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The fragility of rightness. Adjudication and the primacy of practice

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"[.S]ometimes Justice itself is fraught with harm"⁸⁴⁰

"[T]here is no need of irrational gods, to give rise to tragic situations."⁸⁴¹

12 The Fragility of Rightness III. Tragic choice as a legal concept

1 Introduction

This chapter introduces the concept of a tragic legal choice as the third and final constituent of the *fragility of rightness*. By bringing adjudication into the domain of the tragic, I argue for sensitivity for the morally ambivalent character of adjudication. I consider this ambivalence an inherent part of the practice of adjudication, something that cannot be exhaustively prevented, overcome, or dismantled as being a pre-reflective illusion. Even if everything is as it should be, adjudication will sometimes come with moral wrongdoing. Hence, in this sense the *fragility of rightness* brings bad news about adjudication.⁸⁴²

To establish the concept of a tragic legal choice I firstly discuss the concept of the 'tragic' in practical philosophy (2). Subsequently I will designate the central features of a 'tragic legal choice' (3). We shall see that it is the result of a genuine conflict between judicial commitments, that it causes a moral remainder and that it typically evokes a tragic responsive reaction. After this sketch, I shall briefly give some additional arguments for and against anchoring this concept in the practice of adjudication (4). Then I shall briefly discuss the compatibility of the *fragility of rightness* with the demands of the rule of law (5). I shall end this chapter with a conclusion (6).

There is one caveat that must be made at the outset. Tragedy cannot be argued for through an analytical line of reasoning. First and foremost the tragic is something that we experience, something that has a certain effect on us. In the words of Scheler "[t]he 'tragic' is, to begin with, a characteristic of events, fates, characters, etc. that

⁸⁴⁰ Sophocles, *The Complete Plays of Sophocles*, 143.

⁸⁴¹ Williams, Bernard, *Problems of the Self: Philosophical Papers 1956-1972* (Cambridge: Cambridge University Press, 1973), 173.

⁸⁴² For the use of the term 'bad news' I took inspiration from a deep and thought-provoking essay by Bernard Williams that discusses the value that tragedy as a literary genre might have for philosophy. Cf. Williams, 'The Women of Trachis. Fiction, Pessimism, Ethics'.

we perceive and intuit in them. It is a heavy chilly breath that emanates from these things themselves [...].”⁸⁴³ Any attempt to offer decisive and exhaustive philosophical criteria for determining whether a particular judicial choice is tragic would not only be epistemically wrong, it would also be *morally* problematic. It would suggest that one is “more concerned with moral principles than with human realities and hence insufficiently sensitive to human suffering.”⁸⁴⁴ Such an approach would “deny tragedy its proper witness.”⁸⁴⁵

This chapter thus merely aims to offer a rough sketch of a tragic judicial choice and it does not stand on its own. It largely depends on the actual phenomenology of adjudication in everyday practice and also on all kinds of representations of this phenomenology, for instance in film and literature. What is more, as an attempt to stay close to the phenomenological character of the tragic and in order to bring the tragic sensitivity that the *fragility of rightness* in fact proposes to life, a wide variety of cases will be brought forward.

2 Interlude. The ‘tragic’ and (practical) philosophy

Before elaborating the concept of a tragic legal choice, some introductory remarks on the concepts ‘tragic’ and ‘tragedy’ in practical philosophy and legal theory are in order, explaining why the tragic is a relevant concept in accounting for adjudication. The meaning of ‘the tragic’ or ‘tragedy’ in practical philosophy is predominantly based on an understanding of Athenian tragedies that emerged at the end of the sixth century B.C.⁸⁴⁶ During the fifth century B.C. more than nine hundred tragedies were

⁸⁴³ As cited in: Kaufmann, Walter, *Tragedy and Philosophy* (Princeton: Princeton University Press, 1968), 302.

⁸⁴⁴ *Ibid.*, 315. Kaufmann also ridicules attempts to designate definitive criteria on the basis of which certain Greek tragedies are dismissed for not being 'really' tragic. He pointedly states: “There is no virtue in trying to be more tragic than Aeschylus and Sophocles, Euripides, and Shakespeare, claiming that much of what they considered tragic was merely pitiful.” Cf. Kaufmann, *Tragedy and Philosophy*, 315.

⁸⁴⁵ Wolcher, *Law's Task. The Tragic Circle of Law, Justice and Human Suffering*, 221. See also: Kaufmann, *Tragedy and Philosophy*, 315.

⁸⁴⁶ Walter Kaufman puts this point as follows: “the plays in question were not called tragedies because they were so tragic -they merely had some connection with goats, and the Greek word for goat is *tragos*- but the word tragic was derived from tragedy.” Cf. Kaufmann,

performed, but only a few survived. These tragedies and their reception have been central to what we may call the tragic tradition. They were performed during the annual festival of the City Dionysia, a spring festival that was celebrated annually on the south slope of the Acropolis.

The classicists Vernant and Vidal-Naquet describe Greek tragedy as a “unique human achievement” because of its special style and its particularities as a social and to some extent political institution and because it introduced “tragic consciousness” as a hitherto unrecognized aspect of human experience.⁸⁴⁷

This consciousness was organised around the central question ‘what to do’, the protagonists being at crossroads or on the verge of a choice and asking themselves what course of action to take.⁸⁴⁸ One of the most well-known instances is Aeschylus’ *Agamemnon* who has to decide whether to kill his daughter in order to save his army: “Obey, obey, or a heavy doom will crush me! - Oh but doom *will* crush me once I rend my child, the glory of my house - a father’s hands are stained, blood of a young girl streaks the altar. Pain both ways and what is worse? Desert the fleets, fail the alliance?”⁸⁴⁹

The Greek tragedies display the world of practice as a troublesome world of suffering, conflict and unintelligibility.⁸⁵⁰ Moreover, they conceive of man and his actions not as stable realities that could be clearly defined as good or bad and right or wrong, but rather as giving rise to complex questions of responsibility and guilt and to morally ambivalent answers.⁸⁵¹ The protagonist of Greek tragedy is neither a flawless hero nor a vicious scoundrel. He is conceived as unable to offer clear-cut solutions to the

Tragedy and Philosophy, 310. So for the meaning of the tragic we do not follow the colloquial way of using the word, which is to point out bad or really sad situations. That we deduce the meaning of the tragic from the reception of the Greek tragedies obviously is not to say that the colloquial meaning of tragic should be neglected or ridiculed.

⁸⁴⁷ Vernant, Jean-Pierre and Vidal-Naquet, Pierre, *Myth and Tragedy* (New York: Zone Books, 1990), 21, 23.

⁸⁴⁸ *Ibid.*, 29.

⁸⁴⁹ Aeschylus, *The Oresteia. Agamemnon, The Libation Bearers, The Eumenides*, trans. Fagles, Robert, Penguin Classics (New York: Penguin Group, 1975), 110.

⁸⁵⁰ Vernant and Vidal-Naquet, *Myth and Tragedy*, 43.

⁸⁵¹ *Ibid.*, 164.

practical questions at hand, also due to the workings of the external world and its ‘tragic flaw’ (*hamartia*) that produces troublesome ethical realities and suffering.⁸⁵²

“Whoever seeks a moral holiday in art will not find it in Attic tragedy”, Walter Kaufman writes.⁸⁵³

Greek tragedies often show human suffering for which there is no clear cause or justification, even though this suffering always comes in relation with choices and acts. They display a rather complex and troublesome relation between men, their actions and the external world, stressing the moral ambivalence of human realities.⁸⁵⁴

In Sophocles’ *Oedipus Rex* the course of events is such that Oedipus ends up causing precisely what he aimed to avoid.⁸⁵⁵

A first and notorious philosophical discussion of the ‘tragic’ based on an understanding of the Greek tragedies we find in Plato’s work. This discussion was outright antagonistic as he claimed that philosophy is the better teacher of moral wisdom to which tragedy is nothing but a threat.⁸⁵⁶ Although he was an aspiring author of tragedies in his youth, Plato aimed to show how tragic consciousness could be overcome by appealing to logic and reason. In his *Republic* he notoriously criticized the tragic poets for being deluded, for dwelling too much on the suffering of human beings, for giving too much room to irrational emotions and for thereby dangerously influencing and even spoiling the character of Athenian citizens.⁸⁵⁷

According to Plato, citizens should not be trained to lament their troublesome fate as this involved delusion about the values at stake and was both useless and cowardly. He did not want to admit the tragic poet “into a well-ordered State, because he [the tragic poet, IvD] awakens and nourishes and strengthens the feelings and impairs the

⁸⁵² See for a discussion of the different meanings assigned to Aristotle’s *hamartia*: Kaufmann, *Tragedy and Philosophy*, 61-63. In the context of this chapter the relevance of this concept lies in the fact that it conveys the idea of a moral error without implying a clear mistake or wickedness. See also: Aristotle, *Poetics*, trans. Heath, Malcolm (London: Penguin Books, 1996), xxxiii.

⁸⁵³ Kaufmann, *Tragedy and Philosophy*, xxi.

⁸⁵⁴ *Ibid.*, 315.

⁸⁵⁵ *Ibid.*

⁸⁵⁶ Barbour, 'Tragedy and Ethical Reflection'.

⁸⁵⁷ *Ibid.*, 1-2.

reason.”⁸⁵⁸ For Plato the art of measuring, numbering and weighing could actually rescue citizens from their tragic predicaments. Hence, he proposed to outlaw tragedy and particularly to censor the plays of Sophocles and Euripides.⁸⁵⁹

Plato’s self-acclaimed triumph over tragedy has founded a dominant tendency in the history of practical philosophy -legal philosophy included- holding that philosophical or theoretical reason is able to overcome the tragic. This tendency is committed to the Platonic idea, paraphrased by Nietzsche: “Virtue is knowledge; man suffers only from ignorance, he who is virtuous is happy.”⁸⁶⁰ In this tradition tragic consciousness is an indication of ignorance, of insufficient use of one’s cognitive powers to either prevent tragic situations or to evaluate them differently.

The dominance of this Platonic or Socratic view explains the precarious position that the tragic and tragedy have had in practical philosophy. That is, concepts of the ‘tragic’, ‘tragedy’ or ‘tragedies’ seldom figure in that field. In the rare instances where these concepts do occur, it is often to criticize the meaning they convey. One could say that the tragic or tragedy has been an uncomfortable subject for practical philosophy. As Barbour puts it: “Tragedy has often been perceived as a "problem", to be either dissolved, or entirely avoided.”⁸⁶¹ The (neo) Kantian tradition in practical philosophy is for instance based on the idea that the moral quality of life can be exhaustively secured by reason and hence tragedy will not occur, or if it does, only on the phenomenal level without any moral bearing.

Arguably the dominance of this Socratic, highly rationalistic understanding of morality can also account for the fact that tragedy has seldom been a subject in philosophical reflections on law and adjudication: the concepts of the ‘tragic’ and ‘tragedy’ hardly occur in legal philosophy and legal theory.

Of course, in the history of philosophy some philosophers have embraced rather than avoided or criticized the tragic and they elaborated the concept into a theory of either

⁸⁵⁸ Jowett, Benjamin, *Dialogues of Plato: Translated into English, with Analyses and Introduction*, 4 vols., vol. 2, Cambridge Library Collection (Cambridge: Cambridge University Press, 2010), 447.

⁸⁵⁹ Barbour, 'Tragedy and Ethical Reflection', 2.

⁸⁶⁰ Nietzsche, Friedrich, *The Birth of Tragedy*, trans. Fadiman, Clifton P. (New York: Dover Publications, 1995), 50.

⁸⁶¹ Barbour, 'Tragedy and Ethical Reflection', 1.

the tragedies, or the tragic, or both. Aristotle was the first to develop a theory of the tragic. In his *Poetics* he famously gave a definition of tragedy as dramatic genre: “Tragedy is an imitation of an action that is admirable, complete and possesses magnitude, in language made pleasurable, each of its species separated in different parts; performed by actors, not through narration; effecting through pity and fear the purification of such emotions.”⁸⁶² Moreover, together with reversal, recognition and a tragic flaw of the hero he saw suffering as a necessary component of a tragic plot: “an action involving destruction and pain.”⁸⁶³ After Aristotle, Hume, Hegel, Nietzsche, Schopenhauer, Scheler and others have thoroughly paid attention to the Greek tragedies and used the insights gained from them to stress the tragic character of life and society.⁸⁶⁴ According to Hegel’s understanding the defining feature of Greek tragedy -and here he famously used Sophocles’ *Antigone* as an example- is that of a tragic collision between values, not of conflict between good and evil, but between positions that are both justified. He sees tragedy as predominantly conveying that “right collides with right”, a phrase we find in the *Libation Bearers*.⁸⁶⁵ In the last decades ‘tragedy’ reappeared in political and moral philosophy and also in legal theory. Bernard Williams⁸⁶⁶, Martha Nussbaum⁸⁶⁷, Lucinda Cornell⁸⁶⁸, Bonnie

⁸⁶² Aristotle, *Poetics*, 10.

⁸⁶³ *Ibid.*, 18.

⁸⁶⁴ Barbour, 'Tragedy and Ethical Reflection', 12.

⁸⁶⁵ Cf. Kaufmann, *Tragedy and Philosophy*, 203; Aeschylus, *The Oresteia. Agamemnon, The Libation Bearers, The Eumenides*, 197.

⁸⁶⁶ Williams, Bernard, 'Ethical Consistency', in *Problems of the Self: Philosophical Papers 1956-1972* (Cambridge: Cambridge University Press, 1973); ———, 'Conflicts of Values', in *Moral Luck: Philosophical Papers 1973-1980* (Cambridge: Cambridge University Press, 1981); Williams, 'The Women of Trachis. Fiction, Pessimism, Ethics'; ———, 'Liberalism and Loss'.

⁸⁶⁷ Cf. Nussbaum, 'The Costs of Tragedy: Some Moral Limits of Cost-Benefit Analysis'; ———, *The Fragility of Goodness. Luck and Ethics in Greek Tragedy and Philosophy*; ———, 'Tragedy and Justice: Bernard Williams Remembered'; ———, 'Tragedy and Human Capabilities: A Response to Vivian Walsh'.

⁸⁶⁸ Cf. Cornell, *The Philosophy of the Limit*.

Honig⁸⁶⁹, Simon Critchley⁸⁷⁰, Bert van den Brink⁸⁷¹ and others⁸⁷², each in their own way and in different contexts, have elaborated what we might call ‘tragic consciousness’ for moral, political and legal thought. Often this attention for the tragic is part of a critical reaction to foundational moral and political theories. At the same time the tragic is also invoked as part of a constructive attempt to enhance the ethical dimension of judicial and political practices, for instance by postmodern approaches to judging and justice.

3 Tragic legal choice. A tentative sketch

3.1 Conflicting judicial commitments

An important feature of a tragic legal choice is that it is the result of a genuine conflict between judicial commitments. The judge faces a situation in which he cannot solve the legal case without thereby forfeiting one judicial commitment, because right collides with right. The commitments are impossible, meaning that fulfilling one makes it impossible to fulfil the other.⁸⁷³ Below I will point out four categories of conflicts that may give rise to tragic legal choices. The tragic nature of these choices will become clear in the subsequent section when I discuss the idea of a moral remainder and that of a tragic responsive reaction.

3.1.1 Conflicting commitments to fundamental rights

One category of legal conflicts that may give rise to tragic legal choices are situations in which two or more fundamental values that are protected by settled law are impossible, i.e. cannot be realized simultaneously.⁸⁷⁴ *The fragility of rightness*

⁸⁶⁹ Honig, Bonnie, 'Antigone's Two Laws: Greek Tragedy and The Politics of Humanism', *New Literary History* 41, 1 (2010); ———, 'Antigone's Laments, Creon's Grief', *Political Theory* 37, 1 (2009).

⁸⁷⁰ Cf. Millar, John Douglas, 'Interview with Simon Critchley: The Tragic and Its Limits', <http://www.thewhitereview.org/interviews/interview-with-simon-critchley-the-tragic-and-its-limits-2/>.

⁸⁷¹ Brink, *The Tragedy of Liberalism. An Alternative Defense of a Political Tradition*.

⁸⁷² See for instance: Gowans, *Innocence Lost: An Examination of Inescapable Moral Wrongdoing*.

⁸⁷³ Scharffs, 'Adjudication and the Problems of Incommensurability', 1395.

⁸⁷⁴ *Ibid.*

holds that genuine conflicts between fundamental values or rights are an inherent part of the practice of adjudication in Western constitutional orders. These orders protect a plurality of fundamental values, which in one way or another can prove to genuinely conflict. That is, the practical world does not order itself so that the values that a legal order aims to protect can form a seamless web. To believe otherwise would require an incoherent picture of the world, or "the existence of a rather interventionist God [..]"⁸⁷⁵

In mainstream legal thought conflicts between fundamental rights have received relatively little attention. Only incidentally have they been conceptualized as indicating a category that deserves special discussion. This is probably due to the fact that such conflicts are generally construed as *apparent* conflicts, conflicts that in the end can be exhaustively resolved through legal reflection. They are conceptualized as if they are conflicts of propositions, the resolution of which logically requires that one of the conflicting legal claims must be dismantled. Giving rise to an intellectual puzzle in the way any other legal case might do, such conflicts need not be set apart as a special kind of legal case, or so the idea seems to be.

Giving primacy to practice, the *fragility of rightness* follows a different logic, i.e. a logic that is more responsive to the features of the practical world and to the moral experience of everyday adjudication. Within this logic conflicts between legally protected values are not construed as part of a phenomenology that should be dismantled as irrational. In any case they are not treated as propositions to which the requirements of theoretical reason apply. Fundamental rights are assumed to have contour. These values are historically specified ways of dealing with general human needs and capacities. Hence, to treat such conflicts as conflicting propositions and to solve them accordingly would boil down to merely redefining these rights nominalistically. It leaves the actual concerns to which these rights point unaddressed.⁸⁷⁶ For the *fragility of rightness* a conflict between fundamental rights does not necessarily imply that one of the claims is wrong. It may well be that in such a case the source of the 'trouble' lies in the constellation of facts. To deny this is to hollow out the substantial meaning of fundamental rights. In fact it puts the horse behind the cart: the assessment of whether certain interests deserve legal protection

⁸⁷⁵ Williams, *Moral Luck. Philosophical Papers 1973-1980*, 75.

⁸⁷⁶ ———, 'Liberalism and Loss', 94.

would then depend on the workings of the “world’s contingent interventions” rather than on the commitments a legal order actually has.⁸⁷⁷

Of course this is not to deny that certain legal conflicts between fundamental rights can be exhaustively resolved with the help of reflection as it is at work in what has been coined specification and balancing.⁸⁷⁸ Reflection may for instance reveal that in a particular conflict the rights do not genuinely conflict but are reconcilable because only a peripheral aspect of one of the rights is at stake so that the ‘core’ or ‘essence’ of one right can be protected without having to sacrifice the other.

Acknowledging that genuine conflicts may occur, the *fragility of rightness* is thus not tantamount to endorsing some kind of laziness, fatalism or the like in relation to the use of reflection.⁸⁷⁹ It simply aims to accommodate for the fact that in spite of all their efforts judges can nonetheless find themselves in situations in which fundamental rights genuinely conflict, other than as negligible incidents. The *fragility of rightness* sees genuine conflicts between fundamental rights as an inherent feature of a legal order. An example of a potential genuine conflict between fundamental rights is that between the right to a fair trial and the right to protection of one’s private life, including the right to protection of one’s personal development. Take the case of *Jason Barkly and Nancy Rosenbaum*.

The case of *Jason Barkly and Nancy Rosenbaum*

Jason met Nancy’s mother right after she divorced the father of her children. They fell in love and decided to live together. Jason took up residence with Nancy’s mother, Nancy and her two brothers. On the surface everything seemed to be going fine. There were some incidents as Jason was a bit aggressive with the two boys, but this was not structurally the case.

⁸⁷⁷ Nussbaum, *The Fragility of Goodness. Luck and Ethics in Greek Tragedy and Philosophy*, 49.

⁸⁷⁸ Note that in a virtue-ethical conception of legal decision-making specification and balancing should not be understood as fixed methods used to determine citizens’ concrete rights. They are descriptions of ways in which a virtuous judge will try to resolve a legal case.

⁸⁷⁹ Cf. Nussbaum, 'Tragedy and Human Capabilities: A Response to Vivian Walsh', 415. ———, 'The Costs of Tragedy: Some Moral Limits of Cost-Benefit Analysis', 1016. Dworkin, Ronald, 'Do Liberal Values Conflict', in *The Legacy of Isaiah Berlin* (New York: New York Review of Books, 2001), 91.

When Nancy went to high school however, Jason became extremely strict towards Nancy and did not allow friends from school to visit her at home. Nancy felt isolated and one day in a chat session with one of her schoolmates she revealed that Jason, her mother's partner, had been sexually abusing her since she was young and that he was now very jealous regarding her contacts with boys. Jason was arrested that week and prosecuted for sexual abuse of a minor.

The judge has to decide whether Nancy should be mandated to testify in court and to be interrogated both by the prosecution and the defence-lawyers. On the one hand Jason's right to a fair trial is violated if a conviction would be based exclusively on accusations that cannot be further examined. A defendant must have a real opportunity to interrogate the witness, especially if her statement is the only evidence against him.

On the other hand there is Nancy's right to privacy, including her right to protection of her emotional development.⁸⁸⁰ A psychiatrist may point out that a cross-examination is likely to negatively affect Nancy's emotional health because she will have to again experience the traumatic events. He may argue that such an examination should therefore not take place, especially in view of Nancy's young age.⁸⁸¹

The judge may thus face a genuine conflict between fundamental rights: honouring Jason's right to fair trial versus the protection of Nancy's right to privacy. Sometimes there may be ways to reconcile conflicting rights -for instance by compensating the defendant-, but there is no a priori reason to assume that this will always be so.⁸⁸² A certain constellation of facts can form an obstacle to honour the legitimate claims involved at the same time.

⁸⁸⁰ See for similar cases: Hoge Raad, November 17 2009, ECLI:NL:HR:2009:BI3847; Hoge Raad, July 6 2010, ECLI:NL:PHR:2010:BL9001; Gerechtshof 's Hertogenbosch, August 20 2008, ECLI:NL:GHSHE:2008:BE9063; Rechtbank Middelburg, October 8 2007, ECLI:NL:RBMID:2007:BB5057; Rechtbank Alkmaar, April 23 2009, ECLI:NL:RBALK:2009:BI2163. See for a discussion of such a conflict in the context of European International law: Brems, Eva, 'Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention for the Protection of Human Rights and Fundamental Freedoms', *Human Rights Quarterly* 27, 1 (2005), 294.

⁸⁸¹ Cf. Hoge Raad, November 17 2009, ECLI:NL:HR:2009:BI3847.

⁸⁸² Eva Brems puts the conflictual character of such a case as follows: "In this type of case, the victim's statement is often the main evidence. Nevertheless it is in many cases judged undesirable to force the child victim to testify during trial. This is usually based on a concern to protect the human right of the child, in particular the right to protection of one's private life, including the right to protection of personal development. Yet, this may enter into conflict with the defence rights of the accused, specifically his right to examine witnesses." Brems, 'Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial

This example is but one of the range of conflicts that may occur between fundamental rights. Other examples of genuine conflicts are for instance conflicts between the right not to be discriminated and the right to freedom of expression, conflicts between the right to freedom of religion and the right to bodily integrity, conflicts between the right to privacy and personality rights.⁸⁸³

Surely, one could put afore that due to the proliferation of constitutional or human rights, conflicts of rights have indeed been put high on the scholarly agenda⁸⁸⁴ and that there is nothing new in asserting that *genuine* conflicts between fundamental rights are inherent to a legal order. However, even if this is true then it still seems that in so far conflicts of rights are acknowledged as genuine conflicts, they are more often than not conceptualized as rare anomalies or negligible incidents. Their conceptualisation as 'exceptions' in fact reveals a Platonic or 'tragedy evading' stance towards this phenomenon of genuine conflict.

A case in point is the conceptualisation of the landmark case of Miss Evans,⁸⁸⁵ as in the words of Bomhoff and Zucca this case "opened a veritable Pandora's box of incommensurability between rights in conflicts".⁸⁸⁶ At first sight this case and its

in the European Convention for the Protection of Human Rights and Fundamental Freedoms', 26.

⁸⁸³ As to the latter: think of the right of a child to know the identity of his biological father who is merely the sperm donor and the right of the father to stay anonymous.

⁸⁸⁴ Cf. Brems, 'Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention for the Protection of Human Rights and Fundamental Freedoms'; Zucca, Lorenzo, *Constitutional Dilemmas. Conflicts of Fundamental Legal Rights in Europe and the USA* (Oxford: Oxford University Press, 2007); Brems, ed., *Conflicts between Fundamental Rights*.

⁸⁸⁵ Cf. ECHR, March 7 2006, n.6339/05 (Evans. v. the United Kingdom); ECHR, April 10 2007, n. 6339/05 (Evans v. the United Kingdom). See for discussions of this case: Bomhoff, Jacco and Zucca, Lorenzo, 'The Tragedy of Ms Evans: Conflicts and Incommensurability of Rights, Evans v. The United Kingdom, Fourth Section Judgment of 7 March 2006, Application No. 6339/05', *European Constitutional Law Review* 2, 3 (2006); Alvarez, Silvina, 'Constitutional Conflicts, Moral Dilemmas, and Legal Solutions', *Ratio Juris* 24, 1 (2011); Ben-Naftali, Orna and Canor, Iris, 'Evans v. United Kingdom', *The American Journal of International Law* 102, 1 (2008).

⁸⁸⁶ Bomhoff and Zucca, 'The Tragedy of Ms Evans: Conflicts and Incommensurability of

reception indeed seem to acknowledge the possibility of genuine conflict between basic rights and to show sensitivity for the tragic dimension of adjudication. However, as we shall see in the discussion below, closer scrutiny of this case and its reception reveal that it is construed as an ‘exception’ that affirms the rule: legal rationality requires that legal conflicts between fundamental rights can generally be dismantled as merely *apparent* conflicts and as a consequence tragedy can be expelled from the legal domain as a genuinely non-legal phenomenon.⁸⁸⁷

*The Evans case*⁸⁸⁸

Natallie Evans, a woman in her thirties, met *Howard Johnston* at work. They started dating and after a while they became engaged. At a certain point Miss Evans was diagnosed with ovarian cancer and her ovaries had to be removed. Before the removal the clinic offered Miss Evans the opportunity to extract some of her eggs for in vitro fertilization, which was possible because the tumours were growing slowly. Miss Evans agreed and Mister Johnston assured Miss Evans that she did not need to consider freezing some unfertilized eggs, because he really wanted to have children with her.

Six embryos were successfully created and frozen. For medical reasons Miss Evans had to wait two years before any of the embryos could be implanted in her uterus. However, the relationship between Miss Evans and Mister Johnston ended before two years had passed. Therefore Mister Johnston did no longer want to have a child with Miss Evans and he notified the clinic that he wanted the stock of embryos to be destroyed. Miss Evans objected and claimed her right to the stock.

The applicable (English) law, the Human Fertilisation and Embryology Act of 1990, provided that either party could withdraw his or her consent at any time before the embryos were implanted. The clinic told Miss Evans that it was under a legal duty to destroy the embryos. Subsequently Miss Evans brought proceedings before the English national courts seeking an injunction requiring Howard Johnston to consent to planting of one or more of the embryos in her uterus. Both the trial judge and the court of appeal denied her request. Thereupon Miss

Rights, *Evans v. The United Kingdom*, Fourth Section Judgment of 7 March 2006, Application No. 6339/05', 424.

⁸⁸⁷ See for instance Zucca, Lorenzo, 'Conflicts of Fundamental Rights as Constitutional Dilemmas', in *Conflicts between Fundamental Rights*, ed. Brems, Eva (Oxford: Intersentia, 2008).

⁸⁸⁸ Cf. *Evans v. the United Kingdom*, Fourth Section Judgment of 7 March 2006, Application No. 6339/05'; Ben-Naftali and Canor, 'Evans v. United Kingdom'; Bomhoff and Zucca, 'The Tragedy of Ms Evans: Conflicts and Incommensurability of Rights, *Evans v. The United Kingdom*, Fourth Section Judgment of 7 March 2006, Application No. 6339/05'.

Evans went to the European Court for Human Rights (ECHR). She claimed that the United Kingdom's Human Fertilisation and Embryology Act violated her right to respect for private life and family life (art.8), the right to life (art.2) and the provision on discrimination (art. 14) of the European Convention of Human Rights. With regard to the right to private and family life, Miss Evans argued “that the consent provisions of the 1990 Act prevented her from using the embryos she and J created together, and thus, given her particular circumstances, from ever having a child to whom she is genetically related.”⁸⁸⁹

If we take these elements -symmetrical rights and the indivisibility of the good that is needed for their realisation- to be decisive for whether fundamental rights genuinely conflict, such conflicts will indeed be rare. For it will not often be the case that two opposing rights have exact equal weight while the resource necessary for their realisation is indivisible. Such a case would be that of Siamese twins where one is parasitic on the other and the judge has to decide in a dispute between the parents and the doctor about what to do, or a custody case in which a mother wants to move with her child to her (foreign) country of birth, whereas the father wants the child to stay with him or at least in the country where he lives.⁸⁹⁰ If one considers symmetry and equal weight as the exclusive cause of genuine conflicts, it is not surprising that legal scholars such as Zucca conclude that genuine conflicts between basic rights are rare.

"[W]hen we define precisely what amounts to a genuine conflict of fundamental rights, most of the cases will appear to be spurious conflicts", Zucca says.⁸⁹¹

This way of conceptualizing genuine conflicts fits Dworkin's description of what he calls 'tie' situations, in which the legal argument for one position offers exactly as good a justification for a judicial decision as does the argument for the opposing position.⁸⁹² Indeed, according to Dworkin these situations need not concern us, because they will hardly occur: “The tie result is possible in any system, but it will be so rare as to be exotic in these”.⁸⁹³

But more importantly: to conceptualize a case as one involving symmetrical rights by itself already reveals a kind of Platonic reductionism that is at odds with acknowledging the genuine plurality of values. Such a conceptualisation implies a reliance on legal commensurability and the supposed availability of a prior moral measure in terms of which the values at stake can be measured meticulously. It is in fact a way of giving primacy to the commensurans, the measure produced by ‘reflective thought’ rather than by practice.

A second ‘Platonic’ aspect of the conceptualisation of the Evans case is that a genuine conflict is considered a threat to rational judicial decision-making. The idea seems to be that genuine conflicts of rights cannot be rationally solved and since law is about rationally solving

⁸⁸⁹ ECHR, April 10 2007, n. 6339/05 (Evans v. the United Kingdom).

⁸⁹⁰ Zucca, 'Conflicts of Fundamental Rights as Constitutional Dilemmas', 24.

⁸⁹¹ Ibid.

⁸⁹² Dworkin, *Taking Rights Seriously*, 360.

⁸⁹³ ———, *A Matter of Principle*, 143.

conflicts, genuine conflicts of rights should not be accommodated within a legal order.⁸⁹⁴ This idea we find for instance in Silvina Alvarez' article on constitutional dilemma's in which she discusses the Evans case.⁸⁹⁵ She states: "as long as we can find a solution based on rational justification, the conflict is not a genuine moral dilemma or tragic choice" and "the solution reached within the framework of the legal system prevents the legal dilemma from becoming a tragic conflict in the sense of being a conflict with no solution."⁸⁹⁶

This Platonic idea also finds expression in the issue of 'forum' that often comes up in the discussion on conflicts of fundamental rights. Indeed, in relation to the Evans case Zucca and Bomhoff for instance suggest that the ECHR may have used the concept of incommensurability as a "ground on which courts can claim deference to representative institutions."⁸⁹⁷ The ECHR purportedly left the balancing to the national legislatures because there was a genuine conflict of rights and it held that no rational solution was possible. Again, this is not an idiosyncrasy of the judges in the Evans case: in discussions about conflicts of rights it is often questioned whether such conflicts should be solved through adjudication.⁸⁹⁸ Their resolution is held to belong to the domain of politics rather than that of law, as the latter is concerned with rationality and the former is more about a procedure of political legitimacy. Political bodies are generally thought to be the more appropriate authorities for 'solving' genuine conflicts, because they are democratically legitimated. A final relevant 'Platonic' aspect of the conceptualisation of the Evans case is that the qualification of its tragic character is made from a *human* point of view as opposed to a *legal* viewpoint.⁸⁹⁹ The judges in this case take great pains to distinguish between these points of view. One of the national judges stated: "In human terms, the greatest sympathy must, of course, be extended to Ms Evans, who, as a result of this case, now lacks the capacity to give birth to a child which is genetically hers."⁹⁰⁰ In a similar vein Zucca and Bomhoff state that

⁸⁹⁴ Alvarez, 'Constitutional Conflicts, Moral Dilemmas, and Legal Solutions', 68.

⁸⁹⁵ *Ibid.*, 60, 68.

⁸⁹⁶ *Ibid.*, 60,68.

⁸⁹⁷ Bomhoff and Zucca, 'The Tragedy of Ms Evans: Conflicts and Incommensurability of Rights, Evans v. The United Kingdom, Fourth Section Judgment of 7 March 2006, Application No. 6339/05', 434.

⁸⁹⁸ Cf. Gerards, J.H., 'Rechterlijke Belangenafweging in het Publiekrecht', *Rechtsgeleerd Magazijn Themis* 4 (2006), 147-159.

⁸⁹⁹ Zucca says: "all the courts made ample use of the empathetic language of human tragedy. Most of the judges explained that Ms. Evans deserved the greatest sympathy even if in the end she lost the case." Cf. Zucca, 'Conflicts of Fundamental Rights as Constitutional Dilemmas', 24.

⁹⁰⁰ See: Court of Appeal (United Kingdom) June 25 2004, N.B1/2003/2329 (Natalie Evans v. Amicus Healthcare Ltd & Others).

the legal viewpoint must be abandoned if one is to see the tragic dimension of the case: "*Stripped of all legal technicalities* [italics IvD], the plight of Ms Evans presented an obvious human tragedy."⁹⁰¹ From a human point of view one cannot deny the tragic character of the case, but from the legal point of view there is no genuine troublesome loss. Miss Evans deserves sympathy for her plight, but she has no legitimate legal claim.⁹⁰² Legally the decision is not tragic.

As said, the Evans case and its reception epitomize a Platonic way of conceptualizing genuine conflicts between fundamental rights, a way that is typical for mainstream ways of understanding such conflicts. As such it is at odds with the *fragility of rightness*. This approach sees conflicts between fundamental rights neither as limited to conflicts between symmetrical rights -not in the least because in this approach the notion of 'symmetrical rights' does not really make sense-, nor as negligible incidents. Next, for the *fragility of rightness* conflicts between fundamental rights do not put rational decision-making at risk. In the end the 'virtuous judge' will take in all relevant facts of the case, including the values that are at stake, and make an 'all things considered' rational decision.⁹⁰³

In this regard the dissenting judges in the Evans case offer a good example. Their way of judging is more or less in line with the *fragility of rightness*. They did not frame the case as a conflict between two rights with equal weight on the basis of a presumed prior measure. Rather they tried to come to a full and detailed understanding and assessment of the facts of the case. They gave priority to the particular and thereby thought it important that endorsing Mister Johnston's choice would "involve [...] an absolute and final elimination of the applicant's decision," i.e. Miss Evans would never be able to become a genetically related mother.⁹⁰⁴ The appreciation of the case by these judges also allows for the idea that the tragic character of the decision can be acknowledged from the legal viewpoint itself, rather than merely from a 'human' point of view.

⁹⁰¹ Bomhoff and Zucca, 'The Tragedy of Ms Evans: Conflicts and Incommensurability of Rights, *Evans v. The United Kingdom*, Fourth Section Judgment of 7 March 2006, Application No. 6339/05', 427.

⁹⁰² The Court of Appeal of the United Kingdom states it as follows: "[t]he sympathy and concern which anyone must feel for Ms Evans is not enough to render the legislative scheme of Sch. 3 disproportionate [...]". See: Court of Appeal (United Kingdom) June 25 2004, N.B1/2003/2329 (*Natallie Evans v. Amicus Healthcare Ltd & Others*).

⁹⁰³ This is not to deny that the grounds of the decision will to a considerable degree remain unintelligible in the sense that the judge will be unable to offer exhaustive and explicit reasons for seeing and deciding the case the way he does.

⁹⁰⁴ ECHR, April 10 2007, n. 6339/05 (*Evans v. the United Kingdom*).

To summarize: given the plurality of fundamental rights that legal orders protect, genuine conflicts between these rights should be understood as endemic to the practice of adjudication. Serving the one often comes at the cost of the other. Insofar mainstream legal thought does acknowledge genuine conflicts, their conceptualisation reveals a rather Platonic attitude that circumvents the tragic.

3.1.2 Conflicting commitments to law and values of political morality

Another category of genuine conflicts that a judge may face concerns the conflicts between his commitment to applicable settled law and to the values of political morality as they are concretely at stake.

Settled law by itself will surely not necessarily conflict with the values of political morality. On the contrary, ideally it will to a considerable degree be an articulation of these values and also give further room for their realisation, for instance by the use of open norms such as ‘reasonableness’, ‘equity’ and so on.

At the same time, the facts of a case do not order themselves in such a way that the values of political morality that a legal order (the *nomos*) aims to protect, will indeed be served and realised through the effectuation of settled law. To the contrary, the particularities of a concrete case may be such that a judge finds himself confronted with a genuine conflict between his commitment to settled law and his commitment to the values of political morality as they are at stake. In such a case he will not be able to reconcile the considerations to which these commitments give rise. In the resolution he may have to forfeit one of the commitments.

Such conflicts can for instance occur when settled law makes use of legal fictions.⁹⁰⁵ As the law is an institution that aims to regulate citizens’ behaviour in general, it will

⁹⁰⁵ Note that the term ‘legal fiction’ is used here in a looser fashion than the classical definition offered by Lon Fuller in his seminal article ‘Legal Fictions’. In this article Fuller states that a legal fiction is either (1) a statement propounded with a complete or partial consciousness of its falsity, or (2) a false statement recognised as having utility." Cf. Fuller, Lon L., *Legal Fictions* (Stanford: Stanford University Press, 1967), 9. See for illuminating articles on legal fictions: Knauer, Nancy J., 'Legal Fictions and Juristic Truth', *St. Thomas Law Review* 23 (2010); Schauer, Frederick, 'Legal Fictions Revisited', *SSRN eLibrary* (2011), 14. See for an illuminating discussion of legal fictions in the context of medical bio-technology also: Beers, Britta van, *Persoon en Lichaam in het Recht. Menselijke Waardigheid*

inherently make use of legal fictions, that is, of assumptions that do not *necessarily* hold in concrete cases, but are nonetheless considered to be legally valid. In the words of Schauer: legal fictions "are little more than the occasional vivid embodiment of the way in which any enterprise that trades in generality -which law certainly does- will wind up drawing conclusions that may not always be literally correct."⁹⁰⁶ As they are unavoidable for the regulation of society these fictions should not be seen as anomalies. Hence, a virtuous judge, possessing the virtue of justice, will be committed to applying these fictions as part of what it means to bring general considerations to bear on a concrete case. However, the concrete particularities of a case may be such that this commitment implies that the judge feels duty bound to ignore facts that at the same time he does hold to be important from the viewpoint of political morality. Ignoring these facts may then come at the price of violating values of political morality. Let me illustrate this.

The case of *Joachim Mayer*

Joachim Mayer is a boy of seventeen who was raised as a Jehovah Witness.⁹⁰⁷ At the age of sixteen Joachim got acute leukaemia. The doctors told him that blood transfusions were imperative to save his life. However, strongly committed to the ethics of the Jehovah Witnesses and supported by his parents Joachim refused blood transfusions on the basis of his right to refuse care. In reaction to this refusal the Childcare and Protection Board petitioned the court to authorize the necessary treatment, because his parents indoctrinated Joachim and as a consequence he was not able to genuinely assess his interests. Joachim was hardly if at all acquainted with other points of view than the Jehovah's doctrine and therefore the board did not consider him sufficiently competent to make a meaningful choice. In court Joachim eloquently motivated his refusal to give permission for treatment, citing by heart several passages from the bible in support of his claim that God forbids blood

en Zelfbeschikking in het Tijdperk van de Medische Biotechnologie (Den Haag: Boom Juridische uitgevers, 2009), 379-395.

⁹⁰⁶ Schauer, 'Legal Fictions Revisited', 4. In one of the previous chapters I discussed a case of consumer protection. There we saw that assumptions about the cognitive competence of citizens also form an important group of legal fictions.

⁹⁰⁷ See: Gerechtshof Amsterdam, August 31 2010, ECLI:NL:GHAMS:2010:BN7966; Rechtbank Amsterdam, March 12 2010, ECLI:NL:RBAMS:2010:BL9136.

transfusions.⁹⁰⁸ Accepting such a transfusion would amount to a sin and would break his bond with God, Joachim said. He also declared that he was fully aware that the final consequence of his standpoint would be his premature death. As a Jehovah Witness he was not genuinely troubled by the prospect of dying, because for him life on earth is but a relative matter. God promises him eternal life if he behaves like a good Jehovah Witness and fulfils his obligations towards Him.

In a case like Joachim's the judge must decide whether to authorize medical treatment and thus overrule Joachim's refusal to give his consent. The applicable law may hold the legal fiction that adolescents older than sixteen years are competent and able to make their own choices. Their consent is necessary to allow medical treatment. Nonetheless a virtuous judge may experience a genuine conflict between his commitment to (the rationale of) settled law that implies the legal effectuation of said legal fiction and his commitment to certain values of political morality that are at stake, such as the value of life and of not dying prematurely. The judge may find that he violates the latter if he indeed effectuates the legal fiction. He may 'see' that Joachim has hardly been in contact with other world views than that of the Jehovah Witnesses and that he did not genuinely form his own view of life independently of the views of his parents, that is, as a separate and autonomous person. At the same time, the judge may not feel free to make an exception to the rule that expresses the legal fiction, precisely because of the rationale of this fiction that serves formal equality, respect for the right to self-determination, and that is instrumental to efficiency. A case-by-case test whether the legal fiction of competency holds for each and every case, would undermine this rationale. Thus a virtuous judge who perceives all relevant considerations may find that he has to make a choice between genuinely conflicting commitments.

Another way in which settled law can conflict with values of political morality because of the limitations it puts on the information that may be taken into account has to do with the legal effectuation of procedural rules. Whereas substantive law directly provides the considerations that are relevant for defining concrete legal rights and duties, procedural rules prescribe how these rights should be determined. Among many other things, these rules tell us how, where and when one may file a lawsuit and how to proceed. Part of the rationale behind procedural rules is the need for efficient, fair and orderly procedures that ensure legal certainty. Statutes of limitation are part of this group of rules. However, the effectuation of these statutes may conflict with values of political morality: the facts of a case do not come ordered in a way that

⁹⁰⁸ The relevant passages in the Bible are among others: "Only flesh with its soul -its blood- you must not eat." (Genesis 9:3-4); "Abstain from ... fornication and from what is strangled and from blood." (Acts 15:19-21).

makes the effectuation of these rules perfectly harmonize with said values. The effectuation of procedural rules may thus lead to ignoring information that from the viewpoint of the values of political morality is crucial. In such a case the judge may face a genuine conflict between his commitments to reasonable procedural rules on the one hand and values of political morality on the other.⁹⁰⁹ Again, an example.

The case of Mister Hampton

During his holiday in Turkey *Mister Hampton*, a man in his late fifties, fell of his bike and ended up in coma. After he woke from his coma he suffered from aphasia, causing him serious difficulties in speaking and writing. The doctors told him that he would be unable to work as a teacher again.

It was only after some time that Mister Hampton came to think about how to continue his life. At a certain point and on advice of a lawyer he decided to file a claim for a disability benefit because he would not have any prospects on the labour market. However, partly due to a mistake of his lawyer, Mister Hampton filed his claim three weeks past the deadline set by the applicable procedural rule. The social security agency rejected his claim. Mister Hampton appealed this decision, arguing that it was an unreasonable, because disproportionate decision. His claim being overdue did not really threaten the rationale of the limitation, namely to secure a fair, efficient and orderly procedure to all citizens. He also argued his lawyer did not warn him about the deadline. According to Hampton holding him responsible for violation of the statute of limitation would lead to a disproportionate consequence that he should not be asked to bear: forfeiting his claim to the financial means necessary to lead a decent and relatively independent life.

A virtuous judge who now has to decide about the reasonableness of the decision may feel torn between conflicting commitments. On the one hand he may find that the applicable law does not allow a case-by-case assessment whether the violation of the statute of limitations undermines an orderly process or whether it leads to reasonable outcomes. On the other hand, taking all particularities into account, he may find it rather troublesome to hold Mister Hampton responsible, given what has happened to him and in view of the severe consequences. He may experience that from the viewpoint of political morality Mister Hampton still has a right to a social minimum.

⁹⁰⁹ See for instance: *Rechtbank Alkmaar*, November 17 2010, ECLI:NL:RBALK:2011:BU4978; *Centrale Raad van Beroep*, July 4 2012, ECLI:NL:CRVB:2012:BX0565; *Rechtbank Roermond*, October 5 2006, ECLI:NL:RBROE:2006:AZ6714; *Hof Amsterdam*, October 10 2002, ECLI:NL:GHAMS:2002:AV4911.

Again, this is but one example of the way in which a judge might face a genuine conflict between his commitment to effectuating procedural rules and his commitment to the values of political morality that the legal order aims to serve. Here the idea is that resolution of these kinds of conflicts is an inherent part of what the judicial task amounts to.

3.1.3 Conflicting commitments to law and the concrete embodied Other

Another category of conflicts that may give rise to a tragic legal choice are those between the judge's commitment to law and his commitment to the right to respect of the concrete embodied citizen.

Earlier, in chapter seven I discussed this right to respect in the context of an ethical postmodern approach to adjudication based upon Levinas' 'ethics of alterity'.

Although I rejected this approach, the *fragility of rightness* does take the ethical dimension of the concrete encounter between the judge and the citizen participating in the proceedings on board, particularly through the virtue of humanness and the concept of civic friendship.⁹¹⁰ If the judge is both virtuous and a civic friend -albeit qualified by his viewpoint as a judge-, then he will also be committed to honouring the concrete good of the concrete citizen. In effectuating settled law, legal principles and values of political morality the judge should also make a genuine effort to limit the violations of the concrete interests of the embodied citizen. More positively put, it means that as a requirement of reciprocity the judge takes the concrete good of the citizen partaking in the proceedings into account when exercising his discretion. Ideally a judicial decision as a decision by a civic friend can be understood as an expression of well-wishing by the judge.

However, again, as a virtuous judge is a just judge, he is also committed to settled

⁹¹⁰ More specifically, I rejected this approach because it does not give a satisfactory account of how it can be distinguished from a sceptical approach to law. It does not give an answer on how judicial decisions can be justified at all. That is, at least if we want 'justification' to have any substantial meaning which minimally entails that some decisions can be said to be 'better' than others. Also, I asserted that this postmodern approach does not make clear how to distinguish between a *judicial* decision and any other kind of decision that is used to legitimize the exercise of state power. It does not have a clear answer as to the role of law in the kind of judging it proposes.

law. Therefore such a judge may face situations in which the generality of law and the singularity of the good of a concrete citizen are irreconcilable. In such a situation the judge will have the impossible task of treating the citizen before him “both as equal and as entitled to the symmetrical treatment of norms, and as a totally unique person who commands the response of ethical asymmetry.”⁹¹¹ Such conflicts are not necessarily due to mistakes in the law or in the legal system and hence they cannot by definition be prevented or resolved. They belong to the very nature of law as having to deal with both the general and the particular.⁹¹² The case of *Mister Wood* may be an illustration.

The case of *Mister Wood*

Mister Wood is a man in his seventies, married and father of three and grandfather of two.⁹¹³ During the Second World War he fought against the Nazis, was captured and spent two years in a concentration camp. Since then Mister Wood suffered from a posttraumatic stress syndrome. At the same time he was doing relatively well in life. He decided not to think and speak about his war experiences and refused treatment because he did not believe that psychiatrists could really help.

However, things started to go wrong when his wife got Alzheimer. She got very suspicious and read Mister Wood’s behaviour as proof that he was seeing somebody else. Mister Wood tried hard to convince her of his innocence and that he loved only her, but to no avail.

According to the doctor the suspicious and even paranoid attitude of Mrs. Wood was due to her Alzheimer. After Mrs. Wood insisted that she wanted a divorce, Mister Wood became deeply stressed and emotionally instable. He desperately tried to convince his wife that a divorce would not be the right solution, but in vain. As Mrs. Wood indeed started to file for a divorce, Mister Wood lost all hope and came to think that it would be best to kill his wife and commit suicide. A few days after having written his testament, Mister Wood indeed killed his wife by stabbing her in the chest and suffocating her with a cushion. He thought this to be the least painful way. He subsequently took an overdose of sleeping pills, loaded his wife’s body in his car and drove to a canal, intending to drive his car into the water. But Mister Wood fell asleep and the police found him in his car, still alive.

Mister Wood stood trial for murder and the public prosecutor demanded twelve years of imprisonment. In court Mister Wood declared that he felt extremely guilty for having taken the life of the mother of his children, the grandmother of his grandchildren, but that he was

⁹¹¹ Douzinas, 'Law and Justice in Postmodernism', 214.

⁹¹² Cf. Schmidt, 'Can Law Survive: On Incommensurability and the Idea of Law', 151.

⁹¹³ Cf. Rechtbank Middelburg, August 25 2011, ECLI:NL:RBMID:2011:BR5781.

extremely desperate and had not seen another way out because of Mrs. Wood's Alzheimer. In such a case a virtuous judge who at the same time deals with the case as a civic friend will not 'hide' behind legal rules and principles. Giving Mister Wood due respect he will try to decipher the story of Mister Wood and to consider his good. Arguably, in his confrontation with Mister Wood the judge may become convinced that he really loved his wife and that he indeed acted out of anxiety over the continuous paranoid behaviour of his spouse. In view of the psychiatric reports on Mister Wood he could come to the conclusion that his behaviour may at least to some extent be explained by his traumatic war experiences for which he never received treatment. The judge may also come to 'see' that Mister Wood suffers tremendously because of the death of his wife and his feelings of guilt towards her and towards their (grand)children. Confronting Mister Wood in all his particularity the judge may come to experience that the ethical demand for respect implies that he really should not sentence Mister Wood to imprisonment, and that given his age and bad physical condition imprisonment would not make sense. During the criminal proceedings it also became clear that Mister Wood has a tumour in one of his lungs. To sentence Mister Wood to imprisonment would merely add to Mister Wood's suffering and it would mean that he would not be able to mend his relation with his (grand)children. The virtuous judge takes these aspects as legal considerations that he cannot simply ignore or dismantle as 'non-legal' factors. However, he will also feel responsible for upholding criminal law and public norm endorsement. He may think that it would be unfair to others who were sentenced for killing their spouses and that society would not approve if Mister Wood were to go free. To act upon the demand for respect that he experiences as a civic friend would in another sense mean to jeopardize the value of justice and his commitment to settled law and its background principles. It would possibly violate the legitimate claims of the 'third', i.e. the public at large and perhaps those of other citizens who have committed similar crimes.⁹¹⁴ Save for the ethical demand that the judge experiences, he may have difficulty to find an objective reason to treat the case of Mister Wood as an exception. As a consequence the judge can feel torn between his judicial commitments, since honouring one will mean to forego the other. This case is not isolated, but one that epitomizes an inherent conflictual aspect of the practice of adjudication. The concrete good of a particular citizen and his legitimate claim to respect for his concrete good can genuinely conflict with the dimension of generality that also characterizes the law.

⁹¹⁴ In this kind of case different dimensions of 'time' are involved. Where the commitments that the judge experiences towards the concrete embodied citizens relate to the 'here and now' of judgment, the commitment to the generality of law points to the past and to the future. See Douzinas, 'Law and Justice in Postmodernism', 219.

3.1.4 Conflicting commitments due to epistemic uncertainty

The last category of genuine conflicts that may give rise to tragic legal choices is one that puts the categories discussed above in perspective. It adds a layer to them, so to say. For the categories of conflicts that were designated so far the determinacy and hence the intelligibility of the values involved was assumed. However, if we give primacy to practice, this assumption cannot be categorically maintained. We have no reason whatsoever to assume that the practical world will always allow a virtuous and civic friendly judge to perceive the legal bearing of a concrete case at the moment of choice. We must take seriously that in the practical world “it is immensely difficult to see clearly”, as MacDowell has put it.⁹¹⁵

Because of all his qualities a judge may be in a relatively 'good condition' to perceive well, nonetheless he can experience serious difficulties in identifying the legal bearing of the case.⁹¹⁶ He can be confronted with a situation that appears unintelligible and beyond what he can make sense of. This will not necessarily be due to his lack of legal reflection or his lack of knowledge about technicalities that can be completed by expert-knowledge. In such a situation of radical epistemic insecurity a responsible judge will be confronted with a genuine conflict. On the one hand his sense of epistemic insecurity will give him a strong reason not to make a judicial choice at all. On the other hand, it is precisely part of his professional duty to make such a choice, and to do so to the best of his ability -he cannot just flip a coin or refuse to decide. Of course, these kinds of conflicts are most likely to arise in domains of law where reality itself is indeterminate or uncertain due to all kinds of factors, such as the unpredictability of consequences of certain choices, or the limited knowledge about the people or objects involved that should be judged about. Let me illustrate this by the cases of *Joan Gibbs* and *Mary Jones* that we both already discussed in previous chapters.

⁹¹⁵ McDowell, *Mind, Value & Reality*, 72. We find this theme also and very prominently in Iris Murdoch's writings on morality. Cf. Murdoch, 'Vision and Choice'; ———, 'The Idea of Perfection'.

⁹¹⁶ Here it is again worth noting the difference between 'perception' as such and moral perception. Where, other things equal, good conditions of and for the eye suffice for a clear perception, this is not the case for practical wisdom or moral perception.

The case of *Joan Gibbs*⁹¹⁷

Joan was prosecuted for murdering her three babies immediately upon birth. Joan declared that she was scared that her parents, her husband and the villagers would find out about her being made pregnant by a colleague, not being her husband. In a case like that of Joan a judge may well have difficulty to 'see' clearly. On the one hand he may be sensitive for the facts that fit the picture of a heartless killer who acted in a callous, calculating and cold-blooded manner and was fully aware of what she did. On the other hand through his attention for other characteristics of the case -that Joan wanted the corpses of the babies close by and therefore hid them in her parents' house- the judge may also be struck by another image. This could be the image of a woman who has repeatedly given birth in extreme solitude and killed out of her own pathological desperation and insecurity. If forensic psychiatrists also disagree about how to diagnose and evaluate the personality of the accused, the judge may be knee-deep in doubts. He may feel torn between not wanting to make a choice because of a lack of epistemic certainty and his judicial duty to make a choice.

The case of *Mary Jones*⁹¹⁸

Mary Jones was the mother who overcame her addiction and wanted to start anew and be a good mother. However, the Youth Care Office claimed that it was in the interest of the children to let them stay with their grandparents to secure stability and their future. In such a case a virtuous and civic friendly judge -who is well informed by child psychologists- may be in serious doubt about whether all the values of political morality and settled law that are at stake in fact point to a structural termination of Mary's parental rights. Take for instance a criterion like 'the interest of the child' that allows the limitation or even the termination of parental rights. In spite of the help by experts it will sometimes be difficult for a judge to know it is indeed in the interest of a child to limit or terminate these rights. Among the many unknown and uncertain factors are the long-term effects on the development of the children of not having a bond with their biological parents, based on a daily relationship. Neither is it clear how this would compare to the prospect of children living with their parents in a situation of relative neglect. So, in this case the epistemic insecurity follows from the fact that the consequences of the judge's choice will only become clear long after the decision is made. If a judge is fully aware of this, he may be likely to experience a genuine conflict between his duty of having to make a choice and his reluctance to take a drastic decision of which the bearing is not clear.

So far the different categories of conflicts for which the concept of tragic legal choice may be relevant. These conflicts are not due to injustices in settled law, mistakes in

⁹¹⁷ See chapter nine.

⁹¹⁸ See chapter seven.

legal reasoning or vices of the judge, but due to the very nature of the practical world. Hence, rather than putting our hopes in better laws or more judicial reflection to either circumvent or exhaustively resolve such conflicts, it is more realistic to accept that conflict is part and parcel of the moral nature of adjudication.

3.2 Moral remainders and tragic responsive reactions

Thus far I have explained that a tragic choice is characterized by a genuine conflict. Yet there is more to a tragic legal choice than a judge facing such a conflict. The actual *tragic* character of such a choice has to do with the nature of and responses to its consequences.

Earlier in this chapter I referred to the complex notion of *hamartia* that figures in Greek tragedy and its reception. It refers to a wrongdoing that is not due to a clear mistake or a serious moral flaw of the agent. The ‘wrong’ is understood as constituted by a complex interplay between the character of the agent, his actual choice and circumstances and influences lying outside the agent’s control.

Bernard Williams’ notion of a moral remainder can be of help for our understanding of the wrong involved in a tragic legal choice, as it points to a genuine disvalue that results from an in itself justified choice.⁹¹⁹ In this vein a tragic legal choice can be seen as a right legal choice that nonetheless comes with a genuine and legally relevant moral cost. This moral cost can, but need not necessarily be fully clear for the judge at the moment of choice.⁹²⁰ It may also appear *after* the actual legal choice is made.

A tragic legal choice thus points to an inescapably morally ambivalent side to adjudication. For even if the *nomos* is in order and a judge fulfils his professional role adequately, then the resulting legal choice can still lead to a morally disturbing outcome.⁹²¹ In case of a tragic legal choice a judge will morally ‘stain’ or ‘pollute’ himself, he will make dirty hands⁹²² without the actual legal choice being wrong.⁹²³

⁹¹⁹ Williams, *Moral Luck. Philosophical Papers 1973-1980*, 61.

⁹²⁰ That one’s choices can be morally troublesome due to factors unknown at the moment of choice is of course radically epitomized in the person of Oedipus who did not and could not know the actual bearing of his deeds at the relevant moments.

⁹²¹ Cf. Williams, *Moral Luck. Philosophical Papers 1973-1980*, 37, 72, 60-64, 175, 179.

⁹²² Hursthouse, *On Virtue Ethics*, 75. The term ‘dirty hands’ stems from a play by Jean Paul Sartre and has been famously worked out for the domain of political philosophy by Michael

Consequently, as this shows, the concept of a tragic legal choice suggests that there is moral luck involved in adjudication as the actual moral character of a legal choice will be partly determined by factors that are beyond the judge's and a legal order's control.⁹²⁴ Similar to the protagonists of Greek tragedies, judges will “always risk [...] being trapped by their own decisions.”⁹²⁵ Being engaged in practical matters, they have put their “stake on what is unknown and incomprehensible [...]”⁹²⁶ As said, a tragic legal choice also concerns the reaction to the consequences of such a choice. As a moral remainder by and in itself exerts a claim to attention, a tragic legal choice opens the door for the notion of ‘tragic responsive reactions’.⁹²⁷ In Greek tragedy these reactions can for instance be found in the responses of the protagonists to the consequences of their deeds and in the comments of the Chorus on these

Walzer. See: Walzer, Michael, 'Political Action: The Problem of Dirty Hands', *Philosophy & Public Affairs* 2, 2 (1973).

⁹²³ Cf. Greenspan, Patricia S., 'Guilt and Virtue', *The Journal of Philosophy* 91, 2 (1994), 63; Williams, *Moral Luck. Philosophical Papers 1973-1980*, 74.

⁹²⁴ See for a discussion of moral luck: Nelkin, Dana K., 'Moral Luck', in *The Stanford Encyclopedia of Philosophy*, ed. Zalta, Edward N. (Stanford: Metaphysics Research Lab, Stanford University, 2013); Williams, *Moral Luck. Philosophical Papers 1973-1980*, 20-40; Nagel, Thomas, *Mortal Questions* (New York: Cambridge University Press, 1979).

⁹²⁵ Vernant and Vidal-Naquet, *Myth and Tragedy*, 44. See for a discussion of moral luck in relation to ancient philosophy and Greek tragedies: Nussbaum, *The Fragility of Goodness. Luck and Ethics in Greek Tragedy and Philosophy*.

⁹²⁶ Vernant and Vidal-Naquet, *Myth and Tragedy*, 44.

⁹²⁷ For illuminating discussions of what I call 'tragic responsive reactions' see for instance: Bauman, Peter and Betzler, Monica, eds., *Practical Conflicts: New Philosophical Essays* (Cambridge: Cambridge University Press, 2004). Williams, 'Ethical Consistency'. Landman, Janet, *Regret: The Persistence of the Possible* (Oxford: Oxford University Press, 1993). Cunningham, Anthony P., 'The Moral Importance of Dirty Hands', *The Journal of Value Inquiry* 26 (1992). Wijze, 'Tragic Remorse: The Anguish of Dirty Hands'. Greenspan, Patricia S., *Practical Guilt: Moral Dilemmas, Emotions, and Social Norms* (Oxford: Oxford University Press, 1995). Williams, 'Liberalism and Loss'; Montague, Phillip, 'Rights and Duties of Compensation', *Philosophy & Public Affairs* 13, 1 (1984).

selfsame consequences and responses.⁹²⁸ Greek tragedies convey that reactions such as feelings of guilt, regret or anxiety can be rational responses to in itself excusable deeds. Contrary to the Platonic view these responses are not or not necessarily considered a sign of irrationality, misunderstanding or a pre-reflective point of view. In the same vein, the concept of a tragic legal choice suggests that a range of responses to the remainder of a legal choice can be seen as rational and legally pertinent given the moral and legal bearing of the loss involved. Such reactions are acknowledgments that the losing claim has not been sufficiently honoured by the legal choice and that this very fact is morally disturbing.⁹²⁹ They are envisaged as part and parcel of the legal viewpoint itself, rather than as unreasonable, subjective, ‘non-legal’ or peripheral to the actual judicial decision.

Tragic responsive reactions can be merely internal responses -a judge may feel extremely confused or burdened by a particular choice-, but they can also be expressed towards ‘losing’ citizens. In the latter case, they can involve explicit acknowledgments of a certain loss in legal sentences or during court-sessions, attempts to avoid similar conflicts in the future -for instance through suggestions to the legislator or policymakers to change current laws or policies-, or offerings of (financial) compensation.⁹³⁰ In so far these reactions are indeed expressed to the

⁹²⁸ Cf. Nussbaum, *The Fragility of Goodness. Luck and Ethics in Greek Tragedy and Philosophy*, 44. That tragedies also suggest a particular emotional reaction of the audience because of certain ‘consequences’ of the protagonist’s deeds is of course clear in Aristotle’s definition of tragedy where he states that tragedy (as a literary genre) typically evokes pity and fear. Cf. Aristotle, *Poetics*, 10.

⁹²⁹ Arguably one could compare the judge who reacts responsively to the moral remainder with a rag picker who is “salvaging the remains”, a figure that we discussed in the chapter dealing with a postmodern approach to adjudication. For in the end a judge who is responsive to the moral remainder caused by his decisions does a kind of ‘dirty’ work, paying attention to the troublesome limits of his choice and to the ‘garbage’ left by his choice. Cf. Cornell, *The Philosophy of the Limit*, 76.

⁹³⁰ For an interesting discussion of ‘wetgevingsbevelen’ -judicial orders for particular legislation or policy- in the Netherlands see: Boogaard, Geerten, *Het Wetgevingsbevel: Over Constitutionele Verhoudingen en Manieren om een Wetgever tot Regelgeving aan te Zetten* (Oisterwijk: Wolf Legal Publisher, 2013). Boogaard (p. 74-85) locates these ‘wetgevingsbevelen’ or orders in the tradition of what in the United States has been qualified

'losing' citizen, they can also be seen as a way for the judge to show due respect to the losing citizen. Such a reaction expresses that the losing citizen is asked to bear a burden that the judge does not want him to bear if he takes this citizen seriously. Through the lens of the concept of a tragic legal choice all kinds of 'obiter dicta' may qualify as tragic responsive reactions. Possibly they can be understood as the moral - and thus not merely rhetorical- art of talking to the loser. In any case such dicta should not too easily be taken for a merely subjective caprice of the judge or negligible legal phenomena, for as said, they can be rational responses to the morally ambivalent character of the legal choice. We can learn from these as they can be expressions of the moral bearing of a losing claim. Recall for instance the case of Mister Wood who killed his wife and was sentenced to imprisonment. It may well be that a virtuous judge, after he made the actual decision, expresses in his sentence that in this case criminal law reaches its limits and that the actual outcome is morally disturbing because of the plight of Mister Wood.⁹³¹ Through such a reaction the judge can express that in spite of having made a choice to the best of his ability, he acknowledges that the concrete good of Mister Wood has not been wiped from the 'legal field'.⁹³²

Thus, through the concept of a tragic legal choice, the *fragility of rightness* sheds light on what can be called the 'phenomenology of the aftermath' of judicial decision-making.⁹³³ It takes this phenomenology to be part and parcel of the moral nature of adjudication. As such the concept of a tragic legal choice may have explanatory potential for a range of legal phenomena that otherwise will remain unnoticed or will

as 'public law litigation' in which the improvement of laws and policies form the kernel of the legal dispute at hand. See for the introduction of the notion of public law litigation: Chayes, A., 'The Role of the Judge in Public Law Litigation', *Harvard Law Review* 89, 7 (1976).

⁹³¹ We indeed find this kind of tragic responsive reaction in the judgment from which I have drawn for my discussion of the case of Mister Wood. See: Rechtbank Middelburg, August 25 2011, ECLI:NL:RBMID:2011:BR5781.

⁹³² Nussbaum, 'Aeschylus and Practical Conflict', 243.

⁹³³ Bagnoli, Carla, 'Phenomenology of the Aftermath: Ethical Theory and the Intelligibility of Moral Experience', in *New Trends in Moral Psychology*, ed. Tenenbaum, Sergio (Alphen aan den Rijn: Kluwer., 2007).

be ignored for being negligible, non-legal or legally peripheral aspects of judicial decision-making. This idea of a tragic responsive reaction also implies that the *fragility of rightness* opens a relatively broad domain for moral and legal evaluation (and hence also for legal research). If we accept the relevance of the concept of a tragic legal choice, then the moral quality of adjudication also depends on the way judges respond to the consequences of their decisions. Of course, whether and how a judge will respond to a moral remainder will inherently depend on his judicial character. Such reactions can by definition not be prescribed as they imply a certain emotional state. That is, one cannot ‘reason’ for the ‘tragic’; rather, tragedy is experienced through the emotions that indicate loss.⁹³⁴ Hence, and inescapably: different virtuous judges will react differently to the plight of the ‘losing’ citizen.⁹³⁵ I will illustrate how a ‘tragic responsive reaction’ may work out in a concrete legal case by the following case:

The case of *Patricia Bateson and her father*⁹³⁶

Patricia Bateson is a seventeen-year old adolescent who has been seriously and persistently suicidal due to a severe depression. Patricia lives with her father, Tom Bateson. Her mother passed away when she was young. Out of the fear that Patricia would commit suicide, her father rarely leaves the house. However, the tremendous effort to keep his daughter alive starts to exhaust him. Eventually he decides to submit a request for her compulsory admission in a psychiatric hospital. He seeks relief for himself, but he also thinks that intensive treatment is the only way to avert Patricia’s suicide.

‘All things considered’ and on the basis of settled law a judge may choose not to authorize the admission. He may assign decisive weight to the principle of subsidiarity, which says that compulsory admission is only allowed if there are no less intrusive ways of averting the danger. Moreover, if the psychiatric hospital in question does not offer constant care and surveillance, the judge has reasons to doubt whether compulsory admission can in fact prevent Patricia’s suicide.

At the same time, on the basis of his understanding of the fundamental rights that the legal order protects, of his understanding of ‘fatherhood’ and of ‘suicide’, the judge may hold that the interest of the father -the compulsory admission of his daughter- is legitimate. As part of

⁹³⁴ See for a theory about the (important) role that emotions have for legal decision-making: IJzermans, Maria, *De Overtuigingskracht van Emoties bij het Rechterlijk Oordeel* (Den Haag: Boom Juridische uitgevers, 2011).

⁹³⁵ Cf. Stocker, *Plural and Conflicting Values*, 93.

⁹³⁶ Cf. Rechtbank 's-Hertogenbosch, March 31 2010, ECLI:NL:RBSHE:2010:BL9792.

his judicial role he may therefore feel bound to address the troublesome character of the remainder that his choice leaves. He may for instance explain, in addition to the actual decision, why he holds that the father indeed has a legitimate claim to some relief from the responsibility of preventing his daughter's suicide. The judge may also suggest that it would be desirable if policymakers and legislators would reflect on the precarious position of parents living with a seriously suicidal child, for instance by arranging specific provisions for such adolescents. These considerations may be understood as 'tragic responsive reaction' because these are ways in which the judge tries to adequately address the troublesome remainder of his choice.

Before concluding this section it is worth noting that the introduction of the concept of 'a tragic legal choice' is not tantamount to promulgating a 'taximeter-sensibility' for the consequences of legal decisions. For instance, when a local administrative agency denies a citizen a permit to build a shed in his garden and an administrative court authorizes this decision, such a choice is *-ceteris paribus-* not tragic. A tragic legal choice suggests a loss of *high* value, not merely a loss of any kind of interest. If the interest of the losing citizen is merely peripheral to a good life, if it is temporarily affected rather than structurally, if the interest can easily be served by other means, or if the loss is caused by a clear 'fault' of the losing party, then a virtuous and civic friendly judge is not likely to experience this loss as a moral remainder.⁹³⁷

In the end, the concept of a tragic legal choice implies that the remainder is a moral loss that a virtuous judge who decides as a civic friend would experience as a genuine disvalue, committed as he is to settled law and its background values of political morality and to the concrete good of the parties involved.

4 Tragic legal choice in practice. Arguments for and against

In the previous chapter we have seen that the *fragility of rightness* is not meant to be a normative action-guiding approach to judicial decision-making. This is a fortiori the case for the concept of a tragic legal choice. Tragedy cannot be (analytically) argued

⁹³⁷ Cf. Nussbaum, *The Fragility of Goodness. Luck and Ethics in Greek Tragedy and Philosophy*, 27-28. Western constitutional democracies and international human rights treaties do of course give hints as to what kinds of values qualify as high and hence can be at stake in a tragic legal choice. The interests that are protected by these rights are generally considered to be crucial for leading a good life. But, again, from the viewpoint of the *fragility of rightness* explicit, discursive enumerations only serve as rules of thumb.

for, nor can it be imposed. Yet, what we can say is that if the concept of a tragic legal choice would have a (more) stable place in the practice of adjudication, including the practice of legal scholars dealing with issues of adjudication, it would improve said practices.

One advantage of accommodating this concept is that it can enhance the integrity of both judges and legal orders as a whole, at least if we take this integrity to mean staying committed to the moral backbone of the legal order. The concept offers conceptual room for judges to acknowledge that even if they make a right choice, it might involve a genuine wrong. When anchored in practice it can counterbalance the tendency to rationalize legal decisions by denying the moral and legal import of the losing claim, a tendency that is stimulated by mainstream theories of adjudication⁹³⁸, but is also encouraged by human psychology.⁹³⁹ Being in a state of conflict and hence experiencing a sense of anxiety is something that people tend to avoid.⁹⁴⁰ Of course, the concept of a tragic legal choice does not change this, but it does enable judges to more honestly deal with the moral nature of the choices they face.

Next, as I indicated before, the concept of tragic legal choice also has practical value where it comes to the realisation of the principle of liberal reciprocity. This principle minimally entails that each and every citizen should have a reason to bear the burden that the exercise of state-power brings. In the previous chapter I argued that a virtue-ethical approach complemented with the concept of civic friendship could at least to some extent live up to this demand. Still the requirement of reciprocity is difficult to fulfil in case of a genuine conflict between judicial commitments. Not only because in such cases it will largely depend on the person of the judge what choice he will make, but also because the choice will possibly come with a genuine loss. With the concept

⁹³⁸ Earlier we have seen that theories of adjudication that cannot account for genuine moral losses other than as a result of a legal mistake or an injustice, such as Dworkin's theory of adjudication, invite judges to categorically dismantle and deny the rationality of the claim of the losing party.

⁹³⁹ Cf. Freud, Anna, *The Ego and the Mechanisms of Defence* (London: Karnac Books, 1966 (1937)).

⁹⁴⁰ Cf. Nussbaum, *The Fragility of Goodness. Luck and Ethics in Greek Tragedy and Philosophy*, 50. ———, 'The Costs of Tragedy: Some Moral Limits of Cost-Benefit Analysis', 1016.

of a tragic legal choice it will be more likely that losing citizens will be respected in their experience of having to bear a genuinely troublesome cost.⁹⁴¹ A tragic legal choice offers judges at least some support for expressing that the claim of the losing party is legitimate.⁹⁴² In any case, tragic responsive reactions are ways of giving a ‘losing’ citizen a witness to the loss, the kind of witness that mainstream theories of adjudication tend to repress.⁹⁴³

What is more and as we have already seen, an advantage of the accommodation of the concept of tragic legal choice is that it can explain certain legal phenomena that otherwise will be dismissed as mere ‘anomalies’ or arbitrary incidents that may be ignored. Without the concept of tragic legal choice it will be difficult to *coherently* account for all kinds of responses (emotional or practical) that judges do in fact give after their actual decision or in relation to it.⁹⁴⁴ The concept of a tragic legal choice offers a conceptual foothold for such responses.

In addition, allowing conceptual room for the possibility that legal choices have a tragic character advances the moral progress of a legal order. Greek tragedy has shown that it often takes the shock of pain to rightly appreciate the moral bearing of a situation or a choice. Wisdom comes through suffering, as a famous comment made by the chorus in Aeschylus' *Oresteia* says.⁹⁴⁵

In a similar vein the painfulness of tragedy can inform the judge about the nature of the case he confronts. Without the ‘pain’ that a tragic choice brings, the judge and the legal order as a whole may remain ‘blind’ to certain morally relevant aspects of its

⁹⁴¹ Singer, Joseph W., 'Normative Methods for Lawyers', in *Harvard Public Law Working Paper* (Cambridge, US: Harvard Law School, 2008), 948-950.

⁹⁴² Cf. Williams, *Moral Luck. Philosophical Papers 1973-1980*, 37.

⁹⁴³ Cf. Wolcher, *Law's Task. The Tragic Circle of Law, Justice and Human Suffering*, 221.

⁹⁴⁴ For instance, the fact that an administrative agency offers compensation to citizens for an in itself legally right decision of a public agency is difficult to understand without conceiving the loss as a genuine moral remainder. See for a discussion of compensation for in itself legally right law policy: Hennekens, H.Ph.J.A.M., 'Nadeelcompensatie: Wanneer en Waarom?', *De Gemeentestem* 2000 (2000).

⁹⁴⁵ Cf. Kaufmann, *Tragedy and Philosophy*, 187. As to one of the protagonist in Sophocles' *Philoctetes* Nussbaum states that “Philoctetes does not know what it is to respect another person’s pain until he, too, is made to cry in pain”. Nussbaum, 'Victims and Agents. What Greek Tragedies can Teach us about Sympathy and Responsibility'.

own practice. The concept, and connected to it the 'tragic responsive reactions', can help to 'refresh' a legal order, can lead to new insights and possibly to changes in actual laws and policies. Hence, in case of a tragic legal choice it may well be that the 'drama' will often be written 'off court' and in the dialectical process between all legal and political institutions that are concerned with the realisation of values of political morality.⁹⁴⁶

Finally, the concept of tragic legal choice adds to the self-critical potential of both law and adjudication. The concept expresses law's grief about its own limitations that cannot be surmounted or overcome. Precisely because it sheds light on the moral remainders that result from legal choices, the concept prevents an unquestioning attitude towards the practice of adjudication. As such it can be an important antidote against the potential self-congratulatory and morally self-reassuring character of notions of 'rightness' and 'justification'.

In addition to these advantages of acknowledging the tragic character of adjudication two objections remain to be discussed. These are the objections that we already considered in the chapter on a post-modern approach to adjudication. One is the 'Hamlet objection' that says that knowledge about the troublesome character of adjudication leads to incapacitation and inertia of judges. The second objection is that sensitivity for the tragic leads to sentimentalisation of the legal order.

Where the postmodern approach proved vulnerable to these objections, I think the *fragility of rightness* is not. First of all, the *fragility of rightness* does not mean to prescribe tragic consciousness, nor does it suggest that each and every judicial choice is tragic.⁹⁴⁷ The concept aims to first and foremost make sense of a phenomenology that already exists. The dangers of inertia and sentimentalisation are avoided through the virtuousness of the judge. The *fragility of rightness* relies on the virtuous judge to respond in a judicially wise way to the losses resulting from his decisions. This in any case means that the judge will have sufficient courage to take decisions, even though he is fully aware of the troublesome nature of his actual choices. Courageous judges

⁹⁴⁶ Cf. Nussbaum, 'The Costs of Tragedy: Some Moral Limits of Cost-Benefit Analysis', 1013. Again, see for an illuminating discussion of the role of the judiciary for the improvement of laws and policies: Boogaard, *Het Wetgevingsbevel: Over Constitutionele Verhoudingen en Manieren om een Wetgever tot Regelgeving aan te Zetten*.

⁹⁴⁷ Wijze, 'Tragic Remorse: The Anguish of Dirty Hands', 470.

are able to be honest about the conflictual character of the case and to nonetheless make a choice. Also, a judicially wise judge will take care that the loss that is caused by his decision is not unwarrantedly sentimentalized or exaggerated. Through the judicial virtues the judge will be able to reasonably distinguish between mere losses and tragic losses. Again, the *fragility of rightness* does not downplay the importance of reason for adjudication. By focusing on the tragic it merely aims to give expression to the inherent limits of viable human aspirations in relation to law and adjudication.

5 The Fragility of Rightness and the rule of law

To conclude this exposition of the *fragility of rightness* we still need to more directly discuss whether and how this approach to adjudication can live up to the ideal of the rule of law, one of the ideals that constitutes political morality in Western constitutional democracies. “The Rule of Law is one star in a constellation of ideals that dominate our political morality,” to quote Jeremy Waldron.⁹⁴⁸

This ideal addresses the ongoing concern that the exercise of state power may boil down to one group of people ruling another group of people, leaving the latter potentially vulnerable, un-free and coerced.

However, the concept of the rule of law is obviously highly contested. In the course of history contrasting meanings have been assigned to the concept by citizens, lawyers and (legal) theorists and philosophers. One could indeed say that “[t]here are almost as many conceptions of the rule of law as there are people defining it.”⁹⁴⁹

This is not the place to go into those discussions. Rather, I will confront the *fragility of rightness* with one straightforward demand: that the exercise of state-power, also in the form of adjudication, should be based on and bound by rules that are clear, general, public, prospective and relatively stable.⁹⁵⁰ As Brian Tamanaha has put it: “The rule of law, at its core, requires that government officials and citizens are bound by and act consistent with the law.”⁹⁵¹

This requirement, which can be qualified as rule by law, formal justice, legality, or in

⁹⁴⁸ Waldron, Jeremy, 'The Rule of Law and the Importance of Procedure', in *New York University Public Law and Legal Theory Working Papers* (New York: New York University School of Law, 2010), 1.

⁹⁴⁹ Cf. Tamanaha, *On the Rule of Law: History, Politics, Theory*, 4.

⁹⁵⁰ ———, 'A Concise Guide to the Rule of Law', 3.

⁹⁵¹ *Ibid.*

the words of Rawls as “justice as regularity”⁹⁵², is of course not an end in itself, but an important warrant for the protection of citizens’ liberties, for legal certainty and against abuse of power. Ruling by law “allow[s] people to plan their activities with advance knowledge of its potential legal implications”.⁹⁵³ If a state governs by rules it provides a ground for legitimate expectations, or so is the idea. From this perspective it is the case that even if laws are unjust it is still considered a good that they are general, public and consistently applied and that citizens can plan their lives and activities accordingly.⁹⁵⁴

When we take this requirement strictly, the *fragility of rightness* does not live up to it. That is, it understands adjudication as a practice in which the exercise of state-power is primarily determined by people and not by rules. In this approach the outcomes of legal proceedings are the result of how a particular judge perceives and qualifies the particularities of the concrete case and how he weighs the considerations he finds pertinent for that case. What is more, the *fragility of rightness* allows for judicial decisions to be ‘inconsistent’: in similar cases two ‘opposite’ decisions can be right and even in one and the same case inconsistencies may arise: a right legal decision can nonetheless imply wrongdoing by the judge. This surely makes predictions for future cases problematic, to say the least. The ‘outcomes’ that the *fragility of rightness* allows for cannot sensibly be reduced to a set of rules or principles in the sense that they can all be considered as the implications of these rules and principles for a concrete legal case.

In addition, the concepts that the *fragility of rightness* proposes all suggest an important role for the judge’s emotional and affective state, although to a different degree. That is, these concepts indicate that the moral quality of adjudication is partly secured by judges having the right attitude, emotions and affections. But these aspects of the judge can by definition not be regulated by means of rules or principles, although they at the same time do and must influence the decisions that are made. Therefore, this too is a reason why the *fragility of rightness* cannot live up to the formal requirements of the rule of law.

At the same time, the *fragility of rightness* can relate to the concern underlying the

⁹⁵² Rawls, *A Theory of Justice*, 207.

⁹⁵³ Tamanaha, *On the Rule of Law: History, Politics, Theory*, 94.

⁹⁵⁴ Rawls, *A Theory of Justice*, 51.

requirement of legality or formal justice, i.e. the prevention of arbitrary exercises of state-power and connected to this respect for the autonomy or agency of citizens. As to the first: by proposing a range of judicial virtues the *fragility of rightness* can at least offer an answer as to why the decisions that are made by virtuous judges are not arbitrary.

Moreover, by its focus on the virtues and civic friendship the *fragility of rightness* relies on the judge drawing upon a shared social context in which mutual expectations arise that, if possible, are also acknowledged. Having the judicial virtues and the disposition of a civic friend suggests that judges in trying to honour the particular, will deploy a range of ‘thick concepts’ that are highly concrete and that have a ‘contour’, a locally intelligible elaboration with which citizens are therefore also familiar. Ideally citizens can thus make ‘sense’ of the decisions of judges relatively easily, and as such they are able to relate to these decisions, also in terms of their own views on the matter. This shared social context that the judge brings to bear on his decisions adds to the predictability of legal decisions as regards the kinds of considerations that a judge will address. It also compensates for the fact that written law is often to a large degree inaccessible to average citizens and that most citizens simply do not know the law. However and again, the predictability that is at stake here does not refer to actual outcomes.

It must be added to all this that part of the argument leading to the *fragility of rightness* was to show that conceptions of adjudication that rely on legal commensurability -conceptions that stress the normative role of rules and principles-themselves have difficulty to live up to the demand of legality, to say the least. These conceptions -‘other things equal’- generate outcomes that contrary to their claims are unpredictable and possibly also arbitrary. More generally we may thus question the plausibility and feasibility of the demand of legality, at least as it is often understood.

6 Conclusion

In this chapter I discussed the concept of a tragic legal choice as a constitutive element of the *fragility of rightness*. It complements the other two elements: a virtue ethical conception of judicial decision-making and the concept of civic friendship. By introducing the concept of a tragic legal choice the *fragility of rightness* conceptually makes sense of a certain aspect of the phenomenology of adjudication, i.e. its messiness, its unintelligibility, its moral ambivalence and its painfulness. Rather than

understanding it as irrational or as something to be dismantled, the *fragility of rightness* envisages this phenomenology as a potential expression of the moral limitations of adjudication. We have seen that the concept of tragic legal choice indicates that neither the judge nor the legal order as a whole can stay morally ‘pure’ and ‘clean’. Even in its most ideal form adjudication will be a morally ambivalent practice. Justified legal choices will come with genuine wrongdoing, with genuine loss. In the words of John Barbour: “Tragedy requires a recognition of the fallibility of particular moral ideals and aspirations [...]”⁹⁵⁵

I have elaborated the concept of a tragic legal choice by designating four categories of genuine conflicts between judicial commitments to which the concept possibly applies. Moreover, as part of the characterization of a tragic legal choice I discussed the notions of a moral remainder and ‘tragic responsive reactions’. Subsequently I pointed out why the concept of a tragic legal choice has a valuable role to play in practice. It can enhance a more respectful way of dealing with judicial loss, it can stimulate moral progress and it can add to the integrity of a legal order. Also, through the concept of a tragic legal choice the *fragility of rightness* can (better) account for the rationality of certain legal phenomena that often go unnoticed, remain unaddressed, or are simply misunderstood and dismissed as rare anomalies.⁹⁵⁶ In the end the concept of a tragic legal choice is a way to deal honestly with the fact that adjudication is “pervasively and perpetually vulnerable” to the contingencies of the practical world.⁹⁵⁷ Finally, I have confronted the *fragility of rightness* and the three concepts that it proposes with a basic demand of the rule of law, i.e. that of legality. We have seen that strictly speaking this approach cannot live up to this demand, but that it can serve the rationale underlying it through its proposal of the rule of judicial virtue.

⁹⁵⁵ Barbour, 'Tragedy and Ethical Reflection', 25.

⁹⁵⁶ Williams, *Problems of the Self: Philosophical Papers 1956-1972*, 73; Wiggins, 'Incommensurability. Four proposals', 53.

⁹⁵⁷ Harris, George W., *Reason's Grief* (Cambridge: Cambridge University Press, 2006), 3.