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### The fragility of rightness. Adjudication and the primacy of practice

van Domselaar, I.

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“It matters how judges decide cases. It matters most to people unlucky or litigious or wicked or saintly enough to find themselves in court.”<sup>2</sup>

“[..T]he rule of law anoints winners and creates losers, and therefore causes someone to suffer -no matter what it does or who it favours.”<sup>3</sup>

## 1 Introduction

### 1 Adjudication and its troublesome phenomenology

The judge reads his sentence: "I give the local authorities leave to place the minors with long term foster parents with a view to adopt". He now and then looks at Maggie, a mother of four children. To him Maggie has proven to be incapable to provide a stable environment for her children. He has no confidence that Maggie will ever change. Hearing the sentence, we see Maggie suffer and utter her agony-fed anger in heartrending cries. "You bastard, you bastard!" she shouts. The judge continues his sentence in an undisturbed, tranquil manner. Finally, a furious Maggie in desperate anguish is led out of the courtroom. She will never again be a mother in the full sense of the word.

This is a scene from the film *Lady Bird* *Lady Bird*, directed by Ken Loach. The scene conveys the troublesome character of adjudication in a rather direct way, not in the least because of Maggie's cry.<sup>4</sup> It shows us adjudication as a practice that leads to pain and suffering because of decisions that possibly could have been otherwise.<sup>5</sup> The

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<sup>2</sup> Dworkin, Ronald, *Law's Empire* (Cambridge, US: Harvard University Press, 1986), 1.

<sup>3</sup> Wolcher, Louis, *Law's Task. The Tragic Circle of Law, Justice and Human Suffering*, Applied Legal Philosophy (Hampshire: Ashgate, 2008), 13.

<sup>4</sup> Throughout the history of mankind the cry has been the primordial expression of unmistakable pain. Already in Sophocles' tragedy 'Philoctetes' we read: "I cannot mistake that grievous cry of human anguish from afar -its accents are too clear." Cf. Sophocles, *The Complete Plays of Sophocles*, ed. Jebb, Richard Claverhouse (Cambridge: Cambridge University Press, 1924), 198.

<sup>5</sup> Precisely because of its dramatic aspect, adjudication is one of the legal practices that are relatively often displayed in movies, documentaries and novels. Obviously, not only citizens that are directly and formally involved in legal proceedings are affected by legal decisions,

scene naturally leads to all kinds of questions because suffering is a phenomenon that by and in itself is generally experienced as disturbing and that cries out "for its own abolition or cancellation" and hence evokes a critical perspective.<sup>6</sup> Questions also arise because as spectators we have a sympathetic understanding of Maggie's situation. We have become convinced that Maggie really loves her children and that her failure to properly care for them is not for a lack of trying. We have also come to see that as a person the judge is of a certain, not all too emphatic character, that he evidently stems from a particular social class and that he seems to be quite rigid and cold.

So as spectators we naturally ask ourselves: is Maggie right in feeling wronged by this particular judge or can we ignore Maggie's cry and anger as an outburst of mere subjectivity? Has the judge violated some kind of norm or value that applies to his relation with Maggie? Would reinstating Maggie in her parental rights indeed flagrantly harm the interests of the children? What does it mean when the judge says that he is 'bound' to decide in this way? Would another judge perhaps have decided differently? Does the judge's reaction in court show us something about his way of using the law? Is there a 'right' outcome at all in such a case?

It goes without saying that Maggie's case is not a rarity. One need not be a radically critical citizen or legal scholar to agree that adjudication is a large-scale practice due to which concrete citizens lose or do not get something that they value because of a decision that a judge happens to make. We are all familiar in one way or another with adjudication's troublesome phenomenology, its (potential) painfulness, intransparency, unpredictability and messiness. As Ronald Dworkin wrote: "People often stand to gain or lose more by one nod of a judge than they could by any general Act of Congress or Parliament."<sup>7</sup>

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but also others who will experience their consequences. We often get to see these side-effects of legal decisions in literary or cinematographic representations of adjudication.

<sup>6</sup> Mayerfeld, Jamie, *Suffering and Moral Responsibility* (Oxford: Oxford University Press, 1999), 111. For my understanding of suffering I draw on the colloquial meaning of the word: "[t]he bearing of pain, inconvenience, or loss; pain endured; distress, loss, or injury incurred." Cf. <http://www.webster-dictionary.net/definition/Suffering>.

<sup>7</sup> Dworkin, *Law's Empire*, 1. In a similar vein he states: "Day in day out we send people to jail, or take money away from them, or make them do things they do not want to do, under

Of course adjudication is not the only institution that comes with roles which demand of concrete people to make choices that substantially affect fundamental interests of concrete others, choices that perhaps could also turn out otherwise. Families, churches, schools, corporate companies, fraternities, public services and other institutions also know such roles, either formally or informally.<sup>8</sup> However, adjudication is in a league of its own in that the decisions it produces are effectuated with the help of state-power and may entail extreme forms of coercion. Also the scope of adjudication is practically comprehensive; judicial decisions can encompass virtually all aspects of citizens' lives and the workings of nearly all other social institutions.<sup>9</sup>

So in the light of all this the question arises how to account for the *moral* quality of adjudication. Again in the words of Dworkin: "there is inevitably a moral dimension to an action at law [...]"<sup>10</sup> Hence, it is not surprising that contemporary legal philosophy and legal theory have extensively occupied themselves with this question.

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coercion of force, and we justify all of this by speaking of such persons as having broken the law or having failed to meet their legal obligation, or having interfered with other people's rights. Even in clear cases (a bank robber or a wilful breach of contract), when we are confident that someone had a legal obligation and broke it, we are not able to give a satisfactory account of what that means, or why that entitles the state to punish or coerce him." Dworkin, Ronald, *Taking Rights Seriously* (London: Duckworth, 2005 (1977)), 15.

<sup>8</sup> Judges are of course not the only 'law-doers'. In the words of Louis Wolcher: "the list of law-doers can be made just as long as the extension of the concept 'juridical person!'"

For some examples I again quote Wolcher: "property-owners seeking to exclude others from their land; citizens exercising various legal privileges (such as the privilege of self defence); teachers and parents implementing their legal right to discipline unruly children; reporters lodging embarrassing demands for information under the Freedom of Information Act; mutually hostile litigants fighting out their aggressions in lawsuits; lawyers subpoenaing witnesses and executing judgements; [...] bureaucrats granting or denying government benefits; police officers cruising the neighbourhood in patrol cars." Cf. Wolcher, *Law's Task. The Tragic Circle of Law, Justice and Human Suffering*, 41.

<sup>9</sup> For instance, in the Netherlands each year around 1,8 million legal cases are adjudicated. Cf. <http://www.rechtspraak.nl/Actualiteiten/Nieuws/Documents/Basisverhaal-Rechtspraak.pdf> (visited on 15 December 2013).

<sup>10</sup> Dworkin, *Law's Empire*, 1.

A considerable part of the literature these disciplines have generated, deals with the question how a judge can indeed be *justified* in taking a particular judicial decision and with the related question what reason a citizen has to accept the resulting burden.<sup>11</sup>

Offhand it may seem surprising that in this body of literature the troublesome phenomenology of adjudication that gave rise to the moral question in the first place, is almost absent. Except in the form of a brief reference so as to introduce the moral question, mainstream approaches to adjudication typically leave this phenomenology unaddressed.<sup>12</sup> Once such an approach presents a normative theory to account for moral quality in adjudication, adjudication's painfulness, intransparency, unpredictability, messiness, and relative unintelligibility disappear from the discursive stage, so to say. From then on this phenomenology is either understood as the result of a legal mistake or an injustice which theory can correct, or of an un-reflective or irrational understanding of practice itself.<sup>13</sup> In any case moral quality and this

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<sup>11</sup> Cf. Lyons, David, 'Justification and Judicial Responsibility', *California Law Review* 72, 2 (1984); Greenawalt, Kent, 'Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges', *Columbia Law Review* 75, 2 (1975); Dworkin, *Taking Rights Seriously*; Solum, Lawrence B., 'Virtue Jurisprudence. A Virtue-Centered Theory of Judging', *Metaphilosophy* 34, 1/2 (2003); Soper, Philip, 'Legal Theory and the Obligation of A Judge. The Hart/Dworkin Dispute', *Michigan Law Review* 75, 3 (1977); Richards, David, 'The Theory of Adjudication and the Task of the Great Judge', *Cardozo Law Review* 171 (1979).

<sup>12</sup> We see that the troublesome phenomenology of adjudication is used as nothing but a starting point for normative legal theory to get itself off the ground for instance in Ronald Dworkin's classical work 'Law's Empire' where he states: "It matters how judges decide cases. It matters most to people unlucky or litigious or wicked or saintly enough to find themselves in court." Cf. Dworkin, *Law's Empire*, 1. In a similar vein legal theorist David Lyons where he gives an account of the justification of judicial decisions. He briefly refers to this phenomenology when stating that a "judicial decision is not a game played by judges, nor is justification part of such a game. Judicial decisions have a significant impact on important interests of those who come before the courts, as well as on other persons and justification must take this into account." Cf. Lyons, 'Justification and Judicial Responsibility', 192.

<sup>13</sup> Robert Cover goes so far as to state that mainstream legal philosophy and theory "blithely ignore" this phenomenology. In critical reaction to this neglect he famously opened his article *Violence and the Word* as follows: "[l]egal interpretation takes place in the field of death and

troublesome phenomenology are presented as counterparts and if the former is accounted for, the latter may be ignored.

Surely this tendency is not idiosyncratic for legal theory or legal philosophy. The propensity to control and dismantle the apparently dark, messy, painful, unpredictable and incomprehensive aspects of life by means of (normative) theory seems deeply entrenched in Western (intellectual and religious) history.<sup>14</sup> Since the dawn of intellectual history theorizing is embraced as a life saving art, so to speak, as an adequate way of increasing control over the life-threatening practical world. Already in Plato's work we recognize the idea that theory can save human beings from "being buffeted by the 'appearances' of the moment."<sup>15</sup>

This book is a philosophical inquiry into the moral quality of adjudication and its underlying motive is indeed a concern for and an interest in the phenomenology of adjudication. However, the book is also meant to be reflective regarding the role assigned to philosophy and normative theory as one of philosophy's typical products in attempts to account for moral quality in adjudication.

The first part of our inquiry identifies and criticizes the limitations of normative moral theory in accounting for the moral quality of adjudication. The second part of this inquiry will be more constructive: it proposes a particular account of moral quality that takes said limitations of normative theory seriously. This philosophical approach, which I call the *fragility of rightness*, gives primacy to adjudication's practice. It accommodates for adjudication's phenomenology to a large(r) degree than do mainstream approaches. While trying to offer a moral interpretation of adjudication's

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pain, [...w]hen interpreters have finished their work, they frequently leave behind victims whose lives have been torn apart by these organized, social practices of violence." Cover, Robert, 'Violence and the Word', *Yale Law Journal* 95 (1985), 1601.

<sup>14</sup> Cynthia Halpern has put it thus: "There are a multitude of different cultural and historical responses to suffering, but by far the vast majority invoke moral and religious forces to explain the meaning of suffering [...]." In these traditions the problem of suffering is addressed for instance by referring to it in terms of the provenance of multiple gods, in terms of God's plan or in terms of a Grand Moral Theory. See: Halpern, Cynthia, *Suffering, Politics, Power. A Genealogy in Modern Political Theory* (New York: State University of New York Press, 2002), 5.

<sup>15</sup> Nussbaum, Martha C., *The Fragility of Goodness. Luck and Ethics in Greek Tragedy and Philosophy*, Rev. ed. (New York: Cambridge University Press, 2001 (1986)), 93.

practice, this approach does not overcome, prevent or dismantle its troublesome phenomenology as an irrational appearance, negligible side-effect or anomaly. It rather understands this phenomenology as inherent to the moral nature of adjudication.

The *fragility of rightness* is constituted by three elements: *a virtue-ethical conception of adjudication*, the concept of *civic friendship* and the concept of a *tragic legal choice*. By virtue of these elements it presents adjudication as a potentially moral practice, but also as inescapably fragile and disturbing, and therefore as destabilizing for the legal order as a whole, for the judiciary, for concrete individual judges, as well as for citizens.

It goes without saying that my proposal is tentative. The goal of this book is to advance our understanding of the moral character of adjudication and to further, not to close discussions.

## **2 Methodology**

I use two methods to elaborate the argument for the *fragility of rightness*. The method used in the first part of the book fits within what has been coined as the ‘analytical tradition’ in practical philosophy, which aims to achieve “clarity, systematic rigor, narrowness of focus” through discursive argumentation.<sup>16</sup> I use this analytical method primarily as a way of developing an internal critique on approaches to adjudication and theories of justice that are part of the analytical tradition. Hence, one strand of the argument that leads to the *fragility of rightness* is presented by means of relatively abstract and analytical discourse.

The other strand of argument is based on unwrought narrative that seeks to express the phenomenology of adjudication. Thereto I discuss quite some concrete legal cases, although not in the same way in each and every chapter. For instance, in chapter two and three approaches to adjudication and justice are discussed that typically abstract from concrete narrative. I choose to make this ‘felt’ by hardly discussing concrete cases. By contrast, narrative abounds in the critical discussion of these theories in the first part of this book and in the second part that gives primacy to practice. In this way

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<sup>16</sup> McDermott, Daniel, 'Analytical Political Philosophy', in *Political Theory. Methods and Approaches*, ed. Leopold, David and Stears, Marc (Oxford: Oxford University Press, 2008), 11.

I try to reconcile form with content. The concrete cases that are discussed are not meant as mere illustrations of abstract philosophical analysis, but rather as part and parcel of the overall argument. As such the method as a whole resembles what Martha Nussbaum has called ‘perceptive equilibrium’.<sup>17</sup> I set out to find an equilibrium between impressions, emotions and embedded views that surround the practice of adjudication on the one hand and clarity, generality, intelligibility and philosophical rigor on the other. My aim is to stay relatively close to the life and blood of concrete individual legal cases. By giving ample attention to the particulars of cases I hope to engage not only the intellectual faculties of the reader, but also his or her moral perception, empathy and imagination. As we shall see, within the *fragility of rightness* these faculties are considered indispensable for appreciating the moral nature of adjudication.

### **3 Road map**

The overall plan of the book is as follows: in part one, ‘The stability of rightness’, I elaborate a critique on what I call a ‘stabilizing approach’ to adjudication. This qualification covers approaches that in their account of moral quality in adjudication give primacy to normative moral theory. This part of the book consists of seven chapters.

By means of the notion of ‘legal commensurability’ chapter two lays out a formal typology of a stabilizing approach and the predicate ‘stabilizing’ will be explained. In chapter three I will sketch the central features of the kind of normative theories of political morality that a stabilizing approach to adjudication relies upon. The next four chapters offer a discussion of two strong candidate normative theories of justice and an assessment of their capacity to support a ‘stabilizing approach’. These are John Rawls’ Theory of Justice and Martha Nussbaum’s Capabilities Approach. Having concluded that these theories cannot support a stabilizing approach to adjudication, chapter eight supports the preceding *internal* critique by a more fundamental, one could say *external* critique on any attempt to secure the moral quality of practice

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<sup>17</sup> See: Nussbaum, Martha C., *Love’s Knowledge. Essays on Philosophy and Literature* (Oxford: Oxford University Press, 1990), 168-194. In chapter eight I will show that the *fragility of rightness* assigns a more modest function to philosophy than does Nussbaum in her account of a ‘perceptive equilibrium’.



(adjudication included) through normative theory. This chapter also offers some indications of an approach to justice that does without normative moral theory. The sketch of such a quasi-phenomenological approach to justice includes some of the elements that will be specified for the context of adjudication as a special ‘sphere of justice’ in the second part of the book.

This first part of the book prepares the floor for the second and more constructive part, ‘The instability of rightness’. Here I expound the *fragility of rightness*, my version of what I dub a ‘destabilizing approach’ to adjudication. As a preparation chapter nine first offers a critical discussion of a postmodern approach to adjudication as one version of such a destabilizing approach. I criticize and reject this approach, but nevertheless take some of its insights on board. In the next three chapters I present the constitutive elements of the *fragility of rightness*. Chapter ten proposes a *virtue-ethical conception of adjudication* as the first element. Chapter eleven presents the concept of *civic friendship* as the second element and in chapter twelve I introduce the concept of *tragic legal choice* as the third and final element. Chapter thirteen offers concluding remarks and discusses some practical implications of the *fragility of rightness*.

#### **4 Delimitations and caveats**

As said, this book offers a critical study of theories of adjudication and theories of justice and their failing relation to practice, and it defends a new approach to adjudication, named the *fragility of rightness*. A few preliminary remarks are in order. Both in the critical and in the constructive part the argument is delimited to Western legal orders that can be qualified as constitutional democracies under the reign of the rule of law. Thereby the argument is assumed to equally apply to common law and civil law systems, although I do not exclude the possibility that the implications of the *fragility of rightness* may slightly differ for both systems.<sup>18</sup> As this is not the case for the kernel of my argument, for reasons of scope I will ignore these differences.

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<sup>18</sup> See for a clear overview of the central differences between common law and civil law systems and the historical and geographical background of this divergence: 'The Common Law and Civil Law Traditions', *The Robbins Collection* (2010), <http://www.law.berkeley.edu/library/robbins/pdf/CommonLawCivilLawTraditions.pdf>. (visited on December 2013)

Next, because I use ‘typologies’ as a means to characterize ways of thinking about adjudication, law and justice, one could easily charge me with using ‘straw men’. A critical reader who is unsympathetic to the argument could object that it is parasitic on unwarranted simplifications, that it insufficiently takes into account all kinds of nuances within the theories that are criticized and also that it ignores relevant ‘later work’ of certain philosophers and legal theorists.

To some extent my argument is indeed vulnerable to such charges. But I hold that this does not make the rendering of the relevant positions inadequate or my criticism inefficacious against theories that do express the ‘spirit’ that this typology aims to convey. More specifically, an important rationale for using typologies such as those of ‘stabilizing’ or ‘destabilizing’ approaches to adjudication, is that they allow me to shed light on the interconnectedness of the features assigned to adjudication by theories that fall under said typology.

In addition, judges, lawyers or other readers acquainted with the practice of adjudication will immediately discern that I construe adjudication as if it were a practice in which a single judge determines the outcome of a legal case. Thereby I seem to turn a blind eye to the fact that a considerable part of legal cases are dealt with by more than one judge, i.e. in a division bench and also that these days legal decisions are increasingly the work of judicial assistants.<sup>19</sup> Although these issues deserve further attention where the concrete implications of the arguments are concerned, these facts do not influence their validity. Boldly put: what will be the case for a single judge, will also be the case for a group of judges, for a full court, or for other administrators of justice who are involved in legal decision-making.

Also, it may be clear that the focus of this inquiry lies exclusively on the practice of adjudication where concrete citizens are the participating parties in the proceedings. However, given the number of legal entities other than natural persons that are regularly involved in proceedings, this focus may be considered the wrong way to set the stage. The same goes for the fact that we focus on the moral quality of

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<sup>19</sup> At the same time, due to savings on the budget of the judiciary, at least in the Netherlands cases are increasingly decided by a single judge section. See for a critical discussion of the increasing role of legal clerks in legal decision-making also: Kronman, Anthony T., *The Lost Lawyer: Failing Ideals of the Legal Profession* (Cambridge, US: Harvard University Press, 1995), 325-331.

adjudication in relation to the effects on citizens who are formally involved in legal proceedings and not in relation to the effects of these decisions on other citizens. My answer to this potential criticism: because natural persons who are formally involved in legal proceedings often most directly and deeply experience the consequences of judicial decisions, it is this highly substantial area of adjudication that puts the moral question most urgently on the table. Of course this is not to deny that further inquiry may be needed in other areas of adjudication so as to adequately deal with its moral quality. However, this is in line with the fact that the *fragility of rightness* does not pretend to be finally conclusive regarding the moral quality of adjudication.

Next, throughout the book I use a range of *fictitious* legal cases that are based on a study of a range of cases and judgments that are real.<sup>20</sup> Hence, these cases do not *directly* correspond to real judicial cases and judgments. The claim is that these cases *could* happen, not that they actually did happen.

Finally and related to the previous point: this book has an interdisciplinary character. It connects the insights of political philosophy with those of legal theory, theories of adjudication and case law. However, an inherent drawback of interdisciplinarity is that one cannot delve as deeply into the relevant debates as one would do when sticking to one discipline. As I am not a practicing lawyer and do not have specific expertise in a particular *legal* field, legal experts may here and there object to what they take to be a misunderstanding of legal technicalities on my part. As always the devil is in the details, but what matters is the force of the overall argument of the book.

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<sup>20</sup> Because I am acquainted with the Dutch legal system and as a way of avoiding some of the problems that pertain to the domain of legal pluralism, I have chosen to almost exclusively draw on Dutch (case) law. Of course, the legal context and concrete legal setting may be different in other countries, but nonetheless the argument is meant to apply to all Western constitutional democracies.