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

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“[...*W*]hen men are friends they have no need of justice, while when they are just they need friendship as well, and the truest form of justice is thought to be a friendly quality.”<sup>811</sup>

## **11 The Fragility of Rightness II. The judge as a civic friend**

### **1 Introduction**

This chapter introduces the Aristotelian concept of a *civic friend* (*philia*) as the second constitutive element of the *fragility of rightness*.<sup>812</sup> The claim is that if we are to account for the moral quality of adjudication, a virtue-ethical approach to adjudication needs the concept of civic friendship as a way to live up to the liberal principle of political legitimacy and connected to this as a way to show respect for the concrete citizens who participate in legal proceedings. The concept of civic friendship can at least partially make intelligible why a citizen will have a reason to accept a decision that is negative or even detrimental for him, even if -as is the case in a virtue-ethical approach- the judicial decision could have turned out differently had another judge taken it.

I shall first expound the concept of civic friendship as it appears in Aristotle's philosophy (2). Subsequently, I will show how this concept works out for the context of adjudication (3) and engage the question whether this concept is applicable to all fields of law (4). Then I will offer a (partial) explanation as to why indeed the *fragility of rightness* can be qualified as a 'destabilizing approach' to adjudication (5). The chapter ends with some concluding remarks (6).

### **2 Civic friendship**

For Aristotle friendship is a relation in which the parties involved have a genuine and effective concern for one another.<sup>813</sup> Friendship is “good will between reciprocating

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<sup>811</sup> Aristotle, 'Nichomachean Ethics', 1155a-24.

<sup>812</sup> Part of this chapter has been published earlier. See: 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).

<sup>813</sup> Cf. Cooper, John M., 'Aristotle on the Forms of Friendship', in *Reason and Emotion. Essays on Ancient Moral Psychology and Ethical Theory*, ed. Cooper, John M. (Princeton: Princeton University Press, 1999), 312. There is little literature on the value of the concept of

parties”, Aristotle says.<sup>814</sup> It also suggests the inclination to do good for the other. In the words of Cooper, friendship means “that the fact that the other person needs or wants, or would be benefited by, something is taken by the agent as by itself a reason for doing or procuring that something [...]”<sup>815</sup>

What is more, friends are also aware of each other’s well wishing.<sup>816</sup> This mutual awareness is necessary for developing the sense of mutual trust that characterizes friendships. “If there is to be friendship, the parties must have good will towards each other, i.e. wish good things for each other, and be aware of the other’s doing so [...]”, Aristotle says.<sup>817</sup>

At the same time a friendship relation also serves the self-interest of each friend separately because of the good that is realized through the relation. Aristotle's concept of friendship thus points to a complex and delicate combination of self-seeking and selfless concern for the good of the other.<sup>818</sup> Cooper illustrates this subtle conjunction by the professional relation of a businessman with a regular customer. "Such a businessman looks first and foremost for mutual profit from his friendship, but that does not mean that he always calculates his services otherwise than as a means to his own profit. So long as the general context of profitability remains, the well-wishing can proceed unchecked; the profitability to the well-wisher that is assumed in the

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friendship for law and adjudication. See for an important article on this topic: Leib, Ethan J., 'Friendship & the Law', *University of California Law Review* 54 (2006). For a discussion of the relevance of Aristotle’s concept of civic friendship for modern liberal political theory see: Leontsini, Eleni, 'The Motive of Society. Aristotle on Civic Friendship, Justice and Concord', *Res Publica* 19, 1 (2013). For a more sceptical position in this regard see: Hope, Simon, 'Friendship, Justice and Aristotle. Some Reasons to be Sceptical', *Res Publica* 19, 1 (2013). Within the scope of this book I will not go into the objections that are made in this article against assigning a role to Aristotle’s civic friendship in liberal political theory. I do not think these objections are fundamental, but surely they do deserve to be addressed.

<sup>814</sup> Aristotle, 'Nichomachean Ethics', 1155b33-34.

<sup>815</sup> Cooper, 'Aristotle on the Forms of Friendship', 314.

<sup>816</sup> Ibid., 332.

<sup>817</sup> Aristotle, 'Nichomachean Ethics', 1156a11.

<sup>818</sup> Cooper, 'Aristotle on the Forms of Friendship', 317.

well-wishing is not that of the particular service rendered (the particular action done in the other person's interest) but that of the overall fabric of the relationship."<sup>819</sup>

This example also indicates that Aristotle's account of friendship is by no means limited to intimate relationships between persons who are not family. It equally applies to other relations, for instance between parents and children, siblings, spouses, between business partners, members of religious communities, social clubs and political parties, and of course between citizens.

Aristotle distinguishes three species of friendship: advantage friendship, pleasure friendship and character friendship. As the name indicates, advantage friendship is a friendship that works to the personal advantage of the friends involved. Pleasure friendship is based on the pleasure it gives the friends. In both types of friendship the persons involved "do not love by reference to the way the person loved is, but to his being useful or pleasant."<sup>820</sup> These kinds of friendship are conditional in that "the one loved is not loved by reference to the person he is but to the fact that in the one case he provides some good and in the other some pleasure."<sup>821</sup> Character friendships, by contrast, are relations that exist exclusively because of (elements of) goodness in the character of the other. It is this kind of friendship that Aristotle sees as the most complete because it is unconditional and hence does not depend on someone giving pleasure or being useful.<sup>822</sup> But again, what these relations have in common is that they involve reciprocal and effective well-wishing (*eunoia*) of the persons involved. Civic friendship is a species of advantage-friendship according to Aristotle, the advantage being the overall good that living together brings to each and every citizen.<sup>823</sup> In a political community and "animated by civic friendship, each citizen has a certain measure of interest in and concern for the well-being of each other citizen

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<sup>819</sup> Ibid., 327.

<sup>820</sup> Aristotle, 'Nichomachean Ethics', 1156a11-17.

<sup>821</sup> Ibid.

<sup>822</sup> Ibid., 1156b7-b12.

<sup>823</sup> Ibid., 1160a9-a14; Cooper, 'Aristotle on the Forms of Friendship', 333. See for the assertion that civic friends cannot be genuine friends because they lack intimacy and are not genuinely living together: Annas, Julia, 'Comments on John M. Cooper's "Political Animals and Civic Friendship"', in *XI. Symposium Aristotelicum*, ed. e.d., Günther Patzig (Friedrichshafen/Bodensee: Vandenhoeck & Ruprecht, 1987).

just because the other *is* a fellow-citizen.”<sup>824</sup> The good of a fellow citizen matters by and in itself.<sup>825</sup> The idea of civic friendship is thus based on the psychological idea that once citizens have experienced the benefits of living in a political community, as a result they start caring for one another’s good.<sup>826</sup> In the words of Cooper, as civic friends “[t]hey are accommodating rather than suspicious, anxious to yield a point rather than insisting on the full letter of their rights whenever some dispute arises.”<sup>827</sup> In a society animated by civic friendship citizens are willing to sacrifice their own particular interests for one another, lest this does not cost too much. The sacrifice may for instance not endanger the overall profitability of being an active participant in a political community.<sup>828</sup>

This accommodating attitude is also due to the fact that (civic) friends characteristically see one another as 'another self' (*heteros autos*), as people with whom, depending on the character of their friendship, they share a fundamental aspect of their identity. In a society constituted by civic friendship fellow citizens conceive of one another as people with similar powers and vulnerabilities, with a similar overall interest in leading a good life.

### **3 The judge as a civic friend**

As said, as part of our attempt to account for the moral quality of adjudication I put it that the concept of civic friendship forms a valuable complement to a virtue-ethical conception of adjudication. This because it can honour the relational character of adjudication, the fact that adjudication is a practice in which we ask the ‘losing’ citizen to bear the burden of a public decision. If we can understand the practice of adjudication as a specification of civic friendship, this means that citizens can be confident that these decisions are, if anything, also the result of an effective attempt to serve their concrete good. A judicial decision can be understood as an expression of well-wishing by the judge. This well-wishing together with the judge being virtuous

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<sup>824</sup> Cooper, John M., 'Political Animals and Civic Friendship', in *Reason and Emotion. Essays on Ancient Moral Psychology and Ethical Theory*, ed. Cooper, John M. (Princeton: Princeton University Press, 1999), 371.

<sup>825</sup> Ibid.

<sup>826</sup> Cooper, 'Aristotle on the Forms of Friendship', 323.

<sup>827</sup> Ibid., 333.

<sup>828</sup> Ibid., 328.

qualifies the discretion that the judge inherently has and together this well-wishing and virtuousness give meaning to the liberal principle of reciprocity, but also to the principle of respect for the Other.<sup>829</sup> As to the first: a legal decision can be understood as in the best case embodying an equilibrium between the interests of the losing party on the one hand and the interests of his fellow citizens and the good of society on the other. Conversely, the judge and the legal order as a whole can in turn rely on citizens to accept the decision as part of their fulfilling their duty as good willing fellow citizens. As civic friends they have an accommodating attitude and are willing to make a sacrifice. Precisely by accepting the judicial decision, the losing litigant expresses his friendship and his commitment to the political order and the values it aims to protect.

As to respect for the Other, a judge who has the attitude of a civic friend will be sensitive for the particular good of the concrete parties to the proceedings. He will try to grasp and serve that good in the best way possible, in a way that is compatible with his role as judge and hence with the other considerations bearing upon him. The attitude of a civic friend implies that the judge indeed has respect for the Other's otherness, i.e. for the concrete good of the citizen in all his particularity. It also implies that the judge is aware of a shared kind of humanness that allows him to sympathetically appreciate the situation in which the citizen before him finds himself. From the viewpoint of both reciprocity and respect for the Other, civic friendship has yet another function. It can account for the kind of sensitivity that is necessary for the judge to acknowledge the loss that comes with a judicial decision as troublesome. As a civic friend he genuinely cares, he can feel the loss himself. Acknowledgement is likely, because the judge has the kind of attitude towards the parties participating in the proceedings that is conducive to such an acknowledgment. If the judge is both

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<sup>829</sup> It goes without saying that reciprocity in adjudication cannot be realized through the mere 'well-wishing' by the judge and the parties concerned. Whether the principle of reciprocity is satisfied, will obviously also depend on the background institutions and the workings of the main political institutions in society. It is doubtful whether citizens have reason to accept the burdens of judicial decisions if they at the same time cannot also rely on the 'well-wishing' of and in all political institutions, such as the constitution, legislation and policy.

virtuous and a civic friend then the good of the parties is part of his own good and therefore he will be sensitive for the suffering of the losing party.

At this point one may question what civic friendship does contribute to the idea of legal rightness. Within the *fragility of rightness* a right decision boils down to the judge adequately responding to a wide range of considerations, including his well-wishing for the parties to the proceedings. This range comprises different levels of abstractness and generality, and none of these considerations will by themselves have any claim to deliberative priority: neither the considerations drawn from what is considered settled law or from background principles of political morality, nor the ones that stem from his concerns as a civic friend or from his way of perceiving the particulars. In the end a right decision will be an all-things-considered judgement that is made by a (sufficiently) virtuous judge who at the same time has the attitude of a civic friend. As we shall see in the next chapter, such decisions will not necessarily be free of conflict.

#### **4 Does civic friendship apply to all areas of law?**

Above I have argued that civic friendship is an important concept for coming to grips with the requirement of reciprocity in adjudication. I proposed it as a complement to a neo-Aristotelian conception of judicial-decision making that is part and parcel of the *fragility of rightness*. In the next chapter I will introduce the concept of a tragic legal choice as the third constitutive element of this approach. However, at this point the question that needs to be addressed is whether the concept makes sense for all (kinds of) legal cases<sup>830</sup> and whether it requires further elaboration or a particular caveat for some kinds of cases. Due to reasons of scope I will briefly discuss only one category of legal cases for which the concept of civic friendship arguably is not appropriate. This is the category of cases in which citizens are accused of having seriously violated the basic interests of other citizens and thence also the good of society, for instance in certain penal cases.<sup>831</sup> It could be argued that these cases are characterized

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<sup>830</sup> I am indebted to Professor Lawrence B. Solum for signalling that this category of cases at least requires special attention if we introduce the concept of civic friendship to the practice of adjudication.

<sup>831</sup> These cases may fall in the domain of criminal law, but may also come up in other areas of law, like tort cases in civil law or negligence and nuisance cases in environmental law. Here I simply accept the legitimacy of the criminal law. It remains to be seen whether civic

by disrupted or broken relations rather than by relations of civic friendship. If so, the judge's professional responsibilities may not demand that he decides as a civic friend. As a provisional answer to this important point I will make a few remarks. First, Aristotle's notion of advantage friendship and the interpretation of reciprocity implied therein, does not entail that each and every activity taking place in the context of the relation must be advantageous to the parties involved. This is also expressed in the fact that Aristotle sees failures and wrongdoings as part of the practices that constitute friendship. Some of the relations that Aristotle qualifies as forms of friendship, e.g. the relation between parent and child, or between teacher and pupil are clear examples of relations that cannot be characterized without pointing to such experiences of failure and wrong-doing.<sup>832</sup>

As we have seen, what matters is whether the overall fabric of the relationship is advantageous to the parties involved.<sup>833</sup> In order to maintain a friendship both parties must be able and willing to provide for the good "in that respect in which they are friends."<sup>834</sup> Thus, when a citizen fails or does wrong the question is whether he remains a person whose partaking in one way or another can be thought as advantageous to the political community. The advantageous character of a relation does not directly 'evaporate' when a citizen commits a serious crime or other kinds of unlawful wrongdoings: it does not indicate that the profitability of the relation and therefore the friendship has ended. Even if his behaviour is structural, the citizen in question may still maintain the properties that enable him to contribute to a mutually advantageous relation.

Because civic friendship implies considering the friend as 'another self', it comes with the acknowledgment that a fellow citizen is never "intrinsically evil, but a human being like us, with diverse frailties and weaknesses, who has encountered circumstances -whether personal or social- that bring out those weaknesses in the

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friendship can also lead to a fundamental critique on the system of criminal law as it now is in Western constitutional democracies.

<sup>832</sup> Cooper, 'Aristotle on the Forms of Friendship', 312.

<sup>833</sup> Ibid., 327.

<sup>834</sup> Ibid., 326.

worst possible way.”<sup>835</sup> Criminal citizens will be seen as citizens with similar potentials and frailties as all others, due to which they can be held responsible, but at the same time their specific good must be taken into account too.

Also, upholding a relation of civic friendship with a wrongdoer may further the likelihood of a future cooperative attitude of the ‘failing’ citizen and it is profitable for the common good because the wrongdoer may be able to perform or continue to perform several social roles.<sup>836</sup> In addition, to approach citizens who have committed crimes as civic friends also has an epistemological value for society as a whole. This sympathizing attitude may enhance our understanding of what citizens in general need in order to be able to become good citizens, because it “creates incentives [...] to think hard about those circumstances, so that we do not put people under pressures that many normal agents cannot stand.”<sup>837</sup>

Hence, the provisional answer to the question whether the concept of civic friendship applies even in cases of serious crimes and other grave wrongdoings is affirmative. In case of serious wrongdoing the judge can confront the delinquent with the conditions of civic friendship and hold him responsible according to these conditions. He can highlight the fact that the wrongdoer is part of a practice that aims to serve the good of society, including his good and the good of his fellow citizens.

Of course, a judge may find it difficult to have a sympathizing view of criminals or citizens who otherwise deeply violate the interest of others. He may have a hard time trying to ‘see’ them as ‘other selves’. This not in the least because such a sympathizing view may confront the judge with serious moral dilemmas, because the commitments of a civic friend on the one hand and those of a virtuous judge on the other may not always harmonize. I will come back to this point in the next chapter. Obviously, in extreme cases the relation of civic friendship does come to an end, simply because reciprocity is lacking. This may for instance be the case if the wrongdoer lacks the cognitive and moral capacities to be effectively committed to the good of society and of others. It may also end if a citizen who has violated the

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<sup>835</sup> Nussbaum, 'Victims and Agents. What Greek Tragedies can Teach us about Sympathy and Responsibility'.

<sup>836</sup> This point is hypothetical and needs elaboration and empirical support.

<sup>837</sup> Nussbaum, 'Victims and Agents. What Greek Tragedies can Teach us about Sympathy and Responsibility'.

interests of others has structurally and genuinely expressed that he does not wish his fellow citizens well and that he has no concern for the good of society. Then there will be no way of seeing the relation as (potentially) advantageous for society. In these extreme cases the judge still has to comply with the basic values and rules of society on how to treat the wrongdoer in question, but he need not act as a civic friend.

### **5 The destabilizing character of adjudication: a first explanation**

Having outlined a virtue-ethical conception of judicial decision-making and having complemented it with the concept of civic friendship, in this section I shall make a start with elaborating the ‘destabilizing’ character of the *fragility of rightness*. Yet, it is not until the next chapter, in which I outline the concept of a *tragic legal choice*, that we can fully grasp this destabilizing dimension.

One reason for the ‘destabilizing’ character of the *fragility of rightness* is that a virtue-ethical conception of adjudication complemented with the concept of civic friendship does not offer any action-guiding viewpoint for judges or citizens to rely upon. The *fragility of rightness* only offers an *indirect* answer as to why legal decisions are right, that is, by referring to the notion of a virtuous judge and that of civic friendship. Judges will thus have no recourse to any priori decisive ground to rely upon when fulfilling their professional responsibility. He will not have the apparent safety of the dictates of Reason, i.e. the Legal Point of View. He will to a large degree be left on his own, in the sense that his personality will be constitutive for his judicial decision. He must choose what practical conclusion to draw from the considerations that the case invokes. These considerations cannot a priori be ordered or ranked, but present themselves as a rather messy, intransparent constellation. Adjudication will therefore boil down to a rather personal and existentially demanding endeavour.<sup>838</sup>

As already suggested, this lack of an action-guiding viewpoint is also destabilizing for the affected citizens. This because the judge cannot offer a conclusive justificatory

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<sup>838</sup> Note that this is not to say that judging should be ‘personal’ in the sense that the judge is open about all kinds of details that characterize him as a person. The assertion that the profession of the judge is highly personal should not be confused with the idea that judges should share their personality and private lives with the public.

reason for why he makes a particular decision. He cannot offer a justification for seeing the case as he does. Again, in the end the judge can only say 'this is how I see it'.<sup>839</sup> Hence the affected citizen will not be provided with exhaustive explanatory reasons for why he should accept the decision and its consequences. It is through a trust in the quality of the judiciary and through the concrete performance by the judge that the affected citizen can experience the reason why he should accept the decision and the burdens it brings as valuable for him. The limits of articulate reason should be filled in with nothing more than trust in the dispositions of the judge. Uncertain as this may seem, we should remember that the so called 'stabilizing approaches' do not live up to their promises of certainty and therefore do not fare any better.

The *fragility of rightness* is also destabilizing for the legal order as a whole, since a crucial element of it can at best be seen as a seemingly disordered, messy and opaque amalgam of decisions of judges. In any case, a legal order cannot be understood as an ordered whole of explicit propositions that together form one coherent system. It will be far from a 'seamless web' in which each and every decision can be taken as the normative implication of a theory. As we saw, according to this conception two opposing judicial decisions can even both be right in one and the same case or in similar cases.

## **6 Conclusion**

In this chapter I discussed the concept of civic friendship as the second element of the *fragility of rightness*. We saw that the moral quality of adjudication not only consists in the fact that judges to a sufficient degree have developed a set of judicial virtues, but that they will also decide as a civic friend. A right judicial decision will typically be brought about not only by 'the lens of judicial virtue' but also by the well wishing by the judge who has a keen and sympathizing eye for the concrete good of the citizens involved. This good is part of the amalgam of considerations that are relevant for the judge and that he seeks to honour. At least partially this well-wishing provides a reason for a 'losing' citizen to accept a judicial decision, even if this selfsame decision could have turned out otherwise with another judge deciding.

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<sup>839</sup> Solum, 'Virtue Jurisprudence. A Virtue-Centered Theory of Judging', 201.

In addition we saw that the concept of *civic friendship* is even pertinent for domains of law where citizens who participate in legal proceedings have seriously violated the fundamental rights of their fellow citizens.

Finally, I showed why a virtue-ethical conception of adjudication complemented with civic friendship suggests an account of moral quality that is destabilizing for the judge, the parties involved in a legal procedure and the legal order as a whole. It is this destabilizing character of the *fragility of rightness* that returns in the next chapter when the concept of a tragic legal choice is introduced as its final constitutive element. There we shall again see the fragile character of moral quality in adjudication.