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The fragility of rightness. Adjudication and the primacy of practice

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“Occasion by occasion, one knows what to do, if one does, not by applying universal principles, but by being a certain kind of person: one who sees situations in a certain distinctive way.”⁷¹³

10 The Fragility of Rightness I. A virtue-ethical conception of adjudication

1 Introduction

This chapter and the subsequent two chapters expound the *fragility of rightness*, a proposal for a new quasi-phenomenological approach to adjudication.⁷¹⁴ Similar to a postmodern approach, it does not account for the moral quality of adjudication by means of normative moral theory. Rather, it stays close to its practice and hence also to its (troublesome) phenomenology, to the way adjudication 'appears' to be from a relatively unreflective viewpoint.

The *fragility of rightness* is constituted by three elements: a *virtue ethical conception of adjudication*, the *concept of civic friendship* and the concept of a *tragic legal choice*. The idea is that together these elements enable us to offer a plausible account of moral quality in adjudication that can adequately deal with the central problems we identified in a stabilizing approach and a postmodern approach to adjudication. In this chapter I elaborate the first element of the *fragility of rightness*, that is, a virtue-ethical conception of adjudication (2). After this exposition I will discuss the extent to which this conception satisfies the demand of political legitimacy and connected to this the demand of respect for the Other or the concrete citizen who participates in a legal proceeding (3). The chapter ends with a conclusion (4).

⁷¹³ McDowell, *Mind, Value & Reality*., 73.

⁷¹⁴ See also: Domselaar, Iris van, 'A Neo-Aristotelian Notion of Reciprocity: About Civic Friendship and (the troublesome character of) Right Judicial Decisions', in *Aristotle and the Philosophy of Law: Theory, Practice and Justice* ed. Huppes-Cluysenaer, Liesbeth and Coelho, Nuno (Dordrecht: Springer 2013); Domselaar, 'Zelfbevestigende' versus 'Ontregelde' Rechtspraak'.

2 A virtue-ethical conception of adjudication

2.1 Judicial virtues and giving primacy to the particular

As said, the *fragility of rightness* relinquishes the idea that we need theory in order to account for the moral quality of adjudication. Instead it offers, among others, a virtue-ethical conception of adjudication. This conception gives primacy to practice and as a result is premised on the idea that adjudication is about dealing with the concrete particulars of cases.⁷¹⁵ These particulars are considered the ultimate authorities against which the practice of adjudication is assessed.⁷¹⁶

Of course, particulars neither impose themselves on the judge's mind, nor do they jump into his sight of their own accord.⁷¹⁷ So, if we want to steer clear of a nihilist or sceptic approach to adjudication and thus from the idea that 'anything goes', we must establish under which conditions we have reason to think that judges adequately respond to these particulars.⁷¹⁸

It is a crucial insight of Aristotle's ethics that in the end practice is about particulars, but also that these particulars pertain to the domain of perception. Particulars are not

⁷¹⁵ This is an important Aristotelian element in the *fragility of rightness*. As it was Aristotle who so strongly asserted that practice, consisting of activity, action and notions of what to do, is in the end about particulars. Cf. Aristotle, 'Nichomachean Ethics', 1141b14-16. It is important to note however, that the notion of 'particulars' as it is used here also encompasses what in the postmodern ethical approach is meant by the 'Other'. In this context particulars must especially be distinguished from abstractions. Cf. Wolfram, Sybil, *Philosophical Logic* (London: Routledge, 1989), 55.

⁷¹⁶ Nussbaum, *The Fragility of Goodness. Luck and Ethics in Greek Tragedy and Philosophy*, 301.

⁷¹⁷ Cf. Wiggins, 'Deliberation and Practical Reason', 233.

⁷¹⁸ Again, -as we have already seen in the previous chapters- reference to the judge's commitment to moral theory, (legal) principles, legal rules and legal precedents and his ability to apply them does not suffice. Particulars of a legal case will always come in different, unique constellations that are unfathomable and not sufficiently determinable in advance. Also, these particulars may invoke contradicting legal concerns. Hence rules, principles and other kinds of explicit general precepts can never fully take stock of all that might be relevant in a concrete legal case. Cf. Nussbaum, *Love's Knowledge. Essays on Philosophy and Literature*, 66-75; Wiggins, 'Deliberation and Practical Reason', 233; Aristotle, 'Nichomachean Ethics', 47.

the “object of systematic knowledge, but of perception”, Aristotle says.⁷¹⁹ In line with this view the *fragility of rightness* holds that for adjudication to be of a certain moral quality the judge must in any case have the capacity of judicial perception as a version of moral perception.⁷²⁰ In the literature the concept of this 'moral capacity' has also been coined as ‘perceptual capacity’⁷²¹, ‘situation sense’⁷²², 'situational appreciation'⁷²³ and ‘moral vision’.⁷²⁴ All these qualifications refer to the idea of sense-perception. This is not coincidental of course; moral perception resembles ‘sense-perception’ in several ways.⁷²⁵ One similarity is that judicial perception is a capacity through which the judge obtains knowledge about reality. In the same way that sense-perception can show a dress to be 'really' red, judicial perception can show a situation to be ‘really’ discriminatory. Judicial perception brings the judge in touch with practical reality, so

⁷¹⁹ Aristotle, 'Nichomachean Ethics', 1142a27-28. Cf. Wiggins, 'Deliberation and Practical Reason', 233.

⁷²⁰ For this discussion of moral perception I primarily draw on neo-Aristotelian accounts of practical wisdom that in particular focus on Aristotle’s concept of *aisthesis* (perception), on Iris Murdoch’s account of ‘moral vision’ and on works of others that are inspired by this latter account. A salient difference between the two traditions is that in neo-Aristotelian accounts of practical wisdom perception is directly linked to action, whereas in Murdoch’s account it is not. For Murdoch perception is a moral capacity that is relevant for and at work in all kinds of responses other than mere action or decision-making. See for an illuminating and deep discussion of the two conceptions of moral perception: Clarke, Bridget, 'The Lens of Character: Aristotle, Murdoch, and the Idea of Moral Perception', (Pittsburg: University of Pittsburg, 2003).

⁷²¹ McDowell, 'Virtue and Reason', 51.

⁷²² Llewellyn, Karl, *The Common Law Tradition: Deciding Appeals* (Boston: Little, Brown and Company, 1960), 59-61, 121-57, 206-208., as cited in: Solum, 'Virtue Jurisprudence. A Virtue-Centered Theory of Judging'.

⁷²³ Wiggins, 'Deliberation and Practical Reason', 233.

⁷²⁴ Murdoch, 'Vision and Choice'.

⁷²⁵ By sense perception I mean here: "the awareness or apprehension of things by sight, hearing, touch, smell and taste". Cf. <http://plato.stanford.edu/entries/perception-problem/>

to say. It is the ability to grasp certain aspects of reality in a non-inferential, non-deductive way.⁷²⁶

Note that 'reality' here does not point to a Platonic idea of moral reality. I do not mean to suggest the existence of an external independent practical world, nor of a set of brute moral facts waiting to be discovered by the judge. The reality at issue does have an objective side to it, but at the same time it is agent- or response-dependent. In this sense it can be compared with the reality of colours. In the words of Mac Dowell reality is “not brutally there -not there independently of our sensibility- any more than colours are; though, as with colours, this does not prevent us from supposing that [it is] there independently of any particular apparent experience of [it].”⁷²⁷

Another resemblance with sense-perception is that precisely because it is a particular *sensitivity* of the judge, judicial perception does not lead to a 'cool' kind of knowledge, in the sense of impersonal and detached knowledge. The knowledge generated by judicial perception has an emotional and affective dimension. As it generates sensory and embodied sensations, judicial perception comes with a vivid, immediate and lively phenomenology, so to say.⁷²⁸

A judge who has the capacity of judicial perception will thus typically be able to *vividly* imagine the situations in which the citizens confronting him find themselves. For instance, if a judge has to decide whether a certain constellation of 'facts' warrant the qualification of 'domestic violence' as defined and criminalized in penal law, he must be able to form an image of these facts. The accused may assert that these facts should be seen as part of the mutual testing and provoking that is characteristic for his

⁷²⁶ Stuart Hampshire makes the comparison with the perceptual identification of a person. We can tell who the person in the distance is, although we are unable to account for the process leading to this judgment. Hampshire, Stuart, 'Public and Private Morality', in *Public and Private Morality*, ed. Hampshire, Stuart (Cambridge: Cambridge University Press, 1978), 25. See also Aristotle on this point: “So there will not be deliberation about particulars either, as e.g. about whether this is a loaf, or whether it has been cooked as it should; because these belong to the sphere of perception.” Cf. Aristotle, 'Nichomachean Ethics', 1112b350-1113a3.

⁷²⁷ McDowell, 'Values and Secondary Qualities', 146.

⁷²⁸ Cf. Chappel, Timothy, 'Moral Perception', *Philosophy*, 83 (2008), 427-428. The concept of moral perception can thus rather straightforwardly account for phrases like “the way she has treated him is simply disgusting!”

marriage, whereas the victim might qualify the same facts as a form of emotional torture. The judge must then be able to form mental representations of the facts that he gets to see about the situation, a situation that is not directly present to him and may not be familiar to him at all. Nonetheless, in order to know how to respond, these facts must 'strike' him in the right way.

This example also shows a crucial difference between judicial perception and sense-perception: the former is a character sensitive capacity while the latter is not. Where a sadist and an altruist are equally equipped to discern that a dress is red or that certain form is a triangle, things are different with grasping practical reality. Judicial perception is a capacity in which the entire personality of the judge is involved.⁷²⁹ Flaws in his or her character influence his or her understanding of practical reality.⁷³⁰ These flaws will possibly 'block' him from getting in touch with the practical bearing of the facts. The judge will only be able to perceive well if his character is of a certain sort -only then will he be able to take in the 'facts', as it were.

Another important way in which judicial perception differs from sense-perception that is pertinent in this context is that judicial perception as a version of moral perception can be morally valuable in itself. As Lawrence Blum has put it: "We praise, admire, and encourage correct perception and moral insight prior to and independent of its issuing in right action."⁷³¹ Awareness of practical reality and expressions thereof can be accomplishments in their own right. It provides the setting in which judicial responses in their broadest sense take place and as we have seen in the previous chapter, it is this setting that can enhance a non-violent relation with the Other, the concrete embodied citizen whom the judge faces. Judicial perception is thus valuable

⁷²⁹ In the words of Martha Nussbaum, moral "[p]erception is a complex response of the entire personality, an appropriate acknowledgment of the features of the situation on which action is to be based, a recognition of the particular." Cf. Nussbaum, *The Fragility of Goodness. Luck and Ethics in Greek Tragedy and Philosophy*, 309.

⁷³⁰ This is not to deny that one can be wrong about the moral bearing of a situation for reasons other than a character flaw. Cf. Blum, 'Moral Perception and Particularity', 704.

⁷³¹ *Ibid.*, 713.

if not necessary for a good perceptual, emotional and imaginative response to the situation at hand.⁷³²

So far the virtue of judicial perception. It goes without saying that this virtue does not suffice to account for the moral quality of adjudication. For instance, this virtue does not explain how and why judicial decisions differ from decisions that other citizens take. Reference to judicial perception does not suffice to account for the role that the law plays in adjudication. Also, the capacity to adequately perceive the legal bearing of a case cannot yet explain the fact that the judge will actually act, express himself and respond accordingly. For this, other judicial virtues are needed.

Besides judicial perception the *fragility of rightness* proposes a range of other judicial virtues. As the discussion of the virtue of judicial perception already implicitly suggested: virtues are character traits, stable dispositions or "reliable sensitivities".⁷³³ Above all they neither are some sort of competences that are separable from the person in the sense that they may fade without loss of personality, nor are they equivalent to a thoughtless habit or a mere skill. Judicial virtues are qualities that are "well entrenched in its possessor [...], unlike a habit such as being a tea-drinker" [...].⁷³⁴

⁷³² Note that judicial perception is not only at work in certain well-confined situations in which choices have to be made. Judicial perception pervades the judge's life. Hence, as we shall see later, the data pertinent for the moral evaluation of adjudication are not confined to these well-confined situations. See for this point also: *Ibid.*, 714.

⁷³³ McDowell, 'Virtue and Reason', 51.

⁷³⁴ Hursthouse, Rosalind, *On Virtue Ethics* (Oxford: Oxford University Press, 1999). This aspect, the virtues as character traits, is vital for appreciating the force of the situationists' critique on virtue ethics. Situationists argue that robust character traits do not exist because people are too inconsistent from one situation to another for such traits to play a role in the explanation of behaviour. I will not delve deeply into the debate between virtue ethicists and situationists. At this point three arguments against the situationists suffice to support the idea that a virtue-ethical approach to legal decision-making does make sense.

Firstly, virtue-ethics is particularly well-suited to account for the influence of situational factors on human behaviour. A virtuous person will take these into account and he will try to deal with or confront these as good as possible. In the words of Julia Annas: "The more you develop a virtue, the *less* important to you is mere habit, and the more complex and flexible your ability to reason about new and innovative kinds of situations you may be faced with."

Cf. Annas, Julia, 'Comments on John Doris's 'Lack of Character'', *Philosophy and Phenomenological Research* 71, 3 (2005), 637.

What is more, virtue-ethics offers a developmental account of the virtues and hence it is not refuted if people act wrongly, not in the least because particular acts are not the relevant loci of moral assessment. A 'wrong' decision can be part and parcel of the practice of a person who strives to be virtuous, because a virtuous person will reflect on this mistake and on the basis of his insights act differently the next time. It indicates that 'second thoughts' and reflection after one's choices and acts are part of the kernel of ethical life, professional life included. I will come back to this point in this chapter, but also in the next chapter when discussing the notion of 'tragic responsive reactions'.

Secondly, the outcomes of social psychological experiments that the situationists use to challenge virtue-ethics indicate that our common sense idea about virtues or folk psychology in general differs from a philosophical account of the virtues. The latter offers a more demanding picture of the virtues than our every day experience would suggest. So conceived, the findings based on said social psychological experiments show that the virtuous life is much more difficult than we often think and that virtuous persons are quite rare. In this regard Kupperman mentions -that he has been told- that the one person who immediately refused to participate in the notorious Millgram experiment "was also the person who in Viet Nam blew the whistle on the My Lai massacre." Cf. Kupperman, Joel J., 'The Indispensability of Character', *Philosophy* 76, 296 (2001), 243.

Thirdly, an important advantage of virtue-ethics over and above the situationists' explanation of human behaviour is that it allows for an integrative evaluation of the person. Whereas the situationists typically see a person as a set of fragmented selves, each responding differently to certain situations, a virtue-ethical approach understands the person as someone who tries to integrate -other things equal- his values in all areas of his life. As such virtue-ethics can explain why we may be 'shocked' if someone acts honestly in one domain and cheats in another situation without any justifying reason for this difference. Virtue-ethics can explain why we will then have reason to doubt whether that person was indeed honest in the first place. See for this point again: Annas, 'Comments on John Doris's 'Lack of Character'', 640. See for the situationists' critique on virtue-ethics: Harman, Gilbert, 'Moral Philosophy Meets Social Psychology: Virtue Ethics and the Fundamental Attribution Error', *Proceedings of the Aristotelian Society* 99 (1999); Doris, John M., *Lack of Character* (Cambridge: Cambridge University Press, 2002); Flanagan, Owen, *Varieties of Moral Personality. Ethics and Psychological Realism* (Cambridge, US: MIT Press, 1991). See for strong replies to this critique: Sabini, John and Silver, Mauri, 'Lack of Character: Situationism Critiqued', *Ethics* (2005); Annas, 'Comments on John Doris's 'Lack of Character''; Sreenivasan, Gopal, 'Errors

In exploring which judicial virtues judges should have beside that of judicial perception, I use what has been coined a dialectical method, hinging on the views of ‘the many and the wise’, on the *endoxa* as Aristotle would qualify them.⁷³⁵ Across different cultures and countries and throughout history and a wide range of philosophies there exists considerable convergence as to the virtues deemed necessary for social endeavours and practices in general.⁷³⁶ These are also pertinent for adjudication, albeit tailored to the specific context. Adjudication is a social endeavour par excellence, concerned as it is with the legal resolution of conflicts between citizens⁷³⁷ or between a citizen and the government. We do indeed find some elaborations of these virtues (sometimes under the heading of another term, such as ‘values’ or ‘competences’) in national and international guidelines that aim to regulate

about Errors: Virtue Theory and Trait Attribution', *Mind* 111, 442 (2002); Kupperman, 'The Indispensability of Character'.

⁷³⁵ Aristotle describes his dialectical method as follows: "I shall thus take into account the things people say about it: for a true view will have all the available evidence in harmony with it, while a false one quickly finds itself in discord with what is true". Cf. Aristotle, 'Nichomachean Ethics', 1098b10-12. This method assumes that these views do contain at least some truth as expressions of locally embedded insights of normal people and of philosophers and in our case also of legal practitioners and legal scholars who have used their intelligence in their own way in either dealing with judicial decisions in one or more concrete legal cases or who have gained insights through thinking about legal decision-making in general. However, because it does not give up the critical potential of philosophy and underscores the particular value of philosophy, the account offered will not simply be a description of dominant views about (judicial) virtues. Not in the least because there is disagreement about which judicial virtues are central to judging. Antony Duff for instance, is very critical about the virtues mentioned in Solum's virtue jurisprudence, in particular about the virtue of corruption. Cf. Duff, Antony, 'The Limits of Virtue Jurisprudence', *Metaphilosophy* 34, 1/2 (2003). It will be a philosophical account in the sense that I aim to offer a consistent and coherent account of those virtues that are indispensable for judging. See for the critical potential of a dialectical method also: Cooper, *Reason and Emotion. Essays on Ancient Moral Psychology and Ethical Theory*, 288.

⁷³⁶ Cf. Peterson, Christopher and Seligman, Martin E.P., *Character Strengths and Virtues* (Oxford: Oxford University Press, 2004); Annas, Julia, 'Being Virtuous and Doing the Right Thing', *Proceedings and Addresses of the American Philosophical Association* 78, 2 (2004).

⁷³⁷ Corporations included.

the judiciary.⁷³⁸ And in legal theory important views and accounts have been given of virtue-ethical conceptions of legal reasoning.⁷³⁹

On the basis of (my understanding of) these *endoxa* I propose the following judicial virtues as pertinent for our understanding of moral quality in adjudication: judicial perception, judicial courage, judicial temperance, judicial justice, judicial impartiality and judicial independency.⁷⁴⁰ Judges must have these virtues to a sufficient degree if adjudication is to be a morally justified practice and judicial decisions are to be right. Let me elaborate these virtues. As said: the virtue of judicial perception is not sufficient for moral quality in adjudication. One reason was that even if the judge knows what to decide, that is not the same as him actually taking that decision. Here *judicial courage* kicks in as a cardinal virtue that the judges needs. This quality enables the judge to confront and overcome threats, fears and pressures that may

⁷³⁸ See for instance: 'The Bangalore Principles of Judicial Conduct', (The Hague: UN Judicial Group on Strengthening of Judicial Integrity, 2002); 'Judicial Ethics Report 2009-2010: Judicial Ethics, Principles, Values and Qualities', (Europe: Working Group European Network of Councils for the Judiciary, 2009); *Magna Carta of Judges (Fundamental Principles)*; See for Dutch codes that are concerned with judicial ethics: 'NVvR Guide to Judicial Conduct', (Netherlands: The Dutch Association for the Judiciary, 2011); Compared to these enumerations, the *fragility of rightness* seeks to offer a more consistent and internally coherent account of the judicial virtues, thereby also drawing on relevant philosophical traditions.

⁷³⁹ See for instance: Solum, Lawrence B., 'The Virtues and Vices of a Judge: an Aristotelian Guide to Judicial Selection', *California Law Review* 61 (1987); ———, 'Virtue Jurisprudence. Towards an Aretaic Theory of Law', in *Aristotle and the Philosophy of Law. Theory, Practice and Justice*, ed. Huppes-Cluysenaer, Liesbeth and Coelho, Nuno M.M.S. (Dordrecht: Springer, 2013); Solum, 'Virtue Jurisprudence. A Virtue-Centered Theory of Judging'; Amaya, Amalia, 'Virtue and Reason in Law', (Coyoacán: UNAM Philosophical Research Institute, 2012); Amaya, Amalia and Lai, Ho Hock, eds., *Law, Virtue and Justice* (Oxford: Hart Publishing, 2013).

⁷⁴⁰ Note that I do not mention judicial integrity as a separate judicial virtue. This because I hold integrity to be a meta-virtue in the sense that it encompasses all others. See for an elegant and insightful philosophical analysis of the integrity of the judge: Soeharno, Jonathan, *The Integrity of the Judge* (Farnham: Ashgate, 2009).

bring him to not effectuate what he sees as the right thing to do.⁷⁴¹ In order to fulfil his judicial role well, the judge must be able to pay a price, be it in terms of his career, of exclusion within the judiciary or socially, criticism, unpopularity or loneliness.⁷⁴² He should be able to withstand and ignore all possible forces that may improperly influence him. This virtue is particularly needed in cases about which public opinion is rather outspoken -for instance in certain criminal cases against sex offenders, in immigration law cases if the public climate is more or less xenophobic, or in cases in which powerful parties are involved such as the state itself. In such cases he must be courageous and have the inner strength to remain stoical and do his virtuous duty. Judges should also have the virtue of *judicial temperance*. Judicial temperance is the quality of self-restraint, a quality that protects judges from excess.⁷⁴³ A temperate judge controls his impulses in a judicial setting, impulses produced by his frame of mind or temperament and the ensuing incidental urges, needs and desires.⁷⁴⁴ Temperance is a prerequisite for other virtues such as courage. It also contributes considerably to a judge's incorruptibility, a quality that according to Solum we should not assume too easily: "We know from experience that corruption is a real danger for judges. Judicial avarice expresses itself in the blatant and obvious form of soliciting or accepting bribes, and in more subtle financial conflicts of interest, such as trading on advance knowledge of the outcome of judicial proceedings or setting a precedent

⁷⁴¹ See for a general account of courage: Goud, Nelson H., 'Courage: Its Nature and Development', *Journal of Humanistic Counselling, Education and Development* 44 (2005); Walton, Douglas N., *Courage: A Philosophical Investigation* (Berkeley: University of California Press, 1986). See for a discussion of the importance of courage in the Dutch judicial context: Loth, Marc, 'De Goede Jurist. Over Morele Moed, Onafhankelijkheid en een Riskante Omgeving', in *Code en Karakter. Beroepsethiek in Onderwijs, Jeugdzorg en Recht*, ed. Kole, Jos and Ruyter, Doret de (Amsterdam: SWP Uitgeverij, 2009).

⁷⁴² 'Judicial Ethics Report 2009-2010: Judicial Ethics, Principles, Values and Qualities'.

⁷⁴³ Cf. Peterson and Seligman, *Character Strengths and Virtues*, 431.

⁷⁴⁴ For Aristotle moderation (*sôphrosunê*) is restricted to the pleasures of the flesh and primarily has to do with the functions of eating, drinking and sex, functions that we humans share with animals. "Moderation and self-indulgence relate to the sorts of pleasures that are shared in by all the other animals too, which is why they appear slavish and bestial [...]" Cf. Aristotle, 'Nichomachean Ethics', 1118a24-26.

that will benefit a company in which one owns stock.”⁷⁴⁵ Judicial temperance also means that a judge does not display improper anger or inappropriate humour in court, causing the parties to think him biased, to think that he ridicules their person, interests or claims, not to speak freely in court and to mistrust the judicial process.⁷⁴⁶ Then there is the virtue of *judicial justice*. This virtue goes to the heart of what constitutes the specific judicial role.⁷⁴⁷ A crucial task of the judge is that he authoritatively determines the legitimate claims that citizens have against one another and against the state. Judicial justice indicates that a judge is disposed to secure the values of political morality as they are worked out in settled (procedural) law, permeate the legal system and figure in society at large.⁷⁴⁸ The judge must bring these general commitments of a legal order to the case at hand, commitments that are constitutive -but not conclusive- for the idea of a just society as a whole.⁷⁴⁹ The idea is that it takes a (sufficiently) virtuous and just judge to know in concrete which considerations of justice bear upon the case at hand and how. Only a just judge is “ready to enter into the spirit of its requirements.”⁷⁵⁰ An important precondition for this virtue is of course legal intelligence. In order for the judge to be just he must be learned in the sense that he must know the law thoroughly and have the analytical and cognitive skills needed to cope with complex legal questions.⁷⁵¹

⁷⁴⁵ Solum, 'Virtue Jurisprudence. A Virtue-Centered Theory of Judging', 186.

⁷⁴⁶ Under the heading of ‘seriousness and prudence’ the European Network of Councils for the Judiciary states that “seriousness requires behaving respectfully during legal proceedings, being courteous, without excessive solemnity, and without inappropriate humour.” Cf. 'Judicial Ethics Report 2009-2010: Judicial Ethics, Principles, Values and Qualities', 67.

⁷⁴⁷ Cf. ———, 'Virtue Jurisprudence. A Virtue-Centered Theory of Judging', 18.

⁷⁴⁸ Cf. The Magna Carta of European Judges puts it as follows: A just judge aims to “guarantee the very existence of the Rule of Law, and thus, to ensure the proper application of the law in an impartial, just, fair and efficient manner.” Cf. *Magna Carta of Judges (Fundamental Principles)*.

⁷⁴⁹ Cf. Nussbaum, Martha C., 'The Discernment of Perception: An Aristotelian Conception of Private and Public Rationality', in *Love's Knowledge: Essays on Philosophy and Literature* (Oxford: Oxford University Press, 1990), 94.

⁷⁵⁰ Cf. Wiggins, 'Neo-Aristotelian Reflections on Justice', 481.

⁷⁵¹ So, contrary to Lawrence Solum, I do not hold that legal intelligence is a separate judicial virtue, but I consider it a precondition for the virtue of judicial justice. In order for the judge

It is important to note that in view of the primacy of the particular, the virtue of justice does not allow a judge to deductively apply legal concepts. A just judge honours the particulars of the case. Hence the general commitments of justice bear weight only to the extent that they can adequately grasp the particulars of the case. So, a judge must secure the ‘negative moment’ that Derrida so much stressed: he must for a moment try to postpone all the legal concepts that he has at his disposal, allowing the particular to invoke the relevant (legal) considerations. These concepts of justice, among other concepts, must ‘pop’ as it were in the form of a ‘constellation’, a group of interconnected concepts that contribute to the intelligibility of the particulars of the case.⁷⁵²

So far the enumeration of the judicial virtues that, as said, are specifications of the cardinal virtues that in the history of thought have been acknowledged as crucial for any kind of social endeavour. Two more specifically judicial virtues are also crucial for the moral quality of adjudication. These are judicial independency and judicial impartiality. Together with the virtue of justice they are most directly linked to the commonly acknowledged characteristics of the judiciary in Western constitutional democracies.

Judicial impartiality is the first virtue that comes to mind if one enumerates the character traits that a judge should have.⁷⁵³ Impartiality is pertinent for specific roles in society, especially those that imply functioning as a ‘third party’ with the authority to resolve conflicts between two or more conflicting parties.⁷⁵⁴ As such it strongly contrasts with the qualities we want ‘normal’ citizens to have in their private lives. Part of what constitutes living a good life is in fact a more or less unreflective and unquestioning attitude towards the world. As Lucy has put it: “for most ordinary human beings with their vast range of affective commitments -to loved ones, place, nation and various institutions, practices or groups- an impartial stance towards life

to adequately honour settled law and background values of political morality, he should have a ‘knowing how’ that implies a high level of cognitive and analytical skills.

⁷⁵² Williams, ‘Liberalism and Loss’, 94.

⁷⁵³ Of course this also has to do with the fact that the public symbol for adjudication is that of the blindfolded Lady Justice.

⁷⁵⁴ Lucy, William, ‘The Possibility of Impartiality’, *Oxford Journal of Legal Studies* 25 (2005), 7.

and its constituents is both impossible and undesirable.”⁷⁵⁵ By contrast judicial impartiality requires that the judge is disposed to distance himself from his attachments in daily life. He has to disregard his personal make-up and be disposed to recognize and ignore considerations stemming from his possible biases, passions and subjective commitments.⁷⁵⁶ Ideally, impartiality demands absence of all subjective factors. An impartial judge is disposed to have an open-minded attitude towards disputants’ persons, backgrounds and situations, circumstances and claims. Thereby it is important to note that impartiality it is not tantamount to relinquishing one’s experiences, commitments and concerns, that is, to giving up one’s personality. These factors are necessary for other virtues, for instance that of judicial perception. As we have seen: one cannot perceive well if one does not genuinely understand the meaning and the practical bearing of a wide range of ‘thick’ concepts such as discrimination, fraud or sexual abuse, either by one’s own experience or through the use of one’s imagination.

Finally, a virtuous judge possesses the virtue of judicial independency. This virtue stems directly from the institutional role assigned to the judiciary in a constitutional democracy as the final preserver of the rule of law. This virtue implies that a judge is independent of and not influenced by external factors and pressures, be it from litigating parties, governmental bodies, lobbyists or from the public at large.

According to the Bangalore Principles of Judicial Conduct judicial independence comes down to “not letting [one’s] judgments be determined by external influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.”⁷⁵⁷ Sure, judicial independency is closely linked to or may even be seen as a species of judicial courage, as the latter includes the competence to generally confront and withstand all internal and external obstacles, threats and risks to taking right decisions. A judge who lacks this virtue may for instance fail to protect the right to religious freedom of a minority group out of fear for criticism, mockery and other repercussions from the public at large.

⁷⁵⁵ Ibid., 6.

⁷⁵⁶ Ibid., 15.

⁷⁵⁷ Tamanaha, B.Z., *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004), 59.

To summarize our discussion so far: the *fragility of rightness* takes the virtues of judicial perception, judicial courage, judicial temperance, judicial justice, judicial impartiality and judicial independency to be constitutive elements of the moral quality of adjudication.

A few remarks must now be made. First, we must bear in mind that all of these judicial virtues also encompass the ability of judges to behave in such a way that these virtues are best expressed to the public at large. Because of the public character of adjudication, part of what these judicial virtues entail is that they must also be seen to be practised.

What is more, these virtues are an interrelated complex of qualities that are mutually supportive. The judicial virtues that are enumerated cannot clearly be separated from one another. For example, each and every judicial virtue presupposes the virtue of judicial wisdom as the latter implies ‘situational sense’. At the same time, judges need virtues such as courage, impartiality, independence and additional character traits to be able to give expression to what they, being judicially perceptive, see. Here we follow John McDowell who writes: “no one virtue can be fully possessed except by a possessor of all of them, that is, a possessor of virtue in general.”⁷⁵⁸ Yet, this is not to deny that a virtuous judge can experience a genuine conflict.⁷⁵⁹

Next, the list of judicial virtues describes the virtues that an *ideal* judge would possess. As such it offers a perfectionist or developmental account of moral quality in adjudication. A virtue-ethical conception demands that judges strive for these virtues as part of adequately fulfilling their professional role. As we shall see below, this is a piecemeal and slowly progressing undertaking. It requires practice, introspection and external support.⁷⁶⁰

In addition, this virtue-ethical conception implies that judges are only to a limited

⁷⁵⁸ McDowell, *Mind, Value & Reality*, 70.

⁷⁵⁹ I will come back to this point in the next chapter. Here, in any case, I depart from McDowell’s view that the virtues do not give rise to genuine practical conflicts.

⁷⁶⁰ It is for this very reason that Aristotle was keen to stress that the elderly are most likely to have a sharp eye for practical matters. “[...O]ne should pay attention to the undemonstrated assertions and judgments of experienced and older people, or wise ones, no less than to demonstrations; because they have an eye, formed from experience, they see correctly.” Cf. Aristotle, ‘Nichomachean Ethics’, 1143b10-b14.

degree 'free' to be or become a good judge and to take 'right' decisions accordingly. As the practice of becoming and being a virtuous judge boils down to a complex combination between "doing and being done", a judge does not have direct and full control over his own performances.⁷⁶¹ Therefore being a responsible judge means in the first place to strive to become judicially virtuous.⁷⁶² An (aspirant) judge does not have control over his being affected, but he does to a certain extent have control over the conditions under which the judicial virtues are to be realised.⁷⁶³

Finally, a virtue-ethical conception implies that the scope for the moral evaluation of adjudication is much broader than only the actual decisions that judges take. Besides these judicial decisions, relevant data also include all kinds of voluntary and involuntary, spontaneous and emotional responses of judges both in and out of court. For instance, a judge who regularly makes discriminatory jokes at social gatherings may be showing a lack of professional, virtuous character. These jokes may well be an indication that there is something wrong with the judge's professional being and doings, judicial decisions included. The *fragility of rightness* sees the actual judicial decision as but one aspect that is relevant for assessing the moral quality of adjudication.⁷⁶⁴

2.2 The relation to the *equity* tradition

So far it may be unclear how this virtue-ethical conception of adjudication and the stress it lays on the 'particular' relates to the 'equity' tradition.⁷⁶⁵ This tradition largely

⁷⁶¹ Kosman, L.A., 'Being Properly Affected', in *Essays on Aristotle's Ethics*, ed. Rorty, Amélie Oksenberg (Berkeley: University of California Press, 1980), 105. See for this point also: Murdoch, 'Vision and Choice', 84.

⁷⁶² Cf. Clarke, 'The Lens of Character: Aristotle, Murdoch, and the Idea of Moral Perception'.

⁷⁶³ Cf. Kosman, 'Being Properly Affected', 112.

⁷⁶⁴ For this point I draw on and subscribe to Iris Murdoch's view that morality should not focus too much on the quality of actions and decision-making in clearly confined situations. Cf. Murdoch, 'Vision and Choice', 80-81.

⁷⁶⁵ See for discussions of this doctrine in both civil law and common law traditions among others: Beaver, Allan, 'Aristotle on Equity, Law, and Justice', *Legal Theory* 10, 01 (2004); Zahnd, Eric G., 'The Application of Universal Laws to Particular Cases: A Defense of Equity in Aristotelianism and Anglo-American Law', *Law and Contemporary Problems* 59, 1 (1996); Shiner, Robert A., 'Aristotle's Theory of Equity', *Loyola of Los Angeles Law Review* 26

draws on a particular understanding of Aristotle's idea of *epikei* and it is well-entrenched in common law and civil law orders. In it equity is predominantly understood as either a correction on settled law or an amendment to law for the (supposedly limited number of) situations in which the law shows 'gaps' -in the sense of Dworkin's 'holes in a doughnut'-.⁷⁶⁶ Looked at from that angle, equity corrects the deficiencies or lacunas of *legal* justice as a standard that gives the judge discretion to decide how to do justice to the particularities of the case. This idea has been qualified as the 'doctrine of equitable discretion'.⁷⁶⁷

A virtue-ethical conception to adjudication differs from this tradition in some respects. For one thing, it does not consider equity as a gap-filling or corrective instrument for situations in which the law falls short. For to assign this role to equity falsely suggests that in all the other cases a judge does not need this kind of 'measure' to adequately deal with a case. It sees this 'flexible' measure as an inherent and hence pervasive aspect of the practice of adjudication. It holds that adequately grasping the particular is the essence of adjudication and hence that the flexible kind of measure that is allegedly provided by equity will be relevant for all cases. A virtue-ethical conception thereto draws on Aristotle who in his discussion of equity states: "For the rule for what is indefinite is itself indefinite, like the leaden rule used in building

(1994). Sure, in spite of its being well anchored in legal practices and legal theories this doctrine has been the object of severe criticism. It has been criticized for opening the door to uncontrolled flexibility and individuality in judicial decision-making and to judicial tyranny, in brief to an exercise of state-power that is genuinely troublesome from the viewpoint of political legitimacy. As Deborah Demott has put it: "Equity, however large its triumphs, has long been trailed by challenges to its legitimacy." See: Demott, Deborah A., 'Foreword', *Law and Contemporary Problems* 59, 1 (1996), 1.

⁷⁶⁶ Dworkin, *Taking Rights Seriously*, 31.

⁷⁶⁷ Cf. Beever, 'Aristotle on Equity, Law, and Justice', 36; In the Netherlands this 'doctrine of equitable discretion' and its merits have also been widely discussed. See for instance: Schoordijk, H.C.F., *Oordelen en Vooroordelen. Rede uitgesproken bij de 45e dies van de Katholieke Universiteit Brabant* (Deventer: Kluwer 1972); Scholten, ed., *Mr. C. Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht*; Vranken, ed., *Asser-Vranken (Algemeen Deel)*; Wiarda, *Drie Typen van Rechtsvinding*.

Lesbian-style: the rule adopts itself to the configuration of the stone, instead of staying the same shape, and the degree adapts itself to actual events.”⁷⁶⁸

In this conception equity is the kind of standard that is always needed and that in the context of adjudication is provided by the virtue of judicial perception. As said, this because perception is the mode for appreciating the particular.

Here we arrive at another salient difference between a virtue-ethical conception of adjudication and the equity tradition -as it was described above-. Proponents of the ‘doctrine of equitable discretion’ are often most engaged in determining when exactly the law allows for discretion and hence when equity is needed and to what extent. Therefore they hardly pay attention to the reasons we would have to rely on the moral quality of the judgments generated under the heading of ‘equity’. In other words, at least at the outset equity more often than not seems to be deployed as an all-purpose word for all the occasions that the discretionary powers of judges are acknowledged. Surely, this is to put the horse behind the cart. The quality of equity judgments is often rather assumed than argued for or made intelligible.⁷⁶⁹

A virtue-ethical approach works along other lines: it starts from the thesis that by definition the person of the judge has and should have a decisive influence in judicial decision-making. Therefore it identifies a range of judicial virtues. Together these virtues form an argument for the claim that the virtuous judge will use his freedom how to respond to a case in a morally responsible way. So, a virtue-ethical approach is ‘radical’ in the sense that it considers equity -understood as judicial perception- as a measure that a judge needs for all cases. But it also claims to offer a description of the conditions under which we can indeed rely upon judges to make equitable decisions of moral quality.

2.3 The role of codified rules and codified principles

Giving primacy to the particular and hence to the judicial virtues, a virtue-ethical conception does not disregard the valuable function these legal sources have for

⁷⁶⁸ Aristotle, 'Nichomachean Ethics', 1137b29-b32. This understanding is supported by an alternative interpretation of '*elleipsis*' that is defended by Robert Shiner. Shiner argues that “The *elleipein* image, [...] an integral part of Aristotle's theory of equity, does not connote "gaps" in the hole-in-a- doughnut sense. The image, rather, connotes a distance between two things, a falling short.” Shiner, 'Aristotle's Theory of Equity', 1254.

⁷⁶⁹ Shiner, 'Aristotle's Theory of Equity', 1261.

securing the moral quality of adjudication. Neither does a virtue-ethical conception ignore the role of moral philosophy, theories of political morality included, as explicit and discursive resources par excellence.

Codified settled law and explicit values of political morality are particularly important for the virtue of justice. If a judge is just, he will be disposed to honour settled law and generally accepted values of political morality as they are codified in for instance the constitution. Codification is a particular way of expressing the commitments that a legal order has.

Codified legal rules and legal principles and explicit values of political morality are in fact important for all judicial virtues in that they can function as rules of thumb, as summaries of a wide range of good decisions. As such they are of practical use, particularly for junior judges who still need to develop their legal learning and their legal intelligence. They are also useful for judges who are insecure in a concrete case for other reasons, for instance because the case involves a legal field that they are not well acquainted with.⁷⁷⁰ What is more, codified rules and principles can work as helpful safeguards against distorted perception in situations where biases lurk and rationalisations loom. As such they are valuable tools for judges to critically assess their own practice. This is for instance expressed in the following consideration of a guideline for judicial ethics that states that its aim is “to invite judges to enter into critical self-reflection and discourse with their fellow judges.”⁷⁷¹

Another vital function of these explicit and discursive resources is that they provide judges with valuable discursive tools for motivating their decisions. Part of what we expect from judges is that they are able to publicly defend their decisions.⁷⁷² Codified rules and principles are useful and publicly accessible concepts in terms of which the judge can -albeit only partially- explain and defend his choice.

Related to the former point, explicit rules of judicial ethics can also function as public anchor-points in determining the legitimate expectations of society at large with regard to the institution of the judiciary. They can function “[...] as an indication of what society may expect from the judiciary and from judges’ conduct.” It “allows

⁷⁷⁰ Nussbaum, *Love's Knowledge. Essays on Philosophy and Literature*, 99.

⁷⁷¹ Cf. 'NVvR Guide to Judicial Conduct'.

⁷⁷² Hampshire, 'Public and Private Morality', 50.

society insight into the way in which judges perceive their role.”⁷⁷³ So, within a virtue-ethical conception explicit principles and rules are important, albeit not in the form of a (final) commensurans, an exhaustive explanatory and justificatory ground for actual judicial decisions or the practice of adjudication at large.

2.4 Developing the judicial virtues

As a virtue-ethical conception assigns a crucial role to judicial virtues in accounting for the moral quality of adjudication, we must of course address the question of *how* judges obtain these virtues. Due to reasons of scope, I will do so only briefly.

To be sure, by reading books on law and legal matters, attending courses and lectures and learning all kinds of legal precepts and codes by heart one does not become a virtuous judge.

Although these cognitive activities do contribute to the kind of judicial intelligence that is indispensable for several virtues, becoming virtuous has to do with developing one's dispositions and with developing one's emotions and affections. Judicial virtues are developed in practice. As Aristotle puts it: “our actions are also responsible for our coming to have dispositions of a certain sort.”⁷⁷⁴ He compares the learning of virtues with the learning of practical skills and illustrates this by the example of a builder, a discussion that Julia Annas paraphrases as follows: “The beginning builder has to learn by picking a role model and copying what she does, repeating her actions. Gradually, he learns to build better, that is, to engage in the practical activity in a way that is less dependent on the examples of others and expresses more understanding of his own. He progresses from piecemeal and derivative understanding of building to a more unified and explanatory understanding of his own.”⁷⁷⁵ So, in a similar vein: one becomes a virtuous judge by acting and responding as a virtuous judge would and thence the development of judicial virtues requires a set of practices that adequately engage the dispositions, affections, emotions and demands for concrete virtuous behaviour.⁷⁷⁶ Aspirant-judges must be raised and trained in an environment where they can become judicially virtuous.

⁷⁷³ 'NVvR Guide to Judicial Conduct'.

⁷⁷⁴ Aristotle, 'Nichomachean Ethics', 1103b30-32.

⁷⁷⁵ Annas, 'Being Virtuous and Doing the Right Thing', 69.

⁷⁷⁶ Cf. Oakeshott, 'The Tower of Babel', 188.

Because of the importance of practice, I will briefly pay attention to the social practices and institutions that are needed and to the possible obstacles for this development. To that end the insights of 'social moral epistemology' are also pertinent, i.e. the discipline that among other things studies "social practices and institutions that promote (or impede) the functioning of moral virtues so far as their functioning depends on true beliefs."⁷⁷⁷

Of course, a crucial institution for the development of the judicial virtues is the judiciary itself, including the special professional education and training it offers to aspirant-judges. This institution and the education and training it offers should be of a certain quality if it is to offer the necessary directional indicators, ambiance and support for (aspirant) judges to indeed develop the judicial virtues. As a whole of interconnected roles, the institution must first of all provide role models: judges who by simply doing their job display the judicial virtues and the right attitude and dispositions. What is more, there must be sufficient time and support for aspirant-judges to 'practice' in a context in which there is sufficient supervision. These practices must be such that judges will be confronted with the 'particulars' of a case, that is, with the kind of situation that gave rise to the legal case in the first place. Only by being confronted with this reality can he improve his judicial perception. On the negative side, obviously the judiciary should be free from factors that impede the development of judicial virtues, or that more likely contribute to the training of judicial vices.⁷⁷⁸ Efficiency criteria in terms of time and financial means can be such

⁷⁷⁷ Buchanan, Allen, 'Social Moral Epistemology', *Social Philosophy & Policy Foundation* 19, 2 (2002), 126. Allen Buchanan rightly made clear that both proponents of moral theory and of virtue ethics have not paid sufficient attention to the importance of social moral epistemology in order to guarantee that people act rightly. He defines social moral epistemology as "the study of the social practices and institutions that promote (or impede) the formation, preservation, and transmission of true beliefs so far as true beliefs facilitate right action or reduce the incidence of wrong action. A special department of social moral epistemology is the study of the social practices and institutions that promote (or impede) the functioning of moral virtues so far as their functioning depends on true beliefs." Cf. Buchanan, 'Social Moral Epistemology', 126.

⁷⁷⁸ See for a radical but telling critique on developments in the judiciary in the United States that threaten the formation of practical wisdom on the part of the judge: Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession*, 315-352.

potential obstacles that arguably contribute to developing vices rather than virtues.⁷⁷⁹ Such criteria may force judges to cut corners, curtail investigations, interrogations and reflection and dedicate less time to a case than they deem fit. These factors may also result in judges only ‘reviewing’ draft sentences that the court clerk has prepared, without him being confronted with the ‘facts’ of the case and having dealt with the difficulties of legally qualifying these facts. If the judge only reviews draft sentences, in the words of Kronman this “will entail a reduction in the demand that his or her own work makes on the judge’s imaginative powers and the consequent enfeeblement of these powers themselves.”⁷⁸⁰

Other potential obstacles for the development of the judicial virtues are what Buchanan calls ‘elite-culture’⁷⁸¹, ‘surplus status-trust’⁷⁸² and ‘surplus epistemic deference’⁷⁸³ respectively. These are tendencies that are inherent to every professional context and that put the process of judicial character building in peril. The first, elitism, tempts judges to stick to an image of themselves that comes about through self-rationalisation and a lack of (self-)criticism.

Rather the same goes for surplus status-trust and surplus epistemic deference. In the context of adjudication surplus status-trust means that judges and citizens rely on the quality of other judges, without good reason. Surplus epistemic deference boils down

⁷⁷⁹ This is of course not to say that constraints in terms of time and finances should be absent in the organisation of the judiciary. However, they should simply not thwart the possibility of exercising the judicial virtues.

⁷⁸⁰ See for this point also: Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession*, 326.

⁷⁸¹ Buchanan points here to a culture “within an institutional context in which a certain occupational group has attained elite status, thereby receiving special privileges that insulate the group’s members from criticism and that systematically impede the functioning of virtues that may operate quite effectively in areas of the elite’s lives in which the professional role is not implicated.” Cf. Buchanan, ‘Social Moral Epistemology’, 133.

⁷⁸² *Ibid.*, 135. Buchanan defines surplus-status trust as “status based trust that is accorded to the wrong people or is excessive.”

⁷⁸³ *Ibid.*, 136. Surplus epistemic deference is, according to Buchanan, “either deference that is misplaced, as when a person or a group is regarded as a reliable source of truths about matters on which he or it is not, or excessive, as when there is an overestimation of a person’s or group’s reliability as a source of truths.”

to the “disposition to form, sustain, and transmit false beliefs.”⁷⁸⁴ Lack of a critical attitude towards the higher courts, or the views of experts, for instance (forensic) psychiatrist and statisticians may lead to surplus epistemic deference. Surplus epistemic deference undermines the development and training of judicial virtues. For instance, the virtue of judicial independency is irreconcilable with simply accepting statements of experts as true. So, if the development of the judicial virtues is taken seriously, these kinds of obstacles should be removed or counter-balanced.

Evidently, law school is another crucial institution for the development and training of judicial virtues. In order for students to become virtuous judges, to phrase Sullivan, "legal education needs to attend very seriously to its apprenticeship of professional identity."⁷⁸⁵ Law school should contribute to the character building of their students, it should enhance the development of their 'lens', necessary to adequately perceive the legal bearing of the situations they will confront.⁷⁸⁶ They could for instance organize obligatory law-clinics that confront students with actual legal cases in which all kinds of questions arise and that allow them to focus on the importance and the complexity of perception. And what has been coined 'the pervasive method' is relevant: the issues of ethics should be integrated in each course of positive law.⁷⁸⁷ The legal questions that are discussed in classroom should be dealt with against the background of the social context in which they arise, by taking that context into account and by engaging the imagination so as to understand the perspectives and interests involved. All this to sharpen the judicial 'eye' and hence to develop the virtue of judicial perception.

A virtue-ethical conception thus also implies that legal education pays ample attention to the establishment of the facts of a case and to the 'deed' of legal qualification. Indeed, because it holds that adjudication is in the end about particulars, the

⁷⁸⁴ Ibid.

⁷⁸⁵ Sullivan, William M., 'Professional Identity and Purpose', in *Educating Lawyers. Preparation for the Profession of Law*, ed. Sullivan, William M., Colby, Anne, et al. (San Francisco: Jossey-Bass, 2007), 128.

⁷⁸⁶ See for an inspiring article on the importance of focusing on character in legal education: Hall, Timothy, 'Moral Character, The Practice of Law, and Legal Education', *Mississippi Law Journal* 60 (1990).

⁷⁸⁷ Cf. Sullivan, 'Professional Identity and Purpose', 151-152.

establishment of the facts and the issue of qualification are core-issues in the curriculum. On the critical side a virtue ethical conception rejects the kind of legal education that exclusively focuses on the development of legal intelligence and limits the curriculum to the development of knowledge of the law as a settled and explicit body of principles, rules and jurisprudence, as if these were distinct and independent authorities for practical knowledge that have value independently of the situations in which these principles and rules will be used.⁷⁸⁸ Such an approach would in fact be a way of giving primacy to the general rather than to the particular, in spite of the law's practical role.

Also, a virtue-ethical conception is strongly at odds with what Duncan Kennedy has so bluntly qualified as 'legal education as training for hierarchy'.⁷⁸⁹ This phrase points to an educational system that directs students away from a critical attitude towards legal problems and presses them to uncritically accept the authority of superiors if they want to be successful. Their educational environment is replete with what Buchanan coined as surplus epistemic deference, for in such training for hierarchy students have to internalize a specific ideologically laden view of law as 'true', simply because others tell them so.

Finally, it goes without saying that 'background' practices such as family life, other social practices and primary and secondary education and socialisation are also crucial for the development of the judicial virtues.⁷⁹⁰ These background practices should provide a preliminary contribution to the formation of the relevant judicial virtues by for instance paying attention to the social and personal reality of citizens belonging to different groups and walks of life and by offering room for a critical

⁷⁸⁸ In this regard Sullivan has nicely put it: "Intellectual mastery alone is, indeed, always a possible pathology of schooling -one that can subtly subvert the best efforts of professional schools by displacing the goal of learning the profession with a more self-contained academic aim of technical virtuosity, detached from attention to the ends of legal reasoning." Cf. *Ibid.*, 144.

⁷⁸⁹ Kennedy, Duncan, 'Legal Education as Training for Hierarchy', in *The Politics of Law: A Progressive Critique*, ed. Kairys, David (New York: Basic Books, 1982).

⁷⁹⁰ See for a neo-Aristotelian approach to legal education for instance: Nussbaum, Martha C., 'Cultivating Humanity in Legal Education', *The University of Chicago Law Review* 70, 1 (2003).

stance to inherent biases and inequalities that figure in society. Formation and development of judicial virtues in a culture that is highly discriminatory is next to impossible, or at least are faced with an obstacle that is difficult to overcome. If social practices, institutions and legal education fall short in developing the judicial virtues, this will result in a moral deficit of the practice of adjudication and as a result lead to a justificatory lacuna where legal decisions are concerned. Therefore if one takes seriously the moral quality of adjudication, then the quality of said social practices and institutions are relevant and deserve attention.

Above all, becoming a judicially virtuous judge is a demanding endeavour for the (aspirant) judge. In all stages of development, becoming a virtuous judge in any case requires reflection. It requires identifying one's egotistical interests, one's prejudices and fears. As moral agents of a particular kind judges have to try "to see justly, to overcome prejudice, to avoid temptation, to control and curb imagination, to direct reflection".⁷⁹¹ Becoming a virtuous judge is thus a continuous process of (self-)improvement which starts long before one actually becomes a judge. As Julia Annas succinctly says: "We don't become virtuous without effort, nor overnight."⁷⁹²

What this striving boils down to concretely depends on the judge's stage of development and on the orientations that fits a particular stage. In order to become a good judge an aspirant judge must for instance also rely on role-models and follow the lead of his more virtuous colleagues, whereas a senior judge with developed virtues may to a larger degree find his beacons in his own understanding of the law and political morality and in the interests at stake in the cases before him. He will be likely to possess a more elaborate and thorough view on the matter. He will also be likely to make an effort to take decisions that (better) honour the new and surprising aspects involved in the case. The more judicially virtuous he is, the less important it will be for him to stick to what is already known.⁷⁹³

2.5 Legal Rightness

So far I have expounded a list of judicial virtues and the way they can be developed.

⁷⁹¹ Murdoch, Iris, 'The Idea of Perfection', in *Existentialists and Mystics: Writings on Philosophy and Literature*, ed. Conradi, Peter (Harmondsworth: Penguin Books, 1997), 332.

⁷⁹² Cf. Annas, *The Morality of Happiness*, 57.

⁷⁹³ See in this regard also: ———, 'Comments on John Doris's 'Lack of Character'', 637-638.

But what does this mean for the idea of a legally right decision and for the reason we can offer to a ‘losing’ citizen as to why he must bear the specific burden of that decision? Within the *fragility of rightness* a right decision is in any case a decision that is typically made by a judge who has realised a certain threshold level of each and every virtue.⁷⁹⁴ If a judge indeed possesses the virtues above this threshold level, he will be able to recognize to a sufficient degree the amalgam of considerations that are relevant for the case, he will be able to assign them their due weight and respond accordingly, and he will do so for the right reasons. Rightness and the judge’s motives cannot be separated. Legal rightness is thus partly constituted by the person of the judge.

An important implication is that different judges may arrive at different outcomes in similar cases because the judicial virtues do not dictate particular outcomes.⁷⁹⁵ There will not be ‘one right answer’ for each and every case; it is logically possible and very likely that different and even contradicting decisions can simultaneously be legally right. Thus one point of critique on this approach is correct: it does not offer a decision-procedure or a systematic way that tells the judge what to decide. This because such decision-procedures overshoot their mark. The *fragility of rightness* by contrast proposes an ‘inside-out approach’ to legal rightness: in the words of MacDowell the conception of a legally right decision “is grasped, as it were, from the inside out.”⁷⁹⁶

There is no tension between this understanding of rightness and the prevalence of reasonable disagreements about what the right decision is. However, within the *fragility of rightness* the kernel of such disagreements is not so much the analytical

⁷⁹⁴ Also a relatively virtuous judge will surely be able to make legal mistakes and not all decisions of a judge who possesses the virtues up to the threshold level are necessarily right.

⁷⁹⁵ From the viewpoint of the *fragility of rightness* it is pertinent that these differences are articulated for internal, educational and organisational purposes. The level of development of judges is important, for instance for their appointment in a certain position within the judiciary and for the allocation of concrete cases. See for a virtue-ethical approach to the selection of judges also: Solum, 'The Virtues and Vices of a Judge: an Aristotelian Guide to Judicial Selection'.

⁷⁹⁶ McDowell, *Mind, Value & Reality*, 50. Hence, strictly speaking in this approach the legal point of view does not exist independently from the notion of a virtuous judge.

implication of a concept, but rather one's perception and qualification of a particular situation. Such disagreements are "less like differences of choice, given the same facts, and more like differences of vision."⁷⁹⁷ Hence, these disagreements cannot be rationally and conclusively solved by means of an independent measure and the intellect. Instead they require a "skilful presentation of an instance" and persuasion.⁷⁹⁸ In case such disagreements are not resolved they will typically end with something like "you simply aren't seeing it, are you"?

What is more, an important feature of this notion of rightness is that the *action-guidingness* of the losing considerations may be overridden, but not necessarily their moral and legal bearing. This because such a choice is not based on an 'exhaustive' ranking. The choice is not the result of ranking, but the ranking results from the choice.⁷⁹⁹ Because of the limitations of the practical world this choice necessarily cannot honour all the considerations that apply.

At this point one may still object to the claim that the judicial virtues are indispensable for a legal decision to be right. I will therefore conclude this section by arguing for their indispensability by discussing a concrete legal case.

The case of *Robert Dowsen*⁸⁰⁰

During his childhood Robert Dowsen was very quiet. He hardly played with other children and often ignored his parents. Besides going to school Robert engaged himself with the making of futuristic constructions and later on with writing essays dealing with his -almost exclusively negative- view about the essence of being human. As a student Robert lived an isolated life, up to the point that he quit his studies in physics because he had to collaborate with other students and work in groups, for instance when doing experiments.

Not long thereafter, an incident occurred between Robert and his father. In a sudden outburst of anger Robert almost literally threw his father out of the house. On advice of his sister Robert went to a psychiatrist. He was diagnosed with an anti-social disorder and with a paranoid-type of schizophrenia. Since then Robert received treatment in the form of medication coupled with therapy-sessions once a week.

His sister visited him regularly, brought him food and cleaned his house. But Robert decided to break off all contact with his family and he neglected both his personal hygiene and his

⁷⁹⁷ Murdoch, 'Vision and Choice', 82.

⁷⁹⁸ McDowell, 'Virtue and Reason', 65.

⁷⁹⁹ Wiggins, 'Deliberation and Practical Reason', 162.

⁸⁰⁰ Cf. Rechtbank Den Haag, March 20, 2008, ECLI:NL:RBSGR:2008:BC8225.

house. His family, the neighbours and his family doctor became increasingly worried about Robert's condition and thought he was unable to take care of himself.

After Robert started to also behave rather aggressively towards the children in his neighbourhood, his sister suggested that he should commit himself to a psychiatric hospital for a while. Robert was upset by this suggestion and refused to be hospitalized or "bourgeoisalized" as he called it. Nonetheless his sister addressed the public prosecutor and asked for a formal court order to have Robert committed to a psychiatric hospital.

The judge now has to decide whether Robert's situation meets the legal criteria for involuntary commitment. The applicable law states that such a request can be honoured only if compulsory admission is necessary to prevent serious harm or danger to the person concerned or to others.⁸⁰¹ The purpose of this law is to prevent serious self-neglect, self-injury, social downfall and the violation of fundamental interests and rights of others. The judge may only honour the request if harm or danger is imminent because of the psychiatric disorder and no lesser measures than compulsory admission are available. To assess the case the judge visits Robert and talks to him, talks with Robert's sister, his mother, the family doctor and Robert's landlord. He also consults an independent psychiatrist. On the basis of his inquiry the judge pictures Robert's situation and the way he lives and in the end he decides to deny the request. He holds that the criteria for compulsory admission are not fulfilled.

The judge motivates his decision carefully by giving a detailed account of his findings. Although Robert's house is messy, unhygienic and definitely differs from that of an 'average' adult citizen, these facts should according to the judge not lead to the conclusion that Robert is a danger to himself. For he has observed that Robert feeds himself with fresh food and vegetables, that he looks well fed and that he seems to provide for his most basic physical needs, albeit in his own way.

The judge moreover argues that he does not have the impression that Robert cannot live alone. To the judge it seems that Robert in his own antisocial way knows very well how to spend his time: he reads and writes and does not want to be disturbed by others. Precisely because Robert wants to be left alone, the judge thinks that things will probably get worse if he is forced to leave his home.

Neither does the judge see a danger of genuine social decline, because Robert has lived this way almost all of his life. His present situation cannot be seen as the commencement of a 'deteriorating trend', which is the legally relevant criterion.

As to the risk of Robert setting his house on fire, a risk that his sister mentioned, the judge stresses that the mere fact that Robert has magazines and newspapers lying close to his gas stove is not sufficient to conclude that Robert is a danger to himself and to others. The judge has not seen burning marks on the carpet and Robert has declared that he does not have a gas cylinder for his stove. Moreover, regarding Robert's aggression towards the children in the

⁸⁰¹ Cf. Wet Bijzondere Opnemingen in Psychiatrische Ziekenhuizen (Involuntary Commitment of Psychiatric Patients Act).

neighbourhood, the judge argues that in view of the intense and continuous provocations by the children -they throw little stones at Robert's window all day long-, Robert's verbal aggression is not likely to be due to his disorder. His reaction can be taken as an -albeit awkward- result of an understandable annoyance. Finally, the judge finds support for his decision in the fact that although Robert behaves rudely towards his family and social workers, he is willing to speak with others, that is, if necessary.

Now that we have established that it is a necessary condition for legal rightness that the judge possesses the judicial virtues to a sufficient degree, in the next section I will discuss whether this is also a sufficient condition for legal rightness.

3 Political legitimacy and respect for the Other

There is an important weakness in the virtue-ethical conception of adjudication as it is laid out so far. As it stands a virtue-ethical conception has difficulty to fully honour the relational dimension of adjudication, the fact that adjudication affects the interests of concrete embodied citizens. More specifically, a virtue ethical conception does not (evidently) fulfil the liberal demand of political legitimacy, nor the requirement of respect for the 'Others', the concrete citizens participating in the proceedings.

As to the former: this demand in any case entails that the exercise of political power should be made (rationally) acceptable to each and every citizen.⁸⁰² Part of political morality in Western constitutional democracies is that citizens are to be treated as ends in themselves, rather than as means or instruments. In a liberal society we do not want citizens' basic interests to be negatively affected just because this serves the common good or the good of a fellow citizen. This is a fortiori the case for the parties involved in adjudication. Adjudication is an institution par excellence that comes with the exercise of political power and hence it is reasonable to demand that adjudication is capable of explaining itself to the "tribunal" of the understanding of the parties involved in the proceedings.⁸⁰³

In the previous chapters we have seen that we cannot account for this requirement if we understand adjudication as a form of applied moral theory. Legal decisions cannot sensibly be conceptualized as the normative implication of principles of justice,

⁸⁰² Cf. Rawls, *Political Liberalism*, xiv.

⁸⁰³ Waldron, Jeremy, 'Theoretical Foundations of Liberalism', *The Philosophical Quarterly* 37, 147 (1987), 149.

among others because judges will for several reasons often have strong discretion to determine the concrete rights and duties of citizens. Hence these principles are too abstract to offer a meaningful reason for a concrete embodied citizen to accept the judicial decision that affects him. The presumed 'fairness' of these principles of justice can therefore not sensibly be 'transmitted' to the level of judicial decisions. However, a virtue-ethical conception of adjudication does not necessarily fare any better in this regard. The only reason it can give to a losing citizen for why he has to suffer the consequences of a particular decision, is that it is the result of the 'virtuousness' of the judge. In the end the judge can only say to the 'losing' litigant: "that's the way I see it, and I am a competent judge. I cannot say more than that."⁸⁰⁴ It goes without saying that this answer does work to some extent, because it at least indicates that a judicial decision is not the result of the will of a 'vicious' or incompetent judge, that it is not completely 'arbitrary' or outright 'bad'.⁸⁰⁵ Nonetheless, mere reference to the virtuousness of the judge is at odds with the principle of political legitimacy. For one thing, as we have seen, in a virtue-ethical conception two virtuous judges may well arrive at different decisions in similar legal cases or even in one and the same case. Citizens are thus asked to accept judicial decisions and bear their burdens, knowing that these could have been otherwise and still right. Not to additionally offer them a more specific reason that relates to their own concrete good or interest is to either presume that citizens will have some kind of deep trust in or even awe for the judge, or that citizens will not consider themselves worthy of respect.

In any case, exclusive reference to the virtuousness of the judge is an all too elitist answer as to why 'losing' citizens should bear the burden of a legal decision. This problem is even more urgent if judges form a relatively homogenous group in terms of social origin and other respects. Peter Simpson brought this point in more general terms against Aristotle's virtue ethics: "Aristotle's court of appeal is not reason or argument but opinion -and not the opinion of all, but only of a few. These few turn out to be generally identifiable with a particular social class, the class of

⁸⁰⁴ Solum, 'Virtue Jurisprudence. A Virtue-Centered Theory of Judging', 201.

⁸⁰⁵ Thus, a virtue-ethical conception of adjudication can rebut the sceptical view that adjudication is merely the enforcement of the subjective insights of the judge, a view that certainly flies in the face of reciprocity.

gentlemen."⁸⁰⁶

This point is of course intimately linked to the demand of respect for the Other: merely referring to the notion of the virtues of the judge for an account of the moral quality of adjudication and the idea of legal rightness seems to boil down to a form of 'digestion' of the Other, i.e. of the concrete individual citizen whose interests are affected. True, a virtuous judge may be judicially perceptive, but this is not the same as being fully engaged with the concrete litigating parties and being concerned with their concrete good, because of the very fact that it is *their* good. A virtuous judge does not necessarily possess what Cornell has qualified 'mimetic capacity', the capacity to identify with the other in sympathy.⁸⁰⁷ In brief, a virtue-ethical conception insufficiently honours the principle of political legitimacy as well as the postmodern concern and respect for the Other.

If we indeed take these concerns seriously there is yet another problem with a virtue-ethical conception of adjudication. We have seen that it *logically* allows for the possibility of genuine moral loss. That is, in the end it is the choice of the judge that determines the ranking of the considerations involved. The mere fact of this choice does not dissolve the moral bearing of the losing claim. However, a virtue-ethical conception does not guarantee that judges will also be disposed to actually identify and acknowledge it when genuine losses occur. This is at odds with the idea of political legitimacy and with that of respect for the Other. These principles -albeit both in their own way- indicate that the moral loss that results from judicial decisions should not be 'silenced'⁸⁰⁸ or 'digested' by the viewpoint of the virtuous judge.⁸⁰⁹ On the contrary, they indicate that such losses should be identified and acknowledged. Let me illustrate both lacunas of a virtue-ethical conception by the following case.

⁸⁰⁶ Simpson, Peter, 'Contemporary Virtue Ethics and Aristotle', *Review of Metaphysics* 45, 3 (1992), 513.

⁸⁰⁷ Cornell, *The Philosophy of the Limit*, 23. Douzinas and Warrington, *Justice Miscarried: Ethics, Aesthetics and the Law*, 165.

⁸⁰⁸ See for the notion of 'silencing' in a neo-Aristotelian conception of practical decision making: McDowell, *Mind, Value & Reality*, 56.

⁸⁰⁹ Wijze, Stephen de, 'Tragic Remorse: The Anguish of Dirty Hands', *Ethical Theory and Moral Practice* 7 (2004), 456.

The case of Mister Cleave⁸¹⁰

Mister Cleave is a man in his late sixties who due to his precarious financial situation has to sell his house and move to a smaller rental apartment. He has lived alone during all of his adult life, except for the company of the three dogs he invariably qualifies as ‘his little children’. The new apartment, however, does not have a garden. After moving to the new apartment the dogs were really disordered, barked often and loudly and regularly urinated on the carpet in the public hallway because they were used to a garden. Within a few days Mister Cleave received the first complaints of his neighbours and eventually he received a letter from all the neighbours, asking him to get rid of his dogs. With pain in his heart Mister Cleave decides to get rid of two of his dogs. He keeps the oldest dog, the one that he is most attached to.

However, disordered as it already was, the third dog is now even more upset because his two friends are gone and he keeps barking and urinating in the public hall. Although after a few weeks there is some improvement, the neighbours insist that Mister Cleave rids himself of his last dog. He refuses and the neighbours go to court. They demand a prohibition for Mister Cleave to keep dogs because of the hinder and nuisance it causes them, with a fine of fifty Euros a day in case of violation.

In such a case a virtuous judge has to make an all things considered judgment in view of all the particularities of the case and on the basis of settled law and background values of political morality. More specifically, he has to decide whether the hindrance justifies restricting Cleave’s liberty to live with a dog, e.g. whether it justifies restricting his right to privacy.

As said, a virtue-ethical approach does not offer a normative measure that can guide the judge in his reasoning. What is more, as in this approach rightness stems from the idea of a virtuous judge, two opposing decisions can both be right. From the viewpoint of political legitimacy and that of respect for Mister Cleave as a concrete embodied citizen, we may seriously doubt whether Cleave has a reason to accept a decision against him. For what reason will Cleave have to accept if he holds that the judge’s perception is wrong, i.e. that he assigns too much weight to the hindrance his dog causes and too little to his interest to live with his dog? Also, if the judge does not give weight to Mister Cleave’s particular interest to keep his dog, he may rightly feel that he is not treated with respect. What is more, if the judge decides against Cleave without expressing any sensitivity whatsoever for the particular loss that would result for him, he may well have a legitimate complaint that the judge has not really ‘faced’ him, that he has not really dealt with the particular interests that are at stake for him.

⁸¹⁰ Cf. Rechtbank Dordrecht, September 25, 2008, ECLI:NL:RBDOR:2008:BF2284; Rechtbank Leeuwarden, October 25, 2011, ECLI:NL:RBLEE:2011:BU2511; Gerechtshof Den Haag, March 12, 2013, ECLI:NL:GHDHA:2013:BZ6556; Gerechtshof 's-Hertogenbosch, December 28, 2010, ECLI:NL:GHSHE:2010:BP0257.

Sure, one may object that the interests involved in this case are too trivial to function as an illustration of the argument. Whether such an objection is valid is open for discussion, but I think it is not. For one thing, if we embrace a virtue-ethical approach we lack an ‘external’ viewpoint in terms of which we can trivialize these interests. And again, it will depend on the capacity for judicial perception what legal weight to assign to the interests at stake. Also, if this example already arouses some weak intuitions that support the argument, then all the more so will cases that involve ‘more fundamental interests’.

4 Conclusion

In this chapter I discussed a virtue-ethical conception of adjudication as one element of the *fragility of rightness*. I posited that in order for adjudication to have moral quality judges should at least to a certain threshold level possess a set of judicial virtues and strive to become completely virtuous. In expounding the central characteristics of the ideal of a virtuous judge I named judicial perception, judicial courage, judicial temperance, judicial justice, judicial independency and judicial impartiality. It was shown that this focus on judicial virtues has implications for a range of social practices and institutions, particularly for that of legal education and the judiciary itself. These must be such that the judicial virtues can be developed and flourish. On that account the *fragility of rightness* brings the discipline of social moral epistemology into play as a relevant discipline for enhancing the quality of adjudication.

Yet, I also argued that a virtue-ethical conception of adjudication does not suffice as an account of moral quality in adjudication or for the rightness of judicial decisions. Reference to the viewpoint of a judicially virtuous judge, although epistemologically ‘right’, is no sufficient reason for a losing citizen to accept the decision. All the less so, because another judge could have decided otherwise in the same case. A virtue-ethical conception of adjudication by itself is insufficiently sensitive to the relational aspect of adjudication. As such it falls short of honouring the liberal principle of reciprocity and the dimension of respect for the Other, i.e. for the concrete singular embodied citizens participating in legal proceedings. In the next two chapters I will present the concepts of *civic friendship* and *tragic legal choice* as valuable complements to a virtue-ethical conception of adjudication that may compensate these lacunas.