

SENTI ALTERAM PARTEM:
RIGHTS, INTERESTS, PASSIONS, AND
EMOTIONS IN JUDICIAL MEDIATION

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ABSTRACT

Judicial mediators should pay attention to, and work with, passions and emotions as well as rights and interests, for both principled and practical reasons. In principle passions and emotions are inextricably linked to law; they are not incompatible phenomena as is commonly assumed. Practically speaking, passions and emotions are powerful motivating forces which judicial mediators may enlist to facilitate understanding and accommodation between the parties.

This paper advocates a holistic view of rights, interests, passions and emotions based on the view that rights and obligations in public law overlap significantly with social morality which has an emotional foundation. Correspondingly, private law reflects the interests of influential sectors of society; such interests are also underpinned by passions and emotions. Indeed, this paper argues that integrating emotions and passions into the practice of judicial mediation is essential in order to properly acknowledge the parties' claims and to help them advance their interests.

Exploring passions and emotions in judicial mediation is also useful as a technique which may help to build understanding, trust, and cooperation amongst the parties thus resulting in better substantive solutions.

Keywords: mediation; emotion; interests; passions; judges

RÉSUMÉ

Au cours des procédures de médiations, les médiateurs judiciaires doivent prendre en considération les passions et les émotions sous-jacentes des particuliers, veiller aux «droits» et «intérêts» des parties en cause, et agir en conséquence, et cela par principe aussi bien que pour des raisons pratiques. En fait il existe un lien étroit et indissociable entre le domaine du droit et les émotions qu'il suscite et nous reconnaissons que ces deux éléments vont souvent de pair. Les médiateurs judiciaires peuvent axer leurs procédures sur des forces émotives puissantes (comme la passion et l'émotion), ce qui leur permettra d'obtenir une bonne entente entre les parties adversaires et des résultats bien concrets.

Dans cet exposé, nous préconisons une approche globale et holistique concernant les droits, les intérêts, les passions et les émotions des parties adversaires. Cette approche correspond à la notion que les droits et les obligations dans le droit public sont étroitement liés à une moralité de groupe qui, elle, est fondée sur des bases émotionnelles. Quant au droit privé, il s'assure de l'intérêt des secteurs importants dans la société, un intérêt qui est soutenu par les émotions et les passions des particuliers. Nous tenons à démontrer, dans cet exposé, que l'intégration de ces deux critères (passions et émotions) dans les procédures de médiation aide à reconnaître les revendications des parties opposantes et à promouvoir leurs intérêts.

L'examen des passions et des émotions dans les procédures de médiation pourrait donc s'avérer un outil très important. Il s'agit d'une technique qui encourage la compréhension, la confiance et la coopération entre les parties opposantes, assurant ainsi une meilleure solution aux problèmes encourus par les deux parties qui s'affrontent.

Mots-clés : Médiation, émotion, intérêts, passions, juges

INTRODUCTION

Senti alteram partem: “feel for the other party” is an unusual variation of the familiar injunction *audi alteram partem* for those who seek to do justice. I use the new phrase here to emphasize the importance of attending to, and working with, litigants’ emotions, particularly in the context of judicial mediation. To feel for a party is to seek to understand and appreciate the person not only for the thoughts he or she expresses but also for the emotions they are experiencing.

This paper is an attempt to explain why emotions are important for law, justice, and judicial practice. What has been called the “affective turn” in recent research and scholarship has drawn attention to the role of emotions in guiding human behaviour and some of that knowledge has been applied to law. Maroney has formulated a working taxonomy of law and emotions scholarship that helps to clarify the scope of the topic to be discussed here.¹ The taxonomy identifies six distinct, although related, topical areas that may be addressed in the nexus of law and emotion. My focus here will be principally on one of them: the “emotion-centered” approach which entails inquiry into how emotions become reflected in law. My thesis is that to the extent emotions do become so reflected they represent a potential resource for use in legal dispute resolution that should not be ignored.

At this point it may be helpful to state what this paper is not about. The bulk of scientific work in the field of law and emotions has: (1) explored the influence of emotion on the behaviour of legal decision makers or other legal actors (what Maroney calls the “legal actor approach”);² (2) considered the impact of emotions on theories of rationality and choice embedded in the legal system (“theory of law approaches” in Maroney’s taxonomy);³ or, (3) considered how emotions are treated as an explicit subject matter of law (Maroney’s “legal doctrine

1. Maroney (2006).

2. See for instance Schwarz (2000); Wiener *et al.* (2006); Feigenson & Park (2006); Blanchette & Richards (2010); and Angie *et al.* (2011).

3. This area is largely the province of behavioural economics research. See for instance Loewenstein (2000); Elster (2006); and Rick & Loewenstein (2007).