

## Book Review

Susan M. Sterett and Lee Demetrius Walker (eds): *Research Handbook on Law and Courts*, Edward Elgar Publishing, 2019

Jukka Viljanen\*

### **Threats against courts in the time of growing populism and nationalism**

In a recent speech on the topic of Rule of Law and the European Court of Human Rights: the independence of the judiciary, President of the ECtHR *Linos-Alexandre Sicilianos* spoke on the emerging threats faced by courts and the judiciary. He mentioned several developments that are a cause of concern in European countries and their court systems. The rule of law is under attack as a result the growth of populism and

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\* Professor of Public Law, Tampere University, Finland.

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nationalism. This is also in the background of *Research Handbook on Law and Courts*.

President Sicilianos mentions several attacks against the rule of law such as the dismissal, replacement and demotion of judges; the use of disciplinary proceedings against judges and prosecutors for political reasons; the use of threats. The ECtHR has issued important judgments in relation to the impartiality of judges. The Grand Chamber judgment of *Baka v. Hungary* (2016) in particular has been a key-case on developing the criteria under which the actions taken against the judiciary can have a chilling effect on judges' willingness to participate in the public debate on legislative reforms. In the other European Court, the European Union Court of Justice (CJEU) a judgment was passed on Poland (19.11.2019). The CJEU considered that the Polish court reform was not in accordance with Article 47 of the EU Charter of Fundamental Rights. The CJEU focused on the separation of powers required independence in relation to the legislature and the executive.

In addition to that, the new surge of cases has drawn attention to the relevance of Article 18 of the Convention during the last ten years. The Court has now completed multiple reviews in particular of the ultimate reasons behind different kinds of deprivation of liberty for politically motivated cases. This is not related to one single state in its political power struggle, but can be seen more like a trend with the focus on politically motivated actions against opposition forces or human rights defenders. Recently Article 18 has been annexed in addition to Article 5 (Right to liberty and security) cases, also to measures that can be examined under Articles 8 (Right to respect for private and family life) (*Aliyev v. Azerbaijan*, 18.9.2018) and 11 (Freedom of Assembly and Association) (*Navalnyy v. Russia*, 15.11.2018). The Court has introduced a criterion of whether the ulterior purpose, as compared to the Convention-compliant one, was predominant.

In the *Navalnyy* case, the applicant was arrested on seven occasions for taking a part in a peaceful assembly, and the Court found "it established beyond reasonable doubt that the restrictions imposed on the applicant in the fifth and the sixth episodes pursued an ulterior purpose within the meaning of Article 18 of the Convention, namely to suppress that political pluralism which forms part of 'effective political democracy' governed by 'the rule of law', both being concepts to which the Preamble to the Convention refers."

*The Research Handbook on Law and Courts* approaches these trends from a global perspective. The examples come from Europe, Africa, India, Australia, Latin America, Canada and the USA. In the introduction *Susan M. Sterett and Lee Demetrius Walker* point out that there is a change in the story that has been told about the courts. Previously the courts were the ones to hold central governments accountable. Now the story is much more diverse, and questions raised

about the role of the courts has been noticeable, especially in issues like the fight against terror, asylum seekers, emergencies. Political trends and resurgent authoritarianism have made the courts' work difficult. The courts also reflect the problems in society as a whole. The discussion on diversity by gender is one the obvious talking points. In addition, digitalization has a profound influence on the court system. It means that case-law is spreading globally. But it also means that digital traces are spreading, and at the same time digitalization creates massive databases also giving rise to new problems.

*The Research Handbook on Law and Courts* can serve as a source of inspiration not just for researchers but also for those who work in the court system. The book is divided into six parts, each of which presents a variety of themes, and of course it depends on a person's own interest on which parts a reader would like to focus.

The book starts with the part that focuses on the **courts and political accountability**. The role of international tribunals in this discussion has been active and *James Meernik's* chapter discusses especially the development related to the International Criminal Court (ICC), Yugoslavia (ICTY) and Ruanda Tribunals (ICTR). He makes a prediction on the upcoming challenges and especially on the situation in which states do not co-operate with the court. He concludes that if the ICC cannot provide justice when this is in conflict with national interests, it will be a tool of the states, not of the law. More research into developments and their implications for international justice is critical in helping to understand whether independent and impartial justice is indeed possible. In same part the USA and Latin American systems are also studied in light of the judicial-executive relations by *Gbemende Johnson*. One of the critical issues in her chapter is judicial deference. The discussion on judicial appointees seems to become more and more central in political discussion. The reference to Chief Justice Roberts' opinion on the independence of the judiciary in contrast to the discussion of who is appointed by which president is reminiscent of the studies that show according to the author that judicial appointees show increased deference to the party/faction of the executive responsible for their appointments.

*Chris Hilson* approaches in his chapter the theme law, courts and populism. He combines populism with climate change litigation. He makes links to anti-elite and anti-expertise populist rhetoric. His examples are taken from the Brexit campaign and Trump's drain the Washington swamp phrases and withdrawal from the Paris Agreement. The chapter discusses the consequences of the narrative methods used about science and law. His argument is that any short-term advantages may end up chipping away at the currency of the expert discourses of science and law in the longer term. Is it a good thing to rely on populist

cues in strategic litigation? Hilson also points out that the game type of litigation can have its dangers.

**The judicial process part** of the book is the most challenging for a reader. This second part includes a variety of themes introducing numerous and sometimes unrelated subjects which makes it difficult to follow and link chapters to the main storyline. The editors note that in this part the focus shifts from accountability to horizontal relationships and internal processes. *Julio Rios-Figueros* examines internal judicial independence. There seems to be no consensus on what is the optimal or correct design to ensure internal independence. For instance, the results on the role of the judicial council are inconsistent. In some countries these can ensure professionalism and protect internal independence, while in others it has not eradicated undue interference. It is easier to show what designs are bad. These include temporary appointments made unilaterally by the executive; promotions and appointments where the Supreme Court exercises undue influence; biased examination conducted by a politicized or non-transparent judicial council. *Jessica A. Schoenherr and Ryan C. Black* provide their account on the use of precedents in the US Supreme Court litigation. The analysis is based on linguistic patterns. The authors suggest supervised machine learning and their focus on the successes and failures of merits, briefs and the Supreme Court's opinions is interesting, but it also acknowledges that empirical research should be expanded to their legal content. Next *Lydia Brashear Tiede and Susan Achury* report a comprehensive study on Latin American amparo driven actions or inactions. The amparo system dating from 1857 allows both review of constitutionality and review of administrative actions and judicial decisions, as well as specific rights claims. Amparos can be found everywhere except in Cuba. The interesting feature of the Latin American amparos is their connection to rights not only mentioned in the national constitutions but also in the Inter-American Human Rights Convention. It is an important legal tool, but there are features that do not guarantee that courts and judges will agree with those bringing rights claims. The problems related to enforcement and the capacity and resources of the state are ultimately issues decisive for the real success of amparos.

**The third part of the book tackles diversity**, focusing on appointing women to international courts and high courts. These chapters include not just the US system, but also glance at Africa and Germany. Although the courts are more diverse than ever, this does not mean that racial and gender diversity will automatically mean different lawmaking outcomes, argue *Taneisha N. Means, Andrew Eslich and Kaitlin Prado*. However, they present a convincing argument on the benefits of people with different backgrounds. Judicial diversity or lack thereof can profoundly influence lawmaking when cases having broad

and far reaching implications come before the courts. The authors do a close reading of important cases like *Utah v. Strieff* (2016), also important in view of social movements like BlackLivesMatter, focusing on policing practices and misconduct. References to the US Supreme Court and Justice Sonia Sotomayor's dissenting opinion are well analysed in this chapter and are possibly even more relevant in the aftermath of the killing of George Floyd on 25 May 2020, which gave rise to demonstrations and protests not just in the USA but also worldwide.

**The fourth part discusses subnational courts.** As the authors point out, the focus is often on the federal supreme courts, as in the case of Brazil. *Luciano Da Ros and Matthew C. Ingram* go to the state level and follow the variety of capacity and expertise that is relevant in analysing state level courts. They discuss judicial empowerment and this is especially interesting to read in relation to the fight against corruption, which is endemic in Brazil's legal system. The model enabling having an effective trial against city mayors has required expertise and the pioneering example of the Supreme Court of Rio Grande do Sul has been pointed out. The results also seem to demonstrate the importance of the four dimensions of their review: empowerment, activation, behaviour and impact. One of the patterns in legal research is looking at the influence from higher courts to lower courts. However, *Jennifer Bowie and Elisha Carol Savchak* do this in the opposite direction and consider how lower courts' opinions influence the higher courts. The idea is that it is as relevant to understand bottom-up influence in order to have a more thorough understanding of judicial politics. The authors claim that writing clearly matters in order for lower court judges to influence on the state supreme court justices. *Benjamin J. Kaslow* discusses precedents and their diffusion from the state high courts. The ongoing debate on why certain precedents are more discussed than others is in the background here. What causes a precedent to be cited by a state high court and what causes state high court precedents to diffuse outward to other states? One of the bold arguments put forward by Kassow is the near absolute freedom of state high courts to use US Supreme Court precedents. If they want to follow they can, but they can also frequently ignore such a precedent. Kassow sees many possible directions for the development, but one of the potential directions that needs scrutiny is political polarization. He suggests that there may be more room for the state courts to act ideologically. *Luz Munõz and David Moya* also provide an interesting perspective on NGO involvement, especially in environmental cases. They analyse different litigation strategies used by NGOs in the subnational courts. The strategy is to use European legislation to enforce a higher standard of environmental protection and thus put pressure on governments. The differences in NGOs' strategies for legal mobilization are related to their organizational attributes and support structures. An interesting finding is the paradox that local NGOs

with easy access to the policymaking process tend to be more active and successful litigants while international NGOs tend to be less active in litigation.

**Part five discusses courts, inclusion and belonging.** This part also discusses different identities including indigenous and minority identities. *Kati Nieminen* reviews how courts draw boundaries of identity and belonging in minority populations and among indigenous peoples. Her approach to belonging and identity combines the Islamic headscarf discussion before the ECtHR and the Finnish discussion on the Sami people, which includes the Supreme Administrative Court in addition to several international supervisory mechanisms like CERD (Committee on Elimination of Racial Discrimination) and the UN Human Rights Committee (supervising International CP-Covenant). The role of courts can sometimes be surprising and implicit. It is an interesting claim that while the ECtHR weighs and balances personal freedoms, according to Nieminen, it also implicitly and indirectly participates in the debate over the French citizen subject. The Finnish approaches the discussion from a different perspective. The Sami people are opposed to losing their indigenous identity by assimilation. The Finnish Supreme Administrative Court has an explicit role regarding belonging because it decides on who has rights e.g. to vote in the election of the Sami Parliament. The indigenous question is also addressed in *Rebecca A Reid and Todd A. Curry's* chapter focusing on the USA and common law countries like Canada and Australia. This chapter makes the worrying finding that the courts and the executive are in an interactive dialogue. However, the legislative branch often reacts to court decisions protecting indigenous rights by restricting these rights. The contrast in the basic meaning behind the rule of law providing guarantees against arbitrary actions is not delivered in the context of Indigenous peoples.

Finally, the sixth part of the book provides interesting views on the future and discusses the **digitalization of law and courts research**. *Elisabeth Chrun and Rachel Cichowski* discuss the ECtHR database. This is one of the initiatives to use data visualization and make accessibility one of the key features in data projects. For a traditional ECtHR scholar it is always interesting to see how new methods of analysing case-law and rather interesting how earlier research very heavily based on the names of cases providing established case-law and a doctrinal approach to judgments can be combined with the elements developed in the ECHRdb. At the moment the most important results seem to be reached as a teaching tool rather than a tool for researchers. As the chapter explains, a course developed pedagogical tools for the ECHRdb website that will help European human rights come alive in the classroom. *Justin Wedeking* focuses in his chapter on the text as data in law and courts. The chapter discusses the challenges related to computer

text analysis, but despite tensions Wedeking also has an ultimately very positive message about combining computer text analysis with human text analysis. It is precisely the limits of human reading that necessitate engaging with the massive amount of information available.

**Overall,** *The Research Handbook on Law and Courts* can be recommended to those seeking new approaches to research on law and courts. The book provides numerous interesting innovative approaches that enrich the picture of doing research on these topics. In this review I have only been able to provide some indications of the book that raised my own interest as a scholar focusing on doctrinal research on European institutions and how their influence through case-law is diffused to the national courts' practice and legislation. For a scholar it was important that the chapters in this research handbook often referred to issues that needed further and more comprehensive research. The authors also left questions open and did not have all the answers on the table. The main part of doing research is to understand the context where the law and courts operate in the contemporary globalized world. The past, present and future are obviously interlinked. The courts do not operate in a vacuum and political reality impacts what happens in courts. It was refreshing to have a look at issues that are not so familiar in one's own legal culture but which can provide a lesson also valid outside of the context in which it was situated. How courts are equipped to avoid attacks that explicitly question the interlinkage of democracy, human rights and the rule of law remains one of the key questions. The polarization of judicial politics needs counterforces and strong voices like Chief Justice Roberts stating that "we do not have Obama judges or Trump judges, Bush judges or Clinton judges". The worst-case scenario is that we let populist discourse manipulate research and focus on populist and polarized views. Rather than trying to find simple answers, we need to contribute to a comprehensive picture of the law and the courts, expanding to areas that are not yet properly explored. This means focusing not only on well-known courts that are already under scholarly scrutiny but also understanding to look into issues from another and different perspective, focusing on those whose role has not so far been emphasized in research.