May 18th, 9:00 AM - May 21st, 5:00 PM

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Abstract: In this present work we analyze how emotions are intertwined within argumentative legal discourses. From the transcript of a brief trial in a Court of Appeal in Brazil we have the opportunity to observe how the emotional and rational reasoning live together in a deliberation among magistrates. We show that not only technical arguments are the compounds of one decision, but also that subjectivity plays an important role in that legal context.

Keywords: argumentation, emotion, objectivity, reasoning, tribunal

1. Introduction

There are many classical works that study arguments in legal context. We can point out the *New Rhetoric* by Perelman and Olbrechts-Tyteca (2008) or *The uses of argument* by Toulmin (1993), which launch an important debate in the context of argumentation in legal context, already in the second half of the twentieth century. These authors focus on the linguistic dimension in their reflections on the juridical domain. They do not study laws in particular. Regarding this matter, we agree on the fact that "arguments play a very important role in law" (Feteris, 1999, p.1). Indeed, it is precisely this 'important role' the reason that explains why so many theorists of the language develop their researches with data from the legal domain when talking about argumentation and rhetoric. As for the judicial machine, Dupret (2006) states: "the legal activity is, first of all, *langagière*, which, in a free interpretation, means that law depends on language to exist, to have any sense" (p. 229).

For these authors, law and legal reasoning cannot be reduced to the interpretation of codes, decrees, regulations or statutes. If they were so automatic, it would not be necessary to set up higher courts to handle appeals from lower courts. This way, being *langagier* means that law belongs to the dimension of persuasion and probability (Perelman, 1999, p. 304; Meyer, 1999, p. 10). For the authors, the juridical is simply the result of human invention, and laws exist to help people to achieve social goals that go beyond strict law: "a little bit of peace, some equality rights, a certain amount of freedom" (Atienza, 1997, p. 17).

Moreover, magistrates must make their choices acceptable, performing adaptations in their way to interpret codes in the very moment of judging, without forgetting the rules of the judicial ritual and the inquisitive judgment of the audience (Dupret, 2006, p. 164). The moves of *discourse-in-interaction* during a judgment in appeal, at the moment when a decision is in the process to be taken, is an excellent way to understand that law is not strictly the application of codes. In the analytical moment of this work, we shall understand in what ways *langagier* and law—including emotions—are intertwined within argumentative legal discourses. Thus, we will not forget that everything can get a semiotic value; everything can become significant when language and laws come together.

Bondy, P., & Benacquista, L. (Eds.). *Argumentation, Objectivity, and Bias: Proceedings of the 11th International Conference of the Ontario Society for the Study of Argumentation (OSSA), 18-21 May 2016*. Windsor, ON: OSSA, pp. 1-11.

Indeed, in the context of discourse-in-interaction, magistrates would use communicational ordinary procedures (beyond the legal domain) to try to enforce the law, without, of course, transgressing the legal rules. In a deliberation, magistrates create an intense dialogue—sometimes passionate, sometimes intense—where their life experiences, emotions, reasoning and more play a role in the decision making process (Martineau, 2010, p. 56). According to some authors, "a close relationship between justice and argumentation, since the problem of justice is always worked out in a situation of dialogue, in which the parties solve their conflicts and balance their interests, is using criterion which must be justified and not coerced" (Leon, 2007, p. 868). This way, and as we will observe in the analytic part that follows, the precedent used by magistrates in the moment of arguing about the sum of a moral damage, for example, would be the result of some values and personal experience.

When we think of legal argumentation and linguistic analyses, it occurs that studying the dialogic nature of debates in courtrooms is an excellent way to understand how that domain works. Thus, analyzing the way magistrates handle their disagreements, as we do in our research, is a good way to understand the meaning of the word *langagier*, in a context of legal deliberation. For this reason, it is important to highlight the fact that we analyze the legal field from the perspective of a linguist and not from the one of a lawyer. As we shall see briefly, judicial reasoning is composed of "a value among values" (Perelman, 1999, p. 135), especially in cases in which the issue at stake is the definition of an amount in payment for a moral damage.

In fact, many jurists do not hesitate to consider the legal science as a practical science. In addition, this way of understanding the legal world, where "the logic may be considered a kind of dialogic movement of law" (Ghirardhi, 1999, p. 108), allows magistrates to build up their reasoning by using not only the codes, but also their feelings about the codes. This way, their emotional state and their personal way to apply the law are very important, as we seek to show here.

2. Geisteswissenschaften

The kind of reasoning used in the legal domain is not that strictly objective or unbiased like the one used in logic or in Mathematics, for example. According to Perelman (1999), "language of calculation is not the language of poets or diplomats, nor the language of lawyers" (p. 115), what, in a certain way, we seek to confirm in this paper. In reality, in the universe of laws and implementation of legal rules the kind of calculation used is not that strictly "mathematical". Under this perspective, this work illustrates a paradox: putting forward the concept of calculation in a field where measurement methods are imprecise.

As for the legal domain and questions of 'measurement', Garapon (2008) says, "justice is itself measures" (p. 152). This author explains that judges need to know how to define finite quantities, like number of years in prison, fines, damages, indemnities etc. In effect, in the legal field the problem of knowing if the measurement made is the good one is always an important and possible question. For that reason Second Instance courts exist, among other reasons to (re)evaluate decisions and legal quantities, because, in justice, we are always (re)searching the correct quantities. About these aspects, Toulmin (1993) underlines that "legal theory does not use a mathematical treatment" (p. 232). This is what we will demonstrate in this analysis, in the judgment referred to as the "Broken leg case", where judges have decided on the correct amount to be paid for moral damages. It is our intention to show the way that dialectical reasoning works in a legal domain, even if magistrates make calculations and use arithmetic in an original way.

In that territory (the legal one), we are closer to *Geisteswissenschaften*, or "science of the spirit" (Perelman, 1990, p. 16), than to the logical or geometrical domain, where theorems, axioms and formulas get along. Strictly analytical and rational systems, subject to many constraints aiming at getting rid of ambiguity—and all kinds of subjective opinions—do not fit well in the legal system. However, this statement is not that unanimous, because we know that in the philosophical tradition of the seventeenth century mathematics and natural sciences based on measuring, weighing and calculation was outstanding. On the other hand, if something were not scientifically quantifiable, it would be considered vague and confusing. As we know, legal positivism is, to some extent, reinforced this way to understand the world: so true, pure and chaste.

If it is not wrong that our inferences and all sorts of reasoning result from a calculation process more or less complex (Kerbrat-Orecchioni, 1986, p. 24), it is not true, however, that we must restrain everything to a formal model, where there is no space for debates, thus limiting our interpretation of the world. Our objective is to show that reasoning is not only making deductions or calculations. Making deliberations in a tribunal is also a way of reasoning: when judges have to come up with a decision, they put forward arguments and opinions that might change in the course of the process, in particular when they have to know hard cases (for example, when they try to give a "price" to a moral damage). They do not resort to a strictly mathematic reasoning, although they need to make a sort of mathematic calculation. As Perelman and Olbrechts-Tyteca (2008), say, "the territory of argumentation is where the probable and the presumable live" (p. 1).

In fact, judges, as we will show in a little example, cannot limit their work to make calculations like computers at the moment of judging facts. They need to use ways and methods to reach the appropriate decision when they deliberate together with peers. Judges are not supposed to find the "correct" decision just in making a calculation or making irrevocable conclusions in strictly logical operations, because "legal issues relate more to make decisions than to make mathematical calculations" (Perelman, 1990, p. 631). In the analysis to be presented here, we will be able to look at the kind of non-strictly logical calculation that magistrates make in a legal debate. The example that we present below is a good sample of the difficulties of agreement on the amount of a financial compensation in cases of moral damage during a deliberative trial in appeal. According to Restrepo (2007):

> "[making legal decisions] is not like making a mathematical formula, because it is not one choice between 'black or white' (…) the practical truth is open to multiple possibilities of realization (…) all the measures taken by a jurist must consider humans acts in the moment of judging actions. They do not write abstract equations. There is a real purpose: judging humans as subject to rights and obligations." (p. 502)

Grize (1996), as we know, in his effort to understand the reasoning in natural language as the opposite to mathematical logic, tried to describe how thinking works, especially at times that it has no relation to a mathematical calculation, because, in his view "a calculation does not explain anything" (p. 115). On the other hand, here we will try to show how judges need to make calculations, consisting in determining a "price" to a moral damage, when we know that legal subjects are questions of decision, not mathematics: this is actually a great paradox.

3. Negotiation in a context of argumentative interaction

Studies about moral damage in legal context are certainly a rich opportunity to understand and describe means of disagreement among magistrates in some argumentative deliberations. The brief study presented here is based on the analysis of moments of verbal interaction that took place in a Brazilian Court of Appeal. However, such a kind of analytical exercise brings along some risks since, according to some Brazilian jurists, moral damage is one of the most controversial issues of the current Brazilian law (Reis, 2010, p. 1).

Our interest in this paper is to show that, indeed, questions about interpretation of law ought to be studied in connection with questions of language (Perelman, 1989, p. 91). For this reason, the case presented here describes the way judges work in a Court of Appeal in Brazil, when it comes to agreement on the amount of moral damages (or the so-called "price of pain" / *pretium doloris*) to be paid. We will examine the importance that the verbal resonances acquire—somehow perceived in a magistrate's speech—and the argumentative value that each discourse gets in that context. We will then seek to show that "the legal domain is essentially argumentative" (Meyer, 1999, p. 296) and that, because of the argumentative reasoning, a judicial decision could be modified or even overruled, without this representing a breach of law.

In Brazil, some polemic persists about the way magistrates define the amount of the sums to be paid to compensate a moral damage. In general, amounts would be justified in different ways, by using a diversity of reasonable criteria. In this case we presume that a link exists between the fields of economy (the amount) and law (legislation, jurisprudence etc.), during the delicate and sometimes polemic moment of deciding about the price that should be paid as moral damage. The main challenge judges have to face in that moment relates to their ability to make use of mathematical skills (tables, comparative charts, graphs and statistics), but in a dialectic and dialogical way. According to Posner (2008): the economic study […] has found considerable isomorphism between legal and economic analysis" (p. 238). In this exercise of giving each side of a legal process (appellant, defendant etc.) the correct amount (*suum cuique tribuere*), "magistrates always need, first, to qualify one action and, after that step, to quantify what has been qualified" (Carneiro, 1998, p. 134). That is sometimes a complex operation: neither completely mathematical nor exclusively juridical.

The moment of definition of the amount in cases of moral damage could be considered a kind of "bargain" among judges, because they must decide the "offer" which is more appropriate to the case under consideration. In that sense, the Amsterdam School considers negotiation as a kind of argumentative discourse (van Eemeren & Houtlosser, 2007). Some pragma-dialectic followers affirm the following about negotiation in an argumentative discourse:

> "The activity of negotiation, as a type of argumentative discourse, exhibits dialectical and rhetorical aims (...) In addition to the dialectical and rhetorical aims of argumentative discourse, the parties in negotiation can be attributed an institutional aim that is specific to negotiation. This aim distinguishes negotiation from other types of argumentative discourse" (Mohammed, 2007, p. 976).

In absence of a consensual definition of the concept of 'negotiation' in a context of interaction (Kerbrat-Orecchioni, 2011, p. 98), we will consider here, as a situation of negotiation, the moment when one judge, during the deliberation, refuses the "offer" suggested by another magistrate. In this case, A and B (or A, B and C) will have to propose new amounts to be arbitrated as moral damage in the case that is being judged.

Effectively, the refusal to accept one "offer" proposed by one of the members of the deliberation represents a kind of conflict, which may trigger a micro or a macro disagreement. This will mainly depend on the insistence of the magistrate to defend his position on the amount proposed. As a consequence, and as Plantin (1996) underlines, one negotiation in a context of argumentative interaction "may radically change one conclusion P in an unpredictable way" (p. 153). In fact, each amount proposed by a judge during the deliberation here transcribed will be considered, in this work, as a partial conclusion of a reasoning, because, indeed, when A proposes X, that means that this magistrate had already tried to justify the proposed amount.

4. The *Triadique* interaction

The analysis of data, called "TRIBUNAL corpus", allowed us to understand that the judgments recorded follow two different phases: **1st stage**: when the judges qualify an act (as lawful or unlawful). In that moment, they must decide whether, in accordance with the criterion of the law and the evidences presented in the Court of 1st Instance, the moral damage actually occurred. If the magistrates are convinced that the moral damage did not occur, the trial is closed and there will not be compensation to be paid as moral damage. On the contrary, if the judges consider that an unlawful act did occur, the magistrates will have to define in a **2nd stage** the amount to be paid to the victim. In other words, at this stage, judges participating in the deliberation have to define the "price" of the *pretium doloris*. As we already explained, for many Brazilian jurists, this is the hardest moment of the judgment, because they have to determine the amount to compensate the suffering and affliction caused to someone by an illicit act.

The sources of the analysis here presented are discussions among three magistrates (Reporting/REP, 1st Magistrate/M1 and 2nd Magistrate/M2) recorded on audio in a Brazilian Court of Appeal. For this reason, the debate is *triadique*, as it takes place in a group of three judges. According to Kerbrat-Orecchioni (1995), this kind of interaction with three inter-acting members may present some surprises during the development of the intercommunication. The author says that the *triadique* kind of interaction presents a more flexible and unpredictable structure than an interaction with only two people, that is to say, in a *dialogue*.

Even in an institutional context, like a tribunal, we will see that the moment when magistrates try to agree on an amount, interesting interactional configurations may be created, during the process of intercommunication. As it should be presented in the context below, the oral production is more spontaneous, "as a mode of production that gives to the speech more freedom, more animation, spiritedness and speed" (Cornu, 2005, p. 246), as a result of the "negotiation" taking place between the three judges in inter-action.

In the next section, we will examine fragments that describe interactions actively reactive. This will show the way A, B and C may talk at the same time, in moments when lots of proposals and immediate counterproposals are made. There we will observe how the emotional and rational reasoning live together in a deliberation among magistrates, when a legal decision is being elaborated. In this kind of deliberation, the trio is able to influence each other's conclusions in ways sometimes unpredictable when deciding on the *pretium doloris*, i.e., the amount to be paid to compensate a moral damage suffered. From a pragmatic point of view, the exchanges are interesting because we can see how the illocutionary forces act in that context of argumentative interaction. On this account, we may observe all the reactions due to the interventions of each magistrate, mainly when a disagreement takes place.

The analysis shows that the arguments and responses exchanged by magistrates constitute a complex landscape, especially because of the flexibility that the Brazilian legislator gives the

magistrates when interpreting the law about moral damage and the definition of the amount to be paid. However, that "legal freedom" left when interpreting the law makes it more difficult the task of judges when defining the amount to be paid as moral damage, in the light of the complexity of the case under consideration.

5. The broken leg case

In the broken leg case, a Brazilian Court of Appeal hears an appeal filed by a security guard of a public school (Appellant) against a decision issued by a judge in that same tribunal. The diverging opinions among magistrates relate the qualification of the fact. In the trial presented, we will see that three judges, during the deliberation in Second Instance, award damages in a lawsuit involving moral and aesthetic injury (the Appellant had leg deformities). In the excerpts that follow, we observe the existence of a negotiation between the reporting/REP magistrate and a first/M1 and second/M2 magistrate experts. As we have already explained, it is difficult for judges to evaluate how to refund moral damages, because the Brazilian law does not provide them with clear guidelines that may be used when evaluating this kind of prejudice (Reis, 2010). For this reason, it is very common that magistrates enter into long debates when a controversial case is being judged, because they have to qualify one case (the characterization of a 'moral damage') and, afterwards, they are supposed to "give a price" to the moral harm (*pretium doloris*).

In the case of the Broken Leg illustrated below, the issue concerns the case of a security guard that was attacked by bandits during his working time in a public school. After the aggression, the guard became disabled and had to retire prematurely. The man claims that the State has not protected him against that kind of aggression (he worked in a public place). In First Instance, the judge has not condemned the State to pay compensation to the guard. On the other hand, in this new judgment, magistrates agreed that the State had the responsibility over the protection of the man they employed as he could not work armed. Therefore, it was impossible for him to defend himself against that kind of attack. Magistrates, then, in appeal, acknowledged the civil responsibility of the State (the employer of the guard). The Reporting judge suggested the payment of a sum of R$30.000 for the moral and aesthetic damages caused, and, without resistance, M1 and M2 agreed on this amount.

This case illustrates the fact that in the field of legal argumentation, it is possible to reevaluate a decision, contrary to what happens in the mathematical or logic domains, where argumentation is unbiased. In the deliberation reported below, there is space for arguments involving values (subjective perspective) and legal skills (juridical perspective). Our aim is to show in this case that the sensitivity of the magistrates became a productive tool that helped them to decide on the amount of the compensation (R$30.000). Hence, we would say that the intensity of physical pain suffered by the guard became a precedent helping judges to find out what they would ultimately consider the adequate sum. That is an example of the "legal mathematical moment" of the deliberation in the field of moral damage compensation.

The first excerpt shows how the magistrates repealed the decision made in First Instance. Thus, after a technical argumentation (juridical perspective), REP offers a conclusion that contrasts with the one previously judged by another judge from a lower court of the same tribunal. Below we can see that the judge's justification (REP) easily convinced his counselling peers to follow the new interpretation he proposed to the broken leg case:

***TRIBUNAL* 40: Caso da perna quebrada- TRECHO 1[1]**

REL e assim eu estou PROVENDO o recurso
entendendo que é do estado a responsabilidade pelo que aconteceu
eh: **REformando a sentença** e julgando procedente os pedi-o
pedido\ **condenando o réu ((identificação)) a pagar ao autor**
vinte mil reais pelos danos morais e dez mil reais pelos danos
estéticoscorrigidos monetariamente e-etcetc\ condeno ainda ao
pagamento de custas e de honorários de MIL reais é assim que
estou portanto dando provimento ao recurso do autor senhor
presidente\
M1 o meu voto é com o eminente relator
desembargador ((à M2))/
M2 com o eminente relator

***TRIBUNAL* 40: The broken leg case – EXCERPT 1**

REP I agree with the defendant's demand
because the state is responsible for the pain suffered by the man
eh: I propose the **modification of the decision** I condemn
I condemn the plaintiff ((name)) to pay the defendant the amount of
R$20.000 for moral damage and R$10.000 for
aesthetic harm with monetary adjustment e-etc etc\ And also
I condemn the plaintiff to pay all interests that is R$1.000 and it is
the way that I judge the demand of the defendant mister
president of the court\
M1 I agree with the position of mister reporting judge
judge ((talk to M2))/
M2 I agree with mister reporting judge

The last part of the speech of the reporting judge REP (l. 18-26) indicates his disagreement against the judgment of First Instance ["*I agree with the defendant's demand because the state is responsible for the pain suffered by the man*" (l. 18-19)]. After having done so, REP proposes an amount for the moral and aesthetic damage caused to the school guard [("*I condemn \I condemn the plaintiff* ((name)) *to pay the defendant the amount of $20.000 for moral damage and $10.000 for aesthetic harm with monetary adjustment etc., etc.*" (l. 20-23)]. As we observe, in a manifestation of agreement, M1 and M2 indicate their support to REP's decision (l. 27; l. 29).

In line with the "ritual", the first speech is always given by the reporting judge/REP, where he justifies and presents his arguments in support of his own opinion. He must explain the conflict between defendant and plaintiff; illustrate all the circumstances of the case, and sum up the decision in First Instance and the new demands under consideration in the context of this procedure. He must technically present legal arguments to support his decision, propose an amount (in case of real moral/material damage), which must be agreed on by M1 and M2, as

[1] We adopted the transcription conventions of the ICAR laboratory (Interactions, Corpus, Apprentissages, Représentations) in France.

both participate in the deliberation. Contrarily, the other auxiliary judges (M1 and M2) do not have to justify their positions.

Before the official announcement of the decision in that "ritual", we observe below a brief debate about the amount proposed by the reporting judge. The last excerpt below shows the kind of criterion that would take place during the decision about payments and compensations in situation of moral or aesthetic damage.

***TRIBUNAL* 40: Caso da perna quebrada – TRECHO 2**

30	**M1**	°ta razoável esse valor não ta desembargador ((à REL))/°
31	**REL**	°((mudança de tom)) ta\ né°&=
32	**M1**	&°ta razoável/°
33	**REL**	=°apenas a PERNA\ coita:do ele: teve um sofrimento violento né
34		quando se-per:- mas acho
35		que\
36	**M1**	a [apelação
37	**REL**	[vossa excelência tavaaumentan:do\ ou diminuin:do\ como é que
38		ta-/ (.) eu todis[POSto a discutir
39	**M1**	[°nao não°\
40		°heim/ não não eu ta:va:°&
41	**REL**	&°ta-°\
42	**M1**	eh: apelação provida unânime

***TRIBUNAL* 40: The broken leg Case – EXCERPT 2**

30	**M1**	°do you think this amount is reasonable mister ((talk to REP))/°
31	**REP**	°((change of tone)) I think so\ isn't it°&=
32	**M1**	&°it is reasonable/°
33	**REP**	=°it was only the leg \ poor man he: had a violent pain \ you see
34		when he was attacked– but you know
35		that\
36	**M1**	the appeal
37	**REP**	[you were proposing any increase\ or decrease\ of the amount what do you think
38		that is-/ (.) I would discuss without problem
39	**M1**	[°no no°\
40		°what/ no no I was only just°&
41	**REP**	&°ok-°\
42	**M1**	eh: appeal approved unanimously

Unlike a mathematical calculation or a strictly logical reasoning, this excerpt demonstrates that: "an argumentation is never definitively closed", as Perelman (1989, p. 442) used to say. In other words, in the field of legal argumentation, it is possible to review decisions, to renew argumentations and to modify judgments in ways that could not occur in a mathematical or logical domain, whose language is independent from arguments or rhetorical strategies. In the field of law, the possibility of reviewing a decision previously taken is almost an axiom and justifies the very existence of Second Instance and Appeal courts. The broken leg

case exemplifies that in a legal domain a debate has multiple opportunities to be reviewed. In the first excerpt, magistrates overruled the decision taken in First Instance. In this second one, we remark that the *sensitivity* of magistrates, when defining the amount for the moral damage, turns into an "instrument" to help judges to sort out an agreement on a sum.

When M1 goes back to the issue of the amount and asks for his peers' views, conjecturing about a possible change in the amount already defined by the group ($30.000) ("°*do you think reasonable this amount mister ((talk to REP))*/°"/l. 30), he creates a new turn of discussions that could continue for a long time. As a matter of fact, in that "ritual", the discussions do not have a determined number of turns to finish. As we see, magistrates are ready to (re)discuss the sum with the view to find out the adequate value [("*do you think reasonable this amount mister / I think so*\ *isn't it*°*&= / &*°*it is reasonable/*°" (l. 30-32)]. This is actually an important characteristic of that "ritual": the renewing of discussions.

The overlapping of turns/speeches seems to be the best indicator of the spontaneous reactions of judges in this final part of the discussion. So, after a new request of confirmation is made by M1 ("*&*°*it is reasonable*/°"/l. 32), the reporting judge gives an answer that seems to show how difficult it may be to define the amount for the moral damage. REP, in a doubtful and insecure way, says: *"=*°*it was only the leg*\ *poor man he: had a violent pain*\ *you see when he was attacked – but you know that**"*° (l. 33-35). We see that the reporting judge tries to measure the intensity of the pain suffered by the guard and the pertinence of the amount proposed by his colleagues in that respect. In this particular moment, REP manifests his feeling of pity over the aggression that injured the guard. According to Perelman (1990) "the role of reason is always subordinated to non-rational feelings" (p. 123), and in this moment we observe that REP makes an effort to be as rational as possible, although, at the same time, he does not hide his feeling of pity. Indeed, this mixture of compassion and condolence ["*poor man*"/ (l. 33)] at the moment of the (re)definition of the amount of the compensation, is followed by an adversative assertion ["*but you know*"/ (l. 34)] that attests to an appeal to the reason. It suggests that REP made a big effort not to be influenced by his emotions (the feeling of pity) and to preserve the legendary legal impartiality.

Notwithstanding the sample above, the judge and his feeling of pity only highlights the fact that emotions are a component of that argumentative discourse. On this account, Plantin (forthcoming) states that "when we feel pity, we certainly are in the domain of emotions." In this sense, Aristotle had already affirmed, "the passions (*pathe*) which lead us to change our judgments are those accompanied by pain or pleasure, such as anger, pity, fear etc." (Aristotle, 2007, p. 262). In lines 33-35 we notice that the "calculation" made by REP tries to measure the concrete pain (in the physical sense, not moral) suffered by the Appellant ["*that was only the leg*\ *poor man*"/ (l. 33)] in an attempt to correlate it with the amount defined (R$30.000). We observe in this moment a topic of reasoning: "the less/more intense is the pain, the less/more it will have to be compensated". Effectively the expression of emotion ("*poor*") associated with the compassionate tone of voice reveals the emotional state of the magistrate. Moreover, it is all followed by transformations in the *Gestalten vocales* (tone of voice, etc.). In this moment, the emotion is *hétéro-attribuée* (Plantin, 2011, p. 135), that is, that feeling is ascribed by REP to the Appellant. As already noticed by Govier (2010): "sometimes pity and related feelings are desirable emotions. They draw attention to the suffering of others and encourage us to be more humans" (p. 170). In the judge's attitude, we see that it is the feeling of pity that helps the group of magistrates to find the amount to be paid (R$ 30.000). REP made all the possible "arithmetic"

attempting to measure the suffering experienced by the man attacked who had the leg broken by bandits.

What we wanted to highlight by using this case is that, in the legal world, the role of the sensitivity of the magistrates in their judgments has an important function in the decision making process. The Case presented arguments that expose the subjectivity of judges (*arguments de valeurs*/Martineau, 2010, p. 68) in the sense of subjective appreciation, and, yet, some technical arguments (that we effectively did not have space to show here, but that are written in the official sentence). It is clear that the feeling of pity evoked (l. 33) is also used as a criterion to help judges calculate the amount (R$ 30.000). In this way, we have seen in that domain the existence of a complex calculation in a "mathematical reasoning" which intertwines the two types of values, the emotional value and the monetary one.

Last, but not least, we do not assert here that the judge of First Instance was indifferent to the physical and moral pain suffered by the plaintiff, because, as we know, that magistrate did not condemn the State to pay moral damages. From a legal point of view, the reasoning of the magistrate of 1st Instance was simply possible; and this is absolutely valid in the juridical domain.

6. Conclusion

The brief analysis showed that in deliberations in legal domain it is normal the mixing of technical arguments and value arguments, where the subjectivity plays a more prominent role. In *trio* deliberation, the fact that three different people have to negotiate makes it possible for other factors (than the strictly legal norms) to have some influence in the judgment. As we saw, judging is more than listing articles of a code when it comes to build up a decision. According to Robrieux (2010), "even the most rigorous arithmetic can serve an argumentative strategy" (p. 190). In that way, we would rather say that in the context of the case briefly examined, there is a "mathematical aesthetic" (and not a mathematical reasoning) when the magistrate tries to determine the price of a moral prejudice in the domain of dialectic reasoning.

In the broken leg case, it was clear that the *intensity* of physical pain ["*it was only the leg\ poor man he: had a violent suffering*"/ (l. 33)] alleged by the man who was injured was used as a criterion (among legal ones) to guide the judges during the deliberation. In the very moment of deciding on the amount to be paid by the State, magistrates showed a kind of practical objectivity. This shows how values, both monetary and emotional, may coexist in a territory where *langagier* and law are intertwined within argumentative legal discourses.

References

Aristotle. (2007). *Rhétorique*. Présentation et traduction par Pierre Chiron. GF Flammarion.

Atienza, M. (1997). Derecho y argumentacion. *Serie de Teoria Juridica y Filosofia del Derecho, 6*, 249-254. Universidad Externado de Colombia.

Carneiro, M. F. (1998), *Avaliação do dano moral e discurso jurídico*. Porto Alegre: Sérgio Antonio Fabris Editor.

Cornu, G. (2005). *Linguistique juridique*. Paris: Éditions Montchrestien.

Dupret, B. (2006). *Le jugement en action: Ethnométhodologie du droit, de la morale et de la justice en Egypte*. Genève/Paris: Librairie Droz.

Eemeren, F. H. van, & Houtlosser, P. (2007), Countering fallacious moves. *Argumentation, 21*(3).

Feteris, E. T. (1999). *Fundamentals of legal argumentation: A survey of theories on the justification of judicial decisions*. Netherlands: Kluwer Academic Publishers.

Garapon, A., Allard, J., & Gros, F. (2008), *Les vertus du juge*. Paris: Dalloz.

Ghirardi, O. A. (1999). Le raisonnement judiciaire: Bibliothèque de philosophie comparée. *Philosophie Du Droit 6*. Editions Bière.

Govier, T. (2010). *A practical study of argument* (7th ed. / international éd.). Wadsworth.

Grize, J-B. (1996). *Logique naturelle et communication*. Collection Psychologie Sociale. Presses Universitaires de France.

Kerbrat-Orecchioni, C. (1986). *L'implicite*. Paris: Armand Colin Éditeur.

Kerbrat-Orecchioni, C. (2011). Le discours en interaction. Armand Colin. Collection U. Lettres—Linguistique.

Kerbrat-Orecchioni, C., et Plantin, C. (1995). *Le trilogue*. CNRS—Université Lyon 2: Presses Universitaires de Lyon.

León, J. J. (2007), Justice as argumentation. In F. H. van Eemeren & B. Garssen (Eds.), *Proceedings of the Sixth Conference of the International Society for the Study of Argumentation* (Vol. 1), *June 2006* (pp. 867-872). Amsterdam: Sic Sat.

Martineau, F. (2010). *Petit traité d'argumentation judiciaire* (4ème éd.). Praxis Dalloz.

Meyer, M. (1999). *Histoire de la rhétoriquedes Grecs à nos jours*. (sous la direction de) – LibrairieGénéraleFrançaise.

Mohammed, D. (2007). Toward a pragma-dialectical approach to negotiation In F. H. van Eemeren & B. Garssen (Eds.), *Proceedings of the Sixth Conference of the International Society for the Study of Argumentation* (Vol. 1), *June 2006* (pp. 975-984). Amsterdam: Sic Sat.

Perelman, C. (1989), *Rhetoriques*. Belgique: Éditions de l'universite de bruxelles.

Perelman, C. (1990), Éthique et droit. Belgique: Éditions de l'Université de Bruxelles.

Perelman, C. (1999), Logique juridique: Nouvelle rhétorique. Paris: Éditions Dalloz.

Perelman, C. et Olbrechts-Tyteca, L. (2008). *Traitéd'argumentation*. Belgique: Éditions de l'Université de Bruxelles.

Plantin, C. (1996). *L'argumentation*. Paris: Le Seuil (Mémo).

Plantin, C. (2011). Les bonnes raisons des émotions: Principes et méthode pour l'étude du discours émotionné. In, P. Lang (Ed.), *Sciences pour la communication*, Berne.

Plantin, C. (Forthcoming). *Dictionnaire de l'argumentation*.

Posner, A. R. (2008). *How judges think*. Cambridge, MA/London, England: Harvard University Press

Reis, C. (2010). *Dano moral*. Rio de Janeiro: Editora Forense, 5ª edição ampliada.

Restrepo, G. M. (2007). La estrutura del saber jurídico. In F. Q. Álvarez (Ed.), (Varios) La argumentation jurídica: Compilatión y extratos. Medellín, Colombia: Editora Jurídica de Colombia,

Robrieux, J. J. (2010). La rhétorique et argumentation (3ème éd.). In D. Bergez (Ed.), *La rhétorique et argumentation.* Paris : Armand Colin, Collection Lettres Sup.

Toulmin, S. E. (1993). *Les usages de l'argumentation*. (P. de Brabanter, Trans.). Collection L Interrogations Philosophique. Presses Universitaires de France.