

MATEUSZ STĘPIEŃ¹

On the Relationship between Judicial Empathy and the Integrity of Judges²

Submitted: 8.04.2021. Accepted: 9.09.2021

Abstract

This paper dwells on the relationship between judicial empathy and integrity. It claims that for the emergence and proper functioning of judicial empathy as a kind of judicial virtue, a number of conditions needed to be fulfilled, including the development of judicial integrity. The paper aims to unpack this argument and to demonstrate judicial empathy and integrity in action as exemplified particularly by judicial behaviour observed during empirical research in Cracow lower courts. The overall perspective for examining the relationship between judicial empathy and integrity rests on the developmental vision of a judge. Although the presented research fits into the broader interest in judicial empathy and judicial virtues, the paper contains concrete examples of verbal and non-verbal behaviours of a judge that demonstrate how judicial empathy co-functions with other skills and virtues. In general, the paper opposes the marginalisation of judicial skills and virtues.

Keywords: judicial empathy, integrity of judges, judicial virtues, development of judges.

¹ Prof. UJ Mateusz Stępień, PhD – Department of Sociology of Law, Faculty of Law and Administration, Jagiellonian University (Poland); e-mail: mateusz.stepien@uj.edu.pl; ORCID: 0000-0002-1124-8955.

² The research are financed by National Science Centre (Poland) (Registration number 2019/33/B/HS5/01664).

MATEUSZ STĘPIEŃ

Relacja między empatią sędziowską a integralnością sędziego³

Streszczenie

Artykuł dotyczy relacji między empatią sędziowską a integralnością sędziego. Zawiera on tezę, że do powstania i prawidłowego funkcjonowania empatii sędziowskiej jako rodzaju cnoty sędziowskiej konieczne jest spełnienie szeregu warunków, w tym rozwój integralności sędziowskiej. Artykuł ma na celu rozwinięcie tego argumentu i ukazanie empatii i integralności sędziowskiej w działaniu na konkretnym przykładzie zachowań sędziowskich obserwowanych podczas badań empirycznych w krakowskich sądach rejonowych. Ogólna perspektywa przyjęta w badaniach relacji między empatią i integralnością sędziów opiera się na wizji sędziego jako podmiotu podlegającego rozwojowi. Chociaż prezentowane badania wpisują się w szersze zainteresowania empatią sędziowską i cnotami sędziowskimi, niniejszy artykuł zawiera konkretne przykłady zachowań werbalnych i niewerbalnych sędziego, które ukazują to, jak empatia sędziowska współdziała z innymi umiejętnościami i cnotami. Generalnie, artykuł sprzeciwia się marginalizacji umiejętności i cnot sędziowskich.

Słowa kluczowe: empatia sędziowska, integralność sędziowska, cnoty jurydyczne, rozwój sędziów.

³ Artykuł jest efektem realizacji projektu finansowanego ze środków Narodowego Centrum Nauki przyznanych na podstawie decyzji numer 2019/33/B/HS5/01664.

Introduction

This essay aims at problematising the role of a judge's integrity from a judicial empathy angle. Although judicial empathy lies at the centre of the presented approach, both judicial empathy and judges' integrity are part of one ongoing process – the formation and consolidation of the abilities, skills, and virtues associated with performing the role of a judge.

The following considerations are based on several inspirations. First, an earlier study co-conducted by the author of this paper on courtroom interactional dynamics and, more specifically, on the power distance between judge and witness, played an important role in acknowledging the existence of judicial empathy. During the observation of court hearings in Cracow lower courts, several verbal and non-verbal behaviours of judges were interpreted in terms of empathy (understood by the researchers in an intuitive way).⁴ These preliminary observations became an inspiration for the next research project devoted solely to judicial empathy. Second, the wider area of research on empathy conducted in many sciences, especially philosophy, psychology and sociology, provided another source of inspiration for the argument presented in this paper.⁵ Although researching empathy has become enormously popular, one can pinpoint some shortcomings and problems (briefly described below) with how empathy is understood and studied. Third, to some extent, the presented approach to judicial empathy and the integrity of judges is inspired by the vision of the ontology of the social world developed by Tim Ingold, which placed the 'enskillment' process at the heart.⁶ The Ingoldian vision of social ecology focused on human skills allows us to look at judicial empathy with a fresh eye, as

⁴ M. Dudek, M. Stępień, *Courtroom Power Distance Dynamics*, Cham 2021, pp. 105, 110, 160.

⁵ See, e.g., A. Coplan, P. Goldie, *Empathy: Philosophical and Psychological Perspectives*, Oxford 2011; J. Zaki, *Empathy: A Motivated Account*, "Psychological Bulletin" 2014, 140(6), pp. 1608–1647; H. Maibom, *Empathy and Morality*, Oxford 2014; S. Lanzoni, *Empathy: A History*, New Haven 2018; E. Segal, *Social Empathy: The Art of Understanding Others*, New York 2018.

⁶ See, e.g., T. Ingold, *The Perception of the Environment: Essays on Livelihood, Dwelling and Skill*, London 2001; T. Ingold, *Beyond Art and Technology: The Anthropology of Skill*, [in:] M.B. Schiffer (ed.), *Anthropological Perspectives on Technology*, Albuquerque 2013; T. Ingold, *Prospect*, [in:] T. Ingold, G. Pálsson (eds.), *Biosocial Becomings: Integrating Social and Biological Anthropology*, Cambridge. For an application of Ingold's ideas to the legal sphere, see: M. Stępień, *Sprawności prawne – pomiędzy „umysłem” a „działaniem”*: Ku ekologicznemu ujęciu świadomości prawnej, [in:] M. Dudek, K. Strużińska (eds.), *Świadomościowy wymiar prawa*, Kraków 2017, pp. 85–110.

it avoids the divisions that have limited reflection on social life for years. Thinking about empathy and integrity in the judicial context looks completely different when one takes as a starting point an approach that does not separate cognitive processes and emotions/affects, recognises the human being in the developmental perspective, and appreciates the importance of spatial arrangements. Although there will be few direct references to Ingold in the present study, it is his approach that significantly informs the research at hand.

As has been said, this paper goes ‘from judicial empathy to integrity’, which implies that the introductory remarks should be devoted to the former. It is easy to notice that judicial empathy does not have good press. The legal sciences offer very little in terms of shedding light on the use of empathy by judges. This subject has barely any role in the legal education⁷ and professional training of judges. The very phrase ‘judicial empathy’ raises objections. This is frequently because empathy is confused with compassion or unchecked emotionality, which are much more difficult to incorporate into the judges’ toolkits. However, even professional discourse on the subject is limited and full of pitfalls. A number of critical arguments have been raised against judicial empathy. According to these arguments, judicial empathy leads to discrimination against those with whom judges do not empathise, violates judicial impartiality and the ideal of the rule of law or the separation of powers, and causes greater arbitrariness in the decision-making process.⁸ Although the question of whether these arguments are sound remains beyond the scope of this paper, it is easy to notice that how one defines empathy determines how they assess the need for judicial empathy. Choosing definitions focused on ‘entering into the emotional states of others’ or ‘feeling what another feels’ considerably minimises the chance that one would consider empathy as belonging to the repertoire of the desirable qualities of judges. Moreover, it seems that some advocates of judicial empathy have not been convincing. Supporters of so-called empathic judging – characterised by the broad, non-discriminatory use of empathy by judges – exaggerate the role of empathy in the decision-making process and ignore various costs associated with empathising.⁹ Furthermore, their approaches significantly reduce the

⁷ However, see: J.D. Rosenberg, *Teaching Empathy in Law School*, “University of San Francisco Law Review” 2002, 36(3), pp. 621–657; I. Gallacher, *Thinking Like Non-Lawyers: Why Empathy Is a Core Lawyering Skill and Why Legal Education Should Change to Reflect Its Importance*, “College of Law Faculty Scholarship” 2012, 6, pp. 1–49; A. Gascón-Cuenca, C. Ghitti, F. Malzani, *Acknowledging the Relevance of Empathy in Clinical Legal Education: Some Proposals from the Experience of the University of Brescia (IT) and Valencia (ESP)*, “International Journal of Clinical Legal Education” 2018, 25, pp. 218–247.

⁸ B. Fissell has provided a concise summary of this debate in: *Modern Critiques of Judicial Empathy: A Revised Intellectual History*, “Michigan State Law Review” 2016, pp. 817–851; see also R. West, *The Anti-emphatic Turn*, “Nomos” 2013, 53, pp. 243–288.

⁹ T.B. Colby, *In Defense of Judicial Empathy*, “Minnesota Law Review” 2012, 96, p. 1196.

elements that constitute the desirable model of judicial decision-making. These advocates have not considered what judicial empathy, as something specific, is or should be, as they were focusing on the use of empathy as a domain-general ability by judges when performing their tasks. As we demonstrate below, these are two different issues. Such a preliminary glimpse into the state of the art already indicates that the discussion on judicial empathy requires reorientation.¹⁰

Authors who discuss judicial empathy should avoid making easy assessments of the role of empathy in judges' work because (as was mentioned) much depends not just on how empathy is understood, but also on what is considered the desirable vision of judging and the functions ascribed to the law. It is also inaccurate to try to understand the role of judicial empathy without taking into account other elements of the judicial decision-making process. With all this in mind, this paper dwells on the relationship between judicial empathy and integrity. At the level of the academic discourse on judges and judicial decision-making, it can be said that judicial empathy becomes much less controversial when it is complemented by judicial integrity. In turn, referring to the level of the real social phenomena, and not the academic discourse, this paper argues that for the emergence and proper functioning of judicial empathy ('proper', which means that it co-collaborates in the implementation of procedural principles) as a kind of judicial virtue or attitude, a number of conditions needed to be fulfilled, including the development of judicial integrity. In other words, from a developmental perspective, which emphasises the process of becoming the mature judge¹¹, the emergence and functioning of judicial empathy require bolstering the integrity of judges. Thus, the abilities, skills, and virtues that enable the judge to 'go outside' their perspective to 'resonate with others' or 'enter the situation of others' require the simultaneous building of many other types of 'judicial crafts' and the forming of a specific set of them that together make up 'the whole' of the judge.

To justify this argument, the next section of the paper covers the integrity of judges. The later parts deal with general empathy and demonstrate in what sense the emergence of mature judicial empathy requires the judges of integrity. Then, some relevant details of the particular court hearing that was investigated during the empirical research in Cracow lower courts will be presented and discussed. The judicial behaviour during the hearing seemed to perfectly demonstrate judicial

¹⁰ A. Kind has argued similarly in: *Empathy, Imagination and the Law*, [in:] A. Amaya, M. del Mar (eds.), *Virtue, Emotion and Imagination in Law and Legal Reasoning*, Oxford 2020, p. 196.

¹¹ See e.g. M. Stępień, *The Three Stages of Judges' Self-Development*, [in:] A. Amaya, Hock Lai Ho (eds.) *Virtue, Law, and Justice*, Oxford 2013, pp. 137–154.

empathy and integrity in action. The last part formulates conclusions related to the general perspective adopted in this paper.

The Integrity of the Judge

Integrity, understood as a desired property of a person, has been on the radar not only of philosophy, ethics, and psychology but also various specific disciplines (such as the philosophy of law and legal ethics). This issue is multifaceted and complex, as it touches upon many contexts and themes: the morality of the individual, the relationship between the individual and the role she or he performs, and the interactions between those two contexts and the pressure from current politics on the individual. A distinction is frequently made between personal integrity (sometimes referred to as moral integrity) and professional integrity. The meaning of the former is most often indicated as being true to oneself, adhering to principles regardless of circumstances, being autonomous, having a unity of thoughts, words, and actions; being true to one's commitments or consistently advocating for something.¹² Meanwhile, professional integrity is frequently linked with possessing lasting determination to protect the values and principles of a given profession or role, and also with being self-reflective when performing that role.¹³ It seems that the integrity of judges¹⁴ – which, as is worth noting, has been mainly considered in Anglo-Saxon countries¹⁵ – includes elements of these two types but also new aspects. As is frequently argued, judges should not only be faithful to the values and principles of their profession, but above all, they should also protect fundamental constitutional values and, at the same time, protect and maintain some personal autonomy.

The integrity of a judge, understood here as a character trait, can be understood in at least three ways. First, it can be understood as a constant state of being authentic

¹² Compare the different approaches of personal integrity: G. Scherkoske, *Could Integrity Be an Epistemic Virtue?*, "International Journal of Philosophical Studies" 2012, 20(2), pp. 185–215; A. Archer, *Integrity and the Value of an Integrated Self*, "Journal of Value Inquiry" 2017, 51, pp. 435–454.

¹³ Among most popular approaches see e.g. M.S. Pritchard, *Professional Integrity: Thinking Ethically*, Lawrence, 2006; A. Eriksen, *What Is Professional Integrity?* "Etikk i praksis. Nordic Journal of Applied Ethics" 2015, 9(2), pp. 3–17.

¹⁴ See e.g. R.M. Bloom, *Judicial Integrity: A Call for Its Re-Emergence in the Adjudication of Criminal Cases*, "The Journal of Criminal Law and Criminology" 1993, 3, pp. 462–501; J. Soeharno, *The Integrity of the Judge: A Philosophical Inquiry*, Aldershot 2009.

¹⁵ Only several Polish authors have examined the integrity in the legal professions. See: P. Skuczyński, *Integralność*, [in:] H. Izdebski, P. Skuczyński (eds.), *Etyka zawodów prawniczych. Etyka prawnicza*, Warszawa 2006, pp. 105–112; G. Maroń, *Integralność religijna sędziego oraz argumentacja religijna w amerykańskim procesie orzecznictwym*, Rzeszów 2018.

and autonomous in fulfilling the professional role and serving the values of the judiciary. In this case, the judge is not a mere tool, and she or he cannot be instrumentalised (by anyone), as she or he has a distance both to the role and current political pressures. According to another approach, the integrity of a judge means that the judge is always faithful to her or his own core principles and values, reconciled and harmonised with what the professional role calls for. In this case, the judge is not a 'wobbly boat', but a stable and well-grounded person (although this stability may include, for instance, being stable in flexibility). According to the third approach, adopted in this paper, the integrity of a judge is the state of having a stable and harmonised set of properties related to the judicial role that are performed with a degree of personal autonomy, which makes the judge a 'whole'. This understanding refers to the etymology of the Latin word *integrare*, meaning 'to unite' or 'to make whole'. There are plenty of philosophical approaches to integrity that place 'wholeness' or 'being whole' at the centre.¹⁶ It should be noted that this assumes that some elements are or might be combined or integrated into the 'whole' – in this case, various abilities, skills, and virtues that are attuned with the performance of the role of a judge. One can defend the view that the first two above-mentioned understandings of a judge's integrity can be combined with the last approach. This can be described as 'integrity as completeness' and is possible only when the 'wholeness' of a judge is built on a specific set and configuration of abilities, skills, and virtues. Then, integrity would be a state of the judge in which he or she is not only the 'whole' but also someone authentic, autonomous and consistent in sticking to his or her principles while pursuing the goals of the professional role.

Three-level Empathy

Research on empathy has been blossoming dynamically for the last two decades. Despite this, the dominant approaches to empathy have some problems. The understanding of empathy presented below answers the most serious weaknesses of the dominant way of thinking about empathy. In order to improve how empathy is understood and conceptualised (and, in consequence, how it is studied), it is necessary to (1) make more room for acknowledging the sociological factors (such as rules, spatial arrangements, and social structures) influencing the expression and possible development of empathy; (2) go beyond the division of empathy into affective and cognitive, which reproduces the outdated Cartesian tradition of grasping mental processes; and (3) adopt a developmental approach to empathy

¹⁶ E.g. D. Cox, M. Levine, M. La Caze, *Integrity and the Fragile Self*, Aldershot 2003, p. 41.

that understands it as a multilevel phenomenon susceptible to development and integration with other elements within the role or profession. This also includes the possibility of understanding higher-level empathy as a set of several abilities, skills, and virtues suited to a given social setting. Adopting a research orientation based on these three postulates allows for providing an alternative to the dominant ways of problematising empathy, and it immediately influences the understanding of judicial empathy and how it relates to judicial integrity.¹⁷

Empathy is most frequently referred to as a first-level mental process. Despite the differences between particular approaches, most of the authors hold that empathy's core is directed at others. First-level empathy is seen as the natural ability to take the 'perspective of other', to enter into 'the emotions of the other', to 'get into the shoes of the other', and to 'be in tune with the other'. This resonance with others may take different courses, be based on different underlying mechanisms (such as mimicry, mirroring, bodily synchronisation and emotional contagion, imagining or perspective-taking) and lead to various effects. It has been widely proved that people do not use this ability equally towards everyone to the same degree – on the contrary, we are more empathetic towards people similar to us (age, gender, profession).

Empathy as a skill is something different. In this case, the individual uses it more reflectively, and the possibility of developing it comes into play. Acts of empathising are integrated into what is required by the rules and other structural conditions of a given social setting.¹⁸ This stage, in which empathy becomes a second-level skill, requires more than just expanding what comes from empathising on the first level. In specific places and structures, as Ingold writes, an 'education of attention' related to empathising takes place. Subjects reflect on the results of empathising and control how these processes occur, as well as whether and how they are manifested. Empathy becomes something more stable and controllable.

Meanwhile, when the processes of using empathy as a skill take place over a long period, an important change may take place. At the third stage, a given subject is already 'empathetic' and empathy is a (meta) virtue or (meta) attitude resulting in a soft, natural 'getting into other people's shoes' in tune with what other skills dictate, adjusted to particular social settings. In this case, empathy works as a kind of overlay (filter) on one's personality, one out of many, through which reality is perceived.

¹⁷ Some of this postulates have been already applied to study judicial empathy; see e.g. S. Bergman Blix, *Different Roads to Empathy: Stage Actors and Judges as Polar Cases*, "Emotions and Society" 2019, 1(2), pp. 163–180.

¹⁸ Arlie Hochschild has pointed out to the existence of empathy rules (they are socially learned and vary, according to social context expectations regarding empathy that people internalise); *Strangers in Their Own Land: Anger and Mourning on the American Right*, New York 2016.

Judicial Empathy

Given that judges are human¹⁹, it can be argued that at various stages of the broadly understood decision-making process, they utilise the first-level empathy to grasp the perspective of certain others – whether they are aware of it or not.²⁰ It is highly probable that judges' propensity to engage in acts of empathising differs depending on the characteristics of the trial participants. They likely unintentionally empathise with subjects similar to them in some respect. At this stage, these acts of empathising are not controlled by the judges. Nevertheless, at the same time, numerous institutional factors reduce or even eliminate the influence of the effects of the first-level empathy on the judges' decisions. The most obvious factors are the extension of the decision-making process in time, the role played by professional ethics, control of the decision by other courts, collegiality, the existence of evidence rules, the possibility of the exclusion of a judge from a case, and so on. As result, the judge may feel empathy towards someone in a case, even without being aware of it or disclosing it, but this may not affect the final decision.

However, judges can do something else with the impulses that arise from the first-level empathy. They may try to develop this natural ability by fitting it to the requirements of their professional roles in order to secure the implementation of procedural principles and to protect the basic values of the judiciary. This is where the phrase 'integration with the role' comes to mind – a judge can develop his or her empathic skills by incorporating them with other skills, specifics of this social setting, and also his or her personal judging style. In other words, the ability to empathise may be rooted in the specific conditions of judicial work and adapted to usual court business (e.g. the way of asking questions, the way of listening, the way of analysing the context of a case, attitudes towards the participants, and the preparing of judicial opinions). At this stage, empathy as an ability turns into a skill, and therefore it is more canalised and controllable. Contrary to what is sometimes indicated in the literature, judicial empathy is not about extending the first-level empathy to all participants (parties) in the case. This would be impossible to do because it would be extremely exhausting for the judge and, frankly, in most instances, unnecessary. Instead, empathy can be cultivated by judges by adjusting it to the place, rules, and values associated with the role. Obviously, one should distinguish between a judge's attuning with professionals (and in this case, the

¹⁹ J. Frank, *Are Judges Human? Part 1: The Effect on Legal Thinking of the Assumption That Judges Behave Like Human Beings*, "University of Pennsylvania Law Review" 1931, 80, pp. 17–53.

²⁰ See A.N. Glynn, M. Sen, *Identifying Judicial Empathy: Does Having Daughters Cause Judges to Rule for Women's Issues?*, "American Journal of Political Science" 2015, 59, pp. 37–54.

understanding of the perspective of others – that is, the professionals – frequently results in enhancing the efficiency of the proceedings) and with others, especially lay participants (which protects some procedural principles and values).

At the third stage, judicial empathy as a specific judicial virtue or a judges' stable attitude emerges. Judicial empathy consists of (1) maintaining attention and focus on the case, which expresses the judge's commitment and determination to thoroughly resolve the case; (2) adopting the perspective of participants, which enables a comprehensive understanding of their social situations, including how participants perceive and deal with what is happening in the courtroom during hearings; and (3) conscientious and active communication (especially conscientious and active listening) with everyone. The need for judicial empathy results from, for instance, the fact that institutional requirements frequently direct judges in the opposite direction. The following factors often lead proceedings in an inverse direction to empathy: time pressure and case overload, the mechanical nature of examining cases, a focus on technical (procedural) elements, and strategic decision-making (due to possible inspection by a higher instance and internal power dynamics within the judiciary). Moreover, displaying judicial empathy in the courtroom (where it is mostly manifested) can sometimes not be in line with certain procedural principles.²¹ Thus, judges need to be situationally sensitive to showing judicial empathy.²² What needs to be stressed is that impulses of the first-level empathy, in order to become 'judicial empathy' (that is, a virtue adjusted to the judicial role and securing certain values), need to be filtered, steered, and co-shaped by other judicial skills and virtues.

Interestingly, a similar position, although without the need for acknowledging the developmental dimension of empathy, has been already explored within therapeutic jurisprudence. Empathy has been listed alongside warmth, openness, emotional attachment, respect, a positive focus, non-coercion, non-paternalism, clarity, and plain language.²³ In this vein, empathy contributes to preserving the basic goals of court proceedings set by therapeutic jurisprudence, but only when functioning together with these other abilities, skills, and virtues. Similarly, according to the approach presented in this paper, judicial empathy is embedded in specific tasks and activities of judges and balanced by other judicial abilities, skills, and virtues.

²¹ See T. Booth, *Family Violence and Judicial Empathy: Managing Personal Cross Examination in Australian Family Law Proceedings*, "Oñati Socio-Legal Series" 2019, 9(5), pp. 702–725.

²² See, e.g., R. Durham, R. Lawson, A. Lord, V. Baird, *Seeing Is Believing: The Northumbria Court Observers Panel*, Newcastle 2017, pp. 25–26.

²³ B.J. Winick, *Therapeutic Jurisprudence and Problem-Solving Courts*, "Fordham Urban Law Journal" 2002–2003, 30, p. 1068.

After all, judgecraft should incorporate developing judicial empathy, but only alongside other judicial skills and virtues.

Judicial Empathy and Integrity in Action

The following example of judicial demeanour (from the research on the power distance in the courtroom mentioned in the introduction) illustrates the main argument of the paper, which is that for the proper functioning of judicial empathy, a number of conditions need to be fulfilled, including the development of judicial integrity. Obviously, one has to remember the limitations of referring to this one particular case. Only one hearing will be presented, presided over by a judge who seems to be a judge of integrity with judicial empathy. The phrase ‘seems to be’ emphasises that, in fact, it cannot be entirely confirmed that this judge possesses these desirable traits on the basis of such scarce data. The nature of the case at that hearing is also relevant here. The case did not raise any major legal problems or questions regarding facts, and lacked any moral connotations. Simply speaking, it was not a high-profile case. This was also manifested in the public prosecutor’s lenient approach towards the accused. Moreover, it needs to be stressed that, in Poland, the trial judge typically plays a very active role in all types of proceedings.²⁴ The realities of Polish trials continue to be characterised by inquisitorial elements as judges dominate even the evidentiary phase. They also control the preparation of the minutes. Nevertheless, the following example of verbal and non-verbal behaviours of a judge allows for pinpointing some universal features of judicial empathy and its co-functioning with other skills and virtues.

The judge in question, whom we shall call Hercules, during the observational research, was working in the criminal division of one of the Cracow lower courts. The observed hearing concerned the criminal offence of removing survey boundary stakes by an inhabitant of one of the municipalities near Cracow. The accused appeared at the trial, along with his son and a defence lawyer. The accused, a man of advanced age, was showing signs of confusion and stress. As one might have guessed from his testimony, he did not understand why he was accused, and the ‘others trampled [his] crops’ while placing the survey boundary stakes. A public prosecutor took the place in the courtroom on the opposite side to the accused

²⁴ See e.g. G.A. Bednarek, *Polish vs. American Courtroom Discourse: Inquisitorial and Adversarial Procedures of Witness Examination in Criminal Trials*, Basingstoke 2014; A. Ryan, *Comparative Procedural Traditions: Poland’s Journey from Socialist to ‘Adversarial’ System*, “*The International Journal of Evidence & Proof*” 2016, 20(4), pp. 305–325.

and his companions. The audience consisted of two land surveyors and the author of this paper.

At first glance, the very appearance of Judge Hercules and, more precisely, his attire, attracted attention – his impeccably tied tie and a stiffly ironed shirt, which, importantly, was pink. The judge's clothing symbolically illustrated how the judge has fulfilled his role – both in a professional and 'classic' way, but also with a hint of his own style. Right at the beginning of the hearing, the judge apologised for the 35-minute delay (and it should be added that it was the first case heard on this particular day). He also revealed the reason for the delay, which was related to the previous day's last case on the docket. Judge Hercules even invited all those present to his office so that after the trial everyone could see the number of files in the last case of the previous day's docket. Such behaviour is by no means common. Next, at the initial request of the defence lawyer to finish the case during this hearing, Judge Hercules assured the lawyer that it this was what he aimed to do, adding that 'we all want to be on time for watching the football match'. For the anonymisation the data of all participants of the trial, the circumstances of this football match will be omitted. What is important is that the judge's response effectively calmed the defendant and his son, who were already showing drain, and also communicated the cooperative attitude of the judge. It could be even read as an attempt to build a bridge between the participants by referring to shared cultural meanings. Next, Judge Hercules discussed in great detail the procedural motions submitted by the defence and gave the reasons for his stance towards them. The judge's legal argumentation was very professional and precise, and also open to questions and comments from the defence lawyer. The judge's decisions on the defence motions were also paraphrased in language accessible to the accused. Not without significance, the judge asked the accused if something was incomprehensible to him. In general, Judge Hercules, during the whole hearing, perfectly changed his way of speaking, depending on the addressee. It is worth adding that throughout the entire hearing, when the judge addressed the accused, he tilted his body slightly towards him and used more colloquial, though not paternalistic, language (e.g. 'What tempted you, sir, to...'). The judge, as it seems, was able to accurately and quickly read the changes in the emotional states of people in the courtroom. For instance, at some point, when the accused was saying things that could have disqualified him in another civil trial, which distressed the accused's son, he said to the latter, 'Don't be upset, sir.' Then he explained to him why he asked such questions and ensured that they would not bring any negative consequences for his father's civil law litigation. In turn, in response to the high stress of the accused, Judge Hercules wove two stories with humorous overtones into the accused's testimony, which were supposed to refer to local contexts and build a bridge

between the participants. The first concerned the place in the municipality inhabited by the accused, where, as judge Hercules described, it seemed that 'the water flows upwards'. The second story was related to another case handled by the judge. The accused was arrested by the police in March during a search of a vehicle where the accused had hidden seven machetes. As the judge stated, the accused explained to him that he was cleaning his aunt's garden with them. This was a direct reference to both the accused's narrative about organising the vegetable garden and well-known stories in the Cracow area on the use of machetes by supporters of local football clubs. One can argue that the anecdotes were not only calming tools but were also used for community-building and to synchronise the participants by referring to locally embedded meanings. In fact, the use of those stories by the judge required proper recognition of the situation and the emotional states of others.

Many of the behaviours of Judge Hercules observed throughout the whole hearing can be interpreted as constituting judicial empathy. For instance, the judge's posture communicated both a focus on the interlocutor (especially the accused) and active involvement. Next, the way of questioning and listening to the hearing participants was in line with the principles of active communication. Moreover, the judge reacted and adapted to whatever was happening in the courtroom, mainly to what the accused felt at the moment. However, all these elements that formed the judicial empathy of Judge Hercules, in fact, constituted only a part of the much broader set of his judicial skills and virtues (temperament, calmness, argumentative skills, etc.). It is also worth underlining that Judge Hercules's empathy was well integrated with other traits. All this resulted in the protection of the decorum and dignity of the court, and at the same time, deep (but well-justified due to the characteristics of the case) responsiveness to the participants. One could say that Judge Hercules maintained a high power distance (which helped to implement some procedural principles) while also reducing it (which served to protect other procedural principles).²⁵ Importantly, the judicial empathy of Judge Hercules did not cause any exaggerated, biased behaviour or over-emotionality. It did not dominate other skills and virtues, but it remained in symbiosis with them. Judicial empathy acted as an element of a well-functioning whole, leading to the protection of procedural principles and the implementation of the fundamental values of the judiciary.

²⁵ M. Dudek, M. Stępień, *op. cit.*, pp. 43–61.

Conclusions

These considerations are based on the developmental vision of a judge. They assume that the judicial abilities, skills, and virtues necessary for good judging are not 'frozen in time', but, on the contrary, are subject to dynamics and development. This also applies to empathy in judicial work. A judge's empathic development was presented in a model way by referring to the three levels of empathy that correspond to the three stages of a judge's growth, ranging from empathy as an ability to empathy as a skill, and finally, to mature empathy as a virtue.

This vision of a judge's development, in terms of building up judicial empathy, assumes that judges undertake various efforts, using trial and error, and experiment in order to attune general empathy to the specific judicial role. Sometimes this causes shortcomings, such as clumsy forms of showing empathy or smaller or larger excesses of empathy. Such costs of 'forming' mature, empathetic judges could be difficult to accept due to the ideals of the rule of law, equality, and justice. However, the opposite path, that is, the marginalisation of the importance of judicial skills and virtues, has much wider and more profound negative effects. Let us also note that the simultaneous development of the many skills and virtues required to move towards the existence of judges of integrity is a soft remedy for the putative negative results of small steps in the development of judicial empathy, with the inherent excesses and small mistakes. Importantly, a judge who builds up his or her integrity would not be susceptible to expanding empathetic impulses in a manner that results in the infringement of the procedural rights of trial participants. Therefore, questions should be raised about the structural conditions conducive to encouraging and rewarding judges who follow the path of building integrity. It is not hard to see that not all of those who can influence these conditions want to secure the judges' integrity.

Bibliography

- Archer A., *Integrity and the Value of an Integrated Self*, "Journal of Value Inquiry" 2017, 51.
- Bednarek G.A., *Polish vs. American Courtroom Discourse: Inquisitorial and Adversarial Procedures of Witness Examination in Criminal Trials*, Basingstoke 2014.
- Bergman Blix S., *Different Roads to Empathy: Stage Actors and Judges as Polar Cases, Emotions and Society*, 2019, 1(2).
- Bloom R.M., *Judicial Integrity: A Call for Its Re-Emergence in the Adjudication of Criminal Cases*, "The Journal of Criminal Law and Criminology" 1993, 3.
- Booth T., *Family Violence and Judicial Empathy: Managing Personal Cross Examination in Australian Family Law Proceedings*, "Oñati Socio-Legal Series" 2019, 9(5).

- Colby T.B., *In Defense of Judicial Empathy*, "Minnesota Law Review" 2012, 96.
- Coplan A., Goldie P. (eds.), *Empathy: Philosophical and Psychological Perspectives*, Oxford 2011.
- Cox D., Levine M., La Caze M., *Integrity and the Fragile Self*, Aldershot 2003.
- Dudek M., Stępień M., *Courtroom Power Distance Dynamics*, Cham 2021.
- Durham R., Lawson R., Lord A., Baird V., *Seeing Is Believing: The Northumbria Court Observers Panel*, Newcastle 2017.
- Eriksen A., What Is Professional Integrity? "Etikk i praksis. Nordic Journal of Applied Ethics" 2015, 9(2).
- Fissell B., *Modern Critiques of Judicial Empathy: A Revised Intellectual History*, "Michigan State Law Review" 2016.
- Frank J., *Are Judges Human? Part 1: The Effect on Legal Thinking of the Assumption That Judges Behave Like Human Beings*, "University of Pennsylvania Law Review" 1931, 80.
- Gallacher I., *Thinking Like Non-Lawyers: Why Empathy Is a Core Lawyering Skill and Why Legal Education Should Change to Reflect Its Importance*, "College of Law Faculty Scholarship" 2012, 6.
- Gascón-Cuenca A., Ghitti C., Malzani F., *Acknowledging the Relevance of Empathy in Clinical Legal Education: Some Proposals from the Experience of the University of Brescia (IT) and Valencia (ESP)*, "International Journal of Clinical Legal Education" 2018, 25.
- Glynn A.N., Sen M., *Identifying Judicial Empathy: Does Having Daughters Cause Judges to Rule for Women's Issues?* "American Journal of Political Science" 2015, 59.
- Hochschild A., *Strangers in Their Own Land: Anger and Mourning on the American Right*, New York 2016.
- Ingold T., *Beyond Art and Technology: The Anthropology of Skill*, [in:] M.B. Schiffer (ed.), *Anthropological Perspectives on Technology*, Albuquerque 2013.
- Ingold T., *The Perception of the Environment: Essays on Liveliness, Dwelling and Skill*, London 2001.
- Ingold T., *Prospect*, [in:] T. Ingold, G. Palsson (eds.), *Biosocial Becomings: Integrating Social and Biological Anthropology*, Cambridge 2013.
- Kind A., *Empathy, Imagination and the Law*, [in:] A. Amaya, M. del Mar (eds.), *Virtue, Emotion and Imagination in Law and Legal Reasoning*, Oxford 2020.
- Lanzoni S., *Empathy: A History*, New Haven 2018.
- Maibom H. (ed.), *Empathy and Morality*, Oxford 2014.
- Maroń G., *Integralność religijna sędziego oraz argumentacja religijna w amerykańskim procesie orzecznictwym*, Rzeszów 2018.
- Pritchard M.S., *Professional Integrity: Thinking Ethically*, Lawrence 2006.
- Rosenberg J.D., *Teaching Empathy in Law School*, "University of San Francisco Law Review" 2002, 36(3).
- Ryan A., *Comparative Procedural Traditions: Poland's Journey From Socialist to 'Adversarial' System*, "The International Journal of Evidence & Proof" 2016, 20(4).
- Scherkoske G., *Could Integrity Be an Epistemic Virtue?*, "International Journal of Philosophical Studies" 2012, 20(2).

- Segal E., *Social Empathy: The Art of Understanding Others*, New York 2018.
- Skuczyński P., *Integralność*, [in:] H. Izdebski, P. Skuczyński (eds.), *Etyka zawodów prawniczych. Etyka prawnicza*, Warszawa 2006.
- Soeharno J., *The Integrity of the Judge: A Philosophical Inquiry*, Aldershot 2009.
- Stępień M., *The Three Stages of Judges' Self-Development*, [in:] A. Amaya, Hock Lai Ho (eds.), *Virtue, Law, and Justice*, Oxford 2013.
- Stępień M., *Sprawności prawne – pomiędzy „umysłem” a „działaniem”*: Ku ekologicznemu ujęciu świadomości prawnej, [in:] M. Dudek, K. Struzińska (eds.), *Świadomościowy wymiar prawa*, Kraków 2017.
- West R., *The Anti-emphatic Turn*, “Nomos” 2013, 53.
- Winick B.J., *Therapeutic Jurisprudence and Problem-Solving Courts*, “Fordham Urban Law Journal” 2002–2003, 30.
- Zaki J., *Empathy: A Motivated Account*, “Psychological Bulletin” 2014, 140(6).