

Is judicial integrity a norm? An inquiry into the concept of judicial integrity in England and the Netherlands

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1. Introduction¹

Much concern is expressed about the safeguarding of the integrity of judges – but what is judicial integrity?

Given the obscurity of the concept I will take a phenomenological approach, carefully inquiring into the nature of integrity. I will do this by asking two questions: What is the discourse on judicial integrity about? and: Is judicial integrity a norm of its own, or can it be inferred from other norms, such as the rule of law or democracy? With the first question I enquire after how judicial integrity is used in a quotidian sense. With the second question, I enquire after the normative structure of judicial integrity.

This article is structured accordingly. As to the first question, the discourse² on the integrity of judges seems to have a dual character. On the one hand, there are debates in which integrity is at stake according to the participants (Section 2). Another discourse on integrity concerns the safeguarding mechanisms for judicial integrity, which are devised on both European and national levels (Section 3). The second question will be treated in the form of an inquiry into the normative structure of the concept of judicial integrity within the context of democracy and rule of law (Section 4). In the section that follows (5) an effort will be made to clarify the use of integrity in the discourses described. The article will end in some conclusions (Section 6).

Although there are overlapping trends, there is not one single discourse on integrity. It differs significantly per profession and in the case of judges, per jurisdiction. In this article, I focus mainly on the jurisdictions of England and the Netherlands. As ‘sober self-restraint’³ is in order in comparative legal theory I chose but two countries on the rationale of contrast. In addition to examining my home jurisdiction, the Netherlands, I also look into England. There the judiciary is much less of an ‘organization’ – English judges can hardly be described as ‘govern-

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1 I refer to individual judges as ‘he.’ I should now say that wherever ‘he’ is used, ‘he or she’ should be read, but perhaps this is not entirely correct. Although in the Netherlands a vast number of judges are women there only a few instances where the conduct of a female judge has led to a violation of judicial integrity. I know of no cases in England.

2 I do not follow the method of discourse analysis (*cf.* M. Coulthard, *An Introduction to Discourse Analysis*, 1977), as this would require a well-defined discourse. What I present is rather an inventory of the relevant discourses.

3 *Cf.* K. Zweigert *et al.*, *Introduction to Comparative Law*, 1998⁴, p. 41.

ment officials,' acting very differently from what Montesquieu envisaged when he stipulated that judges should be the 'bouche de la loi.' The Netherlands boasts a protracted and widely held discussion on the topic of judicial integrity, based in part on a number of incidents and fuelled by recent organizational reforms. In England the reputation of judges is regarded as proven and tried prior to assuming office. England's traditions of personalized judgments, oral trial and media attention for individual judges have resulted in ample experience on the topic of judicial integrity.⁴

2. Judges on trial: Debates on judicial integrity

Although one can hardly say that there is consensus about the nature of the concept and its functioning in practice, this does not seem to prevent people from complaining about violations of judicial integrity. Let us therefore look at some discussions in which explicit reference to judicial integrity is made. The question whether these discussions actually have anything to do with judicial integrity will not be asked at this point.

2.1. England – the high profile of judges, the legitimacy of appointments, miscarriages of justice and extra-judicial activities

In England judges are viewed more as persons than are their colleagues on the other side of the North Sea, which gives rise to curiosity about intimate details. Of which (noble) descent is the judge? Where did he spend his childhood? Which public school did he attend and what did his lecturers think of him? In which college did he spend his university years and how many firsts did he score? In England curiosity about public personalities is, of course, not only reserved for judges, but also extends to Members of Parliament, cricket players, actors and the like. Still, this curiosity does at times seem to feed questions about the personal or corporate bias of judges.

First of all, there is the question of appointments. There is lively debate on who should appoint, who should be appointed and which procedures should be used.⁵ Closely linked to this subject is the question whether judges connect with society. As John Griffith once observed, senior judges 'have by their education and training and the pursuit of their profession as barristers, acquired a strikingly homogeneous collection of attitudes, beliefs and principles, which to them represent the public interest.' One does not have to endorse the suggestion encapsulated in this observation to acknowledge the legitimacy of the question.⁶ It was recently put into words by Lord Falconer, 'how do they connect with, and retain the confidence of the public, without forfeiting either their independence or their very role in deciding cases in accordance with the facts before them, and the relevant legal principles?'⁷ Part of this discussion is the question of representation. A large number of judges come from the upper layers of society. Should minority groups and women be better represented in the judiciary?⁸

4 A notable difference between these jurisdictions is that in England the majority of criminal cases is adjudicated by magistrates who are laymen. Although the focus of this article is on professional judges, the treatment may apply to any person exercising judicial power, however designated.

5 R. Stevens, *The English Judges. Their Role in the Changing Constitution*, 2005, pp. 169-78.

6 Cf. Simon Lee's (S. Lee, *Judging Judges*, 1988, pp. 33-45) repudiation of an earlier edition of Griffith's book (J.A.G. Griffith, *The Politics of the Judiciary*, 3rd ed., 1985). The 5th edition (1997) is milder in tone.

7 Lord Falconer of Thoroton, *The Role of Judges in a Modern Democracy*. Magna Carta Lecture, Sydney, Australia (13 September 2006).

8 Cf. the consultation paper by the *Department for Constitutional Affairs*, 'Increasing Diversity in the Judiciary' (2006).

These questions are nurtured by the markedly personal fulfilment of the judicial role. Not only does the style of judgments bear the touch of the judge's individuality,⁹ performance at trial is also unique to every single judge. Oddities in judicial conduct regularly reach the newspapers.¹⁰ It must be observed that these do not *eo ipso* enhance the trust that the parties or the public put in the judiciary.

Some decades ago, trust in the judiciary was severely threatened by a number of miscarriages of justice. One only has to think of the *Birmingham Six*, the *Guildford Four* or the *Macguire Seven* and the stir that these miscarriages of justice caused.¹¹ On the recommendations of the Royal Commission on Criminal Justice, the Criminal Appeal Act 1995 established the Criminal Cases Review Commission. Its primary task is to review suspected miscarriages of justice and refer convictions to an appropriate court of appeal where it is felt that there is a 'real possibility' that they will not be upheld. The Commission is also 'to investigate and report to the Court of Appeal on any matter referred to the Commission.' Finally, it is 'to consider and report to the Secretary of State on any conviction referred to the Commission for consideration of the exercise of Her Majesty's prerogative of mercy.'¹² Because of its successes, the Commission's objectives have been widened to include general standards such as 'enhancing public confidence in the criminal justice system.' Due to this wide mandate and the media attention its successes have received the caseload of the Commission has grown – causing an immense backlog.¹³

The 'closed' nature of the judiciary has fuelled suspicions of corporate bias. Supervision and discipline are – to a large extent – internal matters.¹⁴ The public simply has to trust that judges are functioning properly. This is fitting in a tradition where one has to have a well-established reputation prior to becoming a judge.¹⁵ A growing question is, however, whether it is also fitting in an open democracy. Can suspicions be dealt with adequately when things go wrong?

A recurring issue in the English debates, which is closely connected to the above, is that of extra-judicial activity. Interesting in respect of the separation of powers is the fact that judges are frequently called upon to chair Royal Commissions, Committees or 'independent' inquiries. In this capacity they cannot always avoid giving overt opinions on the investigated persons who are frequently politicians.¹⁶ These opinions may give rise to suspicions of bias when they return to act as judges.¹⁷ Interesting from the viewpoint of natural justice are cases in which personal impartiality is challenged on an objective level, such as in the *Pinochet* case.¹⁸ Another issue involving extra-judicial activity is membership in the freemasonry. The secret nature of the organization has been considered incompatible with the trust that one needs to be able to put in judges.

9 One outstanding example being the code inserted into a judgment by Mr Justice Peter Smith in the case concerning Dan Brown's Da Vinci Code (*Baigent v. Random House Group Ltd.*, [2006] E.W.H.C. 719).

10 One has but to think of the recent instance where a judge allowed a 33-year old sex attacker to avoid jail on the condition that he write a letter of apology to his victim. The cause for this mild punishment was the fact that he, as a millionaire's son, had led a 'sheltered life' in India and had been led into temptation. 'Apologise and you won't go to jail, judge tells "sheltered" sex attacker', *The Times*, 11 August 2006.

11 See Griffith, *supra* note 6, pp. 204-13 for an extensive treatment; see J.F. Nijboer, 'Gerechtelijke dwalingen en de rol van deskundigen', 2003 *Justitiële verkenningen* 1, pp. 105-19 on the technical backgrounds – forensics, police investigation *et cetera* – and a comparison with the Netherlands.

12 See for an overview of its role: www.ccrj.gov.uk.

13 Cf. C.H. Brants, *Criminal Cases Review Commission in England and Wales*, 2006, p. 51.

14 See A. Paterson, *The Law Lords*, 1982.

15 C. Guarneri *et al.*, *The Power of Judges. A Comparative Study of Courts and Democracy*, 2002, pp. 66-68.

16 Cf. Griffith, *supra* note 6, pp. 25-57; Stevens, *supra* note 5, pp. 186-189.

17 One only has to think of the impact made by Lord Hutton's Report, which was to clarify the circumstances surrounding the death of Dr. Kelly.

18 *Bow Street Metropolitan Stipendiary Magistrate ex p. Pinochet Ugarte* [1999] 1 All ER 577.

2.2. The Netherlands – miscarriages of justice, neo-managerialism and an increasing interest in the personalities of judges

In recent years a number of miscarriages of justice has troubled the Dutch public.¹⁹ The most noteworthy of these were cases concerning a homicide in Putten²⁰ and a murder in a public park in Schiedam,²¹ where suspects were convicted of murder in all instances up to the highest appeal court in the Netherlands, the *Hoge Raad*. In both cases, it was journalists who on the basis of statements by defiant policemen questioned the judgments and in particular the evidence on which the judgments were based. The journalists proved to be right. These miscarriages of justice were regarded as such a threat to trust in the rule of law²² that a permanent Committee was established under the name *Posthumus II*.²³ Its mandate is not to scrutinize *ex post* the integrity of judges, but that of the prosecution in order to see whether serious flaws occurred in the investigation of offences and/or in the treatment of the subsequent criminal cases, which obstruct the balanced assessment of the case. In spite of these nuances, popular opinion regards this committee as an extra possibility to seek acquittal,²⁴ which sits uncomfortably with the judges.²⁵

In the Netherlands, the judiciary is very much an *organization*.²⁶ In the jargon of the Council for the Judiciary,²⁷ the judiciary is an organization with production, personnel, work processes, performance norms and the like.²⁸ Among the objectives on its 2002-2005 agenda were: improving the efficiency of the organization and gaining more insight into the costs of adjudication.²⁹ This was to aid the financing structure of the courts.

This discourse, which is at times labelled ‘new public management’ or ‘neo-managerialism’³⁰ has proved itself in tackling bureaucracy in various public services – such as healthcare or the schooling system – by ensuring that the organizations work more efficiently. With regard to such public services, however, efficiency accounts for only a part of ‘customer satisfaction’.³¹

19 For an older but very detailed discussion on miscarriages of justice in the Netherlands see H. Crombag *et al.*, *Dubieuze zaken. De psychologie van strafrechtelijk bewijs*, 1992.

20 Rb Zutphen 06-01-1995 LJN AE1685; Gh Arnhem 03-10-1995 LJN AE1892; HR 16-09-1996; HR 26-06-2001 LJN AA9800.

21 Rb Rotterdam 29-02-2001 LJN AB1823; Gh 's-Gravenhage 08-03-2005 LJN AE0013; HR 15-04-2003 LJN AF5257; HR 7-09-2004 LJN AQ9834; HR 25-01-2005 LJN AS1872.

22 Illustrative is the newspaper commentary by Professor H.F.M. Crombag, who argued that judicial mistakes such as these were the symptom rather than the disease, ‘Strafrechtpraktijk heeft therapie nodig. Fouten in zaak Schiedamse parkmoord zijn symptoom van ernstige ziekte’, *NRC Handelsblad*, 25 January 2005.

23 The Committee was named after F. Posthumus, who wrote the official evaluation report on the ‘Schiedammer Parkmoord’ case by order of the Public Prosecution Service.

24 Recently, several scholars have sought publicity to argue in favour of a commission that would have more competences in line with the English Criminal Cases Review Commission (see above), *cf.* ‘Strafkamer van Hoge Raad voldoet niet’, *NRC Handelsblad*, 13 March 2007.

25 See ‘Rechterlijk tekort’, *NRC Handelsblad*, 11 April 2006, and ‘Het ongemak van rechters over Buruma’, *NRC Handelsblad*, 18 April 2006. For this reason, the Commission’s president, Professor Y. Buruma, does not cease to emphasize that the Committee does not take over the role of a judge. It investigates on the initiative of third parties – not the parties involved – whether the process of gathering and presenting evidence has been fair. If this is not the case, the Committee will advise the Public Prosecution Service that it should review the case.

26 C.W. van der Pot *et al.*, *Handboek van het Nederlandse staatsrecht*, 14th ed., 2001, pp. 500-19. The name given to the main Act regulating the judiciary, the *Wet op de rechterlijke organisatie* (Judicial Organization Act) is telling in this regard.

27 In Dutch: *Raad voor de Rechtspraak*; established by an Act of 6 December 2001, *Staatsblad* 2001, 583, which came into effect on 1 January 2002. In respect of the courts, the Council for the Judiciary has an ancillary responsibility for a number of operational tasks previously belonging to the Minister of Justice, such as the allocation of budgets, supervision of financial management, personnel policy, ICT and accommodation. It was also given the tasks of promoting the quality of the judicial system and advising on legislation that has direct implications for adjudication. It differs from the English Department for Constitutional Affairs in that it does not consider itself directly ‘responsible in government for upholding justice, rights and democracy,’ nor does it – at least formally – ‘run’ the courts.

28 P.J.J.M. Bevers, *Samenwerken binnen de rechterlijke organisatie*, 2004; Raad voor de Rechtspraak, *Agenda voor de rechtspraak 2002-2005, Continuïteit en vernieuwing* (www.rechtspraak.nl).

29 As the funding of the courts was linked to output, it will come as no surprise that the output of courts has grown significantly, *cf.* Sociaal Cultureel Planbureau & Raad voor de Rechtspraak, *Rechtspraak: productiviteit in perspectief*, 2007.

30 D.T. Osborne *et al.*, *Reinventing government. How the entrepreneurial spirit is transforming the public sector, from schoolhouse to statehouse, city hall to pentagon*, 1992; L.D. Terry, ‘Administrative leadership, neo-managerialism, and the public management movement’, 1998 *Public Administration Review* 58(3).

31 It is telling that in *Kostovski/Netherlands* ECtHR 20 November 1989 (§ 44), the Netherlands were convicted for sacrificing the fair administration of justice to expediency.

In these examples, health, education or justice seem preferable. In the Dutch situation, where judges need to cope with high and increasing workloads, the intertwining of performance norms and the financing structure has propelled a discussion on neglect for the primary process of judging.³²

Although the personality of judges is traditionally viewed as being subordinate to their office,³³ interest in judges' personal profiles is increasing.³⁴ In 2002, Pim Fortuyn, an extremely popular right-wing politician, was killed by a left-wing activist just prior to the elections. The judge who then tried the murder case was perceived as being partial for having presided over the local department of the centre-left Labour Party.³⁵ The use of substitute judges, a practice introduced to cope with the high workload, has also raised questions as to the impartiality of judges,³⁶ especially where it concerned lawyers who also act as substitute judges – a practice now dissuaded. The discussion on the compatibility of additional offices was initiated by a group of perturbed citizens, who published a 'revealing' account.³⁷ The initiative has wisely been copied by the Justice Department and the judiciary now publishes its own list.³⁸

Every now and then there are incidents involving the private misbehaviour of judges. A few recent examples are that of a judge who beat his Siberian bride and who was tried for abuse, and that of a judge who was convicted of possession of child-pornography. A recurring issue is that of the mild punishments that they receive.³⁹ Also the fact that judges receive their training in – and pursue their career within – the judiciary argues in favour of a well-functioning disciplinary system.

Finally, although allegations of corporate bias are still voiced in the Netherlands,⁴⁰ it has become less of an issue.⁴¹ Corporate bias was at times assumed in respect of participation by women and minority groups, and in respect of the political preference of judges. Nowadays, a large percentage of judges is female. The only concern here is that the higher-level the court is, the lower the percentage of women is.⁴² Minorities are still underrepresented.⁴³ With regard to the political persuasion of the judiciary, in 1991 almost 40% of judges had a clear preference for the anti-monarchist liberal party D66 which occupied only a few seats in Parliament. The survey

32 See M. Boone *et al.*, *Financieren en verantwoordten. Het functioneren van de rechterlijke organisatie in beeld*, 2007 and G.Y. Ng, *Quality of Judicial Organisation and Checks and Balances*, 2007. It has been suggested in various discussions that a relationship exists between high workloads and errors in judging. See for instance the Opinion by N. Jörg, the then Attorney General of the Hoge Raad (HR 25-01-2005 LJN AR6190 opinion 16-44) and the discussion that followed it (*cf.* 'Rechters maken teveel fouten', *NRC Handelsblad*, 29 January 2005; W. Tonkens-Gerkema *et al.*, 'Kritiek op kwaliteit, kritiek op de organisatie?' 2005 *Trema* 4, pp. 137-138).

33 In line with the French, Montesquian tradition (*cf.* G.J. Wiarda, *Drie typen van rechtsvinding*, 1988).

34 P.J. van Koppen & J. ten Kate, *De Hoge Raad in persoon. Benoemingen in de Hoge Raad der Nederlanden 1838-2002*, 2003; 'De rechter spreekt', *Volkskrant Magazine*, 15 (9 August 2003).

35 After the verdict, the centre right Minister of Interior Affairs was the first to react with a public statement that the punishment was too low, *cf.* 'Remkes uit verbazing over vonnis Volkert van der G', *NRC Handelsblad*, 16 April 2003.

36 See for examples: L.E. de Groot-van Leeuwen, 'Over missers en rechters', 2005 *Ars Aequi* 7/8, pp. 612-615.

37 Stichting WORM, *Rapport Integriteit Rechterlijke Macht*, 1996. They also have a website where the additional offices and training of lawyers and judges are listed. It is regularly updated but at times inaccurate (www.sdnl.nl/antecedenten-2005.htm).

38 M. ter Voert and J. Kuppens (*Schijn van partijdigheid rechters*, WODC onderzoek en beleid 199, 2002) conducted wide-scale research into the 'appearance' of partiality of judges. The list of additional offices can be found on the website of the judiciary (namenlijst.rechtspraak.nl).

39 *Cf.* the conviction of the judge who abused his wife, Rb Zwolle 06-06-2006 LJN AX6783. Pity was expressed for the judge that he would no longer be able to exercise his profession, which resulted in a lower punishment.

40 See the highly critical article by Hertogh (M.L.M. Hertogh, 'Vertrouwen in de rechtspraak. Harde cijfers met een flinke korrel zout', 2004 *Nederlands Juristenblad* 23, pp. 1164-1168). He comments on recent surveys, which show a remarkably high level of trust in the judiciary.

41 This has been a concern for over a hundred years, *cf.* G. Vrieze, 'Zijn rechters zonder gedragscode nog wel te vertrouwen? (I)', 2005 *Trema* 4, pp. 142-143).

42 L.E. de Groot-van Leeuwen, 'De feminisering van juridische beroepen; een overzicht van de onderzoeksresultaten', 1997 *Justitiële Verkenningen* 23(8), pp. 103-116. See for the latest figures: Raad voor de Rechtspraak, 2005, *Jaarverslag*, p. 88 (at www.rechtspraak.nl).

43 A. Böcker *et al.*, *Meer van minder in de rechterlijke macht. Etnische diversiteit onder rechters in zes landen*, 2006.

was conducted again in 2003. This time the political preferences were more congruent with the composition of Parliament.⁴⁴

3. European and national developments in regard to safeguarding

In the light of the debates on judicial integrity it is hardly surprising that concern for the safeguarding of judicial integrity has grown. In the last two decades, remarkable developments associated with the topic of judicial integrity have taken place on both international and European levels. Below, some of the most noteworthy will be outlined.

3.1. Bird's eye view of international and European developments

At the sixth United Nations Conference on the prevention of crime and the treatment of offenders, the Committee on Crime Prevention and Control was instructed to elaborate guidelines relating to the independence of judges and the selection, professional training and status of judges and prosecutors. As a result the United Nations drafted the *Basic Principles on the Independence of the Judiciary* in 1985.⁴⁵ As a 'human rights instrument' it is to ensure the realization of intentions, such as are expressed within the Charter of the United Nations, 'to establish conditions under which justice can be maintained, to achieve international co-operation in promoting and encouraging respect for human rights and fundamental freedoms without any discrimination' and principles, such as are found in the Universal Declaration of Human Rights, of equality before the law, of the presumption of innocence and of the right to a fair and public hearing by a competent, independent and impartial tribunal established by law. As might be suspected, the *Basic Principles* are primarily concerned with the administration of criminal justice. It contains mainly instruction norms for the member states.

Of greater importance are the *Bangalore Principles of Judicial Conduct*. On the invitation of the United Nations Centre for International Crime Prevention and Transparency International, a non-governmental organization against corruption, the Judicial Group on Strengthening Judicial Integrity in Vienna 2000 put forward the first draft of these Principles which was based on a large number of ethical codes for judiciaries. The Judicial Group consisted of a Special Rapporteur of the UN Commission, to whom the subject of the independence of judges and lawyers was entrusted, and of seven chief justices from African and Asiatic countries. It was presided over by Judge Weeramantry, vice-president of the International Court of Justice in The Hague. The first draft was revised a number of times, for example at the Round Table Meeting of Chief Justices in The Hague, so as to adequately reflect principles of both common law and civil law traditions. In its final form, as adopted in 2002, it centres round six fundamental values: independence, impartiality, integrity, propriety, (ensuring) equality, and competence and diligence.⁴⁶

The Council of Europe also boasts a tradition of taking notice of the judicial role. Perhaps the strongest incentive for the discussions on the integrity of the judge is the case law of the ECtHR on Article 6 ECHR. For example the requirement of ensuring 'objective impartiality' has sparked discussions on disqualification and recusal.⁴⁷ In *Recommendation R(94)12* 'The inde-

⁴⁴ For an overview of both surveys, see *Vrij Nederland*, 11 October 2003.

⁴⁵ This document can be found on the website of the Office of the High Commissioner for Human Rights (www.ohchr.org, under 'International Law').

⁴⁶ The *Bangalore Principles* can be found on the website of the United Nations Office on Drugs and Crime (www.unodc.org).

⁴⁷ Cf. *Piersack/Belgium* ECtHR 1 October 1982 and *Hauschildt/Denmark* ECtHR 24 May 1989. The Court has, however, given no concrete ruling as to the scope of objective impartiality (M. Kuijjer, *The blindfold of Lady Justice*, 2004, pp. 343-346). On the notion of objective impartiality see P. van Dijk, 'De 'objectieve' onpartijdigheid van de rechter,' 1997 *Nederlands Juristenblad* 27, pp. 1213-1219).

pendence, efficiency and role of judges’ the Committee of Ministers urges governments of the member states to take all necessary measures to promote the role of the judicial power and the individual judge. In 1998 the *European Charter on the Statute for Judges* was put forward, ‘conscious of the necessity that provisions calculated to ensure the best guarantees of the competence, independence and impartiality of judges should be specified in a formal document intended for all European States.’ The Council of Europe also established *The Consultative Council of European Judges* (or: *Le Conseil Consultative des Juges de l’Europe*) in 2000.⁴⁸ This is an advisory body of the Council of Europe on issues related to the independence, impartiality and competence of judges. The Council was, for example, among the bodies advising on the abovementioned Bangalore Principles.⁴⁹

3.2. National developments

On national levels too, there has been a remarkable increase in safeguarding measures.

In England, the topic of judicial integrity has long been left to informal peer leadership, relying on the hierarchical structure of the English judiciary.⁵⁰ Judicial values were understood to be encapsulated in the rule of law.⁵¹ In an attempt to meet the broader concern over departures from standards of public conduct⁵² the Standards Committee was established in 1994. In the first report they defined *Seven Principles of Public Life*, also called the *Nolan Principles*, named after the first chairman, Lord Nolan of Brasted.⁵³ These are understood to apply to the whole public sector,⁵⁴ including the judiciary, and have become the common ground for an extensive framework of codes, principles and regulations in regard to public standards. The *Judicial Studies Board*, established in 1979, has also been active on the subject of judicial ethics, providing ethics courses and producing for example an *Equal Treatment Bench Book*.⁵⁵ The newly established *Department for Constitutional Affairs* has produced several consultation papers including the 2006 paper on the issue of appointments, ‘Increasing Diversity in the Judiciary.’ It also performs research, for instance to the effect of the just mentioned *JSB Equal Treatment Bench Book*, entitled *Ethnic Minorities in the Criminal Courts Perceptions of Fairness and Equality of Treatment* (2003).⁵⁶

In the Netherlands the judiciary was last to join the queue after important developments with regard to integrity in corporate life and central and local governments.⁵⁷ This reluctance to join was explained by the reliance on legal statutes on disqualification and incompatible addi-

48 They have a website on the site of the Council of Europe (www.coe.int).

49 As the *Bangalore Draft* was initially conceived by – in majority – common law judges, the CCJE was very keen to point out civil law tradition sensitivities. They recommended, for example, that in the title ‘code’ be replaced by ‘principles,’ especially in view of the prescriptive and exhaustive connotations of codes in civil law countries (cf. *Comment no 1 of the Working Party of the Consultative Council of European Judges on Code of Judicial Conduct Bangalore Draft* (2002)).

50 See Paterson, *supra* note 14, Chapters 2, 5 and 6.

51 Cf. Raz (J. Raz, ‘The Rule of Law and its Virtue’, in *The authority of law. Essays on law and morality*, 1979, pp. 210-6) who understands the independence of the judiciary and the observance of principles of natural justice as principles, which can be derived from the basic idea of the rule of law. His concept of the rule of law is meager to the extent that it becomes untenable. Although every ancient Greek would acclaim his clear distinction from democracy, separating justice and equality from the rule of law is not compatible with deriving from the same rule of law the observance of principles of natural justice, accessibility to the courts, review powers of the courts and such (214).

52 This concern was brought about by a series of scandals involving among others Members of Parliament, cf. Griffith, *supra* note 6, p. 36).

53 These are: selflessness, integrity, objectivity, accountability, openness, honesty and leadership. Cf. the *First Report of the Committee on Standards in Public Life*, Cm. 2850-I (1995). It can be found on the Committee’s website (www.public-standards.gov.uk).

54 Cf. the wide objective of the Committee, announced by Prime Minister John Major: ‘... to ensure the highest standers of propriety in public life’ and ‘... to examine concerns about standards of conduct of all holders of public office,’ in *Parliamentary Debates, House of Commons*, Sixth Series, vol. 248 (1993/94), col. 758.

55 See their website (www.jsboard.co.uk).

56 The Department was established in 2003. Their mandate and composition are described in their visionary five-year strategy *Delivering Justice, Rights and Democracy* DCA Strategy 2004-09, and can be found at their website (www.dca.gov.uk).

57 S.N. Hogewind *et al.*, *Integriteit als strategie. Uitkomsten van het integriteitsdebat*, 2003.

tional offices and on the prudence of individual judges to avoid both the appearance and reality of non-impartiality.⁵⁸ Some courts found this situation wanting and did not await upper hand measures, creating their own codes for self-disqualification or setting up ethical committees of experienced judges.⁵⁹ On a nationwide level, in 2002 the abovementioned Council for the Judiciary was established. In its agenda for 2005-2008⁶⁰ its first objective was to implement best practices of integrity. This has resulted in the possibility for every judge to do a course in moral dilemmas, in aid in developing integrity codes and in projects on integrity risk management within the court organizations. The same reform that brought about the Council for the Judiciary also included an instruction for the courts to furbish a procedure for complaints against judges⁶¹ and provided a new system of disciplinary measures for judges.⁶² In 2004 the Dutch Association for the Judiciary⁶³ together with the Dutch Assembly of Court Presidents released Judicial Impartiality Guidelines in 2004.⁶⁴ This was done after a widely held discussion.⁶⁵ Individual Courts still have the option to devise integrity codes or take other initiatives in this respect, such as appointing a trustee or installing an ethics committee.⁶⁶

4. Democracy, rule of law and integrity

4.1. Introduction

We may note that in regard to violations or suspicions the term integrity is freely used. We may further note that, in respect of safeguarding, integrity almost seems to be the ‘buzz word’ that stands for everything that is good in the judiciary. Research into the legal realization of a system of control or research into the effectiveness of integrity management within the judiciary is, however, only useful after one has established a normative concept of integrity that is applicable to judges. But how should we understand integrity as a norm? Little has been written on this

58 Statutes on disqualification and recusal can be found in Arts. 36-41 *Wetboek van Burgerlijke Rechtsvordering* (civil law) and 512-518 *Wetboek van Strafvordering* (criminal law). Recently, a recommendation for a protocol on recusal has been put forward (www.rechtspraak.nl).

59 The Court of Arnhem furbished a code for self-disqualification (See Voert, *supra* note 38, p. 91), which the Court of Maastricht adopted as well. In the Court of Groningen, an ethical advisory board of senior judges was established.

60 The agenda can be found on their website (www.rechtspraak.nl).

61 Art. 26 of the *Wet op de rechterlijke organisatie*. On the complaint procedure see M.T.A.B. Laemers, ‘Open opstelling van rechters en aandacht voor kwaliteit. Een bijdrage over klachten van burgers als reactie op rechterlijke ongehoorzaamheid en effecten van klachten op kwaliteit’, in L.E. de Groot-van Leeuwen *et al.* (eds.), *De ongehoorzame rechter. Rechter versus andere rechters, de wetgever, de bevolking en het Europees recht*, 2006, pp. 33-54).

62 Art. 46c of the *Wet rechtspositie rechterlijke ambtenaren*. There are proposals to expand the scope of this article, *cf. Kamerstukken II 2005–2006*, 29 937, no. 6.

63 In Dutch, ‘*Vereniging voor Rechtspraak*’, see www.verenigingvoorrechtspraak.nl for their website.

64 In Dutch, the ‘*Leidraad onpartijdigheid van de rechter*.’ An English translation is available at the website of the Dutch Association for the Judiciary (see for the link: *supra* note 63).

65 The discussion was primed by attorney general Rummelink at the Speulderbos-conference organized by the Court of Amsterdam in 1995 (J. Rummelink, ‘Een gedragscode voor rechters?’, 1995 *Trema* 11/12, pp. 358-363). A symposium was held on ‘Appearance of partiality’ in 2000 (*cf.* the report from F.H. Hekken, ‘Symposium “Schijn van partijdigheid.” Is een verschoningscode wenselijk?’, 2001 *Trema* 1, pp. 9-10) and a special edition of *Trema*, the periodical of the Dutch judiciary, was devoted to the discussion in January 2002. Although the guidelines were perceived as weak and difficult to enforce, they were nevertheless seen as ‘a good start,’ *cf.* M.A. Loth, ‘Leidraad onpartijdigheid rechter: een goed begin’, 2004 *Trema* 5, p. 201.

66 The Court of Zutphen and the Court and Appellate Court of Den Bosch being marked examples. For an apt overview of judicial ethics in the Netherlands see Vrieze, *supra* note 41, G. Vrieze, ‘Zijn rechters zonder gedragscode nog wel te vertrouwen? (II)’, 2005 *Trema* 5, pp. 194-208, and J.A.Z. Hooft Graafland, ‘Beroepsethiek van rechters’, 2005 *Trema* 7, pp. 286-292. An evaluation of the integrity management of the courts under the auspices of the Raad voor de Rechtspraak can be found on their website (*Rapport Visitatie Gerechten 2006* at www.rechtspraak.nl).

subject in philosophical literature.⁶⁷ In what has been written however two considerations are conspicuous.

Firstly, speaking of integrity is specifically meaningful in relation to a public or social sphere.⁶⁸ For example, questions about the integrity of a minister are meaningful especially within the framework of his church, while questions of integrity of a police officer are meaningful in relation to his societal role and questions of integrity of an accountant have meaning in relation to *inter alia* corporate mores. Other forms of integrity, such as personal integrity or moral integrity,⁶⁹ can easily be reduced to other values, whereas in the public sphere it seems to be a value in its own right. It makes a difference, for instance, whether a policeman – who is privately a racist – is authentic or shows integrity in the execution of his profession. And it seems less meaningful to require of your father or a good friend that they should be people ‘of integrity’ in their relationship to you. They should rather be loving, honest, caring, etc.⁷⁰

Secondly, a distinction is made between the subjective and the objective dimension of integrity.⁷¹ Subjective integrity denotes the coherence between the ‘moral principles’ or ‘ground projects,’ which constitute one’s identity. Therefore it could be labelled as the ‘wholeness’ of the person, as ‘harmony with oneself’ or as ‘unity in moral considerations.’⁷² It is closely connected with terms such as authenticity, uprightness or purity, which all express the coherence between the principles of projects that constitute one’s identity and the actions of the person. In philosophical literature, however, it has been suggested that integrity ought not solely to be perceived in such a subjective sense, but that it also has an ‘objective’ dimension.⁷³ Here integrity is regarded as a collection of a number of core values that are to be followed and duties that one ought not to avoid if one wishes to be of integrity.

If we apply these considerations to the judge, we can see that the normative framework in which he operates is the democratic state under the rule of law. I understand the rule of law to be the *legal* framework in which he operates. Its normativity is derived from law: the judiciary is a legal institution and should act as such. I understand democracy to be the *factual* framework in which he operates. Its normativity is derived from the idea of de facto acceptance: in order to be legitimate, its existence and its actions should be acceptable.

In this manner the ideas of the rule of law and democracy secure the normative legitimacy of public functions such as that fulfilled by the judiciary. Classically, it is by these principles that

67 To give but an impression, German works such as the *Historisches Wörterbuch der Philosophie*, the *Philosophisches Wörterbuch*, the *Europäische Enzyklopädie zu Philosophie und Wissenschaften*, the *Handbuch philosophischer Grundbegriffe*, Höffe’s *Lexikon der Ethik*, the *Metzler Philosophie Lexicon* and the *Meiner Wörterbuch der philosophischen Begriffe* grant no locus to integrity. Neither do the American *Routledge Encyclopedia of Philosophy* and *MacMillan Encyclopedia of Philosophy*, the French *Encyclopédie Philosophique Universelle*, Sansoni’s *Enciclopedia Filosofica* and the Dutch *Winkler Prins Encyclopedie van de Filosofie*. It is only in the more recent dictionaries that the term occurs in various meanings, such as in the British *Oxford Dictionary of Philosophy* and *A Dictionary of Philosophy* and the Dutch *Woordenboek der Filosofie*.

68 Cf. H. van Luijk, ‘Integriteit in het publieke domein. Contouren van een representatieve ethiek,’ in R. Jeurissen *et al.* (eds.), *Integriteit in bedrijf, organisatie en openbaar bestuur*, 2002, pp. 58-77, and J.P. Dobel, *Public Integrity*, 1999.

69 Cf. A. Musschenga, ‘Integrity – Personal, Moral and Professional’, in A.W. Musschenga *et al.* (eds.), *Personal and Moral Identity*, 2002, pp. 169-201.

70 *Ibid.*, p. 171.

71 Ashford (E. Ashford, ‘Utilitarianism, Integrity, and Partiality’, 2000 *The Journal of Philosophy* 97(8), pp. 421-439) introduces the terms objective and subjective integrity and puts the emphasis on objective integrity.

72 See for instance Frankfurt (H.G. Frankfurt, ‘Freedom of the Will and the Concept of a Person’, 1971 *The Journal of Philosophy* 68(1), pp. 5-20, and H.G. Frankfurt, ‘Identification and Wholeheartedness,’ in F. Schoeman (ed.), *Responsibility, Character and Emotions. New Essays in Moral Psychology*, 1987, pp. 27-45: ‘He who is of integrity is not a ‘wanton’), Cox, Caze & Levine (D. Cox *et al.*, *Integrity and the Fragile Self*, 2003, p. 41: ‘Integrity is a kind of wholeness, solidity of character or moral purity. It involves a capacity to respond to change in one’s values or circumstances, a kind of continual remaking of the self, to take responsibility for one’s work and thought’) and Musschenga (*supra* note 69, and A. Musschenga, *Integriteit. Over de eenheid en heilheid van de persoon*, 2004, p. 21).

73 See Ashford, *supra* note 71, pp. 421-39. A milder version can be found with McFall (L. McFall, ‘Integrity,’ 1987 *Ethics* 98, pp. 5-20) who limits the object of integrity to that ‘which a reasonable man could accept as important’ (p. 11).

the *mores* of such functions were understood. Professional ethics come with the legal and democratic understanding of the function. For instance, the ethic that the judge should not be too actively engaged in political discussions must be viewed in the context of his position in the rule of law. And the ethic that a judge should show exemplary behaviour both in and out of court has meaning in respect to a democratic society. This brings us to the question whether integrity is a ‘separate norm’ or whether it simply denotes this spectrum of professional ethics.

4.2. Integrity as a condition for legitimacy

According to the ideals of the rule of law and democracy, the legitimacy of public functions lies in competence under the law and the de facto acceptance thereof, towards which public functions have a responsibility.

From a rule of law perspective, institutions are established and endowed with rights and duties. Without the professional character of persons, however, these institutions become an empty shell. For these institutions to act factually in the public interest, persons who are of integrity are needed, whose intentions are aimed at the public interest and whose deliberations adequately reflect the purposes of the institution. Thus, from a rule of law perspective the integrity of the persons acting on behalf of public institutions seems to be presupposed as a distinct norm. Thus, integrity appears as the norm that officials are to be of the right professional character.

From a democratic perspective, according to which the legitimacy of public functions lies in the de facto acceptance thereof, we are faced with the question *why* one would accept the power of judges.

Underlying the idea of acceptance is the idea of trust. In a free society acceptance is ideally a choice from a consciousness that institutions can be trusted with powers that profoundly impact the lives of individuals.⁷⁴ An important observation in this respect is that trust is characterized by an *asymmetrical relationship*. This raises two epistemic problems.

The first problem is that the citizen can never know the true motives for a decision. A litigant cannot ‘check’ the ‘real’ reasoning of the judge. He has to trust the judge in his deliberations, that these are upright and that his final reasoning is not a matter of legal window-dressing. The discretion of the judge is in its essence something not fully controllable. The same is true for dependence on government officials for a building licence or accepting a government’s decision to raise a new kind of tax – to a certain extent one has to trust that the decision is taken in the public interest.

The second problem is that many citizens lack the legal knowledge to check the rightness of the decision. In this respect, the judge has a qualitative advantage: just as we trust a doctor because he knows about medicine, we trust the judge because he knows about law and the application of rules.

The notion of trust correlates to the norm of trustworthiness for public officials. Nowadays trust is no longer understood as the citizen’s fate but also as the official’s norm. Why would a citizen accept the authority of an official merely for the sake of it, now that his money, freedom or property might be at stake? Moving from the term *trustworthiness* to the term *integrity* in this respect is in part a matter of semantics, though not wholly. Integrity seems to be a good candidate

⁷⁴ O’Neill (O. O’Neill, *A Question of Trust*, 2002, pp. 18-19) comments sharply on what has been termed the ‘crisis of trust.’ She calls it exaggerated to speak of a crisis, for evidently people still have sufficient trust in public institutions to vote for them or turn to them. Instead, she speaks of a culture of suspicion: ‘perhaps claims about a crisis of trust are mainly evidence of an unrealistic hankering for a world in which safety and compliance are total, and breaches of trust are totally eliminated.’

for the term to cover this problem area. Integrity has bearing on both professional *ethics* and the ‘purity’ or ‘inviolability’ of a public function in the public domain. In other words, it is concerned with both the *internal* aspect of the idea of trustworthiness: the ethics of the person holding the function, as well as the *external* aspect: the need for accountability in relation to a democratic society.

4.3. *Is integrity a norm?*

Thus, I conclude that from a rule of law perspective integrity is presupposed as a norm. This norm holds that officials are to have the right professional character. From the perspective of democracy, integrity also appears as a norm, namely to be accountable in respect to public trust. Here, the emphasis lies on the external accountability of the function.

This specific tension, between the professional character of the individual official and the external accountability of his profession, I regard as the specific domain of integrity. It is in this sense that integrity has a role of its own to play in the normative discourse on professional ethics. Here it does not merely concern the relationship between the professional and his organization, between professionals or between the professional and a third party, but the relationship between the ethics of the professional and the external accountability of the organization.⁷⁵

5. Understanding judicial integrity

Until now, we have gained only a broad understanding of integrity as a norm. In the following, I will look more specifically at both the concept and the use of judicial integrity.

To understand judicial integrity we must understand the interplay between two perspectives. The first perspective is that of individual judges. How should they acquire the right professional attitude? The first perspective is connected with integrity as presupposed by the rule of law. The second perspective is an external one, and is connected to democratic legitimacy. What does society expect from judges? Whereto is the trust of the public directed and when is sufficient effort made to ensure it?

5.1. *Integrity as professional character*

For normative theories on professional behaviour, we must turn to virtue ethical theory.⁷⁶ In virtue ethics the primary concern is to have the right professional character. This means that the attitude is rightly disposed to both the values and rules that surround the specific profession and the values and rules in the social environment or the public sphere. The selection and assessment

75 Herewith a norm has been laid bare that deals with a key domain of the question of legitimacy of public functions, which cannot be reduced to democratic or rule of law legitimacy. Since integrity is the norm that is to account for the trust in public officials, which in turn ensures *de facto* acceptance and thus democratic legitimacy, one might ask whether integrity is a species of democracy. I think this objection deserves nuancing. The norm of democratic legitimacy does not ‘include’ integrity, but rather points out that the norm of integrity is a necessary one. Democracy as a norm is better viewed as a *ratio cognoscendi* of integrity – it is the basis on which we know that we need the norm of integrity. On the other hand, integrity is the *ratio essendi* of democracy: without officials adhering to the norm of integrity, democratic legitimacy could not exist. The same goes for rule of law legitimacy. The rule of law needs the integrity of officials to exist, whereas we know of this presupposition through the rule of law. Thus, I think that it is safer and more functional to consider integrity a separate norm with respect to the legitimacy of public functions.

76 The *locus classicus* for virtue ethics is Aristotle’s *Ethica Nicomachea*. This work was written for the citizens of Athens, who were to fulfil several political functions during their lifetime. Aristotle’s *Politica* and *Retorica* are written for this same audience. In the last decades, there has been considerable attention to virtue ethics and a number of aspects have been revisited, cf. for instance P. Aubenque (*La prudence chez Aristote*, 1963), A. Oksenberg Rorty (*Essays on Aristotle’s Ethics*, 1980), M. Nussbaum (*Therapy of Desire. Theory and Practice in Hellenistic Ethics*, 1994 and *Hiding from Humanity. Disgust, Shame and the Law*, 2004), A. MacIntyre (*After Virtue. A Study in Moral Theory*, 1981) and O. Höffe (O. Höffe, (ed.), *Aristoteles, Die Nikomachische Ethik*, 1995). The political nature of Aristotle’s virtue ethics – on which the focus lies here – has, however, been somewhat underexposed.

of these values and rules in specific actions is a prudential activity. It is not just about having the right intention or aim, but also about the ability to mediate the concrete situation with professional values and rules and the values and rules of the public sphere. By continually searching for the optimal way to act, the professional character of the actor increases in quality. He then becomes able to act more optimal in future situations.

Virtue ethical theory combines the notions of subjective and objective integrity. With regard to 'subjective' integrity, we can speak of a constancy or solidity in one's attitude. This constancy is achieved by continuously dealing with dilemma's in a prudent manner. We can conclude that integrity is not a virtue besides other virtues, but concerns virtuousness itself – albeit a professional level. It concerns the quality of one's character to act optimally in respect of professional values and the values of the public sphere. With regard to 'objective' integrity, there is the freedom to establish per profession what the 'object' is of the professional attitude. Integrity in this respect is a 'higher order virtue' – it concerns in the first place the quality of the attitude itself, but this attitude is subsequently made concrete in the object of the attitude, which may differ per time, per society or per office. In addition to having the right attitude with regard to the values and rules of a specific profession, there is also the intentional aim towards the values and rules of the public sphere. To be of integrity, one has to have an alertness or sensitivity to these values and rules.

From this perspective we can understand the personal interest taken in English judges. The rule of law – spelled out much less than it is on the Continent – is acknowledged to find its basis in the actions of individual judges. It is their professional character that determines the quality of the rule of law. If the professional character of a judge is insufficiently developed, his ability to act prudently is marred. A keen interest is therefore taken in the personalities of judges, which is – among other things – directed at qualities that judges are to have: the academic performance of a judge might say something about his intellectual capacities, his descent something about his upbringing, his hobbies something about his engagement – or estrangement – from society, etc. This emphasis on the personality of judges also explains the debates on corporate bias. If judges are recruited from a homogeneous layer, can they still adequately mediate between the demands of law and the heterogeneous needs of society? That judges consent to the emphasis placed on their personalities can be concluded from the very personal fulfilment of the judicial role. Crucial in this state of affairs is the tradition that judges are recruited from the barristers, which is still the common – through not exclusive – practice. The professional character of judges counts as tried before assuming office.

In the Netherlands the situation is different. The personality of the judge is seen as subsidiary to his role. An interest taken in the personalities of judges is often a negative one, ferreting for incompatible activities. Although there is little notice for peculiarities in the personalities of judges, the professional character of judges has been receiving more attention. This is in part due to the recent miscarriages of justice, because doubts were cast on the quality of judicial deliberations. In the Dutch discourse the emphasis lies, however, on the institution rather than on the person. This becomes clear when looking at an area where the primary focus lies on the attitude of judges: the purpose of judicial training – both formal and informal – seems to be that the professional character of judges is to be made capable to exercise the institutional role.⁷⁷ Another reason for attention for the professional character of judges is the increased emphasis on the efficiency of the judicial organization. A complaint which is not infrequently

77 Cf. E. Köhne-Hoegen, 'Over de socialisatie en (her)opvoeding van de raio', 2006 *Trema* 5, pp. 186-190.

heard is that the one-sided emphasis on efficiency harms the key activity of judges: taking the time and effort needed to reach a conviction; or put differently: to make prudent decisions.

5.2. Integrity as a norm for external accountability

The second perspective follows from integrity as a condition for democratic legitimacy. In order to see how integrity correlates to public trust, it should also be viewed from an external perspective. Integrity bears the connotation that the values and duties that it generates have the function of labelling offices or organizations with the predicate of ‘sacrosanctity’ or ‘inviolability’ (*cf.* its Latin root *non-tangere*) in the public domain. Herein the professional integrity of the professional concerns not the professional but the profession. Therefore trust is directed at the office and only in the second instance at the office holder. The importance of this external dimension is well illustrated in the verdicts of the European Courts of Human Rights, according to a longstanding tradition of English natural justice. Regardless of the deliberations of the judge, justice should also *be seen to be done*.

In England, where the emphasis traditionally lies on the professional character of the judges, the debates point in the direction of increasing external accountability. The debates on the issue of appointments indicate a felt need to guarantee a level of objectiveness to the public. This is in part to counter allegations of corporate bias. Likewise, the Criminal Cases Review Commission is to secure external accountability, although it is in the first place an instrument to check and improve the adjudication of law. From this perspective, it may also be clearer why it is debated that English judges sometimes chair Royal Commissions. This is not to question their professional character – in fact, this is exactly the reason why the task of chairing Commissions is entrusted to them. It is rather the inviolability of the office that might be harmed, because the office may become exposed to political turmoil.

In the Netherlands, there is a similar tendency towards external accountability. In the first agenda of the Council of the Judiciary, it was named as one of its main purposes. Among other things, the Council is to see to it that the judiciary has a press policy, that debates and conferences are organized on judicial themes and that media are developed by which citizens can gain insight into the workings of the judiciary.⁷⁸ From this second perspective, it can also be better understood why the Dutch homicide cases caused such a stir with respect to the integrity of the judges, in spite of the fact that the fault seemed to lie for the largest part with the prosecution. These miscarriages heavily affect the trust in the office of the judge, because in the eyes of the public the judge is in the end responsible for the judgment delivered. Judges are therefore to be expected to have a keen awareness towards public trust. At times, this may imply special precautions, such as putting extra pressure on the prosecution. The *Posthumus II* Committee, like the Criminal Cases Review Commission, fulfils an important task in this respect.

5.3. Understanding safeguarding discourses

In the above, it has become clear that the safeguarding discourse has its own characteristics. In order to understand these I will briefly discuss two distinctions.

78 Raad voor de Rechtspraak, *Agenda 2002-2005*; *cf.* *Agenda 2005-2008*, pp. 4-8 for a review (see www.rechtspraak.nl).

The first distinction is between the values and rules of the profession or office.⁷⁹ Values are what the prudent professional has as his aim. They give direction to his acts⁸⁰ and are to become part of his attitude.⁸¹ Rules are the written or unwritten rules of play, which surround the profession. With these rules the prudent must comply. They denote the boundaries of the practice.⁸² The exact relationship, overlap or difference between values and rules depends on the practice and the context in which the profession is exercised.⁸³ From a virtue ethical perspective the assessment is important that integrity is not a value or rule of its own, but needs specification by means of both other values and rules.

A second distinction is not so much of an ethical nature but rather one of policy. The professional has an entirety of values and rules as his aim – the object of integrity. There is a confusion of ideas when some of these values or rules are *excepted* from this whole and put under the label of ‘integrity,’ as happens in integrity management. This may, for instance, concern a specific number of rules of which the violation is regarded as a downright violation of the integrity of the profession – as with fraud, corruption or sexual intimidation. In a virtue ethical sense, the fixation of integrity to such a subset is of limited meaning. The professional aim is to have bearing on the whole of values and rules and not just the rules that cannot be categorized differently in terms of competences, communication or professional ethics. For instance, a judge who is devoted to weighing the evidence carefully before delivering a judgment, is acting in line with his professional integrity, whether his court labels this primary responsibility under integrity management or not.

In the *Basic Principles on the Independence of the Judiciary*, the *Bangalore Principles of Judicial Conduct* and the European documents, the principle of integrity is mentioned after core judicial principles such as impartiality and independence. Here, integrity is clearly understood as a value. In the exercise of his role, the judge should be focused on the value of integrity and clear himself and his office from suspicions and violations in this respect. Does, however, labelling integrity as a value undo our understanding of integrity as a professional virtue? This is by no means the case. Values such as impartiality or independence are negatively formulated – they are in essence empty shells. Integrity as virtue provides a positive perspective to these

79 In this respect, John Kekes distinguishes between ‘unconditional’ and ‘defeasible commitments.’ The first form the core of one’s personality, ‘the fundamental components of his identity’ and are indefeasible while the second are a reflection of the social and historical context of the person (J. Kekes, ‘Constancy and purity’, 1983 *Mind* XCII, pp. 499-518, esp. 514). Somewhat analogous is Musschenga’s distinction between the defensive and the prescriptive or evaluative function of integrity. The first concerns the boundaries drawn, the second concerns aspirations or ideals (*supra* note 72 (2004), pp. 73-76, 90). In case of these authors, the range of the defensive or unconditional function is too limited, since it concerns merely the well nigh absolute inviolabilities, such as the inviolability of the body. They thereby loose sight of the deontic aspects of contingent contexts, such as professional contexts.

80 I understand values in an aspiratory or ideal sense. In this respect I follow the characterization that Taekema gives of *ideals*, following Dewey en Selznick, as ‘values, of a complex and dynamic nature, which are embedded in social practices. That is, they are desirable states of affairs which are difficult to realize completely, which provide direction in problematic situations’ (see S. Taekema, ‘What Ideals Are: Ontological and Epistemological Issues’, in W. van der Burg *et al.* (eds.), *The Importance of Ideals. Debating Their Relevance in Law, Morality and Politics*, 2004, p. 39).

81 McFall adopts Kekes’ distinction but labels the constituting pairs as ‘identity-conferring’ and ‘defeasible’ commitments. The distinction remains uncomfortable. It remains difficult to see which values are identity conferring, without conceptualizing one’s intentional orientation. What is identity conferring for one person, does not have to be so for another. As an example of a ‘defeasible commitment,’ McFall mentions the value of professional success. It is, however, hard to see why abandoning the value of professional success could not for some persons be ‘identity conferring’ (cf. *supra* note 73, pp. 12f).

82 There are many types of rules. Rules can be strictly deontological, they can be equipped with sanctions or they can be latent and vague and violations can be accepted (cf. Ashford, *supra* note 71, p. 439).

83 Integrity concerns both values and rules. I therefore regard the discussion of integrity as a Kantian project in the sense of a ‘minimally acceptable social life’ as being too one-sided. See for example Halfon (M. Halfon, *Integrity. A philosophical Inquiry*, 1989) and the pertinent review by George W. Harris in, 1990 *Ethics* 101(1), pp. 188-189. Ramsay also takes a Kantian approach, pointing out ‘several incommensurable basic goods’ instead of ‘reason’ (H. Ramsay, *Beyond virtue: Integrity and Morality*, 1997). The other extreme, which rejects a Kantian approach (see for instance B. Williams, ‘Persons, character and morality’, in *Moral Luck. Philosophical Papers 1973-1980*, 1981, pp. 1-19), I regard as equally one-sided.

values. For an individual judge, impartiality and independence imply that the judge has the capacity to be prudent and decide a case on its own merits. Thus, as a virtue, integrity is the capacity to be mindful of the core values of a profession and to mediate these values with the concrete demands of the case.

On national levels we encounter integrity both as a value and as a rule. In England, integrity is one of the *Nolan Principles*. These principles function as important values within the public sphere, serving as the basis for concrete rules.⁸⁴ In the Netherlands, the *Judicial Impartiality Guidelines* provide a hybrid example. These guidelines appear to be rules, but – since their enforcement is poor – they are to be considered values rather than rules. As the introduction states, one of the objectives is to ‘enhance awareness.’ Judges are to be made sensitive to the specific expectations, values and rules that surround their office. We also find examples of the second distinction. Many courts have devised integrity codes dealing with a specific subset of integrity such as fraud, corruption, best practices on care to be taken with documents, etc.

6. Conclusion

Is judicial integrity a norm? The debates on judicial integrity seem to suggest that integrity is a norm that can be violated. In the debates on safeguarding integrity, it seems to be a kind of overriding principle, which governs professional ethics for judges. But is integrity then, as Simon Lee once put it, merely ‘a catch-all for more or less everything that is good in judicial thought,’⁸⁵ or is there more to it?

Insight into the normative structure of integrity can be gained by looking at it within the normative framework of democracy and the rule of law. The rule of law presupposes the norm of integrity: the holders of public offices are to be of the right professional character. With regard to democracy, a new discourse has emerged in relation to trust. Trust appears to be a condition for democratic legitimacy and thus its correlating norm – integrity – seems to be a separate and fundamental condition for the legitimacy of public functions. I elect to use the term integrity to cover this subject area, because integrity covers both the internal aspect of professional ethics and the external aspect of public accountability. Integrity is thus a separate norm, besides the rule of law and democracy, on which the legitimacy of public offices hinges.

Accordingly, we must view integrity from two perspectives: the perspective of the office holder and the perspective of the office. The first perspective deals with the professional character of the office holder as is presumed by the rule of law. By means of a virtue-ethical approach it is possible to outline its normative implications. The other perspective to judicial integrity is an external perspective. In this perspective, the office holder is regarded as subsidiary to the office, because public trust is in the first place directed at the office. These two perspectives deal with the same matter: the professional integrity of individual judges. The first perspective focuses on the person of the judge: his professional character should be sound and his prudence should be worthy of trust. The second perspective focuses primarily on the institution. It makes clear how stringent the demand of trust is for the office holder and it stipulates the demands towards which the individual judge should be sensitive. Both perspectives are necessary in a society in which the judiciary is a public institution. By means of this distinction, it was possible to come to a better understanding of the discourses on judicial integrity.

⁸⁴ Concrete rules can for example be found in the *Equal Treatment Bench Book*.

⁸⁵ Lee, *supra* note 6, p. 30.

One question has not yet been answered. What to do when a discrepancy occurs between the two perspectives on integrity, for example when a conception of professional character is at odds with an institutional conception? With this question, however, we leave the realm of integrity and enter the realm of the question ‘what is good?’.