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O Guarda e a Fórmula

The Guard And The Formula

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Resumo

O presente artigo discute os limites da teoria jurídica, especialmente a defesa da Fórmula Radbruch feita por Robert Alexy e suas implicações sobre o conceito de Direito. Assim sendo, considerar-se-á como anteparo Antígona, uma tragédia de Sófocles, que tem sido amplamente utilizada em textos jurídicos e pode trazer uma perspectiva diferente na construção da crítica. Primeiramente, a tragédia é analisada em seu contexto, enredo e personagens. Subsequente, o papel do Guarda - um personagem secundário - é discutido considerando-se a Fórmula Radbruch "injustiça extrema não é direito". Como demonstração da crítica, dados históricos evidenciarão que, em tiranias, nenhuma exclusiva ferramenta teórica é utilizada, mas, sim, diferentes perspectivas jurídicas motivaram a resistência ao longo da história. Finalmente, ao criticar a defesa de Alexy da Fórmula, a posição difícil de resistir à lei injusta é considerada, apresentando-se então uma abordagem acerca do ensino em direitos humanos como perspectiva alternativa aos parâmetros formais da visão de Alexy.

Palavras-chave: Fórmula de Radbruch; Antigona; Robert Alexy; Resistência; Educação em direitos humanos.

Abstract

This paper discusses the limits of legal theory, especially Robert Alexy's defence of the Radbruch Formula and its implications on the concept of Law. Antigone, the tragedy by Sophocles, has been widely used in legal texts and can bring a different perspective in the construction of the following critique. First the tragedy is analysed in its context, plot and characters. Later the role of the Guard – a secondary character – is discussed considering the Radbruch Formula which states that *extreme injustice is not law*. Historical data will demonstrate that, in actual tyrannies, no unique theoretical tool is used but different legal perspectives served resistance throughout history. Finally, while criticizing Alexy's defence of the Formula, the difficult position of resisting unjust law is considered while it is presented an approach regarding human rights education as an alternative to the formality of Alexy`s account.

Keywords: Radbruch's Formula; Antigone; Robert Alexy; Resistance; Human rights education.

1. Introduction

Haemon: […]
Who thinks that he alone is wise, that he
Is best in speech or counsel, such a man
Brought to the proof is found but emptiness
(Antigone, 707)[1]

Greek tragedies have proved to be ageless. We are familiar with names and characters that are as immortal as the old Greek gods have been in history. Writers and philosophers have been analysing these plays for centuries: John Milton, Samuel Johnson, Virginia Wolf, Hegel, Freud among others (HALL, 1994). Sophoclean drama has that same enduring popularity and Antigone, especially, has been used in legal and moral studies for a long time[2]. Its richness in conflict and opposition has proved to be paradigmatic for legal studies, especially legal philosophy.

That is why besides focussing on legal theory and research, this paper will make use of literature (Antigone), especially the Law and Literature strategy in which, according to Richard Weisberg: "*literature provides unique insights into the underpinnings of law and that stories and poems stand as sources of law, richer and certainly more accessible than others in legal philosophy*" (WEISBERG, 1992) [3]. Considering this approach, we aim to discuss one of the central logical Formulas in Alexy's work: the Radbruch Formula, opposing it to the conflict of perspectives narrated by Sophocles in Antigone and factual episodes of legal rhetoric under tyrannies.

The major point in Alexy's practical reasoning is the intimate relation between the bases of his theory. To be more precise, the thesis states that there is a conceptually necessary connection between law and morality, and consequently there is a normative argument that points in the same direction, that is a normatively necessary connection (ALEXY,2000). In order to prove the conceptually necessary as well as the normatively necessary connection between law and morality, Alexy establishes three arguments: (I)

[1] All the epigraphs of the present work are based on the edition of the tragedy made by HALL, Edith. Antigone, Oedipus the King and Electra.: Oxford: Oxford University Press, 1998, 178 p.
[2] For a succinct list of materials related to Antigone, see Martha C. Nussbaum, *A fragilidade da bondade [The fragility of goodness] (2009)*, at 383, note 3.
[3] Richard Weisberg, in Poethics and other strategies of Law & Literature (1992), also points that "literature provides a lively and accessible medium for learning about law in an ethical way", at 5.

The claim to correctness, (II) the argument of injustice, and (III) the argument of principles.[4]

The purpose of our use of the Law and Literature strategy is to criticize the Radbruch Formula applied in the argument of injustice, which is linked to the correctness claim. Thus, the paper provides critical overview of, essentially, Alexy's argument about the normatively necessary connection, which brings up the argument of injustice. However, because the argument of correctness takes on a major role, the argument of the conceptually necessary connection will be questioned. Thus, a direct critique of the normatively necessary connection will be made, and therefore the elements of Sophoclean tragedy will be consistent in the critique of the conceptually necessary connection.

Speaking in literary words, the Guard, a secondary character in the play, holds a limited authority guiding his actions according to the *polis'* law enacted by Creon, but at the same time the Guard was the one who had felt the Antigone claim and had the chance to disobey Creon's order, taking into account the possible contradiction he had felt when the paradigmatic conflict took place. This view in the play is important because it works as a balance to promote a weighing of alexyan concepts and measures their validity. Once considered the Guard's view combined with the other relevant characters', they assume a participant's role in Alexy's viewpoint[5], that is: being able to take normative actions.

Although Antigone was the accused one, her courage and strength can be used as a paradigm of *resistance* during extreme times, which is an example for those who want to oppose unjust law under evil regimes – and a judge, the central example in the participant's view, who carries such characteristics, can be called, for the purpose of this paper, Judge Antigone. On the other hand, the Judge who follows the rules will be called Judge Guard. With that perspective, the difficulty of resisting injustice when holding a public position is the focus of this paper: trying to show how the Formula could sound

[4] Each of them are developed in different works, but all are connected in one famous paper called "*Zur Kritik des Rechtspositivismus",* originally published in Rechtspositivismus und Wertbuzeug des Rechts. Vorträge der Tagung der deutschen Sektion der internationalen Vereinigung f. Rechts und Sozialphilosophie (IVR) in der Bundesrepublik Deutschland, Göttingen, 12-14. Oktuber 1988, Ralf Dreier (Org.). Stuttgart: Franz Steiner, 1990, p 9-26.

[5] According to Alexy, adopts the perspective of the participant who, in a legal system, presents arguments about what this legal system commands, prohibits and allows, as well as on their attributions of power. ALEXY, Robert (1990), p 12-20.

good in some ways, but at the end it simply does not modify anything or any tragedy in legal systems.

In conclusion, we try to frame the only way in which the possibility of *resistance* unfolds itself and that is based on human rights education. Following Martha Nussbaum, the idea of resistance can only be triggered of throughout an approach of human rights content that does not allow itself to be summarized in an abstract theory that can be easily cast aside by interest and will of power. Therefore, human rights education must become that powerful narrative in order to function as a source of democratic legal norms and avoid the objectification of different concepts of justice just to fit into a logical formula.

2. The Tragedy

Antigone: […] Creon has ordained
Honour for one, dishonour for the other
(Antigona, 21)

Greek tragedy appears in the end of the 5th century b.C., and before one hundred years had passed, they disappeared. According to Vernant and Naquet (2011), the tragic oppositions reflected the sentiment of that time – but not only that. After the work of Louis Gernet, the authors say that the real theme of the tragedy was the specific social thought of the city, especially the legal discourse still in process of elaboration and debate. The tragedies had a close connection with cases brought to Greek tribunals. The tragic poets used the new legal vocabulary as means to play deliberately with its uncertainties, fluctuations, lack of precision. It was the passing from a religious culture to a legal one.

Greeks did not have the idea of an absolute law, organized in a coherent system such as the modern legal systems. Local authorities versus sacred powers, world order versus Zeus' justice are some of the problems they faced in law. Besides that, moral problems were shown in legal disputes, putting in evidence human responsibility and its

meaning[6]. It's also important to understand the tragedy institutional status at that time: it was not only a form of art but a social institution that the city placed side by side with its political and judicial bodies (VERNANT; NAQUET, 2011). Tragedies were performed by exclusively male actors and produced at sacred festivals in honour of Dionysus, god of wine, dancing and illusion. Every year there was the tragedy competition in which three tragedians competed against each other with the aim of persuading a jury (democratically selected) to award the first prize which brought prestige and fame (HALL, 1994).

Antigone is the most political of Sophocles tragedies. Creon assumes power after Oedipus' two sons (Polyneices and Eteocles) kill each other. The first law that Creon passes is that Polyneices, the traitor who attacked the city, is to be refused burial. Antigone disrespects this decree and buries her brother's corpse, defending that she would not contradict the unwritten law protecting the rights of the dead. Creon's decree and Antigone's reaction start the catastrophic events that will cause the terrible deaths of Antigone, Creon's wife (Eurydice) and son, Haemon.

Following Brandão (1992), in the tragedy Sophocles opposes the ancient law to a sort of new conception that find its basis in the Sophists influence. The play is not only about the accepted *dike*[7]*,* but the new legal frame consisting in the *athemistia's* law, that could be seen as *adikia,* that is injustice and illegality. According to Nussbaum, Antigone is a play about practical reason, ending with the assertion that practical wisdom (*tò phoneîn*) is the most important element of the good living (*eudaimonía*) (NUSSBAUM, 2009, p. 44). Each of the protagonists has a vision of the world that can be simplistic but at the same time it is a vision that cannot be allocated in sides of rightness or wrongness. That is what allows us to say that the Greek tragedies are not themselves tragedies on 'jurisprudence', but certainly on the construction of morality that considers the ethical and legal contingency.

Nussbaum accurately asserts that Creon, despite being Polynieces's (the traitor) uncle, cannot treat him like one because he betrayed the city. His nephew was not an ordinary enemy (whose corpse would be returned to relatives for an honourable burial)

[6] Vernant and Naquet (2011) affirms that no tragedy is a legal debate but, by using law as a subject matter, they used its elements of confrontation as a means for expressing the opposition of values, having the human being as the central theme.

[7] In the Greek mythology, Dike was the goddess of justice and the spirit of moral order and fair judgement based on immemorial custom (BRANDÃO, 1992).

but was a traitor who would not deserve such consideration (NUSSBAUM, 2009). Having to choose between family ties or the city, Creon's edict demonstrates how easily, without any trace of doubt, he chose the city over Polynieces.

> This edict: (…)
> (…) I have proclaimed to Thebes that none
> Shall give him funeral honours or lament him,
> But leave him there unburied, to be devoured
> By dogs and birds, mangled most hideously.
> Such is my will; never shall I allow
> The villain to win more honour than the upright;
> (Antigone, 194)

In the tragedy, on the other hand, Antigone is Creon's extreme opposite. While Creon is closed in himself, denying any chance of tragic conflicts (as any conflict that might appear shall be solved in favour of the city), Antigone also denies any heterogeneity. But, in her case, she chooses family instead of the city. All her life is structured around a simple set of rules and values that prioritizes her choices. Creon's values are circumscribed to the city's civic life; Antigone's are limited to the dead (VERNANT; NAQUET, 2011).[8] Both are narrow minded, unilateral, closed to the perception of another set of values. They want to eliminate the conflict, trying to suppress contradictions and doubts.

Contingencies, however, are part of life, as they will understand. Despite Haemon and Teiresias warnings (in favour of flexibility, against rigidness), Creon will learn the results of his insensitive deeds. Nussbaum remembers that Creon's intention had a civilizing character but turned out to be grotesquely uncivilized (NUSSBAUM, 2011, p. 70). Justice is a dispute indeed and the tensions that give rise to these disputes are, at the same time, part of the values themselves. Antigone, in the passage 450, expresses this dispute by saying that neither *dike* had decreed the rule nor Zeus, showing the conflict between ancient law and Creon`s law, and putting in evidence the values that guided her actions. It's clear by now that the decree by Creon did not obligate Antigone and her agency was in a way in which considered unjust acting according to the *polis* rule, causing her unbearable suffering. Even if Creon rule was in

[8] Antigone's coldness towards her sister and fiancé, who are alive, is noted by Nussbaum (2011). She does not exchange one word with Haemon during the whole play.

coherence with the *polis* law, Antigone took the risk to confront that same unjust law, knowing that her action would certainly generate punishment from Creon.

> **Creon**: And so you dared to disobey the law?
> **Antigone**:It was not Zeus who published this decree,
> Nor have the Powers who rule among the dead
> Imposed such laws as this upon mankind;
> Nor could I think that a decree of yours –
> A man – could override the laws of Heaven
> Unwritten and unchanging. Not of today
> Or yesterday is their authority;
> They are eternal; no man saw their birth.
> Was I to stand before the god`s tribunal
> For disobeying them, because I feared
> A man? I knew that I should have to die,
> even without your edict; […]
> But when my mother`s son lay dead, had I
> Neglected him and left him there unburied,
> that would have caused me grief
> (Antigone, 450-460)

Although Nussbaum recognizes that both – Antigone and Creon – are dangerously narrow-minded and afraid of contingencies, she criticizes Hegel for not recognizing that Antigone's choice is superior to Creon's.[9] Bearing this in mind, we will discuss if Antigone could have been saved by the Radbruch Formula considered in Alexys' approach and how hard it is for an official to resist an order from an authority.

3. The Guard, the Formula... And who could resist?

> **Guard**: It's bad to judge at random, and judge wrong!
> **Creon**: You judge my judgment as you will – but bring
> The man who did it, or you shall proclaim
> What punishment is earned by crooked dealings.
> (Antigone, 323)

The Guard is a minor character in Antigone. Placed in the beginning of the tragedy, he had the unpleasant and dangerous task of telling Creon of the crime committed by

[9] This superiority is clear throughout the tragedy: the plot, its ending and in the lines of Teiresias, Haemon and, of course, Creon himself after knowing what happened to his son and wife (NUSSBAUM, 2011).

Antigone. He is obviously terrified to bring the bad news to Creon, the sovereign of the city who proclaimed that death was the price for disobeying his edict. The authority of the sovereign must prevail, and the Guard's words show his fragile position while heading to Creon's palace: he tells that, more than once, stopped and turned around in his path, thinking "why do you go to certain punishment?" (HALLS, 1994, p.10). He says: "I am the unlucky man who drew the prize (…) and therefore I am come unwilling and, for certain, most unwelcome: nobody loves the bringer of bad news" (HALLS, 1994, p.10).

Creon's response is violent, as one should expect. He says:

> […]
> My oath: unless you find, and bring before me,
> The very author of this burial-rite
> Mere death shall not suffice; you shall be hanged
> Alive, until you have disclosed the crime,
> […]
> (Antigone, 306)

Because of this threat, the relieved Guard will eventually bring Antigone to Creon, being then cleared of the grave earlier accusations. As any official, the Guard must follow orders. At the same time he has a double role: of authority and servant to superior power. In the case of the tragedy, the Guard, besides Creon and Antigone, had the chance, although with severe difficulties as we will see, to decide which way to go or which position to assume: Antigone's or Creon's. But in order to grasp this point, we shall first analyse a theory that preconizes that an authority, when facing extreme injustice, must not apply the unjust rule because it is not law: the Radbruch Formula[10].

In "Statutory Injustice and Suprastatutory Law," a short article published in 1946, Gustav Radbruch wrote:

> The conflict between justice and legal certainty may be resolved in that the positive law, established by enactment and by power, takes precedence even when its content is unjust and improper, unless the contradiction between positive law and justice reaches such an intolerable level that the statute, as "incorrect law" [unrichtiges Recht], must yield to justice. It is impossible to draw a sharper line between cases of statutory non-law and law that is still valid despite unjust content. One boundary line, however, can be drawn with utmost precision: Where there is not even an attempt to achieve justice, where equality, the core of justice, is deliberately disavowed in the enactment of positive law, then the law is not merely "incorrect law,"

[10] The so called Radbruch's Formula is presented in its "final" terms by Robert Alexy, as we shall see during the text. For example, see: ALEXY, Robert. A defence of Radbruch's Formula. In Recrafting the Rule of Law: the limits of legal order, 1999.

> it lacks entirely the very nature of law. For law, including positive law, cannot be otherwise defined than as an order and legislation whose very meaning is to serve justice (RADBRUCH *apud* HALDEMANN , 2005, p. 166)[11].

Robert Alexy (1996, p. 16)[12] explains that the Formula is composed by two parts: the intolerability Formula and the disavowal Formula. Haldeman, following Alexy, states that "while the intolerability Formula is attuned to the level of injustice and therefore has an objective character, the disavowal Formula refers to the purpose or intention of the legislator" (HALDEMAN, 2005, p. 166). Positive law loses its legal validity if, and only if, it reaches a level of extreme injustice. Only in situations of the extreme does legal certainty must give way to arguments based on justice as a ground for judicial "resistance". In ordinary times, however, morality should not determine the validity of law.

Alexy has defended the Radbruch Formula in the general context of a post-positivist theory of law:

> What is correctly taken to be the law depends not only on social facts but also on moral correctness. In this way, what the law ought to be finds its way into what the law is. This serves to explain the Radbruch Formula, which says not that "Extreme injustice should not be law" but, rather, that "Extreme injustice is not law." Perhaps what has been said will suffice, however, to indicate what non-positivists mean when they claim that their more complex explication is closer to the nature of law than the simpler explication offered by the positivists (ALEXY, 2008, p.297).

Once we admit that the Formula is applicable, we must now turn to the Guard who could have saved Antigone. As a participant in the system of the *polis*, the Guard had the importance of a balance in the context of applying or not the decree, especially because the subject matter in question was something contradictory to the ancient law,

[11] The original: „Der Konflikt zwischen der Gerechtigkeit und der Rechtssicherheit dürfte dahin zu lösen sein, daß [dass] das positive, durch Satzung und Macht gesicherte Recht auch dann den Vorrang hat, wenn es inhaltlich ungerecht und unzweckmäßig ist, es sei denn, daß [dass] der Widerspruch des postiven Gesetzes zur Gerechtigkeit ein so unerträgliches Maß erreicht, daß das Gesetz als unrichtiges Rechts der Gerechtigkeit zu weichen hat. Es ist unmöglich, eine Sscharfere Linie zu ziehen zwischen den Fallen des desetzlichen Unrechts und den Trotz unrichtigen Inhalts dennoch geltenden Gesetzen. Es ist unmöglich, eine Schärfere Linie zu ziehen zwischen den Fällen des gesetzlichen Unrechts und den Trotz unrichtigen Inhalts dennoch geltenden Gesetzen; eine andere Grenzziehunh aber kann mit allter Schärfe vorgenommen werdem: wo Gerechtigkeit nicht einmal erstrebt wird, wo die Gleichheit, die den Kern der Gerechtigkeit ausmacht, bei der Setzung positiven Rechts bewußt verleugnet wurde, das ist das Gesetz nich etwa nur "unrichtiges Rechts" vielmehr entbehrt es überhaupt der Rechtsnatur. Denn man kann Recht, auch positives Recht, gar nicht anders definieren denn als eine Ordunung und Satzung, die ihrem Sinn nach bestimmt ist, der Gerechtigkeit zu dienen". In RADBRUCH, Gustav. Gesetzliches Unrecht und übergesetzliches Recht. Süddeutsche Juristen-Zeitung, v. 1, n. 5, p. 105-108 aug 1946.

[12] Given the specificity of the article cited in relation to this essay we will refer preferably to it. ALEXY, Robert. A defence of Radbruch's Formula. In Recrafting the Rule of Law: the limits of legal order, 1999.

and as shown by Antigone, unjust in an ethical sense, causing suffering and pain for those linked by blood ties. If the argument of injustice could be used in such isolated norms (ALEXY, 1990), and if it is normatively binding because this Formula is a result of a balancing between the values of justice and legal security (SOUZA, 2011), the Guard had the opportunity as participant not to follow the rule because there was not a claim to correctness understood as a claim for justice.

It is important to say that Creon could not use the Formula himself since he is the author (the authority) that imposes the decree – how could he ever assess from an external point of view the extreme injustice if he was the one who gave the command, believing that his edict respected the gods' law? Therefore, he considered his command an act of justice –, and also he is an already positioned participant. Who could have disrespected the edict, letting Antigone escape without being caught (therefore resisting or refusing to accept the unfair law)[13]?

The burden of the Formula is on the person who has to choose between following the rule or not. The Guard[14] is the only character in the play that had the chance to save Antigone, because he was able to evaluate if Creon's decree would be unjust as an extreme unjust rule. Taking all characters as participants, the Guard could use Alexy's practical reasoning and balance to assess if the unjust law should be followed or not, in which case it would be characterized as unjust and could not rise a claim to correctness, depriving the norm of its normative sense, and thus not obligating anyone to accept it or use it in a *decisum.*

If we read carefully the Guard's words, we will find a pattern of fear/doubt (if he could, he would have avoided meeting Creon) and eagerness to please the king after arresting Antigone. Some authors contend that Creon did not consult the citizens of Thebes before making his announcement forbidding the burial. If we assume that he composed this prohibition on the battlefield, as Judith Fletcher does, there would be no opportunity for deliberation (he does announce it a second time to the assembly of Theban Elders but without any debate or consultation). "Creon attempts to create law unilaterally, ignoring both the voice of the demos and the laws of the gods" (FLETCHER,

[13]If the decree actually qualifies as unfair law is a point open to discussion. But taking into account the complexity as a whole, only unfair law could cause in a normative sense tragedy, expressing here our point of view about what is something valuable to be called justice or unjust. Later in this work this view will be clarified.

[14]To be precise, the guards (plural) had that chance. But since only one Guard appears in the tragedy, we will assume that he is the one who could have chosen to let Antigone free.

2008, p. 79). In that respect, from an external point of view (Alexyan observer), we could be led to the assumption that the edict is law even if unjust. As an observer it is totally understandable that the Guard followed the rules and executed the order on the basis of either an acceptance of the decree as just or an absence of resistance for fear of the hostile consequences[15].

Antigone chose to defy the decree of a tyrant and bury her brother. She acted as an individual who resists an unjust law.[16] Here we find a connection with Hans Kelsen's positivist view concerning the individual's possibility of resisting to unjust law; as Haldemann emphasizes, Kelsen's content-neutral concept of legal validity does not imply a moral duty to comply with any and all legal norms: "since moral values are only relative, the moral decision to obey or disobey the law is left to each citizen" (HALDEMANN, 2005, p.169). For a judge, however, this statement is not applicable. For Kelsen, according to Haldemann, the proper objective role of judges and officials consists, after all, in the strict application of the law, understood as an effective system of coercive rules (here we find a major difference between Kelsen and Radbruch, as for Radbruch the judge can choose to not consider law a norm that is extreme unjust).

But it is the Guard who could have saved Antigone – if, and only if, according to Alexy's lesson, he had this non-positivistic approach, i.e., the Radbruch Formula in mind and if he agreed that it was worth risking his life to resist an extreme unjust law. But, as Klemperer (1992) has shown, it's not an easy task to have that kind of attitude – a point which is even acknowledged by Alexy's position in his defence of the Formula when he says that, for a judge in an unjust state, it makes little substantive difference whether he relies on Hart's view (based on moral grounds) or Radbruch's (based on legal grounds): other factors, apart from the struggle over the concept of law, are also relevant here, such as, the personal costs and preparedness to take such a resistant attitude.

[15] For an explanation of the internal and external points of view, see HART, H. L. O conceito de Direito (2005) at page 100/101. For an application of these perspectives to the Radbruch Formula, see ALEXY, Robert. A defence of Radbruch's Formula. In Recrafting the Rule of Law: the limits of legal order,1999. For a critical approach of this distinction in Alexy, see Joseph RAZ, Joseph. The Argument From Justice, or How Not to Reply to Legal Positivism (2007). Available at: <http://www.ssrn.com/abstract=999873>. Visited in April 6th, 2016.

[16] Larry Bennett and William Blake Tyrrell, *apud* Fletcher, say that "Antigone acts correctly because she does not defy Creon, leader of Athens, but Creon, the totalitarian ruler of impious Thebes" (FLETCHER, 2008, p. 79). In other words, says Fletcher, blind obedience to the commands of a ruling power was not an obligation if those commands were not sensible.

The Formula presupposes two conditions in Radbruch's approach: extreme times (tyranny, dictatorship and, as a consequence, the risk of suffering institutionalized violence) and will to resist (even if it is one's duty to apply the law – this, of course, being the rarer of the two). It is far easier to find examples of the Radbruch Formula application *after* the evil regime was deposed. We agree with Brian H. Bix when he argues that in practice, the Formula is most likely to be applied when some form of transition from an evil regime to a just one has happened. Therefore, a judge is asked not to apply the law of the previous regime: post-war Germany (after the Nazi era); unified German (after East German past) etc. As Bix outlines, he is unaware of any court using the Formula to refuse enforcement of otherwise valid legal norms enacted *under* that regime[17]– during tyrannical times, as we shall see, more efficient and safer tools are available.

This becomes even clearer when we read Klemperer analysis of the German resistance under the Nazi regime. Comparing the resistance in Norway, France and Holland, he concludes that in Germany the resistance movements had no clear mandate as opposed to those countries where the struggle was against occupation and oppression from a foreign power. In Germany, he says, "there was terror, of course, but also something even more bedevilling than terror, namely, the Nazi regime's semblance of legality, respectability, and cleanliness" (KLEMPERER, 1992, p. 104). Klemperer finds that sociological approach to resistance forgets about its existential dimension, "the autonomous decision of the individual acting in solitude and following the commands of his or her own conscience" (KLEMPERER, 1992, p. 108), against an enormous pressure to follow the rules of the oppressor. At the risk of being accused to betray his or her nation, the individual who chooses to resist does not want to betray his or her conscience. If this

[17] See BIX, Brian H. Radbruch's Formula and conceptual analysis. American Journal of Jurisprudence, v. 56, pp. 45-57, 2011. Available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2017942>. Visited at July 15th, 2015. In this paper, Bix finds that the Radbruch Formula should be seen "as prescriptions for judicial decision-making rather than as descriptive, conceptual or analytical claims about the nature of law". In his other paper the same position is defended: the Formula is important to help judges but doubtful when used as a theory about the nature of law. See BIX, Brian H. Robert Alexy, Radbruch's Formula, and the Nature of Legal Theory. Rechtstheorie, v. 37, pp. 139-149, 2006. Available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=892789>. Visited at July 15th 2015. See also FINNIS, John. Law as Fact and as Reason for Action: A Response to Robert Alexy on Law's "Ideal Dimension". American Journal of Jurisprudence, v. 59, 2014. Available at: <http://ssrn.com/abstract=2428733>. Visited at April 10th 2016: "In short, the Radbruch Formula does not state a conceptual necessity (…). *It is not a truth about law, a truth of the philosophy of law (legal theory),* even if in many cases its adoption and application as a rule of thumb – an 'expedient concept', as Alexy says – works reasonably well in resolving questions arising in legal practice from such injustice".

individual is in fact acting in total solitude or is relying on some previous collective values, is a matter we shall discuss later (WALZER, 1967, p.31)[18]. Anyway, the consequences of such an act are, in most cases, a burden to be carried alone.

Although Alexy (1999) affirms that he does not have any illusions about the chances of a resistance against an unjust regime, which can easily destroy legal practice consensus by intimidation, changes in personnel and rewards for conformity, he then defends his view saying there are two effects that serve as evidence in favour of the Formula and his anti-positivist doctrine: the effect on practice and the risk effect.

About the first effect (on practice), according to Alexy (1999), there is a difference between relying on the legal practice or on the judge's individual conscience. Based on legal practice consensus, there would be a capacity to provide resistance to the acts of an unjust state by arguments which are both juridical and moral. However, there is no empirical evidence in favour of this view. As demonstrated above, Klemperer's scepticism on sociological analysis of movements of resistance can be applied *mutatis mutandis* to the legal theoretical discussions about the realities of tyrannical regimes. It is hard, although not impossible, to believe that a judge under a dictatorial regime would not impose perfect valid rules on the grounds of a legal practice consensus based on non-positivist limits for the concept of law. If this brave judge can do that, it is a matter of a weak regime or a strong and resistant individual: a Judge Antigone. Either way, it's a personal and courageous act (although, as demonstrated in part V of the present paper, preceded by collective values); and in spite of Alexy's own doubts (he thinks that this is a limited effect), one can acknowledge that it is better to rely on both legal and moral arguments than solely on moral ones so as to deny the application of a valid rule under an evil regime. In this respect, Alexy's (1999) argument is better than Hart's, at least under a consequential-pragmatist analysis.

Finally, there is the risk effect, explained by Alexy in these terms:

> Take for example a judge who confronts the question whether he should impose a terroristic prison sentence which falls within the scope of the legislated injustice. […] He is as little concerned about the fate of the accused as he is greatly concerned by his own. On the basis of historical experience, he cannot exclude the possibility that the unjust state will

[18] According to WALZER, Michael. The obligation to disobey. Ethics, v. 77, n. 3 (Apr., 1967), pp. 163-175. Available at: < http://www.jstor.org/stable/2379683> . Visited at visited April 10th 2016: "The heroic encounter between sovereign individual and sovereign state, if it ever took place, would be terrifyingly unequal. If disobedience depended upon a conscience really private, it might always be justified and yet never occur". That's why Walzer defends that there is mutuality in disobedience.

> collapse and he wonders about what would then happen to him. Suppose that he must accept that an anti-positivistic concept of law will prevail or be generally accepted, according to which the norm on which he based this terroristic judgment is not law. It follows that he undertakes a relatively high risk of not being able to justify himself later and thus being prosecuted. The risk is diminished if he can be sure that his conduct will be judged later in accordance with a positivistic concept of law (ALEXY, 1999, p. 31).

Alexy clearly links an anti-positivist concept of law to the disincentive to act according to an extremely unjust law, even if the judge sees no reason to refrain from participating in injustice. It seems here that Alexy is, in other words, saying that an indifferent judge (not saint nor hero, as he describes) would prefer to avoid future condemnation by preferring to risk his life and be condemned at the present time by the evil regime. That is not an obvious and intuitive conclusion. If one is to talk about risks, it is much riskier to confront an evil regime (which is, well, *evil*!) now than expect to be condemned by a future post-evil (and probably *non*-evil) regime that lives only in conjectures unless the tyranny is recognisably in its final breath. If the options for a Judge Guard (not for a Judge Antigone, who doesn't calculate) are: I) present and almost certain pain; or II) future less probable pain, an attitude of utilitarian avoidance of self-sacrifice helps to decide in favour of avoiding the eminent and actual risk in detriment of a future unknown risk. As a result, we have to ask the following question: How Radbruch's Formula would be useful in any practical case of a participant surrounded by the characteristics in account?

4. Judge Antigone and Judge Guard

> **Creon**: Have you no shame, not to conform with others?
> (Antigone, 510)

Alexy tries to use the Radbruch Formula as a component of his concept of law but, as his double-effect lesson shows, at the end of the day it is a matter of personal choice before a dilemma, even though personal choices are never totally apart from values whose origins come from community [as Walzer (1967) argues]. The argument of extreme injustice is a normative argument, thereby it refers to a substantive thesis that could only be affected with substantive arguments (ALEXY, 1998). Until now we only have demonstrated that the Formula itself is not much useful in practical cases of extreme

times, which is a contradiction, because if there is a normatively necessary connection between law and morality, the Guard should had guided his agency in accordance with what the very fundamental core of that connection prescribes, and that is: extreme unjust law is not law. Thus, the general practical obligation is not to follow, because the decree is not in accordance with the claim to correctness raised by morality, represented in the play by Antigone's choice. If that claim does not turn into legal terms, this means that Creon's decree is unjust, because, as Alexy says, the claim to correctness is also a claim to justice (ALEXY, 1998). But the paradox relies on the fact that if the Guard in Antigone is our Judge Guard, his decision of following Creon's decree also raises a claim to correctness – or an objective claim to correctness, as Alexy says: "On the other hand, there is an objective claim to correctness if everybody who decides, judges, or discusses the matter in a legal system must necessarily raise this claim"[19] (ALEXY, 1998, p. 206). Well, the question here is how we can solve the conflict between claims to correctness?

Moreover, every legal system contains coercive precepts which by no means define, but composes such a system, even if it is developed in a minimum. The point is that during the process of defining how to act in accordance to Alexy's logical standards, it is not possible to find a formula that deals with decisions that determine in concrete cases the coercion as a constitutive part of it. As a piece of evidence of this fallibility, the doubts demonstrated by the Guard may even say that he had made constructions on the fact that Creon's decree was unjust, but such constructions were not sufficiently binding to overthrow the element of coercion. It looks like just as Creon and Antigone were blindly seeking certainty, Alexy's argument of injustice does the same.

As a result, another point may be made. The Formula presupposes a certain objective concept of justice in order to be valid, which is not possible in our view, because in order to say that a norm is unjust as a conclusion of logical terms, it is necessary a major premise that defines what justice is. One cannot find this in Alexy's nor in Radbruch's thoughts, especially because when social matters are posed in logical terms, the formal logic is not possible, since it requires a discursive logic. Alexy knows – and this is why he puts so much effort on it – that, in his terms, to prove the connection

[19] An interstation interpretation of that is presented by STRECK, Lenio Luiz. Porque a discricionariedade é um grave problema para Dworkin e não o é para Alexy?.Revista Direito e Práxis, v. 4, n. 2, pp. 343-367, 2013.

between law and morality, the normativity of some ethical standards constructed in principled language must fulfil the formal requirement of the logical conclusion in the argument of injustice. However, this objectification (that justifies the application of the Formula) ends up removing from the legal cases the possibility of having different meanings. In other words, the moral principles which take part in legal systems become imperatives that move the contingency, the soul of one's history[20]. No one could resist this moral daily life without causing himself harm.

The same contradiction within the correctness thesis could be found in the other argument that connects morality and law, namely the conceptually necessary connection. In this argument the theory of principles plays a major role, especially because of the I) the *incorporation* thesis (ALEXY, 1997) that says that each developed legal system (or developed in the minimum) contains principles, and II) the *moral* thesis (ALEXY, 1997), which states that each developed legal system (or developed in the minimum) comprises principles that belong to a common morality. It follows that the application of those principles in specific cases raises a III) claim to correctness, and if some of that principles are moral ones, the claim raised is also a moral claim to correctness (ALEXY, 1997). With that in mind, the moral rule that Antigone chooses to follow was also part of the legal system of Thebes, (which was developed in a minimum). That moral rule was connected somehow to the old Greek Gods, and as Brandão (1992) says, the State was bounded by the rules of Greek Gods that represent a sort of moral principle in the Thebes legal system.

Antigone chooses to follow that moral principle, when confronted with Creon's decree. In this passage, she summarizes her agonizing conflict:

> […] that no one may
> Be left in ignorance; nor does he hold it
> Of little moment: he who disobeys
> In any detail shall be put to death

[20] In this position, the problem of finding an objective concept of justice is something in discussion in moral philosophy. What is considered to be just is always changing, even in the normative sense. For example, Nancy Fraser, alongside with Charles Taylor, has shown that in the past few decades the claim of a normative concept of justice could not only be placed in terms of the Rawlsian equality, but also in terms of *recognition*. On one side, there is a vision attached to the kantian moral tradition with its construction of a person as *an end in itself* requiring *respect.* On the other side, one finds the idea of recognition linked to the critical theory tradition, more developed with the application of a methodology of immanent critique. In any sense, this last point seems more appropriate, because it does not standardize the idea of justice. See the work of Axel Honneth published in HONNETH, Axel. The fabric of justice: limits of proceduralism. Civitas, v.9, pp 345-368, 2009. And also Axel Honneth's theory of justice published in the book HONNETH, Axel. Freedom's Right: The Social Foundations of Democratic Life. Ney York: Columbia University Press, 2014.

> By public stoning in the streets of Thebes.
> So it is now for you to show if you
> Are worthy, or unworthy, of your birth,
> (Antigone, 32).

This passage demonstrates more properly the conflict in question, but here one cannot enter into the practical reasoning proposed by Alexy when principles get in conflict[21]. The balancing is compromised by the elements that surround the narrow-minded Antigone, because she is ethically bounded to act according to ancient costume. *Mutatis mutandis* when a person is in a position like Antigone's – already convinced of the final decision because of inner ethical beliefs – no general theory of discourse will be able to function as an *a priori* procedure, since the decision had been taken all along. Even if someone faces an unjust situation, it will not be possible to justify in procedural-rational terms the decision already taken because such kind of ethical and, most of the times, emotional perspective does not follow the rigid rules of balancing.

Therefore, if a certain decision raises a claim to correctness, it should also raise a claim to justification. This rational justification, however, is not possible in the case of a Judge Antigone because he or she makes a decision based on certain moral imperatives. Sometimes the claim to correctness, and the claim to justification, are not possible in the logical procedural perspective of the arguments because it does not encompass the *hypothetical imperative* that surrounds one own decision. In other words, the claim to correctness does not express ethical values that guide *the normativity of an ethical life*[22].

In that reasoning, García Amado (2012)[23] has shown that the complexity of the problem is not faced simply by establishing logical formulas, presenting this

[21] It's necessary to mention the famous distinction made by Alexy between *principles* and *rules*, both them norms that compose a developed (or developed in a minimum) legal system: "The necessity thesis has found its most elaborated form in principles theory. The basis of principles theory is the norm-theoretic distinction between rules and principles.2 Rules are norms that require something definitively. They are definitive commands. Their form of application is subsumption. If a rule is valid and if its conditions of application are fulfilled, it is definitively required that exactly what it demands be done. If this is done, the rule is complied with; if this is not done, the rule is not complied with. By contrast, principles are optimization requirements. As such, they demand that something be realized 'to the greatest extent possible given the legal and factual possibilities'.3 Rules aside, the legal possibilities are determined essentially by opposing principles. For this reason, principles, each taken alone, always comprise a merely prima facie requirement. The determination of the appropriate degree of satisfaction of one principle relative to the requirements of other principles is brought about by balancing. Thus, balancing is the specific form of application of principles." (ALEXY, 2014, p. 52)

[22] For those who are aware, the usage expression is a title of a paper by Axel Honneth. See HONNETH, Axel. The normativity of ethical life. Philosophy and Social Criticism, v. 40(8), pp 817 – 826, 2014.

[23] García Amado (2012), among many important points, demonstrates how Alexy's claim to correctness is useless. It is not our purpose here to confront this specific aspect of Alexy's theory but we can have a clue of Amado's point if we remember that Creon's edict had a claim to correctness since he believed that the gods

psychological ingredient separating legal from moral claims: if a judge states that N (or the result of the application of a rule) is legally correct, he makes a legal claim of correctness. If simultaneously the judge affirms that N (or the result of the application of a rule) is morally incorrect, he makes a moral claim. In the first case, his point of reference is the legal system. In the second, in order to justify his claim, he will have to argue considering a moral system. According to García Amado, there is not any performative or logical contradiction here, but only a personal dilemma, which can be resolved giving preference to one of these two systems: legality or morality.

Antigone relied solely on the moral system, the normative ancient rule. The Guard after the confession of his *confusion* acted in accordance with Creon's decree, deciding to follow the legal system. If the Formula could help, it could do so by giving a pragmatist tool for the judge, by giving one more line of argument against evil norms. But one cannot expect this doctrine to actually be a conceptual limit of law that is useful even during extreme times. History shows that even when valid and just rules are applied against a tyrannical regime, judges are in great danger, let alone to ignore a rule that favours the regime under the argument that it is not law[24].

So far, one can raise the counter-argument that the points presented above are not a substantive criticism of Alexy's theory. Consequently, we shall move forward. As aforementioned, Alexy's double-effect theory does not stand against historical evidence, because different conceptions about law were useful in different contexts. Mark J. Osiel, in fact, has showed that "contingent political circumstances […] determine which legal theory fosters most resistance" (OSIEL, 1995, 481). After researching Brazilian and Argentinian Judiciary during their respective dictatorships, he concluded that

> Where judges have been largely sympathetic to the authoritarian regime, as in Argentina, they have sought to express their criticism of its most oppressive policies in the same jurisprudential form as the adopted by the regime's rulers. Given this desire to couch judicial criticism in a friendly form, positivism offers the most congenial idiom for resistance where authoritarian rulers seek legitimacy for themselves and their policies

were on his side. Alexy would reply that there is a second aspect that ought to be respected – the actual justice of the system – which was lacking in Thebes at the time of Creon. But that can definitely show how the first premise – the claim to correctness – can be cast aside without losing any theoretical rigour.

[24] In Brazilian dictatorship, which lasted from 1964 until 1985, for instance, Institutional Act n. 1 (the first rule after the military coup) suspended the public employees' rights to stability in their function (right to not be dismissed), which enabled the new regime to impose retirements or dismiss magistrates. Later,in 1969, three Supreme Court justices – Evandro Lins e Silva, Hermes Lima and Victor Nunes Leal – were forced to retire because of their democratic positions. For a recent report on the subject, see <http://www.cnv.gov.br/images/documentos/Capitulo17/Capitulo%2017.pdf.>.

> through the appearance of continuity with the preceding constitutional regime (OSIEL, 1995, p. 542-543).

In Brazil, however, where "the Brazilian Junta did not seek justification for the initial seizure of power by invoking a constitutional provision allowing the declaration of a state of emergency", but instead their political aspirations were revolutionary, [which had influence on the "revolutionary legality" (OSIEL, 1995, p. 527)], since judges were largely unsympathetic to the regime, natural law provided the most congenial form of resistance. But instead of using natural law for moral reasons, according to Osiel, the judges' aim was to address a larger public beyond the ruling circles of the regime. Whenever the Judiciary, says Osiel, wishes to communicate a sense of the regime's fundamental illegitimacy, natural law arguments are best suited (OSIEL, 1995, p. 543). Contradicting Alexy's opinion with empirical research, Osiel reaches an important conclusion: one shall be sceptical about generalizations in this discussion as each of the grand jurisprudential traditions is so plastic "that a skilled rhetorician can always find what he needs, for any purposes, within it" (OSIEL, 1995, p. 548).

Other examples are available. Richard Weisberg research on France under German occupation found the other side of resistance: acceptance. Weisberg argues that the French legal community went beyond the demands of the German occupiers, causing the death of tens of thousands of Jews. According to him, "the prevalent 'postmodernist' hermeneutics directly risks producing modes of practice that replicate Vichy's text-avoidance, relativism, and ethical debasement" (WEISBERG, 2001, p. 145). Weisberg argues that if the legal community had relied on the foundational egalitarianism of traditional French constitutional law, massive murder would have been avoided. Here we find again the evidence of another kind of problem: even in a country where constitutional background existed to support the rhetoric of resistance, the legal community preferred an antitextual approach which liberated the legal professional from ethical norms. Weisberg's arguments, however, are different from Osiel's, for Weisberg is in fact worried that postmodernist theories (*a la* Stanley Fish, for instance) and their lack of restraining principles might be used in the future to bypass or avoid egalitarian traditions[25]. He is more preoccupied with the non-resistant discourse than

[25] It is interesting to compare Weisberg's findings with Raz's statement that "Legal positivists are more likely than natural lawyers or other non-legal positivists to affirm that sometimes courts have (moral) duties to disobey unjust laws" (WEISBERG, 2001, p. 22).

with the other side of the coin. But his findings can add up to Osiel's conclusion: if a French judge under Vichy law had decided to rely on constitutional positivism to antagonize the racist decrees of that time, he would have had at least a theoretical justification that is far safer and stronger than other non-positivist options (including the Formula).

Finally, to make things even more complicated, there is the so called "Belgian case", which demonstrates that even what is *not* law can be law when collective resistance is required above formalities and authoritative procedures. Both during the First and the Second World Wars the Legislative branch in Belgium could not act in accordance with the Constitution, because this European country, a Parliamentary Monarchy, was almost entirely occupied by the Germans. According to Perelman (1979), in his account of the case during the First World War, the King and the army were in the Havre, and as the Legislative could not function, the King enacted statutes without any parliamentary approval (in discordance with articles 25, 26 and 130 of the Constitution). Nevertheless, after these wars, the Hof van Cassatiel/Cour de cassation (Supreme Court of Belgium) considered those acts, enacted without following constitutional obligatory rites, to be fully valid under the justificatory theory of "constitutional *force majeure*" (BONDT; BOCKEN, 2001), even though the Constitution did not provide any such principle. Perelman used this as evidence against Kelsen's positivism and it can be used now as evidence against Alexy. From our perspective, this case proves that when it's time to antagonize (or would it be Antigonize?) evil regimes and unjust laws, different theories serving diverse legal rhetoric can be used, sometimes antitextualist, sometimes positivist ones, without falling into the truncated system of performative contradiction.

It is undeniable that there is danger in this flexible use of legal discourse, i.e., the danger of legitimatizing tyranny through manipulation of rhetoric aiming at weakening the institutional framework but it is also undeniable that law is always under this very threat[26]; that same flexibility, however, can mean the salvation of lives or the beginning

[26]It is relevant to remember what was mentioned above about Radbruch's position: his Formula is not a tool for times of institutional normality. Disobedience in democratic regimes is a much more difficult and contentious topic, one that is not being discussed here. Our main focus is resistance against tyranny. Some recent examples show that even behind a democratic façade (elections, for instance) lies an undemocratic state. For instance, on 11 December 2009 in Venezuela, judge María Lourdes Afiuni was incarcerated and held under house arrest for three years after granting bail to a political prisoner according to provisions of the Venezuelan penal code. An International Bar Association Report found that "Judge Afiuni was arbitrarily arrested without a warrant and without reasons for her arrest following her decision to release a so-called 'political prisoner' in accordance with the Venezuelan Penal Code and a United Nations Working Group on

of a counter-discourse that will eventually depose the regime. As the songwriter Leonard Cohen poeticized: "there is a crack, a crack in everything, that's how the light gets in" (COEHN, 1992)[27]. One can only hope that law can be the crack that lets light get in dark places.

5. Resistance and Human Rights Education

Ismene: What? Would you bury him, against the law?
(Antigone, 44)

In his 1967 paper "The obligation to disobey", Michael Walzer affirms that morally, religiously or politically motivated disobedience is almost always a collective act and finds its justification in the values of the community and the mutual engagements of its members[28]. Putting together Walzer's view, the realities of tyrannies and the plurality of legal concepts used to avoid unjust law, one cannot escape some sort of pragmatism. As stated above, pragmatism is as dangerous as any unprincipled theory: it is a knife that cuts in both ends. It can articulate legal discourse that legitimates dictatorships (as in Brazil, where the military coup was called "revolution" or Vichy and its technicalities about race) or find ways to counter-attack that same regime. How can we assure that

Arbitrary Detention decision. Immediately after her arrest, the late president Hugo Chávez Frías appeared on national television calling for her imprisonment for 30 years and said that her case should be an example to other judges". The IBA delegation found that the case had created an atmosphere of fear amongst judges, known as the 'Afiuni effect', and heard frequently that 'no one wants to be the next Afiuni'. Tthe complete report is available at <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=c11d6207-b021-4622-9fa9-a5be94ccdd97> . For a position (*prima facie*) against judges' resistance under democratic regime, see Carlos Santiago Nino, Ética y Derechos Humanos (1989), pp. 404-411. In a different context (protesting rather than authority resistance), we find a critique of the depoliticizing of protest activity under democratic regime: see EL-ENANY, Nadine. Ferguson and the Politics of Policing Radical Protest. Law and Critique, v. 26, n. 1, pp. 3-6, 2015. For a neo-hegelian approach to political resistance motivated by lack of recognition, see HONNETH, Axel. The Struggle for Recognition – the moral grammar of social conflicts. 1995. These last approaches to resistance are not part of this article.

[27] Transgression under an obedient façade is also common in art. See NEUFELD, Jonathan A. Aesthetic Disobedience. The Journal of Aesthetics and Art Criticism, v.73, pp.115–125, doi: 10.1111/jaac.12157. 2015, "Schoenberg and Stravinsky, in distancing their music from 'revolution,' were at pains to argue just this (Schoenberg replacing "revolution" with the non-political and less radical 'evolution,' for example)" (NEUFELD, 2015, p. 116).

[28] He also says that "… commitments to principles are simultaneously commitments to other men, from whom or with whom the principles have been learned and by whom they are enforced" (WALZER, 1967, p. 164).

this uncertainty will be on the right side when the time comes (right side meaning the non-despotic side)[29]?

Imagine a judge who is loyal to his country's institutional framework and to the human rights legal *corpus* he has learned to respect. Now imagine that these two loyalties are in opposition. The choice between these two set of obligations is what matters. Resistance can only be stimulated through an educational approach whose human rights content is not an abstract theory that can be easily cast aside by interest and will to power. Human rights will only serve its purpose if it is part of a day to day education of the legal student and practitioner. Loyalty to human rights shall be developed once its importance is proven by the demonstration of violations – be them from the right or left of the political spectrum – that shock and cause reaction. That's why a theory like Nussbaum's cultivation of humanity is so relevant.

According to Nussbaum (2003), three capacities are essential to the cultivation of humanity by students: I) the capacity for critical examination, II) the ability to consider the reality of distant lives (recognize other human beings besides their local group or region) and III) the narrative imagination.

The first one is especially important in matters of resistance: it means that the person does not have to accept a belief as authoritative just because it has been handed down by tradition of habit. Only the arguments that survive reason's demand for consistency and justification should be accepted (that is what Socrates called "the examined life"). The second one remembers us that we often neglect the needs of those who live far from us or look different from us. A culture of recognition should be developed as a way of seeing those who are or become invisible (for distance or difference). And finally, the narrative imagination means that intelligent citizenship demands the ability to think what it might be like to be in the shoes of a person different from oneself, to see the world from the point of view of the other. Nussbaum emphasizes how catastrophic would be to be ruled by competent people who have lost

[29]See RORTY, Richard. The banality of Pragmatism and the Poetry of Justice. Philosophy and Social Hope. Penguin Group: Virginia, 2000, p. 99. He debated over this same issue while discussing paradigm shifts in judicial interpretations: "I can share Dworkin's and Ely's concerns over the 'unprincipled' character of such decisions – their concern at the possibility that equally romantic and visionary, yet morally appalling, decisions may be made by pragmatist judges whose dreams are Eliotic or Heideggerian rather than Emersonian or Keatsian. But as a pragmatist, I do not believe that legal theory offers us a defence against such judges […]". Pragmatism, for him, meant freedom from theory-guilt and scientific anxiety. He said that "[…] the test of power and pertinence of a given social science is how it works when you try to apply it" (RORTY, 2000 , p. 96).

the ability to think critically, to examine themselves, and to respect the humanity and diversity of others (NUSSBAUM, 2003, p. 300). The combination of these threes capacities can be done in human rights education by knowing and critically discussing the stories of those affected by evil laws and decisions, including literary pieces (like Antigone).

Hence human rights education must become that powerful narrative[30] in such a way that one holds its set of obligations above the despotic state that is not a source of democratic legal norms and does not requires the objectification of different concepts of justice just to fit into the Radbruch's Formula.[31] Following Walzer's lesson, obligation begins with membership but real obligations come only when membership is qualified as wilful. Human rights shall become part of an educational discourse that generates that very kind of membership. A radical change in the way law is taught has become urgent if we want a human rights culture that goes beyond law school classes: it has to permeate families, neighbourhoods, economical processes and state/person relationships (GALLARDO, 2013). If raised inside such a culture, one could expect to create wilful membership in citizens that confront atrocities and, more important and prior to that, recognize them[32].

The priority, therefore, shall not be placed on different legal theories, as we can perceive, but on something that comes even before that choice: a human rights

[30]See WEST, Robin. Jurisprudence as narrative: an aesthetic analysis of modern legal theory. 1985. Available at <http://ssrn.com/abstract=1738492>. Visited in April 10th, 2016: "Modern legal theorists persistently employ narrative plots as strategic points in their arguments, relating romantic sagas about mythical commanders and communities and saturating their writings with realistic anecdotes from lawyers's and judges' subjective experiences of law".

[31] Raz and Bulygin have both criticized this point. See, for example: BULYGIN, Eugenio. Alexy`s thesis of the Necessary Connection between Law and Morality. Ratio Iures, pp 133-1337, 2000. and RAZ, Joseph. The Argument from Justice, or How not to Reply to Legal Positivism. Oxford legal Studies Research Paper, n. 15, 2007.

[32] John Finnis realized with accuracy that the Radbruch Formula is not clear about the recognition of the threshold between severe and non-severe injustice: "Whatever one may think of that argument, the refinement or complexification suggests that the main Alexy-Radbruch all-or-nothing, valid-or-invalid thesis rests on an unsound assumption: that the morally significant consequences of significant injustice (severe or not) in law's making or content are to be articulated as if, at some point (i.e. in relation to some rules of sufficiently severe injustice), (A) they could all be appropriately identified by reference to the standard legal technique of drawing a bright line between the valid and the invalid; and (B) this bright line is to be sought as a truth about law". See FINNIS, John. Law as Fact and as Reason for Action: A Response to Robert Alexy on Law's "Ideal Dimension". American Journal of Jurisprudence, v.59, 2014. Available at: <http://ssrn.com/abstract=2428733>. Visited at April 10th, 2016.

discourse that encourages a particular subject to take actions that have a universal projection[33].

As Walzer elucidates

> All this is not to suggest that there is anything unreal about individual responsibility. But this is always responsibility to someone else and it is always learned with someone else. An individual whose moral experiences never reached beyond "monologue" would know nothing at all about responsibility and would have none (WALZER, 1967, p. 174).

This is the kind of loyalty or membership that can only be achieved through an education that is critical, empathic and imaginative. It is the learning that matters, the process of education of the decision makers in democratic world that will elucidate the ways to follow in the practical case, not some logical formula that pretend to rationalize the process of taking decisions.

An important point in the process of legal education is the necessity to teach about the fallibility of one owns action in the public sphere. That was neither in Creon, nor in Antigone perspective in the *polis.* She believed she could not fail in leaving her brother without the burial, as well as Creon was certain that he could not fail as the sovereign. At that point Zenon Bukowski gives a relevant insight in his analyses of Antigone:

> One of the most important things here is the search for certainty. We can see how in doing this both Creon and Antigone lay claim to the law. They both try to protect themselves in the armour of the law but in doing so they lose the humanness that they are supposed to preserve. (BANKOWSKI, 2001, p. 32)

It is the capacity of not objectifying the concrete persons behind the case that should be in question, caring about the humanistic side of the stories and not letting this basic characteristics lose themselves in the process. One should avoid falling into the proceduralism of every-day-life, instead giving attention to the constitutive values of each person – values that may even change the way the decision is made. This is the real way to proceed in hard cases, which does not mean that judges and decision makers are not bounded by principles (and also that some of those principles are moral ones). The

[33]It is not reasonable to expect a judge should not have his ideological choices and theoretical preferences related to the concept of law (positivist or non-positivist etc). But this set of preferences may very well be adapted to the circumstances in order to intelligently overcome the persecutions, obstacles and limitations of the dictatorial regime.

ideal perspective should be one that combines the legal framework with the real stories behind each case.

The only way to reach that sort of equilibrium is by using human rights education – or, in Nussbaum terms, cultivate our humanity. We cannot solve social conflicts with formulas, otherwise we would be stuck into some form of dangerous dystopia as in some of the *Black Mirror* (BROOKER, 2001) episodes.

6. Conclusion

Antigone: He has no right to keep me from my own!
(Antigone, 48)

The Guard never saved Antigone – he was too afraid of Creon, too afraid of losing his life or was just too comfortable following the rules. His motivations are not the most important point here. What is relevant is the fact that his position and actions demonstrate how hard it is to apply Radbruch's Formula under an evil regime – other legal theories served better in different situations. As it turns out, the Formula functions only in the aftermath of an unjust regime or, to put in other words, one can only be an alexyan-radbruchian post-positivist *ex post facto.* In fact, this alexyan-radbruchian contribution is fairly important, as well as pertinent. However, what the Formula cannot do is to defy the validity of unjust law *during* the process: other resistance "weapons" of legal argumentation have been more useful and less dangerous. Authorities (including judges), like the Guard, who choose to follow the rules – for fear, prudence or comfort – will still be sentencing cases, applying those extreme unjust rules, even if their conscience tells them not to do so. What one can expect is to provide a legal education that teaches future legal professionals how to avoid unjust law with competence and humanity.

Resisting in favour of the defenceless is an act of personal courage indeed and we cannot expect everyone to develop such an individualistic characteristic: we just don't know, unless the situation presents before us, if we are Guards or Antigones. But as Nussbaum shows, sometimes we can think in another way, which can incorporate a simpler solution than the complex "rational" argument we find in the Formula. The attention must be focused in legal education and different approaches in teaching instead of spending ink and paper to formulate cunning arguments and logical

structures that promise to encompass a certain way to do “the right thing”. We can educate law students in a way that they should recognize boundaries and feel their belonging to something more encompassing than uncritical obedience.

If the Formula states that judges should not apply extreme unjust norms, since they lack the very nature of law, this could be applicable only to logical cases attachable into the ideal democratic state, when legal reasoning is exercised in an environment of freedom and equality, and the contingency of the real democratic world is not considered. Radbruch (and Alexy) may have found a Formula that might be correct but, as far as Antigone’s experience is concerned, might be sometimes just too late.

Referências bibliográficas

ALEXY, Robert. Legal Certainty and Correctness. Ratio Juris, v. 28, n. 4, p. 441-451, 2015.

ALEXY, Robert. Constitutional Rights and Proportionality. Revus, v. 22, p. 51-65, 2014.

ALEXY, Robert. On Balancing and Subsumption: A structural Comparision. Ratio Juiris, v. 16, n. 4, p. 433-449, 2003.

ALEXY, Robert. The Argument from in justice: A reply to legal positivism. Oxford: Clarendon, 2002.

ALEXY, Robert. On the thesis of Necessary Connection between Law and Morality: Bulygin’s Critique. Ratio Juris, v.13, p. 138-147, 2000.

ALEXY, Robert. A defence of Radbruch’s Formula. In DYZENHAUS, David (Org.). Recrafting the Rule of Law: the limits of legal order. West Sussex Hart Pub. 1999

ALEXY, Robert. Law and correctness. Current Legal Problems, v. 68, p. 206, 1998.

ALEXY, Robert. El concepto y la validez del derecho. Barcelona: Editora Gedisa, 1997.

AMADO, Juan Antonio García. Sobre a ideia de pretensão de correção do direito em Robert Alexy. Revista Brasileira de Estudos Políticos . v. 104, 2012.

BANKOWSKI, Zenon. Living Lawfully: love in Law and Law in love. Edinburgh: Spring, 2001.

BLACK Mirror (TV series). Produced by Barney Reisz .Executed by Zeppotron (2001 – 2014). Reino Unido: Channel 4, 2001.

BOCKEN, Hubert , BONDT, Walter de. Introduction to Belgian Law. Brussels: Bruylant, 2001.

BRANDÃO, Junito de Souza. Mitologia grega. 5. ed. Petrópolis: Vozes, 1992. V. II.
COHEN, Leonard. Anthem. *In:* COHEN, Leonard. The Future . Canada: Columbia Records, 1992. CD.

FLETCHER, Judith. Citing the law in Sophocles's Antigone. Mosaic Winnipeg , v. 41, sep. 2008.

GALLARDO, Helio. Teoria Crítica: Matrizes e possibilidades de Direitos Humanos. São Paulo: Fundação Editora Unesp, 2013.

KLEMPERER, Klemens von. "What Is the Law That Lies behind These Words?" Antigone's Question and the German Resistance against Hitler. The Journal of Modern History, v. 64, 1992.

NUSSBAUM, Martha C. The Cultivation of Humanity: A Classical defence of reform in liberal education. Cambridge: Havard University Press, 2003.

OSIEL, Mark J. Dialogue with Dictators: Judicial Resistance in Argentina and Brazil. Law & Social Inquiry, v.. 20(2), 1995.

RADBRUCH, Gustav. Gesetzliches Unrecht und übergesetzliches Recht. Süddeutsche Juristen-Zeitung, v. 1, n. 5, p. 105-108 aug 1946.

SOUZA, Felipe O. de. Entre o não-positivismo e o positivismo jurídico: notas sobre o conceito de direito em Robert Alexy. Direitos Fundamentais e Justiça, n. 14, Jan./Mar, 2011.

HALDEMANN, Frank. Gustav Radbruch vs. Hans Kelsen: A Debate on Nazi Law. Ratio juris, v. 18, n. 2, p. 162-178, 2005.

HALL, Edith. Antigone, Oedipus the King and Electra.: Oxford: Oxford University Press, 1998, 178 p.

VERNANT, Jean-Pierre, VIDAL-NAQUET, Pierre. Mito e tragédia na Grécia Antiga. Perspectiva, 2011.

WEISBERG, Richard. Fish takes the bait: Holocaust denial and postmodernist theory. Critical Quarterly, v. 43, n. 4, 2001

WEISBERG, Richard. Poethics and other strategies of Law & Literature. New York: Columbia University Press, 1992.

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