

**Tomasz Widlak**<sup>1</sup>  
University of Gdańsk

## Judges' Virtues and Vices: Outline of a Research Agenda for Legal Theory<sup>2</sup>

### 1. Introduction

Judges are valued by the quality of their character. This statement is implicit in the wording of the relevant legal acts regulating the status of the judiciary in Poland and other civil law jurisdictions. For instance, the Law on the Organization of Common Courts in Poland demands, on top of other substantive requirements, that candidates for judges be of “impeccable character”<sup>3</sup>. Yet, there seems to be a growing problem with the moral language being used in the public discourse about the judiciary, the role of judges, and their political position. In Poland, the language and arguments used in this debate have been particularly passionate and often laden with extreme emotions. Both at the level of the media and that of experts, statements concerning the moral qualities of particular judges and the judiciary as a whole often seem to be inconsistent and heavily influenced by a political assessment of judges' individual statements, decisions or even particular actions. In the recent years judges, both individually and as a professional group, have been on several occasions described in the media by major politicians or public figures with a variety of evaluative terms, ranging from designations like “corrupt”, “unworthy”, “pathology”, “extraordinary caste”, “thieves”, “organized criminal group”, “oikophobes” – on the one extreme, to descriptions like “patriots”, “steadfast judges” and “hero judges” – on the other. Most of these statements, especially the pejorative ones, were formulated in response to individual cases and particular court decisions and afterwards extended, by way of a faulty generalization, to the assessment of the entire group and its institutions. This language has been accumulating with such frequency and intensity that judges themselves protested, even by issuing formal resolutions<sup>4</sup>.

<sup>1</sup> ORCID number: 0000-0001-8525-4242. E-mail: [tomasz.widlak@prawo.ug.edu.pl](mailto:tomasz.widlak@prawo.ug.edu.pl)

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<sup>3</sup> Article 61 § 1(2) of the Law on Organization of Common Courts of 27 July 2001 (Polish title: ustawa z 27.07.2001 r. – Prawo o ustroju sądów powszechnych, tekst jedn.: Dz. U. z 2019 r. poz. 52 ze zm.).

<sup>4</sup> For instance, Resolution No. 2 of 27 September 2018 adopted by the Representative Assembly of Appellate Judges of Gdańsk (*Uchwała nr 2 Zgromadzenia Przedstawicieli Sędziów Apelacji Gdańskiej z dnia 27 września 2018 r.*), <http://bit.do/e3bUM>, accessed on: 24.05.2019.

Setting aside the *prima facie* visible political, constitutional and other legal and philosophical problems pertaining to the usage of the above-mentioned language, my focus here is on the appropriate theory of the faculties of judges' character that could organize the moral and legal language on their status, selection for judicial offices, and – ultimately – the judicial decision-making process. Is it adequate, appropriate, useful or even possible to evaluate judges based on their particular actions (seen as allegedly immoral/wrong or righteous/good) or the selected consequences of such actions? My proposal is that to attempt to draw on the notion of “virtue” and virtue ethics looks promising for the purpose of 1) ordering the moral language that is being used, which in turn may even lead to 2) formulating an explanatory and normative theory of a judge's role that better responds to the observable deficiencies of the legal deontology. This attempt may be important not only for the professional and scholarly discourse on the judiciary. Its wider impact on containing the public debate cannot be excluded.

## 2. Background: the aretaic turn in moral philosophy

“Virtue” is a notion taken from the philosophical-ethical tradition of the so-called aretaic theory (from the Greek term *arête* – virtue, excellence)<sup>5</sup>. Aretaic theory may refer both to virtue ethics, which is normative moral theory claiming that virtues are central ethical notions, as well as a broader explanatory (descriptive) theory that simply focuses on philosophical questions about virtues and vices, including their nature and their links to other moral concepts (“virtue theory”)<sup>6</sup>. Virtue theory has a long tradition, heavily influenced by the rich history of philosophizing about the moral implications of different traits of human character. It dates back to Aristotle and the Stoics in the Western thought, and Confucianism in the Chinese civilization<sup>7</sup>, just to name the most prominent examples. However, modern ethics had abandoned the concept of virtue and focused entirely on other, influential and mutually opposing theories of morality – deontology, and consequentialism<sup>8</sup>. It was not until 1958, when Elizabeth Anscombe published the article titled *Modern Moral Philosophy*<sup>9</sup>, followed by other powerful critiques of the state of modern ethics such as the ones by philosophers Alasdair MacIntyre<sup>10</sup> or Philippa Foot<sup>11</sup>, that normative theory witnessed an “aretaic turn”.

The central point of the aretaic critique of modern ethics is that the dominant deontological approach uses the notion of moral obligation, which had been in fact bereft of its original theological context already in the age of Enlightenment. According to Anscombe<sup>12</sup>, it is as if the notion of “criminal” were to remain long after the criminal law and criminal courts had been abolished and forgotten. As a result, moral “oughts”

<sup>5</sup> C. Farrelly, L.B. Solum (eds.), *Virtue Jurisprudence*, New York 2008, p. 3.

<sup>6</sup> J. Driver, *Uneasy Virtue*, Cambridge 2001; L. van Zyl, *Virtue Ethics. A Contemporary Introduction*, New York–London 2019, p. 12.

<sup>7</sup> See in general: S.C. Angle, M. Slote (eds.), *Virtue Ethics and Confucianism*, New York–London 2013; L.B. Solum, L. Wang, *Confucian Virtue Jurisprudence*, in: A. Amaya, H.L. Ho (eds.), *Law, Virtue and Justice*, Oxford–Portland 2013, pp. 105–135.

<sup>8</sup> See: N. Szutta, *Statut współczesnej etyki cnót* [Eng. *The Status of Contemporary Virtue Ethics*], “Diametros” 2004/1, pp. 70–84; N. Szutta, *Współczesna etyka cnót. Projekt nowej etyki?* [Eng. *Contemporary Virtue Ethics. A New Ethics Project?*], Gdańsk 2008.

<sup>9</sup> G.E.M. Anscombe, *Modern Moral Philosophy*, “Philosophy” 1958/33, pp. 1–19.

<sup>10</sup> A. MacIntyre, *After Virtue. A Study in Moral Theory*, Notre Dame (Ind.) 1981/2007.

<sup>11</sup> P. Foot, *The Problem of Abortion and the Doctrine of the Double Effect*, in: P. Foot (ed.), *Virtues and Vices and Other Essays in Moral Philosophy*, New York 2002, pp. 19–32.

<sup>12</sup> G.E.M. Anscombe, *Modern...*, p. 6.

and “obligations” are often seen as unfounded and no satisfying alternative to a divine lawmaker as their source and explanation has been proposed. Even the Kantian rule about universalizable maxims is empty and therefore useless since a manifestly immoral or trivial principle could easily pass the test<sup>13</sup>.

On the other side of the ethical discourse, consequentialism – considered for decades as the only alternative to deontology – can be viewed as equally unsuccessful. One of the most prominent theories within this current is utilitarianism, which proposes to focus on the principle of maximization of happiness of the largest possible group of people. Utilitarian thinkers such as Jeremy Bentham and John Stuart Mill based their moral reasoning on the assumption that the only motives for human action are the attraction to pleasure and aversion to pain. Therefore, the morality of actions is measured only by the nature of their consequences (effects), not intentions<sup>14</sup>. No action is inherently moral – those actions that lead to good consequences are also deemed to be good, at least according to an extreme form of utilitarianism<sup>15</sup>. There are many perplexing problems with such an account, not least that the concept of pleasure is superficial, even empty. Some scholars also rightly point out that the same action can fall under many different principles of utility at the same time<sup>16</sup>.

The overall view of modern moral philosophy, shaped by these two traditions, is that ethical debates remain starkly polarized and therefore inconclusive. This is most evident in the field of applied ethics. For instance, in bioethics, the deontological model focusing on the obligation not to kill an innocent person, no matter what the circumstances, was found by many as unsatisfactory and unable to answer the ethical problems of euthanasia. The consequentialist approach aiming at good or bad consequences appealed to some thinkers, but was not without its own problems, like those posed by the assertion that there may be simultaneously different consequences for different moral agents involved<sup>17</sup>. According to MacIntyre<sup>18</sup>, in such modern moral debates, in addition to their inconclusiveness, there is simply no rational way of securing a moral agreement. This is due to “conceptual incommensurability” of the arguments used, their very different historical-philosophical origin, as well as the resulting superficial rationality of the debate, merely covering subjective, emotive beliefs.

Against the background described above, virtue ethics enters the stage with an ambition of overcoming these difficulties and constituting a third way or – in fact – an alternative to both deontology and consequentialism. Instead of continuing the debate in terms of morally right or wrong action, supporters of virtue ethics propose a revival of the ancient focus on the moral agent and her virtues, such as wisdom, courage, temperance, and justice. This requires a substantial change in language: virtue ethics is more concerned with evaluating characters than particular deeds, therefore it cares more about righteousness than justness<sup>19</sup>. In overall, in the aretaic tradition the focus is not so much on the assessment of particular action as on answering the question: how

<sup>13</sup> G.E.M. Anscombe, *Modern...*, p. 2; A. MacIntyre, *After...*, p. 45; N. Szutta, *Czy istnieje coś, co wiemy moralnym charakterem i cnotą?* [Eng. *Is There Something That We Call Moral Character and Virtue?*], Lublin 2017, p. 35.

<sup>14</sup> B. Russell, *A History of Western Philosophy And Its Connection with Political and Social Circumstances from the Earliest Times to the Present Day*, New York 1945, p. 779.

<sup>15</sup> N. Szutta, *Czy istnieje...*, p. 30.

<sup>16</sup> G.E.M. Anscombe, *Modern...*, pp. 2–3, 9.

<sup>17</sup> L. van Zyl, *Virtue...*, pp. 4–5.

<sup>18</sup> A. MacIntyre, *After...*, pp. 6–12.

<sup>19</sup> N. Szutta, *Współczesna...*, pp. 15–40.

to live a good life<sup>20</sup>. Such an approach accounted for revolutionary changes in modern moral theory. Not only has virtue ethics become one of the major approaches in the field, but it has also inspired a discussion that led deontology and consequentialism to produce their own virtue-oriented varieties. Moreover, virtue ethics became immediately important and popular among scholars working in different fields of applied ethics.

### 3. The meaning of the aretaic turn for legal theory

Legal theory has not been so far influenced by the “aretaic turn” to the same extent as other disciplines. The dominance of deontological and consequentialist modes of argumentation and reasoning is clearly visible both in legal ethics concerned with legal professionals, as well as in the ethics of law or a normative theory of what (and how) the law should be. However, there have been some important exceptions, most notable among them being “virtue jurisprudence” project, proposed and actively developed by Lawrence B. Solum<sup>21</sup> and others<sup>22</sup>. The project of virtue jurisprudence, which originated in the USA and which was clearly modelled primarily in reference to the American legal tradition, sees a parallel between the situation in moral philosophy as described by Anscombe and the contemporary legal theory, which is allegedly trapped between “realism” and “formalism”. These two could be better understood as two major epistemic approaches towards the law and the problem of how it should be comprehended, interpreted and applied – instrumentally or deontologically. Virtue thinking has the potential to break the deadlock between the two and enter the stage as a middle way, where the good judicial decision is a function of the judicial virtue, not vice-versa. If I understand Solum’s argument correctly, virtue jurisprudence does not aim at denying legal rules or legal rights as deontological constructs or at ignoring the consequences of the creation or application of a rule. The proposed virtue-based approach helps to deal with issues such as hard cases, which can be seen as critical instances of judicial decision-making. When neither the formal rule nor the instrumental argument is satisfactory, the righteous legal decision is one that is taken by a virtuous judge. It is the quality of the judicial character that is primary and determines the evaluation of the decision, rather than an act-based theory of judging. Although legal theory may well be independent of moral theory, this account is at least a clear parallel to one of the main tenets of virtue ethics, according to which rather than asking “what ought I to do?”, the moral agent should focus on the problem of “what kind of a person should I become?”<sup>23</sup>.

The problem of judicial virtues in relation to both the theory of judicial decision-making and, subsequently, judicial status or judicial character is by far the most promising area of application of virtue theories to legal ethics and the law. However, as one might expect, there is, or may be, far more to “virtue jurisprudence” than that. On the one hand, in his publications, Solum himself elaborates on other issues covered by the project of virtue jurisprudence, such as an aretaic theory of legislation<sup>24</sup> or

<sup>20</sup> L. van Zyl, *Virtue...*, p. 9.

<sup>21</sup> L.B. Solum’s first article appeared in 1988 (L.B. Solum, *The Virtues and Vices of a Judge: An Aristotelian Guide to Judicial Selection*, “Southern California Law Review” 1987–1988/61, pp. 1731–1756), although the concept of ‘virtue jurisprudence’ was used in 2008 in: C. Farrelly, L.B. Solum (eds.), *Virtue...*

<sup>22</sup> A. Amaya, H.L. Ho, *Of Law, Virtue, and Justice – An Introduction*, in: A. Amaya, H.L. Ho (eds.), *Law, Virtue...*, pp. 1–28;

<sup>23</sup> N. Szutta, *Współczesna...*, p. 22.

<sup>24</sup> L.B. Solum, *Virtue as the End of Law: An Aretaic Theory of Legislation*, “Jurisprudence” 2008/1, pp. 6–18.

virtue-centred approach to equity and the rule of law<sup>25</sup>, as well as justice<sup>26</sup>. On the other hand, a full-fledged philosophy of law would need to depart from the methodological assumptions of a meta-ethical virtue moral theory and concentrate on its application to legal theory. Such an approach could lead to even more weighty consequences for legal theory and philosophy because the essential element of virtue ethics as a moral theory is constituted by its teleological character<sup>27</sup>. All virtues are justified by the reference to a certain *telos* (τέλος) of human existence, for instance, for neo-Aristotelians it is the notion of *eudaimonia* (εὐδαιμονία), which means that the ultimate goal of virtuous life is to attain “human flourishing”<sup>28</sup>. This assertion may have immediate and potentially far-reaching consequences for legal philosophy, as it casts some light on the problem of normativity, which has been subject to long and tormenting debates under the deontological and consequentialist assumptions in the philosophy of law. As pointed out by Wojciech Załuski<sup>29</sup>, the idea of *telos* of human life is an obvious and coherent source of normativity under virtue ethics and, consequentially, of the normativity of law in virtue-inspired jurisprudence. This, in turn, entails yet another observation – in the aretaic interpretation, there seems to be no difference, as well as no good reason to differentiate, between legal and ethical normativity. Since the question on the relation between law and morality is foundational for modern legal theory and given that the separability thesis was formative for modern positivism in legal theory<sup>30</sup>, the aretaic proposal is clearly a strong claim. *Prima facie*, virtue jurisprudence could be an important proposal for ethical-legal essentialism, claiming that the connection between law and morality not only exists but is also requisite.

The aspects of virtue jurisprudence mentioned above are only a handful of examples which by no means constitute a comprehensive list of issues that could be covered by a full-fledged virtue legal theory. However, such a theory does not yet exist. The aim is to pose the question whether and how an approach centered on virtue notions could be useful for the theory and philosophy of law in general, and in relation to a theory of judicial decision making and judicial status in particular. This entails that such a virtue approach would need to add some explanatory and normative value to, for instance, understanding the problem of what it means to be a good judge.

#### 4. The pragmatics of a virtue-oriented language

The starting point for this article was the problem of public discourse on the judiciary. It is in the area of pragmatics where the possible benefits of a conversion to virtue-oriented language are the most evident. As mentioned in the introduction to this article, the

<sup>25</sup> L.B. Solum, *A Virtue-Centred Account of Equity and the Rule of Law*, in: C. Farrelly, L.B. Solum (eds.), *Virtue...*, p. 142.

<sup>26</sup> L.B. Solum, *Natural Justice*, “The American Journal of Jurisprudence” 2006/51, pp. 65–105; other authors also propose their own accounts of virtue-based law-making and even law-teaching; see: S.J. Clark, *Neoclassical Public Virtues: Towards an Aretaic Theory of Law-Making (and Law-Teaching)*, in: A. Amaya, H.L. Ho (eds.), *Law, Virtue...*, pp. 81–103.

<sup>27</sup> See: N. Szutta, *Czy istnieje...*

<sup>28</sup> L. van Zyl, *Eudaimonistic Virtue Ethics*, in: L. Besser-Jones, M. Slote (eds.), *The Routledge Companion to Virtue Ethics*, New York–London 2015, p. 183.

<sup>29</sup> W. Załuski, *Normatywność aretyczna versus normatywność nie-aretyczna* [Eng. *Aretical Normativity versus Non-Aretical Normativity*], in: B. Brożek, M. Hohol, Ł. Kurek, J. Stelmach (eds.), *W świecie powinności* [Eng. *In the World of Ought*], Kraków 2013, pp. 153–172.

<sup>30</sup> J. Zajadło, *Pozytywizm prawniczy* [Eng. *Legal Positivism*], in: J. Zajadło (ed.), *Leksykon współczesnej teorii i filozofii prawa* [Eng. *Lexicon of Contemporary Theory and Philosophy of Law*], Warszawa 2017, pp. 237–241.

current discourse on the evaluation of judicial actions, judges' performance or status is built around a "moral oughtness" axis. The reasoning of the authors of statements made in the public sphere often follows more or less this path: a particular judge said X or decided Y, which she was not permitted to do, since X or Y is (allegedly) wrong for a judge to say or do, therefore she is a bad judge or a politically biased one (which, in context, may amount to an "immoral judge"). This is exactly what E. Anscombe criticizes in her essay: the use of "morally ought", which is a notion devoid of content yet retaining its psychological force<sup>31</sup>. Allegedly doing something that a judge "ought not to do" is committing a "wrong" or "impermissible" act and implies that the actor is a "bad" person or judge, perhaps even "unworthy" of the judicial office. These are blanket terms that are not only imprecise, but obviously fallaciously generalizing and therefore misleading, if not manipulative, at least in the context of public discourse. Anscombe suggested dropping the notion of moral oughtness altogether, and argued that

it would be a great improvement if, instead of "morally wrong", one always named a genus such as "untruthful", "unchaste", "unjust". We should no longer ask whether doing something was "wrong", passing directly from some description of an action to this notion; we should ask whether, e.g., it was unjust; and the answer would sometimes be clear at once<sup>32</sup>.

Using a virtue-oriented moral language in opposition to a blanket deontological qualification of moral right and wrong disciplines the author of a value statement. Formulating a more specific critical statement pertaining to an alleged vice (as opposed to a relevant virtue) of a person demands precision and relevance. For example, saying that a particular judge is incompetent, self-indulgent or abusive<sup>33</sup> indicates "a defect of a relevant virtue"<sup>34</sup>. Most importantly, however, this does not need to imply that a person described in this way is inherently a bad human being. It is critical in relation to professional roles because expressing the evaluation of a judge in virtue- and vice-oriented language must presuppose a certain set of essential judicial virtues. One or even several actions performed by the judge may not necessarily disqualify her morally or professionally, as particular virtues may be seen as targeted at responding to specific demands<sup>35</sup>. Therefore, virtue language puts the moral subject, the actor – in this case, a judge – and his faculties beforehand or prior to the evaluation of a particular action. The value of a human person cannot thereby be completely reduced to the mere moral judgement on her particular actions or their consequences.

## 5. Some preliminary problems with the semantics of "judicial virtue"

The virtue-oriented language mentioned above immediately raises some further important questions in relation to judicial roles. First of all, perhaps obviously, it seems there may be at least two categories or kinds of virtues: general virtues, like generosity or benevolence, which could be assigned to any human being, as well as special "professional" virtues of a judge, for instance "judicial sobriety"<sup>36</sup>, seen as a form of temperance. However, is this *prima facie* intuition accurate? It may be the case that there are no specific "judicial

<sup>31</sup> G.E.M. Anscombe, *Modern...*, p. 8.

<sup>32</sup> G.E.M. Anscombe, *Modern...*, pp. 8–9.

<sup>33</sup> G.P. Miller, *Bad Judges*, "Texas Law Review" 2004–2005/83, p. 431.

<sup>34</sup> G.E.M. Anscombe, *Modern...*, p. 6.

<sup>35</sup> See: C. Swanton, *Virtue Ethics: a Pluralistic View*, Oxford 2003.

<sup>36</sup> C. Farrelly, L.B. Solum (eds.), *Virtue...*, p. 9.

virtues” but only a special set of virtues of certain (increased?) “intensity” or “force”, such as e.g. exceptional diligence and carefulness, that make up the right judicial character. Thus, virtue *qua* judicial virtue tends to be measured by its differing degrees. This may well be a truism; however, it also suggests that virtues as dispositions of character are dynamic and perhaps always susceptible to evolution, ideally towards perfection. For example, Mateusz Stępień suggests that judges should undergo a process of self-development, which is, in fact, best reflected in terms of an aretaic model of judicial decision-making<sup>37</sup>.

Secondly, there is a clear problem of objectivism in the discourse on virtues, which raises the question whether a character trait regarded as a virtue in an ordinary situation may, in case of a judge, turn out to be a vice or the other way round: could it be that a judicial virtue is someone else's vice? Ultimately, it is broadly accepted in case of certain other legal professionals that these social roles carry some degree of independence from what a broad-based morality would ordinarily permit<sup>38</sup>. Virtue ethics fits in with that view quite well. For example, a high degree of inquisitiveness of a counsel or a prosecutor, when examining a witness, may serve justice well, while in a general context the same behaviour could amount to an inappropriate nosiness and violation of privacy<sup>39</sup>. As far as the judiciary is concerned, the situation may be even more complex if a judge is caught up in between somehow opposing ordinary virtues. For instance, being humble is seen as a virtue and although probably it is not always a recommended life attitude, it is hard to regard an excess of it as a vice, at least in an ordinary life situation. On the grounds of virtue ethics, a special form of judicial humility was put forward as an instance of a judicial virtue<sup>40</sup>. However, while some call forth for more judicial humility to counter the possible arrogance, others emphasize also the need for judicial courage, because too much humility can prevent judges from being active when this serves the best interests of justice<sup>41</sup>. Striking a balance may be difficult to a point where the two turn into vices in the one and the same case. For instance, the position of Justice Roger B. Taney in the landmark case *Dred Scott v. Sandford* (1857)<sup>42</sup> can be seen as cowardly (not courageous enough) in reference to the issue of Dred Scott's standing before the U.S. Supreme Court and at the same time arrogant in relation to the constitutional question. This perplexity translates directly into the debate on judicial activism as opposed to judicial restraint in legal theory<sup>43</sup>.

## 6. Is there a need for a theory of judicial virtue?

It is clear from the considerations presented so far that even a cursory outline of the possible problems linked with using a virtue-oriented language in reference to the judiciary

<sup>37</sup> M. Stępień, *The Three Stages of Judges' Self-Development*, in: A. Amaia, H.L. Ho (eds.), *Law, Virtue...*, pp. 137–151; M. Stępień, *Droga przemiany 'duszy sędziowskiej'. Ku aretycznej koncepcji orzekania sądowego?* [Eng. *The Path of Transformation of a 'Judge's Soul'. Towards the Aretical Concept of Court Adjudication?*], in: W. Staśkiewicz, T. Stawicki (eds.), *Dyskrecjonalność w prawie* [Eng. *Discretion in Law*], Warszawa 2010, pp. 275–289.

<sup>38</sup> See: J. Oakley, D. Cocking, *Virtue Ethics and Professional Roles*, New York 2001, pp. 117–119.

<sup>39</sup> J. Oakley, D. Cocking, *Virtue...*, p. 119.

<sup>40</sup> See: A. Amaya, *The Virtue of Judicial Humility*, “Jurisprudence” 2017/1, pp. 97–107.

<sup>41</sup> See: S. Sherry, *Judges of Character*, in: C. Farrelly, L.B. Solum (eds.), *Virtue...*, pp. 88–106.

<sup>42</sup> See: P. Finkelman, *Dred Scott v. Sandford. A Brief History with Documents*, Boston–New York 1997; J. Zajadło, *Sędziowie i niewolnicy. Szkice z filozofii prawa* [Eng. *Judges and Slaves. Sketches from the Philosophy of Law*], Gdańsk 2017, pp. 211–226, 229–234.

<sup>43</sup> But see: A. Amaya, *The Virtue of...*, who argues to the contrary that the virtue of judicial humility should not be identified with judicial restraint.

and its role confirms the two general assumptions mentioned earlier: 1) this approach is inherently actor-centred as well as 2) teleological in nature, which means that virtues are conceivable only through the lenses of their particular *telos* or a value they are aimed at. However, this is obviously not enough to bring us closer to clarifying what dispositions in a person should count as judicial virtues and which as vices. It is also unclear which traits are neither of the two or do not count as virtues or vices in the context of the administration of justice. Aesthetic experiences or preferences of taste may also be one's personal traits serving a certain aim. For instance, I feel abhorred by a certain type of food and despise a particular genre of music and this disposition means that I am determined to avoid them to save myself the unpleasant sensations. One could respond that such dispositions of taste have nothing to do with morality. However, the connection with morality as conventionally understood (setting aside the much deeper problem of what exactly morality is about) is, also, not entirely clear in case of at least some virtues. The first example that comes to mind is the well-established division between moral and intellectual virtue. The latter is an object of interest of virtue epistemology<sup>44</sup> and should be of particular interest to anyone thinking about judicial virtues. Is it not true that, at least intuitively, traits such as open-mindedness, curiosity or perseverance are important, even essential, for being a good judge? In any instance, there is at least one intellectual virtue proposed by Aristotle that has the relatively strongest claim to being essential in legal reasoning and decision-making and therefore needs to be taken into consideration – practical wisdom (*phronesis*)<sup>45</sup>.

To add up to the above doubts, it is also worth pointing out that an important element of a concept of judicial virtue may also consist in the psychological or inner mental sphere of the possessor of a virtue. Intuitively comprehended, judicial virtues may, in fact, require good motivations, such as certain reasons or emotions that the particular judge understands or experiences. On the one hand, one may believe it is irrelevant whether a judge acts for praiseworthy or blameworthy reasons and what emotions accompany her decision-making process as long as her external conduct of the matter and its justification is lawful and morally satisfactory (virtuous). On the other hand, however, it is at least doubtful whether virtue jurisprudence could really pass over intrinsic motivations of judges so easily, given e.g. criminal law's constitutive interest in the mental states of defendants or witnesses. For instance, is it immaterial if a judge demonstrates great diligence and carefully proceeds a case with exceptional fidelity to the letter of law, but at the same time her accuracy is motivated by the intention of maximizing the penalty, or, even worse, she feels contempt for the defendant and is obsessed with taking revenge on the defendant on behalf of the society? What if the judge actually decides in advance the result of the case? Does it compromise judicial wisdom and integrity demonstrated in the written reasons for the judgement?

## 7. The methodological approach to judicial virtues

The abovementioned problems illustrate the complexity of the notions of judicial virtue and vice. This article has not started with a definition of virtue precisely for the reasons given above: the notion of virtue seems to be intuitive but not straightforward

<sup>44</sup> See e.g. L. van Zyl, *Virtue...*, p. 10.

<sup>45</sup> See: Aristotle, *The Nicomachean Ethics*, New York 2009, p. 102 ff.

in any ontological or epistemological sense. It may well be that “virtue” is a normative-descriptive term, in a way similar to the concept of “justice” in its insusceptibility to definitional interventions, perhaps due to problems encountered during the attempts at its universalization and formalization<sup>46</sup>. This may explain why there are at least two general approaches towards virtues. The first one is a more traditional call for a proper “virtue theory” (understood broadly, as opposed to a “virtue ethics”) that could explain, in a systematic way, the operation of virtue in reference to other ethical or legal notions<sup>47</sup>. It aims at abstract theorizing about virtue and virtue-related notions that can be afterwards applied to make distinctions and for other explanatory purposes. The second approach is non-foundational and even anti-theoretical in the sense that it does not focus so much on the conceptualization of “virtue” but treats particular virtues as a given or as primary notions (i.e. it does not derive “virtue” from some prior account of right action<sup>48</sup>) and pays attention to answering the question of *what* the concrete virtues are in a certain context. This kind of approach may also be seen as more normative since it essentially leads to advocating a certain virtue-ethical model.

I believe that in addition to the two approaches described above, there may be a certain pragmatic middle-ground. It takes the non-foundational perspective as the starting point but aims to make some conceptual and generalized conclusions. The point of departure for such an approach is an intuitive comprehension of the concept of virtue that can be used for identifying what traits are generally regarded as judicial virtues in a given legal culture, context and time-frame. Instead of simply assuming a normative theory of (arguably) uncontested judicial virtues<sup>49</sup> the aim is, therefore, to gain an interpretative insight into the legal culture for a more widely-shared normative beliefs about the role of judges and judging. Legal culture is considered here in the broad sense, as the law itself, knowledge, and attitudes towards the law, the level of internalization of legal norms, the continuity in law, professional legal ethics, and role models<sup>50</sup>. Poland is simultaneously an example of a typical civil-law jurisdiction and a member of the European Union, so the research findings concentrated on this particular legal culture may be potentially illuminative also for other jurisdictions. Particular methods of such an inquiry could involve linguistic analysis of the concepts referring to judicial virtues or vices, used both in the legal documents and literature, as well as in the wider public discourse, including press publications and public pronouncements. Other aspects of the wider legal culture, expressed in the form of literary works (including biographies and memoirs) and films, may be researched by methods of humanistic (philosophical) interpretation. For instance, exemplarism is a methodological approach used in *Law and Literature* studies that may be useful in analysing historical or fictional judicial role

<sup>46</sup> Universalization or formalization of virtue would arguably need conceptualizing it as a model character trait that can be consciously attained by self-control and deliberation by anyone determined to do so, in other words, the concept of a particular virtue would need to prescribe a self-development procedure that could be pursued by an interested moral agent. This, however, meets a challenging situationist critique based on empirical data from behavioural psychology, according to which our behaviour is determined by non-conscious cognitive process over which we have virtually no control. See: N. Szutta, *Czy istnieje...*; L. van Zyl, *Virtue...*, pp. 166–195; R. Kamtekar, *Situationism and Virtue Ethics on the Content of Our Character*, “Ethics” 2004/3, pp. 458–491; M. Hohol, *Od samokontroli do cnoty. O mechanizmach moralności* [Eng. *From Self-Control to Virtue. On the Mechanisms of Morality*], Kraków 2016.

<sup>47</sup> See: N. Szutta, *Współczesna...*, pp. 40–44.

<sup>48</sup> J. Oakley, D. Cocking, *Virtue...*, p. 32.

<sup>49</sup> C. Farrelly, L.B. Solum (eds.), *Virtue...*, p. 7.

<sup>50</sup> J. Leszczyński, M. Zirk-Sadowski, *Kultura prawna* [Eng. *Legal Culture*], in: M. Zirk-Sadowski, J. Zajadło (eds.), *Wielka Encyklopedia Prawa, t. VIII: Teoria i filozofia prawa* [Eng. *Great Encyclopedia of Law. Volume VIII: Theory and Philosophy of Law*], Warszawa 2016, pp. 231–232.

models<sup>51</sup>. In order to balance the results against the possible bias (for instance, implications of Poland's turbulent history and its impact on the subject matter), it may also be useful to compare the effects of findings with the standards for judicial role, which are dominant in the institutional courts of the European Union, given that Poland is a member and its courts are simultaneously EU courts.

In the second step, the reconstructed catalogue of judicial virtues relative to particular legal and cultural context may, in turn, be the object of inquiry with the aim of providing a framework for a more general theory of virtuous judicial decision-making. Following John Rawls' approach to the notion of "justice"<sup>52</sup>, one could reflect whether the core concept of "virtue" has a common element in various rival conceptions of virtue ethical theories and how it relates to the specificity of judicial virtues inferred from the empirical reconstruction<sup>53</sup>. For instance, it has been recently proposed by Liezl van Zyl that virtues are generally good and reliable character traits, although there is disagreement among major virtue theories as to whether: 1) virtues require good motivation, 2) virtuous activity needs to be pleasant for the possessor of virtue or 3) it is essential that it should be somehow difficult, and, finally, 4) do virtues require a form of intelligence or wisdom<sup>54</sup>. Among the different virtue theories, neo-Aristotelian accounts have been so far the most popular in the context of virtue jurisprudence<sup>55</sup>. Other proposals have rarely been considered as a potential basis for explaining judicial virtues. There are, however, some non-eudaimonistic theories that look promising from the perspective of legal theory. One of the most worthwhile of closer examination is Christine Swanton's<sup>56</sup> pluralistic theory, which argues that virtues are dispositions to respond well to the demands of the world, for example, by the promotion of certain values, such as justice. This account is interesting in the present context, because it stresses that different traits are virtues for different reasons and it takes account of the fact that some virtues are grounded in status, while others in relationships between people<sup>57</sup>. Non-virtue ethics accounts of virtues within the wider virtue theory could also be considered. Kantian or neo-Kantian ethics, with its emphasis on rationality in morality, could stand as the most notable example of this kind<sup>58</sup>. Apart from the conceptions that emphasise good motives, there is also an important current of virtue theorizing that underlines the aspect of virtuous behaviour as a disposition to attain good ends or effects<sup>59</sup>, clearly referring to consequentialism.

## 8. From judicial virtues to a virtue-oriented concept of the judiciary

Last but not least, the research on judicial virtues has to consider the need for formulating wider normative and explanatory consequences of the virtue-oriented account for the

<sup>51</sup> A. Amaya, *Exemplarism and Judicial Virtue*, "Law and Literature" 2013/3, pp. 428–445; T. Widlak, *Egzemplaryzm sędziowski w literaturze prawniczej na przykładzie Sprawy grotolazów L.L. Fullera* [Eng. *Judicial Exemplarism in Legal Literature on the Example of L.L. Fuller's Case of Speluncean Explorers*], in: J. Kamień, J. Zajadło, K. Zeidler (eds.), *Prawo i Literatura. Parerga* [Eng. *Law and Literature. Parerga*], Gdańsk 2019, pp. 95–107.

<sup>52</sup> J. Rawls, *A Theory of Justice*, Cambridge (Mass.) 1999.

<sup>53</sup> Cf. C. Swanton, *The definition of virtue ethics*, in: D.C. Russell (ed.), *The Cambridge Companion to Virtue Ethics*, New York 2013, p. 319.

<sup>54</sup> L. van Zyl, *Virtue...*, pp. 19–20.

<sup>55</sup> See: L.B. Solum, *A Tournament of Virtue*, "Florida State University Law Review" 2005/32, pp. 1365–1400.

<sup>56</sup> See: C. Swanton, *Virtue Ethics...*; C. Swanton, *Pluralistic Virtue Ethics*, in: L. Besser-Jones, M. Slote (eds.), *The Routledge...*, pp. 209–221.

<sup>57</sup> See: C. Swanton, *Virtue Ethics...*

<sup>58</sup> See: L. van Zyl, *Virtue...*, p. 34.

<sup>59</sup> See: H. Battaly, *Virtue*, Cambridge 2015.

judicial roles. This would involve an attempt to answer the question whether the judicial virtues (as reconstructed above) provide legally relevant criteria for the assessment of judicial decisions. Two specific questions pertaining to judicial selection and judicial independence may appear relevant in this context. The first one is whether the reconstructed normative account of judicial virtues could and should provide proper grounds for the process of selection of judges? The assertion that character and competence rather than their personal political views or ideology are legitimate criteria in the process of selection and nomination of judges, especially to the highest judicial offices, may not be fully self-evident. Such a hypothesis is legitimate also on the grounds of the conclusions from other jurisdictions<sup>60</sup>. The *prima facie* intuition may well be that ideology plays or should play a major role, especially as far as judges of the highest courts are concerned. It may be particularly interesting whether the present legal culture *actually* supports the virtue-meritocratic grounds for selection of judges. From the perspective of a legal system as a whole, it is not only impartiality, but also the question of the accountability of the judiciary, that must influence the selection process<sup>61</sup>. The question which criteria in relation to different levels of the judicial hierarchy are and should, in fact, be decisive in the course of selection of judges is not unfounded and needs to be considered in the light of the virtue-oriented approach.

The second important research question is whether the proper judicial character (understood as a particular set of virtues) could support judicial independence and compensate for the changes in law restricting the constitutional powers of the judiciary and to what extent. There is credible historical evidence to support the hypothesis that the demeanour and character of individual judges, even if they are a minority, may influence the overall level of effective judicial independence in a given jurisdiction. For instance, such conclusion may be warranted on the grounds of the recent historical juridical research in the context of the history of the judiciary in Germany during the Nazi regime<sup>62</sup>. The aretaic normative theory of the judiciary needs to be considered in the light of the independence of the judiciary as a whole and the impartiality of individual judges as the two most important characteristics of the justice system in a democratic state. The dominant assumption is that the formal (including constitutional), rule-based guarantees and mechanisms are primary and central for the independence of the judiciary (and, consequentially for the development of judicial virtues). However, it may also be true that the qualities of character of the judges may potentially play a far more important role in securing their independence and impartiality than the classical deontology-driven legal theories are willing to admit. This may depend on the normative beliefs about the roles and qualities of judges that are actually inter-subjectively shared in the relevant legal culture. This problem can be seen as central not only to the aretaic theory of adjudication and judicial status, but also in the wider context of the project of virtue jurisprudence.

## 9. Conclusion

Virtue jurisprudence is a relatively new approach to legal theory and legal ethics. It is especially novel in civil law jurisdictions. The existing legal accounts of judicial virtue

<sup>60</sup> See: L.B. Solum, *Judicial Selection: Ideology versus Character*, "Cardozo Law Review" 2005/2, pp. 659–689.

<sup>61</sup> K. Malleon, *Introduction*, in: K. Malleon, P.H. Russell (eds.), *Appointing Judges in an Age of Judicial Power. Critical Perspectives from Around the World*, Toronto–Buffalo–London 2006, pp. 3–10.

<sup>62</sup> See: H.P. Graver, *Why Adolf Hitler Spared the Judges: Judicial Opposition Against the Nazi State*, "German Law Journal" 2018/4, pp. 845–877.

are still few and tend to focus on selected aspects. Compared to other areas of applied ethics in social sciences, the aretaic theorizing in jurisprudence is not very prominent<sup>63</sup>. The legal scholarship and the law itself are still dominated by deontology and consequentialism, being the two alternatives in normative theorizing. However, virtue-oriented approaches may significantly add up both to legal theory's traditional questions, e.g. concerning the relation between law and morality, as well as serve as a powerful tool for legal ethics and practice. The aretaic research focused on judicial virtues may most effectively proceed by first uncovering what are believed to be particular judicial virtues and vices, considering different aspects of the wider legal culture. In respect to judicial ethics, the existing virtue theories, including especially non-eudaimonistic ones, may be examined for the purpose of identifying the model of virtue best suited to the peculiarities of the judicial profession. Such an aretaic theory of the judiciary would be especially useful and timely if it enabled applying the virtue-centred approach and language to the particular contemporary situation of the Polish judiciary, and to the public discourse on the issue. The results could be significant in an attempt to replace the chaotic and incohesive public moral and political language of evaluative statements about the judiciary with the aretaic terminology. In consequence, the aretaic (rather than deontological or consequentialist) perspective may enable legal scholarship to take a new path in the course of the debate over the status and qualities of the judiciary, including the problems of judicial independence and the selection of candidates for judicial offices.

### Judges' Virtues and Vices: Outline of a Research Agenda for Legal Theory

**Abstract:** This article focuses on the issue of applicability of virtue theory to legal theory in civil-law (statutory) jurisdictions and suggests research areas and problems in that respect. The author starts with an assumption that the notion of "virtue" and virtue ethics should be used for the purposes of legal theory starting from references to judicial ethics and normative theory of judicial decision-making. This approach looks especially promising for the purpose of systematizing the chaotic moral language that is being currently used in Poland in reference to judges, their skills, and qualities of their character, which in turn may lead to formulating an explanatory and normative theory of the judicial role that better addresses the observable deficiencies of legal deontology. The author suggests research that could proceed from interpretatively uncovering what are believed to be specific judicial virtues and vices, considering different aspects of the wider Polish and European legal culture of civil law countries (included but not limited to legal and ethical standards, public discourse, legal and other literature, historical and fictional examples, and role models). With respect to judicial ethics, existing virtue theories, including non-eudaimonistic ones, may be examined for the purpose of identifying the model of virtue best suited to the particular nature of the judicial profession. The aretaic (rather than deontological or consequentialist) perspective may enable legal scholarship to take a new path in the debate on the status and qualities of the judiciary, including the problems relating to judicial independence and the selection of candidates for judicial offices.

**Keywords:** virtue, virtue ethics, aretaic theory, judicial virtues, juristic virtues, virtue jurisprudence, judicial character

<sup>63</sup> A. Amaya, H.L. Ho (eds.), *Law, Virtue...*, p. 5.

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