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On the Significance of Moral Virtues in the Realm of Law

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Peter Koller

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Abstract

The paper consists of four parts. The first part starts with an explanation of the concepts of law and morality and then deals with the mutual interrelations between moral standards and legal orders in general. Its result is the double thesis that morality requires a legal order on the one hand, and that the law relies on moral attitudes. The second part focuses on the role of virtues within morality with the result that moral virtues are indispensable ingredients for an effective moral practice and a lively moral discourse. On this basis, the rest of the paper is dedicated to the significance of moral virtues in the realm of law: while their function in the formation and preservation of flourishing legal orders is inquired in the third part, their importance for everyday legal practice is dealt with in the fourth part.

1. Law and morality

The relationship between law and morality is a matter of continuous debate in legal and political philosophy since antiquity. The main positions on this matter are known to be divided into two opposing camps: legal positivism on the one hand and natural law doctrine or legal moralism on the other. Whereas legal positivism advocates the view that law and morality are conceptually separated in the sense that the validity of legal norms does not depend on their compatibility with any principles of morality and justice, legal moralism maintains that law and morality are conceptually connected in the way that valid legal norms must be in accordance with fundamental requirements of morality and justice at least to a certain degree. In the present context, however, there is no need to enter in this debate, since for my purpose it suffices to deal with the contingent or empirical interrelations between law and morality rather than their necessary conceptual relationship. To this end it is nevertheless necessary to begin with a brief outline of the very concepts of law and morality.

As for the *concept of law*, I would like to propose the following definition: The law is a collective social practice aiming at the provision of generally binding social norms which are characterized by the following features: (1) they are created and applied by authorized agents who are deemed to be empowered to do that; (2) if mandatory, they are backed by organized force, i.e. they may be enforced by authorized people in a determined way; and (3) they entail a two-sided claim to

legitimacy, laid on the part of its authorities on the one hand and on the part of its addressees on the other. I think that the first two features can be taken for granted and do not need any further elaboration. Taken together, they characterize the law as a real social fact, namely as a dynamic system of binding social norms that differs from other practices of social regulation, such as conventional morality and custom, by being based on authorized power whose effectiveness is warranted by means of force. Not so obvious, however, is the third feature, the law's claim to legitimacy, which is thought to explain the law's normative force and connects it in some way to morality and justice. So I should clarify this feature a bit.

The law's claim to legitimacy includes two claims, depending on the parties by whom it is laid, namely the authorities' claim and the addressees' claim. On the one hand, the legal authorities must claim the legitimacy of their directives in order to maintain that these directives should be generally acknowledged by the addressees as binding. On the other hand, there is the claim by the addressees that legal directives, in order to be acceptable as binding norms, are to be legitimate in the sense that they are acceptable to them under proper consideration. There are a number of viewpoints from which the legitimacy of legal norms and practices may be assessed: their social efficiency, i.e. their actual utility for the individuals concerned under the present circumstances; their suitability to promote the common good or the overall welfare of the particular collective under consideration; and their moral appropriateness, i.e. their acceptability from an impartial perspective considering the relevant interests of all people concerned. The question as to whether the law's legitimacy depends on its moral acceptability will be discussed later on.

A *morality* may be understood in a general way as a bundle of practical standards that (i) are autonomous in the sense that they are accepted freely and voluntarily by people who regard them as binding, (ii) claim universal validity in the sense that people who accept them regard them as binding for everybody, and (iii) have special weight in the sense that they are deemed to be more important than other guidelines of human conduct, in some cases even so important that they take absolute priority over other practical standards, like those of personal taste and prudence. On the basis of this general definition, which leaves room for a great variety of different conceptions of morality, I would like to introduce two more specific concepts of morality, namely those of a conventional morality on the one hand, and of a reasonable or critical morality on the other. A *conventional* morality is a set of moral norms that are widely acknowledged by the members of a certain social aggregate (be it a social group, a society, a culture, or even mankind) as supreme standards of their conduct and, therefore, have effective validity in this aggregate. Such moral norms exert, within the respective social aggregate, a certain degree of social pressure resulting from the interplay of the individuals' informal reactions to the behaviour of others. Of course, the mere fact that moral norms are widely acknowledged in a collective doesn't imply that their recognition is based on good reason. So a conventional morality may be more or less reasonable or even rather unreasonable. Moral standards are *reasonable*, if there are sufficient reasons to assume that their standards should be unanimously accepted by all individuals possibly affected

upon critical reflection, i.e. from an impartial point of view and in consideration of all relevant facts, because their general observance is deemed to be in everyone's best interest. It is true, however, that we can never be completely sure that a moral standard is justified, even if it is commonly accepted for the best reasons we know, since there could be other factors that would call it into question. Yet, this fact provides no ground for moral scepticism. Moral discourse is, like any other rational discourse, an ongoing enterprise in which we have to consider any moral standard under discussion in light of all reasons for and against it, in order to accept those standards which seem to be based on the best reasons available. So the idea of a reasonable morality can play a very important role in moral life, since it provides a critical viewpoint of individual moral consideration and public moral discourse, a viewpoint which helps us to reflect on our personal moral attitudes and scrutinize the standards of public morality.

A comprehensive morality contains two levels of moral standards: interpersonal and institutional standards. The *interpersonal standards*, which refer to the normal interactions among people, particularly to face-to-face-actions, may be divided into three sets: (1) *demands of general morality* which are strictly universal, i.e. binding for all people vis-à-vis others independent of their specific social relationships, which in turn include two kinds of duties, namely (a) perfect duties of not harming others without justification and (b) imperfect duties to render active assistance or beneficence to people in need, if this does not involve significant sacrifices; (2) *demands of justice* that are relatively universal in the sense that apply to people involved in certain social relationships, such as communal and exchange relationships, by imposing on them respective associative obligations, such as distributing communal benefits and burdens justly and dealing in market transactions fairly; and (3) *instructions of supererogation* recommending ways of acting that appear highly desirable, but cannot be generally required of individuals, such as charitable activities for people in need that entail significant sacrifices, or heroic actions of political resistance against a despotic regime. In order to make the interpersonal standards effective, a morality needs *institutional standards*, which are concerned with the creation and preservation of a just social order and, therefore are deemed to be *requirements of justice*; they imply at least two duties: (i) a *strict moral duty* to abide by the rules of an effective social order, provided that they are fairly just or at least not greatly unjust; and (ii) a more *indeterminate duty* to contribute to a just social order to an extent which can be reasonably expected.

On the basis of these conceptual considerations, it is possible to identify two conspicuous features of the mutual interrelation between law and morality, which both are aiming to guide interpersonal interactions and social institutions: firstly, that morality requires a legal order, and, secondly, that the law relies on the moral attitudes of its authorities and addressees.

On the one hand, *morality requires a legal order*, because it alone is not capable of regulating social life in accordance with its own demands. And this applies all the more as the number of interacting people grows. In most social communities, we find a widely acknowledged

conventional morality, which appears to be indispensable for achieving a fairly peaceful and beneficial social order. Such a morality, however, does not suffice to ensure such an order, since it unavoidably suffers from a number of shortcomings, which increase along with a society's growing size and differentiation. For it is pretty obvious that there is a negative correlation between the extent of a social aggregate and the content of its conventional morality: the larger a social aggregate is, the smaller is the set of widely shared moral standards, which themselves become even more indeterminate, incomplete and ineffective, as, for example, the moral precepts to respect the possessions of others or not to cheat other people. Such standards are not only too indeterminate to guide people's conduct in most particular cases; but also incomplete in the sense that their application hinges on conditions about which morality keeps silent; and they are also highly ineffective, because the social pressure by which they are backed has lost its strength. These shortcomings particularly apply to imperfect moral duties and demands of justice which remain highly ineffective as long they are not specified through an institutional order that assigns to particular agents special obligations. Consequently, larger societies will only succeed to achieve a fairly peaceful and generally beneficial social order, when their conventional morality is supplemented and supported by an appropriate legal order whose norms and practices fill the gaps which morality unavoidably leaves open.

On the other hand, *the law relies on the moral attitudes of its officials and addressees*, since their claim to its legitimacy is usually, even though not always based on normative principles which include moral standards. As I said before, the legitimacy of legal orders may be assessed from various viewpoints, namely social efficiency, the common good for the respective collective, and morality or justice. Whether or not the officials and addressees of a legal order actually judge its norms from the moral viewpoint, and, if so, what moral standards they assume, is, of course, an empirical question. Nevertheless, due to a legal order's overriding power based on its organized enforcement it is pretty natural that its officials and addressees are usually claiming its moral acceptability too, either on the basis of widely shared standards of conventional morality or with reference to certain principles of critical morality which the respective officials or addressees deem to be publicly defensible. As a result, the law's legitimacy is usually understood in a way that includes its acceptability from the moral point of view, which, when it is taken seriously, is regarded as having normative priority to the other viewpoints. And this applies the more to a critical morality that requires an impartial consideration of the significant interests of all people that are subject to or affected by a legal order. In addition, there is a further respect in which a legal order relies on the moral attitudes of its officials and addressees: the fact that its proper functioning not only requires the loyalty of its officials to its fundamental values and principles, but also highly depends on the voluntary support of its addressees. For a legal order whose rules are not taken seriously by its authorities or deviate too far from the moral convictions of its subjects will operate badly, and in the worst case even collapse. I will return to this aspect later on, after the following considerations on the role of virtues within morality.

2. Morality and virtues

There is, as you know, an ongoing philosophical debate about the question as to the role of virtues within ethics and morality, particularly as to whether virtues are fundamental elements of ethics or merely instrumental devices for a flourishing moral practice. Here, I do not need to deal with this question, since I am mainly interested in the contingent or causal function of virtues for morality and justice as a social practice. For this purpose, however, a few general remarks on the very notion of virtue are in place.

According to usual understanding, a *virtue* is conceived of as a lasting practical disposition or character trait of people that has some motivating force to behave in a certain way which is regarded as desirable. By contrast, a *vice* is a character trait driving people to bad conduct. There are, however, a plenty of dispositions that are widely regarded as virtues, as well as there is a great number of dispositions that count as vices. As to virtues, prominent examples are, first of all, prudence, courage, moderation, and justice, which are called cardinal virtues; and furthermore reasonableness, truthfulness, honesty, fairness, sincerity, benevolence, helpfulness, generosity, politeness, open-mindedness, tolerance, fidelity, loyalty, reliability, sensibleness, diligence, carefulness, humility, modesty, and the like. When we look at this list, it becomes obvious that the assessment of an attitude as a virtue depends not only on the respective evaluative viewpoint, but also on the relevant social context. Sometimes it may even be the case that a human attitude may be regarded as a virtue in one context, whereas it appears as a vice in a different context.

This observation makes it necessary to differentiate between different sorts of virtues in order to put their variety in a systematic order. To this end, I want to make use of three distinctions, namely between intellectual and practical virtues, between non-moral and moral virtues, and between unconditional and conditional moral virtues. The first and most fundamental distinction is the one between intellectual and practical virtues, which goes back to Aristotle (NE: 1103a, 14 ff). *Intellectual* virtues, such as reasonableness and truthfulness, are aiming at true knowledge and theoretical insight, whereas *practical* virtues are directed to right conduct, including the cardinal and also most of the other previously mentioned virtues. Even though the intellectual virtues are often of great importance for the guidance to right conduct, I am mainly interested in practical virtues, which themselves can be divided up into two different sorts, namely non-moral and moral virtues (Höffe 1998: 47).

Non-moral virtues are character traits that motivate individuals to behave in a way that is beneficial for themselves or the members of the social groups to whom they belong, but not necessarily for other people too. So these virtues, such as diligence, perseverance, fidelity, and loyalty, are instrumental to the promotion of the good of particular individuals or collectives, even though they may collide with moral demands. By contrast, *moral* virtues are directed to

moral conduct, a conduct that appears to be required or desirable from a general and impartial point of view, such as justice, benevolence, honesty, and tolerance. There are, however, cases which cannot be easily assigned to one category or may belong to both sorts. Such a case is, for instance, prudence, understood as the pursuit of one's reasonable self-interest: While some authors maintain that its proper exercise is always in accordance with the basic demands of morality, others think that it can also be directed to immoral ends. But this question is of no importance for the following considerations that will deal with moral virtues only.

So a *moral virtue* can be conceived of as a character disposition that motivates to a way of conduct which, in the light of the accepted moral standards, appears required or desirable. This notion of virtue, which relies on its usual understanding from Aristotle (NE: 1105b, 19ff) to Rawls (1971: 192), is sufficiently narrow in order to understand virtue as a specific aspect of moral life, and it is also wide enough in order to be compatible with different conceptions of morality. If we look at the list of virtues which count as moral, we will find that some of them are unambiguously directed to moral conduct, as justice, fairness and honesty, whereas some others may in certain cases also be supportive of the pursuit of morally dubious or even clearly immoral ends, such as helpfulness, generosity, and solidarity, if they extend to unjust social relationships. This observation suggests a distinction between two sorts of moral virtues, namely unconditional and conditional ones. *Unconditional* are moral virtues which motivate to a conduct which appears to be morally required, permissible or desirable in all social contexts, while *conditional* moral virtues are generally conducive to moral conduct, but may, under certain conditions, also lead to morally unacceptable results. In the following, I will mainly deal with unconditional moral virtues in regard to their function for the very practice of morality.

First of all, I would like to raise the question as to whether two capacities on which every moral reasoning is based, namely empathy and impartiality, are to be regarded as virtues. *Empathy*, the capacity to share the emotions of other sentient beings (cf. Wikipedia, 26.11.2014), which is a necessary precondition for taking the needs of others into consideration, is certainly not an inborn property of people, but a mental disposition that human individuals need to acquire through a favourable socialization and cultivate during their whole life. By contrast, *impartiality* is the capacity to abstract from one's own partial interests or sympathies and taking a general and impersonal point of view, from which the respective needs or claims of all people concerned are considered alike. This capacity, which beside empathy is a further constitutive ingredient of moral thinking, is also variable mental disposition that is contingent upon individual education and social culture. Thus, it seems to me that both empathy and impartiality are capacities which qualify as virtues. In fact, they are the most fundamental moral virtues by which morality as a social practice stands or falls. For without them people would neither have reason to take care of the interests of other people, nor be able to weigh them up against each other, including one's own desires.

More prominent moral virtues are justice, fairness, benevolence, peacefulness, and honesty, which all seem to be unconditionally desirable. *Justice*, understood as an individual attitude rather than a property of institutions, is more or less equivalent to the habit of judging and acting in a way that appears morally required in contexts concerning interpersonal or social conflicts, such as the resolution of private litigations, the distribution of common goods or burdens, the exchange of benefits through contractual transactions, the use and exercise of social power, and the punishment of wrongs. *Fairness* as a moral virtue of individuals is apparently closely related to justice, except that it seems to refer more to the procedural aspects of decision-making on the subject-matters of justice rather than their substantial results. In contrast to justice and fairness, *benevolence*, the disposition to do good, is often conceived of as an attitude which mainly applies to the weak moral demands of humanity and supererogatory activities. I think, however, that it is also supportive or even requisite for the reasoning about the demands of general morality and justice, as these demands are to promote the well-being of people as good as possible in order to be generally acceptable. Something similar is true of *peacefulness*, the striving for non-violent resolution of social conflicts, since it is inbuilt in the very idea of morality from the start. Last but not least, the virtue of *honesty*, according to its usual understanding, combines a number of attitudes, such as integrity, truthfulness and sincerity, which all appear to be mandatory both for moral discourse and moral conduct.

Now, I turn to the function of virtues for morality as a social practice, where I want to make a distinction between their general function for morality as a whole, and their special functions for the various sorts of moral standards.

The moral virtues just mentioned have, first of all, the *general function* to strengthen the weak motivating force of moral standards, which often compete with our self-interested preferences and, therefore, are highly susceptible to defection. By creating ‘internal’ sanctions, namely feelings of good or bad conscience, our internalized moral attitudes provide us with some additional, though often rather weak incentives to comply with acknowledged moral standards even in cases where external sanctions are insufficient or missing. In this way virtues contribute to the effectiveness of morality. Since such moral attitudes, however, will flourish only in a supportive social environment that is reinforcing and fostering them, it is necessary that we pay appropriate tribute to their appearance. That is why we are in the habit of acknowledging and praising persons of whom we learn that they have behaved or are still behaving in a morally desirable way beyond the degree that can be expected of average people as a matter of course.

Beside this general function, moral virtues have also various *special functions* according to the different sorts of moral standards mentioned above. Let us take a look at *interpersonal* morality, which itself divides into general morality, justice and supererogation. (1) As for the demands of *general morality*, moral virtues have different functions in relation to the duties under consideration: (a) In relation to *perfect duties*, which, in general, are not only rather clear, but also

not very demanding, virtues have the function to motivate individuals to a regular and lasting compliance with these duties, even in cases where they could easily violate them without risking any social sanction. (b) With regard to *imperfect duties*, which are even more susceptible to defection, because they are generally more demanding and less precise, virtues can help to counteract the permanent and significant temptation to an insufficient compliance; so we may feel moral shame, when we are confronted with the social injustices and evils that result from the fact that the uncoordinated behaviour of individuals fails to achieve a morally acceptable state of social affairs, a moral shame which itself may lead us to contribute to social reform. (2) The demands of *justice* are even more in need of support by corresponding moral virtues in order to be fairly effective; for, on the one hand, they are deemed as rather strong moral demands which constitute individual rights and duties, while, on the other hand, they usually are pretty indeterminate and controversial, so that people are often tempted to tailor them to their particular interests. (3) And regarding *supererogatory activities* moral virtues serve the purpose to motivate people to act in ways that exceed their moral duties, but are desirable from a general point of view (O'Neill 1993; Gert 1998: 285ff). To the functions of moral virtues for *institutional* morality – the strict duty to comply with the rules of a fairly just social order and an indeterminate duty to contribute to a just social order – apply similar observations as for perfect and imperfect duties.

However, the effects of moral virtues vary not only with the nature of moral demands to which they are related, but also with the individuals' moral conceptions. Some people may have strange moral views which bring them in opposition to the conventional morality widely shared within their social environment; for instance the view that any expression that makes fun of religious beliefs or rituals should be regarded as a severe moral wrong deserving death. If such a view goes hand in hand with the pronounced attitude of its advocates to defend it at any cost, this attitude will cause conflict rather than promote a fairly peaceful and tolerant social life. Consequently, not every attitude of persons which they deem a moral virtue, appears to be one from the viewpoint of most other people. But in almost all societies we find a wide-spread consensus on a certain set of moral standards, i.e. a conventional morality backed by informal social pressure. Yet, the fact that moral standards are actually agreed on does not imply that these standards are also reasonably defensible from a critical perspective. So it may be that, upon critical reflection, some of these standards may turn out to be highly erroneous or even immoral, and, therefore, also the individuals' moral attitudes which support their effectiveness. As a result, the last instance for the assessment of whether the standards of an individual or conventional morality are reasonably defensible, is a *critical* morality whose standards appear to be generally acceptable for the best reasons available. In the following chapters, which are dedicated to the role of moral virtues within the domain of law, I will assume that most people are able to take the perspective of a critical morality and exert respective moral virtues in support of a legal order which by and large accords to its demands.

3. Virtues and legal order

This chapter deals with the significance of moral virtues for the creation and preservation of a well-functioning and legitimate legal order in general, i.e. the level of its basic institutional arrangement, including the constitution and legislation. To this end, it is necessary to make in advance a few remarks on the moral aims and limits of a legal order from the viewpoint of a critical morality.

As for the *aims of law*, a legal order firstly has to specify and enforce the fundamental rights and duties of its subjects which flow from well-founded and widely acknowledged perfect demands of general morality and justice, insofar as their enforcement serves the protection of essential interests of people which outweigh the negative consequences of legal force. In my view, these rights and duties not only include the familiar negative duties of non-interference and their correlative rights, but also a few modest positive duties, such as the duty to render help in case of emergency, if such help can be reasonably expected. Secondly, a legal order has to establish and enforce an arrangement of individual rights and duties that facilitates the cooperative fulfilment of those imperfect moral demands whose satisfaction is of essential importance for individuals, but can only be achieved by coordinating their behaviour in an appropriate way. This is certainly true of the demands of social justice which entail positive rights of individuals, such as the rights to legal equality, civil liberty, democratic participation, equal opportunity, and economic justice. And thirdly, a legal order has to issue and enforce individual rights and duties which are necessary for achieving *collective goals* that need cooperative interaction, if their pursuit has been decided on in an appropriate way, even though achieving these goals may not be morally required in itself. So the law may establish rights and duties in order to provide public goods to the citizens' common benefit.

On the other hand, there are also definite *limits of law* constraining the legitimate tasks of a legitimate legal order. First of all, such an order must not enforce erroneous or eccentric moral views that are not aimed at the protection of important human interests, such as the prohibition of homosexual relationships, interracial marriages or blasphemous utterances. This constraint flows immediately from the law's ultimate aim to guarantee a just and generally advantageous social order, because the legal enforcement of eccentric views would create significant costs to those individuals who do not share them without serving the realization of generally acceptable aims. Secondly, a legal order ought not to enforce supererogatory moral ends that exceed the demands whose fulfilment can be reasonably expected of average people from an impartial perspective. For even though such moral ends, such as donating a kidney to somebody who needs one for survival, or rescuing a person by risking one's life, may appear generally desirable, it is not the law's job to enforce them, since this would create social affairs even less desirable than the continued occurrence of the dangers that could be diminished through the legal enforcement of those ends. And thirdly, a legal order must not enforce certain inner convictions and attitudes of

people, even if they may appear morally desirable, since this would unavoidably result in public hypocrisy, or, even worse, a rigid repression of free thought. Consequently, legal force is not an appropriate means to bring forth moral virtues.

Yet, although the law must not enforce moral virtues directly, it certainly can and should contribute to their promotion by supporting them indirectly. There are at least two possible ways: On the one hand, a legal order should provide legal framing conditions of social interaction which make moral conduct beneficial to its subjects rather than disadvantageous, as, for instance, by preventing people from taking benefit from dishonest, corrupt or unfair activities. Thus, a legitimate and functioning legal order actually contributes to the diffusion and cultivation of moral virtues, although it is not its job to enforce them. On the other hand, a legal order may foster moral virtues by providing appropriate positive incentives, such as promoting fairness and solidarity in public education, supporting desirable social activities through public subsidies or the tax system, or offering special awards for laudable ways of conduct.

Now, I want to take a glance on the moral virtues which are supportive of a legitimate legal order both on the part of its decisive political agents and superior legal authorities on the one hand and on the part of ordinary people on the other. In both cases it will be useful to contrast a state of affairs in which the individuals under consideration are guided by such virtues with a situation where they are lacking them and, therefore, only led by their respective individual preferences, particularly their selfish interests.

Which moral demands do we address at the decisive *political agents and legal officials* of a legitimate legal order, such as the ministers of government, members of legislative bodies, judges of high courts, powerful politicians, and influential political advisers, who bear particular responsibility for the shaping and operation of legal institutions, rules and procedures in general? Some of these demands are pretty obvious. First of all, all these persons are expected to stick with the basic requirements of liberal democracy and social justice, especially the basic human rights, such as the rule of law, equality before the law, fair trial, civil and political liberty, and the like. Furthermore, we also expect that these people are led by a publicly defensible conception of the common good rather than pursuing the partial interests of particular social groups, and that they exercise their powers impartially in accordance to what they deem the common best rather than in a corrupt way to the benefit of the political rulers or the rich. Yet, we have to bear in mind that it is hardly possible to enforce these demands through legal means, not only since they are highly abstract and open-textured, but also since persons to whom they are addressed are often beyond legal control due to their position at the top of the legal system. Thus, these persons will hardly abide by those demands sufficiently, unless they acknowledge them wholeheartedly as binding guide-lines of their conduct and comply with them voluntarily even in absence of external pressure. If we imagine that most leading authorities and officials were people pursuing mainly their own interests or private aims and, therefore, would comply with the demands on

their public function only because of their fear of negative consequences when they do not, it is pretty clear that, in this case, the legal order would work very badly or even be in danger to collapse. As a result, a well-functioning legal order requires that its leading authorities and officials possess the relevant moral virtues that motivate them to fulfil their functions in an appropriate way. What are these moral virtues?

First and foremost, the superior political agents and legal officials need a *sense of justice* that enables them to develop a publicly defensible conception of a generally acceptable legal order as a guide-line for their conduct concerning the shaping of legal institutions, rules and procedures. I suppose that, in the context of modern societies, this sense of justice entails a number of more special moral attitudes towards people who are subject to or concerned by the legal order, such as *equal respect* for their fundamental dignity and autonomy, *sensitivity* for their individual needs, *solidarity* with individuals in serious difficulties, *tolerance* for the diversity of their ways of life, and *courage* in defending the principles of justice against illiberal, anti-democratic or inhumane movements or in supporting unpopular measures for the common good against counteracting partial interests. In addition, the superiors of a legal order should also distinguish themselves by various virtues related to their social roles, namely *integrity* in the sense that they are not susceptible to corruption, *responsibility* for the social effects, particularly the possible costs and failures of their decisions, and, last but not least, *judgement and prudence* in the pursuit of their political goals or the exercise of their legal powers. Even though it would be greatly naive to expect of real politicians or officials to achieve these virtues to a more or less full extent, it would be disastrous for a legal order, if they would completely lack them and only pursue their own good or the partial interests of their social class. An important or even necessary condition that politicians and official develop and cultivate these virtues to a sufficient degree is certainly a well-informed and critical public that constantly scrutinizes the superiors' activities for their legitimacy and puts on these people appropriate pressure so that they exercise their powers in a fairly proper way.

Such a critical public, however, could hardly persist, if most *ordinary people* were lacking any moral attitudes in support of a proper shaping and operation of the legal order to which they are subject. So such an order also requires supportive moral virtues on the part of a significant number of its subjects. Some of these virtues coincide with the superiors' virtues previously mentioned, such as those of justice, equal respect, solidarity and courage, while others are relative to the subordinated position vis-à-vis the political and legal powers. The latter include, in consideration of the fundamental truth that power corrupts, a sound *scepticism* of the projects, declarations and activities of the political and legal rulers which often are led by hidden partial ambitions rather than generally defensible reasons, as well as *political commitment* that motivates to contribute to the public discourse on matters of common interest in general and their legal regulation in particular.

There is certainly a variety of social conditions that either foster or impede the emergence and cultivation of moral virtues related to the shaping of legal orders on the part of the decisive political agents and legal officials as well as on the part of ordinary people, such as the respective legal culture, political system, economic structure, and the like. In this context, I just want to point to one factor which seems to me of great importance, namely the degree of socio-economic inequalities. My thesis is that large inequalities undermine the development and force of moral virtues. Although I cannot offer solid empirical evidence for this thesis, I deem it very plausible both for general reasons and in light of everyday observations. A general reason is the conjecture that growing differences between the living conditions and interests of people make it more difficult for them to achieve moral impartiality as the basis of justice and fairness, not only because individuals will have increasing problems to put themselves in the place of others with greatly different living conditions, but also because they will be more inclined to tailor their moral views and attitudes to their own particular interests. And this conjecture seems to find confirmation by the observation of public debates on controversial issues of legal policy, as, for instance, the quarrels on taxation, welfare programs or public education. So I think that a society will hardly succeed in bringing about the moral virtues that are important for a well-functioning legal order, unless it keeps the socio-economic inequalities within by and large justifiable limits.

So much for the moral virtues related to the general arrangements and institutions of a legal order. Yet, such virtues do also play an important role in everyday legal practice to which I now want to turn.

4. Legal practice and virtues

The area of everyday legal practice, as I understand it here, includes a wide range of legal activities, such as the judicial proceedings in lower courts concerning particular cases, the execution of administrative regulations by government offices, the enforcement of legal rules by the police and other administrative bodies, the settlement of legal disputes by arbitral institutions, and the sphere contractual transactions among private parties. In the following, I will take a glance at these activities in order to figure out why and in what respects their proper and fair performance requires certain moral attitudes on the part of their participants, be they legal officials or private people. To this end, it will again be useful to consider a state of affairs in which these individuals are lacking any moral virtues and led exclusively by their self-regarding interests and preferences.

There is a tradition of political thinking advocating the view that the general arrangements of legal orders should be so complete and precise that they provide their addresses, including legal officials, with firm limits of their conduct within which they should be free to pursue their own interests without being subject to further normative standards. At the first glance, this view may

appear attractive, since it relieves us from moral burdens as long as we abide by the legal rules, provided that these rules themselves regulate social life in a general acceptable way. At a closer glance, however, the view turns out to be completely illusory, in fact for a multitude of reasons: (1) Every legal order, even a most complete and just one, unavoidably contains a great many rules which are highly indeterminate or abstract and, therefore, leave to the officials a high degree of discretion to apply them to particular cases in various ways which may significantly differ from the moral perspective, such as the legal notions of guilt, fault, negligence, emergency, self-defence, and the like. (2) Every legal order is actually exposed to the danger that its rules are applied by its officials in a biased, distorted or even obviously incorrect way without providing the subjects concerned with appropriate means of remedy, as, for instance, certain ways of concealed discrimination against individuals because of their ethnic origin or social position. (3) Every legal order includes many rules whose effective enforcement depends on the voluntary cooperation and support of its subjects, including a sufficient number of those who themselves do not benefit from supporting legal enforcement, as in the case when people spend their time for giving testimony in trials by which they are not affected. (4) Every legal order contains sets of rules, as, for instance, those of contract or tort law, whose requirements on individuals' lawful conduct must be kept very low for the sake of practicability, at any rate lower than reasonable standards of morality, with the effect that they may easily lead to morally questionable outcomes, such as distorted contractual transactions or insufficient liability for risky enterprises. (5) Every legal order operates in a way that its actual results in particular cases depend not merely on its rules, but rather on their interplay with variable facts of social reality, such as the individuals' social position, economic situation, knowledge, power, reputation, ethnic origin, and the like, which may cause significant inequalities of their opportunities to have access to law and to enforce their legal claims. All these reasons support the thesis that everyday legal practice must rely on supportive moral attitudes on the part of its participants, if it shall operate in a fair way.

In order to single out these virtues, I suggest to differentiate roughly between three groups: first, legal officials, such as normal judges and agents of public administration, who, in a way represent the servants of a legal order; second, ordinary people as mere addressees or subjects of legal regulations; and, third, lawyers, i.e. professional legal counsels or advisers in behalf of individuals or enterprises in litigations, contractual relationships or other legal affairs.

As for *legal officials*, their most important law-related moral attitudes are, in my view, devotion to the rule of law, a sense of justice, sound judgement and, of course, honesty. *Devotion to the rule of law* has two opposite aspects: on the one hand, *loyalty* and *obedience* to valid legal rules, be they based on legislation or flowing from precedents, as long as their application is not clearly in conflict with fundamental and evident requirements of morality or justice; and, on the other hand, *bravery* or *courage* of refusing to follow such rules, if their application appears to be incompatible with basic moral requirements, apart from situations of compulsion. Unless legal officials had an attitude of loyalty and obedience to the presently valid rules of the legal order, the

rule of law would be built on sandy grounds, for otherwise they could hardly be brought to stick with these rules by the threat of legal sanctions alone. And unless they would never dare refusing to comply with legal rules that they regard as greatly unjust, the rule of law would degenerate to blind obedience, for the law would lose an essential device for its self-correction by paying proper attention to the critical views of those people who are actually implementing it in social reality. In order to arrive at these views, however, legal officials should have a well-developed *sense of justice*, which they also need for applying the relevant legal rules to all cases under consideration impartially and exercising their respective degrees of discretion left by these rules in a fair and appropriate way. In this context, their reasoning should be guided by *sound judgment*, which requires both a solid knowledge of the relevant legal norms and a proper understanding of the affairs of social reality to which these norms apply. Combined with justice, such an understanding should take particular care of actual social inequalities which may impair the legal subjects' equal access to law or their performance within legal litigations or proceedings. All these attitudes, however, would remain somehow incomplete without being supplemented and supported by legal officials' *honesty* or *integrity* that strengthens their resistance to corruption by making them immune to being tempted to misuse their function to the benefit or to the disadvantage of certain subjects, as, for instance, in cases of bribery or political interference.

A well-functioning legal practice also requires various moral attitudes on the part of *ordinary people*, in fact a well-balanced mixture of two opposite kinds: namely, on the one hand, the affirmative attitudes of legal obedience, tolerance for legal failures and willingness to support law-enforcement; and, on the other hand, the critical attitudes of moderate distrust, commitment to struggle for rights, and courage to civil disobedience. In my opinion, there are conclusive reasons to believe that the subjects of a legal order have a moral duty to abide by its rules, as long as these rules are by and large fair or at least not grossly unfair. If so, they should have a moral attitude to this effect, i.e. an attitude to *legal obedience*, which, however, must not amount to blind obedience, but rather be limited to the rules which, by and large, appear morally defensible or at least not grossly unacceptable. If so, people should also exhibit relative *tolerance for legal failures and imperfections* which unavoidably occur in legal practice, for otherwise even a fairly well-functioning practice would possibly be judged as greatly defective. This is particularly true of the official ways of enforcing mandatory legal rules through criminal persecution and private litigation, for these are contingent on various social facts beyond the law's control, with the result, that they are always to a certain extent deficient, accidental and biased. These defects will be diminished when people generally exhibit a sufficient *willingness to support law-enforcement* through their cooperation with the respective legal institutions, at least when they can do that without significant costs; trivial kinds of such support are reporting a criminal act observed to the police and giving testimony in a court trial; more demanding are, for instance, sacrificing valuable time for sitting on the jury, supporting a victim of criminal violence in self-defence, or publishing corrupt practices in state institutions or private enterprises through whistle-blowing

despite the risk of considerable costs in case of detection. However, these moral attitudes in favour of the current legal practice must go hand in hand with some attitudes that reflect a more critical view of this practice. One of them is a habit of *moderate distrust* towards the activities of legal authorities, a habit that should drive forward a lively public discourse submitting these activities to public scrutiny and control. Furthermore, most activities of legal authorities must be initiated by private individuals who have a legal concern, be it because they believe to have a legal claim against others who deny it, because they fell victim to a criminal wrong, or because they think that they were treated incorrectly by public officials, and the like. Consequently, a well-functioning legal practice needs people's *commitment to struggle for their rights* and possibly also for the rights of neighbours who cannot help themselves. This leads to the question as to how people should behave when they believe that the current legal practice suffers in a certain respect from a severe injustice that has survived any attempt to eliminate it through legal remedy and public protest, as, for instance, a clear racial bias in the treatment of people by the police or an ongoing habit of certain enterprises to violate basic social rights of their workers with the connivance of the authorities responsible for worker protection. While ordinary people, in my view, do not have a moral duty to put up illegal resistance to such injustices at the risk of punishment, I deem it a moral virtue of individuals who exhibit the *courage to civil disobedience* in order to strengthen their protest against such a deplorable state of affairs. For, in a by and large liberal society, civil disobedience, i.e. committing non-violent offences under threat of penalty with the intent to draw public attention to unjust legal practices, may contribute to reforming the current legal practice.

Finally, I want to take a glance at professional *lawyers*, such as advocates, barristers, solicitors or legal counsellors whose job is to advise private people in legal matters and represent or support them in legal proceedings. Although their particular roles and responsibilities are to a certain extent contingent upon the respective national legal system, they generally entail two kinds of duty: on the one hand, the lawyers' duty to their clients, including confidentiality, expertise, perseverance, fidelity, reliability, and, on the other hand, their duty to the rule of law or the integrity of the legal order, which requires justice, honesty, courage and commitment to the common good. These two kinds of duty may not only come into conflict with one another, but possibly also collide with the self-regarding interests of the lawyers or their law firms. For a closer inspection of lawyers' moral responsibilities and virtues, I can rely not only on abstract theoretical considerations and fragile intuitions as before, but also on a solid empirical study by the *Jubilee Centre for Character and Virtue*, published recently in a research report under the title *Virtuous Character for the Practice of Law*, which extensively deals with the moral demands on lawyers in general and their performance in face of ethical dilemmas in particular. The participants of the study were divided into four groups, namely two groups of law students (1st year undergraduates and advanced students) on the one hand, and, on the other, two groups of experienced law professionals (solicitors and barristers), who were asked for their opinions concerning lawyers' good performance through an e-survey and interviews. Even though the

study reflects some peculiarities of the British legal system, its main results apparently also apply by and large to other developed legal orders.

According to the study, there is wide-spread agreement on the most important character traits of an ideal lawyer among all investigated groups in spite of slight differences between students and professionals, which obviously mirror their different levels of experience. Anyway, the top virtues include *judgement*, *perseverance*, *honesty*, *fairness* and *perspective*, which all can be certainly affirmed from the viewpoint of critical morality. Yet, these virtues will hardly provide sufficient guidance for lawyers' conduct, as long as they remain that abstract. And since some of them are related to lawyers' duty to the client, such as judgment and perseverance, while others have to do more with the duty to the legal order's integrity, as honesty and fairness, they may easily come into conflict in cases where the lawyers' clients are exclusively interested in outcomes beneficial to themselves rather than in seeking justice. But even if lawyers are inclined to resolve such conflicts in a morally acceptable way, they may be subject to external pressures, possibly by their law firm, to refrain from doing so. Fortunately, the Jubilee Centre's study offers a plenty of interesting information about the range of opinions on how lawyers may cope with various ethical dilemmas which they frequently encounter. Here, I just want to mention three of these dilemmas.

The first (named "Divorce and Children Act Matter") concerns a conflict between a lawyer's duties to the client on the one hand and to the legal order on the other, or, in terms of virtue, between confidentiality and fidelity on the one hand, and justice on the other: A lawyer represents a mother of three children, who originally was seeking to divorce from her husband, but changed her mind and instructs the lawyer to withdraw the legal proceedings, because she wants to move with the children back to her husband, although a number of indications make it highly probable that he brutally mistreated the children, so that the lawyer has strong grounds to believe that the children will be at risk if this happens. Interestingly, an overwhelming majority of students voted for the option that the lawyer ought to report the matter to the social services in order to protect the children, while more than a half of the professionals preferred to withdraw the proceedings as instructed. So it seems that legal experts attribute to lawyers' virtues towards their clients relative to considerations of justice and benevolence much more weight than less experienced people. This conjecture finds additional support by the reactions to the second dilemma ("The HIV-Positive Client Scenario"), which consists in a conflict between a lawyer's duty to confidentiality in favour of a client and an attitude combining beneficence and fairness to the benefit of another client: A family lawyer who represents a female client in a divorce case learns that she found out that her husband, from whom she seeks to divorce, has HIV, and that she is fearful, even though not sure that she has contracted the disease herself; furthermore, she tells the lawyer that she is hesitating to reveal this to her new life-in partner, who accidentally is also a client of the lawyer; so the lawyer, who assumes that the woman will not inform her new partner about the risk, has to make a decision as to whether to do nothing or to disclose the risk to the woman's partner. Now,

in all groups of participants a large majority gave priority to the lawyer's duty to confidentiality and compliance (to do nothing) over beneficence and fairness (disclosing the risk), where the majority is successively growing from group to group along their members' legal knowledge or professional position. The authors of the study seem to be not quite sure about the subjects' considerations which led to this result, for they raise the following questions: "Where the risk to health relates to legally competent adults with no vulnerable children involved, it is judged that, where there is no gross violation of justice, the credibility of the justice system must be protected? If that is so, are the 12% of solicitors and 5% of barristers who would breach confidentiality acting improperly or is it a legitimate difference of judgement?" (Virtuous Character: 21)

The third dilemma ("Rounding-up hours") differs from the former, because it is not about conflicting professional duties or virtues of lawyers, but about a conflict between lawyers' duty to their clients, namely honesty and courage, and their law firms' financial benefit: A young lawyer who works in a law firm is instructed by a superior partner to make ready some files for costing and to round up the hours spent on each file to the next hundred, saying this wouldn't matter to the clients. The young lawyer, however, feels uncomfortable with this instruction and asks advice from another superior partner, who indicates that he does not want to be troubled with the matter, but says he would be ready to deal with it, if the young colleague notifies him of the concerns in a letter. So our lawyer has the choice between rounding up the hours according to the first partner's instruction or writing a letter to the second partner. Although all for groups of participants exhibit a clear preference for the second option, namely that the young lawyer should write a letter, there are surprising differences between the groups, particularly between students and professionals. For the students were significantly less than the professionals in favour of this option, demanding from the lawyer honesty to the clients and courage towards the superior partner. While among the 1st year undergraduates 31% opted for the easy way that the young lawyer should carry out the first partner's instruction, only 16% of solicitors and 5% of barristers found this appropriate. The study authors argue that this result partly reflects the commercial pressures on lawyers, partly the particular position of barristers. This may be right, but it does not explain why especially so many students seem to have no problem with a clearly fraudulent conduct of lawyers towards clients. Could it be that a part of students misunderstood the dilemma by thinking that they were asked for their opinion of what the young lawyer would actually do rather than what he or she should do?