Tragic choice as a legal concept

van Domselaar, I.

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"Some among the great goods cannot live together. That is a conceptual truth. We are doomed to choose, and every choice may entail an irreparable loss."

Isaiah Berlin, *The Crooked Timber of Humanity: Chapters in the History of Ideas,* (PUP, Princeton 1998) 12-13.

Tragic choice as a legal concept

Iris van Domselaar

1. Introduction

We all may face circumstances in which we have to make a tragic choice. If we are lucky enough to escape such a predicament ourselves we can still know about tragic choices as they are displayed in numerous works of art, starting with the Greek tragedies. According to human self- understanding tragic choices are part of human life. However, this is not the case for the self-understanding of legal agents in their professional life. Of course, legal agents may feel sorrow or regret over their legal choices, but if the choice is legally justified the law considers these feelings a personal matter. Although a tragic choice is considered a common phenomenon related to choice situations, in Western legal orders the concept of a legal tragic choice is not acknowledged.

In this article I argue that the concept of a legal tragic choice should be part and parcel of any viable conception of legal reasoning. A structural denial that legal choices can be tragic is irrational, immoral and it impedes the moral progress of law. Acknowledging tragic choice as a legal concept implies that legal agents sometimes have to make a tragic choice that brings agony and anxiety and demands not only a bright mind but also a display of moral worth.

2. Legal reasoning and practical commensurability

Whereas in one's personal life tragic choices are considered a rather common part of human life, from the law-point of view legal choices cannot be tragic. As an explanation one difference between reasoning in one's personal life and legal reasoning stands out. In the former the reasoning may be private, subjective and incidental. Legal reasoning by

contrast involves the use of explicit rules, standards, or principles. In Western legal orders it is held that the rule of law and its basic values like equality and liberty demand a prominent role for identifiable and determinate measures in legal reasoning. If true, the important role of rules cannot account for the fact that from a legal point of view legal choices cannot be tragic. That is to say, emphasizing the importance of rules does not exclude that in some legal cases there is no adequate rule or principle available, nor does it exclude the possibility of conflict between relevant legal norms. In such cases the choice for a decision might be tragic, also from a legal point of view.

In order to understand why from the viewpoint of the Western rule of law legal choices are not and cannot be acknowledged as tragic, the notion of practical commensurability must be introduced.[1] Practical commensurability comprises the main characteristics of the two dominant conceptions of legal reasoning, i.e. balancing and subsumption.[2] Relying on practical commensurability, like balancing and subsuming do, indicates firstly that for all legal cases there is a commensurans available, a final normative source from which right legal answer(s) can be inferred. This commensurans exists prior to the actual legal choice and independently from the legal agent. In this sense practical commensurability implies an 'outside in' approach to legal reasoning: the measure for the right legal choice is found 'outside' the legal agent.[3] It can be a rule, a principle or a legal value, but the legal system as a whole also may function as a commensurans. Characteristic for such a commensurans is that it 'adequately represents' the relevant features of the legal case.[4] This idea of representative adequacy refers to the commensurans' relation with the concrete features of a particular case -particulars can be

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[1] For the exploration of practical commensurability I am indebted to Henry Richardson's discussion of value commensurability in Henry Richardson, *Practical Reasoning about Ends* (Cambridge Studies in Philosophy, CUP, Cambridge 1997) 89-11.

[2] Robert Alexy, 'On balancing and Subsumption. A Structural Comparison' (2003) 16 RJ 433, 433. He identifies 'balancing and subsumption' as the "the two basic operations in the application of law" and argues that subsumption and balancing are both rational ways of legal reasoning.

[3] John MacDowell, *Mind, Value and Reality* (HUP, Cambridge 1998) 50.

[4] Richardson (n1) 89; Cass Sunstein, 'Incommensurability and kinds of Practical Reason and Kinds of Valuations: Applications in Law' in Ruth Chang (ed), *Incommensurability, Incomparability and Practical Reason* (HUP, Cambridge 1997) 238.

qualified in terms of the commensurans-, but also to its substance; the substance of the commensurans is considered adequate, while practical commensurability can only attribute practical force to a commensurans if it is considered valuable, something worthwhile for the legal agent to strive for. This 'representative adequacy' is indeed assumed or taken for granted in theory and practice of both balancing and subsuming. They are grounded upon the idea that concrete particulars can be qualified in terms of abstract categories and also that adequate normative sources supplying these abstract categories are available, like rules, principles, or legal values.

Another relevant characteristic of practical commensurability- and thus of balancing and subsumption- is that it holds maximization as conception of rationality.[5] Since the commensurans is considered the final normative source of the reasoning process, maximization is 'naturally' what rationality demands. How the legal agent should maximize, depends on the conception of legal reasoning employed. Anyway, maximization is pursued with the help of formal rules - in the case of subsumption with the help of the rules of logic and in the case of balancing the rules of arithmetic are suggested. These formal decision procedures must warrant that the normative implications of the commensurans are maximally observed.

Thus, relying on practical commensurability like balancing and subsumption do, implies that for all legal cases there exists a commensurans that encompasses all that is of value from a legal point of view. This characteristic of practical commensurability is particularly manifest in Dworkin's idea that law must ideally be conceived as a seamless web, an identifiable system that can provide right answers for all legal cases.[6]

Two things must be noted, though. First, practical commensurability is perfectly reconcilable with conceptions of legal reasoning that allow for more than one right legal answer. For instance, balancing and subsumption leave room for discretion as to determining the facts of the case and as to the interpretation of the commensurans. Practical commensurability therefore does not necessarily imply that for every legal case

[5] Richardson (n 1) 89; Robert Alexy, 'Constitutional Rights, Balancing and Rationality' (2003) 16 RJ 131,135.

[6] Ronald Dworkin, *Taking Rights Seriously*, (Duckworth, London 1977) 115-123.

there is only one right answer. It does imply however that right legal answers with reference to a commensurans can be substantially demarcated from wrong ones. Secondly, conceptions of legal reasoning that rely on practical commensurability can account for conflicts between legally protected interest, rules and principles. Such a conflict can actually be implied by the concept of a 'hard case'. For instance, when a paraplegic reserve officer is described as a 'cripple' in a satirical magazine, there may be a prima facie conflict between two constitutional principles, i.e. the right to freedom of expression and the right to personal integrity. But, if one relies on practical commensurability the conflict is held to be solved by balancing the weight of the values and interests at stake on the basis of a commensurance like for example the 'constitutional point of view'.[7] Conflicts between legally protected values- like in the case of a conflict between constitutional rights, or other kinds of 'hard cases' can be overcome by means of a 'real' commensurans that dismantles the conflict as only a prima facie conflict or as one in which one of the legally protected values involved outweighs the other. In conceptions of legal reasoning that rely on practical commensurability, legal choices cannot do legally relevant harm.

So, we can conclude that a reliance on practical commensurability and the acknowledgment of tragic legal choice are as a rule mutually exclusive. The essence of a tragic legal choice is that it does not address all that is of legal value in an all-encompassing way, i.e. that a right legal choice can at the same time do legally relevant harm. The dominancy of theories relying on practical commensurability in legal reasoning explains why in Western constitutional democracies legal choices are from a legal point of view rarely considered to be tragic.

3. Why tragic legal choices should be acknowledged

So far we have established that and why in dominant conceptions of legal reasoning legal choices cannot be tragic. Now the question arises why this is troublesome, particularly because tragic choices are inextricably linked to emotions like anxiety and regret and feelings of stress. Precisely by providing a commensurans and related decision-procedures favorable conditions for legal agents are created so as to "to spare themselves

[7] This example is taken from Alexy's discussion about the rationality of balancing in Alexy (n 2) 433, 437.

some of the (…) torment of feeling and understanding"[8] one could argue that conceptions of legal reasoning relying on practical commensurability should be highly esteemed. Practical commensurability explains why the moral agent is not 'driven away' by the forces that impinge upon him in confronting a legal conflict.

However, there are strong arguments supporting the claim that tragic choice should be acknowledged as a legal concept and consequently that practical commensurability should be rejected. First, as a requirement of minimal rationality legal reasoning must be grounded upon an adequate conception of its object: human practice, i.e. the practical world. Legal reasoning must incorporate the essential features of the practical world among which its mutability, its indeterminateness and also the unique character of particulars. These features entail that for some situations a commensurans as it was described earlier is missing or that no commensurans can be really all-encompassing.[9] Legal reasoning cannot account for the features of the practical world by making commensurances more abstract and general. There exists a reverse proportionality between the abstractness of the commensurans and its normative, i.e. practical force. By making a commensurans more abstract and general, one would jeopardize and finally lose its normative force. In this sense the argument not only stresses the plausibility of tragic choice as a legal concept. It also functions as an internal critique on practical commensurability and related conceptions of legal reasoning in so far as they assume the practical force of commensurances, no matter how abstract and general these might be.[10] The aforementioned features of the practical world differ fundamentally from the natural world and so legal reasoning should follow a different logic than does theoretical reasoning. In science, i.e. in theoretical reason, two contradictory beliefs cannot simultaneously be true; our idea of scientific 'truth' requires that one gives up one of the

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[8] David Wiggins, 'Deliberation and Practical Reason' in Amélie Rorty (ed), *Essays on Aristotle's Ethics* (UCP, Berkeley 1980) 237.

[9] The argument refers to the difference between the practical and the natural world that Aristotle already pointed out. See Aristotle 1142a23ff cited and paraphrased in Wiggins (n 8) 235.

[10] This internal critique implies that conceptions of practical commensurability should focus on the person of the legal agent. In general rules do not apply themselves and as a consequence practical wisdom or good judgment is required to ensure that the rules are applied correct. This wisdom is inextricably linked with the person of the legal agent and cannot be accounted for by mere knowledge of facts and of law.

conflicting propositions - thus implying a binary logic. According to this logic, in case of contradictory beliefs, one solves the conflict by dismantling the cognitive content of one of the claims as untrue or false. A person cannot, at same time, be dead and alive. By contrast, legal reasoning is not about how the world is, but about how the world should be. As such, it can allow for conflicting legally protected values, goods and interests. One can be perfectly rational and simultaneously value freedom of speech and respect for the dignity of minorities, although both values may conflict in a particular situation. The fact that maybe legally protected values, goods and interests cannot be realized simultaneously in a particular situation does not logically require that one of the claims must be given up as false or wrong. Not logic, but the world sometimes makes simultaneous realization impossible. Consequently, it is not a fault in legal reasoning or a lack of coherence of the legal system if such values, goods or interests cannot be realized at the same time. Solving legal conflicts with reference to 'logic' by structurally dismantling or subordinating the legal substance of one of the litigants' claims, would mistakenly project "a structure of reasoning appropriate to conflicts of beliefs" onto practical conflicts.[11]

Acknowledgment of tragic choice as a legal concept is a way of observing the logic involved in practical conflicts as opposed to that of theoretical conflicts. A particularly moral argument that favors the acknowledgement of the concept of legal tragic choice is that of legal integrity.[12] For this context the integrity of a legal order means among other things that legal agents stay committed to the moral backbone of their legal order, which in Western constitutional democracies consists of a heterogeneous group of fundamental liberties and goods for all citizens. Of course legal reasoning may involve that legal agents rule that one or another litigant is wrong; not all legal conflicts derive from real conflicts between legally protected values, goods and interest. But, a legal order in which

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[11] See for a discussion of the different logics in theoretical and practical reasoning Bernard Williams's essay about Ethical Consistency in Bernard Williams, *Problems of the Self*: *Philosophical Papers 1956-1972* (CUP, Cambridge 1973) 166-187.

[12] Martha Nussbaum, *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy* (CUP New York 2001) 50; Martha Nussbaum, 'The cost of Tragedy: Some Moral Limits of Cost-Benefit Analysis' (2000) 29 LS 1005, 1016.

legal agents must deny categorically that in some legal choices legally protected goods or values will be forgone can be considered insincere or dishonest. A legal order should leave room for legal agents making a justified legal choice without in the reasoning process necessarily having to 'dissociate' from the legal substance underlying the claims of the losing litigants. Such dissociations can occur for example when legal claims are denied all legal substance, or if the deliberation process results in the outweighing of one value or good by another. By staying committed to these values and goods even in case they conflict, legal agents not only serve the intrinsic value of legal integrity, but they also make a legal order more reliable for citizens. It contributes to citizens gaining trust that when law affects or harms their basic liberties and fundamental material and social conditions, the harm will be publicly recognized as such. Although citizens cannot predict outcomes in particular cases, adjudication can become more predictable in a broader sense. Citizens know that not the contingencies of the world, i.e. the facts of a practical conflict, but rather legally protected values, goods and interest are decisive for the commitments of legal agents.

Next, tragic choice as a legal concept can further moral progress in law.[13] Acknowledging a legal choice as tragic can function as an incentive for reflection about how to avoid the need for similar choices in the future. In this way it provides a valuable impetus to moral progress in law. Relying on practical commensurability which takes legal choices to just establish the implications of already settled law, do not provide such an incentive. Strictly speaking reasoning according to such conceptions of legal reasoning cannot generate new moral insights; it can only detect faults in the legal claims of citizens or establish what is legally the case. Losing claims do not provoke further reflection, no matter their moral plausibility, but can only be considered as mistaken expectations of citizens with regard to their legal claims. By contrast, acknowledging a legal choice as tragic can give rise to the awareness that a particular kind of choice-situation must be avoided, not because it is at odds with what a given commensurans requires, but because of features of the practical world which were not (yet) sufficiently reflected upon before. Rather, a legal tragic choice is held as a possible result of an incomplete understanding

[13] See for a rather different elaboration of this argument also Nussbaum (n 12, 2000) 1005, 1017.

about what justice requires.[14] Obviously, this argument is based on the idea that "tragedy is rarely just tragedy" in the sense of it just being bad luck. A structural denial of the possibility of conflicts between legally protected values, goods and interest can be more 'convenient', i.e. less disturbing for legal agents and for the legal system as whole, but simultaneously constitutes a "passive injustice" committed by insufficient reflection on what justice requires and lack of deliberation about how to avoid similar conflicts in the future.[15]

4. Tragic choice as a legal concept

So far we have seen why the main conceptions of legal reasoning in Western legal orders, i.e. balancing and subsuming, cannot acknowledge a legal choice as tragic. Moreover, it was argued that the denial of the possibility of legal choices being tragic is irrational, at odds with the requirements of logic and wrong from a moral point of view. In order to grasp these arguments fully and to understand the (practical) implications of the acknowledgement of a legal choice as tragic, the concept itself must be clarified.

As was already suggested a legal tragic choice can only arise in the case of a practical conflict between legally protected intrinsic goods, values and other interest.[16] In a coherent legal order these goods and values cannot result in a logical conflict or in a contradiction, as would be the case if the principle of equality was endorsed and at the same time a specific group of citizens was recognized as superior to all others. However, in the case of a practical conflict it is the world and not logic that causes the conflict. The legal values and goods concerned are 'incompossible', i.e. they cannot be realized

[14] This idea of moral progress fits in a dialectical approach to justice. According to such an approach what is just cannot be established once and for all, but is inherently open-ended and thus can change in the light of new circumstances.

[15] Judith Shklar, *The faces of Injustice* (HUP, Cambridge 2000) 51.

[16] Whether values, goods or interests enjoy legal protection can be established by the fact that they are covered by a right, principle or rule, but this need not be the case. For example, in common law systems certain values enjoy protection by means of an authoritative precedent.

simultaneously.[17] For instance, the economic freedom to use clever marketing strategies can in a concrete situation conflict with the good of being able to live in health.[18]

Another characteristic of a legal tragic choice is that the underlying practical conflict is one between fundamental legal values, goods or interests. Choosing between granting a permit to build a shed and protecting the neighbor against the nuisance resulting from the building of the shed is not a tragic choice. Although these interests may enjoy legal protection, they are not "the stuff of tragedy", i.e. they are not fundamental constitutive elements of the human good.[19] Which legally protected values and goods are fundamental enough to constitute a tragic choice in the legal domain, cannot be inferred from the concept itself. Tragic choice as a legal concept is open-ended qua moral substance. But, it does imply a group of heterogeneous values and goods that are necessary elements of the human good. The concept, therefore, only makes sense in a legal order providing legal protection to a plurality of fundamental values and goods and as such 'fits' with Western constitutional democracies in which a variety of heterogeneous basic liberties and social goods enjoy legal protection.

Up to this point, it has not been explained though why a legal tragic choice is actually tragic, in the sense of being troublesome or even raising anxiety. To clarify the troublesome character of a tragic legal choice the notion of a legal remainder or residue must be introduced. A legal remainder is the value or good that is forgone by a legally justified choice, the foregoing of which may cause anxiety, stress and guilt. To state that a legal choice is tragic means the legal reasoning does not 'dismantle' or subordinates the value or good put in the losing claim. It is the choice itself that ranks the legal claims out of practical necessity, i.e. because legal choices must be made. Thus, notwithstanding the rightness of the choice, the 'losing claim' still has legal substance and maintains its normative appeal on the legal agent. Therefore, in the words of Williams, if the legal

[17] Williams (n 11) 117.

[18] Of course, a legal conflict as an institutional phenomenon does not necessarily imply the existence of a practical conflict. In the adjudication process it may become evident that the losing claim was without legal substance.

[19] Richardson (n 1) 112.

agent makes a tragic choice "the notion of "acting for the best" may very well lose its content."[20]

This legal remainder implies that a tragic choice as legal concept also consists of the idea of a 'tragic responsive reaction', an acknowledgment that from a legal point of view relevant harm is done by the legal choice. Regret, offering (financial) compensation, or taking measures to avoid similar practical conflicts in the future are possible ways of providing this acknowledgment.[21] But this notion of a 'remainder' emphatically does not encourage a 'taxi meter sensibility of accurately noting the cost of everything'.[22] As mentioned before, a legal tragic choice implies that in a legal case, fundamental values and goods are at stake. Moreover, this tragic responsive reaction is not meant to express what it means to do something wrong when one has made a justified choice, but is meant to focus on the question what it is that you say to or do for citizens who are affected by this choice.[23]

Hence, one could argue that the reasoning in case of a legal tragic choice consists of two parts. Firstly there is the reasoning that leads to the actual legal choice and secondly there is the reasoning leading to the determination of what comprises an adequate 'tragic responsive reaction' to the harm done by this legal choice. From a 'tragic point of view' legal reasoning does not stop with the mere act of making a legal choice. Facing a tragic legal choice implies that part of the 'legal drama' is written 'off court', written in the dialectical process between the legal remainder and legal institutions reacting on it.[24]

Finally, elements involved in the aforementioned 'tragic responsive reactions' cannot arise independently, without the idea of being a certain kind of person. Moreover, without a commensurans and related decision procedures the justification of a tragic legal choice

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[20] Williams (n 11) 173.

[21] 'Tragic responsive reactions' can de facto be recognized in legal practice in for example legally obliged payment of damage in cases of justified policy, but also in cases in which judges 'instruct' the legislator or administrative agencies. But, without the acknowledgment of tragic choice as a legal concept, it is difficult to provide an explanatory and justifying framework for these 'legal phenomena' and to render them coherent within the legal system as a whole.

[22] Michael Stocker, *Plural and Conflicting Values* (OUP, Oxford 1990) 16.

[23] Bernard Williams, 'Liberalism and Loss', in Mark Lilla, Ronald Dworkin and Robert Silvers (eds), *The legacy of Isaiah Berlin* (The New York Review of Books, New York, 2001) 100.

[24] Nussbaum (n 12, 2000) 9.

must come from the qualities of the legal agent. So, it should not come as a surprise that the concept of tragic legal choice is inextricably linked with an agent-centered conception of legal reasoning. Of course, a tragic evaluative framework for legal reasoning does not explain the quality of the legal judgments with reference to virtues alone.[25] Rules, principles, precedent do play a justificatory and explanatory role, but they do not function as commensurans; they are not the final and pivotal normative source from which the actually legal choice can be inferred. This final normative source is the legal agent himself, and as a consequence the concept of a tragic choice implies an 'inside out approach' to legal reasoning.[26] In order for the tragic legal choice and tragic responsive reaction to be right, the legal agent must be good.

5. Objections

To appraise thoroughly the claim that in Western legal orders tragic legal choices should be acknowledged, the main objections against this acknowledgement are yet to be addressed.

An important objection is that moral arguments do not apply to legal reasoning. If one takes law to be fully autonomous, i.e. independent of considerations derived from morality, moral arguments favoring the idea of tragic choice as a legal concept lose force.[27] We all agree that it does not make sense to bother chess players with moral arguments regarding how they reason as players of the game. Some claim the same goes for lawyers in their role and for their legal reasoning due to the assumed autonomy of their practice. All the more so, because according to the 'internal (legal) point of view' of legal practitioners a legal choice cannot be tragic. However, one could argue that moral arguments do apply to legal reasoning, particularly to the reasoning in cases in which the choice made could be called tragic. Unlike chess, law and legal reasoning are concerned with the specification of fundamental moral values, like equality, liberty and human dignity. In Western legal orders law as an institution is attributed the function of

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[25] Lawrence B. Solum, "Virtue jurisprudence: a Virtue-Centered Theory of Judging," *Metaphilosophy* 34, no. 1/2 (2003).

[26] Mac Dowell (n 3) 50.

[27] Dworkin (n 6) 101.

determining citizens' duties and rights that follow from these values. Due to its moral substance it seems fitting to consider law as only partly and not fully autonomous: characterized by the legal tradition in which it is embedded, and at the same time as object of moral considerations. In so far as law is partly autonomous moral arguments favoring tragic choice as a legal concept must be taken into account.[28]

Another objection against acknowledging tragic choice as a legal concept is that it conflicts with the requirement of formal legality. In Western legal orders it is generally accepted that legal decisions should be predictable for citizens. The 'predictability' in question is to be secured by the impartial application of clear and general rules to particular cases. For this reason, formal legality in law is often equated with the concept of the rule of law and contrasted with arbitrary and thus unpredictable use of state-power. Formal legality, however, is not an end in itself, but is a way of protecting citizens' autonomy. By adhering to the requirements of formal legality the law is supposed to "further individual autonomy and dignity by allowing people to plan their activities with advance knowledge of its potential legal implications".[29] Now, the acknowledgment of tragic choice as a legal concept could jeopardize this autonomy. As a tragic legal choice is not deductively inferred from a general and clear rule or principle it can open the door to arbitrary, obscure and so to unpredictable legal choices. While this objection is grounded upon the idea that formal legality indeed protects citizens against arbitrary legal choices, it must be noted that the latter leaves considerable room for unforeseeable and unidentifiable factors that determine the outcomes of legal choices. Conceptions of legal reasoning relying on practical commensurability might comply with the requirements of formal legality, without furthering citizens' autonomy. Any commensurans, whether it be rules, principles, or values, can be interpreted in several ways. The more abstract the commensurans, the more room for interpretation - think of 'constitutional point of view' as commensurans. In such cases the choices legal agents make are not necessarily

[28] Of course, the matter of tragedy and tragic choices is controversial in moral discussion also. But in contemporary virtue-ethics and in neo-Aristotelian ethics strong arguments are presented for the inevitability of tragedy and tragic choices. Next to that human experience as it is part of legal and moral theory, inescapably points to the tragic character of important choices.

[29] Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (CUP, Cambridge 2004) 94.

determined or substantially limited by the commensurans. Legal agents have discretion regarding the determination and qualification of the relevant features of a case. Although it is often argued that conventions and other empirical regularities may increase the predictability of legal choices, the factors determining legal outcomes are so many that it is not plausible to maintain that legal choices can be predicted concretely. Hence, the relation between formal legality and citizens' autonomy is not as strong as is suggested in the objection in question. This relation between autonomy and formal legality would be strong(er) if the practical world could be ordered and explained analogously to the ordering that Newton found in the natural world, i.e. in finite and determinate factors. However, conceptions of legal reasoning that project the characteristics of the natural world on the practical world are subject to obvious criticism. Whereas regarding the former one could argue that regularities can be explained in terms of a finite and determinate set of causes, for the practical world this claim is controversial to say the least.

Finally and in so far the justification of legal choices in Western legal orders is linked to rationality, one could argue that the concept of legal tragic choice does not fit, because it cannot account for the rationality of legal choices. This objection holds of course for an unqualified agent-based approach to legal reasoning which leaves open the possibility that legal choices are highly irrational, deriving from the mere preferences, biases and other contingent thoughts and characteristics of the legal agent. But, the concept of tragic choice does not stress the actual character of the legal agent for the justification and explanation of legal choices; it implies a virtue-ethical account of legal reasoning.[30] In legal reasoning according to the concept of tragic legal choice, law and the agent being virtuous are inextricably linked, i.e. a rational tragic choice is one that would be made by a virtuous legal agent. Besides having judicial intelligence - the excellences of understanding the law and theorizing about it that fit in a thin theory of the legal virtue, - legal agents must have judicial wisdom as part of a thick account of legal virtues.[31] They must know what to do in a concrete legal case. For this ability the legal agent is primarily informed by particulars as to what concerns are at stake and consequently it is sometimes

[30] Solum (n 25) 184.

[31] Ibid.

described as a ‘situation sense’, or as the capability to ‘perceive well’.[32] Rules, principles and precedents do play a role – they express the concerns the legal agents brings to the case, but they do not suffice. In order to acquire the required practical wisdom the legal agent must be experienced and trained in perceptions of particulars.

Moreover, judicious wisdom implies that the legal agent feels an appropriate amount of sympathy for the fate or predicament of the citizens who are affected by tragic legal choices. The judicious, wise legal agent must have a ‘sympathetic understanding’ concerning human matters. Without this capacity a rational ‘tragic responsive reaction’ is impossible. It has already been argued that this reaction consists of having the right attitude and of expressing the right regret or sorrow in the right way. If a legal choice is tragic, sympathy for the burden of the losing party is required as a necessary condition for giving a rational response to the harm done by the legal choice.

Again, even though in this (neo-Aristotelian) account of rationality the outcome of a tragic legal case might not be predictable for citizens (two inconsistent outcomes could in the very same case both be legally correct), yet citizens’ autonomy is not jeopardized. While the outcome of a tragic legal choice might not be predictable for citizens (two inconsistent outcomes in the very same case could both be legally correct) citizens’ autonomy is not jeopardized though. Up to a point, citizens can predict the choice that will be made, in the sense that they can rely on legal agents staying committed to the fundamental legally protected values, goods and interests in question. These are not given up due to the mere fact of a legal conflict. In this agent-based approach virtue and legality are inextricably linked and it is the virtuousness of legal agents on which citizens can rely and in terms of which their autonomy might be protected. In the concept of a tragic legal choice a lawful and rational tragic choice is one that would be made by a virtuous judge.

6. Conclusion

Sometimes people have to make choices by which they harm fundamental interests, goods or values. In such cases they might justify these choices by referring to a viewpoint

[32] Ibid.

in terms of which they conclude that no relevant harm is done at all. Their reasoning secures them from having to regret what is at the same time right. In case people use these 'strategies' in order to stay safe and in control, it is likely that we consider them immature or dishonest. We think they cannot face an inescapable and troublesome condition of human life, namely the fact that in the practical world values, goods, or interests cannot be realized or protected simultaneously.

However, things are different in the legal domain. In Western legal orders it is generally accepted that from a legal viewpoint legal choices cannot be tragic. Legal reasoning has a strong reassuring character, because right legal choices are held not to leave a legal remainder behind. It is precisely the task of an ideal legal agent, like Dworkins' Hercules, to dismantle or subordinate the legal substance of one of the competing claims at stake in a legal case. Accordingly, we praise legal agents who display control, calmness and serenity and for whom right legal choices leave nothing to lament, at least from a legal point of view.

In this paper it is argued that the legal common sense putting it that a right legal choice cannot be tragic is at odds with the requirements of legal integrity, minimal rationality and logic. Not acknowledging that legal choices can be tragic, also impedes moral progress in law. Therefore, the concept of tragic legal choice is proposed as part of any viable conception of legal reasoning. In this concept the legal agent himself plays a pivotal explanatory and justificatory role as to what it means for a legal choice to be right, but also as to a 'tragic responsive reaction'. Besides having the virtue of legal intelligence as it is assumed in any conception of legal reasoning, legal agents must also have the legal virtues of judicious wisdom, sympathy and honesty. In the context of a legal order in which legal choices are generally not acknowledged as tragic, the importance of the latter should be stressed. If one relies on a 'commensurans' and related decision-procedures, like the two dominant conceptions of legal reasoning do, i.e. balancing and subsumption, a right choice can be reassuring and comforting. By contrast, making a right tragic choice causes "all the torment of feeling and understanding".[33] To be able to surrender oneself to this discomfort requires honesty, i.e. honesty to accept that

[33] Wiggins (n 8) 236.

"we want to live, but we cannot, we want men to be equal, but they are not, we want suffering to end, but it will not. For it is honesty which allows us to see clearly, and occasionally appreciate, the ways, some subtle and some not honest, by which (legal orders) must cope."[34]

Solum, Lawrence B. "Virtue jurisprudence: a Virtue-Centered Theory of Judging." *Metaphilosophy* 34, no. 1/2 (2003): 178--213.

[34] Guido Calabresi and Philip Bobbitt, Tragic Choices, (W.W. Norton & Company, New York 1978) 24.