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Tragic Cases: No correct answer?

An approach according to the Legal Philosophy of Robert Alexy[1]

ABSTRACT: The aim of the current article is to analyze the concept of tragic cases and its different implications based on Manuel Atienza, one of the jurists who specially addressed the issue, and on Robert Alexy, whose work is one of the main references in contemporary Legal Philosophy. According to parameters exposed by Alexy (correctness, rationality, legal argumentation, human rights), some of Atienza's central assertions about tragic cases (lack of correct answer, legal rationality limitation, option for the lesser evil) are herein demonstrated as inadmissible. Based on Alexy's work, it is possible to justify the opposite conclusion about tragic cases, i. e., cases where there is more than one correct answer and these answers are opposed to each other.
Keywords: Tragic cases, Theory of legal argumentation, Claim to correctness, Rationality, Democratic Legal State
Schlagworte: Tragische Fälle, Theorie juristischer Argumentation, Richtigkeitsanspruch, Rationalität, demokratischer Rechtsstaat

I. Democratic States and Hard Cases

Most *factual situations* socially understood as relevant in today's Democratic Legal State are based on statutes (civil law) and precedents (common law). One consequence of such broad social reality regulation lies on the usually immeditate identification of the *answer* to concrete cases in positive law (statutes and precedents). According to the classic common law terminology, these are the so-called *easy cases*.

However, due to both the plurality of social reality and its dynamicity, it is not uncommon that answers to some situations are not immediately found in positive law, regardless of its broadness. These are the so-called *hard cases*. According to Ronald Dworkin, hard cases are those "in which the result is not clearly dictated by statute or precedent".[2]

The more democratic the State, the more active its judicial power; once the case is brought before court, the judge is obliged to judge it, due to non-obviation of ju-

1 The basis of this article were discussed during the *XXVIII World Congress of the IVR – Internationale Vereinigung für Rechts- und Sozial philosophie*, in the presentation entitled *Hard Cases, Rationality and the Transformation of the Legal Order* by the author in the special workshop *Hard and Tragic Cases, Principles and the Limits of Law*, which was coordinated by professors Manuel Atienza (University of Alicante) and José Manuel A. Linhares (University of Coimbra).

2 Ronald Dworkin, Hard Cases, *Harvard Law Review* 88, 6 (1975), 1057–1109, 1057

risdiction and to *non liquet* prohibition. However, the judge's decision must be based on *reasons* rather than on his/her subjective concepts, under penalty of arbitrariness or decisionism.

Thus, the vital role played by *rationality* in the legal discourse becomes clear. Legal argumentation theories are essential to this field, since Law is discursively formulated through statutes and precedents, as well as argumentatively applied to judicial decisions. Robert Alexy and Neil MacCormick stand out among authors who presented legal argumentation theories of great expression and international repercussion, despite the contribution from several authors to the theme, such as Perelman, Toulmin, Aarnio and Peczenik.[3]

The current article focuses on the theory by Robert Alexy, whose book *A Theory of Legal Argumentation* presents *legal discourse* as a *special case* of general practical discourse. Both discourses (i) deal with *practical* issues concerning what should be done or avoided and (ii) raise the *claim to correctness*, i. e., participants want their *propositions* to be *correct* and ground their discourse accordingly.

Nevertheless, unlike general practical discourse, legal discourse is composed of *institutionalized arguments*, i. e., orders, prohibitions and permissions set by the State. Such arguments are also called *authoritative reasons*, since they come from the state body in charge of creating them – legislative power in civil law, and judicial power in common law. *Institutionalized arguments* may:

1) not be *clear* enough;
2) *conflict* with each other;
3) be *incomplete* or *not expressed* in positive law.

Solutions to these hypotheses are, respectively:

1) the appeal to *hermeneutical methods* able to help clarifying and understanding positive law;
2) in case of *rules*, the logical criteria (chronological, specialty and hierarchical) should be used to solve antinomies, whereas the *principle of proportionality* should be used in case of *principles*;
3) it is a *legal gap*, which must be filled with *authoritative reasons* (in the case of analogy, where statutes are applied to non-regulated cases) and/or *non-authoritative ones* (moral, ethics and pragmatic reasons, according to Jürgen Habermas).[4]

Neither of these situations depict an easy case; however, the typical hard case is evidenced in option (3) when there is lack of institutionalized arguments for decision making. Legal decisions must be argumentatively justified, and arguments are based

3 See Chaïm Perelman; Lucie Olbrechts-Tyteca, *The new rhetoric – A treatise on argumentation*, Notre Dame: Notre Dame Press, 1969; Stephen E. Toulmin, *The uses of argument*, Cambridge, 1958; Aulis Aarnio, *The rational as reasonable: a treatise on legal justification*, Belin: Springer, 1987; Aleksander Peczenik, *On law and reason*, Dordrecht-Boston-London: Kluwer Academic Publishers, 1989.

4 These reasons are presented by Jürgen Habermas in his book *Between Facts and Norms* and will be addressed, in details, in item II.III below.

on reasons (otherwise, they are not arguments, but mere statements); thus, the more grounded the legal discourse, the more rational it is. In other words, the *rationality* of discourse is intrinsically related to its *justifiability*.

II. Tragic Cases

If hard cases demand high argumentative burden – in order to solve ambiguities, antinomies or mainly legal gaps –, such burden is also required by the so-called *tragic cases*.

According to Manuel Atienza, tragic cases are those whose solution sacrifice some essential element of a value considered fundamental from a legal and/or moral point of view. Therefore, one would not be faced with different alternatives, but with a dilemma.[5]

If one frames tragic cases in the structure of Robert Alexy's thought, these cases always present a principiological collision, since the core values of a legal system are based on principles, mainly on constitutional principles such as the fundamental principles, which address fundamental rights.

Any decision related to tragic cases implies serious detriment to or sacrifice of the deprived principle in the process of solving these collisions; according to the *law of balancing* – "the greater the degree of non-satisfaction of, or detriment to, one principle, the greater the importance of satisfying the other".[6]

Tragic cases are the classic example of a *stalemate* in the alexyan *weight formula*[7], since both colliding principles have *high abstract weight* (both are fundamental principles), hence the *utmost importance of their satisfaction* – the more important the compliance with a principle, the stronger *the detriment to* the opposite principle.

Despite the similarities in Atienza and Alexy's approaches to tragic cases, the systemic analysis of the alexyan thought shows crucial divergences from the conclusions presented by Atienza – one of the jurists who has mostly studied this subject.

Atienza draws three conclusions, which are directly interrelated and interdependently exposed in his approach to tragic cases[8]. According to the Spanish author, when it comes to tragic cases:

1) *there is no correct answer*;
2) there is a *limitation of legal rationality*;
3) since there is no correct answer, one makes the option for the *lesser evil*.

5 Manuel Atienza, *As razões do Direito – Teorias da argumentação jurídica* [*The reasons of the Law – Theories of legal argumentation*], São Paulo: Landy, 2003, 131, 226; Manuel Atienza, Los limites de La interpretación constitucional – De nuevo sobre los casos trágicos [*The limits of constitutional interpretation – Once again about tragic cases*], *Isonomía* 6 (1997), 07–30, 19.

6 Robert Alexy, *A theory of constitutional rights*, Trans. J. Rivers, Oxford: Oxford Press, 2002, 102

7 See Robert Alexy, The weight formula, in: *Studies in the Philosophy of Law: frontiers of the economic analysis of law*, ed. Jerzy Stelmaech *et al.*, Krakow: Jagiellonian University Press, 2007, 09–27.

8 Atienza, Los limites de la interpretación constitucional, (footnote 5), 08, 13, 26

Atienza justifies conclusion (1) by saying that the legal system does not offer a correct answer to tragic cases, because there is no way to find a solution that does not sacrifice a fundamental value. This would lead to an "internal contradiction" in the legal system, thus making it impossible for the judge to make decisions without violating the system.[9]

He adds conclusion (2) by stating that the existence of tragic cases themselves would be a limitation of legal rationality, since there is no reason in the legal system able to solve these cases. The judge would then have to resort to *reasonable* criteria, i. e., to criteria located between *strict rationality* and pure and simple *arbitrariness.*[10]

He ends up coming to conclusion (3) and emphasizes that the limitation of legal rationality in tragic cases does not mean, however, the "total loss" of rational control in the decision-making process. The lack of answers that can be qualified as correct or good does not mean that all possible alternatives are comparable, since the lack of a "good answer" does not imply the impossibility of identifying worse and better answers. Therefore, according to Atienza, what should be done in such situations "is sincerely opting for the lesser evil".[11]

However, all three conclusions are not applicable to alexyan thought, as demonstrated below.

II.I Correctness

With respect to conclusion (1), it is known that, unlike Dworkin, Alexy does not accept the thesis of one single correct answer in the legal discourse. If legal argumentation is developed within the broad scope of what is *discursively possible* – i. e., between what is discursively necessary and what is discursively impossible –, the possibility of having more than one correct answer in the legal discourse is plausible and permanent. However, the pivotal point is that the *given answer* must be correct, no matter whether the case is easy, hard or tragic.[12]

Answer correctness is measured by the decision *justification*. In other words, the correctness criterion lies on the *reasons* justifying the decision. If the decision is grounded, it is correct. The point is that every judicial decision must be grounded, under penalty of arbitrariness.

There is no doubt that both the *quality* and *extent* of legal reasoning may vary; after all, reasoning may be better or worse (quality), as well as greater or lesser (extent). Two of the legal argumentation rules developed by Alexy can influence the quality and extent of justification in legal discourse, although they are directly related to the *formal*

9 Ibid., 15, 19
10 Ibid., 08, 26
11 Ibid., 25–26
12 Robert Alexy, *A Theory of Legal Argumentation – The theory of rational discourse as theory of legal justification*, Trans. R. Adler and N. MacCormick, Oxford: Oxford University Press, 2010, 179

structure of the logical inference of premises in the so-called *internal justification* (legal syllogism):

> "(J.2.4) The number of decompositional steps required, is that number which makes possible the use of expressions whose application to a given case admits of no further dispute";
> "(J.2.5) As many decompositional steps as possible should be articulated".[13]

Rule J.2.4 influences the quality of legal argumentation insofar as the greater the *logical relevance* of the expressions used to ground its premises, the better (clearer and more organized) the legal argumentation. This logical relevance is presented throughout legal argumentation; the better it is presented, the broader the consensus (or the lesser the dispute) about it. Therefore, according to rule J.2.5, as many steps as necessary (or possible) must be taken throughout legal reasoning. In other words, reasoning must be as extensive as possible.

As it was pointed out, these two rules concern the form, the structure of legal argumentation. The correctness of the *content* of legal discourse premises is verified in what Alexy calls *external justification*. As the scope of what is discursively possible is very broad, legal argumentation premises may be of quite different types. Alexy distinguishes them in (1) positive law rules; (2) empirical statements; and (3) premises that are neither empirical statements nor positive law rules. The methods to justify each type of premise are different. Concerning positive law rules, there must be the demonstration of their compliance with the criteria of validity of the legal system. In relation to the empirical premises, there are several ways of justifying, e. g., the methods of empirical sciences, the maxims of rational presumption and the rules of burden-of-proof in lawsuits. Regarding premises that are neither empirical statements nor positive law rules, the rules of legal argumentation are applicable. Alexy develops six sets of external justification rules and forms, taking into account the diversity of the possible premises in legal discourse,: rules and forms of (1) *interpretation*; (2) *dogmatic* argumentation; (3) use of *precedents*; (4) *general practical* reasoning; (5) *empirical* reasoning; (6) the so-called *special legal argument* forms, such as analogy, *argumentum a contrario, argumentum a fortiori, argumentum ad absurdum*.[14]

The thematic approach of the current article does not allow analyzing, in details, the development of the forms and rules of judicial decisions internal and external justification. What is herein relevant to be known is that decision correctness lies on its justification, and that there are many criteria for the assessment of the rational quality of the justification in legal discourse.

It is worth emphasizing that the answer, although correct, is not necessarily *definitive* – like every answer, due to science *fallibility* or *falsifiability*.[15] However, a correct answer can only be disproved if better reasons justify another decision as the best argument. Consequently, not only consensus is justified, but dissention as well. In other

13 Ibid., 300
14 Ibid., 221–286
15 See Thomas Kuhn, *The structure of scientific revolutions*, Chicago: University of Chicago Press, 1970.

words, both affirmation and refutation of arguments are linked to the notions of correctness and rationality.

It is also worth emphasizing that Atienza equates the lack of a correct answer in tragic cases (i) with an "internal contradiction" in the legal system, (ii) which would lead the judge to violate such system. Again, neither assertion applies to tragic cases according to alexyan thought, since (i) neither the *principiological collision* is an *internal contradiction*, (ii) nor, much less, does the *solution* of this collision happens through the *violation* of legal system.

Collisions are absolutely recurrent in principiological terms, mainly in the case of fundamental rights. If *open texture* is characteristic of legal norms, *constitutional* norms are those whose text is especially indeterminate and inaccurate. Among constitutional norms, principles that declare *fundamental rights* are markedly the vaguest ones, due to both the amplitude of their phatic support and the high weight of the protected value. Solving these principiological collisions without violating the legal system is not only possible, but due. Judicial decisions are based on *balancing* principles of a specific legal system.[16]

II.II Rationality

With respect to conclusion (2), it is necessary to clarify that "*reasonable* criteria" are applied not only to tragic cases, but *reasonableness* is the expression of *rationality* in *all* practical discourses, of which legal discourse is an example, as a special case of the general practical discourse. Alexy uses the expression *practical rationality* rather than reasonableness, because any legal discourse – whether it concerns an easy, hard or tragic case – is based on reasonableness or practical rationality. The (practical) rationality is neither greater nor lesser in tragic cases.

Based on Kant[17], Alexy explains that the difference between the reasonable and the rational lies on the *moral* dimension of the first term. The reasonable, in the sphere of practical rationality regarding human actions, is related to the categorical imperative; whereas the rational, in the sphere of theoretical rationality referring to empirical reality, is related to the hypothetical imperative.

Rationality is based on three criteria, namely: *logical correctness*, which is guided by the concept of *coherence*; *means-ends* ordering, which is guided by the concept of *efficiency*; and *empirical truth* or reliability, which is guided by the concept of *generalizability*. *Reasonableness*, in turn, comprises rationality criteria, as well as the *valuation* criterion – values of what is *correct* and *good* (i. e., the values *Correctness* and *Good*).[18]

16 The solution will be given by the application of the principle of proportionality by weighting colliding principles (after the analysis applied to the adequacy and necessity of the means used in the concrete case).

17 See Immanuel Kant, *Groundwork of the Metaphysic of Morals*, Trans. H. J.Paton, New York: Harper & Row, 1964.

18 Robert Alexy, The reasonableness of law. in: Giorgio Bongiovanni *et al* (org.), *Reasonableness and Law*, Dordrecht-Heidelberg-London-New York: Springer, 2009, 05–15, 06

Thus, the reasonable holds moral elements, whereas the rational does not. Or, as von Wright taught, "the reasonable is, of course, also rational – but the 'merely rational' is not always reasonable".[19]

Practical rationality, which relates to the *content* of legal discourse, is added to *discursive* rationality, which refers to the way the discourse is conducted, i. e., to how speakers should act so that their discourse is rational. The answer of a rational discourse is formally correct. For a discourse to be rational, the legal argumentation rules must be complied with. Examples of legal argumentation rules are the *rationality rules*, which determine *discursive equality*[20] and *freedom*[21]; the *basic rules* such as non-contradiction[22], sincerity[23], consistency[24]; the *justification rules* such as role exchange[25], realizability[26], openness[27]; and the *internal justification rules* such as saturation of arguments and other regulative parameters of legal reasoning[28].

Thus, there is no doubt that rationality criteria in the legal discourse – whether it concerns an easy, hard or tragic case – are different from rationality criteria in the empirical discourse of natural sciences. However, *difference of* rationality criteria does not mean *decrease* or (even less) *lack* of rationality. On the contrary, the practical rationality of legal discourse not only does not exclude, but rather encompasses the rationality criteria of empirical discourse and adds valuation criteria to them. Added to the criteria of both rationality dimensions, there are the rules that direct discourse rationality.

Therefore, there are several rationality criteria. The *argumentative burden* necessary to make a decision may vary and will certainly be lighter in *easy cases* (whose answer is immediately found in positive law), as well as heavier in both *hard* (in which it is necessary to solve ambiguities, antinomies, or legal gaps in positive law) and *tragic cases* (in

19 Georg Henrik von Wright, Images of science and forms of rationality, in Georg Henrik von Wright, *The tree of knowledge and other essays*, Leiden: Brill, 1993, 172–192, 173

20 (2.1) Everyone who can speak may take part in the discourse.

21 (2.2) (a) Everyone may problematize any assertion.
(b) Everyone may introduce any assertion into the discourse.
(c) Everyone may express his or her attitudes, wishes, and needs.

22 (1.1) No speaker may contradict him or herself.

23 (1.2) Every speaker may only assert what he or she actually believes.

24 (1.3) Every speaker who applies a predicate F to an object *a* must be prepared to apply F to every other object which is like *a* in all relevant respects.
(1.4) Different speakers may not use the same expression with different meanings.

25 (5.1.1) Everyone who makes a normative statement that presupposes a rule with certain consequences for the satisfaction of the interests of other persons must be able to accept these consequences even in the hypothetical situation where he or she is in the position of those persons.

26 (5.3) The actually given limits of realizability are to be taken into account.

27 (5.1.3) Every rule must be openly and universally teachable.

28 Alexy clarifies that, for the discourse to be rational, it is not necessary complying with *all* legal argumentation rules (quantity), nor *fully* complying with them (quality), since there are rules that only allow an approximate compliance. Therefore, the concept of discourse rule violation must be set in a different way according to the diverse nature of different rules. In principle, it is always possible determining whether there is (or not) violation in the case of non-ideal rules such as non-contradiction. On the other hand, ideal rules such as universality of participation and universality of agreement are only complied with in an approximate way. See Alexy (footnote 12), 207, footnote 88.

which, despite the given answer, there is serious detriment to or sacrifice of a fundamental principle). However, the point is that answers are argumentatively obtained – i. e., by reasoning developed in the number of steps necessary to allow the used expressions to be indisputable – and these answers are correct, because they are not arbitrarily released, but validly demonstrated.

II.III The lesser evil

Finally, prominent issues are involved in Atienza's conclusion (3), according to which what is done in tragic cases is "making the option for the lesser evil" rather than for the correct answer.

The first issue is that Atienza states that this "option for the lesser evil" results from the limitation of legal rationality, although such limitation does not mean "total loss" of legal rationality – after all, even if there is no correct answer, there are worse and better answers. The question that immediately arises is: what is the "minimum rationality degree" required to avoid arbitrariness? In other words: what is the limit allowed to rationality limitation?

Allowing a little "loss" of rationality without missing "everything", means admitting a legal uncertainty degree incompatible with Law. For this purpose, Legal State created positive law in the eighteenth century. Acknowledging the difficulty in making a decision due to ambiguity, antinomy or legal gap, or acknowledging the tragic aspect of the legal decision due to the sacrifice of a fundamental principle, *does not mean* admitting that this decision may be irrational or "a little" irrational. It does mean the demand for heavier *argumentative burden*, fact that increases the difficulty in rational reasoning. However, *difficulty* is not synonymous with *impossibility* of rational treatment of the case and rationality is *always* due.

The second issue to be highlighted refers to Atienza's conclusion that the legal decision in tragic cases is not good, but the best of the possible ones. The point is that *good* answers do not mean *correct* answers. Saying that an answer is "good", "better" or "worse" than another one has no relation with identifying an answer as "correct" or not. *Good* is not synonymous with *correctness*. Qualifying a decision as good or bad means applying a *value judgment* (according to the *good* criterion) to a proposition, which enunciates a *duty judgment* according to positive law (according to the *correctness* criterion).

Judicial decisions must be *correct*, but may not be *good*. They are correct, if based on objective criteria (first of all, *positive law* – judicial decisions must be in accordance with positive law, which is the elementary institutional argument of legal discourse). However, judging an answer as good or bad depends on society's *moral values*. These values are in the sphere of *general practical* discourse. The first consequence of this situation lies on the greater openness to *dissent* in understanding a decision as good or bad. If, in the legal discourse, which has institutionalized arguments as content, there is not a single correct answer, far less there is a single correct answer in the general practical discourse, which is formed by non-institutionalized arguments.

Non-institutionalized arguments of general practical discourse are composed of non-authoritative reasons, which are classified by Habermas[29] as *pragmatic*, *ethical*, or *moral*:

1) *Pragmatic* reasons are related to the option for techniques and strategies mainly based on the *utility* or *efficiency* criterion. They are related to the search of appropriate means to meet interests, preferences and certain *ends*;
2) *Ethical* reasons arise when discourse participants seek clarity about their *way of life* and about the *ideals* guiding their *common life projects*. Therefore, ethical decisions result from the *cultural and political self-understanding of a community*. They relate to traditions, reflect the identity of a specific society, and go beyond subjective ends based on a "good for us" behavior;
3) *Moral* reasons are raised when discourse participants seek to identify not only what is "good for us" (criterion of *good*), but what is equally good "for all" (criterion of *correctness* or *due*). The content of moral rules could be accepted by everyone as corresponding to the interests of all (universality). According to Maeve Cooke, a rule is only accepted for moral reasons when it gives equal attention to the interests of anyone affected by it.[30]

There is an integration between institutionalized and non-institutionalized arguments in legal discourse. Thus, it is possible using distinct reasons to justify concrete cases:

1) *Easy cases* – mostly solved based on authoritative reasons (positive law);
2) *Hard cases* – institutionalized arguments have their legal gap filled with authoritative (analogy) and non-authoritative (general practical discourse) reasons, which may also be used to clarify ambiguities in institutionalized arguments or to solve antinomies between them;
3) *Tragic cases* – authoritative and non-authoritative reasons are used to justify which of the correct answers should prevail.[31]

III. "Abundance" of correct answers

In fact, according to the parameters set by Robert Alexy in his theory of legal argumentation, tragic cases would be an example not of "lack" of correct answers, but, rather, of their "abundance".

29 Jürgen Habermas, *Between Facts and Norms – Contributions to a discourse theory of law and democracy*, Trans. William Rehg, Cambrige: MIT Press, 1996, 151–168

30 Maeve Cooke, Law's Claim to Correctness, in: George Pavlakos (ed.), *Law, Rights and Discourse – The legal philosophy of Robert Alexy*, Oxford: Hart Publishing, 2007, 225–247, 236

31 In addition to these cases, there is also the possibility of *contra legem* decisions. In compliance with the formal principles of *legal certainty* and *legality*, institutional arguments are binding and must prevail, unless *moral*, *ethical* and *pragmatic* reasons attribute stronger importance to non-institutional arguments. Thus, *contra legem* decisions are exceptional cases where non-authoritative reasons outweigh the authoritative ones. Since authoritative reasons are the primary source of law, the argumentative burden in *contra legem* decisions is the highest one in sphere of legal reasoning.

This is because there is a collision between fundamental principles in tragic cases, wherein there is serious detriment to or sacrifice of one principle. Fundamental principles are constitutional norms, i. e., norms that form the positive law. Therefore, answers to tragic cases are rather found mainly in positive law. Thus, the decisions made in tragic cases not only do not violate the system, but are justified by institutionalized arguments.

The decision is made either based on a principle, or on the opposite colliding one, and both decisions are grounded on institutionalized arguments. In other words, tragic cases not only present correct answers (i. e., justified answers), but there are *two* correct (justifiable) answers and they are *opposite one another*. This is the tragedy of the case.

IV. Law, Democratic State – Criticism

Lastly, the assertion that the answer given to the concrete case – whether it is an easy, hard or tragic case – must be correct is definitely not an overvaluation of the law of Democratic States as "the best of the legally imaginable worlds", as Atienza stated in his book *As razões do Direito [The reasons of the Law]*.[32]

The assertion that the judicial decision must be correct (although there is not a single correct answer in the legal discourse) does not result from an anachronistic exegetical belief in the perfection of positive law or in its completeness. It is simply a matter of primacy to *legal certainty* and protection to *democratic legitimacy* rather than voluntarist subjectivism or authoritarian decisionism.

Asserting that the answer must be correct means only requiring what is elementary for its *controllability*: the decision must be *justified by arguments* based on *objective* criteria. In legal discourse, the objectification of parameters begins with the *institutionalization* of arguments into statutes and precedents. Positive law is the first objective parameter legal decision must be based on. However, *objectivity* of positive law does not mean *exclusivity* of positive law as the content of legal discourse. Legal discourse is not a "different" case of general practical discourse, but a *special case* of such discourse. A necessary corollary of this assertion lies on the fact that, although institutionalized arguments have, *prima facie*, heavier weight in legal argumentation, general practical arguments are not excluded from it, since legal discourse is a *special case* of general practical discourse. Actually, general practical arguments and legal arguments complete one another. It is precisely this that Alexy explains with the adoption of the *thesis of integration* between legal argumentation and general practical argumentation, according to which "specifically legal arguments and general practical arguments should be combined at all levels and applied jointly".[33] He further states that "general practical reasoning forms the basis of legal reasoning".[34]

32 Atienza, *As razões do Direito* [*The reasons of the Law*], (footnote 5), 225–226
33 Alexy (footnote 12), 20
34 Ibid., 287

Atienza criticizes Alexy's theory of legal argumentation twice. According to him, Alexy (i) would consider that "positive law always provides at least one correct answer"[35]; and consequently, (ii) Alexy would have an overly positive and uncritical view about the modern law in Democratic Legal States, with the belief that it is always possible doing justice "in accordance with the Law".[36] However, both criticisms are misleading.

Alexy not only conceives the hypothesis that there might be no correct answer in positive law, as literally expresses this thought in one of the legal argumentation rules:

> (J.7) Arguments which express a link to the literal content of the law or to the will of the historical legislator prevail over other arguments, *unless rational grounds can be presented which give priority to other arguments*. [italics added][37]

According to this rule, legal argumentation is immediately linked to positive law, which is effectively the primary source of law (statutes in *civil law* and precedents in *common law*). Therefore, arguments immediately based on positive law are preponderant; however, again, "preponderance" does not mean "exclusivity". The link between legal argumentation and the law in force does not result in the *identification* of legal argumentation with positive law, neither in its *reduction* to such law, nor in the *sufficiency* of it.

However, the cited rule does not say when there are *rational grounds* to attribute *less weight* to the arguments related to the literal content of positive law (or to the will of the historical legislator). This is left free for the participants in legal discourse to decide and, as said, all "discursively possible arguments" (institutionalized or not) are admissible in this discourse.

Nevertheless, Atienza is perfectly right when he says that on the basis of a certain concept of argumentation there is inevitably a legal ideology, which has moral and political dimensions.[38] However, the critical dimension of a theory or thought is not solely presented through a sociological analysis of reality or an explicit discourse about justice and politics. A *normative* theory on any subject determines *how* it *should be* treated and developed. Since Alexy's thought is based on the concept of rational discourse, the simple affirmation of such discourse is already a critical step taken, because law cannot be rational without incorporating human rights[39], starting with the rules of reason based on discursive freedom and equality. The rights of freedom and equality substantially correspond to these rules; thus, asserting the rationality of law implies asserting human

35 Atienza, *As razões do Direito* [*The reasons of the Law*], (footnote 5), 225–226

36 Ibid., 225

37 Alexy (footnote 12), 248. Alexy's position about the insufficiency of positive law is also evident when he justifies his thought by quoting a decision made by the German Constitutional Court – BverfGE 34, 269 (287) – according to which:
1) "Law [...] is not identical with the totality of statutes";
2) "Written law does not fulfil its task of providing a just resolution to a legal problem";
3) Since legal decisions must not be arbitrary, the judge must justify them with rational arguments, i. e., arguments which are "in accordance with the standards of practical reason and the community's well-founded general concepts of justice". Cf. Alexy, (footnote 18), 25.

38 Atienza, *As razões do Direito* [*The reasons of the Law*], (footnote 5), 225

39 Alexy, (footnote 18), 14

rights. Insofar as these rights are only feasible under the democratic regime, their assertion refers to the assertion of the Democratic Legal State. One single sentence of Alexy summarizes this relation among law, rationality, human rights and democracy, i. e., it sums up the critical dimension of his thought: "reason requires law in order to become real and law requires reason in order to become legitimate".[40]

In addition, the critical dimension of Alexy's thought becomes clear when he literally refers to it in the assertion of the *dual nature* of Law, according to which law has an ideal or *critical* dimension (claim to correctness), besides the real dimension (authoritative issue and social efficacy).[41] The claim to material correctness in law requires its content to be correct. "The correctness of content concerns, above all, justice".[42]

V. Conclusion remarks

Tragic cases are conceptualized by Atienza as cases where there is the sacrifice of legally and/or morally fundamental values. According to him, in tragic cases there is no correct answer, but rather the best possible answer, since the judge is before a dilemma and what is left to do is to sincerely choose the lesser evil. This situation would depict the limitation of legal rationality.

Nevertheless, based on Robert Alexy's thought, such conclusions are infeasible in a Democratic Legal State, which is the only State model compatible with human rights.

In Alexy's work, tragic cases are framed as those where fundamental (constitutional) principles collide and one of them is sacrificed regardless of the given answer. However, legal decision must be argumentatively grounded, i. e., must be rational, and its correctness derive from such rationality. Thus, although there is not a single correct answer in legal discourse, the answer given in the concrete case (whether it is an easy, hard, or tragic case) must be correct, and it will be correct if it is rationally grounded.

Discursive rationality necessarily involves discursive freedom and equality, which are materially related to human rights to freedom and equality. As human rights are only possible in Democratic Legal States, issues such as correctness, rationality, human rights and democracy are inseparable. If one refers to Democratic Legal States, one necessarily refers to correct answers in any case, even in tragic cases. As in such cases there is the sacrifice of either one principle or the opposite colliding principle, they do not only have correct answers, but the answers are opposite to one another.

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40 Ibid., 13
41 See Robert Alexy, The dual nature of law, *Ratio Juris* 23, 2 (2010), 167–182.
42 Robert Alexy, Legal certainty and correctness, *Ratio Juris* 28, 4 (2015), 441–451, 441