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The fragility of rightness. Adjudication and the primacy of practice

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“To show respect is to bow down not before the law, but before a being who commands a work from me”⁶⁶⁰

“Since there can be no cognitive assurance in advance of action we are left with our responsibility for what we do.”⁶⁶¹

9 Adjudication without foundation. A postmodern approach

1 Introduction

In this part of the book I change horses. Rather than using and discussing the lens that a normative theory offers in accounting for moral quality in adjudication and hence staying within a framework of legal commensurability, I will present two versions of what I qualify as a *destabilizing* approach to adjudication. A destabilizing approach is a philosophical account that does not rely on the availability of a final commensurans, i.e. on an explicit normative idea of a just society as a whole. It accounts for moral quality primarily by drawing on an understanding of (potential) characteristics of the practice of adjudication itself, as one particular sphere of justice. This chapter starts with an exposition of one version of such an approach, a postmodern approach to adjudication.

One caveat must be made beforehand. Particularly from an ‘internal point of view’, that is from the perspective of legal practitioners, the central tenets of this postmodern approach are often experienced as rather counter-intuitive, uninformed, all too provocative and disrespectful for the profession of judges. Thence postmodern perspectives on law and adjudication are time and again ridiculed or even ignored in academia. Nonetheless and notwithstanding postmodernism’s reputation, for our purpose to offer an account of moral quality in adjudication something can be learned from the insights it does offer, as well as from its exaggerations and mistakes.

Below I will first briefly expound the central tenets of a postmodern approach to adjudication (2). Consecutively, I will discuss the weak and strong points of this approach and what we can learn from it (3). I will end with some concluding remarks

⁶⁶⁰ Levinas, Emmanuel, 'The Ego and the Totality', in *Collected Philosophical Papers*, ed. Lévinas, Emmanuel (The Hague: Martinus Nijhoff, 1987), 49.

⁶⁶¹ Cornell, *The Philosophy of the Limit*, 168.

(4).

2 Adjudication as honouring the (call of the) Other

2.1 Postmodern ethics

A postmodern approach to adjudication takes its inspiration from postmodern ethics or in the words of Simon Critchley, the ethics of deconstruction.⁶⁶² This ethics has both a critical and a constructive strand.

Its critical strand resembles the anti-theoretical critique that we saw in the previous chapter: postmodernists strongly reject the kind of normative theories of political morality that we discussed earlier because of their reliance on normative principles.⁶⁶³

More broadly speaking their arrows are directed against any kind of 'enlightened' or 'modernist' thinking, in particular against neo-Kantian practical philosophy.

In their own, often highly dense, theatrical and opaque vocabulary, postmodernists argue that practical philosophy more often than not boils down to a form of identity-thinking, a kind of thinking that falsely relies on the (possible) identity between concept and object, ignoring or suppressing the non-identical and privileging the products of 'reason' above actual reality.⁶⁶⁴

As to the constructive side: postmodernists claim to offer more than a destructive and suspicious philosophy. Jacques Derrida as one of the notorious proponents of 'deconstruction' for instance states that he "has done nothing but address the problem of justice."⁶⁶⁵ The discourse on "the incommensurable or the incalculable, or on singularity, difference and heterogeneity are also, through and through, at least

⁶⁶² See for a deep and illuminating discussion of this ethics of deconstruction: Critchley, Simon, *The Ethics of Deconstruction* (Edinburgh: Edinburgh University Press, 1992).

⁶⁶³ Cf. Douzinas, Costas and Warrington, Ronnie, *Justice Miscarried: Ethics, Aesthetics and the Law* (London: Harvester Wheatsheaf, 1994), 7; Stamatis, Costas M., 'Justice without Law: a Postmodernist Paradox', *Law and Critique* 2 (1994).

⁶⁶⁴ Critchley, *The Ethics of Deconstruction*, 6; Douzinas and Warrington, *Justice Miscarried: Ethics, Aesthetics and the Law*, 161. They are *postmodern* because of their rejection of the *modern* idea that morality can be captured in a system, by rules and principles or by any kind of cognition that is available to the subject.

⁶⁶⁵ Derrida, Jacques, 'Force of Law: The 'Mystical Foundation of Authority'', *Cardozo Law Review* 11, 920 (1989), 935.

obliquely discourses on justice", he says.⁶⁶⁶ The postmodern constructive proposal for ethics seeks to make sense of the inherent irreducibility of objects, particularly the uniqueness of every human being. Moreover, it claims to offer an understanding of the moral bearing of a phenomenology that is already out there in the world.⁶⁶⁷

For this latter element postmodernists largely draw on the philosophy of Emmanuel Levinas, in particular his ethics of Alterity. This ethics is based upon an understanding of the special nature of an encounter with the Other.⁶⁶⁸ Explaining whom or what is meant by this Other, Levinas invokes the phenomenology of the face, i.e. its uniqueness, indeterminateness, continually changing character and inescapability. In the words of Douzinas a face is "more unique than the leaf on a tree in the spring, more concrete than the species of a genus, more particular than the instance of an essence, more singular than the application of a law."⁶⁶⁹

By this emphasis on the uniqueness of a face postmodernists aim to underscore that the 'Other' cannot and may not be reduced to a stable general meaning or an intelligible essence. The phenomenology of the face cannot be reduced to a concept, at least not without doing it injustice, or so is the idea.

Postmodernists hold that by the mere fact of appearing this Other has a peculiar impact on us, an impact that crucially differs from the experience one has when confronted with an inanimate object, for instance a lamppost. An encounter with the Other makes us immediately responsible. This responsibility is not the result of the application of abstract categories or of any norms based on a prior foundation, but it simply 'happens' through the fact of the encounter. As such this responsibility is unconditional(ly demanding). That is, it cannot be rejected, dismantled or put between brackets, because it must be taken as if "it was already there".⁶⁷⁰ "The face opens the primordial discourse whose first word is obligation, which no "interiority" permits

⁶⁶⁶ Ibid., 929.

⁶⁶⁷ Cf. Critchley, *The Ethics of Deconstruction*, 4.

⁶⁶⁸ Cf. Bergo, Bettina, 'Emmanuel Levinas', in *The Stanford Encyclopedia of Philosophy*, ed. Zalta, Edward N. (Stanford: Metaphysics Research Lab, Stanford University, 2013).

⁶⁶⁹ Douzinas and Warrington, *Justice Miscarried: Ethics, Aesthetics and the Law*, 119.

⁶⁷⁰ Bauman, *Postmodern Ethics*, 74-75.

avoiding,” Levinas says.⁶⁷¹ So, drawing on this phenomenology of the face postmodernists see ethics primarily as an ethics of responsibility to the Other. In spite of its weight, for the postmodernists this kind of responsibility is not merely a burden. They see it also as an opening to experience one’s own individuality, as one cannot be replaced in relation to the Other. Being responsible is also an opportunity to come alive as individual. Again in Levinas' words: “[r]esponsibility is what is incumbent on me exclusively, and what humanly I cannot refuse. This charge is the supreme dignity of the unique. I am I in the sole measure that I am responsible, a non-interchangeable I.”⁶⁷²

2.2 Postmodern adjudication

A variety of legal scholars have fleshed out what they see as the implications of postmodern ethics for law, justice and adjudication respectively.⁶⁷³ It may come as no

⁶⁷¹ Lévinas, Emmanuel, *Totality and Infinity*, trans. Lingis, Alphonso (Pittsburg: Duquesne University Press, 1969), 200-201.

⁶⁷² Levinas, Emmanuel, *Ethics and Infinity: Conversations with Philippe Nemo*, trans. Cohen, Richard A. (Pittsburgh: Duquesne University Press, 1985), 100-101.

⁶⁷³ See for instance: Cornell, *The Philosophy of the Limit*; Wolcher, *Law's Task. The Tragic Circle of Law, Justice and Human Suffering*; Sokoloff, William W., 'Between Justice and Legality: Derrida on Decision', *Political Research Quarterly* 58, 2 (2005); Smith, Nick, 'Incommensurability and Alterity in Contemporary Jurisprudence', *Buffalo Law Review* 45 (1997); Douzinas, Costas, 'Law and Justice in Postmodernism', in *The Cambridge Companion to Postmodernism*, ed. Connor, Steven (Cambridge: Cambridge University Press, 2004); Douzinas and Warrington, *Justice Miscarried: Ethics, Aesthetics and the Law*; Derrida, 'Force of Law: The 'Mystical Foundation of Authority''; Shepherd, Lois, 'Face to Face: A Call for Radical Responsibility in Place of Compassion', *St. John's Law Review* 77 (2003); Stamatis, 'Justice without Law: a Postmodernist Paradox'. Because of its rejection of any prior foundation, a postmodern approach is also intimately linked to the field of (radical) incommensurability in legal reasoning. In spite of Derrida's explicit rejection of the dichotomy incommensurability-commensurability, I thereby take it that an ethical postmodern approach to adjudication indeed takes radical incommensurability as its starting point. Cf. Derrida, 'Force of Law: The 'Mystical Foundation of Authority''. However, the overlap between postmodern accounts of adjudication and legal incommensurabilism has hardly been explored so far. Within the scope of this book the exact relation between the two frameworks need not further concern us, although it is an interesting topic to be explored. In the words of

surprise that in a postmodern approach to adjudication the encounter between the judge and the parties to the legal proceedings is understood as lying at the heart of adjudication's moral nature.⁶⁷⁴

From a postmodern perspective adjudication is a practice in which the judge must continually respond in the here and now to the pressing question that the parties involved unmistakably ask: "[...] where do you stand"?⁶⁷⁵ Citizens who participate in a legal proceeding "beckon[s] us to heed the call to judicial responsibility", Drucilla Cornell states.⁶⁷⁶ The judge is inescapably responsible for the parties that are facing him, because of the simple fact of their appearance.⁶⁷⁷

Postmodern legal scholars offer some -although limited- suggestions as to what 'responsible judging' boils down to. Being a responsible judge means most of all to respect the Other, i.e. the citizens involved in all their concreteness and hence irreducibility. Therefore, the judge should make an effort not to use rules, precedents or principles of valid law for -as the postmodernists call it- the appropriation, submission and 'digestion' of the uniqueness of the citizens involved. To the contrary, the judge must honour what can be called a pathetic imperative.⁶⁷⁸ Cornell has stressed this immediate and pre-reflective duty by quoting Adorno where he states: "The physical moment tells our knowledge that the suffering is not to be, that things should be different. Woe speaks, 'go'."⁶⁷⁹

Nick Smith, "[c]urrently, virtually no conversation between the two emerging fields of study exists". He in addition identifies a "seemingly untraversable distance between American legal theory and French deconstructive theory." Smith himself discerns two resemblances: "First, both schools reject Platonic metaphysics that assume the existence of a unified "science" of universal value and ethics. Second, these recognitions of incommensurability lead both movements to embrace anti-authoritarian forms of politics." Cf. Smith, 'Incommensurability and Alterity in Contemporary Jurisprudence', 3.

⁶⁷⁴ Douzinas and Warrington, *Justice Miscarried: Ethics, Aesthetics and the Law*, 16.

⁶⁷⁵ Douzinas, 'Law and Justice in Postmodernism', 118.

⁶⁷⁶ Cornell, *The Philosophy of the Limit*, 66.

⁶⁷⁷ Douzinas and Warrington, *Justice Miscarried: Ethics, Aesthetics and the Law*, 165.

⁶⁷⁸ For the term 'pathetic imperative' I am indebted to: Hawkins, Anne Hunsaker, 'Ethical Tragedy and Sophocles "Philoctetus"', *The Classical World* 92, 4 (1999), 350.

⁶⁷⁹ Cornell, *The Philosophy of the Limit*, 26. Cornell quotes Adorno here. Douzinas and Warrington express this imperative as follows: "A face in suffering issues a command, a

In honouring this imperative a responsible judge uses what Cornell qualifies a ‘mimetic capacity’, a capacity “to identify with the other, in sympathy and in appreciation”, over and against his ability to look through the lens of rules, precedents and principles.⁶⁸⁰ Thereto, instead of controlling his empirical self -as an Odysseus tying himself to the mast-, a responsible judge must allow his affections to play a role.⁶⁸¹ Only in this way will a ‘constellation’ arise, a set of concepts through which the Other can be approached in a non-violent way.⁶⁸² A constellation, in the words of Cornell, is “a metaphor for how one should uncover the object as it speaks to us, not as we define it.”⁶⁸³

Legal postmodernists take great pains to show that all this does not lead to radical subjectivism.⁶⁸⁴ They firmly reject the idea that *Grundlosigkeit* (giving up on any prior grounds) ends up in *Sinnlosigkeit* (irrationality and senselessness).⁶⁸⁵ Neither do postmodernists discard valid law as they locate the encounter between the judge and the parties involved in the *nomos*, the normative legal order that encompasses both settled law and values of political morality.⁶⁸⁶ Derrida for instance stressed that a judge indeed violates the demands of legality “if he doesn't refer to any law, to any

degree of specific performance: “Welcome me”, “Give me sanctuary”, “Feed me”.’ See: Douzinas and Warrington, *Justice Miscarried: Ethics, Aesthetics and the Law*, 165.

⁶⁸⁰ Cornell, *The Philosophy of the Limit*, 23; Douzinas and Warrington, *Justice Miscarried: Ethics, Aesthetics and the Law*, 165.

⁶⁸¹ Cornell, *The Philosophy of the Limit*, 179.

⁶⁸² *Ibid.*, 23.

⁶⁸³ *Ibid.*, 178. Cornell here draws on Adorno's negative dialectics. He describes this idea of constellation as follows: “The constellation illuminates the specific side of the object, the side which to a classifying procedure is either a matter of indifference or a matter of burden.” Cf. Adorno, Theodor W., *Negative Dialectics*, trans. Ashton, E.B. (New York: Continuum, 2007), 162.

⁶⁸⁴ Cornell is disturbed by this confusion that “is repeatedly made in the tirades against ‘deconstruction’ [...]”. Cf. Cornell, *The Philosophy of the Limit*, 94.

⁶⁸⁵ *Ibid.*, 102.

⁶⁸⁶ In the words of Cover: “We inhabit a *nomos* - a normative universe. We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void.” Cover, Robert, 'The Supreme Court, 1982 Term. Foreword: Nomos and Narrative', *Harvard Law Review* 97, 4 (1982), 4.

rule” or “if he improvises and leaves aside all rules, all principles.”⁶⁸⁷ Postmodernists see legal principles as also indispensable for the resolution of conflicts. They are well aware that in legal proceedings there are more ‘Others’ involved who demand respect and that a ‘third’ viewpoint is always needed to adjudicate between competing positions and claims. “We need legal principles that guide us through the maze of competing legal interpretations, precisely because all claims cannot be vindicated”, Cornell states.⁶⁸⁸

But, at pains of reverting to ‘identity-thinking’, this *nomos* or these rules and principles are not allowed to function as a prior normative ground. They must not be ‘brought’ to the legal case in advance as this would impede the formation of constellations and hence violate the demand for respect of the Other, i.e. the concrete embodied citizen involved.⁶⁸⁹

Therewith we arrive at the point where we can appreciate Derrida’s notorious paradox of justice: “[..] for a decision to be just and responsible, it must in its proper moment if there is one, be both regulated and without regulation: it must conserve the law and also destroy it or suspend it enough to have to reinvent it in each case, rejustify it, at least reinvent it in the reaffirmation and the new and free confirmation of its principle.”⁶⁹⁰

On the one hand the judge should see to it that citizens who participate in legal proceedings are not absorbed by the abstractions of the legal system and on the other

⁶⁸⁷ Derrida, 'Force of Law: The 'Mystical Foundation of Authority'', 961.

⁶⁸⁸ Cornell, *The Philosophy of the Limit*, 105. Or as Costas Douzinas states: “When someone comes to the law, he or she is already involved in conflict with at least one more person and the judge has to balance the conflicting requests.” Cf. Douzinas, 'Law and Justice in Postmodernism', 213. These principles are to function as guiding lights for the settlement of such disputes. Cornell, *The Philosophy of the Limit*, 106.

⁶⁸⁹ In the words of Cornell: “We can only form constellations if we have grasped the misrecognition inherent in identity-logical thinking.” Cf. Cornell, *The Philosophy of the Limit*, 23.

⁶⁹⁰ Derrida, 'Force of Law: The 'Mystical Foundation of Authority'', 961. Or in other words: “How are we to reconcile the act of justice that must always concern singularity, individuals, irreplaceable groups and lives, the other or myself *as* other, in a unique situation, with rule, norm, value or the imperative of justice which necessarily have a general form [..]?” ———, 'Force of Law: The 'Mystical Foundation of Authority'', 949.

hand he must also honour the *nomos*. Therefore at the moment of choice a responsible judge will always have an aporetic experience, an experience of undecidability.⁶⁹¹

It is this aporetic experience or negative moment that according to postmodernists gives a utopian trend to their account of adjudication and sets it apart from a fatalistic view.⁶⁹²

By paying attention to what escapes categories and rules of settled law a postmodern approach claims to open up the (conceptual) space for radical freedom and for pushing the limits of settled law.

Finally, a postmodern approach to adjudication puts the phenomenology of the aftermath firmly on the legal agenda, so to say. That is, according to postmodernists the judge will by definition be unfaithful to the Other's otherness. As he must after all make comparisons "which inevitably call for an analogy of the unlike and the same" the judge cannot escape identity-thinking.⁶⁹³ Hence, if judges fully live up to their professional responsibility, their decisions will still leave a disturbing remainder.⁶⁹⁴ Consequently, in postmodern legal writings one will find discussions about how to respond to this remainder. Cornell has for instance discussed the act of mourning as a way to deal with the 'Other's death' -a rather emphatic way of pointing to what can never be fully grasped. "It is through mourning, then, that we remember the remains", Cornell states.⁶⁹⁵ Wolcher takes 'ethical distress' to be a vital element of the

⁶⁹¹ Derrida, 'Force of Law: The 'Mystical Foundation of Authority'', 961.

⁶⁹² Sokoloff, 'Between Justice and Legality: Derrida on Decision', 341.

⁶⁹³ Cornell, Drucilla, 'Post-structuralism, the Ethical Relation, and the Law', *Cardozo Law Review* 9 (1988), 1591. Cf. Bauman, *Postmodern Ethics*, 9.

⁶⁹⁴ In the words of Louis Wolcher, judges as "the agents of law and justice", as "law-doers", will always cause "a veritable tidal wave of human suffering as they go about performing law's task, whether they realize it or not." Wolcher, *Law's Task. The Tragic Circle of Law, Justice and Human Suffering*, xxi.

⁶⁹⁵ Cornell, *The Philosophy of the Limit*, 73. She thereby refers to Walter Benjamin's *chiffonier*, the rag picker who is "salvaging the remains", the one who "gathers what is left behind." ———, *The Philosophy of the Limit*, 76.

But again, as the Other and hence the loss are fundamentally unintelligible, for the postmodern legal scholar it is only through the failure to bring the Other fully to life that mourning the Other as indeed an Other can succeed. Cf. ———, *The Philosophy of the Limit*, 73.

experience of a responsible judge. He describes it as a kind of guilt “that cannot be argued for or willed away. This sort of guilt, at least, seems permanently stamped on the human heart, like a tattoo on the epidermis.”⁶⁹⁶

All this clearly shows that a postmodern approach by no means offers a reassuring picture of adjudication’s moral potential. Even in its best form adjudication will be an inherently messy -similar cases may have different outcomes-, intransparent -judicial decisions are largely unintelligible- and morally disturbing -judicial decisions always leave a remainder- practice according to postmodernists. As will be clear, this approach does not seek to dismantle or overcome the troublesome phenomenology of adjudication. It rather seems to be a way of making sense of it. Perhaps a postmodern approach -paradoxically- even prescribes it. In any case it strongly criticizes all attempts to overcome this troublesome phenomenology by means of Reason. How the postmodern approach to adjudication works out for the evaluation of concrete legal judgments I will illustrate by a concrete legal case.

The case of *Joan Gibbs*⁶⁹⁷

Joan is a woman of twenty-six who has lived in one and the same small village all her life. Already for quite some years Joan is married to Richard who works at the local petrol station. As Joan herself works as a cashier in the local supermarket and the couple is widely known in the village. Both are generally considered very pleasant, happy and sympathetic people. However, one day after receiving an anonymous tip the police finds three suitcases in the attic of Gibbs’ parents, each holding a baby’s corpse. Joan Gibbs is arrested. After a few days of interrogation Joan declares that she has indeed given birth to these babies and that their father was a colleague at the supermarket. She also declares that she killed them immediately upon birth and hid the corpses in her parents’ attic. Gibbs explained that she had always wanted to be a ‘perfect’ daughter for her parents and that she was most afraid for the consequences once her husband and the villagers would find out about her pregnancies. Gibbs also gives detailed accounts of how she had made efforts to conceal her pregnancies for her husband, her parents, her colleagues and fellow villagers.

⁶⁹⁶ Wolcher, *Law's Task. The Tragic Circle of Law, Justice and Human Suffering*, 85.

⁶⁹⁷ Cf. Rechtbank Leeuwarden, May 3 2011, ECLI: NL:RBLEE:2011:BQ3315; Rechtbank 's-Gravenhage, November 26 2004, ECLI:NL:RBSGR:2004:AR6518; Rechtbank Breda, July 7 2004, ECLI:NL:RBBRE:2004:AP8503; Rechtbank Breda, March 23 2010, ECLI:NL:RBBRE:2010:BL8559; Gerechtshof 's-Gravenhage, September 12 2005, ECLI:NL:GHSGR:2005:AU2469.

Gibbs is tried for triple baby murder. The public prosecutor holds Gibbs fully accountable and demands eight years imprisonment.⁶⁹⁸ The judge sentences accordingly and motivates his sentence by arguing that Joan has killed extremely vulnerable and defenceless creatures and that he thinks she has done so in a rather calculating and cold-hearted way. Joan has given birth to the three babies in silence, without anybody noticing, something which already requires an almost super-human form of self-control, the judge states. Above that Joan has killed them with her bare hands, which the judge also considers a sign of her cold-bloodedness. The judge blames Joan for not using contraceptives or not having an abortion as 'any normal person' would have done. As a modern woman she could have and Joan has willingly taken the risk of becoming pregnant, the judge holds. He is not sensitive to Joan's 'explanation' that she wanted to be a perfect daughter, as this indicates that Joan has given priority to her own interests and the approval of her parents, rather than to the lives of the babies. For the judge the 'calculus' that Joan made is incomprehensible. In his sentence he furthermore ponders that Joan must have some kind of psychiatric disorder, given the 'seriousness' and 'abnormality' of her crimes. However, because Gibbs refused to be examined in a forensic observational centre, he argues that he cannot take her mental state into account, neither in deciding whether to hold her responsible, nor in determining the actual sentence. The judge concludes that he must hold Gibbs fully accountable and sentences her to six years imprisonment, also because Gibbs' crimes have deeply shocked her family, the residents of the village and society at large.

From a postmodern perspective two aspects of this sentence are particularly noteworthy. First, the sentence shows how identity-thinking in adjudication conceals the performative side of judging. That is, the judge presents his decision as what he is bound to do according to law, merely establishing what the case is legally.⁶⁹⁹ The reasoning of the judge hides from view that in reaction to Joan's refusal to be observed in a forensic observational centre, he could have opted to consult psychiatric and psychological experts on the subject of mothers who kill their babies. The judge uses the concepts in a way that covers up that he in fact has *chosen* not to do so and that he has *chosen* to hold Joan fully responsible for her deeds and to sentence her the way he did.

Next, from the viewpoint of a postmodern approach it is seriously questionable whether this judgment will qualify as a judicially *responsible* decision, whether this decision shows sufficient respect to Joan as Other. Besides the 'naked facts', the judge used these concepts as if they were already 'validated' beforehand, prior to the case, and he consequently imposes them upon Joan. For a postmodernist this way of using these concepts blocks the judge from

⁶⁹⁸ In the Netherlands the relevant applicable legal rule is article 290 of the Dutch Criminal Code. This rule states that a mother who intentionally kills her baby during or right after giving birth will be sentenced to maximally six years imprisonment or to a fine of the fourth category.

⁶⁹⁹ Wolcher, *Law's Task. The Tragic Circle of Law, Justice and Human Suffering*, 75.

experiencing feelings of sympathy, which would make way for a ‘constellation’ of concepts to arise as a (more) non-repressive basis for his judgment.⁷⁰⁰ Moreover, by this digestive way of using concepts and by not using his ‘mimetic capacity’ the judge also denies Joan a sympathetic spectator who can adequately respond to the remains. His kind of reasoning impedes a perspective to arise that can be responsive to a rather disturbing remainder. It blocks the access to an underlying reality: that this is a case about a young woman who possibly due to a mental disorder killed her babies, and who due to the terrible events and the sentence will never be able to lead a ‘normal life’ again.

3 Taking postmodernism seriously? Pros and cons of a postmodern approach

In our search for an account of moral quality in adjudication we can learn from both the weak and strong points of a postmodern approach. Let me start with the weak points.

One such point is that in spite of its effort to argue to the contrary, a postmodern approach lacks sufficient discriminatory power to actually account for *moral* quality in adjudication. This is a pressing issue, all the more so because postmodernists such as Cornell emphasize the importance of the desiring being, the empirical self as crucial for respecting the Other. But, as this ‘empirical self’ or the subjectivity of the judge is not further qualified, it is difficult to conceive how a postmodern approach can avert legitimating a form of decisionism. The benchmarks that we have seen so far do not suffice in this regard, far from it.⁷⁰¹ Precisely because in a postmodern

⁷⁰⁰ Cornell, *The Philosophy of the Limit*, 34.

⁷⁰¹ At first sight Costas Douzinas seems to meet this concern. He portrays a right judicial decision as the result of a “dialectical relationship between the general principles to be derived from past cases, custom, and statute, and the specific facts involved in any particular dispute.” He thereby refers to *casuistry* as it appears for instance in common law traditions. Douzinas adds that the faculty of *conscience* is crucial for the judge to be able to find the right equilibrium between the particularities of the case and the prior rules and principles. However, I think it is a serious question whether the tradition of *casuistry* can be harmonized with giving primacy to the Other. That is, casuistry as it exists in common law traditions seems to suggest that the generality of the legal viewpoint can be harmoniously reconciled with the particularities of the case, and hence with the Other’s otherness. This does not fit with the more confrontational portrayal of the encounter with the Other that is so characteristic for postmodern ethics. Also, as Douzinas does not substantiate what ‘conscience’ means, it is unclear why it can secure a certain moral quality of judicial decisions. Moreover, it remains to be seen whether in this casuistic kind of reasoning the

approach the judge's decision must be *his* decision and a unique interpretation of law, we need to know what defines legal and moral quality.⁷⁰²

This all the more so if we are to take the demand of political legitimacy and the demand of reciprocity therein seriously: we need a more substantial answer as to why for instance a 'losing' or negatively affected citizen will have reason to accept the burdens stemming from the judicial decision and why he as 'another' 'Other' is not 'better' served.

Surely Derrida has conceded that within a postmodern approach there is indeed a very thin line between mere force and a responsible decision. "Left to itself, the incalculable and giving (donatrice) idea of justice is always very close to the bad, even to the worst for it can always be appropriated by the most perverse calculation," he says.⁷⁰³ However, these acknowledgments do not make the critique less urgent, as this 'thin line' may be due to an unnecessary lack of conceptual power on the part of the postmodern approach itself rather than to the inherent nature of adjudication. In any case, we need not be convinced that there is no middle ground between the kind of identity-thinking that postmodernists reject and their rather indeterminate account of honouring the Other. Without additional arguments, a postmodern approach not only risks to justify or celebrate judicial decisions that we do not want to be justified or celebrated. It also leaves unexplored the possibility that a range of other professional qualities can indeed prevent that decisions are merely subjective, or 'digestive' towards the Other.

Other can in fact survive as Other and not be usurped by the notion of *conscience*. Cf. Douzinas, 'Law and Justice in Postmodernism', 216.

⁷⁰² Douzinas describes this double character of justice as follows: "A community (and its law) based on justice is double: first, it is an ethical community of unequal hostages to the other and a network of undetermined but immediate ethical relationships of asymmetry, where I am responsible and duty bound to respond to the other's demand. But, second, community also implies the commonality of law, the calculation of equality, and the symmetry of rights. Here we approach the postmodern aporia of justice: to act justly one must treat the other both as equal and as entitled to the symmetrical treatment of norms, and as a totally unique person who commands the response of ethical asymmetry." Ibid., 214.

⁷⁰³ Derrida, 'Force of Law: The 'Mystical Foundation of Authority'', 971.

Next there is what I call the ‘Hamlet objection’, the charge that the phenomenology that the postmodernists propose as leading will incapacitate the judge. Having penetrated the ‘true nature of things’, Hamlet cannot act. “Knowledge kills actions, to action belongs the veil of illusion -that is the lesson of Hamlet”, Nietzsche said.⁷⁰⁴ A postmodern approach is particularly sensitive to this lesson, because it sees the experiences of ‘mourning’, ‘anxiety’ and ‘ethical distress’ as *necessary* corollaries of responsible judging. It seems that within this approach judges should *always* experience their decisions as genuinely painful and epistemologically resting on quicksand: justice shows itself in anxiety. “I think that there is no justice without this experience, however impossible it may be, of aporia,” Derrida says.⁷⁰⁵ In a similar vein Wolcher asserts that in the end adjudication is “a long and emotionally difficult investigation of the dark and sorrow side of human experience, where buckets fall quietly every hour every day.”⁷⁰⁶ Thence according to a postmodern approach judges should feel guilty, anxious and insecure all the time. But if judges were to continually feel this way, it could lead them to either avoid hard decisions or to not accept the office at all.⁷⁰⁷ Continuous anxiety and distress are not what the judiciary needs, at

⁷⁰⁴ Nietzsche, Friedrich Wilhelm, *The Birth of Tragedy: Out of the Spirit of Music*, trans. Smith, Douglas, Oxford World's Classics (Oxford: Oxford University Press, 2000), 46.

Hamlet is used in philosophy to describe the inertia that may come from (too much) reflection. Hegel described Hamlet’s inertia as follows: “His noble soul is not made for this kind of energetic activity; and, full of disgust with the world and life, with decision, proof, arrangements for carrying out his resolve, and being bandied from pillar to post, he eventually perishes owing to his own hesitation and a complication of external circumstances.” Cf.

Hegel, George Wilhelm Friedrich, *Hegel's Aesthetics: Lectures on Fine Art*, trans. Knox, T.M. (Oxford: Oxford University Press, 1998), 1226.

⁷⁰⁵ Derrida, 'Force of Law: The 'Mystical Foundation of Authority'', 947.

⁷⁰⁶ Wolcher, *Law's Task. The Tragic Circle of Law, Justice and Human Suffering*, xiv.

⁷⁰⁷ The latter is not something that postmodernists would deny. Again, as Wolcher states: “[..] it is hard to think too much about how justice is done without wanting to become neither a victim nor an executioner.” “It is hard to think too much about how sausage is made without wanting to become a vegetarian.” *Ibid.*, 84.

least not if it is to function.⁷⁰⁸ Again, postmodernist legal scholars do not offer the conceptual tools to differentiate between different kinds of judicial decisions and hence between different experiences to which they may give rise.

Next, a postmodern approach cannot prevent the sentimentalisation of adjudication. For the same reason, i.e. its lack of discriminatory power, it risks that feelings of regret, ethical distress and anxiety will become fetishes because judges should *always* feel genuinely troubled. It may bring judges to sentimentalize all kinds of consequences of their decisions, even if these consequences could have been prevented by better decisions or if the interests at stake are rather futile.

In addition, one may wonder whether a postmodern approach does not lapse into identity-thinking when it claims to already 'know' the kind of phenomenology that the confrontation with the Other gives rise to. How can we know in advance what kind of effect the Other has or should have on the judge? By seemingly also directly prescribing rather than merely understanding a particular phenomenology we may have reason to fear that the postmodern approach itself kind of takes 'possession' of this Other.⁷⁰⁹

These objections also point to a philosophically rather fundamental problem. As it stands, a postmodern approach to adjudication is unclear, to say the least, about its own relation to practice. On the one hand it rejects normative philosophies for the digestive role they assign to reason and in addition it gives priority to the Other as singular being that makes the judge responsible by the mere fact of appearing before him. In this sense a postmodern approach merely explains on a conceptual level what morally is the case already, rather than that it prescribes what must be on its own account. On the other hand, and paradoxically, as a philosophy the postmodernist approach also seems to more or less *directly* prescribe a particular way of judging and a particular kind of phenomenology.

⁷⁰⁸ Kronman has put it thus: "[t]he most significant fact about our courts today is the enormous number of cases they must handle." Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession*, 320.

⁷⁰⁹ Cf. Jacobs, F.C.L.M., 'Ten Overstaan van Allen. Levinas en de Universaliteit in de Ethiek', in *Emmanuel Levinas over Psyche, Kunst en Moraal*, ed. Bleijendaal, Herman, Goud, Johan, et al. (Baarn: Ambo, 1991).

Finally, we cannot but mention that because of their attempt to apply postmodern insights to an institutional context postmodern *legal* scholars may unintentionally reaffirm what their sources of inspiration fundamentally reject.⁷¹⁰ For instance, Drucilla Cornell takes her inspiration for her own approach to law and adjudication from Theodor Adorno's negative dialectics.⁷¹¹ However, Adorno saw modern societies as radically evil because of the dominance of bureaucratic rationality and their bourgeois coldness, as they ignore more embodied cognitions and ask of citizens and officials to suppress their emotions, and as a result to stay unaffected when they are confronted with suffering.⁷¹² It was because of this radical critique on society that Adorno offered only *negative* ethical criteria to be used as *resistance* against the tendencies of modern society. For this very reason Adorno himself did not propose an ethics to be applied by the dominant institutions in modern societies. Thus, on the basis of the underlying conception of society that spurred postmodern views the -one on one- application of this ethics to actual institutions risks to suggest the overall legitimacy of adjudication and the institutions on which it hinges.

So far the critical points. As may be clear, these are reasons to not accept a postmodern approach to adjudication. But their identification is nonetheless productive because they can function as so many warnings against the kind of pitfalls that one must avoid if one tries to account for moral quality in adjudication without relying on normative theory.

As to the strong points in a postmodern approach, insights that we may want to take on board in the development of such an account: whatever one may think of its terminology, a postmodern approach rightly points to the specific relational dimension involved in adjudication, i.e. its being an encounter between concrete citizens and a concrete judge. It also rightly points to the moral bearing of this relational aspect, namely that the parties involved in legal proceedings deserve respect in all their concreteness. This aspect is valuable as a way of coming to grips with the liberal demand of political legitimacy for the context of adjudication, particularly if one finds that normative foundations cannot live up to this demand.

⁷¹⁰ For this point I am indebted to Professor Bert van den Brink.

⁷¹¹ Cornell, *The Philosophy of the Limit*, 100.

⁷¹² Cf. Freyenhagen, Fabian, 'Moral Philosophy', in *Theodor Adorno. Key Concepts*, ed. Cook, Deborah (London: Acumen Press, 2008), 109.

Again, in the eyes of the (legal) common sense, in view of run of the mill legal cases and the number of legal entities other than natural persons that are parties participating in legal proceedings, this dimension may be experienced as rather misplaced. Nonetheless, the points postmodernists make regarding the judge's responsibility towards the Other are important for the many cases in which natural persons are involved, cases about interests that may not be all that important on the scale of history, but that are crucial to those persons and their lives.

Next, a postmodern approach sheds light on a rather unexplored field of the practice of adjudication: that of the aftermath of legal decisions, i.e. the remainders and the question how we should respond to them. As said, this aspect of adjudication has hardly received attention in legal theory, legal discourse and (socio-)legal research. If we give primacy to adjudication's practice there is no a priori reason to ignore this field. Rather to the contrary, we should have a keen eye for it.

Finally, we can use the postmodern insight that *all* attempts to morally account for adjudication should be wary of the risks of identity-thinking and digestively imposing one's concepts on reality. The postmodern approach itself is thereby not excluded. It does not take a legal formalist as opponent to see the risks of identity-thinking. All accounts of moral quality in practice will by their very (aspirational) nature be prone to hostility towards phenomena that disturb or even block their aspirations. In situations where one faces such phenomena it is easier to impose one's concepts on them and stick to a rather self-congratulatory and appeasing account, rather than to honestly acknowledge the moral limits of practice and hence of one's endeavour.

4 Conclusion

In this chapter I discussed a postmodern approach to adjudication, an approach that rejects all forms of identity-thinking and at the same time claims to account for the moral bearing of adjudication. It explains this moral bearing principally by focusing on the encounter between the judge and the Other, i.e. the parties that are involved in legal proceedings. Because of the mere fact of this encounter the judge bears responsibility towards this Other as a concrete, singular embodied being.

I also discussed what I take to be the weak and strong points of a postmodern approach and concluded that if we want to come up with a plausible account of moral quality of adjudication, we must try to avoid the former and cherish the latter. Such an approach must in any case sufficiently explain the (un)reasonableness of legal

decisions and why they are morally defensible, and it must not lead to the incapacitation of judges or to the sentimentalisation of adjudication. Such an approach must also be clear about its relation to practice, and should in the end not relapse in the ‘normative trap’ of prescribing to practice how it should be, or what judges should experience.

At the same time I established that we can learn from some postmodern insights. One such insight is that we must be sensitive to the relational dimension of adjudication and its moral bearing. We must take seriously that adjudication is an encounter between a concrete judge and concrete parties, which in any case demands respect for the parties in all their concreteness. In addition, the sensitivity that postmodern legal scholars show for the phenomenology of the aftermath of legal decisions is of value, as well as their (sometimes all too) keen eye for the risks of identity-thinking and its digestive potential in all attempts to account for moral quality of practice. These sensitivities we should take on board.