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

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*"The project of finding a short cut to heaven is as old as the human race."*<sup>141</sup>

*"We claim to walk straight in the path of justice."*<sup>142</sup>

### **3 On reason's hope. Normative theories of political morality and their potential stabilizing function for adjudication**

#### **1 Introduction**

In the previous chapter we discussed a stabilizing approach to adjudication that relies on legal commensurability and by implication also on a normative theory of political morality. A stabilizing approach holds that if the law and judges comply with the demands of the best normative theory available, adjudication can be a practice - negligible incidents aside- that is fully intelligible, discursively explicable and morally harmonious. This approach assigns to a normative theory of political morality the power to dissolve the (potentially) troublesome phenomenology of adjudication in an epistemically and morally reassuring way.

In this chapter I will discuss the features of normative theories of political morality more thoroughly. It offers a typology of such theories (2) and, in addition, briefly discusses the role these theories themselves assign to adjudication (3). The chapter ends with a brief conclusion (4).

The argumentative aim of the chapter is twofold. I seek to illuminate why a normative theory of political morality is a key element of a stabilizing approach, or more succinctly put: what normative theory has to do with stability. In addition, the chapter sets the stage for the subsequent chapters in which two specific versions of a normative theory of political morality will be scrutinized to assess their potential to validate a stabilizing approach to adjudication.

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<sup>141</sup> Oakeshott, Michael, 'The Tower of Babel', in *Anti-Theory in Ethics and Moral Conservatism*, ed. Clarke, Stanley G. and Simpson, Evan (New York: State University of New York Press, 1989), 185.

<sup>142</sup> Aeschylus, *The Eumenides*, ed. Lloyd-Jones, Hugh, trans. Lloyd-Jones, Hugh (New Jersey: Prentice-Hall, 1970), 30.

## 2 On (the stabilizing effect of) normative theories of political morality

Obviously, offering a typology of normative theories of political morality is a far from neutral exercise. As moral theory itself is a contested concept, any interpretation will be an expression of a particular stance on the matter. In the words of Robert Louden: “there exists no detailed, univocal definition of the term which is employed faithfully by all who profess to be ethical theorists.”<sup>143</sup> So, I cannot but play with loaded dice when offering a typology of normative theories of political morality. As a way to compensate for this inescapable bias, I seek to present a typology that the most miscellaneous moral philosophers can at least to some extent accept. Also, the reader should bear in mind the purpose of this typology: to better appreciate the spirit of a stabilizing approach to adjudication. So far the preliminaries.

In order to understand the spirit of normative theories of political morality it should be reminded that the word *theory* comes from the Greek word *theôria*, which in turn is based on the verb *theôrein*, “to look at, view, behold.”<sup>144</sup> In ancient Greece this verb was applied to sight-seeing travellers, to attendants at festivals in distant cities, and to people who came to witness public games. At a certain point philosophers were compared to such *theôroi*, people who only observe what is happening, and the connection between theory and philosophy was made.<sup>145</sup> Later on *theôria* gradually lost its focus on *visual* perception and the word gradually evolved towards a “mental gazing at, completing, or studying”, a meaning which we can already clearly find in Plato’s *Republic*.<sup>146</sup>

Therefore it is not surprising that the origin of the tradition of normative moral theory has indeed been located in Plato’s philosophy, particularly in Socrates’ method of practical inquiry. In answering practical questions Socrates notably abstracted from all kinds of particularities and from the specific local considerations that characterize the perspective of a concrete situated person.<sup>147</sup> “[...U]nder Socratic reflection we

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<sup>143</sup> Louden, Robert B., 'Virtue Ethics and Anti-theory', *Philosophia* 20, 1 (1990), 95.

<sup>144</sup> ———, *Morality and Moral Theory. A Reappraisal and Reaffirmation* (New York: Oxford University Press 1992), 85.

<sup>145</sup> *Ibid.*, 86.

<sup>146</sup> *Ibid.*

<sup>147</sup> Williams, Bernard, *Ethics and the Limits of Philosophy* (London: Fontana Press, 1985), 190.

seem to be driven to generalize the I and even to adopt, from the force of reflection alone, an ethical perspective.”<sup>148</sup>

In this Socratic vein normative theories of political morality in their account of a just society typically abstract from the contingencies that characterize a political order and its concrete institutions and also from the embedded judgements that occur in such an order. Normative theories of political morality typically “represent the priority of the moral over the political”.<sup>149</sup> In the words of Raymond Geuss they offer an “ethics first view”: through the use of theoretical reason they single out the ends that a society should strive for, as well as the constraints these ends suggest for institutional arrangements.<sup>150</sup>

More particularly normative theories of political morality typically introduce a set of normative principles that can justify, evaluate, guide and explain the political order to which they apply. A political philosopher who offers a normative theory of political morality will try to “reduce that apparently endless diversity of particular moral judgments” by means of abstraction.<sup>151</sup> He will offer “some basic concepts”, or as Bernard Williams has coined them, ‘thin concepts’.<sup>152</sup> These concepts articulate on the most general and abstract level “a schema, a very bare outline” of what the central concerns should be in respect to citizens’ basic rights and duties.<sup>153</sup> Society is construed as potentially the materialization of (theoretical) reason itself and thus as fully intelligible and transparent, and as such also publicly accessible.<sup>154</sup> In the end normative theories of political morality boil down to a project of systematization. This

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<sup>148</sup> Ibid., 21.

<sup>149</sup> Hawthorn, Geoffrey, ed., *Bernard Williams. In the Beginning was the Deed. Realism and Moralism in Political Argument* (Princeton: Princeton University Press, 2005), 2-3.

<sup>150</sup> Geuss, Raymond, *Philosophy and Real Politics* (Princeton: Princeton University Press, 2008), 8.

<sup>151</sup> Hawthorn, ed., *Bernard Williams. In the Beginning was the Deed. Realism and Moralism in Political Argument*, 50.

<sup>152</sup> Ibid., 47.

<sup>153</sup> Williams, Bernard, 'Liberalism and Loss', in *The Legacy of Isaiah Berlin*, ed. Lilla, Mark, Dworkin, Ronald, et al. (New York: The New York Review of Books, 2001), 92.

<sup>154</sup> Cf. Hawthorn, ed., *Bernard Williams. In the Beginning was the Deed. Realism and Moralism in Political Argument*, 46; Rawls, John, *A Theory of Justice* (Cambridge: Harvard University Press, 1999 (1971)), 434.

is clearly expressed by Martha Nussbaum where she states that “one of the major purposes of having an ethical theory is to bring the material of ethical experience into pernicious ordering, rendering the incoherent coherent (by suitable revision and discarding), and showing how one thing is related to another. This also makes it possible to extend the application of principles to previously unconsidered material, or to see how one concrete judgment can be extended to similar cases.”<sup>155</sup>

For the realization of their substantive goals normative theories of political morality depend on the competences of the relevant agents, i.e. of politicians, officials and citizens to understand and apply the abstract concepts they provide. So, as a rule these theories hold that public officials and citizens “should think, not only in moral terms, but in the moral terms that belong to the political theory itself”.<sup>156</sup> All relevant agents should at least to a certain degree have the virtues that are necessary for applying a theory: “clarity and consistency of thought, speech, and action, the ability to reflect, to detach oneself from prevailing opinion, to ask questions, to give reasons.”<sup>157</sup> At the risk of being infeasible, normative theories of political morality have it that citizens and officials ideally are something of a philosopher, or must in any case be able to detach themselves from their normal embedded views and unreflective ways of understanding the world.<sup>158</sup>

This demand of detachment is why normative theories of political morality are often also considered the typical products of the Enlightenment and modernity, as “[t]he goal of Enlightenment was to advance as close as possible to a kind of intellectual utopia in which ignorance and superstition [...] are replaced by a seamless web of beliefs verified by rational methods.”<sup>159</sup> Indeed, normative theories of political morality are keen to present themselves as forceful antidote to or weapon against

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<sup>155</sup> Nussbaum, 'Why Practice Needs Ethical Theory. Particularism, Principles and Bad Behaviour', 57.

<sup>156</sup> Hawthorn, ed., *Bernard Williams. In the Beginning was the Deed. Realism and Moralism in Political Argument*, 3.

<sup>157</sup> Geuss, Raymond, *Outside Ethics* (Princeton: Princeton University Press, 2005), 6.

<sup>158</sup> Cf. Oakeshott, 'The Tower of Babel', 193.

<sup>159</sup> Hawthorn, ed., *Bernard Williams. In the Beginning was the Deed. Realism and Moralism in Political Argument*, 45.

biases, prejudices, traditions and other ‘irrationalities’ that may figure in a political order.<sup>160</sup>

It is important to note that this claim to objectivity and detachment is not to say that normative theories claim to present final and infallible viewpoints of justice. Political philosophers who present a theory of political morality do not hesitate to stress that their conception of justice is inherently open-ended, open for improvements, just as theories in the natural sciences may be revised after new observations.<sup>161</sup> But at the same time normative theories of political morality generally do assign absolute standing to their conceptions of justice where their practical status is concerned.<sup>162</sup> As theory is given primacy over practice, the viewpoint of justice that these theories propose is presented as the “final court of appeal in practical reasoning”.<sup>163</sup> It means that once a particular theory is considered the best available at a certain time and place, its principles must be applied as if they have a ‘once and for all’ status. For practical matters these principles ‘guillotine’ all other viewpoints, they must be taken as absolutes.

In addition and related to the previous point, normative theories of political morality see it as an important practical task to resolve social conflicts. In a society that is reigned by a normative theory of political morality the rules of theoretical reason and hence also the principle of non-contradiction apply: contradictory statements regarding the basic claims of citizens cannot both be true and hence at least one must be false.<sup>164</sup>

Normative theories of political morality tend to “assimilate conflicts in moral belief to theoretical contradictions and apply to moral understanding a model of theoretical

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<sup>160</sup> Williams, *Ethics and the Limits of Philosophy*, 85; Hawthorn, ed., *Bernard Williams. In the Beginning was the Deed. Realism and Moralism in Political Argument*, 33.

<sup>161</sup> Cf. Nussbaum, 'Why Practice Needs Ethical Theory. Particularism, Principles and Bad Behaviour', 57.

<sup>162</sup> Cf. Geuss, *Philosophy and Real Politics*, 17.

<sup>163</sup> Rawls, *A Theory of Justice*, 116.

<sup>164</sup> Cf. Horn, Laurence R, 'Contradiction', in *The Stanford Encyclopedia of Philosophy*, ed. Zalta, Edward N. (Stanford: Metaphysics Research Lab, Stanford University, 2012).

rationality and adequacy”.<sup>165</sup> They often hold that “for any apparent conflict, either one of the conflicting statements is not true or the two statements do not really enjoin incompatible actions.”<sup>166</sup> Consequently, when a social conflict occurs a vital point of political morality is to ‘show’ that one of the parties involved in the conflict was irrational, i.e. mistaken about the (moral) weight of the interests involved.<sup>167</sup>

More generally, normative theories of political morality hold that once a society complies with its demands, citizens cannot have any legitimate complaints against workings of the central institutions in this order. They account for the requirement of political legitimacy in a rather straightforward way: the moral viewpoint they offer is considered an exhaustive and final reason before each and every citizen regarding their particular positions and their concrete plights. This notwithstanding the fact that justice can in practice be counter-intuitive, can be at odds with our everyday and raw experience on a pre-reflective level and can be inconvenient or even extremely painful. But these experiences do not render a complaint legitimate as “the claims of personal prudence are already given appropriate weight within the full system of principles”.<sup>168</sup> Reasonable citizens must be able to distance themselves from these more embedded views and ‘subjective’ experiences so as to accept the practical implications stemming from these principles.

Theories of political morality thus embrace what can be qualified as the doctrine of moral harmony.<sup>169</sup> They aim to completely and exhaustively reconcile citizens with

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<sup>165</sup> Williams, Bernard, *Moral Luck. Philosophical Papers 1973-1980* (Cambridge: Cambridge University Press, 1981), 81. Cf. Williams, 'Liberalism and Loss', 162.

<sup>166</sup> Gowans, Christoffer W., 'Introduction. The Debate on Moral Dilemmas', in *Moral Dilemmas*, ed. Gowans, Christoffer (Oxford: Oxford University Press, 1987), 4. Gowans sees this characteristic not only as a strand of modern conceptions of moral theory, but as a rather dominant one in moral philosophy. He writes: “[..] with few exceptions philosophers from Plato on have viewed moral dilemmas as mere appearances”. See also: Louden, 'Virtue Ethics and Anti-theory', 97.

<sup>167</sup> Cf. Hawthorn, ed., *Bernard Williams. In the Beginning was the Deed. Realism and Moralism in Political Argument*, 13; Williams, 'Liberalism and Loss', 100-102.

<sup>168</sup> Rawls, *A Theory of Justice*, 117.

<sup>169</sup> For the use of the term ‘moral harmony’ see: Williams, Bernard, 'Replies', in *World, Mind, and Ethics*, ed. Altham, J.E.J. and Harrison, Ross (Cambridge: Cambridge University Press, 1995), 139.

the political order they live in by trying to overcome any kind of ambivalence and *aporias* where citizens' positions in society are concerned.<sup>170</sup> Through (the use of) theoretical reflection citizens are made at home in the political order by making this order completely intelligible and by securing that citizens will not suffer from genuine moral loss.

On the basis of the discussion so far we can establish that if normative theories of political morality live up to their aspirations, they will have a stabilizing effect on (the central institutions of) a political order. In any case, the troublesome phenomenology of such an order can be explained and justified as either a mistake or as a negligible side-effect of living in society that is committed to a moral ideal that citizens have reason to endorse.

Normative theories of political morality are also morally and epistemically reassuring for the central institutions in society: for each and every question with regard to citizens' claims in society they offer a final and morally exhaustive, loss-free answer. In a sense these theories bring good news about the moral potential of a political order.<sup>171</sup> They bring hope because they hold that a political order is in essence friendly to their aspirations and they rely on the idea that "[a] society free from irremovable contradictions, a society pointing the way as logic does, to correct solutions only, can be built eventually, given enough time and good will."<sup>172</sup>

So far the typology. On the basis of this typology we can now see why a normative theory of political morality plays such a crucial role in a stabilizing approach to adjudication. These theories typically offer a viewpoint of justice that dovetails well with the features of a final commensurans. That is, as it befits the description of the final commensurans the viewpoint of justice that these theories propose is assumed to have sufficient normative force in order for the relevant values to be honoured by the relevant agents and institutions. It is presented as a viewpoint that is external and independent and as such offers guidance to the agents and institutions concerned.

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<sup>170</sup> Cf. Bauman, Zygmunt, *Postmodern Ethics* (Oxford: Blackwell, 1993), 9.

<sup>171</sup> Cf. Williams, Bernard, 'The Women of Trachis. Fiction, Pessimism, Ethics', in *The Greeks and Us. Essays in Honor of W.H. Adkins*, ed. Loudon, Robert B. and Schollmeier, Paul (Chicago: The University of Chicago Press, 1996).

<sup>172</sup> Bauman, *Postmodern Ethics*, 9.



Also, similar to a final commensurans these principles of political morality purportedly encompass all concerns that are deemed pertinent for answering the particular practical problem at hand. They are assumed to have absolute standing precisely because of the assumed exhaustiveness and adequacy of their viewpoint. In addition, and again as it befits a final commensurans, such a conception is held to rationally resolve actual social conflicts; it allegedly offers solutions that do not come with genuine moral loss.

So, if theories of political morality can indeed live up to their claims -other things equal- this would warrant a reliance on legal commensurability, and by implication it would warrant a stabilizing approach to adjudication. At least in so far they comply with the principles of political morality, judicial decisions can be assumed to be determined or at least sufficiently constrained by principles of political morality, they can be assumed to be the rational resolution to the conflict at hand and they can also be assumed to exhaustively satisfy the legitimate claims of the citizens involved. The liberal principle of reciprocity will then be fully satisfied. Based on such a conception the losing citizen can be provided an exhaustive and explicit reason for why he should bear the burdens of a particular judicial decision. Such a citizen is not 'sacrificed', but rather given his moral due. If the claims of a theory of political morality can be upheld, such a theory indeed supports an epistemically and morally reassuring account of adjudication. The troublesome phenomenology of adjudication can then be dealt with as a negligible side-effect of living in a society that is committed to principles of political morality, i.e. to justice. This phenomenology may be ignored as the result of a pre-reflective, primitive or subjective point of view.

### **3 The role of adjudication. Returning the compliment**

As said, the validity of a stabilizing approach to adjudication depends on the availability of an adequate normative theory of political morality. In this section we shall see that such theories of political morality return the compliment: they consider adjudication a crucial institution for the realisation of the values of political morality they propose. But this is not an analytical claim. Theories of political morality on the one hand and law and adjudication on the other are not intrinsically linked. There is no a priori reason to assign a practical role to law and adjudication for the realisation of justice. In a society of saints who agree on a common ideal, disputes about citizens'

basic claims will not occur and law and adjudication would presumably be redundant institutions.

But where the conditions in our world are concerned, normative theories of political morality do assign an important practical task to both the institutions of law and adjudication for the realisation of their goals.<sup>173</sup> They consider adjudication as the forum par excellence through which the principles of political morality, i.e. of justice, are effectuated. Due to the intellectual skills of judges, their impartiality and their institutionally anchored independency, the judiciary is seen as a particularly appropriate institution for the realisation of values of political morality vis-à-vis concrete citizens. In this regard normative theories of political morality often take it to be salient that despite the sometimes extreme inequality between the parties, citizens who go to court can equally rely on a full and fair hearing of the merits of their case and that the case will be settled on the basis of this hearing, of the law and of moral principles. Moreover, through adjudication the values of political morality will ideally also be realised beyond the scope of the actual parties concerned.

All this is not to say that normative theories of political morality claim to ‘directly’ determine the reasoning of judges. By contrast, they are sensitive to and respect the difference between the institutional rights of citizens -legal rights included-, and the rights and duties that they would have if the background values of political morality would be the exclusive normative source. Theories of political morality typically assign a certain autonomy to the institutions that bear responsibility for the realisation of values of political morality. They rely on a division of labour, so to say.

At the same time, these theories also stress that law and adjudication are only ‘partially autonomous’. Bound by the specific rules of their institution, they are not insulated from the requirements of political morality.<sup>174</sup> Other than for instance the institution of chess, law and adjudication are subject to the principles of political

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<sup>173</sup> John Rawls’ and Martha Nussbaum’s theories of justice are cases in point as we shall see in the next chapters. Cf. Rawls, *A Theory of Justice*, 175; Nussbaum, Martha C., ‘The Supreme Court, 2006 Term. Foreword: Constitutions and Capabilities: ‘Perception’ against Lofty Formalism’, *Harvard Law Review* 121, 1 (2007).

<sup>174</sup> Cf. Dworkin, ‘Hard Cases’, 1079.

morality precisely because they intensely influence citizens' lives.<sup>175</sup> Consequently, normative theories of political morality typically hold that in applying the law judges have the political duty to honour the values of political morality by means of settled law.

So, as said, normative theories of political morality return the compliment they receive from a stabilizing approach to adjudication as to the importance of their role. They assign an important task to adjudication in guaranteeing the protection of citizens' moral rights. Adjudication is not considered as merely one mode of dispute resolution among others, but rather as an institution in which the values of political morality can be effectuated in a most clear and elegant way in confrontation with concrete citizens.

#### **4 Conclusion**

This chapter offered a typology of normative theories of political morality. It also paid attention to the role such theories assign to adjudication.

The typology explained that if theories of political morality can indeed live up to their claims, than -other things equal- they indeed can play an epistemically and morally reassuring role in (the main institutions of) a political order. More specifically, for the institutions of law and adjudication it would warrant a reliance on legal commensurability and hence also justify a stabilizing approach to adjudication. This because the viewpoint of justice that such theories offer fits the features of a final commensurans. We also saw that theories of political morality typically return the compliment to a stabilizing approach to adjudication. In the same way this approach holds that a normative moral theory of political morality plays a key role in adjudication, normative theories hold that adjudication is a crucial institution for the realization of their goals.

As the next steps in our examination of the validity of a stabilizing approach, in the following four chapters I will answer the question whether the strongest candidate background theories of political morality for law and adjudication indeed live up to their own claims. We shall see that these theories are more fragile and less reassuring

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<sup>175</sup> This partial autonomy explains why political philosophers such as Rawls and Nussbaum do consider themselves a relevant 'voice' when critically evaluating actual case law.

than they themselves suggest and that this bears on the moral character of adjudication.