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Commentary on “Emotional Legal Arguments and a Broken Leg”

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1. Introduction

In Damasceno Morais’ paper, “Emotional legal arguments and a broken leg,” a view that espouses a dance between logical and emotional reasoning in decision-making processes in the court of law is elaborated. I’ll cut to the chase: I’m sympathetic to this analysis of juridical practices. Where magistrates must review and assess proceedings in order to render a verdict, Damasceno Morais writes that *values* and *personal experiences* of these judges contribute to the negotiation process (p. 1). The author demonstrates the emotional tenets of juridical decisions specifically in a context where there is more than one magistrate, such that two or three magistrates must mutually negotiate.

When magistrates need to decide on a verdict based on a given case there are several judgments at play: are the accounts truthful, or probable? Is there concrete evidence? Do the actions in question cross legal lines? What is the just punishment, or response, if they do? Is the court’s decision fair? Does it abide by precedents? Create a precedent? While some of these decision-making processes are based on verifiable “facts,” most of these decisions are “interpretive,” in that they rely on judges to make reasoned inferences. Deciding on the amount of “moral damages” one owes is a prime example of such inferencing. Magistrates do not have a code, or law book, that prescribes moral damages amounts. It is this process of deliberating that Damasceno Morais claims can be laden with emotional reasoning. These reasoned inferences, in fact, stem from a capacity for emotional understanding.

Below I discuss a few quibbles I have with Damasceno Morais; namely, what I think is a misuse of the term “negotiation” in the context of juridical decision-making. And, further, a challenge to apply the author’s theory to “single” magistrates judging cases is presented. Neither of these discussions object to the more substantive claim that the author makes about “emotional reasoning,” but they may be pushing the author to consider making more controversial claims. Then I connect the author’s analysis with other examples and concepts that only corroborate, and help to further explain, the view espoused.

2. Negotiation or deliberation?

Damasceno Morais refers to the process of Brazilian magistrates deliberating the appropriate moral damages compensation as a *negotiation* (with reference to pragma-dialectics). However, the deliberative process of magistrates does not include some important and necessary tenets of negotiation. The author defines negotiation – in context – as, “the moment that one judge, during the deliberation, refuses the ‘offer’ suggested by another magistrate” (p. 3). Proposing and

rejecting offers is indicative of negotiation, but this argumentative dialogue has other criteria that are not met by magistrates deliberating. Referring to Walton's dialogues, the goal of a negotiator is to strike a good deal for him/herself (1998, p. 100). Negotiators have different interests in a negotiation, and their goal is to arrive at some, typically mutually-beneficial, settlement. Co-founders of the Harvard School of Negotiation, Fisher and Ury (1991), agree that principled negotiation can result in parties – who have different interests – working at developing mutually-satisfying outcomes. In the process of delivering a verdict regarding retributory damages magistrates do not have different interests, unless we begin to look at underlying, implicit motivations and biases that guide each magistrate's decision. Furthermore, important elements of a negotiation include negotiators' individual commitments, their BATNA (best alternative to a negotiated agreement), and even their relationship with each other (Fisher & Shapiro, p. 208). To varying degrees, these aspects of classical principled negotiation are not present in the context of magistrates deciding on compensation amounts related to moral damages caused by an accused. Magistrates are not serving their self-interests. They do not have a BATNA, and so it follows that they do not get to "walk away" from the situation if their interests are not met. They must derive a fair verdict.

It is not clear how committed Damasceno Morais is to the negotiation dialogue being present in the work of Brazilian magistrates. If it is important, then an account of how paradigm aspects of negotiation are integral in judges deliberating needs to be elucidated. For instance, it is arguable that magistrates may be concerned with preserving their relationship with each other, and that this is an important interest to secure rapport for a future of working with each other. Otherwise, in returning to Walton's dialogues, it seems that the summary of magistrates deciding on a verdict is more in line with a *Deliberation*. The purpose of a deliberation is for arguers to come together, discuss an issue, and resolve the issue. By the end of the process of deliberation, a decision as to the best action plan, or outcome, is made. The arguers are expected to articulate reasons for their positions, and in an effort to come to the best outcome, jointly agree on a solution. This is done in a fairly non-adversarial way, as the arguers are looking for the best solution, as opposed to a personally-satisfying solution.

There are some fundamental differences between a Deliberation and Negotiation that make the latter ineffective in the context of magistrates' duties. In negotiations the "truth" of the matter is not *that* important, and there can be an adversarial nature to the dialogue. Deliberations require the "truth" in order to make decisions/verdicts; deliberations are, typically, not adversarial. It seems that this latter description is more in line with what magistrates do. In 2009 I articulated how different types of emotional arguments occurred in various argumentative dialogues. To summarize, in a negotiation dialogue, it is possible that negotiators use emotion as a reason (Ben-Ze'ev 1995, Gilbert 1997), that negotiators express themselves emotionally (Gilbert), or that negotiators even elicit empathy or pity to strike a deal (Walton 1992). These are four different ways that emotion can lead to emotional reasoning in negotiation dialogues. In a deliberation, it is possible that emotions of arguers could prompt them to form an argument (i.e. emotion as a reason), and depending on how committed or attached negotiators are to the process and context, they may express themselves emotionally too. But otherwise, emotions are not obviously endemic to deliberative processes. And, yet, what Damasceno Morais shows is that there are threads of emotional reasoning in *deliberative* contexts. I may be pushing Damasceno Morais to consider a more contentious line of argument, but we can mostly agree that negotiators might very well use and show emotion in a negotiation. It is less "appropriate" for *deliberators* to use and show

emotion, and yet the author's analysis shows that emotional reasoning can occur in a seemingly objective, truth-seeking process.

3. Emotional Reasoning in the Absence of a Second and Third Magistrates

Regardless of the argumentative dialogue that best represents the process Brazilian magistrates undergo, the conception of emotional reasoning that Damasceno Morais describes applies to the process a single magistrate endures too. For instance, reason is subordinated to non-rational feelings when a magistrate simultaneously makes an effort to be rational about deciding on retributory damages and demonstrates compassion to the victim in this reasoning process (p. 6). This combination of rational and emotional reasoning can occur without the presence of the second and third judge. Damasceno Morais refers to Aristotle's notion that emotions, like pity, can lead us to change our judgements (p. 6). And, so, regardless of how many magistrates are present, I argue that even one judge is susceptible to being guided by their emotions. In keeping with Aristotle's views of emotion, in *De Anima* Aristotle states that having an emotion requires *thought* (Book II, 414). When we have an emotion, we have it because we are able to articulate a thought. A magistrate who feels empathy for a victim, for example, has intellectually processed the victim's situation. Considered in the manner Aristotle advances, emotion *is* infused with rationality.

I understand that Damasceno Morais discusses multi-magistrate circumstances in an effort to show that there is an act of *argumentation* that occurs in order for the magistrates to come to a decision. And, in this dialectical enterprise of argumentation (i.e. a negotiation for Damascene Morais), emotional reasoning is evident when the first magistrate justifies his/her view to two other magistrates. In this case, the magistrates are *having* an argument. Without the latter two magistrates though, the first judge can undergo the same reasoning process in *making* the argument. Not only is the emotional reasoning occurring in the context of an argument₂, it is also demonstrated in an argument₁ (O'Keefe).

4. Corroboration

I have mediated disputing parties in a Small Claims court setting (2007 to 2008). These parties do not attend court looking for mediation; it is a service that the courts recommend, as it is less antagonistic, parties have some control over outcomes, but most of all it lightens the load on the court system. More often than not, each party thinks they are in the "right," that they will "win" the case if given the opportunity to proceed in front of a judge, that "justice" would be served in their favour. This type of overconfidence bias was quite typical, as was the implicit trust in an "objective" court system. Because mediation was voluntary there were many parties who rejected mediation in a casual meeting room in favour of a courtroom with an all-knowing judge. The reality is that verdicts made by judges depend on more than the (often conflicting) testimonies the parties share in the courtroom. The particular judge, how the judge feels on a given day, how the judge responds to the attitudes of the parties involved, how the judge responds to whether the parties have representation, how the judge responds to whether the parties even tried to engage in mediation instead of taking up the court's time on the docket – all of these factors can weigh into a given judge's decision. This helps explain why some judges are more accepting of adjournments and others are not, why some suspend judgement to review notes and files after parties take the stand, while others make quick judgments based on parties' oral testimony only, etc. These intricacies and differences in different judges' decisions in a Small Claims Court are more

complicated and numerous than I have shared, but the point for my purposes is to demonstrate that a judge's decision is not always predictable. So, as Damasceno Morais posits, there are aspects of emotional reasoning that may influence judges' verdicts.

Damasceno Morais writes that legal reasoning is essentially argumentative. To some extent, this is obvious. That decisions and sentences can be appealed demonstrates that the outcomes of a judge's decision(s) are definitely up for debate. Perhaps because this is ultimately a normative process it is not ironclad, which connects with the notion of the *fallibility* of arguers. It is possible that a magistrate has rendered a wrong verdict, an unduly harsh sentence or even unfair punitive measure(s). Legal reasoning, a combination of logical and emotional reasoning, can be assessed when it seems weak.

It is safe to agree that we are not all uniform beings, and we may react differently to the same events. A challenging task for judges, I think, is to discern when appellants/subjects/defendants are being sincere in describing psychological, emotional, or mental suffering. I suggest that a deeper awareness of *Emotional Intelligence* could be key to cracking the code of ambiguity when it comes to these types of public domains. Rational reasoning helps with more descriptive processes (the car is rendered irrecoverable from the crash; the defendant legally owns the gun in question, etc.). There is, presumably, no bias inherent in making these types of descriptive claims. Deciding on punishments is interpretive though, and so being more practiced and in tune with emotional reasoning - in many cultures - could help with the normative analysis and practical responses to magistrates' decisions.

5. A Stronger Application

Damasceno Morais adheres to the following definition of negotiation: "the moment that one judge, during the deliberation, refuses the 'offer' suggested by another magistrate" (p. 3). The court transcript that is analyzed in "Emotional legal arguments and a broken leg" does not contain magistrates who disagree with each other. To the contrary, the second and third magistrates are amenable to the financial amount that the first judge suggests the accused be charged with. It seems to me that an example where there is dissensus, and the judges really have to work out their differences, this context could elicit a much richer analysis where emotional reasoning could be present. As I stated at the outset though, regardless of these quibbles I think Damasceno Morais has successfully demonstrated that emotional and rational reasoning simultaneously occur within juridical deliberations.

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