

5. The legal virtue of reflexivity and the rule of law

Isabel Trujillo

1. INTRODUCTION: THE VIRTUE OF LAW AND THE LEGAL VIRTUES

The virtue ethics approach has a long and well-established tradition, from ancient Greek philosophy to the present day.¹ The contribution that virtue ethics and virtue jurisprudence make to legal theory is also well known, in the theory of legal reasoning, in the debate on interpretation, but there are many other fields in which it is still potentially fruitful.²

Compared to other approaches, virtue ethics is typically agent-centred, but with some caveats. Virtue is a human disposition that grows through training not simply as the result of conformity to a system of principles, but in the context of social practices.³ Precisely for this reason, virtues are interesting means that can be considered institutional resources in a time of multiculturalism and pluralism, when the disagreement on common rules and principles could be deep. For this to be possible, some conditions must be met, and this contribution is about one of them, reflexivity, a feature of the knowledge required to practise virtues in the legal field.

¹ In contemporary moral philosophy the obliged reference is G. Elisabeth Anscombe, 'Modern Moral Philosophy' (1958) 33 *Philosophy* 1. Among others, Philippa Foot, *Virtues and Vices* (Blackwell 1978). See also Julia Annas, *The Morality of Happiness* (Oxford University Press 1993), and Id., *Intelligent Virtue* (Oxford University Press 2011).

² Colin Farrelly and Lawrence B. Solum (eds), *Virtue Jurisprudence* (Palgrave Macmillan 2008). See also Amalia Amaya, 'Law and Virtue Theory' in *Encyclopedia of the Philosophy of Law and Social Philosophy* (Springer 2019) <https://link.springer.com/referenceworkentry/10.1007/978-94-007-6730-0_159-1> accessed 15 October 2025.

³ Pier Cesare Rivoltella, *Le virtù del digitale. Per un'etica dei media* (Morcelliana 2015) 6.

Within the vast debate on virtues, it is possible to distinguish two different approaches. On the one hand, there is a standard view that works on a broad-spectrum view of human capacities and their related virtues. This approach produces taxonomies and classifications of virtues (cardinal, intellectual, moral) to be tested and applied in different contexts.⁴ Starting from this picture, there would be standard virtues to apply to care, medicine, business, research, teaching, and, in our case, law. Once we have an idea of which human traits are virtues, a similar scheme is applicable to different human activities, as well as to professional roles.⁵ On the other hand, there is an alternative approach that starts from the different social practices at stake and looks for the best ways of practising them that are to be considered the virtues of those practices.

The link between virtues and social practices can be brought back to MacIntyre.⁶ Virtues help human development in the sense that they lead human beings to achieve some abilities necessary for the success of certain common activities and train agents to practise those activities fruitfully. This is the meaning of virtues as standards of excellence directed to implement the best fulfilment of goals operating in the different social activities. Looking from inside the practice, it is possible to identify the suitable virtues for those practices with regards to their aims. This does not mean that social practices – and their virtues – are totally self-contained.⁷ But this approach takes the specificity of practices seriously and permits building the virtuous behaviour from the activity at stake. Even if in the world of virtues there will be common

⁴ For a discussion on the main features of, and controversies about virtue ethics, Rosalinde Hursthouse and Glen Pettigrove, 'Virtue Ethics' in *The Stanford Encyclopedia of Philosophy* (Fall 2023) <<https://plato.stanford.edu/archives/fall2023/entries/ethics-virtue/>> accessed 15 October 2025.

⁵ Professional virtues imply a commitment to key human goods that are part of a flourishing life. Justin Oakley and Dean Cocking, *Virtue Ethics and Professional Roles* (Cambridge University Press 2001).

⁶ He is not the only one to follow this path. On the contrary, in some way, this is a common demand for all virtue ethicists, insofar as virtues are related to practical actions in context, actions that are contingent on and up to us. The reason for quoting MacIntyre's work is that he has developed this view within a broader philosophical perspective, including an idea of rationality and a viewpoint rooted in social and cultural traditions. Different from the agent-centred feature of the approach exclusively directed to agent perfectionism, MacIntyre's account of virtues rests on a conception of human reason embedded in social practices. From this point of view, only a particular society with proper goods to aim at could offer an intelligible context for virtues. Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (University of Notre Dame Press 1981), Id, *Whose Justice? Which Rationality?* (University of Notre Dame Press 1988), Id, *Three Rival Versions of Moral Enquiry. Encyclopedia, Genealogy, and Tradition* (University of Notre Dame Press 1990).

⁷ David Miller, 'Virtues and Practices' (1984) 6 *Analyse & Kritik* 49.

elements in consideration of human capacities, the focus is on specific virtues for each practice or at least specific ways of practising virtues in context. This second approach is preferable, in a nutshell, because it is easier to find an agreement on what makes a good practice, rather than on what makes a good life, but primarily because the benchmark test for virtues is the achievement of the goal of the practice. I have defended the idea that, being that the rule of law is the main virtue of law – where the word ‘virtue’ is used to signify the law’s main quality⁸ – legal virtues can be identified in those abilities necessary for upholding it. The rule of law represents the goal of the practice of law and can lead legal practitioners to virtuous actions. At the same time, legal virtuous actions are those that help and support the rule of law.⁹ The emphasis on virtues for the rule of law is not a strategy for overturning the principle of the superiority of the rule of law over the rule of men and women, but a reason for grasping the complementarity of institutions, procedures and rules, on the one hand, and legal practitioners’ and citizens’ skills and behaviours, on the other. This kind of approach could liberate new resources for improving the rule of law, potentiating the protection against arbitrariness that it aims at offering.¹⁰

According to this reading, virtues are conceived both as professional and practical abilities and institutional resources, rather than tools for the flourishing of people.¹¹ Virtues serve to make agents’ behaviour consistent with the aim of the social practice at stake and with its standards of excellence. In the practice of law, the success of an action takes priority over the perfection of the individual who carries it out. A bad judge who knows how to administer justice according to the law is better than a good judge who does not adequately understand how the law administers justice.

One crucial test regards the complexity of the application of rules and standards. The mere fact that the application of rules and standards requires special

⁸ Joseph Raz, ‘The Law’s Own Virtue’ (2019) 39(1) *Oxford Journal of Legal Studies*, 1.

⁹ I have developed this framework in Isabel Trujillo, ‘The Complementarity Between the Virtue of Law (the Rule of Law) and the Legal Virtues’ (2025) 54 *The Netherlands Journal of Legal Philosophy* <<https://www.boomportaal.nl/tijdschrift/NJLP/NJLP-D-23-00002>> accessed 15 October 2025 and deepened further the virtue of reflexivity in Isabel Trujillo, ‘Riflessività e rule of law: il primato del diritto e il fattore umano nella sua implementazione’, in Lucia Corso, Giuseppina Barcellona, Antonella Scaravilli (eds), *Quali virtù per il rule of law? Prospettive di giuristi e filosofi* (Giappichelli 2026) 111.

¹⁰ See Gerald J. Postema, *Law’s Rule. The Nature, Value, and Viability of the Rule of Law* (Oxford University Press 2022).

¹¹ A virtuous action does not depend only on the agent’s character, but rather it depends on some features of the action itself. For this reading, see Sukaina Hirji, ‘Acting virtuously as an end in Aristotle’s Nicomachean Ethics’ (2018) 26(6) *British Journal for the History of Philosophy* 1006, DOI: 10.1080/09608788.2018.1454296.

skills is a reason for questioning the ways of human action. Virtues ensure that behaviour within the practice is shaped by autonomous decision-makers even if following principles and rules, in the same way that the non-virtuous actors feel as external or imposed. It is not a question of internalising the rules, because internalisation could be the result of manipulation whereas virtues require free judgement and deliberation. The point is that no other than the subject who finds herself acting in real terms can understand what virtuous behaviour must be implemented in the specific case.¹² The virtue of reflexivity plays an important role in this frame made of goals and actions.

As it is well known, this self-referential assessment is the ground of the accusation of relativism directed at the virtue approach.¹³ But, on the one hand, deliberation and decision are always personal and situational. Rules and consequences are useful elements to integrate into deliberation, but they have a moderate weight in understanding and deciding what must be done. They do not provide by themselves the answer to the question of what is correct to do in actual cases. The answer is the result of human deliberation in a contextualised domain. But this does not mean that virtues are the product of individualistic and abstract deliberation. On the other hand, social practices are not subject to the will and decisions of single individuals. Virtues' incorporation into specific social practices makes them a collective enterprise. From a dynamic point of view, those entering the practice learn what is necessary to make it work, acquiring know-how and learning principles, rules and good practices.¹⁴ By training and experience practitioners shape their behaviours. From this point of view virtues are forms of expertise that participants need to learn and perform within the practice. Coming to the practice of law, a certain legal knowledge¹⁵ or even mindset is necessary for legal practitioners to enter the practice. But this is necessary also for lay people, even if it demands somewhat different things from each of them. This mindset or *forma mentis* somehow involves knowledge of the law, both in the expert form of legal science and in the basic

¹² According to the principle that the virtuous subject judges everything correctly. Aristotle, *Nicomachean Ethics*, 1113a, 30 <<https://ia600506.us.archive.org/0/items/AristotlesNicomacheanEthics/Aristotles%20-%20Nicomachean%20Ethics.pdf>> accessed 15 October 2025.

¹³ In the context of legal ethics, see David J Luban and W. Bradley Wendel, 'Philosophical Legal Ethics: An Affectionate History' (2017) 30(3) *Georgetown Journal of Legal Ethics* 337.

¹⁴ Linda T Zagzebski, *Exemplarist Moral Theory* (Oxford University Press 2017).

¹⁵ Legal knowledge and legal science are very wide, ambiguous and vague terms. A map of the ambiguities can be found in Alvaro Nuñez Vaquero 'Ciencia jurídica' in *Enciclopedia de Filosofía y teoría del derecho* (Unam 2015) 601. I will use them in an inclusive way, but with the common assumption that they are relevant for the practice of law.

understanding of its mechanisms. Moreover, if the practice is one and unified, these two perspectives should be somehow consistent.¹⁶ The rule of law is a perfect candidate for identifying not only the goal of the legal practice but also the legal mindset necessary for implementing it.

This is the framework in which I will introduce the virtue of reflexivity. This virtue is at the intersection between the intellectual knowledge necessary for practising law and the moral resources adequate to take part in it. Its intellectual status makes it a candidate for describing the basic knowledge required for becoming an aware actor of the practice of law.

2. REFLEXIVITY AND THE CONCEPT OF LAW

Reflexivity moves in the opposite direction to the separation of the idea of law (or ideal, in this case synonymous) and the practice of law.¹⁷ The rule of law has been interpreted as the main virtue of law, and in this sense, it is the best candidate to play the role of the internal regulative ideal of law.¹⁸ The centrality of the rule of law compared to other values possibly operating in the legal system (democracy, human rights, distributive justice) or in synergy with it,¹⁹ can be shown by the distinction between the different forms of failure of the law in consideration of its basic grammar. The absence of free elections is an injustice (even very serious), but it can be distinguished from the lack of clear rules, the threat to judges' independence, or the absence of fair trials. The latter represent serious and structural failures of law,²⁰ whereas the former, even if very serious too, regards the contingent fact that the law at stake is state law. In other words, the relevance of free elections is related to a specific model of law, state law, that is at the same time a political and a legal entity, where the

¹⁶ This is a relevant point for a philosophy of law, which has often distinguished between the concept of law of officials and the folk concept of law. For an innovative presentation of the discussion, see Brian Flanagan and Ivar R Hannikainen, 'The Folk Concept of Law: Law Is Intrinsically Moral' (2020) 100(1) *Australasian Journal of Philosophy* 165, DOI: 10.1080/00048402.2020.1833953.

¹⁷ Against eliminativism, the idea according to which legal practitioners do not need the concept of law to exercise well their professional role. Eliminativism implies also that what we call legal is nothing more than a disguised power decision, or that there are no legal obligations because ultimately all obligations are moral. See Lewis A. Kornhauser, 'Doing Without the Concept of Law' (2015) NYU School of Law, Public Law Research Paper 15 <<https://ssrn.com/abstract=2640605>> accessed 15 October 2025.

¹⁸ John Finnis, *Natural Law and Natural Rights* (Oxford University Press 2011) 270 and Raz, 'The Law's Own Virtue', 1.

¹⁹ As indicated in Article 2 Treaty of European Union.

²⁰ Francesco Viola, 'Il Rule of law come idea di società' in Giuseppe Acocella (ed), *Materiali per una cultura della legalità* (Giappichelli 2020) 25.

more general principle of participation of those affected, a principle linked to the rule of law, is applied in the form of political elections. The rule of law entails the consultation of those affected by decisions according to the principle *quod omnes tangit ab omnibus approbari debet* (what touches all ought to be approved by all). But free elections are only one of the possible ways to realise that aim; it is determined by majorities and minorities, and it corresponds to the way liberal institutions evolved in territorial States conferring a privilege to citizens. The principle of consultation or involvement of those who are affected can neither be completely reduced to a majority rule nor limited to such a parameter (citizen membership). In addition, the way in which the principle of consultation and involvement should work in legal practice is offering reasons and taking part in deliberations rather than opposing numbers. The right to a hearing is an example of participation according to the rule of law, as well as taking part in judicial decisions,²¹ or the practice of administrative consultation and accountability.²² I cannot develop here this point, which has to do with the specificity of the practice of law and its ability to take different forms.

In 2008, Nigel Simmonds developed the thesis according to which law is a moral idea embodied in established practices. The rule of law is the goal of those established practices, but, at the same time, it constitutes the immanent (implicit or explicit) parameter to criticise those practices.²³ Therefore, he defined reflexivity as the ability of making implicit or explicit appeal to the rule of law in the practice of law. This movement of reflexivity is to be understood as the ability to link a practice and its aim. I will build on his intuition, trying to articulate the way in which reflexivity can be performed. The virtue ethics approach helps to shape reflexivity as a trait of human actors. In fact, the grammar and language of virtues are well suited to bridge the gap between theory and practice.²⁴

Obviously, not all the models of legal knowledge are reflexive. The idea of legal science as a value-free explanation of merely existing law, eventually offered to those who will make political decisions on it, will perhaps be considered scientific,²⁵ but not reflexive. To contribute to the practice of law, legal

²¹ Lon L Fuller, 'The Forms and Limits of Adjudication' (1978) 92(2) Harvard Law Review 353.

²² Jens Steffek, 'Public Accountability and the Public Sphere of International Governance?' (2010) 24(1) Ethics and International Affairs 45.

²³ Nigel Simmonds, *Law as a Moral Idea* (Oxford University Press 2007) and Simmonds, 'Reflexivity and the Idea of Law' (2010) 1(1) Jurisprudence 1.

²⁴ Kristján Kristjánsson, *Virtuous Emotions* (Oxford University Press 2018) 184.

²⁵ As it is well known, this was the purpose of Hans Kelsen, *Pure Theory of Law* (University of California Press 1960). Recently, Widlak distinguishes between Kelsen's works on legal theory and his works on legal philosophy, the latter devoted to international law, where the telos of law, namely peace, emerges. According to the author, this

science must distance itself both from merely descriptive readings of facts and from external – in other words, manipulative, ideological – readings of law. As Julie Dickson has recently written, '[l]aw exists both as an institutional practice and social fact, and as a normative, reason-giving, and value-aspiring phenomenon'.²⁶ All the forms of legal knowledge – legal theory, legal science – need to do justice to this specific duality of law, and this is where reflexivity plays an important role. Mere descriptive readings do not recognise the value-aspiring dimension of law, whereas manipulative and ideological readings impose external values to aspire at from outside. In the light of reflexivity, the task of legal knowledge is to articulate the best possible version of law, where 'best' refers to its value (law as it should be), and 'possible' refers to its factual existence (law as it is).²⁷ The task of connecting the factual dimension of the practice of law with the goal of realising a non-arbitrary form of social interaction can only happen in the space in which human agents operate. Their work can be understood as an artistic and crafting activity or a technique,²⁸ but both these readings call into question human abilities.

The consideration of the rule of law as the aim of legal practice raises preliminary the problem of the content of the rule of law. As is well known, the different checklists (or even laundry lists²⁹), but also the different legal traditions of the rule of law, seem to cast a shadow on the content of the rule of law for its possible equivocal different formulations. The most famous list was Fuller's eight desiderata.³⁰ It is worth noticing that lists are not only the product of theories but can be the result of bottom-up approaches in search of common elements in different countries, such as the one elaborated by the European

is treated philosophically and therefore also reflexively. At least in relation to international law, Kelsen would answer the question of what law should be. Tomasz Wdłak, 'The Teleology of Peace and Kelsen's Philosophy of International Law' in Jorge E Nuñez, Gonzalo Villa-Rosas and Jorge L Fabra-Zamora (eds), *Kelsen's Legacy. Legal Normativity, International Law and Democracy* (Hart Publishing 2025) 241.

²⁶ Julie Dickson, *Elucidating Law* (Oxford University Press 2022) 87.

²⁷ Luigi Lombardi Vallauri, *Corso di Filosofia del diritto* (Cedam 1981) 179.

²⁸ Francesco Viola, 'Il diritto tra arte ed etica' in Cristina Hermida and José Antonio Santos (eds), *Una filosofía del derecho en acción* (Camara Diputados 2015), 5–17.

²⁹ Jeremy Waldron, 'The Rule of Law as an Essentially Contested Concept' in Jens Meierhenrich and Martin Loughlin (eds), *The Cambridge Companion to the Rule of Law* (Cambridge University Press 2021), 121.

³⁰ This list includes the prospective and non-retroactive nature of the law, the practicability of the law, its promulgation or publicity, the clarity and comprehensibility of the regulatory text, the non-contradiction and coherence between the provisions, the stability of the rules over time, the generality and congruence between officials and rules, in the sense that the latter must be applied by officials subject to the same rules, and the requirement that the rules be applied impartially. See Lon L Fuller, *The Morality of Law* (Yale University Press 1964).

Commission for Democracy Through Law.³¹ It finds a convergence around five principles that integrate the rule of law: the principle of legality, the principle of legal certainty, the prevention of abuse or misuse of power, the principle of equality, and access to justice. In the context of different checklists, reflexivity helps to find an organic and holistic meaning for the rule of law in its different manifestations, understanding the specific instantiations as originating from a core ground, that is the limitation of arbitrariness.³² The rule of law can adapt to differentiated forms of law and to their evolution. Regarding this problem, it is worth distinguishing different levels of discourse: the rule of law's core idea, its principles, and indicators for measuring its performance.³³ Reflexivity – this time understood as the capacity of connecting the checklists and the goal of the rule of law – can be seen in Krygier's idea of a teleological approach against the anatomical reading, being the root of the unity the aim of the rule of law. In fact, the rule of law core idea can be pursued and achieved through different forms, schemes, and actions, necessarily context-sensitive. The use of indicators – nowadays dominant in supranational and international organisations³⁴ – aims at measuring the degree of implementation of the rule of law in different and comparable situations.³⁵

This discourse is not an abstraction. The Legal Services Board, the regulatory committee of legal services in England and Wales, in compliance with the Legal Services Act (2007), section 1(1)(b), that establishes that lawyers must uphold the constitutional principle of the rule of law, affirms that, notwithstanding the different positions in the debate on the content of the rule of law, the constitutional principle of the rule of law can guide lawyers' behaviours

³¹ European Commission for Democracy Through Law, *Rule of Law Checklist*, CDL-AD(2016)007-e.

³² Martin Krygier, 'The Rule of Law: Pasts, Presents and Two Possible Futures' (2016) 12(1) *Annual Review of Law and Social Science* 199.

³³ I am not using here as an argument the importance of the value of the rule of law in the international community, and the strategies for its strengthening, as attested for example by the presence of the rule of law as one of the Sustainable Development Goals of the United Nations Agenda 2030 (see *Transforming our world: the 2030 Agenda for Sustainable Development* A/RES/70/L. I, 25/09/2015, but even before the resolutions by the United Nations General Assembly n. 2625 (XXV) 24/10/1970, A/RES/55/2, 8/9/2000 and A/RES/67/186, 20/12/2012). For a better integration of the empirical and theoretical levels in the discussions on the rule of law, see Sanne Taekema, 'Methodologies of Rule of Law Research: Why Legal Philosophy Needs Empirical and Doctrinal Scholarship?' (2021) 40 *Law and Philosophy* 33.

³⁴ See World Justice Project Rule of Law <<https://worldjusticeproject.org/rule-of-law-index/global>> accessed 16 October 2025.

³⁵ Jeremy Waldron, 'The Rule of Law' in *The Stanford Encyclopaedia of Philosophy* (Fall 2016) <<https://plato.stanford.edu/archives/fall2016/entries/rule-of-law/>> accessed 16 October 2025.

and serves to offer a guide in controversial cases that professional codes of conduct do not clarify. The principle of the rule of law can offer, for instance, an answer to the vexed question of divided loyalties (the opposition between the duties to a particular client and the duties to the collective);³⁶ it makes it possible to frame the question of combining the freedom of choosing clients while guaranteeing access to justice and many other implications for the rule of law determined by lawyers' jobs in litigation and beyond the courts.³⁷ Rather than understanding the rule of law as a set of mechanisms and procedures, or a sort of invisible hand, that produces fair outcomes without the commitment and engagement of those involved in the practice, the rule of law requires the ability of legal practitioners to fix appropriate actions to build a fair social ordering, putting together facts and actions value-driven.³⁸

Reflexivity, in this context, is the intellectual and moral ability to connect law's normative ideals with its concrete applications. It allows legal practitioners to deliberate about how their actions, decisions, and interpretations serve or undermine the rule of law.

3. THE REFLEXIVE TURN IN THE EVOLUTION OF LEGAL SYSTEMS

Apart from describing the style of practical reasoning typical of social practices, reflexivity became increasingly important at the end of the nineteenth century in the epistemological, sociological and philosophical fields, as a reaction to the object/subject dualism. It is a strategy against simplistic readings of the subject's knowledge as an external observer, especially in social and practical sciences, to which legal knowledge belongs.³⁹ Reflexivity is a common feature in social research, where methods used to describe phenomena contribute to the construction of phenomena themselves.⁴⁰

³⁶ Precisely, the rule of law offers a key for overcoming the conflict between those loyalties, such as the possibility of breaching confidentiality when the principle is used to violate the law.

³⁷ Richard Moorhead, Steven Vaughan and Kenta Tsuda, 'What Does it Mean for Lawyers to uphold the Rule of Law? A Report for the Legal Services Board' <<https://legalservicesboard.org.uk/wp-content/uploads/2023/11/FINAL-LSB-Lawyers-and-ROL-Report-2023.pdf>> accessed 16 October 2025.

³⁸ Behind the idea of law, there is always an idea of a fair society, see Viola, 'Il Rule of law come idea di società'.

³⁹ Karen Lumsden, *Reflexive Theory: Method and Practice* (Routledge 2020).

⁴⁰ Emilie M. Whitaker and Paul Atkinson, *Reflexivity in Social Research* (Palgrave MacMillan 2021). Reflexivity has been at the centre of a revision of the internal/external point of view of the sociology of law by Pierre Bourdieu, *In Other Words: Essays Towards a Reflexive Sociology* (Stanford University Press 1990).

When traditions have lost their capacity to guide people's actions, new resources different from those of the past must be found, and social actors are the best options. This evolution has been reinforced by the process of individualisation of social agents that characterises contemporary cultures. The thesis of the sociology of risk is that the disintegration of traditions in a global society leads to the liberation of individuals, but at the same time it also implies a call to their responsibility.⁴¹ Reflexivity is the typical quality of social actors who recognise that they are part of the solution to the problem and, before, they are part of the very problem.⁴² It activates some typical processes. The first is the awareness of our perception of the world and our impact on it, recognising the specificity of our own role in modifying the world we live in. The second is the ability to set priorities, thanks to the capacity to distinguish and give different weight to values. Third, reflexivity activates a personal commitment to protect the most important interests, participating in decision-making processes, and, even more importantly, engaging in preventing difficulties and deviations.⁴³ All these characteristics make reflexivity a good background for emphasising the contribution of social actors involved in the practice of law.

A field in which reflexivity is prospering today is international law.⁴⁴ In this context, reflexivity is understood as indicating the scope of scholars' contribution to the practice of law. The debate is directly inspired by the more general reflexive turn in social research. Reflexivity has been defined as the attitude to 'turn on the relationship between the object and the subject of investigation'.⁴⁵ The exercise of reflexivity is observable in some recurrent directions of research: in the abundance of histories of international law, each of them trying to understand the very nature of international law itself, in the affluence of inquiries on the background of its actors and how they approach their work as international lawyers, or in the attention to the role of international lawyers in the building of international law.⁴⁶

The case of the histories of international law is very illustrative. Generally, these histories are attempts to explain how legal practitioners reacted to the

⁴¹ Ulrich Beck and Elisabeth Beck-Gernsheim, *Individualization* (Sage 2002), 31.

⁴² Margaret S. Archer, *Structure, Agency and the Internal Conversation* (Cambridge University Press 2003), 255.

⁴³ Cfr. Jan F Haugseth and Eli Smeplass 'The Greta Thunberg Effect: A Study of Norwegian Youth's Reflexivity on Climate Change' (2023) 57(4) *Sociology* 921.

⁴⁴ Jean d'Aspremont and Sahib Singh, *Introduction: The Life of International Law and Its Concepts in Concepts for International Law* (Edward Elgar Publishing 2019), 1.

⁴⁵ Andrea Bianchi, *International Law Theories* (Oxford University Press 2016), 3.

⁴⁶ There is a good synthesis in Martti Koskenniemi, *To the Uttermost Parts of the Earth. Legal Imagination and International Power, 1300–1870* (Cambridge University Press 2021). But see also Jean d'Aspremont, *International Law as a Belief System* (Cambridge University Press 2017).

legal and cultural challenges of their times, using the legal categories already available for new challenges and new tasks.⁴⁷ Legal imagination has been emphasised, a combination of legal culture and legal consciousness, that matches the capacity of legal *bricolage*, the skill of expanding legal concepts and categories. In times of change and transformation, the effort of imagining new legal tools starts with concepts and instruments at hand to be expanded and revised. Legal knowledge does not work in a descending way, from axiomatic systems and through deductive inferences, but in the form of circular research, working on similarities and differences, that is always a good strategy for expanding knowledge.⁴⁸ Similar considerations can be seen in the legal knowledge needed for applying law to cases. Against the dominance of the deductive model in legal reasoning, both in the tradition of common and civil law, thinkers with different backgrounds support the importance of working with the logic of similarities and differences.⁴⁹

Historically, the idea according to which legal science not only describes law, but rather takes part in building it has been recurring, to the point of speaking of a *Juristenrecht*, an alternative to a law of judges or a law of legislators. In the last centuries, this idea has been inversely proportional to the consolidation of state power. The more importance is given to the power of the modern state, the less credit is given to legal doctrines, because it must be accepted that law is a political product controlled by legislators. An example of the decline of the role of legal doctrines can be observed in the origin and spread of the prohibition of quoting legal doctrines in judicial decisions in Europe since the end of the seventeenth century. In the past, the role of legal doctrines was crucial for both legislation and adjudication. In this framework, the work of legal knowledge represented a limit to political power, as far as legal science was not a mere mirror of what legislators wanted.⁵⁰ The point is not to see legislators, judges, legal scientists or even lawyers as antagonists, but to see all those roles as complementary. All of them are necessary to achieve the very aim of the practice of law.

⁴⁷ Koskenniemi, *To the Uttermost Parts of the Earth*, 1.

⁴⁸ *ibid.* 4–12.

⁴⁹ See in the civil law approach Karl Engisch, *Einführung in das juristische Denken* (Kohlhammer Verlag 2018) and in the common law approach Edward H Levi, *An Introduction to Legal Reasoning (1941–48)* (The University of Chicago Press 1962).

⁵⁰ This was the famous definition of legal science by Norberto Bobbio, ‘Scienza del diritto e analisi del linguaggio’ in Uberto Scarpelli (ed), *Diritto e analisi del linguaggio* (Edizioni di Comunità 1976), 287. In the same direction, Carlos E. Alchourrón and Eugenio Bulygin, *Introducción a la metodología de las ciencias jurídicas y sociales* (Biblioteca virtual Miguel de Cervantes 2000).

There is a reason why the idea of reflexivity is prospering among international lawyers: they are used to dealing with complex systems of sources of law, and they act in a fragmented order in which different systems interact. Nonetheless, the evolution of the law of the states in their increasing cooperative relationships, on the one hand, and the porosity of legal systems among them, on the other hand, open new perspectives for legal actors. The complexity of identifying legal rules in pluralistic legal systems requires a particular effort and responsibility. The deconstruction of the traditional scheme of sources discards the adequacy of purely formal solutions to the problem of validity based on regulatory hierarchies and exclusionary borders. The principle of legality and the duty to act in accordance with the law are no longer an exhaustive and satisfactory guide. The principle of legality must be revised in the light of new inputs such as inter-legality, which better sums up the idea of the primacy of law in the interconnections among different legal orders.⁵¹ In any case, as proposed by the quoted European Commission, the principle of legality converges – together with predictability, control of abuse of power, equality, access to justice – in the implementation of the rule of law. To this end, judges, lawyers, and legal scientists in general, cooperate together in the implementation of the rule of law.⁵²

Reflexivity plays an important role in the crafting of real cases. It is the key to legal practitioners' ability to absorb and translate social inputs into legal terms, and the condition for the shaping of fair legal solutions. Legislators, judges, lawyers, advisers, and civic servants are called to reflect on the legal action at stake and to commensurate it with the rule of law. In this sense, the rule of law can be identified, on the one hand, as the mark of law, and, on the other hand, as the pattern of the very legal mindset or *forma mentis*. Reflexivity can be considered the cognitive ability to link up the idea of law

⁵¹ Gianluigi Palombella (ed), 'Approaching Inter-legality' (2022) 11(1) Rivista di Filosofia del diritto 7.

⁵² Another implementation of reflexivity can be found in the context of the fight against bias, on which feminist jurisprudence has insisted. Reflexivity is related to the epistemological attitude to turn upon one's own personal and professional position, for evaluating the risks of stereotypes deriving from inevitable situated knowledge. 'A key component of gendered research, reflexivity is the process by which researchers seek to constantly reflect upon, examine critically, and analyze the nature of the research process—when choosing methods, when carrying out the research, and finally when writing up the research project and thinking about outcomes, solutions, and even research presentation. ... Gender-sensitive researchers will commonly use self-reflexivity in their own research but will also partake in collaborative reflexive techniques after conducting their research in order to deepen their analyses via the perspectives of other researchers and the research participants themselves'. UN-INSTRAW, *Gender Research. A How-To Guide* (2017) <<https://genderaveda.cz/wp-content/uploads/2017/10/gender-research-a-how-to-guide.pdf>> accessed 16 October 2025.

with its practice. From this point of view, reflexivity could be considered the very ability of those adopting the ‘internal point of view’, against prudential or strategic approaches to law.

Reflexivity is for sure a virtue of those taking part in the practice of law as officials. Simmonds makes the comparison between the rule of law and friendship. From time to time, we interrogate ourselves on the way in which our or others’ behaviours fall into the category of what a good friend would do. Am I acting as a good friend? Are my/their behaviours typical of good friends? In the same way, reflexivity evaluates the way in which our institutions and our legal actions correspond to good law, the one inspired by the rule of law. The difference between the case of friendship and the rule of law is that the reasons to uphold the rule of law are institutional and not optional or personal.⁵³ Implementing the rule of law is mandatory for public officials and legal practitioners in general. From this point of view, reflexivity is interconnected with fidelity. But whereas reflexivity is a cognitive ability, fidelity is a solid commitment to the task of realising the rule of law. It is a question of trust: fidelity is grounded on the promise that the law makes to those that accept its governance – the promise to offer protection against arbitrary powers – and it is normally solemnly grounded on the promise that legal practitioners make when they accept the duties of their roles. Reflexivity is the root and condition of fidelity.⁵⁴

4. REFLEXIVITY AS A JUDICIAL VIRTUE, AN ILLUSTRATION

Reflexivity acquires a particularly clear and demanding meaning when observed from the perspective of judicial decision-making. In adjudication, reflexivity is not a matter of introspective self-awareness, but a practical and institutional virtue that shapes how judges understand and exercise their role within the rule of law. It designates the capacity to relate one’s decisions not only to the applicable legal materials, but also to the position one occupies in the legal system and to the systemic effects that judicial reasoning produces over time.

Judicial reflexivity presupposes, first, an awareness of the cooperative and non-solipsistic nature of adjudication. Judges never decide in isolation: their decisions are embedded in a network of other decisions, institutional roles, procedural constraints, and dialogical practices involving other courts, litigants, and legal professionals.⁵⁵ Reflexivity, in this sense, is the capacity to sit-

⁵³ Simmonds, *Reflexivity and the Idea of Law*, 11.

⁵⁴ On the idea of fidelity see Postema, *Law’s Rule*, passim.

⁵⁵ Fuller, ‘The Forms and Limits of Adjudication’.

uate one's own judgement within a collective enterprise aimed at the practical realisation of the rule of law, rather than to conceive adjudication as an exercise of individual authority.⁵⁶ This role-awareness is particularly relevant in contemporary legal systems characterised by multiple levels of jurisdiction and by the growing importance of judicial reasoning in maintaining the unity and coherence of the law in multilevel contexts.

Second, reflexivity manifests itself in the discipline of judicial argumentation. The contribution of courts to the rule of law does not lie in the mechanical production of predictable outcomes, but in the articulation of publicly accessible reasons capable of justifying decisions within a shared normative framework.⁵⁷ In constitutional systems, reflexive judges are those who understand that legal certainty emerges not from the elimination of discretion, but from the progressive sedimentation of reasons through motivated decisions that can be scrutinised, contested, and, if necessary, revised.⁵⁸ In this sense, reflexivity underpins the responsibility to give reasons that are intelligible not only to the parties, but also to other judges and to the legal community at large, thereby transforming adjudication into a site of institutional accountability.⁵⁹

Third, reflexivity operates as a virtue of self-restraint. The more judicial decisions affect the interpretation and stabilization of common legal norms – especially in the case of higher courts or nomophylactic functions – the stronger the need for an awareness of the limits inherent in the judicial role. Reflexivity enables judges to temper the legitimate power they exercise by continuously relating it to the anti-arbitrariness function of the rule of law. This does not entail passivity or formalism, but rather a reflective engagement with the boundaries between interpretation, application, and innovation, guided

⁵⁶ Ronald Dworkin famously emphasised that judicial decision-making requires maintaining coherence between particular decisions and the principles that justify the legal system as a whole. In his interpretive account, judges are called to decide cases in a way that both fits and justifies the existing body of law, treating it as an expression of underlying principles rather than a mere set of rules. He also described the collective and diachronic nature of adjudication through the metaphor of law as a 'chain novel', in which each judge contributes a new chapter that must be consistent with what has been written before while developing the story in the best possible way. See Ronald Dworkin, *Law's Empire* (Harvard University Press 1986), 225–75. While Dworkin's interpretive attitude concerns the way in which legal materials are approached and justified, reflexivity concerns the way in which legal actors understand their own role within that practice.

⁵⁷ Robert Alexy, *A Theory of Legal Argumentation* (Oxford University Press 2010); Manuel Atienza, *Las razones del derecho* (Centro de Estudios Constitucionales 1997).

⁵⁸ Michele Taruffo, 'Aspetti del precedente giudiziale' (2015) *Criminalia* 37.

⁵⁹ Letizia Gianformaggio, 'Certeza del diritto' in *Filosofia del diritto e ragionamento giuridico* (Giappichelli 2008).

by the requirement that power be exercised according to law and justified by reasons.

Understood in this way, reflexivity is a genuinely judicial virtue: it integrates cognitive, institutional, and ethical dimensions of adjudication. It allows judges to connect the normative ideals of the rule of law – such as legality, equality, and legal certainty – with the concrete practices through which these ideals are realised. By fostering role-awareness, argumentative responsibility, and self-restraint, judicial reflexivity contributes to making adjudication a central mechanism through which the rule of law remains a living, self-corrective, and non-arbitrary practice.

5. CONCLUSION

Reflexivity is a cognitive virtue, enabling one to grasp the aspirational meaning of the practice of law and to perform accordingly, linking law as it is with law as it should be. Interpreted as a virtue, reflexivity requires a form of situated judgement that evaluates how one's behaviours contribute to or threaten the goals and ways of the practice. It can be considered an institutional virtue as long as it is not reducible to individual morality, but it is embedded in roles, procedures, and forms of reasoning socially established and consolidated, even if susceptible to correction. In short, reflexivity is the ability to see oneself as both actor and addressee of the law. It can be practised by connecting action to purpose; applying to oneself and one's institution the same criteria used to judge others and accepting being bound by law in the same way one enforces it. It is grounded on reasons that are not strategic or external, but internal to the legal practice and intelligible to those affected. It requires pondering how professional position discretion or expertise may generate risks of arbitrariness or opacity, and remaining receptive to criticism, contestation, and institutional learning. For citizens and legal practitioners as such, practising reflexivity means complying with law while also monitoring, questioning, and engaging in its improvement. Reflexivity describes a responsible way of inhabiting legal practice. It is grounded in knowledge of the law and guides action accordingly. However, it is only the starting point for other dispositions and virtues, for which there remains ample space.

What is common between legal practitioners and lay people is the incompatibility of exclusive external or manipulative approaches to law. From this point of view, ordinary people have an advantage, because they tend to expect justice from law, simply looking at whether and how justice is done by legal practitioners, whereas legal practitioners are aware of the possible flaws in the system and could distance themselves from it. Without reflexivity it is hard to understand that the success of the practice depends on every actor's involvement. In the case of lay people, reflexivity leads not only to upholding the

rules by respecting them as part of their contribution to the rule of law, but also to demanding accountability and transparency from those who exercise the power, as well as participation in improving the system. The latter is the task of transformative justice,⁶⁰ which involves legal practitioners and citizens alike in the enhancement of rules and institutions, all of them as citizens/actors engaged in social change.

Reflexivity as a virtue is the other side of the coin of the principle according to which ‘those who rule with law and in its name are at the same time ruled by it’.⁶¹ In this version, reflexivity does not refer to the actors involved in the practice, but indicates a quality of law, with important consequences for those participating in the practice of law. Reflexivity requires us to accept for ourselves (for everybody) the same rules and treatment. For Aristotle, this is one of the meanings of justice: it requires wanting for us what we are keen to give to others.⁶² It implies treating ourselves within the same parameters that we use with others. Postema says that it leads to the idea of a polity as a net, and not as a hierarchical chain.⁶³ Equality under the law gives life to a relationship of mutuality and peerhood in which we are responsible for each other, as a basis of a horizontal conception of the rule of law. Precisely because we co-belong to each other, any form of abuse of power (deriving from an advantage in terms of competence, ability, position, or even legitimate competence or right), any non-deliberative use of power (that is, the one that does not take the dialectic of argumentative inclusion seriously), and even the impersonality of power (which makes the relationships opaque) are arbitrary. The rule of law is a human way of managing mutual relationships. A reflexive knowledge of law, both in its expert and in its basic forms, could feed this virtuous circle.

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⁶⁰ Transformative justice is designed to produce changes in social settings. It is generally considered an alternative to retributive and restorative justice because it is directed to challenge the premises on which those practices of justice are grounded. It could be said simplistically that transformative justice is the task of legal practitioners as citizens. Paul Gready and Simon Robins (eds), *From Transitional Justice to Transformative Justice: A New Agenda for Practice* (Cambridge University Press 2019).

⁶¹ Postema, *Law's Rule*, 56.

⁶² Aristotle, *Nicomachean Ethics*, 1129b, 3 <<https://ia600506.us.archive.org/0/items/AristotlesNicomacheanEthics/Aristotles%20-%20Nicomachean%20Ethics.pdf>> accessed 16 October 2025.

⁶³ Postema, *Law's Rule*, 55–6.

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