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BOOK REVIEW

Joe McIntyre, The Judicial Function Fundamental Principles of Contemporary Judging. Springer, Singapore, 2019. Pp. 302, ISBN: 978-981-32-9114-0; 978-981-32-9115-7 (eBook)

Johannes Riedel*

Reflection on the judicial role leads to an analysis of the courts' function in dispute resolution and social governance. Judicial decision-making is characterised as the interaction of reason and intuition, with the method of that decision-making being to establish relevant norms, assess the facts and apply the law to the facts. The impartiality and independence of the courts are described as dependent on their function and not as a consequence of the separation of powers. Extensive research is presented on threats to impartiality and on mechanisms to counter such threats. The result is a pleading for the critical role of courts in the governance of society.

Keywords: courts; function; impartiality; integrity; accountability

This book is a voluminous and comprehensive review of all principal aspects of the functioning of courts; not in the sense of technical performance, tools and abilities, but of the role of courts in modern society. This enormous task has been tackled by the author with great diligence, thorough research and apparently after many years of thoughtful observation and deliberation.[1] The result is an opus magnum that leaves few questions unanswered, at least for readers familiar with common law judicial systems, and offers substantial information from the point of view of a lawyer educated in this system to any reader interested in courts.

The plan of the book is laid out in both the author's preface and in the first part on '*Development of Principles of Contemporary Judging*'. Referring to dangers caused by 'the drumbeats of change' which are 'reverberating across the globe', the author attempts to

* Johannes Riedel has been working as a judge in courts of law in Bonn and Cologne and in judicial administration, as civil servant in the Ministry of Justice of North Rhine-Westphalia as head of the department for legal education and in the function of director of the state law exam office. From 2005 to 2014 he was president (chief judge) of the Court of Appeal in Cologne, Germany, and until 2015, German member of the Consultative Council of European Judges (CCJE) with the Council of Europe. Johannes Riedel, Ehrental 67, 53332 Bornheim, Germany, johannes.riedel@t-online.de

[1] Joe McIntyre, *The Judicial Function: Fundamental Principles of Contemporary Judging* (Springer, 2019) pt XIII '...culmination of over a decade's work'.

'unpack' relevant issues.[2] The invitation to the reader to reflect on the judicial role is combined with the announcement that the book is both a work of theory and also a 'tribute and celebration of our courts'.[3] The author emphasises that the book's focus is on function, rather than on power. At this early stage, it becomes equally clear that the book is intended to be a pleading for the courts. 'The animated spirit of this book is a belief that courts remain well-honed and effective institutions that perform a critical role in the governance of society'.[4]

In the second part, '*The Nature of Judicial Function*', after quoting several famous references to the myths of court work,[5] the author turns to the two major functions of courts: dispute resolution and social governance. He begins by detailing well-known aspects of these functions, providing thorough references to literature on the common law system. He lays out several methods of dispute resolution and finally describes the role of the courts as third-party merit-based dispute resolution. The topic of social governance is also discussed in great detail in its historical and sociological dimensions.[6] The conclusion is hardly surprising, although the author maintains that these two aspects of the judicial function, dispute resolution and social governance, which in his view are 'woven together into a coherent single function' are 'poorly understood in the literature'.[7]

The third part concerns '*The Judicial Decision-Making Method*'. In the first chapter of this part, the author argues that the judicial process cannot be reduced to either logic or choice. Instead it is composed of non-arbitrary discretions, guided by reasoning yet dependent upon an act of will. The judge of this 'new archetype' is forced to take responsibility for his or her decision.

The author explains that his focus is on underlying theoretical foundations of the judicial decision-making process, rather than any specific manifestation (as in the histories of France and England). He borrows Kirby's[8] religious terminology and lays out a broad historical view on judging, including, inter alia, Bacon's essay '*Of Judicature*', the principle of *stare decisis*, the concept of the judge as a spokesperson, Oliver Wendell Holmes' famous remarks on fallacy of formalism and, finally, Lord Reid's equally famous observations.[9] All this is very interesting and convincingly leads to the conclusion that the process is an interaction of reason and intuition (or discretion); a balance of freedom and constraint.[10] For the life-long practitioner, this is hardly surprising.[11]

This leads the author to discourse on three methodical steps, namely establishing relevant norms, assessing the facts and applying the law to the facts. From the point of view of a

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[2] Ibid 5–6, 9; *Kafka's Process (the Trial),* cited p 8 note 16, in connection with the image of typical practitioners, however, does not seem to be a representative example.

[3] Ibid 6.

[4] Ibid 9.

[5] See, eg, p 26 referring to Blackshield*: 'an "air of sanctity and mystery" is "carefully preserved in the courtroom – not merely in the solemn ceremonial use of robes and rituals … but in the inward and spiritual attitudes of which these are but the outward and visible sign"'* – an observation which the author of this review cannot confirm for about forty years of his judicial work.

[6] Ibid 33, 49 et sequ.

[7] Ibid 71, 73.

[8] *Judicial Activism* (London, 2004).

[9] McIntyre (n 1) 85.

[10] Ibid 94. On page 93, the author remarks: *'The existence of the dispute is prima facie evidence of the inability of pure reason to resolve the dispute; if logic were sufficient, disputes would only reach judicial determination where one of the parties was acting illogically or unreasonably.'* With respect, the reviewer's decades of judicial experience on both the trial and appellate levels reflect a different picture: Quite often, litigants appear to be acting illogically or unreasonably, at times maliciously, with intention to deceive the court, or from extra-judicial motives like the *sine ira et studio* wish for a third-party decision.

[11] The reviewer, in his judicial work, always liked to remind himself of the poem, *'Law, say the gardeners, is the sun'* by *W.H. Auden,* where one verse reads: *'Law, says the judge as he looks down his nose, … law is as you know I suppose, …'.*

continental judge steeped in the civil law tradition, much could be added to this part: the intensive debates in the philosophy of law or legal theory with respect to positivism and natural law or *Naturrecht* well into the late 20th century; the concept of judges as 'social engineers' advocated by some in the 1970s; broad methodological concepts concerning the determination of factual issues relevant for the case decision;[12] and detailed analysis of elements necessary to weigh the evidence, especially concerning witnesses.

The summary of this part convincingly shows that judicial work is dependent on choices, that this aspect is of critical concern, that 'the judge is guided in the assessment of the dispute's legal merits in a manner that is non-arbitrary and constrained, yet flexible and responsive. … The choices of the judge matter, and that judge "can neither avoid nor transfer to the others the responsibility for his decisions"',[13] true but new?.[14]

Consequently, Part IV deals with '*Judicial Impartiality, Deviation and Threats to the Judicial Method*'. After again pointing out that he is offering a theoretical framework, the author presents the concepts of judicial independence and impartiality as dependent upon judicial function and method. Somewhat surprisingly, he proclaims the idea of a universal model or standard as being 'misguided'.[15] For him, independence promotes impartiality and thereby serves as a means for 'the fulsome performance' of judicial function.[16]

This part presents a thorough review of international documents on independence, ranging from the *Declaration of Human Rights* to the *UN Basic Principles*, including quite substantial reference to relevant work in Europe.[17] In contrast to this, the author rejects the view that independence is rooted in the separation of powers.[18] He makes the convincing statements that independence amounts to 'being free from fear' and should not be seen as a personal privilege.[19]

What follows is a discussion of subcategories of threats to impartiality, divided into threats related to individual cases (e.g. bias and recusal) and structural threats (referred to in traditional terminology as threats to judicial independence). The first element is presented exhaustively; with respect to the second issue, the author acknowledges the existence of a vast literature, so certain shortcomings are inevitable.[20] Still, a broad picture is laid out, from job threats and 'purging' of judges to mergers of courts.[21]

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[12] In Germany, generations of young jurists have suffered under the burdensome rules of this technique, taught to write exam papers or *Relationstechnik* which, however, were aiming at a correct analysis of the issues in order to avoid arbitrary and unnecessary hearing of evidence.

[13] McIntyre (n 1) 154, citing J. Wróblewski, *The Judicial Application of Law* (1992).

[14] Ibid at note 11, *supra*.

[15] Ibid 161.

[16] Ibid 168.

[17] The author speaks of the 'prolific work' of the Council of Europe and refers, inter alia, to opinions of the Consultative Council of European Judges (CCJE).

[18] McIntyre (n 1) 167: '*Not only does it unnecessarily tie judicial independence to a particular, ill-defined constitutional settlement, but it depends upon formalist conceptions of judicial decision-making to limit judicial power.*'

[19] Ibid 169, referring to Handsley, *Issues Paper on Judicial Accountability* (2001). The idea of a personal privilege has long been rejected by German courts, e.g. Bundesgerichtshof, judgment of Sept. 27, 1976 – RiZ(R) 3/75.

[20] Ibid 207. A book review cannot discuss these elements in detail. However, certain references to relevant continental European literature (much of it available in English, e.g. publications by the Institutes in Bologna, Bern and Utrecht) in addition to citing Contini & Mohr, 'Reconciling Independence and Accountability in Judicial Systems' (2007) *Utrecht Law Review,* would have been helpful for the overall picture.

[21] With respect to mergers, see page 217; here also, discussions on the European continent could have been worth noting. 'Purging' is only mentioned in connection with East German judges (p 213 note 68 referring to Bell, *Judiciaries within Europe* (Cambridge, 2006)), whereas far more difficult questions arise in connection with so-called 'vetting' or 'lustration' procedures, cf. *Challenges for judicial independence and impartiality in the member states of the Council of Europe Report prepared jointly by the Bureau of the CCJE and the Bureau of the CCPE for the attention of the Secretary General of the Council of Europe,* p 67. This report also discusses the situation in several member states of the Council of Europe; presently, concerns exist with respect to Poland, Turkey and Ukraine.

In logical order, Part V '*Judicial Integrity and Accountability*', examines possible mechanisms to ensure impartiality. Accountability, responsibility and ethics are convincingly described as parts of a whole, the purpose being 'promotion of adherence to higher order principles of contemporary judging'.[22] Internal and external aspects of accountability are described, and the thesis that 'well-designed' accountability mechanisms support judges in their work will certainly invoke broad consensus. The same applies to the statement that there is 'imprecise use of these labels' and, citing Le Sueur, that it is an 'amorphous concept'.[23]

What follows is an exhaustive and again largely theoretical analysis of relevant literature, with reference to various codes of judicial conduct.[24] Practical applications are discussed in some depth in Chapter 14, with consideration of the elements of personal conduct, substantive performance and of judicial institutions as subcategories. Following this, models of procedures for accountability are explained, including parliamentary address, judicial councils and informal social mechanisms. Much of this is referential, although readers might have preferred to learn more about these practical examples and applications.[25]

Informal mechanisms are laid out in detailed categories: conscience; culture of the judiciary; the role of the legal profession; following mechanisms of 'substantive accountability' with open justice; judicial reasons; the appeals process; internal mechanisms; criticism; and media relations.[26] It would have been interesting if, in addition to listing these elements, the author had assessed their weight for the judicial process.[27] The forceful and convincing conclusion is that accountability is not inconsistent with, but complementary to, the independence of courts.[28]

In the final part, the author reiterates the steps of his programmatic approach, underlining again his attempt 'to make the case for courts as their future cannot be taken for granted'. He argues that placing the discussion of the judicial function in a broader framework will promote better understanding of that function and help to fend off criticism by those suspicious of judicial power.[29] Almost in passing, he points out the absence of an institutional defense of courts;[30] indeed, Justice Ministers or Attorneys-General rarely play this role. Courts or judiciaries have so far not organised themselves sufficiently to elect strong speakers who could mount such a defense and truly speak for them.

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[22] Ibid 228; what exactly these principles of higher order are, remains open.

[23] Ibid 230, 234 note 37, Le Sueur, *Developing Mechanisms for Judicial Accountability in the UK* (2004). The reason for this seems to lie in linguistics: 'accountability', or in French '*responsabilité*', are not self-explaining terms, but require that referential questions be answered, i.e. for what, to whom, to what extent, and to which end should they apply. When working on Opinion 18 of the CCJE [cf. note 17, above], the reviewer encountered lengthy discussions in the working group until the terminology was to some extent clarified and filled with substance, cf. Opinion 18 (2015) [20]–[33].

[24] Including the U.S., Canada, Australia and New Zealand, and the UK, whilst the broad discussion in continental Europe is not mentioned.

[25] See, eg, the vast sources of the National Center of State Courts in Williamsburg, Virginia in the U.S. <https://www.ncsc.org> which could have been tapped whereas, on loss of capacity, only the famous case of the former chief justice of Gibraltar [2009] UKPC 43, or, with respect to civil liability, Italy are mentioned (cf. pp 261, 265).

[26] Somewhat unfortunately, no references are provided to the extensive literature in Europe, cf., e.g. publications of European networks of the Judicial Councils, the Supreme Courts, the Venice Commission, opinions of the CCJE. In the experience of the reviewer, collegial discussions between chief judges (court presidents) and judges are strong mechanisms of accountability (what does it mean for an English judge if the Chief Justice asks him to tea?).

[27] In the opinion of the reviewer, the function of the need to give reasons and of the appeals process is largely underestimated in present discussions.

[28] McIntyre (n 1) 288; see also Opinion 18 of the CCJE, [20]: '*This "accountability" is as vital for the judiciary as for the other powers of the state because it, like them, is there to serve the public. Moreover, provided a careful balance is observed, the two principles of judicial independence and accountability are not irreconcilable opposites.'*

[29] Ibid 295.

[30] Ibid 296, '*… who … should defend the judiciary*'.

The outlook given by the author is, in his words:

> Once the governance role of the courts is fully appreciated and accepted, the exclusion of large portions of the community from active participation in judicial processes amounts to a denial of a political right, and not simply an economic or welfare interest. Once the genuine evaluative role of the judge is accepted, then issues of gender diversity on the bench (and the senior bar) become critical, not only to ensure a diversity of viewpoints and opinion, but to promote acceptability and confidence through better representation. Similarly, this recognition of legitimate judicial subjectivity invites reflections on methods of judicial appointment. Once the act of judicial wisdom … is honored, far greater leeway is afforded to the design of rules of procedure and evidence. When the goal is sufficiency, and a judge always required to make a difficult decision, there is a greater tolerance for responsive practices.[31]

Whether this approach is more powerful and convincing than a traditional understanding of the separation of powers in a democratic state is for the reader to judge.

Altogether, this book is a wonderful compilation of relevant aspects of substantial court work, a great source of reference, excellent and rewarding reading and, finally, a fantastic instigation for reflection and discussion on courts. On a closer look, certain implied limitations become apparent: the book does not concern all courts, but 'contemporary courts' seems to be a synonym for courts in a democratic society. The concept of third-party dispute resolution is clearly valid for civil litigation; whether the same applies to criminal courts, family courts, child custody and child protection cases, or to cases concerning the confinement of mentally ill persons (involuntary commitment or sectioning) is not explored.

An almost hidden remark points to the overall question of professional ethics and, moreover, of what makes a good judge, when the author describes the purpose of accountability as 'promotion of adherence to higher order principles of contemporary judging'.[32] In the view of the reviewer and his personal experience, when it comes to the standing of courts in a democratic society, the bottom line is trust and confidence. Most elements necessary to ensure trust and confidence are discussed in this book and what Lord Sales has said in the Foreword can only be underlined: this book is a '…forceful argument for the importance and legitimacy of the judicial role'. Another almost hidden sentence adds what, in the opinion of the reviewer, is the most important element for trust and confidence, and for convincing attempts to perform the core task of courts, which is the search for truth and justice: 'Ultimately, the health of the judicial system depends upon the professional values and integrity of the judges themselves.'[33]

Competing Interests

The author has no competing interests to declare.

[31] Ibid 301.1

[32] Ibid 228; discussing this would, however, require another book. For professional evaluations of judges cf. Riedel, 'Individual Evaluation of Judges in Germany' (2004) 4(5) *Oñati Socio-Legal Series* [*online*], 974–992.

[33] Ibid 220.

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