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Reply to commentary on 'Emotional legal arguments and a broken leg'

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1. Bias, argumentation and objectivity

The 11 OSSA proposed papers to discuss different kinds of bias in argumentation domain. For this reason, we proposed a short case study that shows, in a polylogical perspective, magistrates making unanimous decision based in subjective criteria, beyond strictly legal arguments. In The broken leg case, in which we analyze argumentation in legal context, effectively the most important aspect to point out is the implicit motivations and *biases* that inspired the group of magistrates (that is, the collective *ethos*) in the moment of finding the amount to be payed as moral damage.

Thereby, showing that a deliberation presents "slices of negotiation", when judges need to evaluate ways to refund moral damages in a kind of non-strictly logic calculation, was just a way to describe that context of judgment in a specific Brazilian Court, even if that was not the most relevant point of analysis in that discourse-in-interaction presented. In reality, we did intend to focus on the subjective aspect of the polylogical interaction, as a way to demonstrate that "not all bias is bad bias" (Walton 1992, p. 257); on the contrary, that is even normal, as assert jurists like Atienza (1997; 2003), Perelman (1999), Cornu (2005) and Ghirardi (1999).

This way, the technical subtleties between *deliberation*'s and *negotiation*'s concept, when magistrates try to use their mathematic skills in a dialectic and dialogical way in the moments that they tried to find the more reasonable amount (*suum cuique tribuere*) to compensate a moral damage, do really not belonged to the inner scope of the presented paper. That is due to the fact that, in the brief presentation of the extracted *data,* we just wanted to point out that in a legal domain it is not unusual the intertwining of technical and value arguments, where the subjectivity plays a prominent role, defeating the mythical legal objectivity, as we will try to reinforce here.

2. Negotiation is embedded in deliberation

As Posner says (2008, p. 85), "judgement is a matter of deliberation - not necessarily collective." In that way, 'The broken leg case' tried to describe the moment that magistrates deliberate to define the amount to be paid (*pretium doloris*) by one of the parts of a legal process (defendant or plaintiff). In that context, we considered deliberation a diversified genre of interactional activity in which magistrates are motivated to critically examine if a fact would or not be considered a moral damage.

The analysis of "TRIBUNAL corpus" allowed us to recognize important characteristics of moral damage´s judgements, in some Brazilian courts. In that way, the moment that

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magistrates dialogue to decide the appropriate amount to each case was described as a kind of 'bargain', simply because in that moment of deliberations they must decide the most appropriate offer to the case under consideration. Even if in the analyzed case magistrates effectively do *not* serve their *self*-interests or look for a personal satisfying solution, they are serving the Justice's interests, personified in the plaintiff and the defendant's proceedings.

Moreover, why would we not negotiate/bargain in name of others, without seeking particular interests? In this moment, I wonder about members of stock exchanges bargaining the best indicators for example. In this kind of situation, stockbrokers do not negotiate in their own names, but in the name of the enterprise that they represent. In this sense, The broken leg case showed magistrates trying to strike a *good deal* in the name of the Justice, in the very specific moment of the definition/evaluation of the amount to be payed as a moral damage. That kind of magistrate's action is what we recognized as *a kind of* negotiation.

This way, although negotiation is embedded in deliberation, in the second step of judgements about moral damage (the first step is to decide if an action would be considered a licit act or a moral damage), in the paper we had not the aim to deeply discuss that dichotomy (negotiation *versus* deliberation). Moreover, "since negotiation and deliberation share important features – both are collective decision-making procedures centered on the practical question 'what to do' – they can be easily confused during the process of analyzing actual fragments of discourse" (Ihnen, p. 598). Probably this overlap of characteristics between 'deliberation' and 'negotiation' has led Ms Carozza to ask for clarification about the difference between these terms, what seems reasonable, even if that was not the objective of our proposition.

In the domain of ethnometodological studies, territory from where our work took some theoretical contributions, analysts of polylogal interactions are prudent to define precisely what a negotiation is. In Kerbrat-Orecchionni's work (2002; 2011), for example, we see that, in the domain of *discours-in-interaction,* the notion of *negotiation* may be very polemical sometimes. In this way, and to sum up, in our analysis, we called "negotiation" moments that judges speak openly about money, amounts (*pretium doloris*), trying to establish criteria to define prices (the called *suum cuique tribuere*), accepting or refusing "offers" suggested by another magistrate, during deliberations. Although magistrates do not make personal deals or defend self-interests, in the sense used in Walton's dialogues or classical principled negotiation, the case presented shows a moment of negotiation embedded in deliberation, in the sense we that just tried to elucidate.

3. Emotional reasoning in unanimous decision

It is clear that the kind of reflection made by magistrates in the moment to find the criteria to justify the amount to be payed ("°*it is reasonable*/°"/l. 30-32) would be applied to a group of magistrates or a single one. The combination of rational and emotional reasoning can occur easily without the presence of the second and third judge, as Ms Carozza perfectly argues. We did not intend to show the contrary.

In fact, what we proposed to stress in the analysis presented is that in a deliberative model, the participation of all members of the Court in every case is important not only because the magistrates are assumed in that model to be open to persuasion, but also because each may be able to contribute to "making the opinion in even a unanimous decision *the best that it can be"* (Posner, p. 303).

Thus, we tried to demonstrate that the exteriorization of the *foro interno* allows the group of magistrates share biases that strengthen the *collective ethos* (Amossy, p. 160). In that way, the choice of the criterion to measure the amount to be paid as a moral damage in that specific case indicates a connection between external and self-deliberation.

When the three members choose the same subjective criterion to evaluate a moral damage, that demonstrates a collective bias. In that case, unanimity is a remarkable way to making a decision *the best that it can b*e, in addition to be a strong way to make justice voice speak louder.

4. Sentiments and other kinds of justice

The most important point in the paper presented was to demonstrate how difficult would be to magistrates to have a list of amounts to help them to find criteria to define monetary values to diverse degrees of moral damages. The very moment in which judges deliberate about the criterion to be used in The broken leg case based in the intensity of the guard's physical pain is a subjective way to judge (*''=°it was only the leg\ poo:r man he: had a violent pain\ you see when he was atta-cked – but you know\''°* /l. 33-35). This excerpt illustrates that, in judging, magistrates may not talk about truth, but about sentiments, sensations, emotions and other kind of *bias*.

The difficult to value the amount of a moral damage oblige magistrates to find criteria not completely objective. Nevertheless, as we have already seen, *not all bias is bad bias*. This way, the case showed that some aspects of law and legal reasoning would not be reduced to the interpretation of codes, decrees, regulations or statutes. In fact, in some aspects, the juridical domain is simply the result of human invention, where laws exist to help people to achieve social goals that go beyond strict law.

To conclude, a stronger analysis of disagreement in the moments of "bargain" and "negotiation" in that kind of judgement is examined in the work *Le prix de la douleur: Gestion des désaccords entre magistrats, dans un tribunal brésilien de seconde instance*/2013, a PhD thesis defended in France, in Université Lumière Lyon 2.

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