Book Review

Jeanne Gaaker, Judging from Experience: Law, Praxis, Humanities, Edinburgh University Press 2019.

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Jeanne Gaaker's impressive *Judging from Experience: Law, Praxis, Humanities* is difficult to define. As the title suggests, the book, coloured by insights from and references to the author's experience as a criminal law judge in the Netherlands, is about the act of judging, and about being a good judge. But at the same time, *Judging from Experience* is also a passionate yet mature defence of "law and literature" as a research field, and in particular of the relevance of literature for the judge. Further yet, the book is in itself also a work of law and literature – or at least law and literature 'lite' – its 13 chapters developing Gaaker's argument partly through a reading and discussion of literary works.

At the heart of *Judging from Experience* is the notion that "judges should read fiction, because the lessons it teaches can be applied directly to decision-making" (Gaaker 2019, 138). Divided into three parts, the book argues the point in detail, although it takes several detours in so doing. Part I is about the enchantment of knowledge in law. Chapters 1 to 3 provide a brief historical view of legal thought, discussing different legal trends and the historical context which gave them birth. The aim of these chapters is to provide a map of how we got to the current stage of legal theory and practice, whereas Chapter 4 and 5 provide literary counterparts to these trends.

Part II is where the book really springs to life, in my opinion. It is here that the aforementioned detailed defence of law and literature can be found. In Gaaker's (2019) own words, Part II "provides the building blocks for a humanistic model for doing law" (6). Chapter 6 focuses on practical knowledge, or phronèsis; Chapter 7 on metaphor; Chapter 8 on empathy and mimesis (imitation or representation of the world); and Chapters 9 and 10 on legal narratology. As Gaaker convincingly argues,

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not only are phronèsis and empathy, as well as the understanding of metaphor, mimesis and narratology, necessary attributes of a good judge, but literature plays a crucial role in cultivating these capabilities

Part III deals with "the perplexities of judges that become the scholar's opportunity" (Gaaker 2019, 7). Its three chapters provide for a fascinating read, although at times I found it a bit challenging to grasp how they fit the overall structure of the thesis. Chapter 11 returns to the topic of empathy and asks what the cognitive turn in narratology may offer to judges who deal daily with the narratives and emotions of others. Chapters 12 and 13, on the other hand, move the discussion to a very different theme, namely new technologies and the challenges they pose. Drawing from Heidegger (1977), Gaaker seems particularly concerned about the issue of instrumentality, suggesting that it may increasingly be human beings who "stand by" for technology in a world dominated by digital technology (instead of technology acting as a tool for humans). Moreover, Gaaker draws the reader's attention to the fact that, despite their apparent neutrality, technological vocabularies and narratives tend to legitimate certain type of knowledge and have their own strategies of exclusion and inclusion.

As this short synopsis demonstrates, *Judging from Experience* is a rich book which touches on many fundamental questions of law and is bound to provide something for everyone interested in legal theory, law and literature, and/or practicing law. As it is impossible to do justice to all parts of the book in a short review, I will here focus on the two interlinked themes that I see as its most important contributions, namely the discussion on how to be a good judge and the defence of law and literature.

Gaaker's analysis of judging starts from a humanistic/sociological perspective of judges as concrete individuals, shaped by their background and past experiences, no matter how impartial they seek to be. Closely interlinked with this humanistic approach is an emphasis on the narrative nature of law, as well as on the fact that narratives are always constructed – by the parties to the dispute, but also by the judge who, in making a decision, selects from a vast material of facts in order to structure the world, the case, and the decision she takes. Language is therefore not neutral for Gaaker but always a process of inclusion and exclusion, showing things in a specific light.

A good judge therefore has to have at least a rudimentary understanding of how language and narratives operate, and what kind of constraints they pose on us. But in addition to this, Gaaker discusses at length four other skills which are necessary for the judge. The most important one, and the one which all the others together, is practical wisdom, or phronèsis. Practical wisdom is not simply a matter of knowledge and technique, but most of all a matter of character and morality (Gaaker 2019, 103–104). It is not about knowing eternal truths but about the capacity to sense what the situation demands and to act upon it. It is therefore about deliberation, balancing and dialectical

reasoning (Gaaker 2019, 109–111). Inspired by Paul Ricoeur's (1992, 2000, 2007) work on justice and law, Gaakeer writes that each decision is a process of hermeneutic movement between our ideas of good life and the decision to be made, taking into consideration all the facts and background of the case. This requires imagination, awareness of the pitfalls of the linguistic framework of law, and self-awareness of the judge's private and professional biases.

Another important skill which can be enhanced by reading literature is the understanding of metaphor. As Gaaker emphasizes, *how* things are said in law is almost as important as *what* is being said. A lot of this has to do with how likeness and difference are presented. Law is therefore intricately connected to metaphor, which is a tool for helping to convey and produce new meaning in law. Indeed, metaphor is in play in the formulation of legal concepts, in the development of legal doctrine, as well as in legal practice (Gaaker 2019, 121). Furthermore, understanding metaphor is also important because "the novelty of a word and its initial meaning wear off through our continued usage of it, up to the point we no longer actively consider how the word came into being in the first place" (Gaaker 2019, 127). Yet, metaphors frame decisions and influence our reasoning. This again calls also for self-reflection on the part of the judge as it is important for the judge to consider to what extent her background and worldviews influence her legal thought.

In addition to understanding metaphor, a good judge should understand mimesis. This, then, is the third skill required of the judge. Here, too, Gaaker's view is heavily influence by the work of Ricoeur (1983, 1985, 1988), who distinguishes between three stages of mimesis. The first is prefiguration, or the pre-narrative quality of human experience. A law-related example could be the understanding of what is robbery and how it usually takes place as an event. The second is configuration, or the narrative emplotment of events. This goes back to the insight that there are no pre-existing legal truths, but legal knowledge is brought about by actively and creatively bringing together rules and connecting them to contexts which differ from case to case. Any story, including a legal one, is actively created by organizing a series of facts into an intelligible whole. Finally, the last stage of mimesis can be called reconfiguration, referring to the moment when the reader appropriates the text into her own world, thus bringing together the two former stages of mimesis. This occurs for example when the judge makes a decision and may sometimes lead to unexpected judicial paradigm shifts, changing our previous pre-understandings.

Closely related to mimesis is the fourth capacity required of the judge, namely empathy and need to understand emotions. Judicial disputes are usually triggered by emotions and the judge therefore has to be aware of the stories important to the litigants, filtered away as they often are in judicial thinking. Moreover, the judge has to be aware of the

emotions her decisions will trigger, as well as of her own emotions, which may impact her decisions (Gaaker 2019, 211).

One cannot therefore be a good judge without empathy. By empathy, Gaaker means feeling *with*, rather than feeling *for*, which dominates sympathy. Particularly important for the judge is narrative empathy, which has to do with the perspective-taking induced by reading and hearing narratives of another's situation, and is necessary for enabling the judge to give meaning to the emotions of a representation (Keen 2013). This kind of narrative empathy requires imagination and is at play in every decision, as judges must imagine to the best of their capabilities the other's situation before delivering a judgment. They are also at play in reading the case file and selecting relevant facts, for words alone can never describe the emotions at work.

A key point that Gaaker develops through her discussion of these skills is that being a judge is about much more than simply knowledge of legal rules. Although such knowledge of law is of course an absolute minimum requirement for acting as a judge, it is insufficient for being a *good* judge. Improving as a judge is therefore not only about developing one's legal knowledge but most of all about developing one's Aristotelian virtues and understanding of life, society and the world. It is here that reading literature becomes necessary. As Gaaker (2019) declares, "judges should read fiction, because the lessons it teaches can be applied directly to decision-making" (138). In particular, it can help the judge understand the complexity of the human condition and the ways in which narratives construct reality. Furthermore, as both law and literature are about capturing the world in word, literature can help the judge understand the legal adages of interpretation, namely "different but not contrary" and "the same but differently".

In a similar vein, it is also important for the judge to have at least some knowledge of humanities in general, and the dialectical method in particular. Deciding or arguing a legal case is always about constant movement between the fact of the case and legal norms, between the unavoidable generality of the rule and the particularity of the situation (Gaaker 2019, 95–96). Similarly, law as a more general phenomenon develops through dialectics between practice and theory, practice turning to theory for justification and theory drawing from practice. Not only must those working in law therefore be both theorists and practitioners, but the whole process of interpretation and application of law takes place within a constantly shifting framework, shaped by new judicial decisions and theoretical insights.

Gaaker does not however endorse law and literature uncritically. By contrast, she seems to worry that unless the research community remains self-reflective, much of law and literature research is doomed to remain irrelevant; or worse, unnecessarily limit the scope and potential of the field. There are two reasons for this. The first is common to all interdisciplinary research, in particular in the current context in which even universities are increasingly dominated by an economic

mindset. As Gaaker (2019) acknowledges, economic rationale tends to result to the outcome that "the discipline whose language is victorious determines the form of cooperation" (58). Yet, there is no avoiding interdisciplinarity in law and literature. Hence, the solution is not to downplay the interdisciplinary nature of one's work but the embrace it even more fully. In this regard, law and literature has the advantage over some other interdisciplinary fields that its two components – law and literature – are so strongly connected by the element of language. Indeed, law and literature are both "wider linguistic systems of cultural significance" (Gaaker 2019, 62). Moreover, the field of law and literature may include within itself the cure to the problems of interdisciplinary research. As Gaaker (2019) explains, by drawing the judges's attention to the fact that interpretation is a "process that demand our active participation and helps promote awareness of our own role in the creation of meaning", reading literature may help judges to operate in a world where institutional languages fight for hegemony (90).

Secondly, there are certain special characteristics which have to be accounted for when conducting interdisciplinary research involving law specifically. First, such interdisciplinary research has to be able contribute to legal practice, or it will remain a self-contained academic discourse, destined to wither away. This has to do with the practically-oriented nature of law – although it must be stated that it is probably heavily influenced by Gaaker's experience as a judge and does not reflect the view of all academics. Secondly, and interconnectedly, interdisciplinary research must respect the multipolarity of law; in other words, the fact that there are always at least two separate texts in play. Whereas in literary theory the primary object of research is the literary text, law is a matter of constant movement between legal rules and the narrative construction of the facts of a case. Furthermore, the legal text is always authoritative in a way that cannot be compared to the literary text.

Overall, *Judging from Experience* is an impressive piece. With a very wide scope, the book touches on issues from virtue ethics to Robert Cover's (1986) violence of law, and from critical legal studies style indeterminacy and fragmentation arguments to literary theory, to name just some arbitrarily selected examples. This is both the book's strength and its weakness. At times the book takes turns which I found slightly difficult to follow or pin down. I was not for example entirely sure what were the functions of the history of law or the discussion of contemporary technology for the overall argument of the book. At the same time, it is the breadth of the book that makes it such an enjoyable and fascinating read. Not all the points raised are novel, of course, but they are assembled together in a lucid, novel and fresh way which reflects the author's impressive background in both literature and law, and in particular her experience as a judge. In short, *Judging from Experience* is a mature text which can be recommended to anyone interested in law and literature, legal theory or legal practice.

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