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A Philosophical Inquiry

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Preface

The importance of judicial integrity is undisputed. It is seen as a constituent for the legitimacy of judicial authority, as a condition for sound judicial decision-making and as a prerequisite for public trust. Across the world, many initiatives are taken to safeguard judicial integrity. The concept of integrity and its normative implications are, however, clouded by obscurities. Does integrity concern merely the absence of misconduct or does it also refer positively to specific norms or values? If so, is it a norm in its own right or is it merely a 'buzz word' for everything good in the judiciary?

In light of the need to safeguard the integrity of the judge,[1] the normative questions concerning what the integrity of the judge is and along which lines it should be safeguarded are the central questions of this book. These questions are complicated by the fact that little has been written about the subject in philosophical literature. It would seem that the vast amount of attention that integrity receives in practice is at odds with the understanding of the subject in theory. Therefore, in order to say anything meaningful about the nature of judicial integrity, this book also sets itself the task of developing a theory about professional integrity of public officials. In doing so, this book aims not only to contribute to our understanding of judicial integrity, but also to a philosophical understanding of integrity in general.

There are good reasons to explore the concept of the integrity of the judge via a philosophical inquiry. Research on the legal realization of a system of control or research into the effectiveness of integrity management within the judiciary is only useful after one has established a normative concept of integrity that is applicable to judges. The present lack of clarity about the meaning of judicial integrity is also an obstacle to undertaking sociological or legal research. For what would one research? Or which statutes or practices fall within its scope? It is a task of philosophy to provide such a normative analysis. Moreover, notions by which integrity is often described – amongst others conscience, conviction, good conduct, moral steadfastness and prudence – are philosophical terms or at least philosophically laden. It requires a philosophical investigation to re-articulate these notions in relation to the concept of integrity.

The method of this philosophical inquiry is hermeneutical. I come to an understanding of the phenomenon of judicial integrity by carefully exploring the circle between fact and norm, discourse and theory, opinion and argument,

1 Although the focus of this book is on professional judges, the treatment may apply to any person exercising judicial power, however designated.

thus spiraling down to an apparent understanding of judicial integrity. This understanding is thus not the result of analytical deduction – to which the literature does not yet lend itself – but of a careful phenomenology. Specific philosophical discussions, which fall outside of the scope of this phenomenology, will be treated in the footnotes.

This philosophical inquiry is to be applied to the practice of judges. The applicability to judges is an important feature, as practices in the judicial world, which are concerned with integrity management, are nowadays often inferred from corporate ethics. These default methods do not do justice to the specific problems that surround judicial integrity, especially the problem of judicial independence.

This book is organized around five questions, to which the chapters correlate: (1) Is judicial integrity a norm? (2) Can a theory of professional integrity of public officials be developed? How can this theory be applied to judges with respect to (3) decision-making and (4) conduct? (5) Finally, by which parameters must judicial integrity be safeguarded?

In Chapter 1, an inventory is made of the discourses about judicial integrity. I will first look at the discourse about violations of integrity in both established and developing democracies. I will then look at practices of safeguarding judicial integrity and at deeper undercurrents that have led to an awareness of judicial integrity. I conclude this chapter with an analysis of the role of judicial integrity against the broader framework of democracy and rule of law: is judicial integrity a norm in its own right?

In Chapter 2, I will develop a theory of professional integrity of public officials. In order not to be blinded by the practices connected with one profession, I will also take into account discussions about professions that have had to deal with integrity problems prior to the judiciary having had to do so. These discussions show some important features that must be accounted for in a theory of integrity. With these features in mind, a theory of professional integrity of public officials will be developed through the consideration of philosophical literature.

In the next chapters this theory is applied to the judge. Chapter 3 is concerned with the core activity of the judge, namely judicial decision-making. What does it mean to be a person of integrity in decision-making? What is the relation between the character of the judge and the process of adjudication? How is a judge to render external accountability for his decisions so that they enhance public trust? These questions will be treated in light of the theory of integrity as developed in Chapter 2.

Chapter 4 is concerned with judicial conduct other than decision-making. As Lord Devlin once put it, 'the judge who gives the right judgment while appearing not to do so may be thrice blessed in heaven, but on earth he is of no use at all'.[2] How is the conduct of the judge to be perceived as an exemplification of the judicial institution? How ought judges to behave outside court? These questions will be treated in light of the theory of integrity.

2 Devlin (1981:3).

In Chapter 5 I will examine safeguarding professional integrity. This chapter sets the parameters for safeguarding integrity and considers their applicability to the process of selection and appointment, to judicial decision-making and to the conduct of judges. As this book is a philosophical inquiry, it will not cover the empirical question concerning the effectiveness of specific safeguarding measures. The emphasis lies on setting the parameters for safeguarding and showing their interconnectedness and their relation to institutional values. The exact implementation of these parameters in a concrete legal culture, however, takes shape in a discourse that lies beyond the scope of this book.

Three final remarks need to be made. First, this book is not about the integrity of law,[3] nor does it postulate a theory of judicial integrity from a theory about the integrity of law. Equally, the matter of competence in respect to the separation or balance of powers is not a central focus of this book.[4] The subjects of judicial integrity and the integrity of law cannot, however, be entirely separated. Since the discussion about the integrity of law falls outside of the scope of this thesis, suffice it to say that judicial integrity presupposes societies, which are a democracy under the rule of law. I understand the rule of law to encompass general principles, such as classic and social human rights.[5]

Second, as the discussion about integrity is still in its infancy, I am venturing into uncharted territory. As a result, some parts of this book are more technical than others as they go into primary philosophical texts – especially in Chapters 3 and 4. Such a treatment raises specific hermeneutical questions about the use of these texts. Every time that I discuss a philosopher, whether Aristotle or Hegel, I take the following approach. I do not treat these philosophers within the broader framework of their own metaphysics and ontology. Rather than taking a 'top-down' approach I look at their philosophy from a 'bottom-up' angle. This 'bottom-up' approach finds its justification in the fact that the viability of their thoughts can be demonstrated by showing how they work in dealing with specific philosophical problems.[6] Thus,

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3 See Dworkin (1986). Dworkin's notion of the integrity of law has been criticized widely, especially with respect to its clarity, cf. Gaffney (1996), Honeyball & Walter (1998) and Raz (2004). In so far as the integrity of law is understood as coherence, I concur with Raz when he argues that this principle may be inferior to some other alternatives in justice and in fairness (2004:289). I am therefore hesitant to connect the theory of integrity, which I will develop in this book, with a notion of the integrity of law as there is much obscurity about the latter.

4 This problem area is referred to as judicial activism (Thomas 2005:88–107), judicial policy-making (see the classic work of Bell 1983) or in a more pejorative sense, as judicial politics (cf. Stone Sweet 2000; Sunstein, Schkade, Ellman & Sawicki 2006).

5 As I will argue, I adopt a broad approach to the rule of law that nears the idea of the *Rechtsstaat* (see Section 3.1 of Chapter 1; see Soeharno 2006 for a comparison of the notions of rule of law and *Rechtsstaat*).

6 In taking this approach, I follow Peperzak (2001:80), Quante (1997:46) and Siep (1997:14). They have developed this approach to deal with Hegel's philosophy, which – as is well known – has some preponderant claims. Their stance can be summarized as follows:

I will not adopt the metaphysical underpinnings of Aristotle or the holistic claims of Hegel – but merely look at their analysis of specific problems.

Third, I refer to the judge in male terms. This is done for mere practical purposes.

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overarching claims need only to be considered *after* the relevance of their plausibility in dealing with a specific problem has been shown.

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Abbreviations

Cat.	*Aristotelis Categoriae et De Interpretatione*. Edited by I. Bywater. Oxford: Oxford University Press (1949).
EN	*Aristotelis Ethica Nicomachea*. Edited by I. Bywater. Oxford: Oxford University Press (1954).
EN (*Irwin*)	*Aristotle, Nicomachean Ethics*. Translated with introduction, notes and glossary by T. Irwin (2nd ed.). Indianapolis: Hackett (1999).
EN (*Ross*)	*Aristotle, Nicomachean Ethics*. Translated by W.D. Ross. Oxford, Clarendon Press (1908).
EN (*Rowe*)	*Aristotle, Nicomachean Ethics*. Translated (with historical introduction) by C. Rowe. Philosophical introduction and commentary by S. Broadie. Oxford: Oxford University Press (2002).
Grl	*G.W.F. Hegel, Grundlinien der Philosophie des Rechts (Naturrecht und Staatswissenschaft im Grundrissen)* [1820]. Edited by J. Hoffmeister. Hamburg: Meiner (1995).
GrlE	*G.W.F. Hegel, Elements of the Philosophy of Right*. Edited by A.W. Wood and translated by H.B. Nisbet. Cambridge: Cambridge University Press (1991).
Pol.	*Aristotelis Politica*. Edited by W.D. Ross. Oxford: Oxford University Press (1957).
Ret.	*Aristotelis Ars Rhetorica*. Edited by R. Kassel. Berlin: De Gruyter (1976).

Contents

Chapter 1
Is Judicial Integrity a Norm?

1. Introduction

This chapter aims at providing an inventory of the discourse on the integrity of judges[1] and at providing an analysis of the role of integrity as norm in the context of a democratic rule of law.

In section 2 I explore the scope of judicial integrity: its violations, its safeguarding and the developments which explain its upsurge. First, the debates about violations of judicial integrity are outlined. I will look at both established democracies, where 'traditional' integrity violations such as fraud or corruption are practically absent, and developing democracies, where several forms of judicial corruption infringe the rule of law. I will then look at safeguarding activity with respect to judicial integrity on both international and national levels. Lastly, I will look at factors that contribute to the upsurge of the concept of integrity. Why is it a buzz word now, but was hardly mentioned a few decades ago?

In section 3 the concept of integrity is placed in a broader normative framework of rule of law and democracy. The question is asked if integrity can be reduced to this normative framework or if it is a norm in its own right. I will defend the latter position. Integrity is a norm that serves the legitimacy of public functions. I conclude that there is a need for a philosophical theory of what integrity as norm entails.

2. The Rise of the Concept of the Integrity of the Judge

2.1 Judges on Trial: Debates on Judicial Integrity

Although there is hardly a consensus about the nature of the concept of integrity or about its practice, this does not seem to hinder people from complaining about violations of judicial integrity. Let us therefore look at some discussions in which explicit reference to judicial integrity is made. The selection below is by no means exhaustive and the question whether these discussions have actually to do with judicial integrity will not be asked at this point. The purpose is to give the reader an impression of some of the issues that are often referred to as a violation of judicial integrity.

1 I do not follow the method of discourse analysis (cf. Coulthard 1977), for it would require a well-defined discourse. It is rather an inventory of the relevant discourses.

I distinguish between established democracies and developing democracies. In established democracies there are debates about miscarriages of justice, the ancillary functions of judges, corporate bias, misbehaviour of judges, the independence of judges and neo-managerialism within the judicial organization. In developing democracies there is also the difficult issue of corruption: bribery, political interference and organizational corruption within judicial organizations have a grave impact on the rule of law.

2.1.1 Integrity issues in established democracies

'Established democracies' and 'developing democracies' are types,[2] whereby 'established' and 'developing' refer to the quality of public institutions. In established democracies, traditional integrity problems such as fraud and corruption are practically absent and trust in the judiciary is relatively high. Developing democracies are democracies with developing institutions. Here traditional integrity problems take centre stage in the discourse on integrity. Of course, as these are mere types, exceptions confirm the rule.

Miscarriages of justice Due to higher media scrutiny, investigative journalism and new evidence science such as DNA analysis, judicial miscarriages are more likely to be detected. These miscarriages have a severe impact on the trust in the judiciary.

For example, in two high profile cases in the Netherlands, a case concerning the murder of a 23-year-old stewardess in Putten in 1994[3] and a case concerning the murder and rape of a 10-year-old girl and the sexual abuse of an 11-year-old boy in a public park in Schiedam in 2000,[4] the suspects were convicted of murder in all instances up to the highest appeal court, the *Hoge Raad*.[5] During both cases it was journalists who questioned the judgments and in particular the evidence on which the judgments were based. Their doubts were dismissed at the time but in the end the journalists proved to be right and the cases still make headlines today. The problem of miscarriages of justice is not confined to the Netherlands. For instance, in England a number of miscarriages, the *Birmingham Six*, *Guildford Four* and the *Maguire Seven*, caused a great stir.[6] It is fair but unfortunate to say that every country has its own landmark miscarriages.

2 The distinction is common in the literature. For examples of the usage of the terms, see Malleson & Russell (2006) and Gloppen, Gargarella & Skaar (2004).

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

4 Rb Rotterdam 29-05-2001 LJN AB1823; Gh 's-Gravenhage 08-03-2002 LJN AE0013; HR 15-04-2003 LJN AF5257; HR 07-09-2004 LJN AQ9834; HR 25-01-2005 LJN AS1872.

5 For an older but very elaborate discussion on miscarriages of justice in the Netherlands see Crombag, Van Koppen & Wagenaar (1992).

6 For an extensive treatment see Griffith (1997:204–213).

Increasing interest in the personalities of judges and their ancillary functions In common law countries, interest in the personality of judges is traditionally high, which gives rise to intimate curiosities. These curiosities are nurtured by the notably personalized completion of the judicial role. Not only does the style of judgments bear the touch of the judge's individuality,[7] but also the performance at trial is unique to every single judge. It must be observed that these are not *eo ipso* benign to the trust that the parties or the public have in the judiciary.[8] Although in the civil law tradition the personality of judges is traditionally seen as subsidiary to their office,[9] there is an increasing interest in their personal profile that is concerned with their ancillary functions.[10] Sometimes it is initiated by a group of perturbed citizens who publish a 'revealing' account.[11] Some judiciaries publish their own list.[12]

Extra-judicial activities are often seen as a societal responsibility. For example, in common law countries judges are frequently called upon to chair Royal Commissions, Committees or 'independent' inquiries.[13] This is interesting in respect of the separation of powers, for in this capacity they cannot always avoid giving overt opinions on the investigated, who are sometimes politicians.[14] These opinions may arouse suspicions of bias when they return to act as judges.[15] Interesting in respect of natural justice are cases in which personal impartiality is challenged on an objective level, such as in the Pinochet case, where Lord Hoffmann failed to declare his links with Amnesty International. This led to the unprecedented setting aside of a judgment of the House of Lords.[16]

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7 An outstanding example being a code put into a judgment by Peter Smith J in the case concerning Dan Brown's *Da Vinci Code* (*Baigent v. Random House Group Ltd* [2006] EWHC 719).

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

9 In line with Montesquian tradition that the judge should be a '*bouche de la loi*', Montesquieu (1868:XI.6).

10 According to Di Federico (1997:193:196) in Italy the number of ancillary functions runs into 'tens of thousands'.

11 For the Netherlands see Van der Voort, *Rechtspraak in opspraak. Over schurken in jurken* (2006) and Stichting WORM, *Rapport Integriteit Rechterlijke Macht* (1996). They also have a website where the ancillary functions and education of lawyers and judges are – not very accurately – listed (www.pj-design.nl/burhoven/antecedenten-2005.htm).

12 For instance in the United Kingdom (www.publications.parliament.uk/pa/ld/ldreg/reg01.htm) and in the Netherlands (namenlijst.rechtspraak.nl).

13 For a critical discussion of the arguments against and in defence of this practice in England and Israel, see Beatson (2005).

14 Cf. Stevens (2005:186–189) and Griffith (1997:25–57).

15 One has only to remember the impact of the UK Report of Lord Hutton, which was to clarify the circumstances surrounding the death of Dr Kelly.

16 *Bow Street Metropolitan Stipendiary Magistrate ex p. Pinochet Ugarte [1999] 1*

Another issue concerning extra-judicial activities is membership of the Freemasonry or like organizations. The secrecy of these organizations has been viewed in many countries as incompatible with the trust that one needs to have in the judges. For example, after the 'clean hands' operation in Italy, all memberships of secretive organizations were forbidden for judges.[17]

Corporate bias Corporate bias concerns worries about the over- or under-representation on the basis of gender, minority, social class, region, political preference or religious background.

In some countries, there is a serious lack of women in the judiciary. In many countries, this has led to active policy. For example, vacancies in Germany state that with equal qualifications women are privileged.[18] Sometimes there is no under-representation in the judiciary as a whole, but merely at the higher court levels, such as in the Netherlands.[19]

Another corporate bias issue concerns minority groups. For example, in France there are questions about the under-representation of Muslims. Even though they comprise about 8 per cent of the population, they have been for a long time 'practically invisible' in the judiciary.[20] In Canada under-representation has led to affirmative action whereby a policy of active encouragement rather than quotas was used.[21]

Sometimes political bias can be experienced as a problem. In France there are debates about the role of judges in political scandals[22] and in the United States political preference of judges form a constant point of discussion.[23]

Misbehaviour of judges Every now and then there are incidents involving the misbehaviour of judges in private or in court. A rather horrific example is that of a district court judge for the Oklahoma 10th circuit (USA). In July 2006 he was accused of using a penis pump, while hearing a murder trial, after a 'wooshing' sound was heard by members of the jury. Police found semen on the chair and floor behind the bench and on his robe. The jury found him guilty and recommended a one-year imprisonment, which was raised to four years by the presiding judge.[24]

All ER 577.

17 On corruption within the Italian judiciary and ties with the *Cosa Nostra* see Della Porta (2001).

18 See Böcker & de Groot-van Leeuwen (2006:20).

19 Cf. de Groot-van Leeuwen (1997:103–116). For the latest numbers see www.rechtspraak.nl.

20 See Provine & Garapon (2006:190).

21 See Böcker & de Groot-van Leeuwen (2006:97).

22 See Roussel (2002).

23 For an older but well-documented overview on the development of judicial politics in the United States see Wolfe (1986).

24 It came to light that he had exposed himself more than 15 times. 'Penis Pump Judge Gets 4-Year Jail Term', *USA Today*, 18 August 2006.

Debates may also concern the behaviour of the judge in private. A Belgian judge, KA, who frequented sadomasochistic (SM) clubs and participated in SM practices with his wife and others, was found guilty in 1997 of assault which led to bodily harm and of incitement to immorality and prostitution, as he suggested to the management of an SM club that his wife be employed there as a 'slave' to indulge in extremely violent practices.[25] His defence, that it was a private matter and consensual, was rejected up to the European Court of Human Rights due to the severe gravity of the acts. The Court remarked for example that KA, as a judge, must have been aware of the principle that the victim's consent had no bearing on the unlawfulness of the acts committed or on the perpetrator's guilt.[26]

Such misbehaviour raises questions as to a disciplinary system for judges. Due to judicial independence, supervision and discipline are – to a large extent – internal matters. The public simply has to trust that judges behave well. This situation is justified by strict selection procedures or by a tradition where one has to have a well-established reputation prior to becoming a judge.[27] A growing question is, however, whether this situation is fitting in an open democracy. Can suspicions be dealt with adequately when things go wrong?

Neo-managerialism Recent reforms in the judiciary have put more emphasis on the issue of efficiency. This is seen as part of rendering external accountability: to heighten accountability with respect to spending taxpayers' money, but also with respect to the requirement that judgments will be delivered in due course.

This may raise some integrity problems, especially with integrity on a case level. For example in the Netherlands,[28] the fact that funding is related to output[29] gives

25 The *Cour de Cassation* eventually dismissed him (25 June 1998) and thereby stripped him of his pension.

26 An important factor was the fact that the men rented private venues rather than visit SM clubs because the clubs would not allow the acts perpetrated upon the woman. Cf. ECHR, 17 February 2005, *KA and AD – Belgium* (appl. no. 42758/98 & 45558/99), §§ 46–61.

27 Guarnieri & Pederzoli (2002:66–68).

28 In the Netherlands, the judiciary is very much an organization (the name of the main statute wherewith the judiciary is regulated, '*Wet op de rechterlijke organisatie*' says as much). In the jargon of the Council for the Judiciary, the judiciary is an organization with a production, personnel, work processes, performance norms and the like. Among the objectives in its 2002–2005 agenda were: improving the efficiency of the organization and gaining more insight into the costs of adjudication (*Agenda voor de rechtspraak* 2002–2005, *Continuïteit en vernieuwing* at www.rechtspraak.nl). This was to aid the financing structure of the courts. Since the funding of the courts was linked to output productivity, it comes as no surprise that the output productivity of the courts has grown significantly; see Sociaal Cultureel Planbureau & Raad voor de Rechtspraak, *Rechtspraak: produktiviteit in perspectief*, 2007. For a defense of the necessity of efficiency see Rottier (2003:36).

29 See 'Besluit financiering rechtspraak 2002', in *Staatsblad* 2002, nr. 390 and 'Besluit financiering rechtspraak', in *Staatsblad* 2005, nr. 55. For an English translation (Decree of 28 January 2005 containing new rules on the funding of the court sector in