Are There Really "Tragic Cases"? A Critical Analysis of Manuel Atienza's Proposal[1]

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DOI | 10.14195/2184-9781_4_6

ABSTRACT
The aim of this article is to critically analyze the concept of the tragic case proposed by Manuel Atienza, starting from the same basis – the work of Robert Alexy –, but reaching very different conclusions. In the light of the parameters presented by Alexy (correctness, rationality, legal argumentation, human rights), the inadmissibility of some of Atienza's central assertions about tragic cases is exposed (such as the absence of a correct answer, the limitation of legal rationality, the option for the lesser evil), as well as the unsustainability of the very notion of tragic cases itself.

KEYWORDS
Easy, Hard and Tragic cases; Theory of legal argumentation; Positive law; Claim to correctness; Rationality; Democratic Rule of Law

1. Easy and Hard Cases, Theory of Legal Argumentation

Most *factual situations* socially understood as relevant in today's Democratic Rule of Law are based on statutes (especially in civil law) and precedents (especially in common law). One consequence of such broad social reality regulation lies in the usually immediate 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 the plurality of social reality and its dynamicity, it is not rare that answers to some situations are not immediately found in positive law, regardless of its broadness. These are the so-called *hard cases*.

[1] This article is a further development of the article *Tragic Cases: No correct answer? An approach according to the Legal Philosophy of Robert Alexy*, published in *Archiv für Rechts- und Sozialphilosophie* 105, 2019/3, 392-403.

According to Ronald Dworkin (1975, 1057), hard cases are those "in which the result is not clearly dictated by statute or precedent".

The more democratic the State, the more active and independent its Judiciary; once the case is brought before a court, the judge is obliged to judge it, due to the principle of non-obviation of jurisdiction and to the principle of *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. Theories of legal argumentation are essential to this field, since law is discursively formulated through statutes and precedents, as well as argumentatively applied to judicial decisions. Despite the contribution from several authors to the issue of *legal argumentation*, such as Chaïm Perelman and Lucie Olbrechts-Tyteca (1969), Stephen E. Toulmin (1958), Aulis Aarnio (1987) and Aleksander Peczenik (1989), Robert Alexy and Neil MacCormick stand out among authors who presented legal argumentation theories of great expression and international repercussion – the Spanish jurist Manuel Atienza (2006) states that Alexy's and MacCormick's theories together form the so-called *standard theory of legal argumentation*.

The current article focuses on the theory by Robert Alexy (2010a), who presents *legal discourse* as a *special case* of general practical discourse. Both discourses (i) deal with *practical* issues concerning what is *commanded*, *prohibited,* and *permitted*, and (ii) raise the *claim to correctness*, i.e., participants assert their *propositions* as *correct* and ground their discourse accordingly. Nevertheless, unlike general practical discourse, legal discourse is composed of *institutional arguments*, i.e., orders/commands, prohibitions, and permissions set by the State. Such arguments are also called *authoritative reasons*, since they come from the state body in charge of their creation – Legislative Power in civil law, and Judiciary in common law.

However, *institutional arguments* may sometimes (i) not be *clear* enough, (ii) *conflict* with each other, or (iii) be *incomplete* or *not expressed* in positive law. The solution to each of these problems is presented respectively as follows.

If (i) the law is unclear, *hermeneutical methods* should be used to clarify positive law and make it more intelligible. In case of (ii) normative antinomy, if the conflict is between *rules*, the *logical criteria* (chronological, specialty and hierarchical) should be used to solve the antinomy, whereas if there is a collision between *principles*, the *principle of proportionality* should be used to

solve the collision. Finally, in case of (iii) *legal gaps*, when there is no positive law to be applied, the gap must be filled with *authoritative reasons* (in the case of analogy, where statutes and/or precedents are applied to non-regulated cases) and/or *non-authoritative reasons* (moral, ethics and pragmatic reasons), according to Alexy (2021), based on Jürgen Habermas work (1996)

Neither of these situations depicts an easy case; nevertheless, the typical hard case is evidenced especially in the third option, when there is an openness in positive law, and the judge is faced with a lack of institutional arguments for decision-making. Legal decisions must be argumentatively justified, and arguments are based 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*.

2. Tragic Cases

If hard cases demand a 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 (2003; 1997), tragic cases are those whose *solution sacrifices 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 (as usual), but with a *dilemma*.

Mostly based on Alexy's thought, Atienza (1997) draws three conclusions in his approach to tragic cases. 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. one makes the *option for the lesser evil*.

Atienza (1997, 19) justifies the statement (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.

Atienza adds the assertion (2) and states 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* (Atienza 1997).

Atienza (1997, 25–26) ends up coming to a 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 compatible and comparable, since the lack of a "good answer" does not imply the impossibility of identifying *worse* and *better* answers. Therefore, the author concludes that what should be done in such situations "is sincerely opting for the lesser evil".

However, precisely on the basis of Alexy's thought (2010a), we consider that none of the three statements above may be inferred from the work of the German jurist, and even the existence of *tragic cases* themselves is questionable, as explained below.

3. No correct answer

With respect to statement (1), it is known that, unlike Dworkin, Alexy (2010a) does not support 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 not only plausible but also permanent. However, the pivotal point is that the *given answer* must be *correct*, no matter whether the case is *easy*, *hard,* or even *tragic* (if the latter really exists).

From the *formal* point of view, legal reasoning is correct if it accomplishes the legal and discursive *proceedings*, expressed in the rules of *positive law* and rules of *legal argumentation*.

From the *material* point of view, the correctness of the answer is measured by the *justification* of the decision. In other words, the correctness criterion lies in the *reasons* justifying the decision. If the decision is reasoned, i.e., argumentatively grounded, and its arguments are demonstrated or proven,

the decision is correct. Evidently, every judicial decision must be reasoned, under penalty of arbitrariness.

Yet, 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 (2010a) may influence the quality and extent of justification in legal discourse, although they are directly related to the *formal* 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.

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 should be present throughout legal argumentation; the more logical the justification, the more intelligible the argumentation. Moreover, 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 or/and (?) the structure of legal argumentation. The correctness of the *content* of legal discourse premises is verified in what Alexy (2010a) 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 into (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 a demonstration of their compliance with the validity criteria of the legal system. In relation to the empirical premises, there are several ways of justifying, e.g. the methods of empirical sciences, as well as the legal maxims of rational presumption and the rules of burden-of-proof with regard to law. As for the premises that are neither empirical statements nor positive law rules, the rules of legal argumentation are applicable. Alexy

(2010a) 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*.

The thematic approach of the current article does not allow for analyzing, in detail, 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.

Nonetheless, if the legal reasoning that justifies the decision taken is really based on reasons, i.e. on substantiated arguments, it is not only formally correct but also tends to be materially correct, no matter how good or how great it is. Substantiated arguments are those supported by institutional arguments (statutes, precedents, legal doctrine), and/or non-institutional arguments (moral, ethical, pragmatic arguments) rationally grounded.

Institutional arguments are typical of legal discourse, which is a *special case* of *practical discourse* (Alexy, 2010a). Practical discourse is a normative discourse in which the claim to correctness is raised. *Legal discourse* is a special case of practical discourse because it is also a *normative* discourse which raises the *claim to correctness*, but is bound to statutes, precedents, and legal doctrine, i.e. *institutional arguments* or authoritative reasons.

General practical discourse is composed of *non-authoritative reasons*, which are classified by Habermas (1996; 1989) as *pragmatic*, *ethical*, or *moral*. *Pragmatic* reasons are those related to the option for techniques and strategies mainly based on the *utility* or *efficiency* criterion according to a *means-end* relation.[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 arguments result from the *cultural and political self-understanding of a community.*[3] *Moral* reasons are raised when discourse

[2] *Pragmatic* reasons are related to the search of appropriate means to meet interests, preferences and certain ends.

[3] *Ethical* reasons relate to traditions, reflect the identity of a specific society, and go beyond subjective ends based on a "good for us" behavior.

participants seek to identify what is *universally good*, what could be accepted by *everyone* as corresponding to the interests of all (*universality*)[4] – e.g. a rule is only accepted for moral reasons when it gives equal attention to the interests of anyone affected by it (Cooke, 2007).

On the one hand, one may often argue that the decision is not correct, stating that it should be based on other institutional arguments or one may even say that it is not correct, because it is against positive law. The point is that positive law is composed of multiple institutional arguments and so the decision may be based on reasons with which one may disagree, but this does not render the decision incorrect, since it is justified with institutional arguments.

On the other hand, in those hard cases characterized by a legal gap, that is, an openness in positive law due to the lack of institutional arguments, the openness must be filled and it will be not by the judge's subjective conceptions, but by reasons drawn from positive law (e.g. by *analogy*), and/or by rationally grounded non-institutional arguments, i.e. moral, ethical and pragmatic arguments. Obviously, for an argument to be considered a valid moral or ethical argument, it must be *justifiable*, and it will be so if it has the possibility to face a process of rational argumentation about what is morally or ethically *correct*. Therefore, the reference here is not to any Moral or Ethics, but to a justifiable Moral or Ethics (Alexy, 2000).

Accordingly, no matter if it is an easy or a hard case, the answer given by Judiciary must be correct, and it will be if it is based on positive law (institutional arguments) or on justified/justifiable non-institutional arguments.

However, one point that should be noted is that in today's Democratic Rule of Law *moral* values taken as *fundamental* by the society tend to become the content of *legal* norms. In this type of State, the *most relevant values* for society are provided (and protected) by *positive law*, whose norms are endowed not only with *binding force*, but also with *coerciveness*. Coerciveness, in terms of the possibility of the *State* using physical force to enforce the norm, is currently only possessed by *legal* norms. Therefore, the more relevant the moral value, the more it tends to be regulated by law, mainly by constitutional or legal *principles*.

[4] *Moral* reasons concern not only what is "good for us" (criterion of *good*), but what is equally good "for all" (criterion of *correctness* or *due*).

It is worth emphasizing that the answer, although correct, is not necessarily *definitive* – like every scientific answer, due to science *fallibility* or *falsifiability* (Popper, 1978; Popper, 1997; Kuhn, 1970). 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 words, both affirmation and refutation of arguments are linked to the notions of correctness and rationality.

It is also important to highlight that Atienza (1997, 15, 19) 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.

However, both statements should be contested. Actually (i) neither the *collision of principles* is an *internal contradiction*, (ii) nor, much less, does the *solution* of this collision happen through the *violation* of legal system. Collisions are absolutely recurrent in terms of principles, mainly in the case of fundamental rights principles. If the *open texture* is characteristic of some legal norms, *constitutional* norms are those whose text is especially indeterminate and vague. Among constitutional norms, principles that declare *fundamental rights* are markedly the vaguest ones, due to both the amplitude of their factual support and the serious weight (according to the Alexyan triadic scale) of the protected value. Solving these collisions of principles without violating the legal system is not only possible, but it is *obligatory*, since judicial decisions are based on *balancing* principles of a specific legal system, and balancing is a *rational* process made up of arguments which comply with positive law.

The solution of collisions of principles is made possible by the application of the *principle of proportionality*, by which the *suitability* and the *necessity* of the *means* used in the concrete case are assessed, and the colliding *principles* are *balanced* so that one of them prevails in that specific situation. However, as it is well known, according to the *theory of principles* by Alexy (2002), the fact that legal principles collide does not mean that there is a violation of the legal system. On the contrary, as stated above, collisions of principles are quite frequent in legal systems, since their factual support is very broad, without precise determination or exact delimitation. In other words, due to the normative structure of principles, their collision is not a violation of the legal order at all. On the contrary, it is even an expected or foreseen situation.

4. Limitation of Legal Rationality

With respect to the statement (2), according to which there is a limitation of legal rationality in tragic cases, because there would be no correct answer, and the judge would then have to resort to *reasonable* criteria (Atienza 1997), it is necessary to clarify that "*reasonable* criteria" are applied not only to the cases classified by Atienza as tragic, but *reasonableness* is the expression of *rationality* in *all practical* discourses, of which *legal* discourse is a special case. Thus, any legal discourse – whether it concerns an easy, hard or what would be a tragic case – is based on reasonableness or practical rationality. Therefore, (practical) rationality is neither greater nor lesser in tragic cases.

In the light of Kant (1964), Alexy (2006) explains that the difference between the *reasonable* and the *rational* lies on the *moral* dimension of the former. 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 of what is *correct* and *good* (i.e., the values *Correctness* and *Good*) (Alexy 2009).

Thus, the *reasonable* holds *moral* elements, whereas the *rational* does not. Or, as Georg Henrik von Wright (1993, 173) taught, "the reasonable is, of course, also rational – but the 'merely rational' is not always reasonable".

Practical rationality, which relates to the *content* of legal discourse, is added to *discursive* rationality, which refers to a formal structure: the way the discourse should be conducted, i.e. how speakers should act so that their discourse is rational. Therefore, the answer of a rational discourse is formally correct. For legal 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*[5] and *freedom*[6];

[5] (2.1) Everyone who can speak may take part in the discourse.

[6] (2.2) (a) Everyone may problematize any assertion.

(b) Everyone may introduce any assertion into the discourse.

the *basic rules* such as non-contradiction[7], sincerity[8], consistency[9]; the *justification rules* such as role exchange[10], realizability[11], openness[12]; and the *internal justification rules* such as saturation of arguments and other regulative parameters of legal reasoning (Alexy, 2010a)[13].

Thus, there is no doubt that rationality criteria in the *legal* discourse – whether it concerns an easy, hard, or even what would be a 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 *hard* cases (in which it is necessary to solve ambiguities, antinomies, or legal gaps), and would also be in *tragic cases* (in 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.

(c) Everyone may express his or her attitudes, wishes, and needs.

7 (1.1) No speaker may contradict him or herself.

8 (1.2) Every speaker may only assert what he or she actually believes.

9 (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.

10 (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.

11 (5.3) The actually given limits of realizability are to be taken into account.

12 (5.1.3) Every rule must be openly and universally teachable.

13 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. Cf. Alexy (2010a).

5. Option for the Lesser Evil

Finally, prominent issues are involved in Atienza's conclusion (3), according to which what would be 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 would not mean "total loss" of legal rationality, since there are worse and better answers even if there is no correct answer. The question that immediately arises is: what is the limit allowed to rationality limitation? In other words: what is the "minimum rationality degree" required to avoid arbitrariness? Atienza does not answer these questions in his explanation about this "option for the lesser evil".

Allowing a little "loss" of rationality without missing "everything", means admitting a legal uncertainty degree incompatible with law. For this purpose, Constitutional States created positive law in the eighteenth century. Acknowledging the difficulty in deciding due to ambiguity, antinomy or legal gap (or even acknowledging the tragic aspect of a legal decision due to the sacrifice of a fundamental value), *does not mean* admitting that this decision may be irrational or "a little" irrational. It does mean the demand for a heavier *argumentative burden*, a 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* decisions do not mean *correct* decisions. 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. Value judgments are moral ones, and *judicial decisions* are not *moral* decisions, but *legal* ones, which enunciate a *duty judgment* according to *positive law* (i.e. regarding 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 point is that in general practical discourse, many normative questions are discussed, but often no agreement or consensus is reached, and social life frequently demands decision-making, under penalty of anarchy or civil war (Alexy, 2008; 2015). Therefore, practical discourse *is not sufficient* to solve coordination and cooperation problems typical of social life, because it does not necessarily lead to decisions. Thus, there is the necessity of positivation and of legal discourse in order to solve conflicts and decide impasses. In legal discourse, decisions are necessarily reached, since the Judiciary cannot fail to judge (by virtue of the principles of non-obviation of jurisdiction and of *non liquet* prohibition).

Thereby, there is greater openness to *dissent* in understanding a decision as good or bad. If, in the legal discourse, which has institutional 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-institutional arguments.

There is an *integration* between non-institutional and institutional arguments in legal discourse. Actually, general practical arguments and legal arguments complete one another. It is precisely this that Alexy (2010a, 20) 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". As a matter of fact, "general practical reasoning forms the basis of legal reasoning" (Alexy, 2010a, 286).

Thus, it is possible to use distinct reasons to justify concrete cases. *Easy cases* are mostly solved based on authoritative reasons (positive law). In *hard cases*, positive law has its legal gap filled with authoritative (analogy) and non-authoritative (general practical discourse) reasons, which may also be used to clarify ambiguities in institutional arguments or to solve antinomies between them. Similarly, if we consider the existence of *tragic cases*, authoritative and non-authoritative reasons would be used to justify which of the correct answers should prevail.

Finally, in compliance with the formal principle of *legal certainty* and according to rule J.7 of the theory of legal argumentation by Alexy (2010a), institutional arguments are binding and must prevail, unless *moral*, *ethical,* and *pragmatic* reasons attribute stronger importance to non-institutional arguments:

(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. (Alexy, 2010a, 248)

6. Are There Really Tragic Cases?

As mentioned above, Atienza (2003; 1997) defines tragic cases as those whose solutions sacrifice some essential element of a value considered fundamental from a legal and/or moral point of view. Thus, in these cases, one would not be faced with different alternatives (as usual), but with a *dilemma*.

If one frames tragic cases in the structure of Robert Alexy's work, especially the theory of principles (Alexy, 2002), these cases always depict a collision of principles, since the core values of a legal system are the content of principles, mainly constitutional principles such as the fundamental rights principles.

According to the *law of balancing* (Alexy. 2002, 112), "the greater the degree of non-satisfaction of, or detriment to, one principle, the greater the importance of satisfying the other". Tragic cases are the classic example of a *stalemate* in the Alexyan *weight formula* (2007), since both colliding principles have *serious abstract weight* (both are constitutional principles) and so the same *utmost satisfaction importance*. These conditions lead, under the law of balancing, to the proportional relationship by which the more important *the compliance with* a principle, the stronger *the detriment to* the opposite principle.

Thus, it is not rare that the degree of detriment to one principle is so serious, due to the serious degree of the importance of satisfying the colliding principle, that the outweighed principle is completely excluded. When it comes to fundamental rights principles, we are talking about values considered the highest and most important by society. Therefore it is not uncommon that the solution of the collision of fundamental rights principles sacrifices some essential element of a value considered fundamental from a moral and/or legal point of view.

Hence, what Atienza calls a "tragic case" is actually no more than one of the many cases in which a fundamental right principle is outweighed

by another fundamental right principle and the interference with the former is so serious that it is sacrificed. As a matter of fact, this is just one of the possible results of the solution of the principles collisions that daily happen in a society. One typical example (of several) is the case of abortion. If priority is given to women's rights (right to freedom, right to self-determination and autonomy, right over their own body, among others), the right to life of the fetus is completely outweighed, i.e. it is sacrificed. If the opposite happens, that is, if priority is given to the right to life of the fetus, it is not possible to fulfill women's rights to any degree, that is, women's rights are sacrificed.

It is important to highlight that when there is a collision between fundamental principles, wherein there is a serious detriment to or sacrifice of one principle due to the serious importance of satisfying the preceding principle, both principles establish fundamental values (since both are fundamental rights principles). The "tragic" point is that one of these values is sacrificed, despite its fundamental relevance for society. Since both values are socially taken as fundamental, sometimes principle P_1 takes precedence over principle P_2, sometimes the opposite may happen, according to the factual and legal possibilities. Thus, the decision is made either based on principle P_1 or on principle P_2. Since both principles are fundamental and comprise the positive law, both decisions are grounded on arguments. Therefore, the decisions made in these cases not only do not violate the system but are justified by institutional arguments.

Lastly, some of Atienza's statements throughout the presentation of his notion of tragic cases and some of his criticisms of Alexy's theory of legal argumentation are worth clarifying.

On the one hand, the Alexyan assertion that the answer given to the concrete case – whether it is easy or hard – must be correct is not an overvaluation of the law of Democratic States as "the best of the legally imaginable worlds" (Atienza, 2003, 226). The assertion that the judicial decision must be correct (although there is not a single correct answer in 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 of *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 argu-*

ments 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 on which legal decisions must be based.

However, the *objectivity* of positive law does not mean its *exclusivity* 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 in the fact that, although institutional arguments have *prima facie* heavier weight in legal argumentation than general practical arguments, the latter arguments are not excluded from it. Actually, general practical arguments and legal arguments complete one another. It is precisely this that Alexy (2010a) explains with the adoption of the *thesis of integration* mentioned above.

On the other hand, Alexy's assertion that the answer given in legal discourse must be correct does not mean that "positive law always provides at least one correct answer", nor it depicts an overly positive and uncritical view about the modern law in Democratic Rule of Law by Alexy (Atienza, 2003, 225).

The German jurist not only conceives the hypothesis that there might be no correct answer in positive law, but literally expresses this thought in rule J.7 of the theory of legal argumentation rules presented above. By this rule, arguments that express a link to the literal content of positive law prevail over other arguments, "unless rational grounds can be presented which give priority to other arguments" (Alexy, 2010a, 248).

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, once 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.

Yet, 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. This is left free for the participants in legal discourse to decide and, as said, all discursively possible arguments (institutional or not) are admissible in this discourse.

Nevertheless, Atienza (2003) 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. 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 (Alexy, 2010a). Thus, asserting the rationality of law implies asserting human rights. Insofar as these rights are only feasible under the democratic regime, their assertion refers to the assertion of the Democratic Rule of Law. One single sentence of Alexy (2010a, 13) 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".

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) (Alexy, 2010b). The claim to material correctness in law requires its content to be correct, and according to Alexy (2015, 441) "the correctness of content concerns, above all, *justice*" (italics added).

7. Concluding 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, such conclusions are demonstrated as infeasible in the Democratic Rule of Law, which is the only State model compatible with human rights. On the basis of Alexy's work, tragic cases are framed as those where fundamental principles (usually fundamental rights principles)

collide and one of them is sacrificed. Thus, tragic cases are nothing else but cases in which there are fundamental rights collisions, whose result is the sacrifice of one of the competing principles. Actually, this situation may happen in both easy and hard cases, since the fact that one of the colliding principles is completely excluded from the case has nothing to do with the immediate identification or not of the answer to the concrete cases in positive law.

The essential point is that legal decisions must be argumentatively grounded, i.e. they must be rational, and their correctness derives from such rationality. Thus, although there is not a single correct answer in legal discourse, the answer given in the concrete case must be correct, and it will be correct if it is rationally grounded.

Discursive rationality necessarily involves discursive liberty and equality, which are materially related to human rights to liberty and equality. As human rights are only possible in the Democratic Rule of Law (as fundamental rights), issues such as correctness, rationality, human rights, and democracy are inseparable. If one refers to the Democratic Rule of Law, one necessarily refers to correct answers in any case (whether it is easy or hard, whether one colliding principle is sacrificed or not).

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