDT 2003, 853), whereas Prinz delineates them more generally as «emotions that arise in the context of morally relevant conduct» and that they «promote or detect conduct that violates or conforms to a moral rule» (PRINZ 2007, 68). Among different taxonomies of moral emotions stands out Haidt's categorisation to four families of prototypical moral emotions: (1) other-condemning (contempt, righteous anger, disgust), (2) self-conscious (shame, embarrassment, guilt), (3) other-suffering (compassion), and (4) other-praising (gratitude, elevation) (HAIDT 2003; see also TANGNEY et al. 2007 and PRINZ 2007).

The example of righteous anger (sometimes also referred to as indignation or moral outrage) illuminates the relevance of moral emotions for criminal law and reveals emotional and cognitive parallels to many criminal law concepts. Research has thus shown that righteous anger implies blame (QUIGLEY & TEDESCHI 1996) and provokes direct punitive response (HUTCHERSON & GROSS 2011), sometimes termed as altruistic punishment (BOYD et al. 2003; FEHR & GÄCHTER 2002). In fact, the role of moral outrage has been researched specifically in criminal law context (ASK & PINA 2011; BASTIAN et al. 2013; FEIGENSON 2016; GOLDBERG et al. 1999). These studies have confirmed that moral outrage did influence the legal decisions of the decision makers. Moreover, this research clearly illustrates how moral emotions play a central role in discussions on cognitive mechanisms underpinning legal decision making and reasoning in (criminal) law. In cognitive terms, ultimately, these mechanisms are integral to moral decision making.

3. Emotions experienced by the decision maker

3.1. Dilemmas on the role of emotion in legal decision making

The illusion of a judge as a cold and emotionally detached mouthpiece of the law has been long debunked. It comes as no surprise that jurists are as susceptible to emotions in their decision making as any other human beings. However, acknowledging the presence of emotions in the process of legal decision making opens a plethora of other more complicated questions. They relate to the overarching theme of how do, and how should, emotion integrate into legal decision making. The first set of dilemmas pertains to the relation between emotion and the so-called rational reasoning. Can—and should—these two components be detached? Does emotion inevitably obscure rationality in legal reasoning? Are there some (types of) emotions that are more desirable than the others in this process or is it the intensity or another quality of experienced emotions that is of higher relevance. Perhaps the instigator of the emotion should be also taken into account? Emotions may be more or less preferable whether incited by the alleged crime, its outcome, the perpetrator, or other stakeholders involved in the criminal trial. Finally, there are many different decisions being taken in the context of a criminal trial. Emotions may not have (equal) relevance for all of them. For example, righteous anger may

⁴ See for example SAJÓ 2016 on the relationship between moral emotions on the one hand and constitutionalism and fundamental human rights on the other.

influence a sentencing decision but not the decision on criminal responsibility of the defendant. It appears that none of these questions can be resolved with a general answer. As Bandes aptly concludes «the appropriateness of particular emotions cannot be discussed apart from the context in which they appear» (BANDES 1996, 372).

In this chapter, we will often assume a figure of a judge as a prototypical legal decision maker in the criminal law context. However, *mutatis mutandis* the addressed dilemmas are applicable to other professionals in the criminal justice system, such as prosecutors, law enforcement officers, defence attorneys and other legal representatives, members of parole panels and other similar bodies. Moreover, regarding the emotional impact on legal decisions, justifiability of the demarcation between legal professionals and lay decision makers in criminal law should be considered. Do emotions shape decisions of jurors and (as is the case in many jurisdictions) lay judges in mixed panels differently than those of professional judges? This question seems particularly pertinent in light of a scarce research on professional jurists in that area, compared to more prevalent studies on mock juries.

3.2. *Emotion and general decision making*

Before venturing into the inquiries on the role of emotion in legal decision making, the place of emotion in our every-day judgments should be briefly illuminated. A useful starting point in this discussion is Kahneman's division of human cognition to System 1 and System 2 (KAHNEMAN 2011; see also KAHNEMAN & FREDRICK 2002). System 1 is quick, intuitive, effortless, and draws from emotion while System 2 is slow, analytical, determined, and effortful. System 1 is much more prevalent and more efficient in our every-day decision making. However, it is also more prone to mistakes. This is why the role of System 2 is to either re-evaluate (and correct) particular judgments of System 1, or to independently resolve more complex cognitive tasks. Therefore, in this model, emotion first acts as a powerful indicator to System 1, facilitating its quick and efficient decisions. However, emotion also indirectly proposes a decision to System 2, which may through more thorough deliberation either confirm or reject it.

Much research has built upon this model and further elaborated how emotion impacts our judgment. Various experimental work has also differentiated between modes of emotions and their temporal dimensions in the process of general decision making. In a succinct overview of this field, VÄSTFJÄLL and SLOVIC (2013, 258-266) explain that emotion may first be experienced as predecisional affect influencing decision prior to its being made. Predecisional affect may come as current mood, anticipatory emotions, or anticipated emotions. Anticipatory emotions are emotional reactions experienced at present by thinking of the future outcome. Anticipated emotions, conversely, are not felt at present, but are cognitively anticipated to occur after the decision. On the other hand, postdecisional affect represents emotion experienced when the decision has already been made.

Further distinction between emotions involved in the decision-making process concerns the cause of the experienced emotion. Thus, incidental affect is unconnected to the decision task (e.g., sadness due to received bad news), while integral affect is related to the very decision (e.g., anxiety whether one will choose the best option). This chapter does not allow for explanation on how these various types of emotions integrate into the decision-making process. These mechanisms are complex and differ according to the outlined taxonomy of affective or cognitive state, a particular experienced emotion and a particular type of decision taken. Suffice it to say that plethora of experimental evidence confirms the assertion that emotions indeed shape our judgments and decisions in our everyday life⁵. The provided framework also sets a theoretical foundation for exploring the impact of emotion in legal decision making.

⁵ For a comprehensive overview see VÄSTFJÄLL & SLOVIC 2013.

3.3. Moral emotions and moral decision making

Recent decades have seen an increased attention in research of moral judgment and the relevance of moral emotion therein. We zoom in to this area of decision making as decisions in criminal law are inevitably intertwined with moral judgments (WEST 2020). Evading complex discussion on the relationship between morality and (criminal) law that has intrigued many legal scholars, this chapter will undertake the assumption that many criminal law norms overlap with moral norms and thus moral decisions inevitably underpin crucial criminal law decisions.

Moral judgment usually pertains to «either the moral value of an action—its being good/bad or right/wrong—or whether one should/should not or ought/ought not [to] perform it» (MAIBOM 2010, 1001). Similarly as in any decision making, the dual-process models of cognition (KAHNEMAN & FREDRICK 2002) can be also applied in the realm of moral judgment. HAIDT (2007, 998) thus contrasts moral intuition and moral reasoning:

«Moral intuition refers to fast, automatic, and (usually) affect-laden processes in which an evaluative feeling of good-bad or like-dislike (about the actions or character of a person) appears in consciousness without any awareness of having gone through steps of search, weighing evidence, or inferring a conclusion. Moral reasoning, in contrast, is a controlled and “cooler” (less affective) process; it is conscious mental activity that consists of transforming information about people and their actions in order to reach a moral judgment or decision».

HAIDT (2007) further claims that the role of moral emotions, however, is not reduced only to moral intuition. In fact, moral emotions in his view, have a pivotal impact on moral reasoning as well by instantly suggesting the outcome of a moral judgment. In the subsequent process of moral reasoning, typically only those rational arguments are sought that buttress the initial intuitive moral judgment signalled by the affect. While in the process of rational deliberation the intuitive, affect-laden moral judgment may be corrected or changed by reasoning, this requires much cognitive effort and does not occur often.

This model of moral decision making is sometimes termed as the new sentimentalism. The term implies a sharp departure from the opposing and older paradigm of moral rationalism, which emphasises the prevalence of rational reasoning in morality (MAIBOM 2010). While the new sentimentalism is not unanimously accepted in literature on moral decision making, many scholars in the field tend to embrace one form of sentimentalism (see e.g., GREENE 2013; GREENE et al. 2008; HAIDT 2003; NICHOLS 2002; PRINZ 2007; SLOTE 2014). Moreover, even authors who do not subscribe to sentimentalist explanations of moral judgment, acknowledge that the role of emotions in human morality was underestimated in previous rationalistic approaches (BLOOM 2013; CRAIGIE 2011; GREENSPAN 2011; HUEBNER 2013; MAIBOM 2010; NUCCI 2001).

This shift to emotionalism is substantiated by research findings from many different fields. Neuroscience provides one such important area. Brain imaging experiments have revealed that brain areas generating and regulating emotions are also involved in moral reasoning (YOUNG & KOENIGS 2007). Moreover, clinical studies with patients who sustained damage to these brain structures indicate that these individuals also have impaired moral judgment (e.g., DAMASIO 2005; KOENIGS et al. 2007; MARTINS et al. 2012). Research from developmental psychology also seems congruent with sentimentalism. It indicates that very young children make intuitive moral judgments even before they develop more sophisticated cognitive mechanisms. When justifying why particular behaviour is good or bad, children draw reasons from other people's emotions (e.g., this would make them sad, angry or upset). Moreover, when very young children themselves break moral rules, they already display moral emotions (guilt, shame) (NUCCI 2001). Further support for the claim that emotions are indeed pivotal in moral judgment comes from different strands of experimental psychology. Research has thus shown that individuals' moral judgments

changed when a particular emotion was invoked in them. For example, by induced disgust, test subjects' moral judgments became harsher (HORBERG et al. 2009; WHEATLEY & HAIDT 2005), whereas with invoked mirth their moral judgments became more utilitarian (STROHMINGER et al. 2011; VALDESOLO & DESTENO 2006). The observation that people heavily rely on their moral sentiments in moral judgments is further supported by the discovered moral dumbfounding phenomenon. HAIDT (2001) coined this term for situations when people make intuitive moral stance on a certain matter (e.g., moral disgust on incest) and try to justify it with rational arguments. When their arguments are rebutted, however, they still stick to their intuitive judgment despite admitting to the fact that they cannot rationally defend their decision.

3.4. *The role of (moral) emotions in criminal law decision making*

Recently, the body of literature exploring the effect of emotion on decision making in (criminal) law has been steadily growing. This research usually builds on the previous findings on the role of emotion in general and in moral decision making, particularly on research on how people attribute blame and/or develop propensity to punish (in a non-legal meaning of the terms) (e.g., ASK & PINA 2011). However, by applying these concepts to a legal context, researchers face many hurdles specific to the domain of legal decision making. They first pertain to the fact that legal decision making is governed by a complex set of substantive and procedural legal rules, legal principles, and rules of interpretation, which legal theory usually denotes as legal reasoning. Secondly, professional legal decision makers are (through education, training, and professional socialisation) typically much aware of these rules and hence of the fact that legal reasoning is not and ought not to be done in the same fashion as every-day judgments. It would be reasonable to hypothesise that such motivated cognition, put in psychological terms, mitigates the effect of emotion in legal decision making to at least a certain degree⁶. Methodologically, however, this hypothesis is difficult to test; not at the least because in the process of legal decision making, many emotions might be experienced and many different decisions are taken⁷. Researchers thus typically focus only on selected emotions and on particular legal decisions (e.g., the role of anger on the criminal responsibility assessment). However, in such a complex system, it is methodologically perilous to draw causal conclusions from one single variable to the other (internal validity). Another critical obstacle concerns the test subjects. As neither actual jury members nor professional jurists are readily accessible for this type of experiments, researchers most often resort to mock jurors⁸ as test subjects, which further obfuscates extrapolation of results to both real juries and even more so to professional decision makers (ecological validity) (see also PHALEN et al. 2021, 288-290). With these caveats in mind, one should be very careful in drawing broad conclusions from this area of research. Notwithstanding that, this research still offers intriguing insights into the relationship between emotion and legal decision making.

FEIGENSON and PARK (2006) offer a useful model on how emotion might influence legal decision making, which may help us navigate through particular findings of various studies in this field. They propose three ways in which emotion impacts the process of legal judgment. First, emotions can influence individual's strategies for processing information. Thus for example, some emotions such as anger, disgust, and happiness typically pair with a sense of a higher certainty in a decision maker, which may in turn reduce her analytical processing of legally-relevant information and increase susceptibility for heuristics-based solution (TIEDENS & LINTON 2001). Interestingly,

⁶ See, e.g., LERNER & TETLOCK 1999 and DESTENO et al. 2000 on evidence that motivation may correct emotion-related biases.

⁷ Cf. FEIGENSON 2016 on possible effects of multiple emotions on legal decisions.

⁸ Mock juries in this kind of experiments do not consist of actual jury members, but of selected individuals (most often students) who are assigned this role in deciding a hypothetical or actual case.

this effect has been confirmed in a criminal law context with professional decision makers, namely the Swedish crime investigators. When assessing reliability of a witness, angry as opposed to sad investigators more readily employed heuristic processing of information (ASK & GRANHAG 2007; see also SEMMLER & BREWER 2002 for similar results with mock jurors).

Second, emotions may produce mood-congruency effect in legal decision makers⁹. As summarised by Feigenson and Park: «People in positive moods tend to make more positive evaluations of ambiguous information; people in negative moods tend to interpret the same information more negatively» (FEIGENSON & PARK 2006, 148). Thus, evaluating inconclusive evidence, a prosecutor in a negative mood might perceive, interpret, and memorise more details unfavourably for the defendant compared to a prosecutor in a more cheerful mood.

Finally, emotions may affect the way people make particular decisions by providing informational cues. These mechanisms operate in variety of very distinctive and sometimes complex ways, in which emotions may affect directly or indirectly and operate as incidental or integral factors (see FEIGENSON & PARK 2006 for an overview). In a criminal-law context, the impact of integral emotions (affects evoked by some features of the criminal case) seems of particular relevance to our discussion. A study by BRIGHT and GOODMAN-DELAHUNTY (2006), for example, showed that conviction rate in a group of mock jurors with greater anger (induced by gruesome photographic evidence) was significantly higher than in a group that was not shown any evidence. FEIGENSON and PARK (2006, 152) assume that decision-makers in such situations use their emotional state as an informational cue concerning the judgment target (e.g., defendant's blameworthiness).

After accounting for various mechanisms through which emotions may impact legal decision-making, other variables should also be included to the picture. They mostly pertain to integral emotions and concern the questions of who or what invokes the emotion and towards whom the emotion is directed to (SALERNO 2021). Thus, for example a judge may feel sympathy for the victim of the offence, and anger towards the defendant. However, she may also be compassionate towards the defendant and disappointed by the victim. A prosecutor might be repulsed by the offence itself but not necessarily by the mentally challenged defendant. These distinct factors should also be carefully considered when discussing the impact of emotions on legal decisions.

By sketching the background of variability of the mechanisms and modes through which emotions impact legal decision making in criminal law, we take an example of anger and briefly present some research looking into the effects of this emotion. Anger is usually experienced when a person deems that a responsible other has caused an event that one appraises as personally relevant, but incongruent with one's goals (TANGNEY et al. 2007, 361), particularly when such events are perceived as unjust or unfair (MIKULA et al. 1998). Psychologists, however, distinguish anger on the one hand from righteous anger or moral outrage on the other. The latter is more common with decision makers in criminal justice. Moral outrage is typically caused not by perceived harm to the person experiencing this affect but by harm caused to someone else or by a breach of moral norms (RUSSELL & GINER-SOROLLA 2011).

Research indicates that anger in decision makers directly or indirectly increases their punitiveness towards the defendant. An interesting experiment by ASK and PINA (2011) investigated how anger impacts mock jurors' assessment of criminal intent in an embezzlement case. They found that angry jurors attributed more criminal intent to the defendant compared to neutral and sad ones¹⁰. Consequently, this led to jurors' greater punitiveness. GEORGES et al. (2013) measured how mock jurors' anger reflected in their sentencing decisions in a capital case trial. They found that the angrier the jurors were, the more likely it was for them to decide for a death sentence, as angrier jurors estimated mitigating circumstances of the case presented by the

⁹ As opposed to emotion, mood is usually characterised by lower intensity and longer duration (SCHERER 2005, 702).

¹⁰ The effect of anger increasing the intentionality judgment has been also confirmed in a non-legal setting (e.g., SUBRA 2021).

defence as weaker. Another study utilising a murder case, where anger was imposed by a victim impact statement, also revealed that angry jurors were more likely to opt for death sentence compared to both neutral and sad jurors (NUÑEZ et al. 2015; see also NUÑEZ et al. 2017). Similar effect of anger on punitiveness of decision makers in a criminal trial scenario was also found in experiments by MATSUO and ITOH (2017) and LAURENT et al. (2014).

As pointed out, we should not make any direct inferences from studies on mock juries to judgments of professional legal decision makers. In fact, experiments investigating the impact of emotion on decisions of judges and other criminal justice professionals are extremely scarce. One such intriguing study with 53 Norwegian judges revealed that emotions displayed by the witness-victim during her testimony did not influence judges' witness credibility assessment nor their decisions on defendant's guilt (WESSEL et al. 2006). Conversely, an identical scenario tested on lay decision makers revealed that lay people in their assessments relied heavily on victim's displayed emotion, rather than on the content of her testimony (KAUFMANN et al. 2003). Discordant with these findings are results of a study with the Swedish police investigators. It revealed that angry (as opposed to sad) professional criminal investigators evaluating witness credibility did not pay attention to the consistency of the witness statement with the main investigation hypothesis (ASK & GRANHAG 2007). This indicates that anger indeed influenced investigators' information processing strategy and consequently their professional judgment.

The few cited studies do not allow for any general conclusions on the impact of emotion on the decision making of the criminal justice professionals. However, they allow for the assumption that the significance of the experienced emotion on legal judgments does not only differ between lay persons and legal professionals but might also vary between different groups of professionals within the criminal justice.

4. *Empathy and legal decision making*

Much discussion at the intersection of law and emotion revolves around the desirability of empathy in legal decision making. However, every mentioning of the empathy should come with a caveat of a considerable terminological and definitional confusion about the term in literature (CUFF et al. 2016). Most scholars, nonetheless, agree that empathy is not an emotion (as it is sometimes presented)¹¹ but rather a capacity to feel or understand other people's emotions, as well as their thoughts, perceptions, feelings and other cognitive states. Here, a distinction should be drawn between affective and cognitive empathy, which is not always clearly made in discussions on legal contextualisation of empathy.

«[Affective] empathy refers to situations in which the subject has a similar emotional state to an object as a result of perceiving the object's situation. [...] Cognitive empathy refers to situations when the subject arrives at an understanding of the object's state through cognitive processes. It implies that the subject has used cognitive perspective taking to project him or herself into the position of the subject» (PRESTON & DE WAAL 2002, 2).

When exploring the role of empathy in legal decision making it is therefore useful to clarify which type of empathic capacity one has in mind. Perhaps also due to this definitional vagueness, the debates on whether it is beneficial for judges to utilize empathy in their work entail variety of arguments pro et contra. BANDES (2009) emphasises that empathy is an

¹¹ Some authors tend to conflate empathy with the emotions of compassion and/or sympathy as well as with the phenomenon of emotional contagion. Nevertheless, empathy may incite and can be compatible with these emotions. For distinctions see e.g., PRESTON & DE WAAL 2002; WISPÉ 1986.

essential human capacity which, through understanding other people's affective and cognitive states, enables us to function in a social world. Hence, it is also an essential prerequisite in judging, as it enables judges to understand other people's conduct and gives them basis for their moral reasoning. Similarly, HENDERSON (1987) recognises a valuable source of (human) knowledge in empathy (see also WEST 2020). She argues that empathy benefits a legal decision maker both in the process of discovering a conclusion as well as in the process of justifying this conclusion, in a manner that is unreachable to disembodied reason. Providing an example from criminal law, Bandes posits: «In a criminal case, the effort to understand the defendant's perspective can yield information valuable for both the guilt and sentencing phases of the trial» (BANDES 1996, 379).

On the other pole, some authors raise concerns over (improperly) utilising empathy in judging. These range from claims that empathic imagination has no normative significance in judging (POSNER 1995) to fear that empathy may lead to partiality and bias and, therefore, might be inconsistent with objectivity and the rule of law (ROACH ANLEU & MACK 2021). In that respect, BANDES (2009) warns against selective empathy; when a judge more easily empathises with a party having a background familiar to the judge compared to a person with dissimilar life experience. The criminal justice system seems particularly sensitive setting for selective empathy where defendants are often marked by disadvantaged socioeconomic, family and educational backgrounds or come from otherwise marginalised social groups. In contrast, this is typically not the case with judges, prosecutors, and other legal professionals. Judge's empathy might thus be more readily accessible for some victims or perhaps defendants with more relatable personal profiles to the decision maker herself (e.g., white-collar crime defendants). In fact, research indicates that in sentencing decisions, white male jurors in United States are more likely to show bias against defendants from other racial and demographic backgrounds. As an explanation for this bias, researchers propose the flip side of the selective empathy mechanism, which they term as empathic divide (HANEY 2003; LYNCH & HANEY 2011).

An interesting study by WETTERGREN and BERGMAN BLIX (2016) reveals how, apart from judges, empathy is employed by other criminal law professionals, namely the prosecutors in Sweden. This study convincingly shows how empathy is used as a valuable legal reasoning tool in various important prosecutorial decisions. In one presented case in the study, a prosecutor was in a dilemma whether to press charges for the offence of aggravated unlawful threat, as the suspect's conduct caught on CCTV cameras was somewhat ambiguous. By thoroughly analysing the suspect's behaviour, the prosecutor has concluded that the suspect panicked and reacted under fear rather than with the intention to threaten. Interestingly, in substantiating to the researcher her decision not to prosecute, the prosecutor buttressed her conclusion by employing empathy. She explained that the emotions of fear and panic is what she would have felt in the suspect's position (WETTERGREN & BERGMAN BLIX 2016).

A study conducted among Australian judicial officers, indeed, reveals that a majority of them believe that empathy is essential or very important in their day-to-day work. Moreover, several «describe their judicial practice as entailing impartiality and empathy, almost as complementary forces requiring careful and persistent monitoring of their boundaries» (ROACH ANLEU & MACK 2021, 74). This reflection perhaps best encapsulates the ambiguous nature of empathy in legal decision making. It is an indispensable human ability allowing a legal decision maker to fully comprehend different perspectives of the stakeholders involved in a case—along with the legally relevant emotional aspects. On the other hand, its potential selective application together with its ability to invoke emotions in the decision maker herself, may go contrary to the postulates of impartiality and objectivity.

5. Emotions as normative elements of the criminal law norms

In the first part of this chapter, emotions were tackled from the vantage point of extra-legal phenomena influencing legal decision making. In that role, emotions were recognised as both an indispensable element in the process as well as potentially detrimental factor obscuring and unduly biasing rational process of legal reasoning. Therefore, it is easy to overlook that on the other hand, emotions in criminal law often play a prominent legal role of the very normative elements in legal norms. Performing in this role, they pose a duty (and often a challenge) to jurists to furnish them with legal definitions, to recognise, interpret, and prove them. Take for example the following provision on excessive self-defence from the Slovenian Criminal Code:

«In the event the perpetrator has acted beyond the limits of justifiable self-defence, he or she may receive a more lenient sentence; when he or she acts due to *severe irritation* or *great fear* caused by attack, his or her punishment may be remitted» (emphasis added)¹².

When the court is applying this provision and is considering whether the defendant exceeding self-defence acted due to severe irritation or great fear caused by the attack, it will first need to interpret the terms “severe irritation” and “great fear”. The defence (that has been shifted the burden of proof in this case) needs to establish that the perpetrator was indeed in an emotional state that matches one of these definitions. Despite these being legal terms, they derive their meaning from and need to correspond to actual experienced emotions. Hence, in establishing these facts the court needs to find the way to unravel (*ex post facto*) deeply subjective experiences of affects in the perpetrator. This may pose difficult evidentiary challenges, which in practice usually require assistance of an expert (e.g., psychiatrist or psychologist).

The selected example pertains to the rules on sentencing (at least in the provided legal order). However, emotions are weaved into legal norms of many other eminent criminal law subject matters of both substantive and procedural nature¹³. One such important area are rules on culpability and excuses, more specifically on criminal insanity and (substantially) diminished capacity¹⁴. While typically the application of these rules requires underlying mental condition or sometimes intoxication with psychoactive substances, many legislations also allow for the application of the rules on diminished capacity and insanity even due to extreme emotional excitation. This might be the case with offenders acting under uncontrollable rage, severe anxiety, shock, or in a panic attack (BLOMSMA & ROEF 2016).

Moreover, emotions may stand as normative elements of particular (modes of) criminal offences. Let us take for example a provision on manslaughter from the Swiss Criminal Code: «Where the offender acts in a state of extreme emotion that is excusable in the circumstances, or in a state of profound psychological stress, the penalty is a custodial sentence from one to ten years»¹⁵. In this provision, the perpetrator’s excusable state of extreme emotion or psychological stress is the normative element constituting a mitigated form of homicide. A comparable common law definition can be found in voluntary manslaughter (KAHAN & NUSSBAUM 1996).

Even more often, however, emotions appear in criminal offences as their implicit presuppositions. Hate crimes present one such example. What typically qualifies these acts as hate crimes as opposed

¹² Criminal Code of the Republic of Slovenia, Article 22, Paragraph 2 (unofficial English translation) (Official Gazette of the Republic of Slovenia, no. 50/12—official consolidated version, 6/16—cor., 54/15, 38/16, 27/17, 23/20, 91/20, 95/21, 186/21 and 105/22—ZZNŠPP).

¹³ Needless to point that provided examples may be regulated differently in different legal orders.

¹⁴ It must be noted that different jurisdictions use different legal terms for this concept, as well as different normative levels of diminished capacity.

¹⁵ Swiss Criminal Code of 21 December 1937, Article 113 (unofficial English translation).

to other forms of (violent) offences is that they are motivated by the emotions of hatred (or perhaps moral disgust¹⁶, contempt, or similar affect) rooted in prejudice or bias against certain social group¹⁷. Furthermore, many jurisdictions have recently criminalised offences generally termed as revenge pornography. Although both theoretical and legal conceptions vary, narrower definitions distinguish this type of offences from similar unlawful sharing of another's intimate content, in that it is incited out of revenge¹⁸ by the victim's (ex sexual) partner (WALKER & SLEATH 2017).

Finally, some criminal offences can only be committed if the perpetrator's conduct causes a certain emotion in the victim or if such a conduct is typically capable of causing a certain feeling. In many jurisdictions this is the case with rather common crimes, including threat, extortion, or stalking, which might require that the perpetrator's conduct is capable of instilling fright or other emotional distress in the victim.

Another area where emotions play an important and often controversial normative role in criminal law are sentencing decisions. Legal orders vary in how they prescribe emotions of defendants and victims to be taken into account in deciding upon an appropriate sentence. Some legal orders explicitly lay down particular emotions that decision makers need to consider, for example remorse (ROACH ANLEU & MACK 2021, 41). Some legal orders only exemplify typical emotions that can be considered in sentencing, whereas other jurisdictions leave a wider discretion relating to the factors the courts may or may not take into account. In practice, emotions in the perpetrator are often considered as aggravating or mitigating factors when they are weighed as motives for an offence (e.g., HESSICK 2006). Vengeance, jealousy, envy, and hatred are examples of such aggravating factors. On the other hand, a judge or jury may consider motives in offences committed out of compassion, pity, love, or provoked rage as mitigating factors. An even more controversial matter in sentencing are emotions displayed by the offender after committing a crime, such as shame¹⁹, regret, or guilt. In this context, remorse has gained the most theoretical attention (e.g., BANDES 2016; BENNETT 2016; PROEVE & TUDOR 2016; SARAT 1999). The displayed remorse by the defendant is normally considered a mitigating factor leading to a more lenient sentence. Interestingly, however, the court sometimes even expects the defendant to show this particular emotion during a trial. Hence, the lack of displayed remorse or remorse that is feigned, can be used as an aggravating factor when a court imposes a criminal sanction (ROSSMANITH et al. 2018).

Victim's emotional distress caused by the committed offence can be a similarly deciding factor in sentencing. While regarding victim's suffering as a relevant circumstance in applying sentence has not been disputed, more controversy has been stirred by the victim impact statements allowed in many common law jurisdictions. With a victim impact statement, the victim obtains an opportunity to present to the court how the offence has affected her life, but also to propose a sentencing recommendation to the court (BOOTH 2016). Such statements, particularly in the capital punishment trials in the United States, have become increasingly emotional; sometimes with an included video material underlaid with evocative music, they resemble short documentary films about the victim's life (WINOGRAD 2008). This led to the dilemma, dealt even by the Supreme Court of the United States, whether particular victim

¹⁶ In this vein, KAHAN 1998, 1634 «suggest[s] that the “hate crimes” debate is better understood as a “disgust crimes” debate».

¹⁷ It should be emphasised that there is no universal definition of hate crime and that conceptualisations of this phenomenon vary both in theory and in legal regulation between countries (see e.g., SCHWEPPE 2021). Many authors agree with SULLAWAY 2004, 253 that «the presence or absence of the emotion of hate is a poor criterion by which to define hate crimes».

¹⁸ As succinctly explained by MCDERMOTT et al. 2017, 71: «[R]evenge is not motivated by the rational expectation of future deterrence. It is instead driven by the intrinsic pleasure that one expects to experience upon striking back».

¹⁹ Critically on the effect of shame pursued by the criminal law, see MASSARO 1999.

impact statements were overly emotional²⁰. Many feared that emotionally charged content might unduly bias the jury or judge and thus render sentencing decision unfair (BANDES 1996). The presented dilemma provides a good example on the complex and metamorphic role that emotion plays in the criminal law decision making. A substantive criminal law question (emotional distress by the victim to be considered in applying criminal sanction) invokes a procedural (evidentiary) challenge of establishing this fact. This, in turn, implies concern whether provoked emotions in decision makers (as an extra-legal factor) will meddle with and bias legal reasoning, which finally results in a broader procedural issue, whether these emotional factors undermine fair trial and due process rights in a criminal trial.

Finally, focusing on solely procedural criminal norms, we find that emotions sometimes take a central stage in that area as well. In this context, especially emotions of victims and other witnesses are of concern. On the one hand, procedural regulations should strive to prevent (additional) emotional harm (secondary victimisation) that the criminal trial might cause to these vulnerable participants. On the other hand, however, such protective measures should not overly impose on the defendants' fair trial rights. Pursuing the first goal, many contemporary criminal procedures include sets of regulations aiming at preventing intimidation, humiliation, and fear in victims and other witnesses. In fact, in the European Union, Directive 2012/29/EU²¹ imposed an obligation on all member states to adopt procedural measures in their domestic laws that would recognise and prevent potential emotional distress in victims during pre-trial and trial proceedings. On the other hand, however, the jurisprudence of the European Court of Human Rights (ECtHR) cautions that the concern for the (emotional) wellbeing of witnesses should not breach the defendant's conventional fair trial rights, namely the right to examine witnesses against him. Interestingly, tackling the relevance of witnesses' fear, ECtHR calls for a closer investigation of this affect.

«A distinction must be drawn between two types of fear: fear which is attributable to threats or other actions of the defendant or those acting on his or her behalf and fear which is attributable to a more general fear of what will happen if the witness gives evidence at trial»²².

Without further examining the quoted argument, that ECtHR develops in the cited and other decisions, it is evident that emotions as the interest of procedural criminal law may sometimes take a central stage in legal fora.

Moreover, affects as more distant procedural factors should be also considered in other procedural undertakings of various criminal trial participants. Let us take, for example, false admission of guilt made by the defendant under threat, or a witness's perjury motivated by revenge. Such acts, which are procedurally invalid, are directly motivated by emotions. Perhaps more indirectly, but no less importantly, emotions act in the background of the traditional instruments of procedural law—oaths²³. Historically, the effectiveness of oath stems from the fear of deity's wrath and punishment in case the person taking the oath breaches it (WHITE 1903). Notwithstanding its archaic roots, the oath or affirmation taken by various procedural actors remains an inevitable component in almost any contemporary criminal procedure. It seems that an important factor for its effectiveness still nowadays lies in the psychological,

²⁰ See e.g., *Payne v. Tennessee*, 501 U. S. 808 (1991) and *Kelly v. California*, 07-11073 (2008).

²¹ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

²² ECtHR, *Al-Khawaja and Tahery v. the United Kingdom*, 15 December 2011, no. 26766/05 and 22228/06, Para. 122.

²³ Interestingly, oaths in some jurisdictions directly invoke on emotions. For example, Australian judicial officers swear that they will dispense justice «without fear or favour, affection or ill-will» (CAMPBELL 1999, 146).

particularly emotional weight that the act of swearing imposes²⁴. The person taking the oath is not only motivated by the fear of a pending legal sanction if she breaks it, and the expected emotions of guilt or shame, but also by moral pride in keeping to the oath²⁵.

Furthermore, all criminal proceedings usually give authority to the presiding judge(s) to prevent and sanction undue acts of insult, humiliation, or other emotional harm to any participants of the proceedings in order to protect the dignity of the persons involved and the authority of the court itself.

Finally, attention should be also brought to restorative justice mechanisms that increasingly complement regular criminal proceedings in contemporary jurisdictions²⁶. While the advantages of these alternatives to traditional criminal proceedings are manifold, their emotional aspect should not be underestimated. A crucial advantage of successful restorative justice programmes is the alleviation of negative emotions, not only those of the victim and the offender but also of other stakeholders; sometimes even the wider community affected by the offence (ROSSNER 2013; STRANG 2002). This emotional “discharging” prevents new criminogenic situations among those involved in the incident and in their immediate social environment. Decision makers in the police, prosecuting authorities, and courts selecting suitable cases to be diverted to restorative justice mechanisms are therefore often instructed by procedural norms or guidelines to consider these emotional aspects of cases as criteria.

Lastly, we should also touch upon the acts of clemency. In various jurisdictions pardons may be granted by different authorities; often by the head of state, government or some other body. In effect, clemency absolves a convicted person (or defendant before conviction) of all or some consequences of the criminal conviction²⁷. Reasons for a granted pardon vary. Nevertheless, this institution is often understood (not without controversy) as a correction of a particular (unjust) criminal justice system outcome (NOVAK 2015). While it would be naïve to claim that nowadays clemency is based on actual emotions felt by those in charge of this decision, the etymology of the term clearly reveals its emotional background at least in its symbolic dimension. Thus, an act of clemency often reflects a public—rather than initially sovereign’s—sentiment about a particular criminal case or a particular convicted person²⁸. The public might feel sympathy, compassion or pity towards the convicted person that the public believes did not deserve a conviction or (particularly harsh) punishment. The public might also exhibit forgiveness or mercy for someone who is believed to have already paid their debt to the society. Such public sentiments may legitimise discretionary clemency decisions and thus reduce concerns over arbitrariness²⁹.

The provided examples are not exhaustive in any way but nevertheless support the assertion that emotion is indeed part and parcel of the very normative structure of both substantive and procedural criminal law.

6. *Emotions from the socio-legal perspective*

Criminal trials and related criminal proceedings are highly formalised and uniform processes if viewed through normative lenses. However, criminal law proceedings can be observed also as

²⁴ For empirical evidence in a non-criminal law context on how oath-taking markedly improves truth telling, see e.g., JACQUEMET et al. 2019.

²⁵ On guilt, shame, and moral pride as instigators of moral behaviour, see TANGNEY et al. 2007.

²⁶ For a comprehensive comparative overview see DÜNKEL et al. 2015.

²⁷ Similar can be claimed for amnesty, which in comparison to pardon, is usually passed by a legislative body and might be motivated by different, e.g., political or pragmatic, reasons.

²⁸ Cf. SAJÓ 2016, on the influence of public sentiment in the formation of constitutional norms.

²⁹ «[A]ll countries must wrestle with clemency's underlying tensions between unchecked discretion and law; between individualization and arbitrariness; and between mercy and justice» (NOVAK 2015, 820).

social phenomena, as dynamic interactions among the involved stakeholders embedded in a specific cultural environment and institutional setting. Moreover, the participants (e.g., judges, attorneys, defendants, witnesses) are of different social status and hold various amounts of social power. Socio-legal research, that explores these aspects of court proceedings, has been increasingly paying attention to the function of emotions therein. This strand of research observes how emotions are displayed, managed, interpreted, or instrumentally employed by various procedural actors for various purposes (e.g., BERGMAN BLIX & WETTERGREN 2016).

Socio-legal analysis of emotion in judicial context builds upon concepts developed in sociology of emotion and applies them to legal settings. One such important concept is emotional labour³⁰. It denotes adapting (suppressing or inducing) emotions to fit a particular social or professional setting according to the so-called feeling rules (HOCHSCHILD 2012). Feeling rules in judicial (criminal law) context entail expectations concerning which emotions and how ought or ought not to be displayed in a particular court situation, for example during witness interrogation³¹.

The concept of emotional labour can be easily linked to the notion of self-regulation that MARONEY (2020) discusses as a crucial component of a desirable judicial temperament—a set of personal traits ideally possessed by a judge. Maroney argues that besides positive and negative emotionality, judge's self-regulation is pivotal. It entails not only the ability to control which emotions and how are exhibited by a judge in a particular judicial setting, but also which emotions and how strongly are felt by her.

However, ROACH ANLEU and MACK (2021, 11) note that emotion management in court also entails regulating experienced and expressed emotions of other trial participants:

«the judiciary can use their own feelings and emotion displays to accomplish their daily tasks and professional goals. Judicial officers can adopt a certain demeanour to evoke particular emotions as a way to foster trust, or as an attempt to induce certain feeling states among participants in their workplaces».

It should be pointed out that properly applied emotion management can be a highly beneficial and powerful tool in criminal proceedings. It can be used to strengthen decision making in criminal law through various strategies. For example, a judge, who uses warm, calm, and compassionate communication mode in addressing a frightened or nervous witness may acquire from the witness more, and more accurate information which will foster the truth finding process in the trial. Conversely, using cold and authoritative tone to remind a defence attorney that he is abusing his procedural rights might be an effective way for a judge to keep an adversarial balance between the parties and to ensure orderly progress of a procedure.

On the other hand, a legal decision maker may also employ emotion management to regulate her own emotions. By doing so, a judge may again pursue different objectives. Perhaps a judge might want to exhibit dispassion during an emotionally heavily charged testimony to convey the appearance of neutrality, impartiality, and procedural fairness to the public (MACK & ROACH ANLEU 2010). However, a judge might also want to regulate her experienced (not just displayed) emotion, in order to avoid unwanted bias in her decision making (see above, 3.4). In an insightfully study of Australian judicial officers, ROACH ANLEU and MACK (2021, 104-111) reveal different methods and techniques that judges use to regulate their own affects. These include self-talk, an internal discourse with oneself as conscious self-reminder of one's formal

³⁰ In literature, the notion of emotional labour partially or completely overlaps with some related terms, such as emotion regulation, emotion management, emotion work, or affective practice. For an overview of these concepts see ROACH ANLEU & MACK 2021, 8-12.

³¹ As noted, feeling rules also vary culturally. For example, as acknowledged by BERGMAN BLIX & WETTERGREN 2016, 32: «If anger is expressed, it is likely to be more subtle in Sweden than in the US, due to the societal emotional regime».

function. Adjournment of proceedings—often resorted to when a judge feels anger—is an efficient and immediate way for a judge to distance herself from the emotion-triggering situation, to reflect upon it and her feelings, and to regain composure. Furthermore, judges make use of debriefings with colleagues and peers as a method to unburden emotion-related stress, whereas sometimes they also take advantage of humour for this purpose. Notwithstanding our focus on judges' emotion management, it should be pointed out that this practice is equally available and utilised by other criminal justice participants. They use it to pursue their own specific goals and to perform their own specific roles. For example, FLOWER (2021) reports on emotional performance of defence attorneys whose primary concern is conveying loyalty to defendants they represent, while WETTERGREN and BERGMAN BLIX (2016) document on prosecutors' use of empathy in emotion management.

However, the flip side of the emotion management is the danger of its instrumental use that can be an equally powerful weapon working against procedural fairness and legitimacy of criminal justice. Thus criminal justice participants may take advantage of emotions to manipulate other stakeholders³², to exert their social power or to reaffirm their social status in the courtroom in manners that lack legitimacy (BERGMAN BLIX & WETTERGREN 2016; MACK & ANLEU 2010).

7. Conclusion

The many recent endeavours of scholars to tackle the role of emotions in criminal law have opened fascinating new perspectives on the decision making in the criminal law. Most importantly, they have allowed us to better understand the complexities and multidimensionality of this process. Despite still many unresolved challenges, these new insights should not be neglected. This is equally in the interest of the legal theory and of legal practitioners, who deal with emotions and legal decisions on daily bases; but ultimately, it is in the interest of all the criminal justice participants. Embracing a thoroughly multidisciplinary research on emotion in criminal justice does in no way threaten the central criminal law postulates as we have nurtured and developed through centuries. On the contrary, by better understanding the element of emotion that had previously been either intentionally ignored or unintentionally overlooked by the criminal law doctrine, we may make a better use of the fundamental criminal law principles and develop them further with the aspiration of a just application of the criminal law.

³² Cf. Pillsbury's discussion on deliberate or unconscious "emotional deception" in written judicial opinions (PILLSBURY 1999, 341).

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