

Maciej Wojciechowski, Bogna Dowgiałło, Dorota Rancew-Sikora  
Gdańsk University

## Emotional Labour of Judges

### Abstract

Our article concentrates on emotions as related to the functioning of man in the judicial system seen as a modern bureaucratic institution. Special attention is given to the work of judges due to their key position in this system. In legal discourse there is a dominating normative idea of a judge as a decision-making subject free of any emotional factors influencing their judgment. According to this traditional approach, a decision biased even in the slightest way by emotions could not be regarded as impartial, whereas judicial impartiality is regarded as one of the core values of the justice system. Our standpoint assumes not only that judges experience emotions but also asserts that they are being manifested in varied ways. Our analysis is based on Arlie Hochschild's conception of emotional labour. Such labour is being performed when an individual reflects on his or her feelings and makes an effort either to change or to inhibit emotions which are regarded as misfitting. The necessity of emotional work is a result of cultural feeling and expression rules. It seems *prima facie* that there is one clear expression rule regarding displaying emotions by the judge in the Polish legal culture: no emotions allowed. However, contrary to possible reconstructed declarations and recommendations warning judges against showing emotions, the rules of expressing them in Polish courts are not unequivocal. We claim that one can distinguish between unconditional and conditional rules of expressing emotions. The former relate to expressing emotions concerning non-professional participants, and conditional rules of expressing emotions relate to professional participants in the hearing. There are situations in which an emotional reaction is reasonable, because it represents certain values to which the justice department adheres, and those in which judges regret showing annoyance or anger. The goal of the emotional labour performed is not only a realization of the value of impartiality, but also the balance of the judges that allows them to efficiently fulfil their role.

### 1. Introduction

The answer to the question whether the quality of emotions, their perception and their role in regulating behaviour makes a man distinct from other animals arouses much controversy and touches upon deep philosophical problems of human nature. This article focuses only on emotions as related to the functioning of man in the judicial system

seen as a modern bureaucratic institution. Special attention shall be given to the work of judges due to their key position in this system.

There are many possible theoretical approaches to “law and emotions”.<sup>1</sup> To recall just a few, one may point at: the emotion-centred approach that analyzes how a particular emotion is or should be reflected in law, the theory of law approach that analyzes the way theories of emotions are reflected in particular theoretical approaches to law.<sup>2</sup> This paper reflects the legal action approach where the main point of inquiry concerns the emotions of judges, particularly modes and aims of the so-called emotional work that they perform.

In legal discourse, there is a dominating normative idea of a judge as a decision-making subject free of any emotional factors influencing their judgment. According to this traditional approach, a decision biased even in the slightest way by emotions could not be regarded as impartial, whereas judicial impartiality is regarded as one of the core values of the justice system. The concept of affective neutrality of judges dates back to the 17th century and was postulated by Thomas Hobbes in his famous work *Leviathan*. According to T. Hobbes what makes a good judge is among others: “to be able in judgment to divest himself of all fear, anger, hatred, love, and compassion”.<sup>3</sup> This idea exerted much influence on the judicial system and shaped social expectations towards the judiciary.

A similar belief might be also derived from Max Weber’s idea of legal rational authority which is strongly linked with bureaucratic organization of a special kind:

Bureaucracy develops the more perfectly, the more it is “dehumanized”, the more completely it succeeds in eliminating from official business love, hatred, and all purely personal, irrational, and *emotional* [emphasis added] elements which escape calculation. This is appraised as its special virtue by capitalism. The more complicated and specialized modern culture becomes, the more its external supporting apparatus demands the personally detached and strictly objective expert, in lieu of the lord of older social structures who was moved by personal sympathy and favour, by grace and gratitude.<sup>4</sup>

In bureaucratic organization all activities of decision makers are governed by general, abstract, and clearly defined rules which diminish the necessity for inventing individual instructions for each specific case. Due to *categorization*, individual problems and cases are classified on the basis of previously set criteria. In this way, as underlined by Robert Merton: “The structure is one which approaches the complete elimination of personalized relationships and non-rational considerations (hostility, anxiety, emotional involvements, etc.)”.<sup>5</sup>

Surprisingly enough, Merton did not question the division between reason and irrational emotions even though he was not able to draw a clear separating line between the two. According to him (paradoxically) strict adherence to rational procedure brings about an emotional attitude which induces over-concern with procedure and timidity. Eventually fulfilling the rules becomes a goal in itself. R. Merton calls it “displacement

<sup>1</sup> T. Maroney, *Law and Emotions. A Proposed Taxonomy of an Emerging Field*, Law and Human Behavior, 2006/30, p. 126.

<sup>2</sup> T. Maroney, *Law and Emotions...*, p. 127.

<sup>3</sup> T. Hobbes, *Leviathan*, Digireads.com Publishing 2009, p. 122.

<sup>4</sup> M. Weber, *Economy and Society: An Outline of Interpretive Sociology*, Berkeley, Los Angeles, London: University of California Press 1978, p. 975.

<sup>5</sup> R. Merton, *Social Theory and Social Structure*, New York: Free Press 1968, p. 255.

of sentiments from goals onto means". Proceedings become more important and engaging than the case under consideration. Any threat to meeting rules by an official becomes a source of fear and fury.<sup>6</sup>

Blurring the distinction between reason and emotions is more and more visible nowadays. Assumptions underlying the above distinction have become subject to criticism. A great and famous role in the criticism has been played by the work by Antonio Damasio. His famous claim that there is no specific part of the brain which would be exclusively responsible for affective responses<sup>7</sup> has played a huge role in questioning the philosophical distinction between reason and emotion.

Since the contradiction between cognition and emotion – a dominant paradigm dating back to the Enlightenment – is increasingly challenged, emotions have become a legitimate topic in scientific discourse. As far as law is concerned, there are voices postulating to attend to the emotional feature of judicial practice. Legal feminism especially emphasizes that the ideal of emotional detachment of judges is postulated not only in order to control the judicial authority and prevent judges from acting in their own interests.<sup>8</sup> Representatives of this theoretical approach claim that behind the idea of impartiality and disengagement there is a hope that judges are “extraordinary”, have special qualities.<sup>9</sup> Feminism, as other movements which are critical towards standard practices, postulates disclosure and deconstruction of processes taking place within the judiciary. What it encompasses is highlighting the social and cultural conditions under which judges give rulings, reflection over the content of legal norms as well as unofficial rules in order to diminish hierarchic environment that dominates the courtroom and in the end – rejection of the belief that in the adversarial system compassion is not involved in decision making<sup>10</sup> or – in the normative sense – empathy may not be helpful while asserting moral judgments.<sup>11</sup>

The role of emotions had also been of interest to the evolutionary philosophy of law, where emotions are one of the components of the so-called *rudimentary sense of justice*.<sup>12</sup> However, emotions have become a subject of inquiry of legal scholars other than those associated with traditional schools of philosophy of law. Emotions are no longer the exclusive subject of inquiry of psychologists. The latter are being joined by sociologists, philosophers, economists, and others. This clearly indicates the beginning of a general tendency in the area of social sciences which is the perfect ground for interdisciplinary study of emotions.

For legal practitioners the problem of emotions is reduced quite often to the question: do they determine legal decisions? There is a bulk of psychological research regarding the influence of emotions on social judgments and the variety of cognitive levels it may occur on. For example, people in positive moods tend to think more creatively and are better at inductive reasoning, while negative moods make people better at analytic and deductive reasoning.<sup>13</sup>

<sup>6</sup> R. Merton, *Social Theory...*, p. 261.

<sup>7</sup> A. Damasio, *Descartes' Error: Emotions, Reason, and the Human Brain*, New York: Avon Books 1994, p. xiii.

<sup>8</sup> J. Resnik, *Feminism and the Language of Judging*, Arizona State Law Journal, 1990/22.

<sup>9</sup> J. Resnik, *Feminism...*, p. 32.

<sup>10</sup> J. Resnik, *Feminism...*, p. 37.

<sup>11</sup> L. Rodak, *Are we all feminists now?*. Wyzwania ze strony feministycznej jurysprudencji wobec tradycyjnej teorii prawa [Eng. *Challenges from the feminist jurisprudence towards traditional legal theory*], *Archiwum Filozofii Prawa i Filozofii Społecznej*, 2014/1, p. 75.

<sup>12</sup> W. Załuski, *Ewolucyjna filozofia prawa* [Eng. *Evolutionary Philosophy of Law*], Zakamycze 2009.

<sup>13</sup> N. Feigenson, J. Park, *Emotions and Attributions of Legal Responsibility and Blame: A Research Review*, *Law and Human Behavior*, 2006/2, p. 147.

It is therefore hardly surprising that scholars take up the subject of influence of emotions on legal decisions. There is a bulk of research on affective influence on legal judgments, particularly judgments of responsibility and blame,<sup>14</sup> however they are based on experimental inquiry and not realities of the legal process, which is obvious. The sole fact, however, that in many situations there can be an influence of emotions and moods on decisions being made does not imply that such an influence takes place in the case of real legal decisions issued in a real court. Such a remark applies to even such interesting experiments as the one performed in Norway in involving professional Norwegian judges. They were to watch a video recording of a statement of an actress acting as a rape victim. Three versions of her testimony were presented. In the first one, her behaviour displayed despair and hesitation as if fighting to keep control (congruent condition). Second, where the story was told in a flat manner displaying little emotion (neutral condition). In the third version the “victim” was relaxed and sometimes smiling to the camera. Her behaviour was contrary to cultural expectations regarding the behaviour of a rape victim (incongruent condition).<sup>15</sup> The results of this experiment were compared with an analogical inquiry where the participants were recruited from laypersons. The results showed that the emotions displayed by the rape victim did not determine judges’ credibility judgments while the average layperson was governed by social stereotypes regarding the behaviour of a rape victim.<sup>16</sup>

We claim that there remains a problem of extrapolation of such results into real situations of the application of law. That is a reason why we find statements of causal determinacy between emotions and legal judgments issued by judges too strong. Therefore our approach is different. We shall not examine the influence of emotions on judges’ decisions. Instead, we shall focus on questions such as: what are the expression rules as far as emotions are concerned?; do judges treat all experienced emotions as unacceptable?; how can their emotional work be described?; what is the aim of the emotional work they perform?

Our inquiry so far has been based on unstructured interviews with six judges from Polish District Courts [*Sąd Rejonowy*]: three judges from Criminal Justice Departments, two judges from the Civil Justice Department, one judge from the Commercial Division; There was also one interview with a judge from the Administrative Court of First Instance [*Wojwódzki Sąd Administracyjny*]. Despite the relatively small number of interviews, the evidence collected encompasses almost two hundred of standardized pages of transcript with nearly 70,000 words.

## 2. Arlie Hochschild’s concept of emotional labour

The term *emotional labour* was coined by Arlie Hochschild to indicate the conscious and intended process which results in making emotions that an individual feels and displays fit the situation. According to Hochschild, people feel in a socially arranged way. A social actor is able to mark the difference between an appropriate and inappropriate feeling for a given social role and in a specific social setting because, as Hochschild points out, there are feeling rules which inform people what should be felt, what feelings

<sup>14</sup> N. Feigenson, J. Park, *Emotions...*, p. 147.

<sup>15</sup> E. Wessel, G.C.V. Drevland, D.E. Eilertsen, S. Magnussen, *Credibility of the Emotional Witness. A Study of ratings by Court Judges*, *Law and Human Behavior*, 2006/2, p. 223.

<sup>16</sup> E. Wessel, G.C.V. Drevland, D.E. Eilertsen, S. Magnussen, *Credibility...*, p. 227.

should be displayed and what and how people should talk about their emotions. In other words, feeling rules are the cultural scripts prescribing the strength, duration and the type of expected feeling. For instance, there exists a cultural rule that we are supposed to *feel* sadness at a funeral. To achieve the proper state of mind individuals perform emotional labour. From this perspective, a social actor is sentient which means that she or he is conscious and feeling at the same time: feeling and reasoning may complement each other. Reasoning may support emotion work as an individual reflects on his or her feelings and makes an effort either to change or to inhibit emotions which are regarded as misfitting. An act of emotional labour is performed during a face to face or voice to voice interaction and involves spoken words, tone of voice, eye contact and other body language techniques. Its purpose is not only to produce proper feelings in an individual who is performing emotional labour but also to influence the others towards whom the emotions are directed. In service jobs people do emotional labour to make their customers feel good whereas in the penitentiary, staff do emotional labour to make prisoners feel bad.<sup>17</sup>

Our approach seems important inasmuch as the legal discourse in Poland decisively rejects the possibility of displaying any emotions by the judges. The reason is the view of emotions as a threat to judges' impartiality present in the Polish legal culture. One might argue that there seems to be no necessary connection between being in an emotional state and violating the ideal of impartiality.<sup>18</sup> However, the issue of relations between emotions and impartiality requires closer analysis and falls outside the scope of this article.

Our standpoint assumes not only that judges experience emotions but also asserts that they are being manifested in varied ways. The theory of Hochschild concerns equally feeling and expression rules, nevertheless we shall focus mainly on the rules governing expression. We also strongly emphasize that through our claim of manifestation of emotions we do not intend to evaluate fact of displaying them in any way nor do we assume they have any influence on partial or final decisions of a judge. It is often rational though, in the larger sense of being adaptive or effective, to feel, just as it could be maladaptive not to feel.<sup>19</sup>

### 3. Courtroom hearing – situational and emotional approach

Legal scholars usually describe a situation of a hearing through pointing at its meaning and function, but most of all through the rules aiming to regulate the behaviour of its participants.<sup>20</sup> It is claimed to be “a key moment of a court proceeding” that “aims at a just resolution of a dispute”.<sup>21</sup> Therefore a “description” of a court hearing is mostly of prescriptive nature which should be no surprise taking into account the status of propositions formulated by legal dogmatics and the fact of being a subject of legal

<sup>17</sup> A. Hochschild, *The Managed Heart. Commercialization of Human Feeling*, Berkeley, Los Angeles, London: University of California Press 2003.

<sup>18</sup> See. M. Wojciechowski, *Rehabilitacja namiętności? Emocje a postulat bezstronności* [Eng. *Rehabilitation of passions? Emotions and postulate of impartiality*], *Archiwum Filozofii Prawa i Filozofii Społecznej*, 2013/2.

<sup>19</sup> A. Hochschild, *The sociology of feeling and emotions: Selected possibilities*, in: M. Millman, R. Kanter (eds.), *Another Voice*, Garden City: Anchor 1975, p. 284.

<sup>20</sup> T. Grzegorzczak, J. Tylman, *Polskie postępowanie karne* [Eng. *Polish penal procedure*], Warszawa 2014, p. 757.

<sup>21</sup> A. Łazarska, *Sędziowskie kierownictwo postępowaniem cywilnym przed sądem pierwszej instancji* [Eng. *Leadership of a judge of the civil procedure in first instance court*], Warszawa 2013, p. 202.

regulation. A court hearing falls within the scope of not only legal rules but also legal principles. For instance, the judge as a host of all proceedings in the courtroom is obliged to guarantee order, predictability and efficiency of court proceedings.<sup>22</sup> Because of that he or she should not permit lengthiness and deviation from the main point.<sup>23</sup>

However, despite many rules and principles regulating a hearing, its course is predictable only to some extent. The reason for this is the level of its dynamics. It can be described as a focused interaction (E. Goffman) from the sociological point of view. It is a social event having temporal and spatial boundaries, with participants having ascribed roles and likely to interact to achieve their goals. One needs to distinguish between professional and non-professional participants of a court hearing. What divides those two groups is not only their occupation but, most of all, it is the consciousness and knowledge about rules of conduct constituting what is appropriate and inappropriate behaviour in court. The complexity and difficulty of a judge's position is being constituted by many factors like the following:

- the legal duty of handling all proceedings in an efficient way but without neglecting proper procedural rules and with the main goal of a hearing in mind;
- the duty of controlling own behaviour and that of other participants;
- meeting persons from radically different social backgrounds than the one that judges are usually raised in;
- being in the position of the recipient of all statements made in the courtroom – even statements issued by the lawyer to the witness are directed at the judge;
- as a result, the necessity of creating a proper attitude to emotions expressed by the participants;
- last but not least – the decisional feature of the situation – the judge has to make numerous decisions on many procedural matters and, in the end, pronounce a sentence.

A court hearing is therefore a dynamic situation and its specificity comes from the form of interaction between participants. This is a situation where one subject possesses power over others. Those others, particularly laypersons, behave in a way that one of interviewed judges described as being “doused with their emotions”. As a consequence of those factors, a court hearing seems to be principally the only moment when a judge has an opportunity to display their emotions even if they are not willing to do so. Emotions of the judge are generated by the emotions of other participants, though. The latter are a consequence of many factors like: case type (civil, criminal, family case), relations between parties, their particular features of character and their social status. Emotions that are displayed by the participants other than the judge can be divided into biographical and situational.

Biographical emotions are the ones which originate from the event because of which the courtroom hearing is taking place (e.g. a tort, committing a crime or being a victim of a crime, making a will, etc.) Situational emotions are the ones being a result of a given constellation of facts in the courtroom. Biographical emotions will be experienced by nature by the laypersons while situational emotions can and are experienced by laypersons and professional lawyers.

<sup>22</sup> A. Łazarska, *Sędziowskie...*, p. 202.

<sup>23</sup> A. Łazarska, *Sędziowskie...*, p. 205.

#### 4. Feeling and expression rules in judges' narratives

It seems, at least *prima facie*, that there is one clear expression rule regarding displaying emotions by the judge in the Polish legal culture: no emotions allowed. Such an assertion is justified if one limits their inquiry to the titles of articles present in the Polish Legal Bibliography. One phrase keeps recurring: “without emotions” meaning that dealing with a given problem without them is the right thing to do. It does not mean, however, that the content of those papers concerns emotions. Quite the opposite. The number of articles of Polish scholars on the emerging field of law and emotion remains low.<sup>24</sup> There has been, however, some interest in judges' emotions when a Norwegian judge shed a few tears in the highly publicised Breivik trial. The common opinion among lawyers and judges, like the former Supreme Court judge Teresa Romer, is that a judge cannot display anger nor being touched.<sup>25</sup> According to T. Romer, a judge should not “even raise his voice, otherwise he is not a professional”.<sup>26</sup> Similar opinions have been expressed by the judges interviewed in our research.

The thinking mode of judges on emotions is also well characterized by the following case. While conducting interviews and collecting data, we heard a short story about a judge who was filling out some psychological questionnaire. When doing that, he was trying to mark the “right” answers. The significant consequence was a question from the psychologists whether he was honest in his responses since the result suggested a psychopathic personality. Therefore one may claim that the ideal, professional behaviour of a judge is one completely deprived of emotions. One of judges even said:

There is a judge who is my role model. Please believe me she always has the same tone of voice.

In the light of our evidence above, a clear conclusion regarding expression rules in the Polish legal culture seems to be too simple.

#### 5. Unconditional and conditional expression rules

The claim that the rule of expressing emotions by the judges is only one and short: “a judge shall not display any emotion” can be justified if based on the widely available empirical material in the form of the legal articles available in the Polish Legal Bibliography. We claim, however, that this rule is not so simple. The data collected by us entitle us to refine the rules for expressing emotions, because we claim that one can distinguish between unconditional and conditional rules of expressing emotions. The former relate to expressing emotions concerning non-professional participants, and conditional rules of expressing emotions relate to professional participants in the hearing. The above mentioned rule: “a judge shall not display any emotion” is unconditional. When asked by us, the judges viewed display of emotions as a threat to impartiality:

<sup>24</sup> One of few exceptions is K. Chajbos, *Praca emocjonalna w zawodzie sędziego*, [Eng. *Emotional labour at judges' profession*], „Ruch Prawniczy, Ekonomiczny i Socjologiczny”, 2013/1 and J. Królikowska, *Společné tworzenie prawa – emocje czy racjonalność* [Eng. *Social lawmaking – emotions or rationality*], in: J. Utrat-Milecki (ed.), *Prawo i ład społeczny. Integralnokulturowa analiza zagadnienia racjonalności* [Eng. *Law and social order. Integral and cultural analysis of rationality*], Warszawa 2011.

<sup>25</sup> M. Domagalski, *Emocje nie dla sędziego* [Eng. *Emotions are not for a judge*], Rzeczpospolita, 9 May 2012.

<sup>26</sup> M. Domagalski, *Emocje....*

Of an impartial arbiter we require to keep an outer appearance in such a way that these *signs of bias are not shown*.

We have to deal with our emotions and *emotions should not affect the outcome*.

At the same time judges indirectly admit that the unconditional rule of expressing emotions (the rule not to express them) refers in particular to the defendants:

Do I get angry sometimes? Of course I get angry sometimes. Probably *least likely with the defendants*.

Judges do happen to raise their voices, but it does not necessarily mean annoyance or anger, but only a controlled attempt of regaining power over the proper course of proceedings.

Looking at the monitor makes it difficult to control the room when the case is difficult. When there are a lot of emotions, because on the one hand, you have to control the room, so it does not reach such a level, which just happens, some outshouting, insulting each other, because such things happen.

Beside the unconditional rule of (not) expressing emotions, one can also speak about a conditional rule, whose wording would be: “a judge should not disclose any emotion, unless it is in the interests of justice”. In practice, this rule will cover mostly the emotion of anger and joy understood as the appearance of a smile on the face of the judge.

As for the anger, the decision to impose the penalties provided for by law for the trial’s participants must be served “cold”. Sometimes, however, a breach of the enforced rules in the courtroom by the participants is so blatant that either (1) in the descriptions of their own mental state, judges use a phrase “to get upset” to describe such an emotion as e.g. anger, or (2) the described behaviour of participants is negatively evaluated by judges. However, there is no own remorse because of such a reaction, which suggests that, although excluded emotions are behind it, it is not judged negatively.

(1) I happened to witness once that a lawyer offended a prosecutor in a very ugly way. He said such a very ugly thing to the prosecutor, so personally ugly [...] and *then I got upset*. I am like a host in this courtroom and I also should make sure that no one gets abused and this prosecutor was an older man, very polite, very gentlemanly. If he had somehow snapped or reacted otherwise, then I would have considered them even. However, he only went red, did not say anything, and so I felt that I had to react somehow and *I sort of scolded* that lawyer. I also entered what he said into the record, and informed the regional bar council about it, so as to let them take the appropriate measures. [...] I came to the conclusion that I cannot pretend that I did not hear it”.

The second example of a judge’s anger can be a similar situation in which a professional attorney addresses his trial opponent in an unacceptable form, and although the judge did not describe their state at that time, he assessed the attorney’s misconduct during the interview just by using the words:

(2) “this vile accusation”

with emotional overtones. This would entail, although at a lower degree of certainty than in the first case, that the decision to fine the attorney was an expression of the judge’s anger. We accept in this regard the old view of Aristotle that there is anger,

which is proper (virtuous),<sup>27</sup> and it is such which is aimed at people harming other persons of a certain status (children, parents, wives).<sup>28</sup> Similarly, the judge who is the host of the courtroom makes sure that no harm comes to any person present at the hearing. The judge's anger, which is not regarded as something reprehensible, is the result of a specific behaviour of one of the professional attorneys toward another professional. This anger naturally takes one of the acceptable forms of the process.<sup>29</sup> We believe that the possibility of its occurrence is greater in instances where the subject breaching the rules of a hearing is a professional. In the case of laypersons, the judges tend not to disclose their emotions understanding that such persons have not fully internalized these rules, while a lawyer or legal counsel not only knows but also understands the interactive agenda and the values behind it, so the judge's anger is sometimes expressed, naturally within certain limits. The latter are variable, but, let us repeat, we believe that the boundaries for professional and non-professional participants in the hearing lie elsewhere.

The second reaction of judges, which potentially can be proven to convey emotions of broader understood joy, is smiling. Although the smile does not necessarily mean just joy. This is because there are many types of smiles, but here we have in mind a smile expressing warmth and a friendly attitude. Smiling is covered by a conditional rule of expression, because judges "allow" themselves to smile, which means that while smiles appear on their faces, they are at the same time performing the emotional labour in order to avoid it. A smile or sometimes a joke behind it is considered a way to calm the situation, lighten the tense atmosphere:

Such things [jokes] also lighten the atmosphere and for that you also need to apply this humorous approach because if a serious face is kept and they will be talked to in a serious manner, then they may not understand. Because sometimes they can be so stubborn in those strange arguments of theirs. So sometimes humour appeals to common sense, of course you have to adapt to the situation, it is not that the situation is always the same. But rigidity, rigid behaviour of sorts, is not appropriate. It is not that the judge is some mummy sitting. Does nothing but speaks formal things to the parties, does not show any human impulses nor any facial expressions, because he is afraid that his impartiality will be challenged. It is nonsense for someone to approach it this way.

## 6. Emotional labour of judges

Perceiving the profession of judges as a service is not widespread. This is probably due to the high social status of judges and the power they hold. But what they are doing can be described as providing services in the field of justice and conflict resolution. There are legal and non-legal rules regulating this kind of judge's action. It is necessary to include the feeling rules and expressing rules into the non-legal kind. Hence judges

<sup>27</sup> "For instance, both fear and confidence and appetite and anger and pity and in general pleasure and pain may be felt both too much and too little, and in both cases not well; but to feel them at the right times, with reference to the right objects, towards the right people, with the right motive, and in the right way, is what is both intermediate and best, and this is characteristic of virtue." Aristotle, *Nicomachean Ethics* (ed. by Roger Crisp), Cambridge: Cambridge University Press 2002, 1106b, p. 30.

<sup>28</sup> Aristotle, *Nicomachean Ethics*..., 1127a, p. 75.

<sup>29</sup> On judges' anger see T. Maroney, *Angry Judges*, *Vanderbilt Law Review*, 2012/3.

and other lawyers can be listed among professionals who work emotionally.<sup>30</sup> There is a difference, however, between the emotional labour of judges and e.g. that of flight attendants as described in the classic work of A. Hochschild. She came to a conclusion that the effects of flight attendants' activities carried out on their own feelings are the titular commercialization of feelings, the manifestation of which is to serve the purposes of business. The effect of this phenomenon sometimes leads to processes of alienation and strangeness towards oneself.<sup>31</sup> Judges' action upon their own emotions does not lead to the commercialization of feeling like in the case of flight attendants, but it serves a specific vision of order, in which behaviours labelled as "emotional" are ousted.

According to Hochschild, emotional labour can take the form of evocation, where cognitive focus on a desired feeling is absent, or suppression, where cognitive focus is on an undesired feeling which is initially present.<sup>32</sup> In the case of judges, we can talk almost exclusively about the suppression of emotions. It seems that judges are socialized into learning to restrain emotions. It takes a variety of forms: not showing kindness in the form of a smile, despite the fact that a judge may privately be a person showing kindness,

[the question of whether a judge smiles in the courtroom] *I try not to*. This rarely happens to me.

Well, in a private prosecution God forbid should I show some emotions and, I don't know, *reply to someone who is leaving and says 'Merry Christmas', one of the opposing parties. I always reply 'good-bye'*. Because God forbid I should say 'Merry Christmas' to a private accuser, the accused would have written to the president that I am biased. So, I try not to.

It can also be the opposite situation, when the judge is taking action in order to create a mindset among the parties in the hearing:

I certainly try to make sure that the people who come to court are not stressed out [...]

Suppressing emotions also includes working on own style of conducting trials, which is difficult for young judges because of the ambiguity of the rules in this regard. People starting to work as a judge must decide whether they shall in the courtroom be a judge with a straight face, a warm judge or a judge of the authoritarian type.

As soon as you walk into this work, *you find your own style* of conducting these trials and you *tame* this reality, this courtroom, this theatre, right? Everyone has a different manner. I try to talk and behave gently, not too gently to not to set them straight if necessary, but generally I'm quite polite. Well, I try to listen to what they have to say and the defendants don't cause problems. There are people [judges – M.W.] who look down on everyone, magisterially and sometimes downright rude. Also it depends on the person. *When I created this style of mine of conducting these trials, then the courtroom had become so relaxed*. And it stopped bothering me ... these formulas.

In the beginning young judges feel strange and uncomfortable in this role, which can also be seen by the difficulty in accepting one of the rules of maintaining the distance,

<sup>30</sup> They fulfil two of three criteria proposed by Hochschild for jobs calling to emotional labour: judges do have face to face contact with court hearing participants and sometimes are to produce an emotional state in some of them. A. Hochschild, *The Managed Heart...*, p. 147.

<sup>31</sup> A. Hochschild, *The Managed Heart...*

<sup>32</sup> A. Hochschild, *Emotion Work, Feeling Rules, and Social Structure*, American Journal of Sociology, 1979/3, p. 561.

that is, talking about themselves in the third person (“the court stated” instead of “I said”).

In the beginning I had problems with that: speaking about myself in the third person. Just like when a witness says: ‘please read it to me because I do not remember’. So then, my first reaction is always this: ‘I will read for you momentarily’. But I’m talking about myself in the third person: ‘the court will read it to you momentarily’. Now I am used to it.

The adoption of this role requires the rejection of personal identity for the duration of the trial and the adoption of the new official role:

But as judges I think we have one thing easier. We have the attire. That moment, when you put on the toga, put on the chain, these props make it easier for a man to enter the role that now they shall judge. I mean, this is how I see it. It’s something like that. I don’t know how to describe it, but there is such a thing when that chain is put on. [...] It’s not heavy for nothing. But there is something in it, like getting into the role like that of an actor. He dresses up and we dress up and I think it does matter.

In addition to external props that are as if imposed from the outside, judges use a variety of strategies in their emotional work. Some of them are procedural, such as the postponement of judgment. The provisions of Polish procedural law provide for such a possibility, if the case is complicated or for any other valid reason. The judges, however, sometimes use it for the purposes of specific emotional labour:

If I don’t like the parties, then even if the case is simple and I really shouldn’t defer the announcement of judgment, because it is not by far the complexity of the case, but I classify it as an another important cause, although I don’t enter it into the record. The fact that I need this time for the parties to leave, so that I can forget about the fact that I do not like them, that they upset me, that they behaved badly in the courtroom, to give a fair judgment. And really, this time, when these emotions cool down is very necessary.

Another strategy that uses the judicial system’s right to appeal is the method that we call “not by my hands”. It applies to a situation in which the judge hesitates what decision to make. On the one hand, the judge has their own conviction on the facts of the case or the correct interpretation of the rules. On the other hand, the judge may suspect that their position will not be shared by a higher court. The “not by my hands” strategy is used where the inner conviction of the judge does not allow them to give a ruling that could stand in a higher court. Thus, the judge makes a settlement with their own conscience by shifting the responsibility for a wrong decision, in their opinion, to a higher court:

Well, at this point, what do I do? And so I began to wonder, sometimes it’s something like this: let the district court take the responsibility for this. So I won’t overrule it but I will dismiss it. It will go to the district and let the district court do with it what it wants.

Another strategy is to secure the presence of somebody well liked e.g. asking an assistant for recording the minutes during difficult trials, which has a calming effect on the judge.

Emotional labour may involve even such transitory, yet important issue for interpersonal communication, as eye contact. This issue may be the subject of a number of very interesting research studies. At this point, we shall only mention that judges are aware of the importance of eye contact for the interaction in the courtroom. In this regard,

we can distinguish a restrained attitude, where because of the necessity to observe protocol such contact is avoided; a direct approach, in which the judge is the subject definitely establishing the contact; and finally a distributive approach, where a glance is an expression of impartiality. In the latter attitude, the gaze is treated as an object of emotional labour involving the bestowal of it upon both parties equally.

[...] there are such cases where in a more natural way I make eye contact with a particular party, usually with the one with which, I don't know, I feel more sympathy, or it is in some way easier for me, and there are ones with which I avoid it. But I have observed it some time ago and now I'm trying to pay attention to look at each party for a similar period of time. But I'm saying that this is an issue that I work on.

## 7. The goal of working on emotions

It would seem that the purpose of the study on emotions is obvious – the value of impartiality. There are two grounds for the disqualification of a judge in Polish law: by the power of the statutes (*iudex inhabilis*) and the existence between the judge and a party or its representative of such a relationship that could give rise to doubts as to the impartiality of judge (*iudex suspectus*). The basis for submitting a request for the exclusion of a judge is the latter situation. However, the goal of emotional labour in the form of impartiality requires clarification.

Judges do not show, or try to not show emotions, not because they are afraid that they will cease to be impartial, but because they can be accused of a lack of impartiality. In practice, such charges are, however, rarely taken into account, although they are used as elements of strategy by those who report them. The purpose of such requests may be, for example, dragging out proceedings, and submitting a request for the exclusion of the presiding judge is one of many means that can lead to this. From the judge's perspective such requests are to disrupt the normal course of proceedings, moreover that judges exhibit rather large confidence in their own abilities of impartially judging a given situation.

J [...] I know what case would be difficult for me. The abuse of animals. Such a case would have been difficult for me.

Q But this difficulty would involve...?

J Emotional reasons.

Q But it would be the aversion to that person at that point?

J Yeah, I think so.

Q And would you wonder whether e.g. you'd be impartial?

J I think I would have managed. We have to be professional. Well, if we decide on this profession, then we have to deal with the consequences.

We each have to deal with our emotions and emotions should not affect the outcome. After all I have enough work experience that based on what I have in the acts and provisions, I am capable of making a decision, I mean, I hope to make a fair judgment, right? And it's hard for every mother to turn off, you know, in cases where children are harmed:

This trust also applies to other judges:

[concerning the question of tears of the Norwegian judge during Breivik's trial] I think it's inappropriate. I mean, I will say this: *I believe the fact that she was able to give a fair judgment* [emphasis added]. And whether she was crying there ... Well everyone has their limits.

Confidence in the possibility of an impartial judgment can be interpreted as completion of a particular job's emotional labour. Its effects can be seen in instances where our interviewees said what cases are difficult for them emotionally: cases involving children in criminal departments, cases of cruelty to animals, cases of rape, cases concerning involuntary crimes where the presence in court is a drama for the victims as well as for the perpetrators of the crime:

A Gypsy ran over a woman on a pedestrian crossing. The woman died on the spot. And so: the accused weeping, his family weeping, and on the other side the victim's daughters crying and there is no winner here. The woman will not get her life back whether he goes to jail or not. He did not do this intentionally. He will go to jail, so a tragedy for the other side as well. All have lost here. Well, such unintentional crimes are unpleasant.

The fact that in such cases the judges do not suspend their emotional involvement, but go through the trouble of resolving them demonstrates the undertaking of emotional labour. We must not, however, confuse the idea of emotional labour with the concept of emotional costs. The costs are the result of labour as related to overcoming own feelings. In the case of judges, they involve problems with sleep, translating the relations of power from the courtroom onto family relationships, the decreasing trust and growing suspicion, the fatigue resulting from the fact of associating with so many aspects of someone else's life ("we are downright doused with [other people's] feelings"). Hence it can be concluded that impartiality is the peculiar objective of emotional labour because it is solely for the purpose of external judgment. Beside impartiality we can also indicate a second, more internal, goal of this work, which is the efficiency of own actions, understood as a balance needed to perform professional duties.

## 8. Conclusions

In this article we tried to relate classic conceptual categories from the field of sociology of emotions introduced by A. Hochschild to the situation of professional judges in the course of a trial.

Contrary to possible reconstructed declarations and recommendations warning judges against showing emotions, the rules of expressing them in Polish courts are not unequivocal. There are situations in which an emotional reaction is reasonable, because it represents certain values to which the justice department adheres, and those in which judges regret showing annoyance or anger. The goal of the emotional labour performed is not only a realization of the value of impartiality, but also the balance of the judges that allows them to efficiently fulfil their role. While working on emotions, the goal of which is to realize the value of impartiality, is based on clear rules and strategies subordinate to the elimination of emotions, the second of the identified objectives requires more complex emotional management. Judges are not taught how to achieve a balance that allows them to efficiently fulfil their role, they work on their emotions as if "blindfolded".

The data presented in the article are an invitation to undertake interdisciplinary research on this problem. It seems that paying further homage to the belief that judges are "emotional cyborgs" and the court is an "emotional vacuum" closes the way to reflection on the importance of emotions in the courtroom process and condemns trial participants to "blindly" undertake working on emotions, which may involve unnecessarily high costs.

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