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Diversity of Judgments: Reason and Emotions in Forensic Practice

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Abstract: This paper questions the role of emotions in judicial persuasion: first, I will provide a brief overview of affective states, focusing on the structure of s.c. epistemic feelings; then, I will present some experiments which are going to be developed in a current research-project in a local court in Italy, to understand the interpersonal effects of epistemic feelings on judicial persuasion; finally, I will draw conclusive reflections on the relationship between forensic rhetoric and emotion.

Keywords: Cognition, emotions, epistemic feelings, forensic rhetoric, legal argumentation, legal reasoning.

1. Introduction

Despite a long-standing interest on emotions and several researches on emotional reactions and attitude formation, especially through psychological and cognitive exploration, emotions in courtrooms have received very limited attention. We know that people use their emotions to influence other people's attitudes but we tend to refer to the judge as a superman, capable of remaining impervious to emotional attacks and to decide on the basis of a rational logical path. The decision is considered to be an exercise in pure rationality and emotions are generally considered as irrational or disturbing factors of cognitive processing. The use of *pathos* is interpreted as an irrational tool opposed to rational proof, a diversionary strategy, and alternative to reasoning. In judicial reasons, the pathetic argument is excluded or evaded: therefore, deliberately, it is unclear whether emotional expressions indeed influence attitude formation and/or change and, if so, under which circumstances such influence occurs.

Here, we investigate the possibility that judges, as individuals, use emotions as information upon which to base their attitudes and their final decision.

We argue that at the basis of the split between emotions and judgment there is a certain concept of rhetoric and, therefore, of persuasion.

We believe that the devaluation of the decisive role of emotions in the judicial decision-making process is conditioned by the negative meaning with which we still speak of rhetoric today. A centuries-old tradition has accustomed us to think of rhetorical discourse as a partisan, subjective, irrational and emotional discourse. Although the process of re-evaluation of this discipline has been going on for more than half a century, centuries of discredit and mistrust have marked an evident trace in the use of rhetoric as manipulation (Raimondi, 2002).

The rebirth and recovery of this discipline is a complex and non-linear phenomenon: rhetoric has been taken up in many argumentative fields, from literature to communication, from economics to social psychology, up to the law. This operation took on different meanings.

This study enhances the recovery of a rhetorical way in the legal field: this way will reject the dualism between emotions and judgment and consider judicial discourse as essentially emotional and pathetic.

Before developing this idea, it is important to consider some definitional issues. The paper will therefore be divided into three parts:

- a) First, we will give a general definition of emotion, with the intention of showing an overview of all forms of emotional reactions. Among the affective states we will focus in particular on the so-called epistemic feelings, as they play a leading role in reasoning and judgment.
- b) The objective of this research is to investigate whether, and if so, under which conditions, judges use epistemic feelings as information and when forming their attitudes. At this stage we will present some experiments that will be developed in a territorial court in Italy (Court of Appeal of Trento) to a sample of judges. Experiments investigate how epistemic feelings can shape the judicial attitudes about an object.
- c) Finally, the aim of the third part is to highlight the relationship between emotions and judgment and to lead empirical experiments into a rhetorical analysis of emotions.

2. Emotions: an overview of current research and theories

Definitions of emotion vary widely: combining elements of several influential accounts, there is considerable consensus on a number of key aspects¹. Emotions can be defined as comparatively short-lived, differentiated, and intense responses to events that are appraised as relevant to a particular concern or goal (Lazarus, 1991), which are directed toward a specific stimulus (e.g., a person, an object, a situation) and are characterized by distinct subjective experiences, expressions and action tendencies.

Emotion, from a conceptual point of view, means all forms of affective reaction to specific stimuli, experienced as positive or negative. It is an affective episode, which arises suddenly, spontaneously and which has a short duration. For instance, happiness arises when one is making good progress, sadness arises when one faces a loss and anger arises when one's goals are frustrated.

Emotions arise from an individual's appraisal of the situation (Lazarus, 1991): as a situation can be positive or negative in many ways, appraisal is multidimensional and depends on aspects related to one's identity. According to some theories (Haidt, 2001), emotions are reactions determined by our history and culture. According to others (Prinz, 2004), there are moral emotions, preceding and determining moral decisions.

These qualities differentiate emotions from moods, which are more diffuse, longer lasting feeling states without a clear cause or object. In contrast to emotions or feelings, moods are less specific, less intense and less likely to be provoked by a particular stimulus or event. People experience positive or negative: there have been many studies done on the effect of the moods on the cognitive mind (Martin, E. A. & Kerns, J. G., 2011).

Mood also differs from temperament or personality traits, which are even longer lasting. Temperament is associated with personality: it is something you are born with or acquire young and seldom change. Temperament lasts for the duration: it is a lifetime platform on which moods and emotions occur (Schinnerer, J.L. 2007). Temperaments are often vague, diffuse emotions, which may be contrasted with the more distinct mood and very specific emotions.

¹ For an overview on the affective states and their difference, see P. Goldie (2000, Ch. 6) and J. Prinz (2004, Ch. 8).

Emotions involve feelings. According to Peter Goldie (Goldie, 2008), emotions involve two kinds of feeling: bodily feeling and feeling towards. Bodily feelings are directed towards the condition of one's body, although they can reveal truths about the world beyond the bounds of one's body – that, for example, there is something dangerous nearby. Feelings towards are directed towards the object of the emotion – a thing or a person, a state of affairs, an action or an event; such emotional feelings involve a special way of thinking of the object of the emotion. Feelings differ from full-edged emotions in two ways (de Sousa, 2009). Unlike emotions, feelings can be attributed at a subpersonal level, whereas emotions are typically attributed only to persons. Moreover, emotions are more complex than feelings, which share four points of resemblance with emotions: involving evaluative appraisal; telling something about the subject and the object; playing a role in the guidance of intellectual activity; having a characteristic phenomenology.

Emotional expressions convey information about the expresser's feelings (Ekman, 1993), traits, social intentions and appraisal of the situation (Ekman, 1993).

Building on the idea that emotional expressions provide information, the s.c. EASI theory investigates the interpersonal effects of emotional expressions (Gerben & Heerdink, 2015; van den Berg; van Kleef). According to this model, individuals can thus acquire pieces of information from others' emotional expressions.

Among feelings, epistemic feelings are those that enter into the epistemic processes of cognition. Epistemic feelings have attracted attention only quite recently: if it is not controversial that emotions play a role in the process of deliberation, it is important to clarify more specifically what this means.

A recent study indicates an exemplary classification of epistemic feelings as suggestion to understand how they affect cognition, inquiry and meta-cognition. We will report here some indications to clear up their nuances (De Sousa, 2009, pp. 146-147). De Sousa lists four categories of epistemic feelings:

- 1) Wonder or curiosity: such feeling motivates inquiry about a range of questions or topics without assuming any clear questions.
- 2) Doubt: motivates inquiry but it presupposes a specific proposition or existing beliefs.
- 3) Certainty or rightness: it is the opposite of doubts. This feeling blocks any inquiry because we may feel we have the answer we are looking for. Certainty about one proposition does not preclude further inquiry into other questions. Very close to the feeling of certainty, which focuses on propositions, we face with the distinct feeling of trust, which regards persons. Strictly speaking, trust is not an epistemic feeling, but because of the importance of testimony in the formation of most of our beliefs, De Sousa argued worth including it.
- 4) Familiarity: it is a metacognitive feeling that induces us to believe that we know something before we are able to retrieve what we know.

What is most remarkable about the epistemic feelings is the complexity of their mechanisms because they normally escape awareness. They lie below the level of conscious deliberation: epistemic feelings seem to serve precisely the function of providing premises elaborated at the subpersonal or intuitive level for use in explicit inferences (de Sousa, 2009, p. 152). So they determine a process that is functionally equivalent to making an inference, even though no explicit inference is made.

Epistemic feelings play a leading role in reasoning and judgment. In our daily life, we could find more examples of these affective states that guide our reasoning and our actions.

Suppose we believe true that the professor of philosophy of law at the Faculty is an up-right person: how can we believe this information to be true? Where do we get this information? This information is derived from specific epistemic sensations, such as the feeling of certainty. Suppose someone claims that the coronavirus is incurable and that we will never be able to have a vaccine: faced with this proposition, the feeling that many would have is uncertainty. The evaluation of information is never neutral but is accompanied by sensations that tell us, for each piece of information, if it is certain / uncertain, evident / doubtful, true / false, known / unknown, familiar/unfamiliar.

The theorists of epistemic feelings point out that when we think, we process information: our feelings participate in the cognitive process. The information, that is the object of our thinking is, in fact, perceived as obvious, interesting, questionable, familiar, unknown, related to others, etc. Our thinking is always combined with sensations, which are not expressed in inferences and, therefore, not evident.

The fact that we consider information as obvious / doubtful / true / false / certain / uncertain / surprising / boring / known / unknown depends on our personal epistemic feelings. We believe that this category of feelings shows a further aspect of the role of emotions compared to cognitions: to ensure a good understanding of what people say and of social situations, the use of rationality and the examination of reasons and motivations exposed is insufficient. It is necessary to penetrate the reasoning and analyse the feelings that underlie people's behaviour. In the same way, being aware of our emotional regulation allows us to fully understand our thinking and to enjoy our emotions without falling victim to them.

Perceiving emotions is indispensable in the cognitive process: for their analysis and control.

This ability must be exercised by everyone, both in the interpersonal relationship and in the personal rethinking.

In the legal field, it is conceivable that arguments may be perceived by the judge in a certain way depending on his own epistemic feelings, which undermine and trigger the argumentation developed by the parties.

Epistemic feelings are used in judicial cognition, as they are in everyday arguing, but it is unknown their practical relevance.

To investigate the effects of such epistemic feelings on judicial attitudes, one direction that we believe would be particularly interesting is the empirical research, aimed at reconstructing the decision-making process in some specific law-cases and, in particular, re-evaluating information on the basis of epistemic feelings in order to finally understand how much one's feelings may affect cognition and inquiry in judgment.

In the next section we will report on an experiment that will be developed in Trento (Italy), with the collaboration of a sample of judges operating in a territorial Court. The research project is funded by the Faculty of Law of Trento and the Trento Bar Association. Due to the COVID-19 health emergency, the experimental research has been interrupted and will be resumed compatibly with the safety measures. For this reason, in this paper, we will indicate one of the tests, without being able to discuss now the expected results.

3. Experimental studies on epistemic feelings in judgment

The objective of the present research is to investigate whether, and if so under which conditions, judges use their own epistemic feelings as information when forming the decision. The topic of origins and relations of the epistemic feelings is highly relevant but still under-researched.

Vogl et al. (2019) is a handful experimental study addressing several epistemic emotions to investigate their origins and effect, exploring both within-person and between-person data. This present study will not replicate those findings. The present research question is novel and relevant for judicial reasoning: we focus on detecting the use of epistemic feelings and their impact in the decision-making process. The experimental perspective of analysis is that of legal argumentation, as developed in the frame of forensic rhetoric studies, in Italy, by Cermeg (Research Centre on Legal Methodology).²

The perspective is pragmatist, by taking into account how facts, values, knowledge and errors are intertwined in the legal reasoning. Looking at the practice and the experience of judging, forensic rhetoric proposes a model based on rhetoric to reduce the gap between judgment as it is and judgment as it should be. According to this model, the rhetorical procedure does not involve the loss of rationality but rather enriches the criteria in a movement that tends to include rational, ethical and emotional factors. How should the judge decide in a reasonable way? According to this theory, the judge should take into account the speeches of the parties, analyse them and evaluate them according to different criteria: topical adequacy, relevance, logical coherence, dialectical correctness and persuasive commitment.

The model must be integrated to deeply understand the role of emotions. We chose to focus not on emotions in general but on the four classes of epistemic feelings: while we may be able to assess the validity of deductive arguments set out in the judgment, we may be not be able to achieve the complete analytic understanding of the judicial process. Knowing the basic epistemic feelings means acquiring a deep knowledge about fundamental dimensions of emotion affecting cognition.

The method of research will consist in an interview: judges will be asked to review their decisions through specific questions that will help them understand how information was processed. Through a process of reverse appraisal, the judges-observers will may infer epistemic feeling in relation to a particular object and evaluate what feelings they may incorporate in their attitude about the object and measure how much they affect their inquiry, cognition and meta-cognition.

For instance, the feelings of knowing include the judgment that one has learnt something. That means there is an implicit, unconscious and automatic process consisting in retrieving information from memory: this provides guidance on further choices. But we don't know anything about the accuracy of the sensory output of this research. Such feeling provides an indication but we don't know if it is or not reliable because the process of retrieving information is not explicit-conscious or controlled.

Based on this logic we propose to the judges, who participate in the research, to review the decision process, detecting the epistemic feelings and evaluating their use and their effect on reasoning.

The participating judges will be recruited on a voluntary basis from the judges of the territorial court of Trento. Both judges and public prosecutors will participate as decision-makers in the research project. Each magistrate is asked to select at least one recent provision (order or sen-

² See Manzin (2020), Puppo (2020) and Tomasi (2020).

tence), including the motivation part. All instructions and questions will be presented through the computer. The approach is straightforward: we will ask participants about their attitude toward that object, the parties and the lawyers assisting the parties. Participants will be instructed to carefully rethink about the judgment, the context, and work experience, personal relationships with the parties and with the lawyers, memories and intuition. They would be asked some questions about it. Through the questions, we will explicit internal states, including emotional reactions and attitudes. Participants will also rate the applicability of each epistemic feeling, from 0 (not applicable) to 5 (very applicable). We will collect more data by increasing the number of judges and the number of provisions to be re-analysed for each judge.

Questions are asked in such a way as to obtain an immediate and spontaneous response from the judge: there is a risk that the judge, in analysing her own decision-making process, will not be willing to recognize her own epistemic feelings as a source of information. For this reason, we will provide questions about facts and objects that are related to epistemic feelings. We design patterns of questions aimed at understanding if the effect is more likely due to the information inherent in the epistemic feelings.

In this paper, we will present an extract of the questionnaire, dividing the questions related to the classes of feelings.

See following page of this article for Table 1 with questionnaire (p. 7).

Table 1

Note: Refer back to page 3 for a description of epistemic feeling categories

Epistemic feelings	Questions	Yes/No Answers	If yes: scale <i>0: none</i> <i>1: low</i> <i>3: moderate</i> <i>4: high</i> <i>5: very high</i>
<i>Wonder</i>	a. During the discussion, was the speech attractive? b. During the discussion, were you impressed by the voice or the gestures of the lawyers? c. Did you write the decision at home? d. Did you write the decision in the office? e. Did something or someone disturb you during the discussion of the parties? f. Did something or someone disturb you when writing the decision? g. Did the parties' speech intrigue you?		
<i>Ddoubt</i>	a. Was the speech easy to understand? b. Did you have doubts about the regulatory framework? c. Did you have doubts about the facts? d. Did you consider a premise as obvious?		
<i>Rightness</i>	a. Did you consult sources other than the case documents? b. Did you consult databases for the decision? c. Did you consult internet for the decision? d. Do you think you left out some data or information? e. Did you recognize a topic as strong?		
<i>Familiarity</i>	a. Did you know the parties? Did you know the lawyers? b. Did you know the topic of the case? c. Have you ever pronounced on this matter? d. Did the case remind you of something?		

The questions are simplified and are designed to make the participants reflect on emotions and, above all, on the factors on which emotions depend. For this reason most of the questions concern external situations from which meanings can be inferred.

In an ensuing study, it would be necessary to deepen the answers and ask the judges if they perceived emotions during the writing of the sentence, if they are able to recognize the emo-

tions and if they perceived one or more epistemic feelings. The judges should therefore describe the context of emergence of the affective state and qualify it.

Therefore, the questionnaire can also be used as a tool for critical review of one's cognitive process. A deficient or incomplete perception of emotions has repercussions on the ability to understand social situations and other people's behaviours (see Dellantonio & Pastore on alestitimic situation). Recognizing emotions is the prerequisite for regulating them and to applying any strategies based on emotions. Each of us has more or less developed emotional regulation abilities: the questionnaire may lead us to understand whether we have used any emotional information and to maintain control over them.

4. On forensic rhetoric

Researches on epistemic feelings reveal that information is processed not only with reasoning but also affectively. Our cognitive processes are never purely logical, as information is accompanied by sensations that tell us something (if it is certain, uncertain, evident, doubtful, true, false). Therefore, the fact that we consider certain information as certain/uncertain, true/false, evident/doubtful, familiar/unfamiliar, may depend not on what we have heard but on our epistemic feelings.

Such feelings exist, cannot be eliminated and cannot be clearly separated from reasons because they are part of the reasoning. We believe that such experimental tests concerning epistemic feelings contribute to understanding the 'good reasons of emotions' (Plantin, 2011).

Pathos is not an accessory or an irrational element, but contributes to the construction of persuasive discourse. Emotions are a complex phenomenon: the arguments, the way of speaking, and the context in which the argument takes place provoke an emotional reaction, which guides our deliberation.

The relationship between emotions and judgment should not be understood solely in the sense that emotions are capable of distorting or influencing speech. When analysing a judgment, the analysis would include a set of elements, which do not end in the product, but which extend to the discursive process. Therefore, knowing what kind of person is the one who acts, what relationships he or she has with the parties, what story he or she has are relevant elements for deliberation.

The category of epistemic feelings and their impact on deliberative practice undermines those models developed by some modern psychological theories of persuasion that maintains a substantial dualism between rational and irrational processes.

Epistemic feelings show that the processing of a certain cognitive content also depends on sensitive conditioning.

I am referring in particular to the so-called Elaboration Likelihood Model (ELM), designed by Petty and Cacioppo (Petty, Cacioppo, 1981, 1986). This model aims to identify which routes lead us to change our attitudes and, more exactly, what type of cognitive processing is required for this to happen. According to Petty and Cacioppo, this change in attitude can take place through two differentiated routes, which are mutually exclusive: the central route and the peripheral route. The first is a process of careful elaboration of information and reflection on arguments; the second is based on elements that are not directly relevant to the topic but that are background information, or peripheral signals, such as the attractiveness of the source, the motivation to give a positive impression of one's self.

Starting from this dichotomy, the authors identify two different cognitive routes that are perceived as alternative, in the sense that mutual interferences are not foreseen. This distinction, *prima facie*, could recall the Aristotelian classification about rhetorical proofs and, in particular, the distinction between *logos*, *ethos* and *pathos*. One might think that the central route of the ELM coincides with the *logos*, and that *ethos* and *pathos* are the peripheral signals. But this is not the Aristotelian perspective, as it has been correctly revised by Francesca Piazza's studies on Aristotle (Piazza, 2015).

Ethos and *pathos* are not in the 'suburbs' of cognition and are not an alternative route: *logos ethos* and *pathos* are not alternative or parallel ways of persuasion but interlaced.

Aristotle, also, admits the existence of peripheral elements of persuasion, in the sense of irrelevant, but does not necessarily identify these elements with the emotional aspects relating to the speaker or listener. In the rhetorical model, Aristotle conceives of persuasion as a unitary process in which the emotional state of the speaker and listener fully participates. In the Aristotelian perspective, the speaker and the listener are not external to the discourse, but actors who participate and construct a discursive situation. In other words, persuasive discourse is not only the message that is produced but is also the result of a process in which the speaker and listener play a constitutive role.

What is said is one of the elements that make up the speech, but there are other circumstances, such as the emotional state of the speaker to be investigated.

5. Conclusion

The affective states are an aspect that modern theories of legal argumentation do not take into adequate consideration. The analytical attention is always turned to the discourse as it appears in the sentence: but this discourse is the result of a more complex process.

If we decide to rely on the decision maker, based on what information do we say he is a correct person? Let's take into consideration his competence, his reliability, and his honesty: this is not irrational; it is strategic. We may also just follow our own feeling that when we talk about judges we refer to someone highly reliable.

Only an authentically rhetorical perspective enhances the emotional dimension of the judicial discourse.

Any attempt to bring the judicial reasoning back to a mathematical proof is a failure: judgment is a rhetorical discourse in all respects and rhetoric is the relationship between emotions and judgment.

This study constitutes a first step to sensitize judges, by including them in the experimental activity, to the possibility of elaborating the information affectively. By 'affectively,' we do not only mean pleasure / displeasure but something more complex, as believing that you know something because you feel that. Feeling plays a fundamental role from an epistemic point of view.

The analytical apparatus of argumentative theories in the legal field must be integrated on this profile.

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