

The rules of the rationality of practical discourse in the light of ethics of discourse: An analysis of Robert Alexy's proposal

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Abstract

The author discusses the rational argumentation of the values from a proposal defended by the legal philosopher Robert Alexy. The paper shows that discourse for Alexy is essentially a regulated activity. A model of certain rules ensure the rationality and correctness of practical discourse oriented towards resolving conflicts of value. Firstly, the types of rules responsible for the rationality of practical argumentation are described. Secondly, some open problems relating to the claim to correctness of reasoned practical discourse are posed, namely problems derived from the idea of consensus and that of a single correct answer to certain practical issues that include conflicts of values and raise basic disagreements.

Keywords: discourse ethics, deliberative democracy, model of rules, correctness

Introduction

In political philosophy, models of deliberative democracy have become the banners of a forceful intellectual conception (Elster, 1998; Gutmann & Thompson, 2004). The common denominators shared by the populated family of deliberativist conceptions include: a) that political decisions must be adopted after a process of exchanging reasons, the result of which is the triumph of the best argument; b) that all those affected by them must take part in said decisions; and c) that the product of such a process must be that of a full rational consensus of the issues around which the controversy revolves.

As can be seen, deliberativist conceptions rely on the fact that practical reason, displayed in cognitive and argumentative skills, can result in an objective discussion on values and a rational consensus on axiological conflicts. However, despite the extent to which this rationalist faith has developed, it is hard to find a clear and broadly accepted notion of the meaning of “arguing rationally”. With respect to this, José Luis Martí says the following: “Despite the crucial relevance of these concepts [“arguing”, “providing plausible reasons”] in understanding the deliberative model, the literature of deliberative democracy has in general, with a few exceptions, neglected them entirely” (Martí, 2006, p. 97).

Indeed, there is no single generally admitted stance with respect to practical rationality and its alleged objective use in questions of value. Moral philosophy, in fact, configures a cross-linked fabric of optimistic and sceptical conceptions of a variety of sorts with respect to practical reason.

My modest objective is to argue that there is a thought-provoking proposal for discussion or rational argumentation of the values from a proposal defended by the legal philosopher Robert Alexy (a global landscape of argumentation in the legal domain can be found in Atienza, 2017; Feteris, 2017). Following the traces left by the *ethics of discourse*, Alexy claims that just as *theoretical discourse* implicitly involves a claim to “truth”, in *practical discourse* we also find an implicit claim to “correction” (see also, Apel, 1991; Habermas,

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2000; Feteris, 2003, pp. 139–159; Wojciechowski, 2010, pp. 53–69; Forst, 2011).² It is therefore feasible to aspire to a “correct response” to our conflicts of value and basic disagreements. Without becoming involved here in the “universal” or “transcendental” nature of the substantiation of practical discourse (Johnston, 2016, pp. 719–734), I shall show that discourse for Alexy is essentially a regulated activity. Certain types of rules ensure the rationality and correctness of practical discourse oriented towards resolving conflicts of value. I therefore propose to achieve two goals in this work. Firstly, to pose what types of rules are responsible for the rationality of practical argumentation. Initially, my task on this issue shall be basically descriptive and not discursive. Secondly, once the first goal has been completed, I wish to pose some open problems relating to the claim to correctness of reasoned practical discourse. These are basically parasitic problems of a fundamental one, namely: whether it is possible to speak of a single correct answer to certain practical issues that include conflicts of values and raise basic disagreements, and what such a claim consists of.³

1. Typology of rules

There is no single type of rule with which to face the challenges of reason. According to Alexy, we must distinguish at least five types of rules: fundamental rules, rules of reason, rules on the burden of argumentation, rules of rationale and, lastly, rules of transition. Although Alexy does not actually say so, the model of rules he proposes does not work on an “all or nothing” basis. A model of deliberative democracy made up by these “constitutive” rules may be gradually or partially satisfied in actuality. The model is normative and ideal as it serves precisely to assess to what degree political reality responds to the model and is closer or further from its deliberativist heart. No doubt each of the rules I shall describe following Alexy may generate some philosophical problem. I shall, however, prioritize the expository nature of the rules over the formulation of problems because I wish to pose the fundamental problem of the claim to correctness of practical discourse in the second part of the paper. To begin with, let us see what these rules are and how they work.

Fundamental rules

There is a first group of rules that operate as genuine possibility conditions of any linguistic communication in which truth or correctness are dealt with (Alexy, 1989, p. 185).⁴ They are as follows:

² In order to avoid misunderstandings, in the following lines of my paper, the term ‘discourse’ can be understood as a set of oral or written utterances expressible in a certain language. The notion of ‘practical discourse’ is more restrictive than the previous definition of the term *discourse*. As a matter of fact, it refers to the kind of discourse that involves some type of rules, principles, standards or normative or evaluative arguments. Given this definition, the category of “discourse ethics”, specifically refers to those ethical guidelines that are presupposed in any moral or legal argumentation. Such guidelines are linked to correction claims or claims of validity. Every social actor, for instance a juror, must defend these guidelines with arguments that claim to be valid, and satisfy, especially, requirements of practical rationality. The rules of rationality in Alexy’s practical discourse are rules that refer to a discourse in the “ideal” sense, that is, a discourse in which social actors respect rules of argumentative rationality. Such “ideal” discourse is often distinguished from the “real” discourses articulated by social actors. Such discourses are not necessarily minimally close to the aforementioned rules of rationality. For more details (see, for instance, Maliandi, 2010; Forst, 2011).

³ In this work, I will make references to disagreements of values in a *generic sense* (for a much more detailed classification of types of disagreements in moral or legal domains see, for instance, Besson, 2005). With regard the specific problem of “faultless” disagreements (a topic that there is no need to discuss here) (Köbel, 2004, pp. 53–73).

⁴ Herein paragraphs are translated into English from the work published in Spanish, in a splendid translation by Manuel Atienza and Isabel Espejo. Atienza is one the greatest specialists in legal argumentation in the world, and an expert on Alexy’s work. Besides, Alexy is a frequent visitor at the Master's Course of Legal Argumentation in Alicante, headed by Atienza. As a result, the Spanish edition is very faithful to Alexy’s original work.

- a) No speaker may contradict him/herself.
- b) A speaker may only state what he/she him/herself believes.
- c) A speaker who applies predicate F to an object “a” must also be willing to apply F to any other object equal to “a” in all relevant aspects.
- d) Different speakers may not use the same expression with different meanings.

As can be detected, a) this refers to the basic rules of logic, in this case those we apply to normative statements (forbidden, allowed, obligatory) or to value statements (good, bad). They are therefore rules of a logic of norms or a deontic logic, whereby we take it for granted that logical relationships between norms are possible. With respect to b) it is no more than the rules of “sincerity” in communicative preferences. The arguer may of course be a “hypocrite”. But in the game of public debate and fair play, even hypocrites find themselves obliged to adjust their “true value preferences” to one that may be publicly defended with plausible reasons.

If we now address c) the requirement refers to the use of linguistic expressions by a single speaker, while d) to the use of linguistic expressions by different speakers. In c) the category of “consistency” becomes clear. If this category is applied to value judgements, this would lead to a rule that would uphold the principle of universalisation of the judgement and, according to Alexy, such a rule would be as follows: “Every speaker may only state those value and duty judgements that s/he would likewise state in all situations in which s/he would claim they are the same in all relevant aspects”. Meanwhile d) claims for a “community of language use”. Given the multiculturalism applied to language issues, this condition appears to be problematic; nevertheless, deep down there is faith in the chance of finding a kind of language translation manual which could be clarified conceptually in a certain generalized discourse on our expressions.

Rules of reason

As Alexy rightly recalls, practical discourse attempts to *justify* the assertion of normative statements; these assertions may operate to refute value stances, answer questions, substantiate political proposals with moral implications, etc. (Alexy, 1989, pp. 187–188). As stated by Alexy the following rule governs an assertive speech act (Alexy, 1989, p. 188):

a) “When asked to do so, every speaker should substantiate what s/he states, unless s/he can provide reasons to justify refusing to give grounds”.

- a) As claimed by Alexy, this should be seen as the “general rule of substantiation” (Alexy, 1989, p. 189). From this perspective, according to Alexy, “someone who substantiates something expects, as far as the substantiation process is concerned, to accept the other as a party in the substantiation, with the same rights (Alexy, 1989, p. 189),⁵ and not to coerce, or lean on the coercion of others”. Language games that do not comply with this constitutive rule cannot genuinely be considered substantiation. Following Alexy, these typical requirements of what Habermas would call “ideal situation of dialogue” could be said to be formulated by three rules that guarantee equality of rights, universality and non-coercion, respectively. The first rule regulates admission in discourse and prescribes the following:

- a.1) Anyone able to speak may take part in the discourse.

⁵ As regards the subject of rights, and “conflict of rights”, is widely known Alexy’s thesis of balancing and the proportionality test. In this paper, I will not discuss this topic as it is sufficiently autonomous in relation with my present purposes here related with ethical issues. In the same sense, I will not discuss the “special case thesis” maintained by Alexy because its treatment raises another kind of philosophical problems linked with the relation between moral and legal system (see, for instance, Alexy, 1999, pp. 374–384; 2014, pp. 51–65).

The second rule regulates the freedom of discussion and can be formulated in three requirements:

a.2) “Everyone can problematise any assertion”; “Everyone can introduce any assertion into the discourse” and “Everyone can express their opinions, wishes and needs”.

Lastly, the third rule, which protects discourse from the shadow of coercion, goes thus:

a.3) “No speaker may be denied the exercise of his/her rights established in a.1 and a.2 by way of coercion within or outside the discourse”.

Rules on the burden of argumentation

In accordance with Alexy, the principle of universality of judgement is built into a “general rule of substantiation” according to which “when requested to do so, every speaker must substantiate what he/she states, unless he/she can provide reasons to justify refusing to give grounds” (Alexy, 1989, p. 191). What underlies this principle is the fact that if someone attempts to treat a person or state of affairs differently from the way it is being treated in a regular pattern of cases, he/she should provide reasons for it. This correlates with principles like Perelman’s principle of “inertia” according to which a praxis or opinion that has been accepted once may not be abandoned without a reason for doing so. In the light of these considerations, in the opinion of Alexy, the following rule applies:

Rule on the burden of argumentation (R1) “Someone attempting to treat a person A differently from a person B is obliged to substantiate the difference”.

This is explained on the backdrop of the principle of “equality” of participants; anyone deviating from this principle must provide good reasons for doing so. R1) tells us that when a speaker states something, his/her interlocutors in the discourse are entitled to claim substantiation. As Alexy says, for something to be the topic of discourse, it has to be stated or to be questioned indicating a reason for it. This can, in turn, be formulated by means of rule R2, which prescribes the following: “Anyone who attacks a proposition or a rule that is not the object of the discussion, must give a reason for doing so” (Alexy, 1989, p. 192).

Lastly, Alexy tells us that it is inadmissible for a speaker to continually demand reasons from her interlocutor. This is why rule R3 is formulated claiming the following: “Someone who has invoked an argument is only obliged to provide further arguments if presented with counterarguments”. In addition, rule R4 is raised in the interest of argumentative clarity, according to which “when someone introduces into the discourse a statement or manifestation about her opinions, wishes or needs that does not refer to a former manifestation as an argument, must, if so requested, provide grounds for why he/she introduced such a statement or manifestation” (Alexy, 1989, pp. 192–193).

Rules of substantiation

The first group of rules is made up of different variants of the principle of generalizability or universality. Alexy compares Hare, Habermas and Baier’s formulations (Alexy, 1989, pp. 197 and ff.). Nevertheless, despite their stylistic differences, these variations point basically to a rule in which a normative proposition may be accepted by “all” those involved. In Hare’s formulation that Alexy follows, this rule says the following: “Someone stating a normative proposition that presupposes a rule to satisfy other people’s interests must also be able to accept

the consequences of such a rule in the hypothetical case in which he/she is in those other people's situation" (Alexy, 1989, p. 198).

In Habermas's case, according to Alexy, this rule is formulated thus: "The consequences of each rule for the satisfaction of each one's interests must be acceptable to everyone" (Alexy, 1989, p. 198). Meanwhile, following Baier, Alexy formulates the rule according to which: "All rules must be able to be taught openly and generally".

Yet, with these rules, we have still not ensured a "rational consensus". The participants of discourse, in fact, and as we shall see in the second part of this paper, start out from what Alexy calls "irreconcilable normative convictions". First of all it is necessary to address the assessment of how these "convictions", or "preferences" if one prefers, are formed. It is important because the authentic preferences upon which a deliberative democracy works have no self-interest but rather are impartial and rational in the sense that they are not deformed by manipulation (Martí, 2006, p. 63). That is why the moral rules that serve as a basis for the speaker's moral conceptions, for Alexy, must be able to pass the test of their "historical-critical genesis" (Alexy, 1989, p. 199). A moral rule fails such a test if the normative conviction or the value preference has lost its rational justification or if this justification is insufficient. Meanwhile, the moral rules that serve as a basis for the speaker's moral conceptions or preferences, according to Alexy, must be able to pass the test of their "historical-individual configuration" (Alexy, 1989, p. 200). This refers to the fact that it is necessary to investigate whether the convictions have incorporated cognitive dissonances due to "unjustifiable conditions of socialization", that is, conditions of manipulation or coercion regarding the content of the convictions or preferences.

According to Alexy, it should not be forgotten that practical discourse is developed to resolve practical issues that actually exist (Alexy, 1989, p. 200). This points to the fact that practical discourse must also lead to results that can be put into practice. This requirement demands thorough empirical knowledge of the limits of reasonableness of our convictions and preferences.

Rules of transition

All the rules studied so far aim to guarantee rationality in the exchange of arguments between participants in a democracy. This does not, however, ensure that all the practical issues may be overwhelmingly resolved by means of practical discourse. A number of problems can emerge. For example, disagreement on questions of fact, linguistic problems when users employ expressions with different meanings, or the sheer existence of irreconcilable normative convictions, a topic I shall address below. For such cases, it may be necessary to move from practical discourse to "other forms of discourse". According to Alexy, the rules that make it possible to move on to other discourses, for example, from a theoretical or empirical discourse or one of language analysis, are the rules of "transition" or rules for moving from one form of discourse to another in which it is at least possible to clarify the value differences that block consensus among all those affected (Alexy, 1989, p. 201).

2. Problems open to the claim to correctness of practical discourse

I have so far expounded what the rationality of a model of deliberative democracy consists of. The dense network of rules I have described, following Alexy's proposal, is oriented towards establishing reliable grounds for rational discussion on values. In this sense it takes a metaethical position in favour of "cognitivism". However, as any keen reader will have noticed, these rules are not devoid of problems. For example, the rule of the universality or generalizability of judgement is subjected to the heat of current debates on moral particularism. To what extent does the idiosyncrasy of particular cases not demand a situationalist look averse to generalization? In the case of the rule requiring every speaker to be able to take part in the discourse establishes what role shall be given to prelinguistic creatures such as animals or foetuses. Should they also be represented in the debate? What substantive implications for the

debate on the “personality” of animals or foetuses might a positive response to the above question have? And lastly, to mention another problematic case; does the requirement of “one” linguistic community have a performance limit given the *factum* of cultural and linguistic pluralism? These questions act as indicators of issues that deserve detailed analysis that I shall not go into here so as not to lose track of my central purpose. To be precise, my purpose is to highlight some problems that are open to the claim to correctness or the correct response for all our existing practical issues. In a model of deliberative democracy – and the same goes for the ethics of discourse – it is relevant to aspire to a “full consensus” on practical issues (Lariguet, 2011a, pp. 75–89). Jeremy Waldron has criticised this ideal aspiration to full consensus. He points out the following: “[...] dissent or disagreement [are viewed] as a sign of incompleteness or the politically unsatisfactory nature of deliberation. Its approach implies that there must be something wrong with deliberative politics if reason fails, if consensus escapes us, and we have no other option but to count votes” (Waldron, 1999, pp. 91–92).

The presupposition of consensus by the model operates as a linchpin for the correctness of the participants’ response to a practical issue. There is, however, a problem here. In the words of Alexy: “[the] said problem refers to the question of whether an ideal discourse would lead to a consensus on every practical issue”. Alexy’s response is that “such consensus does not follow logically from determining that the conditions [the rules] of the ideal discussion have been fulfilled” (Alexy, 1989, p. 301). Consensus on a practical issue is something “substantive” and the rules of rational discussion only have a “formal” nature with respect to this. Alexy says that a guarantee of consensus “could therefore only be accepted if the empirical premise that there are no anthropological inequalities of the men opposed to the discourse were true, and that they could exclude, also under the conditions of ideal discourse”, a consensus in practical issues; hence, in matters of value. Alexy claims that this issue “cannot be resolved”. “There is no procedure that makes a safe prognosis possible regarding how participants would proceed in the discourse as real people under the admitted, and not real, conditions of ideal discourse” (Alexy, 1989, p. 301).

But there is another more intricate issue regarding consensus and it is that of contradiction. In Alexy’s own words, “if there is no guarantee of consensus, then it must be held as possible, after a potentially indefinite duration of discourse, for the participants to defend norms which are nevertheless irreconcilable”. The result of the procedure would thus be both N and -N. But according to the procedural conception of deliberative democracy, this means that both N and -N, insofar as they are products of the rationalised use of discourse, qualify as “correct”. Yet this conclusion, as Alexy acknowledges, would have to be denied if we accepted that there is a “single” correct answer for each practical issue (Alexy, 1989, p. 302). For all that, the presupposition of an “independent” correct answer of the procedure, that is to say, an absolute and not procedural conception of the correct answer appears to Alexy to enclose an “ontological thesis” with little value and against which much can be said. According to Alexy, the theory of discourse has an absolutely procedural nature of correctness (Alexy, 1989, p. 303). Following what Alexy would call undoubted procedural correctness, there would be a “considerable reduction of irrationality” (Alexy, 1989, p. 304).

Yet although what Alexy claims may be conceded, the pertinence of a non-procedural concept of correctness for deliberative democracy cannot just be denied. Martí has highlighted that an independent criterion of correctness to which to adjust to is required for a model of deliberative democracy to work (Martí, 2006, p. 64). If this criterion were admitted we would have the procedure linked to a critical “substance” which would evaluate the quality of its very content. Beyond this, the problem that persists for the claim to a single correct answer is that of the existence of contradictions or irreconcilable normative convictions for one and the same practical issue. This does not seem to be an illegal statement for our democracies. In their midst it is not uncommon to attend debates between extreme and irreconcilable value positions with

respect to abortion, the status of the embryo, reproductive cloning and euthanasia. Indeed, in democratic societies characterised by “pluralistic values”, the presence of “dilemma conflicts” between differing positions is not ineradicable. This pluralism, which leads to dilemma conflicts, generates what Susan Wolf has dubbed “pockets of indeterminacy” (Wolf, 1992, p. 788) in our moral theories as they do not tell us what the correct answer is (Lariguet, 2011b). This occurs in conflicts in which, as Silvina Álvarez says, situations are given “where there are valid reasons to resolve the issue in favour of both opposing positions” (Álvarez, 2008, p. 25). In such cases there seems to be an impossibility to apply two conflicting values and hence the impossibility of a single correct answer is opted for.

All the same, even though it were true that full consensus is impossible on certain practical issues, this does not mean that deliberation is incapable of producing certain beneficial effects from the point of view of democratic legitimacy. With respect to this, José Luis Martí has claimed the following: “We expect deliberation to generate a greater and better understanding of the different points of view, to resolve those disagreements based on erroneous beliefs, and to bring those corresponding positions as close together as possible⁶. Although it may not allow us to reach a consensus or increase agreement quantitatively, the decisions subsequent to the deliberation are, as we shall see later, more informed, and even the deliberative disagreements, those lasting beyond the deliberation, are also more valuable” (Martí, 2006, p. 33).

For all that, Martí himself admits that “the very practice of argumentation *presupposes* the existence of an intersubjectively shared correct answer to what we are arguing about”. This presupposition, however, clashes with the existence of varying and unfathomable value patterns. Nevertheless, Martí responds that these patterns are only in disagreement for “epistemic reasons” but not for “ontological” reasons (Martí, 2006, p. 29). To think the opposite would lead us to a “radical” pluralist conception that would be unacceptable even to basic disagreement theorists like Waldron. But most importantly, Martí adds, it is irreconcilable with deliberation (Martí, 2006, p. 29). However, despite this statement by Martí, there are no arguments in his quoted work to lead one to think that disagreements between irreconcilable and, prospectively, unfathomable value positions are merely epistemic in origin, that is to say, resulting from cognitive deficits on the matter of values. One might hypothesise (Lariguet, 2008) that there could be cases in which “no more need be known” and despite this both the conflict and the dilemma persist. Assuming that what I say makes sense, the idea of an unequivocal claim to correctness that settles a value conflict continues to be an open problem upon which further meditation is due.

3. Final considerations

I have claimed in this paper that the *leitmotiv* of deliberative democracy is based on an appeal to practical reason and an exchange of the best arguments to reach a consensus among all those affected by a practical issue *x* that is to be uniformly and universally resolved.

I have claimed that a step before discussing the scope of the *leitmotiv* consists in asking what the conditions for rational deliberation are. I have pointed out that the legal philosopher Robert

⁶ In this sense, Alexy’s “rules of transition” would appear to be operating, which would seem to make it possible to move from litigating practical discourse to other forms of discourse that clarify the nature of the differences and incompatibilities in value positions (for incomparabilism see, for instance, Chang, 1998). In this regard, it is worth recalling that Alexy considers that “legal discourse” is a “special case” of practical discourse because it shares with it the claim to correctness (Alexy, 1989, pp. 206 and ff). One might think that those issues not settled with deliberation in a parliament and which remain as basic disagreements shall be resolved by way of judicial or juridical deliberation. In this regard, legal discourse could have rules to move on to discuss value preferences from the point of view of a certain legal order. But this does not mean that judges will plausibly solve the underlying moral conflict of the incompatibility of convictions or normative preferences. In fact, the “special case” thesis deserves a particular, independent paper which would make it possible to analyse the problems that emanate from said thesis.

Alexy's proposal provides an answer when paired with the ethics of discourse. There are certain typologies that guarantee deliberative rationality in a democracy. After explaining what the rules are, I have examined the problems that are open for the claim to correctness in response to practical issues in our societies. I have indicated that it is initially necessary to determine the procedural or non-procedural nature of the criterion of correctness. I then argue that, in the context of the pluralism of prospectively unfathomable and irreconcilable values, dilemma conflicts arise that question the claim to a single correct answer for value debates. Admitting that there may be as many correct answers as there are normative convictions is tantamount to sliding down a slope that would lead us to normative relativism. Consequently, our challenge consists in reconciling – if at all possible – the claim to unity of the correct answer with the existence of dilemma conflicts which appear to form part of a real phenomenology of our world.

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