

Book Review

DIVERGENT PATHS

The Academy and the Judiciary

by Richard A Posner

CHOO Han Teck

*LLB (Hons) (National University of Singapore), LLM (Cambridge);
Judge of the Republic of Singapore.*

But Holmes did not tell us that logic is to be ignored when
experience is silent^[1]

1 *Divergent Paths*² is a commentary and thesis on the Judiciary and the academia, inspired by the belief of the author, Richard Posner, that the critical analysis of judges has been neglected. That, he says, is partly because of the growing trend in interdisciplinary studies. He is concerned that no one is studying what goes on inside the minds of judges. He thinks that judges are treated like “black boxes” – “Evidence and arguments go in, a decision eventually comes out, but no one seems to know, to be telling, what happens in between.”³ So perhaps he has opened up his own mind for study. He confesses that he can only talk about the elite law schools and not the non-elite ones of which he says he knows not much. He also claims to speak only about the Federal Courts of Appeal, not “other American courts” of which he knows little.

2 As to the other branch of the legal profession that he writes about in this book, Posner says that there has been little criticism from the academia about how judges work partly because professors are specialists whereas judges are generalists. He also thinks that professors associate analysis and critique with criticism, and maybe some judges also think so. A third reason he suggests is that professors are often too pally with the judges and therefore avoid unfriendly moves such as writing critically about judges or their judgments.

3 The first reason Posner gives for the Judiciary’s disinterestedness in academic articles is the problem of wordiness. He

1 Benjamin N Cardozo, *The Nature of the Judicial Process* (Yale University Press, 1921) at p 33.

2 Richard A Posner, *Divergent Paths: The Academy and the Judiciary* (Harvard University Press, 2016).

3 Richard A Posner, *Divergent Paths: The Academy and the Judiciary* (Harvard University Press, 2016) at p 6.

says that academic articles are overlong and “dense with footnotes”.⁴ If, he says, law students find “verbose, pretentious, obscurantist” legal scholarship as “badges of eloquence”, professors will continue to write like that.⁵ Judges, on the other hand, will not have “the patience to wade through long articles clogged with footnotes”.⁶ On the subject of students, Posner thinks that there has been a lowering of standards in the quality of students, partly because of the increase in the number of law schools, and that in turn leads to an increase of faculty members Posner regards as “refugees from more competitive or less lucrative fields”.⁷

4 Going to the nub of what he finds to be the problems in the judgments of the courts, Posner says that they are insufficiently analytical; many are also written by the law clerks, not the judges themselves – except for a few judges, himself included. He also thinks that, like professorial writing, judgments are also too wordy and full of jargon. Posner quotes Schlag in saying that:⁸

... the academic practice of writing for judges increasingly appears as a degraded art-form used to communicate with persons who are not listening in order to achieve nothing very much whatsoever.

He finds that one of the consequences of compromise at the appellate court level is that focus on the precise nature of the legal principles is blurred. Posner quotes a passage from the last paragraph of the conclusion of an article by Richard Fallon, and comments that:⁹

... [j]udges will not understand it even if ... they read carefully the forty-eight pages of Professor Fallon’s article that precede it – for they won’t understand those pages either. Nor will their law clerks understand it, nor law student, nor lawyers ... [the article is] of a complexity and pitched at a level of abstraction, that only law professors will understand, unsurprisingly because they are the intended audience.

5 Posner then arrives at the “Great Schism”. His broad thesis is that academia should do more to help judges develop the law, and judges ought to read more academic critiques. This, he says, is not

4 Richard A Posner, *Divergent Paths: The Academy and the Judiciary* (Harvard University Press, 2016) at p 11.

5 Richard A Posner, *Divergent Paths: The Academy and the Judiciary* (Harvard University Press, 2016) at p 11.

6 Richard A Posner, *Divergent Paths: The Academy and the Judiciary* (Harvard University Press, 2016) at p 11.

7 Richard A Posner, *Divergent Paths: The Academy and the Judiciary* (Harvard University Press, 2016) at p 13.

8 Richard A Posner, *Divergent Paths: The Academy and the Judiciary* (Harvard University Press, 2016) at p 27.

9 Richard A Posner, *Divergent Paths: The Academy and the Judiciary* (Harvard University Press, 2016) at p 43.

happening. His book examines why the schism has arisen and how it can be closed. He is aware that in the old days, judges did not cite academics other than dead ones, but that is changing because of the increasing role the law clerks have in drafting judgments. Citing living writers always carries the risk of citer and cited indulging in mutual back-scratching.

6 Posner's criticisms against the Judiciary concern deficiencies in two areas. The first is structural, and that concerns appointments and the salary of judges as well. Posner is also critical of the ability of federal judges to manage their staff and their court, and he discusses this in ch 3. The second concerns deficiencies in functionality, that is, how judges decide. On the latter, Posner has much to say. He is particularly disturbed by the formalist approach to judicial duties. He takes great pleasure in reminding the reader that "no one of the great judges from John Marshall to Holmes to Cardozo, were formalists".¹⁰ In the American context, formalists are contrasted with realists. The former, Posner summarises, exercise judicial restraint (in spite of the obvious tension between precedence and originalism). Realists are activists, in Posner's view, who exercise common sense to achieve practical results. Formalists interpret and apply. That is backward-looking. When faced with a novel issue, the formalist will ask: "What resolution is dictated by existing legal materials?" He will then look to past decisions, often way too long in the past in Posner's view. Legal realism, the heart of Posner's own jurisprudential pinning, is "law without mystical trimmings, verbosity, pretense, obscuratism".

7 Thus, dense academic writing intended for other academics will not help realist or even formalist judges, although formalist judges with their love for doctrine may incline a little more favourably towards academic contributions. But the realist works differently; he (the realist):¹¹

... forms a preliminary estimate of the best decision in a case by an assessment of the facts (including institutional or systemic facts, such as the possible impact of the decision one way or another on legal uncertainty or on the amount of litigation), and the values and policies promoted or retarded by the facts, and then asks whether the case can be decided on the basis of the assessment without undue violence to legal doctrine.

He goes on to state that there is not much more to judging than what he has said, and if so, he states, rhetorically, that "judges ought to be able to

10 Richard A Posner, *Divergent Paths: The Academy and the Judiciary* (Harvard University Press, 2016) at p 88.

11 Richard A Posner, *Divergent Paths: The Academy and the Judiciary* (Harvard University Press, 2016) at p 83.

write opinions that are simple enough to be readable by nonlawyers”.¹² Realist and formalist judgments also differ in the use of precedents, which has greater importance to formalist judges.¹³

8 Realist opinions, according to Posner, also differ structurally from formalist ones:¹⁴

The formalist will usually begin his opinion with a brief statement of the issue or issues to be decided and a lengthy statement of facts. Then will come to a lengthy recital of applicable legal doctrine, whether found in precedent or in a statute or constitutional position.

Judgments of realist judges are clearer, more readable by the layman, and are recognised by how many things don't appear in them – “No multifactor tests except to be ridiculed, and no statements of review.”¹⁵

9 Posner has a sceptical outlook when it comes to judicial interpretation. Here he believes formalist and realist judges are alike. They “claim to be ‘interpreting’ constitutional and statutory provisions when really they’re extracting a meaning that they themselves had inserted in these often opaque documents”.¹⁶ He thinks that it is a myth to believe that they are interpreting the meaning objectively. Furthermore, precedence, which is a big tool for interpretation, is of little utility in Posner’s view because he believes that like cases should be treated alike only if they were decided about the same time. Context of time and place are significant factors that disrupt what he perceives to be blind precedent following. He acknowledges that realism too has its problems. It tends to blur the line between form and substance (though some may not think this a bad thing) and, more importantly, it blurs the distinction between doctrine and fact. Somehow Posner gives the impression that that is not a crunching problem that cannot be solved by clear judgment writing.¹⁷ To him, the ills of interpretation stem from

12 Richard A Posner, *Divergent Paths: The Academy and the Judiciary* (Harvard University Press, 2016) at p 83.

13 Richard A Posner, *Divergent Paths: The Academy and the Judiciary* (Harvard University Press, 2016) at p 83: “To the full-blooded formalist nothing is new.”

14 Richard A Posner, *Divergent Paths: The Academy and the Judiciary* (Harvard University Press, 2016) at p 85.

15 Richard A Posner, *Divergent Paths: The Academy and the Judiciary* (Harvard University Press, 2016) at p 83.

16 Richard A Posner, *Divergent Paths: The Academy and the Judiciary* (Harvard University Press, 2016) at p 93.

17 Richard A Posner, *Divergent Paths: The Academy and the Judiciary* (Harvard University Press, 2016) at p 128:

Law is not alone in being a field remote from science and math and saturated in rhetoric ... [b]ut law is one of those weak fields of intellectual endeavor that proudly embraces bad writing attributed to an indispensable technical vocabulary, ignoring books hopelessly seeking to improve the writerly quality of judicial opinions and lawyers’ briefs.

ignorance or an indifference to how words and sentences are interpreted. Posner says that “by disparaging legislative history as a guide to statutory meaning the formalist judge enlarges his own interpretative role by reducing that of the legislator”.¹⁸ To him, interpretation is an intuitive action; it is an active – not passive – recovery of meaning.¹⁹

10 Although Posner ranks “passivity” lower than other deficiencies in the problems of the Judiciary, it is one of his more stunning criticisms, and deserves long and frank study. The problem arises from:²⁰

... a judge’s tendency to conceive himself as an umpire, and the lawyers as players, in the game of law. That outlook reflects an unthinking commitment to adversary procedure and invites both excessive tolerance of lawyers’ shortcomings and excessive delegation of judicial work, especially case preparation and opinion drafting, to law clerks.

He believes that it is their commitment to the adversarial system that judges are reluctant to appoint their own experts. One can only assume that cost is not a factor.

11 It is thus the conception that a judge’s role is merely that of the umpire that he relegates himself to performing the function of choosing which side has the better lawyer, when, of course, he (the judge) ought to be rendering just decisions.²¹ This leads Posner to question why lawyers and judges never question the statistics that experts (for that matter, anyone else) produce; that is hardly surprising because Posner’s premise is that “the factual record is generated by the lawyers”.²² Posner cites John Langbein in support. Langbein from Yale believes the “inquisitorial” system to be superior to the adversarial system. Langbein wrote to Posner, saying:²³

... [in an adversarial system] Counsel’s incentive is to win, and hence to conceal or submerge relevant evidence, to coach witnesses, to advance biased expertise, and to distort the truth by means of abusive

18 Richard A Posner, *Divergent Paths: The Academy and the Judiciary* (Harvard University Press, 2016) at p 100.

19 Richard A Posner, *Divergent Paths: The Academy and the Judiciary* (Harvard University Press, 2016) at p 112.

20 Richard A Posner, *Divergent Paths: The Academy and the Judiciary* (Harvard University Press, 2016) at p 131.

21 Richard A Posner, *Divergent Paths: The Academy and the Judiciary* (Harvard University Press, 2016) at p 134: “But a judge who thinks of himself as an umpire will often be deciding a case on the basis of which lawyer is better.”

22 Richard A Posner, *Divergent Paths: The Academy and the Judiciary* (Harvard University Press, 2016) at p 137.

23 Richard A Posner, *Divergent Paths: The Academy and the Judiciary* (Harvard University Press, 2016) at p 139.

cross-examination ... In European civil procedure, the litigants play a role in nominating proofs, that is, in telling the court what they think should be investigated, but the main role in investigating fact is assigned to the court, that is to judges, whose job is not to win, but to seek the truth.

12 A major deficiency in process of justice is the insular mind of the judge itself. Posner comments on this deficiency to the fullest, discussing how judges fall behind as technology sweeps the world ahead.²⁴ That may be due in part to the lack of curiosity to move with the times, a factor that Posner claims that a heavy workload may also be blamed for the lack of judicial curiosity – their preference to stay with and not stray from the trial record so as not to “take a more active role in developing a record on which to base the decision of a case”.²⁵ That is accompanied by a lack of self-knowledge. Almost all judges claim to be impartial in the sense of not being influenced by bias and prejudice (what Posner describes as his “priors”), but, Posner says, “the judge who thinks he isn’t influenced by his priors ... is more likely to be more influenced by them than a more self-aware judge”.²⁶ Hence, like the rest of the profession judges prefer the “noble lie” than accord a higher value on truth. Disagreeing with the Kantian distinction between truthfulness and candour, Posner thinks that judges have to be candid as well as truthful about their grounds of decisions.²⁷

13 Posner’s chapter dealing with the structural deficiencies of the federal courts, including the US Supreme Court, covers (his view of) the courts’ deficiency in managing judicial staff – mainly, the law clerks. He holds a strong view that judges should do the first draft of all opinions, leaving the clerks to do the editing. He thinks that judges have got it wrong when they think that it should be the other way round. He refers to two effects of delegating opinion writing to the law clerks at the Supreme Court level: “greater uniformity in opinion-writing style across Justices (that is, their opinions are stylistically more alike) but less uniformity in the opinion-writing style of a given Justice across time”.²⁸

24 He agrees with Frederick Schauer who describes such judges as “informationally disabled” in Frederick Schauer, “Our Informationally Disabled Courts” (2014) 143(3) *Daedalus* 105.

25 Richard A Posner, *Divergent Paths: The Academy and the Judiciary* (Harvard University Press, 2016) at p 161.

26 Richard A Posner, *Divergent Paths: The Academy and the Judiciary* (Harvard University Press, 2016) at p 166.

27 Kant believed that it is wrong to lie, but he did not believe that there is a duty of candour. If you think a dog is ugly you need not tell its owner that, but you should never tell the owner that his dog is beautiful. Richard A Posner, *Divergent Paths: The Academy and the Judiciary* (Harvard University Press, 2016) at p 182.

28 Richard A Posner, *Divergent Paths: The Academy and the Judiciary* (Harvard University Press, 2016) at p 228.

14 Posner says that the “lack of collegiality” is a deficiency in a system that is collegial in essence. A lack of collegiality “may be expressed in snarky or even intemperate dissents and concurrences, in judges’ nitpicking the opinions of colleagues”.²⁹ These are matters he ranks alongside poor work ethic, foot dragging and a reluctance to retire when they are no longer physically able to cope. One factor that seems to stand out in the way American courts are structured, which has been the subject of comment over time, is the strong ideological component in the selection of the judges as well as the manner opinions are written.

15 It may have occurred to Posner three-quarters of the way through the book that he has a second component – the “Academy”. He confesses straight away that this part is much shorter because the academy “can’t solve anywhere near all the problems that beset the federal judiciary”.³⁰ He judges the US Supreme Court, harshly insisting that:³¹

The Justices are less likely than other judges to pay attention to scholarly – to any – criticisms, believing that no one not a Supreme Court Justice could understand the Court, or that the Court’s critics are motivated by envy or political disagreement, or that to accept criticism would signal weakness and impair the court’s prestige and its power.

With that note of pessimism, he added another by suggesting that the contribution of scholarship should “shift in academic emphasis from critique of particular decisions and doctrines to critique of particular judges, and judging, below the level of the Supreme Court”.³²

16 Posner would like to see more critiques of opinion writing styles and structures as distinct from their content. He cites a list of aspects of a judicial opinion that merit inquiry – matters such as the length and style, factual accuracy, breath and imaginativeness of research. Timeliness in the delivery of judgments and candour are also worthy of study. Appreciating that there are already books on how to write a good judgment, including books of Bryan Garner, Posner encourages academics into this field because he thinks that the available books are not written by “prominent academics”, and, unable to resist the swipe, he

29 Richard A Posner, *Divergent Paths: The Academy and the Judiciary* (Harvard University Press, 2016) at p 235.

30 Richard A Posner, *Divergent Paths: The Academy and the Judiciary* (Harvard University Press, 2016) at p 262.

31 Richard A Posner, *Divergent Paths: The Academy and the Judiciary* (Harvard University Press, 2016) at p 262.

32 Richard A Posner, *Divergent Paths: The Academy and the Judiciary* (Harvard University Press, 2016) at p 266; he also cited his own book on Cardozo: Richard A Posner, *Cardozo: A Study in Reputation* (University of Chicago Press, 1993).

adds, “Garner is not an academic at all”.³³ Posner also finds it irresistible to set out his own nine commandments on “good judicial writing”.³⁴

17 Through the mist of his own pessimism in this area Posner hopes that what he has suggested in this book “will resonate with some law professors as a research method that could yield new insights into the legal systems”. Posner then turns to his next target in academia – the law school curriculum. Here he hopes to see less of the formalist approach, that rigour devoted to doctrine, and a faculty embracing more of the realist approach to law. He remains a little sceptical for two reasons. First, he thinks that students “resist the intellectual approach of a faculty oriented to the social sciences. Few are interested in becoming legal intellectuals. They want to be successful legal professionals”.³⁵ The second is, as some professors tell him, “students are natural formalists because formalism is an intellectual crutch and they are in an unfamiliar environment [when they enter law school]”.³⁶

18 Finally, Posner, discusses the idea of a continuing judicial education. He knows that there have been suggestions for law schools to set up graduate programmes that would prepare lawyers to be judges but says that none exist as far as he knows. He believes that there is a need to educate judges “in areas of the natural and social sciences that they have to be comfortable with in order to apply legal doctrine competently”.³⁷ There is, in short, “a need for continuing, judicial education in process rather than substance, in judging rather than in doctrine”.³⁸

19 Aware that he has been highly critical throughout, Posner ends by offering his “Alice moment” confession.³⁹

33 Richard A Posner, *Divergent Paths: The Academy and the Judiciary* (Harvard University Press, 2016) at p 270.

34 Richard A Posner, *Divergent Paths: The Academy and the Judiciary* (Harvard University Press, 2016) at pp 270–271.

35 Richard A Posner, *Divergent Paths: The Academy and the Judiciary* (Harvard University Press, 2016) at p 301.

36 Richard A Posner, *Divergent Paths: The Academy and the Judiciary* (Harvard University Press, 2016) at p 302.

37 Richard A Posner, *Divergent Paths: The Academy and the Judiciary* (Harvard University Press, 2016) at p 347.

38 Richard A Posner, *Divergent Paths: The Academy and the Judiciary* (Harvard University Press, 2016) at p 351.

39 Richard A Posner, *Divergent Paths: The Academy and the Judiciary* (Harvard University Press, 2016) at p 385.