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The fragility of rightness. Adjudication and the primacy of practice

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1 Concluding summary

The starting point of this book was the troublesome phenomenology of adjudication.

Adjudication is -among other things- a form of state-power exercised vis-à-vis concrete citizens that at least from a relatively unreflective perspective seems messy, unpredictable, unintelligible, and for losing citizens genuinely painful.

This phenomenology naturally gave rise to the question how we can account for the moral quality of adjudication. We saw that this question cannot exclusively be answered by common sense views, that is, by the views that are often held by legal practitioners and citizens. These views insufficiently explain how it is that adjudication can possess *moral* quality, the requirement of political legitimacy included. At this point philosophy entered the stage as the discipline that is fitting to provide an adequate answer.

The first part of the book proceeded by examining the plausibility of one rather dominant philosophical way of understanding moral quality in adjudication which I called a *stabilizing approach to adjudication*. This way is also relatively dominant in practice. A stabilizing approach relies on *legal commensurability* and related to this on a normative background theory of political morality. It understands adjudication, at least in its ideal form, as applied theory, i.e. as the institutional specification of a normative theory of political morality.

In this approach normative theory is reason's reassuring answer to the (potentially) troublesome phenomenology of adjudication. Theory is assigned the power to either prevent this phenomenology to occur or to dismantle its being troublesome as an irrational delusion, the consequence of merely a subjective point of view. Because of this purported power of normative theory a stabilizing approach offers a morally and epistemically reassuring picture of adjudication for the judge, for the affected citizens and also for the legal order as a whole. Morally speaking, it can provide for stability in all kinds of ways, or so it is thought.

In assessing the validity of this stabilizing approach to adjudication I examined whether normative theories of political morality can fulfil the task such an approach assigns to them, and connected to this whether they can live up to their own practical aspirations.

Through both an internal and an external critique I argued that even the best available theories of political morality cannot validate a stabilizing approach, its corresponding reliance on legal commensurability, or the epistemic and morally reassuring picture it has of adjudication.

As to the internal critique: for this purpose two normative theories of political morality have been scrutinized as strong candidate background theories of law and adjudication, i.e. Rawls' theory of justice and Nussbaum's Capabilities Approach.

For each of these theories it was established that when applied to society they lead to *residues of justice*. They allow or even produce situations that are at odds with the substantive practical goals that they have set: to secure that citizens can lead a life in accord with their dignity and to prevent arbitrary exercises of state-power. Discussion of a range of legal cases showed how these theories' limitations bear upon the moral character of adjudication. If a legal order and all judges fully comply with the demands of justice, i.e. the principles of political morality, this will not prevent that adjudication will sometimes be arbitrary, messy and lead to morally ambivalent outcomes that harm citizens' chances to lead a humanly dignified life. Therefore these theories are unfit to support a stabilizing approach to adjudication.

At the same time it was argued at length that Nussbaum's Capabilities Approach is a better candidate for supporting such an approach, compared to Rawls' theory of justice. Her theory can solve at least some of Rawls' residues of justice and thus make adjudication more 'stable', that is, less arbitrary and causing less moral loss. It was pointed out that the main reason for this advantage is that Nussbaum's theory of justice is based on a conception of the person that is more embedded and situated than that of Rawls. Hence, the claims that are derived from this conception to a larger degree accommodate for actual empirical knowledge as it already figures in society. By staying closer to and accommodating more of the moral reality of everyday life Nussbaum's theory is more sensitive to the information that matters if we want to secure citizens a life in accord with dignity. Because of this sensitivity her principles of political morality are conceptually richer and able to address more of the concerns that from the viewpoint of equal dignity matter concretely. Also, these principles are more determinate, containing more factual information and hence leaving less room for (strong) discretion. But as said, despite of these advantages, it was established that Nussbaum's theory cannot prevent residues of justice to occur, with dire consequence for the moral nature of adjudication. In the end the Capabilities Approach does not warrant a stabilizing approach to adjudication either.

As to the external critique: the question whether a stabilizing approach and its way of understanding adjudication's troublesome phenomenology can in the end be saved by a better normative theory of political morality was answered negatively. It was argued that normative theories of political morality are by definition unfit to secure the moral quality of a political

order and its main institutions. This not so much because of their specific content but because of the instrument that they deploy to realize their aspirations: normative theory.

I argued that to put a political order and its central institutions under the reign of a normative theory of political morality would not produce the desired outcomes. On the contrary, it may even reduce the moral quality of such an order. So I concluded that in spite of its psychological attractiveness a stabilizing approach to adjudication is not tenable. No normative theory of political morality can have the morally and epistemically reassuring function that a stabilizing approach asks from them. No such theory can warrant a reliance on legal commensurability as it cannot sensibly perform the function of a final commensurans. Against the background of these conclusions, it made sense to reject a stabilizing approach as the way to account for moral quality in adjudication and to change horses, i.e. to try an approach that does not rely on a normative theory of political morality. To this end, as a first preparatory step I proposed a quasi-phenomenological way of thinking about justice. Such an approach accounts for the moral quality of the central institutions in society on a piecemeal basis and bottom up, rather than in an all-encompassing way and top down with the help of normative principles of political morality.

An abstract and general articulation of a just society -also in the form of principles of political morality- can in this approach still be of value, but not as the (normative) rails that must keep the central institutions on their moral track. In a quasi-phenomenological approach the moral competences of the responsibility bearing agents and thick value concepts play a key role in understanding and securing the moral quality of institutions. What the moral quality of a particular institution concretely boils down to, depends on the particular 'spheres of justice' that are at stake and the distinguishing features of these spheres.

Hence, the second part of the book discussed how a quasi-phenomenological approach to justice works out for adjudication as one such sphere of justice. In this part I presented the *fragility of rightness* as my understanding of moral quality in adjudication.

As part of the argument leading to *the fragility of rightness* I first discussed a postmodern approach to adjudication as another philosophy that seeks to come to grips with moral quality in adjudication without relying on normative theory. Although this approach is often dismissed off hand for its all too extreme and over-simplified positions, I argued that there were constructive lessons to be learned from it. According to a postmodern approach the crucial moral moment in adjudication is that of the encounter of the judge with the Other as a concrete embodied unique human being. The moral quality of adjudication depends on the quality of this relation, i.e. on the extent to which the judge succeeds in honouring the Other.

I rejected a postmodern approach primarily because of its self-defeating normative positions and aspirations and its failure to account for adjudication's 'reasonableness', but nevertheless we took two postmodern elements on board. These were the respect that is due to the concrete embodied and unique citizens who participate in legal proceedings and a concern with the potential so-called 'violence' that may come with any kind of moral project that is pursued and executed in the name of 'reason' vis-à-vis concrete citizens.

So, I proposed the *fragility of rightness* as my constructive understanding of moral quality in adjudication that does not rely on normative moral theory. It encompasses three elements: *a virtue-ethical conception of adjudication*, the concept of *civic friendship* and the concept of a *tragic legal choice*. It was asserted that through these elements we can -albeit only partially and indirectly- grasp what it means for adjudication to have moral quality. They were not proposed as normative, action-guiding concepts and thence they do not offer the terms in which judges or citizens should think and act. They are predominantly meant to better understand what it means for adjudication to have moral quality and as such they can have only indirect practical force.

As to the first element, *a virtue-ethical conception of adjudication*, we saw that it is intimately linked to the uncontroversial idea that adjudication is a particular sphere of justice that is most prominently concerned with 'particulars'. These particulars include, but are not limited to the dimension of the unique, concrete embodied citizen. We saw that in order for judges to be able to adequately respond to these particulars and to make right decisions they must possess a range of *judicial virtues*, a set of character traits and reliable sensitivities, expressed in both their doings and beings, in their actions and feelings. In expounding the central characteristics of the ideal of a virtuous judge I named judicial perception, judicial courage, judicial temperance, judicial justice, judicial independency and judicial impartiality.

It was established that if we define moral quality by referring to the judicial virtues, adjudication couldn't exclusively be assessed on the basis of actual decisions. Within the *fragility of rightness* adjudication is more than a set of judicial decisions, the relevant data for its moral evaluation are wide(r) ranging. They include all kinds of voluntary and involuntary, spontaneous and emotional responses of judges both in and out of court.

Subsequently, it was argued that a *virtue-ethical conception of adjudication* by itself does not suffice as an account of moral quality of adjudication. At least it does not if we want such an account to also accommodate for the liberal demand of political legitimacy and connected to this respect for the concrete embodied citizen who participates in a legal procedure. Indeed, we saw that the idea of a (sufficiently) virtuous judge is not yet a convincing reason for a

negatively affected citizen to accept *this* particular exercise of state-power. It does not render the decision acceptable for *him*. This is all the more disturbing because within a virtue-ethical conception of adjudication different judges can take different, even opposite but both right decisions in similar cases.

As a way to mitigate and compensate for the potentially elitist and in this sense -at least vis-à-vis the 'losing' party- disrespectful side of a virtue-ethical conception of adjudication, I argued that the concept of *civic friendship* has complementary value. An ideal judge not only decides as a judicially virtuous judge, but also as a civic friend. In his role the judge aims to genuinely address the concrete good that is at stake for the parties concerned. In this way he can pay respect to the concrete embodied citizens who are involved in the legal proceedings, i.e. he can (try to) live up to the moral demand stemming from the mere fact of his encounter with these citizens.

The third element of the *fragility of rightness* is the concept of a *tragic legal choice*. I argued that this concept is indispensable if we want to understand moral quality in adjudication. We saw that tragic legal choices stand for *genuine* conflicts between judicial commitments that result in a *moral remainder* and as such typically lead to a *tragic responsive reaction*. If judges face such conflicts their decisions may be justified but nonetheless have a morally ambivalent side to them.

On the basis of the exposition of these three elements it became clear that the *fragility of rightness* boils down to a *destabilizing* approach to adjudication in the sense that it surely does not offer an epistemically and morally reassuring picture of adjudication. Although it offers an understanding of moral quality, it does not categorically dismantle the troublesome phenomenology of adjudication as either due to mistakes or as the result of a subjective and irrational point of view; far from it. Messiness, unintelligibility, insecurity, moral ambivalence and painfulness are considered inescapable parts of the moral nature of adjudication itself and hence of what moral quality in adjudication 'looks like'.

So, despite the fact that *the fragility of rightness* has a strong aspirational side to it in that it takes the practice of adjudication as one that can and should have moral quality, it also shows the inherent limitations and precariousness of its aspirations.

2 Some practical implications

As said, in spite of its evaluative language the *fragility of rightness* does not claim to be normative in the sense of having direct action- or reasoning-guiding force. By giving primacy to practice and by providing the 'why' for the 'that', this approach offers conceptual anchor

points for moral quality that can account for quality as it already exists in practice.

But all this is not to deny that the *fragility of rightness* has some practical implications. For instance, by the concepts it introduces it offers a (critical) perspective that can further spur moral improvement. Also, these anchor points may lead to ad hoc interventions on a local level. Whether this will be the case, depends on the extent to which the concepts of the *fragility of rightness* make sense in a concrete context.

Here I will briefly and tentatively ponder on what I consider to be some practical implications of the *fragility of rightness*, with the reservation that these implications need further thought and must be tailored to a concrete local context. Further (empirically informed) research is needed.

One practical implication concerns the establishment of the facts. We saw that the *fragility of rightness* in its account of moral quality in adjudication gives priority to the particulars of the case. Hence, the establishment of the facts and the practice of legal qualification are seen as key judicial activities and legal education should above all be a training of the ‘judicial eye’. This means that the aspirant-judges, while learning settled law in the abstract, must at the same time be confronted with the particulars, that is, either with real-life situations or with representations of such situations (for instance in literature, films and documentaries).⁹⁵⁸ Learning about the particulars and learning about the law ideally are integrated activities. More generally, from the viewpoint of the fragility of rightness it is vital that a set of practices and institutions of sufficient quality are available in society in which the judicial virtues and the attitude needed for civic friendship can be developed and further strengthened. This in any case also indicates the necessity of alertness regarding tendencies in professional and educational practices that may undermine this development, such as ‘elite-culture’, ‘surplus status-trust’ and ‘surplus epistemic deference’.⁹⁵⁹ On that account the *fragility of rightness* brings the discipline of social moral epistemology into play as relevant for enhancing the

⁹⁵⁸ This idea of course fits within the law and literature tradition. See for the argument that lawyers and judges should read literature in order to train their ‘judicial eye’: Nussbaum, *Poetic Justice. The Literary Imagination and Public Life*.. For discussions by legal theorists and legal practitioners about the importance of novels for law see also: Witteveen, Willem and Taekema, Sanne, eds., *Verbeeldingsmacht. Wat Juristen Moeten Lezen* (Den Haag: Boom Juridische uitgevers, 2000)..

⁹⁵⁹ These phenomena were discussed in the chapter on a virtue-ethical conception of adjudication.

moral quality of adjudication.

As the focus lies on the judicial virtues, due attention should also be paid to the psychological obstacles that may impede the judge having the right emotions or affective states. For instance, knowledge about the influence of a peer-group on one's emotional state can be helpful for the training of the virtue of judicial courage.

Next, because the virtues and civic friendship play such a crucial role in guaranteeing moral quality, ideally these should also be expressed in the indicators that are used for the selection of judges and the assessment of their quality. Obviously further inquiry is needed to develop such indicators adequately and to identify possible drawbacks of character-based assessments. Another practical implication is that efforts to systematize adjudication must be limited. As the particular and not the rule is the measure, these efforts should not be such that the particulars are 'lost' and vanish from judicial sight due to the lens that the 'system' imposes. Although the explication of regularities in and among judicial decisions can add to the quality of the justification of legal decisions -by providing for discursive material-, and can also be of assistance in detecting biases and 'distorted' perceptions, systematisation as such does not add to legal rationality, but rather to the contrary: it can threaten it. Again, within the *fragility of rightness* moral quality by itself does not require that similar cases be decided similarly or like cases be decided alike. Offering an 'inside out approach' to moral quality, it allows for different virtuous judges 'perceiving' differently and hence they can rationally arrive at different conclusions.

Related to this point: within the *fragility of rightness* the *content* of a legal decision and the judge's *treatment* of the citizens involved in legal proceedings cannot conceptually be separated. Both aspects of adjudication are held to be integrally and intimately related elements of realizing moral quality. The treatment of the parties consists in ways of being (not) responsive to the good of the concrete citizens involved in the proceedings, something that has moral import by itself and also plays a vital role in arriving at the right judicial decision.

Hence, in legal education and in monitoring the quality of adjudication these dimensions should not be separated. The *treatment* of citizens who are involved in legal proceedings is not a corollary, non-legal aspect of adjudication, but an integral part of realizing moral quality. Again, within the *fragility of rightness* the moral quality of adjudication cannot exclusively be deduced from the actual decisions of judge, because all kinds of other data are relevant as well -the treatment of parties included.

The focus that the *fragility of rightness* puts on the relational aspect also means that the

‘setting’ in which the encounter takes place -the procedural setting included- must allow for the judge to experience a ‘negative moment’, a relatively passive moment in which he can indeed ‘face’ the parties involved. (From this perspective the digitalisation of adjudication may of course have serious drawbacks for moral quality.)

Next, the *fragility of rightness* has consequences for our appreciation of *obiter dicta*, the range of considerations in judicial decisions that cannot sensibly be understood as part of the *ratio decidendi*. It does not take these *obiter dicta* as necessarily subjective, non-legal and hence irrelevant utterances of a judge. Rather, they are considered potential expressions of the moral sensitivities of a virtuous judge who in his role of civic friend also seeks to be responsive to the concrete good of the citizens. If the quality of judges is up to standards, they can be seen as part of adjudication’s moral backbone, i.e. as expressions of legal knowledge, of judicial understanding of the particulars of the case generated in the confrontation with these particulars. In case of a *tragic legal choice* these *obiter dicta* possibly also qualify as a ‘tragic responsive reaction’, as part of the art of talking to the losing citizen who has to bear a burden that from a judicial viewpoint we do not want him to bear.

In any case, the *fragility of rightness* indicates that *obiter dicta* are to be taken (more) seriously as valuable phenomena for legal research, not only by judges themselves but also by scholars.

Finally, because of its focus on the potential tragic character of judicial decision-making the *fragility of rightness* implies a vital monitoring task for local judiciaries and councils for the judiciary to identify and record tragic remainders. If similar remainders seem to occur on a regular basis, this may be a reason for the judiciary to give a signal to policy-makers and legislators and thus ask them to take measures that prevent these situations in the future. In accord with the lesson taught by Greek tragedies that it often takes suffering to come to insight, the ‘tragic remainders’ can thus contribute to moral progress in a legal order