10. Comparing culturally embedded frames of judicial dispassion

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If you had been a competent prosecutor, which you are not, you would have hedged against the possibility that maybe the judge would disagree with you . . . on the law. . . If these drug dealers are walking free, it is because you did not hedge against that possibility. Don't lay it at my doorstep. . . [I]f they are walking out of here it is because you people were not competent enough to put in an extra charge in your indictment.²

The prosecutor proceeds with the interrogation of the accused in a happy-go-lucky tone of voice. The accused is mocking her but she pretends not to notice and continues to ask questions that are leading and provocative, making the accused all worked up and defensive. The judge is not taking any notes and sits looking from the accused to the prosecutor and back again. The prosecutor asks a series of questions to which the accused simply answers no: 'Did you see anybody hit him as he stood up? Did you see anybody hit him when he sat down?' The judge turns abruptly to look at the prosecutor, then puts her hand on her mouth and keeps looking at the prosecutor.
(Author's Observation, drug offence, Monika, Judge, 45+)

INTRODUCTION

The above vignettes illustrate two different ways of expressing judicial anger; the first is an admittedly extreme case retrieved from Terry Maroney's work on angry American judges, and the second is an observation excerpt from our research project, *Emotions in Court*, studying the emotions and emotion management of Swedish judges and prosecutors. The first excerpt features Judge Sprizzo's outburst after he was forced to acquit the defendants in a large drug dealing case due to sloppy prosecutorial work.³ In the second excerpt one of us shadowed Judge Monika during a drug trial and had learned during lunch that she was upset at the prosecutor for asking flawed and leading questions and failing to work the accused in a manner that would make him collaborative. Like Judge Sprizzo, Judge Monika was angry because her ability to do her work depended on the prosecutor's ability to do hers.⁴

These excerpts are from two different legal systems (common law and civil law), as well as from two different national cultures (American and Swedish). Yet, they are similar in terms of how the law and legal actors' roles are constructed and institutionalized, and in each of

¹ This research has received funding from the European Research Council (ERC) under the European Union's Horizon 2020 research and innovation programme awarded to Bergman Blix (grant agreement No 757625). Both authors have contributed equally to this work.

² U.S. District Court Judge John Sprizzo in 1989 scolding prosecutors for having handled a drug case badly. See Terry A Maroney, 'Angry Judges,' *Vanderbilt Law Review* 65, no. 5 (2012): 1232.

³ Maroney, 'Angry Judges,' 1232.

⁴ Stina Bergman Blix and Åsa Wettergren, 'The Emotional Interaction of Judicial Objectivity,' *Oñati Socio-Legal Series* 9, no. 5 (2019): 726–46.

the excerpts, these shared structural elements determine the relationship between judge and prosecutor as interdependent but asymmetrical, giving rise to situations where the judge will feel frustrated and angry at the prosecutor. The judge, although the more powerful party, is restricted from interfering with the prosecutor's work for reasons of impartiality. If the prosecutor's work is deficient, the judge can do nothing. In both excerpts, these judges find their powers obstructed by deficient prosecutors, and react with anger – an emotional response to power challenges and obstacles.⁵ Frustration and anger, in this case, are emotions embedded in a particular composition of power, status and professional interdependencies between the judge and the prosecutor in a Western legal system, which transcends both the differences between the legal systems of common law and civil law and the cultural differences between nations. The difference between these two judges, situated in different national cultures and different legal systems, lies in how anger is expressed – a difference, we argue, that stems from different national/cultural emotional regimes. In the American common law system, the judge's anger can be both articulated (verbally) and visibly displayed without violating norms about judicial dispassion. In the Swedish civil law system a judge's anger during the trial is only detected, to the trained eye, in very subtle gestures such as putting down the pen and jerky movements. Only after the trial is over, and the judge has withdrawn 'backstage,' does she release her anger.

The aim of this chapter is to begin to scrutinize these differences in emotional expressions, outlining a theoretical framework for the comparative study of emotions in Western legal systems as being embedded in national emotional regimes. An emotional regime is defined by historian William Reddy⁶ as 'a set of normative emotions and the official rituals, practices, and emotives that express and inculcate them'. In our usage it means that an emotional regime is a system of feeling and display rules; norms about which emotions are appropriate and how they should be expressed in various social contexts.⁷ In this chapter, we distinguish the *national/cultural emotional regime* – the emotion norm system pertinent to a defined cultural sphere, usually a nation – from the *Western legal emotional regime* – the general emotion norm system of the Western legal sphere. Furthermore, as will be explained below, we differ between these two emotional regimes (the one of national culture and the one of Western legal systems) and what we have termed 'the emotive-cognitive judicial frame.'⁸ The emotive-cognitive judicial frame conceptualises the micro-social and everyday legal *practice* of orienting an array of situated feeling and display rules.

There is hardly any previous research looking at the criss-crossings of different emotional regimes and their enactment in concrete legal practice, but there is a body of research highlighting the concept of 'legal culture' and its relation to a country's broader social culture.⁹

⁵ Theodore D Kemper, *Status, Power and Ritual Interaction - A Relational Reading of Durkheim, Goffman and Collins* (Surrey, U.K.: Ashgate Publishing Limited, 2011).

⁶ William Reddy, *The Navigation of Feeling - a Framework for the History of Emotions* (Cambridge: Cambridge University Press, 2001), 129.

⁷ Arlie Russell Hochschild, *The Managed Heart - Commercialization of Human Feeling* (Los Angeles: University of California Press, 1983).

⁸ Stina Bergman Blix and Åsa Wettergren, *Professional Emotions in Court: A Sociological Perspective* (London: Routledge, 2018).

⁹ See, e.g., David Nelken, 'Using the Concept of Legal Culture,' *Australian Journal of Legal Philosophy* 29 (2004); Lawrence Friedman, 'The Concept of Legal Culture: A Reply,' in *Comparing Legal Cultures*, ed. David Nelken (Dartmouth: Dartmouth Publishing, 1997), 33–40.

Saguy and Stuart¹⁰ suggest that the extant literature's approaches to this topic can be categorized in a tripartite typology: (1) culture as an independent variable (shaping law); (2) law as an independent variable (shaping cultural perceptions), and; (3) law as culture, turning the focus from the legal institutions and actors to how the mundane, everyday interactions of people in their homes, communities, and workplaces 'actively make law'¹¹ by defining common legal practices and understandings. The third approach emphasizes what seems to be a generic understanding of legal culture, i.e., how a country's populace makes sense of and uses their legal institutions, including ascribing legitimacy to them. Friedman,¹² however, distinguishes this *external* legal culture from an *internal* legal culture within the legal profession itself, which pertains to legal professionals' meaning making, values, etc.

In our view, the relationship between law and culture is dialectic; law shapes cultural norms and values and is simultaneously shaped and affected by them. Law and legal institutions are culturally embedded and dialectically interact with their societal surroundings. Our focus in this article is on legal institutions and legal actors, and how *internal* legal culture (in our terminology, 'the emotive-cognitive judicial frame') is embedded in the larger context of a socio-culturally specific national emotional regime. We also argue that the emotive-cognitive judicial frame is not only part of the national emotional regime but contains key universal rules for emotions and emotional displays derived from the regime of judicial dispassion¹³ shared with all the legal systems in the West. The emotive-cognitive judicial frame thus does not conceptualize merely 'internal' culture as a profession-specific variant of 'external' (national) culture, but also proposes that essential parts of the internal (profession-specific) culture are 'universal' (Western legal) and transcend national culture. In practical terms, when we study specific emotive-cognitive judicial frames, we should be able to tease out the norms of emotion and emotion management that pertain to the Western emotional regime of judicial dispassion from those that pertain to local/national emotional regimes.

In this chapter, we will first review the relationship between rationality and emotion and its implications for the legal system, as well as the growing research field of emotions in law. Thereafter, we summarize the theories of and previous research into the socio-cultural variations of emotional regimes, followed by a basic theoretical toolkit for comparative studies of emotive-cognitive judicial frames that we have developed based on our own research. We then offer some concrete methods, based on our own and others' research, for studying emotive-cognitive judicial frames across national cultures.

EMOTION, RATIONALITY, AND THE REGIME OF JUDICIAL DISPASSION

The traditional perspective on the relationship between emotion and rationality positions the two as opposed to one another. The rise of modern Western thinking is largely built upon the

¹⁰ Abigail C. Saguy and Forrest Stuart, 'Culture and Law: Beyond a Paradigm of Cause and Effect,' *The ANNALS of the American Academy of Political and Social Science*, 619 (2008): 149–64.

¹¹ Saguy and Stuart, 'Culture and Law,' 158.

¹² Friedman, 'The Concept of Legal Culture: A Reply.'

¹³ Terry A Maroney, 'The Persistent Cultural Script of Judicial Dispassion,' *California Law Review* 99, no. 2 (2011): 629–81.

emotion-rationality distinction.¹⁴ Man (sic!) was seen as the only species who could tame his nature, his body, and his emotions in the service of reason; ‘emotion’ implicated what was female, natural, of the body and private, and reason implicated what was male, civilized, of the mind, and public. The metaphor of ‘Mother Nature’ illustrates this masculine image of the new scientific attitude.¹⁵ The association of emotions as ‘things’ that can inflict harm and thus need to be controlled turns emotions into threats to ‘the proper functioning of the Western ideal of a rational person.’¹⁶

The modernist dichotomy of reason and emotion permeates Western legal systems because these were constructed at the same time as other modern institutions such as science and democratic government.¹⁷ For the law to perform justice objectively and equally for all citizens – a process essential for the production of public trust and compliance with the rule of law – emotions and emotional attachments must be ‘put aside’.¹⁸ As Maroney states, ‘[l]aw . . . was thought to be a bulwark against popular emotion. The judge came to be seen as the primary figure guarding this realm of rationality, by taming the emotions of litigants, ignoring the emotions of the public, and divesting herself of her own’.¹⁹ The bifurcation of rationality and emotion seems to be fundamental to legal professionals’ perceptions of how they interpret and apply the law and exercise their power over people. In many ways, law’s *sine qua non* seems to be a lack of emotion; the ‘regime of judicial dispassion’²⁰ is inherent to ‘legal ideology’.²¹

In most Western countries, the strict separation of rationality and emotion has been challenged over the past four to five decades. Rationality and emotion are argued to be mutually supportive²² or even intertwined,²³ and that their relationship follows different logics in different cultural contexts. The relation between emotion and rationality can be more or less reflected, it can be managed by different techniques, and specific situations or interactions can be considered more or less rational or emotional both across cultures and across time.²⁴ Barbalet²⁵ emphasizes the necessity of emotions for instrumental rationality, which he argues requires commitment and a sense of what is and is not relevant material and information for the task. To concentrate, one needs to feel basic security and trust in the future, and to be caught up in the action, one needs to feel ‘a sense of sufficiency’, being absorbed by the task while

¹⁴ Michel Foucault, *L'ordre Du Discours* (Paris: Gallimard, 1971); Margaret C. Jacob, *The Cultural Meaning of the Scientific Revolution* (New York: Alfred A. Knopf, 1988); Georg Henrik von Wright, *Vetenskapen Och Förnuftet* (Stockholm: Bonnier, 1986).

¹⁵ Von Wright, *Vetenskapen Och Förnuftet*, 65.

¹⁶ Zoltán Kövecses, *Metaphor and Emotion: Language, Culture, and Body in Human Feeling* (Cambridge: Cambridge University Press, 2000), 48.

¹⁷ Kövecses, *Metaphor and Emotion*, 48.

¹⁸ See also Hans Heinrich Gerth and C. Wright Mills, eds., *From Max Weber: Essays in Sociology* (New York: Routledge, [1948] 1998).

¹⁹ Maroney, ‘The Persistent Cultural Script of Judicial Dispassion,’ 635.

²⁰ Maroney, ‘The Persistent Cultural Script of Judicial Dispassion,’ 635.

²¹ Bettina Lange, ‘The Emotional Dimension in Legal Regulation,’ *Journal of Law and Society* 29, no. 1 (2002): 204.

²² Antonio R. Damasio, *Descartes's Error* (New York: G.P. Putnam, 1994).

²³ Jack Barbalet, *Emotion, Social Theory, and Social Structure—A Macrosociological Approach* (Cambridge: Cambridge University Press, 1998).

²⁴ Eva Illouz and Shoshannah Finkelman, ‘An Odd and Inseparable Couple: Emotion and Rationality in Partner Selection,’ *Theory and Society* 38, no. 4 (2009).

²⁵ Barbalet, *Emotion, Social Theory, and Social Structure*, 60.

avoiding distractions. Guiding and facilitating emotions promote focus, such as pride and satisfaction in one's skills; in the case of legal professionals, these are the skills of legal encoding and juridical knowledge. We may also add interest and curiosity in the task, aesthetic pleasure in the beauty of logics and consistency. Barbalet suggests that distaste orients the determination of whether information is relevant or irrelevant; in the case of legal professionals, we have also seen distaste expressed as 'irritation'.²⁶

Considering that current broader social and scientific trends criticize or even abandon the conventional view of rationality and emotion as opposed phenomena, it is hardly surprising that the 'script of judicial dispassion' has also been challenged.²⁷ Today, emotions in court is a rapidly expanding research field with enough findings to date to securely prove that legal systems are not devoid of emotion, and that emotion play a decisive role for rational action in terms of professional legal behaviour.²⁸ Indeed, the gap between the prevailing discourse of dispassion and the actual emotionality of everyday practice, or the tenacity of legal ideology, makes the courts a particularly interesting case for the study of emotion and rationality as intertwined.²⁹

Previous research, primarily in the common law system, has investigated various ways that emotions are active in courts, demonstrating the expressions, usage, and effect of discrete judicial emotions,³⁰ the use of conscious and unconscious emotion management,³¹ and the emotional treatment of litigants and plaintiffs.³² Research has particularly investigated the multiple roles and potential pitfalls of empathy in legal professional work.³³

²⁶ Bergman Blix, and Wettergren, *Professional Emotions in Court*.

²⁷ See, e.g., Susan A Bandes, ed., *The Passions of Law* (New York: New York University Press, 1999).

²⁸ Terry A Maroney, 'Law and Emotion: A Proposed Taxonomy of an Emerging Field,' *Law and Human Behavior* 30, no. 2 (2006); Maroney, 'The Persistent Cultural Script of Judicial Dispassion'; Terry A Maroney and James J Gross, 'The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective,' *Emotion Review* 6, no. 2 (2014); Richard A Posner, *How Judges Think* (Harvard: Harvard University Press, 2010); Sharyn Roach Anleu and Kathy Mack, 'Magistrates' Everyday Work and Emotional Labour,' *Journal of Law and Society* 32, no. 4 (2005); Kathy Mack and Sharyn Roach Anleu, 'Performing Impartiality: Judicial Demeanor and Legitimacy,' *Law and Social Inquiry* 35, no. 1 (2010); Susan A Bandes and Jeremy A Blumenthal, 'Emotion and the Law,' *Annual Review of Law and Social Science* 8 (2012).

²⁹ Bergman Blix and Wettergren, *Professional Emotions in Court: A Sociological Perspective*.

³⁰ Mack and Roach Anleu, 'Performing Impartiality'; James Ptacek, *Battered Women in the Courtroom: The Power of Judicial Responses* (Boston: Northeastern University Press, 1999).

³¹ Jennifer A Scarduzio, 'Maintaining Order through Deviance? The Emotional Deviance, Power, and Professional Work of Municipal Court Judges,' *Management Communication Quarterly* 25, no. 2 (2011); Roach Anleu and Mack, 'Magistrates' Everyday Work and Emotional Labour'; Penny Darbyshire, *Sitting in Judgment: The Working Lives of Judges* (Oxford: Hart Publishing Ltd., 2011); Martine Herzog-Evans, *French Reentry Courts and Rehabilitation: Mister Jourdain of Desistance* (Paris: Editions L'Harmattan, 2014).

³² Darbyshire, *Sitting in Judgment*; Roach Anleu and Mack, 'Magistrates' Everyday Work and Emotional Labour.'

³³ Susan A Bandes, 'Empathy, Narrative, and Victim Impact Statements,' *The University of Chicago Law Review* 63, no. 2 (1996); Tracey Booth, "'Cooling out' Victims of Crime: Managing Victim Participation in the Sentencing Process in a Superior Sentencing Court,' *Australian & New Zealand Journal of Criminology* 45, no. 2 (2012); Nigel G. Fielding, 'Lay People in Court: The Experience of Defendants, Eyewitnesses and Victims,' *The British Journal of Sociology* 64, no. 2 (2013); Mary Lay Schuster and Amy Proppen, 'Degrees of Emotion: Judicial Responses to Victim Impact Statements,' *Law,*

Nevertheless, previous research to a large extent maintains an ambivalence as to whether rationality and emotion are separate phenomena; emotion is often not considered or integrated as part and parcel of professional legal work, but is seen as occasionally supportive of it. In contrast, we, like the discussion above, assert that emotion and rationality are intertwined and inseparable. To cut across the cultural bifurcation of emotion and reason, however, we have discovered the need to develop a conceptual toolkit to help with the interrogation, observation and analysis of simultaneous emotive and cognitive actions and interactions. Before developing this toolkit, we will first discuss how national/cultural as well as the general Western legal emotional regimes influence local emotive-cognitive judicial frames, and how the legal sphere's configuration of the emotional/rational conceptualization can be traced to structural conditions and tensions in the broader society.

THE SOCIO-CULTURAL VARIATIONS OF NATIONAL EMOTIONAL REGIMES

Historical analyses have shown that different epochs and cultures form different 'systems of feelings',³⁴ which have been analysed in terms of 'emotional regimes',³⁵ 'emotionologies',³⁶ or 'emotional communities'.³⁷ The notion of 'system' depicts what groups of people 'define and assess as valuable or harmful to them; the evaluation that [people] make about others' emotions; the nature of the affective bonds between people that they recognize; and the modes of emotional expression that they expect, encourage, tolerate and deplore'.³⁸ Different systems can vary in the relationships between private/professional emotions, formality/informality, and expectations on self-regulation.³⁹ Wouters, for example, compares the British emotion habitus, where maintained social hierarchies and a high degree of social tact keep emotions of violence and sexuality in particular banned from public life, to the American informal habitus, with its less distinct barriers between private and public life.⁴⁰ The example of the American judge's open expression of anger at the beginning of this chapter illustrates the indistinct barriers between formal and informal performances in the American emotional regime, while the Swedish judge presumably has a larger variation between her expressions of anger in her professional (formal) versus her private (informal) life.

Culture and the Humanities 6, no. 1 (2010); Åsa Wettergren and Stina Bergman Blix, 'Empathy and Objectivity in the Legal Process: The Case of Swedish Prosecutors,' *Journal of Scandinavian Studies in Criminology and Crime Prevention* 17, no. 1 (2016).

³⁴ Barbara H Rosenwein, 'Worrying About Emotions in History,' *The American Historical Review* 107, no. 3 (2002).

³⁵ Reddy, *The Navigation of Feeling*.

³⁶ Peter N Stearns and Carol Z Stearns, 'Emotionology: Clarifying the History of Emotions and Emotional Standards,' *The American Historical Review* 90, no. 4 (1985).

³⁷ Rosenwein, 'Worrying About Emotions in History.'

³⁸ Rosenwein, 'Worrying About Emotions in History,' 842.

³⁹ Cas Wouters, *Informalization: Manners and Emotions since 1890* (London: Sage, 2007); Reddy, *The Navigation of Feeling*; Peter N. Stearns, *American Cool - Constructing a Twentieth-Century Emotional Style* (New York: New York University Press, 1994).

⁴⁰ Wouters, *Informalization*, 134-35.

Modern social-psychological research focusing cross-cultural differences on emotions have found that feeling and display rules and their social function vary across (and within) cultures.⁴¹ So far cross-cultural studies predominantly study differences between individualist Western and collectivist Eastern cultures,⁴² focusing on how emotions are differently experienced, expressed, and valued depending on differences in the construction of identity.⁴³ Because we focus on cross-cultural comparisons *within* the modern Western emotional regime, we argue these differences pertain to expression, rather than function. The emotional regime of Western countries, particularly the legal regime, share an individualistic culture and an ideal of judicial dispassion.⁴⁴

National as well as general Western emotional regimes influence local court/judicial emotional regimes. Historical research on specific *legal* emotional regimes have shown that the legal sphere's configuration of the emotion/rational conceptualization can be traced to structural conditions and tensions in the broader society. This means that the binary emotion/rationality conceptualization has not been static over time. For example, the formation of a new Russian legal system after the 1917 revolution emphasized the role of emotion in judicial decision-making as a breach with the former, emotionally distant 'bourgeois' system. While this change pertained to the national Russian system, it could be traced to the emergence of a 'free law movement' in Germany.⁴⁵ Nevertheless, as argued in the introduction, the combination of broader Western rational features, such as male, civilization, mind and public, are also observed in these historical legal emotional regimes. Sandra Schnädelbach's study on the shifting meaning of the concept of *Rechtsgefühl* (feeling of justice) in late 19th and early 20th century Germany shows that threats to the status position of the male bourgeois judiciary went hand-in-hand with a growing professionalization of the judge position. The formerly innate capacity of *Rechtsgefühl* changed into a judicial capacity that demanded training and advanced emotion management.⁴⁶ Contemporary research linking legal emotional regimes to national regimes are lacking, but, for example, Bergman Blix and Wettergren have shown how the extreme subtleness of emotional expression in Swedish courts should be interpreted in light of Sweden's status as a high-trust society with a tradition of public consensus.⁴⁷

⁴¹ Batja Mesquita and Nico H. Frijda, 'Cultural Variations in Emotions: A Review,' *Psychological Bulletin* 112, no. 2 (1992).

⁴² Batja Mesquita, 'Emotions in Collectivist and Individualist Contexts,' *Journal of Personality and Social Psychology* 80, no. 1 (2001); Michael Eid and Ed Diener, 'Norms for Experiencing Emotions in Different Cultures: Inter-and Intranational Differences,' *Journal of Personality and Social Psychology* 81, no. 5 (2001).

⁴³ Shinobu Kitayama, Batja Mesquita, and Mayumi Karasawa, 'Cultural Affordances and Emotional Experience: Socially Engaging and Disengaging Emotions in Japan and the United States,' *Journal of Personality and Social Psychology* 91, no. 5 (2006).

⁴⁴ Maroney, 'The Persistent Cultural Script of Judicial Dispassion.'

⁴⁵ Pavel Vasilyev, 'Beyond Dispassion: Emotions and Judicial Decision-Making in Modern Europe,' *Rechtsgeschichte-Legal History* 25 (2017).

⁴⁶ Sandra Schnädelbach, 'The Jurist as Manager of Emotions. German Debates on *Rechtsgefühl* in the Late 19th and Early 20th Century as Sites of Negotiating the Juristic Treatment of Emotions,' *InterDisciplines* 6, no. 2 (2015).

⁴⁷ Bergman Blix and Wettergren, *Professional Emotions in Court*, 27.

The notion of emotional regimes has been criticized for being too static and not allowing for differences in the emotional experience and expression across and within social spaces.⁴⁸ In our own research on the Swedish courts, we regarded ‘judicial emotional regime’ as an overarching concept,⁴⁹ echoing Maroney’s notion of a ‘script of judicial dispassion’.⁵⁰ Our empirical analysis revealed a need to emphasize both that emotion and cognition were inseparable, and that court interaction demanded a more fluid conception of how feeling rules shift between social spaces and situations, allowing for a multiplicity of habituated behaviours. We developed the notion of ‘emotive-cognitive judicial frame’ – a restricted behavioural script for law professionals⁵¹ – to allow us to better conceptualize the embodied character of situated feeling norms and the ways these norms are embedded in larger structures, i.e., regimes.

A THEORETICAL TOOLKIT FOR THE ANALYSIS OF EMOTIONS IN COURT

The notion of the emotive-cognitive judicial frame proposes that feeling rules and other social norms or constraints are not merely cognitive but also emotional. Indeed, the fact that these norms are emotional is crucial for their effectiveness – people would not care about norms if they did not feel them.⁵² Merging the emotive and cognitive thus emphasizes that the habituation of a frame’s social constraints is a simultaneous process of *learning to feel* and *learning to think* in particular ways. Habituation⁵³ is the embodiment of emotional expressions, achieved through socialization, training, and repetition over time. Frames become habituated and settled to the extent that people begin to take a frame – a certain way of understanding and responding to a situation – for granted;⁵⁴ their emotion management and adjustment to situated emotion norms becomes backgrounded. Frames are situational. People walk in and out of frames during their everyday life. The morning stress of breakfast and seeing children off to school has a different emotive-cognitive logic than the workday; a judge can, for example, experience and express anger differently in the two different frames. Like Rosenwein’s concept of ‘emotional communities’, frames allow actors to ‘move . . . continually from one such community to another—from tavern to law courts, say—adjusting their emotional displays and their judgments of weal and woe’.⁵⁵ We use the concept of ‘frame’ rather than ‘community’ because

⁴⁸ Benno Gammerl, Jan Simon Hutta, and Monique Scheer, ‘Feeling Differently: Approaches and Their Politics,’ *Emotion, Space and Society* 25, no. 1 (2017).

⁴⁹ Stina Bergman Blix and Åsa Wettergren, ‘A Sociological Perspective on Emotions in the Judiciary,’ *Emotion Review* 8, no. 1 (2016).

⁵⁰ Maroney, ‘The Persistent Cultural Script of Judicial Dispassion.’

⁵¹ Bergman Blix and Wettergren, *Professional Emotions in Court*, 22.

⁵² Randall Collins, ‘Theoretical Continuities in Goffman’s Work,’ in *Erving Goffman - Exploring the Interaction Order*, ed. Paul Drew and Anthony Wootton (Cambridge: Polity Press, 1988), 41–63.

⁵³ Stina Bergman Blix, ‘Professional Emotion Management as a Rehearsal Process,’ *Professions and Professionalism* 5, no. 2 (2015).

⁵⁴ Erving Goffman, *Frame Analysis: An Essay on the Organization of Experience* (Boston: Northeastern Univ. Press, [1974] 1986).

⁵⁵ Rosenwein, ‘Worrying About Emotions in History,’ 842.

Goffman⁵⁶ conceived this concept as inherently fluid and not static in relation to the subject, even when it is habituated and embodied.⁵⁷

Situational frames, such as the emotive-cognitive judicial frame, are distinct from but conditioned by the more general emotional regime of the broader societal culture in which they are embedded. This means that examples such as a judge's anger, in both her private and professional capacities, is aligned with these broader societal cultural conventions or behavioural norms. The concept of emotional regime thus refers to the dominant societal discourse and knowledge about the role of emotions and the set of feeling and display rules and emotion words available through that discourse.⁵⁸

Undoing the bifurcation of emotion and rationality crucially allows us to consider the emotionality of actions and dispositions that are not conventionally seen as emotional. This is first and foremost achieved by the concept of 'background emotion', which derives from Barbalet's theorizing on emotions of rationality.⁵⁹ Backgrounded emotions 'function by giving attention to external but not internal objects of emotional apprehension'.⁶⁰ According to Barbalet, backgrounded emotions are calm and quiet, of low visibility to others, and just below the feeling subject's consciousness. In our usage, background emotions need not always be conducive to the action at hand; they can also be distracting and call for a change of action. As long as this focus shift is of a non-dramatic, routine character, it can be managed in the background.⁶¹ Thus, emotion management can be backgrounded too. For example, a judge may act on her background emotion of worry, stemming from the emotive-cognitive assessment that a victim is extremely nervous, and manage her own worry and the victim's nervousness by seeking eye contact with the victim's counsel to ensure that the counsel will calm the victim. None of the legal participants in this action would register this event as (emotional).⁶²

In contrast to background emotions, 'foreground emotions', make an emoting subject aware of her own feelings. In Barbalet's⁶³ terms, foreground emotion calls attention to both external and internal objects of action, and probably also to whether and how the experienced emotion needs to be managed, given the emotion norms of the situational frame. The subject is aware of the emotion and feels that it obstructs concentration on the task at hand, as when a judge is overwhelmed by sadness and is about to cry during a hearing. However, we can also imagine that actors can consciously summon an emotion conducive to a specific action. For example, a judge can summon anger to enhance her authoritarian display when reprimanding a misbehaving person in court, while keeping within the emotion norms of the frame. The emotion being consciously conveyed is in the foreground, but is not a distraction since it is conducive to the action at hand.

An interesting case consists of emotions that are backgrounded to the subject but foregrounded to others. In our research, this was exemplified by some judges who consistently

⁵⁶ Goffman, *Frame Analysis*.

⁵⁷ Bergman Blix, 'Professional Emotion Management as a Rehearsal Process.'

⁵⁸ Reddy, *The Navigation of Feeling - a Framework for the History of Emotions*, 129.

⁵⁹ See, e.g., Jack Barbalet, 'Emotions Beyond Regulation: Backgrounded Emotions in Science and Trust,' *Emotion Review* 3, no. 1 (2011): 36–43.

⁶⁰ Barbalet, 'Emotions Beyond Regulation,' 39.

⁶¹ Åsa Wettergren, 'Emotive-Cognitive Rationality, Background Emotions and Emotion Work,' in *Emotions in Late Modernity*, eds, Roger Patulny, et al. (London: Routledge, 2019).

⁶² See Bergman Blix and Wettergren, *Professional Emotions in Court: A Sociological Perspective*.

⁶³ Barbalet, 'Emotions Beyond Regulation.'

denied feeling any emotions, and who rejected the idea that emotion would be of any use to legal practice. But their work-related emotions were highly visible in our observation notes. A judge would beam with pride when talking about rewarding experiences as a judge, steam with frustration when encountering obnoxious journalists, radiate irritation at the cocky defence lawyer, or bounce with excitement at the interesting murder case that was just allotted to him. Yet, he would be entirely unaware of his emotional displays. In a Swedish context, these backgrounded (to the emoting subject) yet highly visible (to others) emotions are almost exclusively a male phenomenon. These backgrounded/foregrounded emotions suggest a rather fascinating tentative conclusion: specific constellations of power, status, gender, and frames enable some actors to ignore or even transgress situated emotion norms and yet be recognized as 'rational' (as opposed to 'sentimental' and 'irrational') actors. This conclusion points to an additional explanation of why emotive-cognitive judicial frames in other Western countries, such as Italy, allow much more leeway in judges' emotional expressions than in Sweden, and yet the regime of judicial dispassion remains a valid prerequisite for the objectivity and rationality of the courts. A possible understanding may be that judges' power, privilege and masculinity allow them to act more emotional and still be deemed rational. This observation will of course depend on the national emotional regimes in which the emotive-cognitive frame is embedded; if the national emotional regime allows for lavish emotional expressivity, individuals in privileged social positions may display even more of it. The unconsciously expressive judges in the Swedish context are few and stand out due to the very subtlety of the Swedish emotional regime that shapes the local emotive-cognitive judicial frame.

The emotive-cognitive judicial frame is a concept, we argue, that is applicable to legal systems in all national contexts. It differs from the Western judicial emotional regime in that it combines the ideals and emotion norms of this regime, notably the ideal of dispassion, and the emotion norms of the 'local' national emotional regime, which determines how much leeway is permitted for emotion norms of dispassion. In Sweden, the extreme cultural subtlety of the national emotional regime interacts with the Western regime of judicial dispassion to create an emotive-cognitive emotional regime that is devoid of visible emotions.

Background emotion and background emotion management are crucial concepts in the study of emotions at work in social spaces characterized as unemotional. These background emotions are often the calm and quiet emotions that inform, orient and support rational action and unnoticed background emotion work, allowing actors to deal with actual or potential emotive-cognitive attention shifts before these shifts surface as distracting foreground emotions. Background and foreground emotions do not connote any specific, discrete emotions; they are not classificatory categories. The concepts allow us to differentiate between what people actually experience as an emotional state, on the one hand, and human beings' constant emotionality (even when an individual is unaware of any feelings) on the other. Background emotions conducive to rational and professional action – as opposed to foreground emotions that disturb focus – also provide a convenient way to talk and reflect about emotion in and of 'non-emotional' spaces. The distinction between background and foreground emotions is applicable to all legal systems, but the visibility of background emotions will vary according to both the national emotional regime and the ways that power and status is distributed within it.

This brings us to the important concepts of power and status, which are also universally applicable and which direct our attention to social structures, the distribution of resources (power) and recognition (status) in a society. It is fairly safe to say that the legal professions are high status professions in all Western societies, and that judges are especially invested with

vast executive power as part of their profession. Power and status add 'group charisma'⁶⁴ to the emotive-cognitive judicial frame, i.e., the collective pride and satisfaction of belonging to a powerful and 'uniquely valuable' social group.⁶⁵ Group belonging and the emotional energy of interacting with group members,⁶⁶ for instance in court proceedings, are strong motivators for habituating and reproducing core group values and beliefs, such as legal practice as unemotional.⁶⁷

POWER AND STATUS

Power and status relations are both sources and outcomes of emotions, and they seem to work in similar ways across national emotional regimes, at least in democratic Western countries.⁶⁸ For instance, if I accord another person status this will likely prompt that person to like me, particularly if the other is my subordinate (social as well as my subordinate at work). If the other is my superior, the status-giving is likely conditioned by various feeling rules governing emotional exchanges between social unequals.⁶⁹ Kemper⁷⁰ defines the relationship between status and power as voluntary versus non-voluntary compliance; if the powerful person is also accorded high status, then subordinates are likely to comply voluntarily. In our data, we have seen how legal actors, particularly prosecutors use status-giving to achieve voluntary compliance from police. This strategy may be wholly calculative and inauthentic, but it is still more efficient than using a prosecutors' formal power to command the police. For instance, prosecutors are aware of the fact that the police are more likely to secure and provide good evidence if they are encouraged to suggest the next step in an investigation, rather than being submitted to the prosecutor spurting out directives.⁷¹

There are instances when judges are not given the status they need or want to perform in court and use power to get their way, raising their voices to show power or holding someone in contempt of court. These uses of power may, however, undermine one's status – people will have to obey, but will resent the use of force.⁷² It follows that the use of power inherently contains efforts to gain legitimacy; if power is legitimately obtained, then it becomes authority. Kemper defines authority as 'a status grant to some to enable them to use power under certain defined circumstances against those who grant them the right to do so'.⁷³ In democratic societies, the law is constantly seeking the populations' legitimacy and trust, with the goal of exercising authority rather than force. In Western courtrooms utilizing the regime of judicial

⁶⁴ Norbert Elias and John L. Scotson, *The Established and the Outsiders* (London: SAGE, 1994).

⁶⁵ Bergman Blix and Wettergren, *Professional Emotions in Court*, 56.

⁶⁶ Randall Collins, *Interaction Ritual Chains* (Princeton: Princeton University Press, 2004).

⁶⁷ See Bergman Blix and Wettergren, 'The Emotional Interaction of Judicial Objectivity.'

⁶⁸ Theodore Kemper, 'Toward a Sociology of Emotions: Some Problems and Some Solutions,' *The American Sociologist* 13, no. 1 (1978).

⁶⁹ Candace Clark, *Misery and Company: Sympathy in Everyday Life*. (Chicago: University of Chicago Press, 1997).

⁷⁰ Kemper, *Status, Power and Ritual Interaction*.

⁷¹ Bergman Blix and Wettergren, *Professional Emotions in Court*; Wettergren and Bergman Blix, 'Empathy and Objectivity in the Legal Process.'

⁷² Andrew Abbott, 'Status and Status Strain in the Professions,' *American Journal of Sociology* 86, no. 4 (1981).

⁷³ Kemper, *Status, Power and Ritual Interaction*, 22.

dispassion, legal professionals subordinate to the judge therefore engage in ‘ritual deference’⁷⁴ towards the judge, which the judge expects. This ritual deference is a way of ‘doing’ the authority of justice. The patterns of emotions that evolve when this rule of ritual subordination is breached are likely to be similar across countries, even if the magnitude and display of court interactions differ.

According to Kemper, ‘status seeking is a perpetual aspect of relational interaction’.⁷⁵ If this is true for legal professionals’ interactions, it means that the emotions observed in inter-professional interactions are indications of the status relations between legal professionals, and vice versa; knowing the status relations, one may roughly predict what emotions may be at stake. Both giving and receiving status are commonly associated with satisfaction, and receiving status gives rise to pride⁷⁶ and self-confidence, or what Collins⁷⁷ simply labels emotional energy.

Status, power, and emotions are structurally associated with one another across time and space, and therefore a status and power theory of emotions can be used as a blueprint to compare professional emotions in court across different countries. The introductory vignettes of this chapter are one example of this. This technique can be used to analyse other emotional processes besides those between legal professionals, such as the emotional processes affecting lay people and common audiences at trials and emotional processes related to the legal system’s broader social legitimacy.

METHODOLOGICAL APPLICATIONS AND AGENDA FOR FUTURE RESEARCH

As we have argued in this chapter, the modern Western perceptual dichotomy between reason and emotion and its embodiment in Western jurisprudence is likely present in all Western countries. However, social phenomena are contextually structured, and we also expect local variations due to the unique characteristics of national/cultural emotional regimes. In this last section, we will focus on methodological applications for empirical comparative research of legal emotional regimes.

There are several ways to detect differences and similarities in emotion norms or ‘feeling rules’⁷⁸ across emotional regimes, focusing on both discursive and interactional elements. Discursive clues can be found by problematizing emotion terms (e.g., tracking whether a specific term actually signifies an emotion) and, if so, what that emotion (or ‘emotive’⁷⁹) implies, its relative importance, if it is seen as active or passive, and if it is associated with specific bodily or gestural changes.⁸⁰ Another discursive clue is silence, or lack of references to emo-

⁷⁴ Thomas J. Scheff, *Microsociology. Discourse, Emotion, and Social Structure* (Chicago: The University of Chicago Press, 1990).

⁷⁵ Kemper, *Status, Power and Ritual Interaction*, 17.

⁷⁶ Kemper, *Status, Power and Ritual Interaction*, 19.

⁷⁷ Collins, *Interaction Ritual Chains*.

⁷⁸ Hochschild, *The Managed Heart*.

⁷⁹ Reddy, *The Navigation of Feeling*.

⁸⁰ Barbara H Rosenwein, ‘Problems and Methods in the History of Emotions,’ *Passions in Context* 2010, no. 1 (2010); Monique Scheer, ‘Are Emotions a Kind of Practice (and Is That What Makes Them

tions in specific spheres of life, such as informal/formal and private/public spheres.⁸¹ A third discursive clue is the use of metaphors and ironies. Kövecses suggests that the cross-cultural use of the metaphor of anger as a hot fluid in a container (the body) points to a universal experience of anger.⁸² In comparative legal studies, these discursive clues can be used when comparing documents, such as written verdicts, across different national contexts, and for comparing the relationship between discursive clues and different forms of emotional expressions. How are emotives or silences used in public hearings, confidential group deliberations, and so on across national systems?

Moving to the interactional elements, Stearns' analyses of 'emotionology' is interesting when focusing on modern Western cultures, since it implies the tracing of emotional standards across time.⁸³ Stearns builds on Norbert Elias' analyses of the civilizing process, using etiquette books and manuals to trace how social and economic changes impact expectations of emotional interaction. This research is similar to sociological research showing that the contemporary instrumental use of emotions is linked to support of capitalism and the market.⁸⁴ For legal comparisons, situating emotional standards in court within larger societal structural systems can explain differences as well as similarities in emotional expressivity. For example, international institutional changes, such as the triumph of the New Public Management model⁸⁵ in most Western countries, can be linked to increased standardization of emotional expressions across countries, while unique national emotional regime characteristics, such as the high-trust society of Sweden versus the low-trust society of the U.S., can explain differences in emotional expressivity between countries. Having described its utility and components, we will now discuss more specifically how our conceptual toolkit can be put to use in future research by identifying three analytical features which allow for nuanced and multifaceted comparisons of the role of emotions across legal and national systems: rituals, roles, and norms.

Comparing Rituals

The court process can be analysed as a comprehensive ritual 'achieving, training, articulating, and modulating emotions'.⁸⁶ Procedural rules and regulations govern the setup of each step in the legal process; public hearings take place in specifically designed rooms, where every

Have a History)? A Bourdieuan Approach to Understanding Emotions,' *History and Theory* 51, no. 2 (2012).

⁸¹ Rosenwein, 'Problems and Methods in the History of Emotions'; Wouters, *Informalization*.

⁸² Kövecses, *Metaphor and Emotion*, 35.

⁸³ Stearns, *American Cool*, 3.

⁸⁴ Hochschild, *The Managed Heart*; Arlie Russell Hochschild, *The Commercialization of Intimate Life – Notes from Home and Work* (Berkeley: University of California Press, 2003). See also Stjepan G. Mestrovic, *Postemotional Society* (London: Sage, 1997).

⁸⁵ New Public Management is a neoliberal model for governing public sector organizations inspired by private business, which was initialized in the 1980s. Its various implementations in many Western countries has led to a focus on financial control and 'value for money' by identifying organizational goals and measuring the fulfilment of these goals; a 'customer-perspective' on the citizens using the services of public sector organizations; and striving for a market-like structure of the public sector by introducing 'competition' between private and public sector organizations (deregulating public services such as health care and education) (see Management Study Guide, 'New Public Management Model,' <https://www.managementstudyguide.com/new-public-management.htm>, last accessed 9 January 2021).

⁸⁶ Scheer, 'Are Emotions a Kind of Practice,' 210.

role has its designated place. These ritual discursive and architectural premises are interesting to compare in themselves as components to control disturbing emotions. Furthermore, the confined spaces and elaborate manuscripts within legal contexts frame the ‘case bound interaction chains’;⁸⁷ hearings unfold in the same sequence every time. The method of shadowing is particularly useful here; following professional actors in and out of these interaction rituals can expose the unfolding of foreground emotional processes, such as the excerpt at the start of this chapter with Judge Monika’s building up anger. Shadowing legal professional actors in different cultural (national) contexts makes it possible to situate emotional motivations and expressions in the emotion norms of a wider cultural context, and examine the relationship of these particular emotion norms to specific judicial tasks in different judicial frames that all share the universal ideal of judicial dispassion. In particular, attending to these rituals through shadowing is essential for uncovering backgrounded emotional processes that are difficult to reflect on in formal interviews and are largely invisible in written documents. For example, can we find the same bundles or sequences of background emotions across different national/legal rituals, or are there different emotional patterns?

Comparing Roles

Comparing rituals focuses on interactional patterns, while comparing roles focuses on motivations and expressions at the group level. In our previous research, we have compared the roles of judges and prosecutors to identify how these roles construct objectivity depending on differences in goals, organization, and structural position.⁸⁸ Comparing roles thus puts greater focus on which organizational and institutional features identify group experiences. For example, in some countries (e.g., Sweden) hearings are temporally continuous, while in others (e.g., Italy) most hearings are interspersed over long sequences in time. How do these temporal dimensions influence build-ups and attenuations of emotions for different legal professionals?

Comparing Norms

The fluid conceptualization of frames (discussed earlier) allows for comparing how frames can be ‘played’;⁸⁹ for example focusing on breaks in frame maintenance such as humorous incidents⁹⁰ or occasions when legal professionals signal one thing with emotional expressions but emphasize the opposite verbally.⁹¹ Emotional norms also come to the fore when interacting frames clash.⁹² In court hearings, this can happen when the emotive-cognitive judicial frame

⁸⁷ Collins, *Interaction Ritual Chains*.

⁸⁸ Bergman Blix and Wettergren, *Professional Emotions in Court*.

⁸⁹ Erving Goffman, *Encounters: Two Studies in the Sociology of Interaction* (Indianapolis: The Bobbs-Merrill Company, Inc., 1961).

⁹⁰ Stina Bergman Blix and Åsa Wettergren, ‘Humour in the Swedish Court: Managing Emotions, Status and Power,’ in *Judges, Judging and Humour*, eds, Jessica Milner Davis and Sharyn Roach Anleu (London: Palgrave Macmillan, 2018); Sharyn Roach Anleu, Kathy Mack, and Jordan Tutton, ‘Judicial Humour in the Australian Courtroom,’ *Melbourne University Law Review* 38, no. 2 (2014).

⁹¹ Lisa Flower, ‘Doing Loyalty: Defense Lawyers’ Subtle Dramas in the Courtroom,’ *Journal of Contemporary Ethnography* 47, no. 2 (2018); Bergman Blix and Wettergren, ‘The Emotional Interaction of Judicial Objectivity.’

⁹² Goffman, *Frame Analysis*.

meets the emotive-cognitive frames of laymen (victims, defendants and witnesses) coming to court who do not know, or do not agree with, the judicial frame's emotion norms. Importantly, comparing transitions between situational frames – backstage preparations, front-stage presentations, and backstage ventilations⁹³ – facilitates detecting the relative importance of boundaries between formal/informal and private/professional behaviour. How are the transitions between frames achieved, and are the boundaries between them relaxed or strict?

The conceptual toolkit and methodological considerations discussed in this chapter all point towards the use of qualitative methods. We base this argument on the fact that qualitative data can be analytically generalized by identifying 'context-bound typicalities',⁹⁴ that is patterns in the data that generate ideal-typologies and theoretical concepts. In this chapter we have argued, implicitly, that under all conditions similar to those of our Swedish legal system study, similar patterns can be expected, and thereby the concepts suggested in our toolkit can be fruitfully transferred from our study to the next. We do not exclude the use of quantitative methods in the long run, but the field of emotions in law in general, and comparisons between countries in particular, is still largely uncharted ground. Qualitative methods are the best fit for investigating new previously unstudied social phenomena or probing into new issues unfamiliar to the social world. It would not make sense, for instance, to survey people about background emotions and professional emotions when they are generally socialized to consider only foreground emotions as proper 'emotions' and to categorize these as belonging to the private, not the public and professional, sphere. Obviously, the more data we get on local and universal patterns of professional emotions in court, the easier it will be to construct adequate survey questions that will capture the range and extent of emotional processes in court and across national cultures, allowing for statistical generalizations and correlations at the macro level. This may be necessary in order to truly tease out the general from the particular in the comparative study of emotions in law, perhaps especially if we venture outside the Western world.

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⁹³ Bergman Blix and Wettergren, *Professional Emotions in Court*.

⁹⁴ Bente Halkier, 'Methodological Practicalities in Analytical Generalization,' *Qualitative Inquiry* 17, no. 9 (2011): 788.

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