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

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*“To the extent that law imposes burdens, it requires justification.”<sup>21</sup>*

*“Conventional theories of law take it for granted that once a given instance of human suffering is objectively justified by something called ‘the law’ there is no further need to be concerned with it.”<sup>22</sup>*

## **2 A stabilizing approach to adjudication**

### **1 Introduction**

Now that we have established that from a moral point of view it matters what decisions judges take, we can start to address the question how to account for moral quality in adjudication. To this end and as a first step in our inquiry this chapter offers a critical analysis of mainstream normative approaches to adjudication. One such approach is a ‘common sense’ approach. It largely reflects the shared understandings of legal practitioners and citizens. Another approach is a philosophical approach. It articulates a way of understanding adjudication that is rather dominant in legal theory and practice.

In this chapter both approaches will be expounded. First I will discuss the ‘common sense’ approach. I will argue that this approach does not suffice as an account of moral quality in adjudication (2). Such an account needs a perspective that is more detached and critical. It needs philosophy. In the remainder of the chapter I discuss the central features of a ‘stabilizing’ approach as a philosophical approach to adjudication (3). Subsequently, I explain why such an approach can be qualified as ‘stabilizing’ (4), and I will address the potential charge that I have overstated the stabilizing character of this approach (5). The chapter ends with concluding remarks and some thoughts on how we can best assess the merits of a stabilizing approach and hence proceed with our inquiry (6).

### **2 The morality of adjudication and why philosophy needs to come in**

Lawyers and non-lawyers may question whether we need philosophy in trying to account for the moral quality of adjudication. For it seems that our ‘common sense’ already provides us with a rather straightforward answer on this justificatory

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<sup>21</sup> Lyons, 'Justification and Judicial Responsibility', 196.

<sup>22</sup> Wolcher, *Law's Task. The Tragic Circle of Law, Justice and Human Suffering*, 25.

‘problem’. Common sense suggests that moral quality of adjudication is secured if judges do "what is required, expected, or otherwise appropriate of persons occupying that role."<sup>23</sup> If judges adequately fulfil their judicial role, then we need not be bothered by the painfulness of legal decisions - at least not from a moral point of view, because in Western constitutional democracies the judicial role itself is morally defensible.

Brian Tamanaha paraphrases this common sense view on adjudication when stating that: “[a]n institutionalized, independent judiciary is crucial to both functions of the rule of law: it is an important means to hold government officials to the law (vertical), and to resolve disputes between citizens according to the law (horizontal).”<sup>24</sup>

So, the common sense view of adjudication boils down to the idea that the moral quality of adjudication is secured through judges fulfilling their professional role within an in itself defensible legal order.

At the surface this idea has plausibility. But at the same time it goes without saying that if reference to the judicial role is to have any justificatory force for legal decisions and their consequences, we have to assess whether and to what extent this role actually constrains a judge. As David Lyons rightly states: “[n]ot just anything a court might think up as a way of deciding a case will do. For not just anything is capable of *justifying* a decision.”<sup>25</sup> Hence, any account of moral quality in adjudication must as a minimum offer a set of constraints connected to the judicial role, such that judicial decisions are not tantamount to the legal effectuation of personal values, feelings, whims or caprices. Such an account must minimally rebut the sceptical view of law and adjudication which seriously and forcefully challenges the idea that judges are in any meaningful way constrained by the law. In the eyes of a sceptic, the judicial role does not bridle the judge at all. Consequently, referring to the judicial role cannot do any justificatory work, as it inherently implies strong discretion for the judge.

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<sup>23</sup> Wasserstrom, Richard, 'Roles and Morality', in *The Good Lawyer*, ed. Luban, David (New Jersey: Rowman and Allanheld, 1983), 25.

<sup>24</sup> Tamanaha, B.Z., 'A Concise Guide to the Rule of Law', in *Florence Workshop on The Rule of Law* ed. Walker, Neil and Palombella, Gianluigi (Florence: Hart Publishing, 2007), 14.

<sup>25</sup> Lyons, 'Justification and Judicial Responsibility', 184.

Although the age-old discussion on the sceptics' arguments is extensive, I will nonetheless briefly expound some of their main arguments in order to gain clarity about the challenges that any account of the moral quality of adjudication must face. Notwithstanding the wide variety of their views, the sceptics belonging to the Legal Realists and the Critical Legal Studies Movement<sup>26</sup> agree that the law is radically indeterminate. They hold that because of this radical indeterminacy the judge has strong discretion in each and every case: "in any set of facts about actions and events that could be processed as a legal case, any possible outcome -consisting of a decision, order, and opinion- will be legally correct."<sup>27</sup> As Holmes so pointedly put it, the law is nothing but the sum of the "prophecies of what the courts will do in fact, and nothing more pretentious".<sup>28</sup>

In support of their indeterminacy thesis the sceptics put afore several arguments. First, they assert that the law is indeterminate because it never offers just one single and clear rule that is solely relevant to a case -there is always a group of (vague and contradictory, at least competing) rules applicable<sup>29</sup> with "multiple potential points of indeterminacy", so that in each and every case the judge is free to choose which rule to apply.<sup>30</sup> Also, where legal precedents are involved, judges can more or less randomly decide what rule a certain precedent stands for, because every precedent can be interpreted in several ways. Thus, the judge has unrestricted leeway to choose the

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<sup>26</sup> Because the Legal Realists and members of the Critical Legal Studies Movement produced a vast literature and because their mutual relations and differences are deeply complex, for this context the sceptical approach will be presented by primarily drawing on secondary literature, in particular on: Altman, Andrew, 'Legal Realism, Critical Legal Studies, and Dworkin', *Philosophy and Public Affairs* 15, 3 (1986); Kramer, Matthew H., *Objectivity and the Rule of Law*, Cambridge Introductions to Philosophy and Law (Cambridge: Cambridge University Press, 2007); Barak, Aharon, *Judicial Discretion* (New Haven: Yale University Press, 1987).

<sup>27</sup> Solum, Lawrence B., 'Legal Theory Lexicon', [http://lsolum.typepad.com/legal\\_theory\\_lexicon/2004/05/legal\\_theory\\_le\\_2.html](http://lsolum.typepad.com/legal_theory_lexicon/2004/05/legal_theory_le_2.html). (Visited December 2013)

<sup>28</sup> Holmes, Oliver Wendell, 'The Path of the Law', *Harvard Law Review* 10 (1897), 459-461.

<sup>29</sup> Altman, 'Legal Realism, Critical Legal Studies, and Dworkin', 187.

<sup>30</sup> *Ibid.*, 186.

outcome of any case and make his interpretation fit that outcome.<sup>31</sup>

Second, the sceptics assert that the judge has considerable freedom to select and establish the relevant facts of the case. The law itself does not prescribe how judges should select the relevant facts and neither do these facts present themselves with labels that mention the applicable rule. Consequently, the judge has the freedom to select and establish the facts such that his legal arguments lead to the decision that he intuitively favoured from the start (his “hunch”) and for whatever reason that pleases him. Jerome Frank has eloquently stressed this point where he states that “[t]he judge, in arriving at this hunch, does not nicely separate his belief as to the “facts” from his conclusion as to the “law”; his general hunch is more integral and composite, and affects his report -both to himself and to the public- concerning the facts.”<sup>32</sup>

Third, from a sceptical point of view moral background principles cannot solve this problem of indeterminacy. These principles are themselves too indeterminate and legal systems are generally characterized by a group of both encompassing and contradictory moral principles.<sup>33</sup> In the words of Altman: “the jurisprudential invocation of principles only serves to push back to another stage the point at which legal indeterminacy enters and judicial choice takes place.”<sup>34</sup>

By these arguments the sceptics do not mean to deny that judicial decisions can (sometimes) be foreseen, that is, predicted. Their indeterminacy thesis does not imply an unpredictability thesis. However and in the same vein: according to the sceptic, predictability is not an indication of determinacy either, as it is based on nothing but

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<sup>31</sup> Ibid.

<sup>32</sup> Frank, Jerome, *Law and the Modern Mind* (New York: Brentano's Publisher, 1931), 116. See for discussions about the (intimate) relation between facts and rules in the process of legal reasoning and the resulting ‘discretion’ of the judge by Dutch legal theorists: Scholten, P., ed., *Mr. C. Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht* (Zwolle: W.E.J. Tjeenk Willink, 1974), §26; Vranken, J.B.M., ed., *Asser-Vranken (Algemeen Deel)* (Zwolle: W.E.J. Tjeenk Willink, 1995); Wiarda, G.J., *Drie Typen van Rechtsvinding* (Deventer: W.E.J. Tjeenk Willink, 1999); Smith, Carel E., *Regels van Rechtsvinding* (Den Haag: Boom Juridische uitgevers, 2005), 82-86; ———, *Feit en Rechtsnorm. Een Methodologische Studie naar de Betekenis van de Feiten voor de Rechtsvinding en de Legitimatie van het Rechtsoordeel* (Maastricht: Shaker, 1998).

<sup>33</sup> Altman, 'Legal Realism, Critical Legal Studies, and Dworkin', 189.

<sup>34</sup> Ibid.

empirical regularities in the behaviour of a particular judge or a certain group of judges, rather than on the normative force of arguments and reasons drawn from the legal system. The regularities in legal decision-making that might make them predictable are due to “extra legal factors such as shared psychological inclinations, rather than to the terms of legal requirements and entitlements”.<sup>35</sup>

Obviously, if we would embrace the sceptics’ view on law and adjudication it would have far-reaching implications for our inquiry. If the sceptics are right, the notion of moral quality in adjudication simply does not make sense. For, as far as the sceptic is concerned, “every answer to the particular legal question is as good (or as bad) as any other answer.”<sup>36</sup>

If we would assent, there is no morally sensible answer to the questions of losing citizens such as Maggie whose plight we discussed in the introduction: ‘Why me?’, ‘Why in this way?’, ‘What have I done to deserve this?’. What is more, if we agree with the sceptics, the judicial role cannot free the judge from full and personal responsibility for the particular consequences of his decisions, nor can it help him to make sense of the consequences of these decisions.<sup>37</sup> How the judge assesses the bearing of his judicial decisions will exclusively depend on his personal ethics.

This way of portraying the practice of adjudication boldly contradicts the common sense idea of adjudication that I mentioned earlier. In the words of Jeffrey Brand Ballard: “[t]he conviction that judges are “bound by the law” is very common among lawyers, judges, legal scholars, and members of the general public.”<sup>38</sup> But, it goes without saying that the commonness of this appealing conviction by itself does not suffice to rebut the sceptic view. To more thoroughly analyse the plausibility of this ‘common sense’ view of adjudication and whether it can rebut the sceptic view, I turn to Hart’s analysis of law and adjudication. This because Hart claims to offer a description of the ‘internal point of view’ of legal practitioners, especially judges. Through his articulation of this ‘internal viewpoint’ he claims to offer an account of an essential aspect of the true understanding of the judicial role that refutes the

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<sup>35</sup> Kramer, *Objectivity and the Rule of Law*, 26.

<sup>36</sup> *Ibid.*, 14.

<sup>37</sup> See Barak, *Judicial Discretion*, 131.

<sup>38</sup> Brand-Ballard, Jeffrey, *The Ethics of Lawless Judging* (Oxford: Oxford University Press, 2010), 4.

sceptical view. The articulation of this 'internal point of view' might show us what judges and legal practitioners actually mean when they say or think that they are legally bound to make decision X or Y.

Drawing on said 'internal point of view', Hart asserts that the law is not as undetermined and adjudication not as arbitrary as the sceptics suggest. Hart concedes to the sceptic that because of the mere fact of it having language as its vehicle, the law does have an 'open texture' that sometimes leaves strong discretion to a judge in a concrete case. "The discretion thus left to him by language may be very wide; so that if he applied the rule, the conclusion, even though it may not be arbitrary or irrational, is in effect a choice", Hart says.<sup>39</sup>

However, Hart holds that strong discretion is exceptional and limited to hard cases. From the internal point of view that legal practitioners share, most legal rules have perfectly clear core-meanings that "smoothly work over the great mass of ordinary cases".<sup>40</sup> And even where the law allows for strong discretion, legal decisions are not necessarily arbitrary or irrational. According to Hart in these cases the law still excludes a wide range of considerations and reasons as non-legal and hence also excludes various outcomes as incorrect.<sup>41</sup> Where judges have to use strong discretion and "it cannot be *demonstrated* that a decision is uniquely correct", these decisions can nonetheless be "acceptable as the reasoned product of informed impartial choice. In all this we have the 'weighing' and 'balancing' characteristic of the effort to do justice between competing interests", he says.<sup>42</sup>

Hart further asserts that if we want to understand the way in which judges are 'bound' by law, we should also take the range of secondary rules, rules of recognition and rules of adjudication that characterize modern legal orders into account.<sup>43</sup> By accepting his role the judge not only commits to applying settled legal rules, but also subscribes to the rules that belong to the "common public standards of official

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<sup>39</sup> Hart, H.L.A., *The Concept of Law*, 3th ed., Clarendon Law Series (Oxford: Oxford University Press, 2012 (1961)), 127.

<sup>40</sup> *Ibid.*, 128.

<sup>41</sup> Cf. Kramer, *Objectivity and the Rule of Law*, 15.

<sup>42</sup> Hart, *The Concept of Law*, 205.

<sup>43</sup> *Ibid.*, 94.

behaviour.”<sup>44</sup> Ultimately the edifice of law as a whole of primary and secondary rules is based on a rule of recognition that is not so much a rule, but rather a complex of historical, social and institutional facts. This rule indicates -albeit implicitly and as a matter of social fact- that the system of valid law exists and is accepted and thus ‘binds’ the judge.<sup>45</sup> By accepting his role, the judge explicitly subscribes to the system and declares himself bound by it, thus taking a qualified internal point of view. As suggested, Hart’s analysis of the ‘internal point of view’ is not only an account for the relative determinacy of law, but also a meagre account for the moral quality of adjudication. He for instance points out that judges will not see injustice and the violation of generally accepted moral principles as part of the goals of settled law. David Lyons summarized Hart on this point: “courts may have to reach beyond the law, but they are expected to do so responsibly, to a mode of moral adjudication.”<sup>46</sup> In addition, in his discussion of the relation between law and morality Hart also refers to the judicial virtues, more specifically to the virtues of impartiality and neutrality, as qualities that judges must have and use when assessing the alternatives at stake.<sup>47</sup> In this way he also aims to rebut the idea that strong judicial discretion is tantamount to arbitrariness or irrationality. On the basis of Hart's articulation of the ‘internal point of view’ one might think that common sense is right in holding that adjudication will have moral merit because judges are bound by the law -at least, if broadly conceived-. However, such a conclusion is premature and also wrong. For one thing, the constraints that judges experience as a matter of social fact do not yet suffice as a defence of the determinacy of *law*. For such a claim more independent arguments are needed with regard to the qualities of this ‘internal point of view’, i.e. of these constraints. This also, because -as Hart himself acknowledges and emphasizes- the considerations constituting the ‘internal point of view’ may themselves be under-determinate, open to a range of different interpretations and hence subject to judicial choice.<sup>48</sup>

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<sup>44</sup> Ibid., 116.

<sup>45</sup> Ibid., 101-103.

<sup>46</sup> Lyons, 'Justification and Judicial Responsibility', 187.

<sup>47</sup> Hart, *The Concept of Law*, 205.

<sup>48</sup> Cf. Kramer, *Objectivity and the Rule of Law*, 19.

Also, Hart's rather superficial reference to the judicial virtues is too weak an argument. Briefly mentioning these virtues can hardly do the argumentative work that is needed to corroborate the claim that a "fresh choice between open alternatives" is *not* necessarily arbitrary or irrational.<sup>49</sup>

Next, even if the 'internal point of view' does constrain the judicial role, this still is not an argument for the *moral* determinacy of the law and hence for the moral quality of judicial decisions. If reference to the 'internal point of view' is to account for *moral* quality we need reasons to believe that it generates outcomes that are *morally* defensible.

As a legal positivist, Hart would not be bothered by this point. In his 'separation thesis' he posited the claim that law and morality are to be clearly distinguished conceptually. Positivism according to Hart is nothing more than "the sin, real, or alleged, of insisting on the separation of law as it is and law as it ought to be."<sup>50</sup>

So Hart is far from believing that law has intrinsic moral merit. Rather to the contrary, he notes that history shows it can be (ab)used for all kinds of purposes and still be law.<sup>51</sup> Settled law is not always wise or just and hence the 'internal point of view' may also come with a morally troublesome content.<sup>52</sup>

At this point Hart's articulation of the 'internal point of view' stops to be of any help to common sense when aiming to refute the sceptics. Hart himself stresses that to honestly explore the moral character of adjudication we cannot be content with the dominant self-understanding of this practice. This is why Hart defends a wide concept of law.<sup>53</sup> He emphasizes that we should not assume too easily that the exercise of judicial power is justified. This would conceal the "delicate and complex moral issues" that are so intimately connected to the law.<sup>54</sup> As Hart puts it: "however great the aura of majesty or authority which the official system may have, its demands must

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<sup>49</sup> Hart, *The Concept of Law*, 128.

<sup>50</sup> Hart, H.L.A., *Essays in Jurisprudence and Philosophy* (Oxford: Oxford University Press, 1983), 51.

<sup>51</sup> Hart, *The Concept of Law*, 210.

<sup>52</sup> Lyons, 'Justification and Judicial Responsibility', 191.

<sup>53</sup> Hart, *The Concept of Law*, 207-212. See also: Lyons, 'Justification and Judicial Responsibility', 210 and next.

<sup>54</sup> Hart, *The Concept of Law*, 211.

in the end be submitted to a moral scrutiny”, which scrutiny must be referring to “something outside the official system.”<sup>55</sup>

Hence, for our inquiry into the moral quality of adjudication we need a more critical and distanced perspective, one outside or beyond what judicial officials as a matter of social fact acknowledge as valid law and as justified decisions.<sup>56</sup> In this inquiry we do not want to simply accept what legal practitioners consider familiar, normal or legally right, simply because they experience it that way. For one thing, this ‘internal point of view’ as the viewpoint of participating lawyers is likely to be self-congratulatory or a rationalisation of the status quo.

Therefore an essential role is reserved for (legal) philosophy as a discipline with the critical potential and analytical rigor that make it well-suited for offering an account of moral quality in adjudication.<sup>57</sup> Through philosophical analysis we can leave the (legal) cave and possibly get a brighter and truer vision of the moral character of adjudication.

“Innocence is indeed a glorious thing; but the real world, being guilty, needs philosophy,” Nussbaum rightly says.<sup>58</sup> In the remainder of this book I will therefore indeed address the issue of moral quality in adjudication from a philosophical point of view. Below I start off by presenting the central features of a *stabilizing approach to adjudication* as a philosophical approach that indeed does not content itself with the interpretations that are dominant within a legal system.

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<sup>55</sup> Ibid., 210.

<sup>56</sup> Cf. Lyons, 'Justification and Judicial Responsibility', 210 and next.

<sup>57</sup> Of course, the nature of philosophy is itself a matter of philosophical debate as will also become clear in the argument that is pursued in this book. But notwithstanding this continual debate, it is rather uncontroversial that philosophy is a discipline that can be distinguished by its explicit, discursive, rational and critical way of proceeding. Cf. Quinton, Anthony, 'The Ethics of Philosophical Practice', in *The Oxford Companion to Philosophy*, ed. Honderich, T. (Oxford: 1995).

<sup>58</sup> Nussbaum, Martha C., 'Why Practice Needs Ethical Theory. Particularism, Principles and Bad Behaviour', in *The Path of the Law and its Influence. The Legacy of Oliver Wendell Holmes, Jr.*, ed. Burton, Steven J. (Cambridge: Cambridge University Press, 2000), 50.

### **3 A stabilizing approach to adjudication. Legal commensurability and adjudication as applied moral theory**

This section expounds the central features of a ‘stabilizing approach to adjudication’, a particular philosophical way of accounting for moral quality in adjudication.<sup>59</sup> It is an approach that relies on legal commensurability and conceives of adjudication as applied moral theory.<sup>60</sup> In this approach the ideal of adjudication is understood as the practical implication of a normative moral theory.

Throughout the history of western legal thought the idea of commensurability (or comeasurability) has been connected with law.<sup>61</sup> John Finnis observes that “[a]

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<sup>59</sup> Elements of this section I have discussed in an article addressing two dominant conceptions of adjudication that can be recognized in the current Dutch jurisprudential debate. See: Domselaar, Iris van, 'Zelfbevestigende' versus 'Ontregelde' Rechtspraak', *Nederlands Juristenblad* 86, 16 (2011).

<sup>60</sup> As will become clear, the typology that is offered largely draws on the work of Ronald Dworkin who is a legal commensurabilist par excellence, but also on the work of others who have discussed the issue of commensurability in relation to practical reasoning more generally. For this discussion I am highly indebted to the illuminating way Henry Richardson has analysed commensurability in practical reasoning. See: Richardson, Henry S., *Practical Reasoning about Final Ends* (Cambridge: Cambridge University Press, 1997).

<sup>61</sup> An important impetus to the contemporary debate about commensurability in law has been given by the Pennsylvania Law Review Symposium on ‘Law and Incommensurability’ held at the University of Pennsylvania Law School. The papers presented at this conference are published in: Symposium, 'Law and Incommensurability', *University of Pennsylvania Law Review* 146 (1998). For a discussion about (in)commensurability in relation to or relevant for law see also: Chang, Ruth, 'Introduction', in *Incommensurability, Incomparability and Practical Reason*, ed. Chang, Ruth (Cambridge, US: Harvard University Press, 1997). Finnis, John, 'Commensurability and Public Reason', in *Incommensurability, Incomparability, and Practical Reason* (Cambridge, US: Harvard University Press, 1997). Luban, David, 'Incommensurable Values, Rational Choice, and Moral Absolutes', *Cleveland State Law Review* 38 (1990). Schauer, Frederick, 'Commensurability and its Constitutional Consequences', *Hastings Law Journal* 45 (1993). Warner, Richard, 'Incommensurability as a Jurisprudential Puzzle', *Chicago-Kent Law Review* 147 (1992). Wright, R. George, 'Does Free Speech Jurisprudence Rests on a Mistake? Implications of the Commensurability Debate', *Loyola of Los Angeles Law Review* 23 (1989). George, Robert, 'Does the 'Incommensurability Thesis' Imperil Common Sense Moral Judgements?', *American Journal of Jurisprudence* 37

classical explanation of law calls it a measure: *quedam regula et mensura actuum*, a kind of rule and measure of action.”<sup>62</sup>

Moreover, dominant contemporary legal thought -either explicitly or implicitly- holds that legal commensurability is a necessary condition for the justification of legal decisions.<sup>63</sup> If the legal propositions in a concrete case are not commensurable, no rational legal decision can be made, or so is the generally shared idea.<sup>64</sup>

Not surprisingly, *incommensurability* in law is often presented as an equivalent to the ‘non-decidability thesis’, constituting a threat to “our ability to reason decisively” and to rationally in law.<sup>65</sup> Related to incommensurability questions are often raised about the legitimacy of adjudication as the institution fit to rationally solve social conflicts. Where incommensurability applies, it is suggested that we would do “better to ponder whether these cases would be better left to judges, or whether they should start a social conversation, that can lead to a better shaping of social preferences.”<sup>66</sup>

Surely this presumed relation between justification, rationality and commensurability is not exclusive for legal thought. Already in Plato’s Republic we can read that “the arts of measuring and numbering and weighing come to the rescue of the human understanding.”<sup>67</sup> One could indeed state that in dominant conceptions of practical

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(1992); Schroeder, Jeanne, 'Apples and Oranges', in *Research Paper Series* (New York: Cardozo Law School, 2001). Mather, Henry, 'Law-making and Incommensurability', *McGill Law Journal* 47 (2002). Scharffs, Brett G., 'Adjudication and the Problems of Incommensurability', *William and Mary Law Review* 42 (2000). Schmidt, David J., 'Can Law Survive: On Incommensurability and the Idea of Law', *University of Toledo Law Review* 26 (1994). See for a general and illuminating overview of the philosophical discussion about incommensurability of values: Hsieh, Nien-hê, 'Incommensurable Values', Metaphysics Research Lab, Stanford University, URL = <http://plato.stanford.edu/archives/fall2008/entries/value-incommensurable/>.

<sup>62</sup> Finnis, 'Commensurability and Public Reason', 215.

<sup>63</sup> See for a defence against this critique: Alexy, Robert, 'Constitutional Rights, Balancing and Rationality', *Ratio Juris* 16, 2 (2003).

<sup>64</sup> Bix, Brian, *Law, Language and Legal Determinacy* (Oxford: Clarendon Press, 1995), 97.

<sup>65</sup> Scharffs, 'Adjudication and the Problems of Incommensurability', 1372.

<sup>66</sup> Brems, Eva, ed., *Conflicts between Fundamental Rights* (Oxford: Intersentia, 2008), 30.

<sup>67</sup> Plato, 'The Republic', ed. Jowett, Benjamin (The Internet Classics Archive), Book X.

reasoning “the commensurability issue lurks as a reef upon which hopes for rational deliberation [...] seem likely to be wrecked.”<sup>68</sup>

Nonetheless, in spite of its presumed importance for rational decision-making, both in philosophy and in jurisprudence the concept of commensurability is still contested and considered deeply complex.<sup>69</sup> Hence I will offer only a tentative sketch of legal commensurability and will leave certain important controversies in abeyance. This sketch is only meant as the articulation of a particular way of thinking about the morality of adjudication.<sup>70</sup>

Roughly put: legal commensurability indicates that for almost all legal decisions there will be a legally valid measure, i.e. a commensurans, on the basis of which a judge can come to a correct legal decision.<sup>71</sup> This need not be the same commensurans for every legal decision. To suppose otherwise would amount to a rather implausible monism as regards the standards that are used in legal reasoning. Legal

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<sup>68</sup> Richardson, *Practical Reasoning about Final Ends*, 89.

<sup>69</sup> Cf. Bix, *Law, Language and Legal Determinacy*, 96, 104. Brett Scharffs commented on the recent debate on commensurability in law: “although there is considerable overlap in usage, and although some common ground does appear to be emerging, reading the literature might give one the feeling that this is a debate about to collapse from its own weight.” Cf. Scharffs, 'Adjudication and the Problems of Incommensurability', 1373.

<sup>70</sup> Again, this ‘narrative’ largely draws on Ronald Dworkin’s theory of adjudication.

According to Brian Bix commensurability is central to Dworkin’s attempt to justify legal decisions: “If the evaluative criteria of Dworkin’s theory are incommensurable, then the claim that there must be unique right answers to most legal problems must fail.” See: Bix, *Law, Language and Legal Determinacy*, 104. Dworkin himself seldom explicitly refers to commensurability. At one point he argues that his theory of adjudication “presupposes a conception of morality other than some conception according to which different moral theories are frequently incommensurate.” Cf. Dworkin, Ronald, 'A Reply by Ronald Dworkin', in *Ronald Dworkin & Contemporary Jurisprudence*, ed. Cohen, Marshall (London: Duckworth, 1983), 272. Other theories of adjudication to a certain degree also 'fit' within the framework of legal commensurability, such as those of Robert Alexy and Neil MacCormick. See for instance: Alexy, 'Constitutional Rights, Balancing and Rationality'. MacCormick, Neil, *Legal Reasoning and Legal Theory* (Oxford: Oxford University Press, 1978).

<sup>71</sup> Henry Richardson describes a commensurans as “the commensurating value or good”. See: Richardson, *Practical Reasoning about Final Ends*, 15.

commensurability requires that a range of commensuranses is available -be it principles, rules or other legally valid standards- that can be hierarchically ordered and that together form a coherent and consistent system that can in the end be reduced to one final higher order commensurans. As we shall see below, this final commensurans that has both justificatory and explanatory force for the legal order as a whole is a normative theory of political morality.

In contemporary philosophical studies about commensurability one finds a variety of predicates that are used as equivalents for 'commensurans', such as 'metric'<sup>72</sup>, 'scale'<sup>73</sup>, 'higher level synthesizing category'<sup>74</sup>, 'common unit of measurement'<sup>75</sup>, or 'common measure'.<sup>76</sup> In spite of the sometimes substantial differences in meaning, these denominators have in common that they all refer to a shared measure that is used as decisive ground for a ranking between pairs of items in terms of 'more than' or 'equal to'.<sup>77</sup> For any of these equivalents the idea is that there is a measure in terms of which certain things can exhaustively be compared. Such a measure is, as Finnis has put it, to provide for a "(non-optional) standard for comparing options and ranking them as obligatory, permissible, or impermissible, or as legally valid and enforceable or unenforceable, voidable or void, and so forth".<sup>78</sup>

A significant question is whether such a commensurans is confined to a ratio scale, a measure that is characterized by a fixed zero point and units of equal distance and that consequently facilitate a cardinal ranking.<sup>79</sup> Both for the moral and the legal domain this has been a serious point of debate. For instance, Ruth Chang reserves the term

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<sup>72</sup> Cf. Sunstein, Cass, 'Incommensurability and Kinds of Valuation', in *Incommensurability, Incomparability and Practical Reason*, ed. Chang, Ruth (Cambridge, US: Harvard University Press, 1997), 238.

<sup>73</sup> Cf. Grimm, Stephen, 'Easy Cases and Value Incommensurability', *Ratio* 1 (2007), 28.

<sup>74</sup> Cf. Stocker, Michael, *Plural and Conflicting Values* (Oxford: Oxford University Press, 1990), 172.

<sup>75</sup> Cf. Hsieh, 'Incommensurable Values'.

<sup>76</sup> Cf. Raz, Joseph, 'Incommensurability and Agency', in *Incommensurability, Incomparability and Practical Reason*, ed. Chang, Ruth (Cambridge, US: Harvard University Press, 1997), 110. Cf. Richardson, *Practical Reasoning about Final Ends*, 91.

<sup>77</sup> Cf. Raz, 'Incommensurability and Agency', 110.

<sup>78</sup> Finnis, 'Commensurability and Public Reason', 215.

<sup>79</sup> Grimm, 'Easy Cases and Value Incommensurability', 28.

‘incommensurable’ for “items that cannot be precisely measured by some common scale of units of value” and thereby suggests -other things equal- that commensurability entails the prevalence of a ratio scale.<sup>80</sup> Others have pointed out that legal commensurability also obtains when an ‘ordinal scale’ is available.<sup>81</sup> An ‘ordinal scale’ obtains, in the words of Stephen Grimm, when “some candidate for measurement X is better than another candidate for measurement Y, but not that it is better by some fixed quantitative amount.”<sup>82</sup>

For the context of *legal* commensurability the broader interpretation of the concept of a commensurans seems more plausible. Confining its definition to a ratio scale can hardly account for the intelligibility of theories of adjudication that claim or suggest to rely on legal commensurability. It simply does not make sense to hold that a judge can arrive at a rational decision because the right to freedom of expression weighs 3.2 times more than the right not to be discriminated. It therefore seems more plausible to hold that commensurability obtains when a ranking between legal claims is possible on the basis of an ‘ordinary scale’. Typical examples of a commensurans will then be rules, precedents, legal or moral principles and legal ‘viewpoints’ such as the ‘common point of view’.

If one relies on legal commensurability it is crucial that the commensurans is sufficiently determinate to guide the reasoning of the judge so as to lead to a particular right outcome or a well-confined range of such outcomes. This measure thus allows the judge, in the words of Dworkin, only ‘weak discretion’ in the sense that it will require judgment on the part of the judge to connect the term(s) of the commensurans with the concrete case at hand.<sup>83</sup>

In order for a commensurans to have in any sensible way actual action-guiding force it should also be available independently of the judge and antecedent to the decisions

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<sup>80</sup> Chang, 'Introduction', 2. For the legal context Cass Sunstein also seems to confine the commensurans to a ratio scale presenting the dollar as exemplary metric. He holds that “[u]nder this general definition of metric, many possible standards -excellence, well-being, affective allegiance- count as criteria, but not as metrics.” Cf. Sunstein, 'Incommensurability and kinds of Valuation', 238.

<sup>81</sup> Luban, 'Incommensurable Values, Rational Choice, and Moral Absolutes', 67.

<sup>82</sup> Grimm, 'Easy Cases and Value Incommensurability', 28.

<sup>83</sup> Dworkin, *Taking Rights Seriously*, 31-39.

to be made. Legal commensurability indicates that the measure that channels the decision-making is already ‘in place’ before the legal agent confronts a legal case and independently from him.<sup>84</sup> It thus suggests an ‘outside in’ approach to legal decision-making: the measure for the right legal decision is to be found ‘outside’ the legal agent.<sup>85</sup>

It is this ‘priority’ and ‘independency’ of the commensurans that can explain the difference between ‘commensurability’ and ‘comparability’.<sup>86</sup> Where comparability merely suggests that an agent can rank two or more different items on the basis of some shared feature, commensurability means that such a ranking is grounded on a “significant rationale”.<sup>87</sup> Commensurability does not amount to the possibility of ad hoc ranking by an agent who deliberates what to do. Rather, it indicates that a ranking is “induced by some significant or even essential property of the items.”<sup>88</sup> Legal commensurability thus indicates the availability of a measure that has normative force in relation to the judicial decision to be made. For this normative force of the commensurans another feature must be introduced, i.e. its alleged ‘representative adequacy’.<sup>89</sup> This assumed representative adequacy of the commensurans explains why judges are held to be justified in applying the commensurans to the particular legal case at hand.

For this context the meaning of representative adequacy is twofold. First, it points to what may be called ‘rationality as intelligibility’, pointing to what at a certain time and place can reasonably be said to be intelligible.<sup>90</sup> One could say that this test is

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<sup>84</sup> Richardson, *Practical Reasoning about Final Ends*, 251. cf. ———, *Practical Reasoning about Final Ends*, 104.

<sup>85</sup> See also: McDowell, John, *Mind, Value & Reality* (Cambridge, US: Harvard University Press, 1998), 50.

<sup>86</sup> Authors who stress the difference between comparability and commensurability in practical reasoning in general: Stocker, *Plural and Conflicting Values*, 175, 178, 214; Scharffs, ‘Adjudication and the Problems of Incommensurability’, 1393.

<sup>87</sup> Luban, David, ‘Value Pluralism and Rational Choice’, in *Georgetown Law School Research Paper* (Georgetown: Georgetown Law School, 2001), 7.

<sup>88</sup> Luban, ‘Incommensurable Values, Rational Choice, and Moral Absolutes’, 67. Cf. Soper, ‘Legal Theory and the Obligation of A Judge. The Hart/Dworkin Dispute’, 504.

<sup>89</sup> See Richardson, *Practical Reasoning about Final Ends*, 104-111.

<sup>90</sup> MacCormick, *Legal Reasoning and Legal Theory*, 103.

“concerned with what makes sense in the world, and with what makes sense in the context of the system.”<sup>91</sup> Obviously, whether a commensurans satisfies such a test need not be undisputed. Debates about whether legal concepts make sense for a particular case cover a considerable part of what ‘the stuff of adjudication’ is all about. Questions of intelligibility arise particularly in relation to the ‘qualification’ of the facts.

Second, the representational adequacy of the commensurans also suggests that it is a measure in terms of which all that matters for a concrete legal case is exhaustively taken into account.<sup>92</sup> The lens offered by a commensurans is assumed to be also morally adequate for the identification of the relevant interests and facts. So, if one relies on legal commensurability the reasons provided by settled law cannot by themselves explain why a judge is justified in effectuating these selfsame reasons against citizens, i.e. why they would count as a genuine justification for a particular judicial decision. The notion of ‘representative adequacy’ functions as the intermediate concept that bridges the gap between adjudication and morality as being inextricably linked.<sup>93</sup> As such this representative adequacy of the commensurans can also make sense of the fact that theories of adjudication that rely on legal commensurability typically hold that adjudication “has value, that it serves some interest or purpose or enforces some principle -in short that it has some point.”<sup>94</sup> Robert Alexy for instance expresses this idea where he argues that if the law raises a claim to rightness, this by itself provides an argument for the idea that “morality is

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<sup>91</sup> Ibid. Henry Richardson qualifies the kind of ‘rationality’ between the measure and what is measured as one of ‘inherence’; a commensurans must be a concept that can reasonably be said to be instantiated, honoured or realized by a particular decision. Richardson, *Practical Reasoning about Final Ends*, 110.

<sup>92</sup> Cf. Wiggins, David, 'Incommensurability. Four proposals', in *Incommensurability, Incomparability and Practical Reason*, ed. Chang, Ruth (Cambridge, US. : Harvard University Press, 1997), 53.

<sup>93</sup> In this way legal commensurability is supposed to overcome the justificatory deficit of Hart’s descriptive positivism.

<sup>94</sup> Dworkin, *Law's Empire*, 47.

necessarily included in the law”<sup>95</sup> because “moral reasons can and must participate in the justification of legal decisions when authoritative reasons run out.”<sup>96</sup>

It is at this point that the role of normative moral theory of naturally kicks in, as the final or supreme commensurans, as the decisive and exhaustive normative source in adjudication. If one relies on legal commensurability, adjudication is construed as an institutional expression of normative moral theory.<sup>97</sup> Of course, commensurabilists do not hold that in each and every legal case judges invoke arguments drawn from a normative moral background theory of law and adjudication.<sup>98</sup> Legal commensurability simply implies that for judges the “ladder of theoretical ascent is always there” if needed.<sup>99</sup>

There are several candidate normative moral theories for the function of a final commensurans. To qualify, such a theory must according to Dworkin fit most of settled law and at the same time it must be superior to any other theory as a matter of political morality.<sup>100</sup> In the end the judge must choose the best theory, that is, the theory that offers the soundest political and moral principles that are consistent or even coherent with the existing body of valid rules.<sup>101</sup> So to rely on legal

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<sup>95</sup> Alexy, Robert, 'The Nature of Legal Philosophy', *Ratio Juris* 17, 2 (2004), 164.

<sup>96</sup> Ibid., 165. MacCormick attributes representative adequacy to rules where he states that rules “may be conceived of as tending to secure, or being aimed at securing, some end conceived as valuable, or some general mode of conduct conceived to be desirable.” MacCormick, *Legal Reasoning and Legal Theory*, 156.

<sup>97</sup> It is in relation to this function assigned to moral theory as the final justificatory commensurans that Dworkin refers to the value of integrity of law. Integrity of a legal order indicates that judges insofar as possible treat a particular system of legal standards “as expressing and respecting a coherent set of principles, and to that end, to interpret these standards to find implicit standards between and beneath the explicit ones.” See: Dworkin, *Law's Empire*, 217; Dworkin, Ronald, 'In Praise of Theory', *Arizona State Law Journal*, 29 (1997).

<sup>98</sup> Cf. Dworkin, 'In Praise of Theory', 360.

<sup>99</sup> Ibid.

<sup>100</sup> Dworkin, Ronald, *A Matter of Principle* (Cambridge, US: Harvard University Press, 1985), 143.

<sup>101</sup> Cf. Greenawalt, 'Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges', 387.

commensurability means that the practice of adjudication or judicial decision-making has a two-sided nature: it accommodates a wide range of institutionally embedded considerations, but at the same time it also includes a more independent moral point of view. This moral point of view is offered by a normative theory of political morality. This two-sidedness is succinctly expressed by Robert Alexy where he states that the law “necessarily comprises both a real and factual dimension and an ideal and critical one. In the definition of law the factual dimension is represented by the elements of authoritative issuance and social efficacy, whereas the ideal dimension finds its expression in the element of moral correctness.”<sup>102</sup>

So far the exposition of some features of a commensurans. Now the question remains how a judge can be justified in making a *particular* decision. The claim that the commensurans by itself is the supreme determining factor in the legal decision does not suffice as an answer. We still lack a particular arithmetic that connects said commensurans with the decision.

Those relying on legal commensurability take ‘maximisation’ as such a guiding arithmetic, i.e. the rational method for closing the gap between the commensurans and a concrete judicial decision.<sup>103</sup> In the words of David Luban: “The connection between commensurability and rational choice is straightforward. If goods are commensurable, they possess a common measure, and we may choose among them by a simple algorithm: More is better, less is worse.”<sup>104</sup>

Importantly, in this context ‘maximisation’ is not confined to reasoning that aims to ‘maximize’ a quantifiable good or ‘utility’. It has the more general meaning of attempting to make the decision that best instantiates, contributes to, or promotes the

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<sup>102</sup> Alexy, Robert, 'The Dual Nature of Law', *Ratio Juris* 23, 2 (2010), 167.

<sup>103</sup> Henry Richardson makes this idea of maximizing explicit in his characterisation of practical commensurability, which entails that a “commensurans is to serve as the measure in terms of which the agent makes a choice, by maximizing along its dimensions, and not merely as a summary of the choices an agent has made.” Richardson, *Practical Reasoning about Final Ends*, 104.

<sup>104</sup> Luban, 'Value Pluralism and Rational Choice', 6.

commensurans.<sup>105</sup> It surely covers what is usually meant by ‘deduction’ and ‘balancing’ as common methods of legal reasoning.

Note that a reliance on an arithmetic like ‘maximisation’ is not tantamount to being committed to a mechanistic or formalistic view of adjudication. Neither is such a reliance premised on the idea that for each and every decision there is one single right answer. As said, legal commensurability allows for the possibility that the commensurans delineates a well-confined range of possibly correct legal answers. Legal commensurability is thus fully consistent with envisaging adjudication as a highly complex interpretative activity in which serious disagreements can arise. In fact, this is precisely what legal commensurability suggests and why Dworkin assigns superhuman intellectual and philosophical skills to his model of the ideal judge, Hercules.<sup>106</sup> To come to the right decision(s), Hercules interprets settled law in the best light, that is, in the light of the most convincing background theory of political morality, truly an intellectually demanding task.

As the example of Hercules already reveals: the important role that adherents of legal commensurability assign to theory has consequences for the professional responsibilities of the judge. If one relies on legal commensurability, a good judge must satisfy the demands of a normative moral theory. The pivotal judicial virtue of the judge will be a theoretical ability, the ability to interpret the law on the basis of the background moral theory.<sup>107</sup> Within the framework of legal commensurability the judicial role is in essence philosophical and an excellent judge will be identified by his “his or her ability to articulate the implications of such background theories [...]”<sup>108</sup> Competent judges may of course make mistakes, but this will then be either

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<sup>105</sup> Cf. Grimm, 'Easy Cases and Value Incommensurability', 28. Robert Alexy for instance conceptualizes constitutional rights by using this notion of maximisation where he states that these rights are norms “requiring that something be realized to the greatest extent possible, given the legal and factual possibilities”. See: Alexy, 'Constitutional Rights, Balancing and Rationality', 135.

<sup>106</sup> Cf. Dworkin, *Taking Rights Seriously*, 105.

<sup>107</sup> Richards, 'The Theory of Adjudication and the Task of the Great Judge', 218.

<sup>108</sup> *Ibid.*, 205. See also: Greenawalt, 'Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges', 367.

because they use the wrong kind of theory or because they make “more pedestrian errors of analysis.”<sup>109</sup>

Finally, an important feature of legal commensurability is the way it understands the bearing of the losing claim. In this regard Dworkin makes a telling distinction between 'bare harm' and 'moral harm'.<sup>110</sup> For Dworkin bare harm is the idea of a loss as an affected citizen subjectively experiences it. Whether such bare harm indeed occurs will thus by implication depend on an empirical state of affairs, for instance the suffering or frustration that is actually experienced by the losing party.<sup>111</sup> From a moral point of view -other things equal- we do not need to be concerned with this kind harm.

Moral harm, by contrast, is according to Dworkin an objective loss and hence we should be troubled by it from a moral point of view. Moral harm “assumes that someone suffers a special injury when treated unjustly” and which stems from the injustice factor.<sup>112</sup> Now, legal commensurability suggests that the negative consequences that may be experienced by citizens who participate in legal proceedings -negligible incidents aside- are to be understood as bare harm, referring to a merely subjective state of the citizen that is legally irrelevant. Consequently the losing claim “does not simply lose out, it vacates the field. It is not on the scene any more at all”, so to say.<sup>113</sup>

Of course, this feature has everything to do with the assumed representative adequacy of the commensurans. If one relies on legal commensurability the idea is that all that matters legally is exhaustively accounted for by a commensurans. And as the commensurans determines the ranking there is simply no viewpoint available in terms of which the judge is allowed to assign legal or moral weight to the losing claim. Or to put it differently: a commensurans functions as what Dworkin has qualified a ‘dispositive concept’, i.e. a dimension that in the end functions as a two-edged sword:

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<sup>109</sup> Dworkin, *Taking Rights Seriously*, 313.

<sup>110</sup> ———, *A Matter of Principle*, 80.

<sup>111</sup> *Ibid.*

<sup>112</sup> *Ibid.*

<sup>113</sup> Nussbaum, Martha C., 'Aeschylus and Practical Conflict', *Ethics* 95, 2 (1985), 243.

a test for *conclusive* claims as to the concrete legal rights that citizens have and thus as to the related duty of judges to establish and enforce these rights.<sup>114</sup>

This categorical denial of all moral and legal relevance of the losing claim entails that no *genuine* conflicts of legal (including moral) rights will occur, at least not as a phenomenon that is part of the moral nature of adjudication.<sup>115</sup> The framework of legal commensurability only allows for prima facie conflicts -think for instance of Dworkin's 'hard cases'- which are waiting to be dismantled by rigorous legal reasoning.<sup>116</sup> Legal commensurabilists like Dworkin will thus typically raise the following questions, just rhetorically: "How can both A and B be true when B is a straightforward contradiction of A, stating, for example, that a company is not liable for a damage? How can both p and non-p be regarded as true answers?"<sup>117</sup>

#### **4 Stability explained**

In this section I will further explain why I call theories of adjudication and actual practices of adjudication that rely on legal commensurability and on normative moral theory 'stabilizing'.

The connection between 'commensurability' and 'stability' is nothing new. From the early days of Western philosophy -and even before that- commensurability was considered not only an important condition for rationality as we saw in the previous section, but connected to this, also for the stability of agents facing a practical question. For instance in Sophocles' 'Antigone' the protagonist Creon achieves -in the words of Martha Nussbaum- "singleness, straightness, and an apparent stability" because he relies on commensurability.<sup>118</sup> In the same fashion Plato notably stressed

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<sup>114</sup> Dworkin, *A Matter of Principle*, 125.

<sup>115</sup> Cf. Waldron, Jeremy, 'Rights in Conflict', *Ethics* 3 (1989). This feature of the moral irrelevance of the losing claim can also and more straightforwardly be explained by the fact that legal commensurability in the end sees judicial decision-making as a form of applied moral theory and thus as being under the guise of theoretical reason and bound by the principle of non-contradiction.

<sup>116</sup> Cf. Dworkin, Ronald, 'Hard Cases', *Harvard Law Review* 88, 6 (1975).

<sup>117</sup> Statman, Daniel, 'Hard Cases and Moral Dilemmas', *Law and Philosophy* 15, 2 (1996), 133-134.

<sup>118</sup> Nussbaum, *The Fragility of Goodness. Luck and Ethics in Greek Tragedy and Philosophy*, 58.

that commensurability would save people from indecisiveness and neurotic conflict.<sup>119</sup> Commensurability could protect people from “intolerable pains and confusions.”<sup>120</sup> In contemporary legal thought we can discern a similar connection between commensurability and stability. Theories of adjudication that rely on legal commensurability are considered stabilizing for the judge, the legal order as a whole and also for the citizen(s) concerned. By contrast, radical *incommensurability* in law has been linked to a state of indecisiveness, ambiguity, arbitrariness, and “a sense of hopelessness and helplessness”.<sup>121</sup>

As to the stability for the judge: within the framework of legal commensurability a judge always has a prior and external measure to his avail that contains -albeit by implication- the right answer (or a well-defined range of right answers) for the legal case at hand. Although finding this right answer may be an intellectually demanding task, the judge need not experience any kind of fundamental epistemic insecurity or radical doubt, let alone a sense of ‘madness’ when he is at the point of making a decision. Far from that, legal commensurability gives a judge firm legal ground to stand on.

Legal commensurability is also stabilizing for the judge because the judicial role is rather impersonal. Judging is understood as a constative activity rather than as a performative activity. It is about establishing what the case is in fact already. So strictly speaking the person of the judge, his will or character, is not involved. What is involved are his cognitive skills that are necessary to determine and recognize the implications of the commensurans. If one relies on legal commensurability, adjudication is predominantly a matter of application. He does not have to understand a legal decision as his deed in the sense of: ‘due to me, John, Mister X has to bear this

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<sup>119</sup> Cf. Barbour, John D., 'Tragedy and Ethical Reflection', *The Journal of Religion* 63, 1 (1983), 1; Schmidt, 'Can Law Survive: On Incommensurability and the Idea of Law'; Pildes, Richard H., 'Review: Conceptions of Value in Legal Thought', *Michigan Law Review* 90, 6 (1992); Nussbaum, *The Fragility of Goodness. Luck and Ethics in Greek Tragedy and Philosophy*, chapter 4 and 6.

<sup>120</sup> Nussbaum, *Love's Knowledge. Essays on Philosophy and Literature*, 106.

<sup>121</sup> Scharffs, 'Adjudication and the Problems of Incommensurability', 1435. See also: Luban, 'Incommensurable Values, Rational Choice, and Moral Absolutes', 68.

burden A as a result of my choice.’ He can -of course within certain boundaries- simply refer to his professional responsibility to apply the law.

The morally reassuring effect of legal commensurability for the judge is also due to the following. Within the framework of legal commensurability the judge is obliged to exclusively use the lens of the commensurans in determining what to decide.

Consequently his attention is turned away from the reality that the judge experiences as concrete situated being, i.e. from the confrontation with the affected citizen, from the considerations that he otherwise would take seriously, that is, when not fulfilling his professional task. Using the lens of a commensurans, the judge does not ‘see’ the affected citizen, nor does he experience the relational aspect of the situation. Hence, the shield of the commensurans protects the judge against being ‘naked’, so to say, when confronted with the concrete reality that characterizes a legal case.

Another reason why legal commensurability is morally reassuring for the judge is the assumption that every legal case can be *exhaustively* resolved, that is, without a moral loss. As such, legal commensurability offers the judge the prospect of moral innocence. It allows him to avoid ‘dirty hands’.<sup>122</sup> The pain, harm and suffering stemming from right legal decisions can be categorically accounted for in terms of what Ronald Dworkin has called ‘bare harm’, being a legally irrelevant subjective experience of the losing citizens.<sup>123</sup> As a consequence the judge will be perfectly justified to experience the consequences of his decisions “as dispassionately as we view the April showers that bring the flowers of May.”<sup>124</sup>

It is important to note, however, that the idea of judicial moral innocence dovetails neatly with the possibility that judges will sometimes feel a sense of insecurity, loss, regret, guilt or personal responsibility. Within the framework of legal commensurability these experiences are not understood as part and parcel of the judicial role. Rather, they are treated as indications that the subjective inner-life of the judge is not (yet) fully determined by his professional point of view. Once the judge has fully internalized the framework of legal commensurability, the way he personally

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<sup>122</sup> See for an illuminating discussion of ‘dirty hands’: Gowans, Christopher W., *Innocence Lost: An Examination of Inescapable Moral Wrongdoing* (Oxford: Oxford University Press, 1994), 228-237.

<sup>123</sup> Cf. Dworkin, *A Matter of Principle*, 80.

<sup>124</sup> Wolcher, *Law's Task. The Tragic Circle of Law, Justice and Human Suffering*, 62.

experiences his decisions is likely to change. The idea is that a “belief in commensurability cuts very deep: taken seriously, it will transform our passions as well as our decision-making, giving emotions such as love, fear, grief, and hence the ethical problems that are concerned with them, an altogether different character.”<sup>125</sup> As said, legal commensurability is also ‘stabilizing’ for the legal order as a whole. If adjudication fulfils the requirements that stem from legal commensurability, a legal order need not be troubled by the exercise of force that it generates. Legal decisions will be morally justified and fully transparent, rather than expressions of arbitrary and opaque exercises of force.<sup>126</sup> Within the framework of legal commensurability, the principle of political legitimacy can be exhaustively satisfied where adjudication is concerned. Citizens who participate in a legal proceeding will have an explicate reason to accept the burden of a legal decision. Ideally this decision is the implication of living in a principled society, i.e. a society that understands the relations between citizens as a matter of political morality. If a citizen nonetheless complains about the painful consequences of a particular decision, the legal order can ask him to wise up and revise his views on the matter, i.e. to make a distinction between what he subjectively experiences and what is legally the case.

In this way, and to conclude this section, a reliance on legal commensurability is also stabilizing for the ‘losing’ party of a legal proceeding. This citizen does not have a reason to be confused or troubled because of being wronged. He will not be troubled by the confusing and painful experience of being the victim of a decision that could have been otherwise, or that lacks moral ground. A losing citizen can be provided an explicit and exhaustive reason as to why he should accept the particular decision and the resulting burdens. In this way he can also fully understand and concretely experience what living in principled society amounts to. Within a framework of legal commensurability principled judicial decisions are not seen as just “a matter of

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<sup>125</sup> Nussbaum, *Love's Knowledge. Essays on Philosophy and Literature*, 106. Cf. Pildes, 'Review: Conceptions of Value in Legal Thought', 1546. Again, this purported transformative influence is not specific for legal commensurability, but is attributed to practical commensurability in general.

<sup>126</sup> Cf. Dworkin, *Law's Empire*, 71.

theoretical elegance, but also as a matter of how a community committed to equal citizenship should govern itself.”<sup>127</sup>

### **5 Do I overstate the stabilizing character of legal commensurability?**

On the basis of the preceding section one could of course question whether I have not overstated the stabilizing effect of legal commensurability. To rebut this potential charge I will examine a slightly looser, less stringent interpretation of legal commensurability. This interpretation should have the same justificatory potential, but without the stabilizing consequences that I discussed in the previous section. Such an interpretation is in fact offered by Matthew Kramer in his elucidating and thought provoking article ‘When is there not one right answer?’<sup>128</sup>

Kramer presents an approach to adjudication that is characterized by a reliance on legal commensurability combined with the acknowledgment that judges will sometimes have strong discretion and cause or authorize a genuine moral loss. His approach suggests that to rely on legal commensurability is not that stabilizing at all. Legal commensurability will indeed produce a troublesome judicial phenomenology, or so seems the idea. I will argue that Kramer’s account is incoherent and that reliance on legal commensurability implies commitment to a stabilizing view to adjudication. Kramer’s contention that a correct legal decision can nonetheless cause a genuine moral loss is intimately connected with his critique on Dworkin's theory of adjudication, stating that the latter insufficiently acknowledges the inherent plurality of moral values. Kramer’s approach seeks to be more responsive than Dworkin’s to the fact that judges may have to decide about plural values. He does so by identifying two classes of situations in which he thinks that genuine moral loss should be acknowledged due to this plurality of values.

The first category of legal cases that Kramer identifies is the one for which “the uniquely correct response to a moral problem lies in opting for the lesser of the two wrongs.”<sup>129</sup> In these cases the judge makes the right decision by choosing the lesser evil. Because “if the judge does not choose the lesser evil in order to avoid the

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<sup>127</sup> Dworkin, Ronald, *Justice in Robes* (Cambridge, US: Harvard University Press, 2008), 53.

<sup>128</sup> Kramer, Matthew, 'When Is There Not One Right Answer', *The American Journal of Jurisprudence* 53 (2009).

<sup>129</sup> *Ibid.*, 63.

greater, he or she will have failed to adopt the uniquely correct course of conduct”, Kramer argues.<sup>130</sup> Contrary to Dworkin’s view, in these cases the moral value of the losing claim “remains fully operative”.<sup>131</sup> Thus, for Kramer determinate correctness is fully consistent with the idea of a genuine moral loss that will have to be rectified or compensated for. As he puts it: “[b]eing overtopped does not amount to being negated.”<sup>132</sup> Although a judge may decide in accord with the ranking by choosing the ‘lesser of the two wrongs’, according to Kramer this does not make the moral bearing of the losing claim evaporate.

The second category is that of legal cases in which the values at issue are incommensurable. In these cases judges will have strong discretion to decide one way or the other, as there is no common measure available in terms of which competing legal propositions can be ranked: “there is no coherent moral basis for an overall comparison between them.”<sup>133</sup> For cases in this category Kramer also holds that legal decisions may cause a genuine moral loss. He states: “when moral obligations coexist incommensurably [...], each of them continues to obtain as a moral obligation. A person’s non-compliance with any such obligation is a wrong that will have to be rectified.”<sup>134</sup>

So according to Kramer both categories of cases show that a reliance on legal commensurability may well be “[f]ully consistent with the spectre of inescapable wrongness” and with attributing strong discretion to the judge. They suggest a rather radical sort of judicial responsibility and also unintelligibility regarding the grounds of the decision.<sup>135</sup> Again, these aspects are in contrast with the predicate ‘stabilizing’ that I assigned earlier to approaches to adjudication that rely on legal commensurability.

However, I think that Kramer fails in his attempt to give a looser and less stabilizing interpretation of legal commensurability. He fails because the two categories of legal

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<sup>130</sup> Ibid.

<sup>131</sup> Ibid., 66.

<sup>132</sup> Ibid.

<sup>133</sup> Ibid., 64.

<sup>134</sup> Ibid., 66.

<sup>135</sup> Ibid., 63.

cases he delineates cannot coherently be accounted for.<sup>136</sup> As said, the first category refers to situations in which determinate correctness holds according to Kramer -and hence there is a commensurans- and at the same time the judge is deemed to have violated a professional obligation because he did not decide in accord with the losing claim. The problem with this category is that Kramer's description of the cases largely draws on the rhetorical force of the concepts of 'duty' and 'obligation'. He begs the question as to why the judge has a duty to compensate for the losing claim in these cases. This is problematic because the contrary seems to be the case: in view of what is meant by commensurability, in these cases a judge has no duty at all with regard to the losing claim. The 'ranking' -as suggested by Kramer's notion of 'lesser evil'- indicates that a commensurans is in fact used and thus that the judge is exclusively duty bound to give effect to the ranking that this commensurans dictates. There is no separate normative source in terms of which a duty of the judge to decide otherwise can be grounded. It is this reductive power of the commensurans together with the requirement of maximization that Kramer underestimates. These features of commensurability are not reconcilable with the acknowledgment of a genuine moral loss. Consequently, in the effectuation of this ranking the judge does not violate the value at stake in the losing claim. Kramer must either relegate the claim on rightness as determinate correctness, or he must acknowledge the reductive power of the commensurans as the decisive source for determining the duty of the judge. More or less the same holds for the second category of legal cases. Kramer argues that genuine incommensurability occurs in situations where there is simply no value available in terms of which the options can be ranked. Due to this incommensurability judges will have strong discretion. Kramer at the same time asserts that the judge then has "remedial obligations" under which he has to rectify his "non-compliance with the unfulfilled duties."<sup>137</sup> But, if in a legal case the available options are genuinely incommensurable, Kramer must be clear about why the judge would have a duty at all to decide for the one or for the other, and why he must rectify his non-compliance

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<sup>136</sup> It must be noted that Kramer does not explicitly put forth these arguments for legal reasoning, but rather for practical reasoning in general. However, as these arguments are a way of criticizing Dworkin's theory of adjudication it seems that indeed the arguments are meant to also hold for the legal domain.

<sup>137</sup> Kramer, 'When Is There Not One Right Answer', 66.

with an unfulfilled duty. Richard Warner has put this problem of incommensurability concisely: “The jurisprudential problem is to explain how such decision-making is consistent with the institutional demand that courts’ decisions are based on the *superiority* of one set of reasons over the others. What does the court appeal to as a way of showing that one set of reasons is superior to another, competing set? My point is not that this problem is unsolvable. My point is that there is a problem to be solved.”<sup>138</sup>

Kramer in any case does not solve this problem by simply premising that in case of incommensurability the judge has a duty to decide in accord with both claims. Moreover, it remains to be seen whether the attempt to accommodate for the second category of cases does not jeopardize Kramer’s overall reliance on legal commensurability. This reliance hinges on the idea that the second category of cases is a rare phenomenon in law. However, to stick to an overall reliance on commensurability by simply asserting that incommensurability in law will not be commonplace because that would be “devastating”, as Kramer indeed does, is not a convincing strategy. It is a highly problematic assumption and surely begging the question. By accommodating this category of cases, rather than loosening the implications of legal commensurability, Kramer opens the door to full-fledged scepticism that is both at odds with the identification of a genuine moral loss and of course with legal commensurability.

Hence, the two categories of legal cases identified by Kramer cannot function as an argument against the claim that a reliance on legal commensurability is stabilizing for judges and a legal order as a whole. Kramer fails to elucidate how his theory of adjudication can genuinely accommodate the possibility that legal decisions may lead to ‘inescapable wrongness’, while at the same time maintaining a claim on determinate correctness for the majority of cases. If determinate correctness is not assumed, he fails to make clear how it is that a legal decision can be justified or determined as right at all. Also, in that case the notion of ‘inescapable wrongness’ is simply incoherent, at least without further justification for qualifying a particular decision as ‘wrong’. As it stands, Kramer’s amendment to Dworkin does not so much put the stabilizing effect of a reliance on legal commensurability in perspective, but rather ends up either making the sceptical approach to adjudication plausible, or

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<sup>138</sup> Warner, 'Incommensurability as a Jurisprudential Puzzle', 170.

reaffirming the idea that a claim of determinate correctness entails the denial of relevant moral loss.

## **6 Conclusion and how to proceed**

This chapter started with a discussion of a ‘common sense’ approach to adjudication, an approach that characterizes the shared views of legal practitioners and arguably of citizens with regard to the moral quality of adjudication. Thereto I used Hart’s ‘internal point of view’ as an adequate reconstruction of this common sense interpretation. I rejected this approach because it lacks critical, justificatory force. It offers a rather appealing and self-gratulatory interpretation of adjudication without good reason.

For an account of moral quality in adjudication a more critical and detached viewpoint is needed and I introduced philosophy as a proper discipline to offer such an account. Subsequently, I discussed a stabilizing approach to adjudication, as a philosophical approach that relies on legal commensurability and related to this also on the normative force of moral theory. Moreover, I have pointed out why I qualify this approach as ‘stabilizing’, i.e. why it is that such reliance is stabilizing for the judge, for the legal order as a whole and also for the 'losing' citizen.

So now the question we face is whether we shall accept a stabilizing approach to adjudication and how we should proceed when answering this question. As to the latter: assessing the merits of a stabilizing approach on the basis of its ‘fit’ with the actual practice of adjudication will not help us. A stabilizing approach offers a moral ideal of adjudication that has both critical and aspirational potential and therefore by definition it does not need to fit the actual practice, because actual practices of adjudication can be full of ‘mistakes’. What is more, no ‘neutral’ description of adjudication can be offered. Any description will be contested and hence such a description in and by itself can never function as a knockdown argument for or against an account of moral quality in adjudication.

For our assessment of a stabilizing approach to adjudication I thus propose a different route. Its starting point is the role of normative moral theory on which this stabilizing approach hinges for its validity. A stabilizing approach assumes that a normative background theory of political morality can function as a final commensurans for law

and adjudication, thereby warranting a reliance on legal commensurability.<sup>139</sup> Such normative theories are thus assumed to function as an exhaustive explanation and justification for the practice of adjudication.

Yet, this reliance is neither self-evident nor unproblematic. In fact, it is a rather vulnerable feature of a stabilizing approach. Ronald Dworkin, the ‘legal commensurabilist’ par excellence, even stated that his theory of adjudication could possibly be wrong “in virtue of some more problematic type of indeterminacy or incommensurability in moral theory.”<sup>140</sup>

The validity of potential normative background theories of political morality is therefore a highly pertinent object for further scrutiny.

We must see whether indeed these theories can support a stabilizing approach to adjudication, i.e. to what extent a normative theory of political morality can in fact support a reliance on legal commensurability and its stabilizing -its morally and epistemically reassuring- picture of adjudication. In the remainder of the first part of this book I will focus on this very question.

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<sup>139</sup> Finnis, John, 'On Reason and Authority in Law's Empire', *Law and Philosophy* 6 (1987), 375.

<sup>140</sup> Dworkin, *A Matter of Principle*, 144.