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The Need for Empathic Judging

By: N. Anand Venkatesh

Empathy, the ability to understand and share others' hopes and struggles, is crucial for a judge to make fair decisions. It is essential for conflict resolution, understanding, and forming connections with others.

Speaking at a recent summit, the chief justice of India, Justice D.Y. Chandrachud, said, “Technology, infrastructure, filling up vacancies ... these are milestones in our mission. But above all, I think what sustains judicial institutions in the long run is your sense of compassion and empathy, and your ability to answer the plaintive cry of a citizen in the wilderness.” This striking observation makes us ponder the role of empathy in the decision-making process.

The word empathy has, for some time, acquired a negative meaning, particularly in the context of judging because of a perception that judges are only umpires who are there to call balls and strikes. The term “empathy” is usually confused with “sympathy”. Empathy is the ability to identify and understand the thoughts and feelings of others and to appropriately respond to them. Empathy is all about perspective, all about being able to step into someone else’s shoes and appreciate all of the forces and constraints that shaped their behaviour.

Emotional empathy, sometimes called compassion, is more intuitive and involves care and concern for others. Cognitive empathy requires effort and more systematic thinking, so that it may lead to more empathic accuracy. It entails considering others and their perspectives, and imagining what it is like to be them.

Judges are human beings with histories, experiences, philosophies, and points of view. Research shows that judges risk being biased by spontaneously tuning in to one side but not the other if they do not reflect on their empathic behaviour. Reason and emotion are often cast as opposites. Yet emotion comes in a wide array of manifestations and has a variety of relations with its supposed opposite. Understanding emotion better is key to grasping how jurisprudence casts the relation between psychology and judicial decision-making.

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Jurisprudence encompasses four typical views of how legal decision-makers react to emotions. The first category is the dispassionate law-giver for whom the law is essentially a question of logic and deduction. The second category is the biased judge. The third is the selfless umpire who is guided by the conventional wisdom that judges should leave their personal predilections and emotional commitments behind when they ascend the bench. The fourth is the one relevant to the present discussion: the empathic judge.

For this person, a call for empathy in judging means that judges need more than just smarts, experience, expertise, and impartiality. He understands that empathic judging is not judging based on misplaced sympathy: it is good judging. He is certainly not going to decide cases on the basis of sympathy or anything else other than law.

Judges can easily have emotional reactions to other players in the courtroom, responding with condescension and impatience when bored or angry. A judge needs empathy to see why people do things, not to just decide what happened, but why it happened. Judges should be encouraged to do more by tracking the outcomes of their cases to see if there is evidence of bias. It is really hard to understand how our own identity shapes the world until you have the data that shows where you are placed.

People see everything in a biased fashion because of who they are and what they have experienced in their lives, and judges are no different in that regard. Widening one’s circle of empathy is also a part of the solution, and judges must spend more time learning about the people who come into their courtrooms to better understand their perspectives.

I am reminded of the words of the Dalai Lama where he insists that empathy is an important facet of life, which gives us the ability to appreciate another’s suffering. He states, “Whenever I meet people I always approach them from the standpoint of the most basic things we have in common. We each have a physical structure, a mind, emotions. We are all born in the same way, and we all die. All of us want happiness and do not want to suffer. Looking at others from this standpoint rather than emphasising secondary

differences such as the fact that I am Tibetan, or of a different colour, religion or cultural background, allows me to have a feeling that I am meeting someone just the same as me. I find that relating to others on that level makes it much easier to exchange and communicate with one another.”

I do not find a simpler way to understand the significance of the word empathy than this. A person who has not developed the trait of being empathetic cannot possess that virtue while acting as a judge. What you are as a human reflects in your performance as a judge.

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The quality of empathy, of understanding and identifying with people’s hopes and struggles, acts as an essential ingredient for arriving at just decisions and outcomes. Empathy is a fundamental building block for conflict resolution and understanding, and bonding with others. There are marginalised groups, which include women, people with disabilities, people of colour, LGBTQ+ people, indigenous people, people of a lower socio-economic status, and so on. Marginalisation is the result of discrimination.

Discrimination exists in many forms, such as racism, sexism, ableism, and in various other forms. Whether or not the discrimination is overt or covert, it marginalises others. These groups have been historically disempowered and oppressed by influential and discriminatory groups. Is it possible to understand and empathise with the trials and tribulations of someone belonging to this section without directly experiencing that specific form of oppression yourself?

There will always be parts of an experience of someone with fewer privileges than you that you will not understand, and you will not know how deeply you do not understand it. The unknown unknowns. Not because you are not physiologically capable of understanding, but because it is unlikely that you have been able to do the work to dismantle your privileges to the point that you can see someone else’s experience clearly enough to claim an understanding. As the famous Elvis Presley song goes, “Yeah, before you criticise and accuse, walk a mile in my shoes.”

You do not know what you do not know. I will never know what it is like to live as someone else who is oppressed in a different way than me. I will always have blind spots because of my privileges. I recall the words of Thomas Nagel in his essay 'What is it to be a Bat', where he says that there is no way of knowing what it is like to be another person, much less a bat. Still, it is better when we try to be empathetic than when we do not try. It is relevant because we have to relate to other humans in our lives and work.

We have to try to understand them, and a critical step to understanding others, paradoxically, is understanding that you cannot. Not really. Not completely. The gap you encounter when you consider what it is like to be a bat might be bigger than the one you fall into when you attempt to understand the perspective of your co-worker, but there is still a gap. Understanding that gap and what it means comes with recognising that the question is not what it would be like for you to be a bat. The question is, what is it like for the bat to be a bat? That is the real question of empathy, and the ability to empathise matters.

Empathy is not imagining how you would feel if you were a bat. Empathy understands what it is like for the bat to be a bat. More accurately, it is doing your best to understand, and at the same time knowing that ultimately you cannot. You are not a bat. Empathy is the capacity to relate to the experience of another vicariously, as if the feelings were your own, but we cannot really do this, not all the way.

Judges at all levels, up to the topmost court, must be sensitised regularly on the importance of being empathic in the decision-making process. Sensitivity is the key to developing empathy.

This is easy to grasp when we are talking about bats, but it is easy to forget when we are interacting with other humans because other people seem so much like us. It is easy to convince yourself that you know what someone else is going through, but you do not, not completely, because the other person’s subjective experience is only accessible from one vantage point – theirs. Harper Lee in *To Kill a Mockingbird* has these everlasting lines, “You never really understand a person until you consider things from his point of view [...] Until you climb inside of his skin and walk around in it.”

There is a demand that constitutional courts should have justices with many different backgrounds and life experiences. The reason is that the issues plaguing the system require understanding from various perspectives. Constitutional cases often require justices to balance competing interests. In doing so, justices’ values and life experiences matter enormously. This is where empathy plays a vital role.

Judges at all levels, up to the topmost court, must be sensitised regularly on the importance of being empathic in the decision-making process. Sensitivity is the key to developing empathy. Judges must, therefore, sensitise themselves to develop this trait. To a large extent, this will help them identify their prejudices and biases, and come out of them to render real justice to the parties to a dispute.

People believe in the system to redress their grievances and we will be doing a disservice to them if we do not appreciate the problem from their perspective by showing more empathy. If judges lack empathy, there is every justification for artificial intelligence (AI) to take over the task of making decisions. By developing the trait of empathy, judges will be not only good at what they do, but also meaningful human beings.

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