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The fragility of rightness. Adjudication and the primacy of practice

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Publication date
2014

[Link to publication](#)

Citation for published version (APA):

van Domselaar, I. (2014). *The fragility of rightness. Adjudication and the primacy of practice*. [Thesis, fully internal, Universiteit van Amsterdam].

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Regrettably, due to technical problems a couple of paragraphs were somehow deleted. After the sentence "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" on page 253 the text should read as follows:

Do the judicial virtues play an indispensable role for the judge to arrive at a right decision in this case? I think they do. As always, the facts that characterize Robert Dowsen's situation do not present themselves ordered according to relevance, nor do they come labelled with the relevant legal interpretations and evaluations. It is the quality of the judge's 'eye' that allows him to *discern* which facts are relevant and of importance. For instance, the judge must consider whether or not it matters what the content of Robert's refrigerator is, the hygiene of his bed and the quantity and kind of stuff that Robert gathers. And he must be able to grasp the legal bearing of the facts, i.e. he must be able to legally qualify the facts adequately. Thereto the virtuous judge must be judicially perceptive, he must be able to 'perceive well', which includes -besides knowing the relevant rules and principles- the ability to imagine the kind of life that Robert lives, i.e. to feel empathy with his situation, to see his fundamental interest in freedom or what is left of it, and to adequately discern the alleged dangers for Robert himself and for others. For one thing this implies that the judge must have his emotions (sufficiently) in place. If the judge for instance suffers from mysophobia and is easily abhorred and disgusted if confronted with situations that do not conform to his standards of hygiene, this will influence his perception of Robert's situation and it will also influence his inquiry. Emotions of disgust typically come with a deeply negative evaluation of the object or situation concerned, as a danger that should be avoided or overcome and that evokes the desire to distance oneself from it.¹ If disgusted, a judge will more readily consider Robert's situation as indeed 'dangerous' to himself and others, as a situation that should be overcome and avoided. His disgust may make him blind for Robert's ability to live his life in his own way and his interest to be free from all interference. It will keep Robert 'at a distance' and reaffirm his 'otherness', which will hinder him to see Robert's way of life as also deserving respect. So, judicial perception does seem essential in this case. The facts of the case and their legal bearing cannot be perceived by any kind of 'eye'.²

¹ See for an insightful book about disgust: Miller, William Ian, *The Anatomy of Disgust* (Cambridge, US: Harvard University Press, 1997). Therein (p.8-9) Miller for instance states: "Disgust evaluates (negatively) what it touches, proclaims in the meanness and inferiority of its object." It is suffused, too, with "ideas of a particular kind of danger, the danger inherent in pollution and contamination, the danger of defilement."

² Cf. Blum, Lawrence, 'Moral Perception and Particularity', *Ethics* 101, 4 (1991), 102. Antony Duff for instance makes this assumption in his critique on a virtue-ethical approach to judicial decision-making. Duff asserts that what constitutes the rightness of the decision is not the virtuous judge having made that decision, "but the features of the case that the virtuous judge can see." Cf. Duff, Antony, 'The Limits of Virtue Jurisprudence', *Metaphilosophy* 34, 1/2 (2003), 221-223. Again, the problem with this assumption is that it denies the inescapable vicious circle to which the legal realists drew our attention: in order to know what the relevant legal facts are, the judge needs some kind of rule, but to know

Next to judicial perception, this case shows that the other judicial virtues are constitutive for a right decision as well. Take the virtue of independence: without this virtue the judge may not be able to withstand pressure from 'experts' and family members who will surely strongly criticize him if he does not honour their request for involuntary commitment. The judge needs a disposition that protects him against giving in to this pressure and complying with their views for the wrong reasons, guaranteeing that he maintains a critical independent standpoint. It must safeguard him against unconsciously giving too much weight to the expert's view, simply because he is an expert.

In addition, the judge also needs judicial courage because he needs to be able to adequately cope with the inherent uncertainty about and even fear for the consequences of his decision. What if Robert eventually does set fire to his apartment or violently assaults one of the children in the neighbourhood? The judge should be neither too risk-averse, nor too optimistic in this regard. Judicial courage is the disposition also needed to adequately deal with these uncertainties.

Finally, this case shows that judicial virtues are needed for a right legal decision because of the importance of the judge's motive. Judicial virtues are about making right decisions, in the right way and also for the right reasons. For instance, the judge may use his discretion in the evaluation of the facts to simply let maladjusted Robert perish because he finds it would be all too expensive to provide care. Of course, his motivation will then be different. Precisely because the relevant criteria contain a range of 'open norms' he can rationalize his own subjective feelings by means of the law. Although this decision may be legal, it is nonetheless wrong, because permeated with wrong intentions.

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 it is also a sufficient condition for legal rightness."

which rule is relevant, he needs to know which facts are relevant. So, there is no such thing as 'the features of the case', that is, not without some kind of mediation in which the person of the judge is inherently involved. All this is not to deny that the relation between the judge's perception and the 'facts' is a point that needs further scrutiny.