

ARENDT'S THEORY OF JUDGMENT FOR A POST-APARTHEID SOUTH AFRICA

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1 Introduction

In this essay I will attempt to examine the ways in which judgment as described by Arendt, could have been applied to the decision of the court in *Three Rivers Ratepayers Association v Northern Metropolitan*¹ in order to reach a more just decision than the court *a quo*. The court *a quo* ordered the eviction of a group of homeless individuals from land owned by the applicants. The evicted group was destitute and the court order made no mention of assisting them in finding alternative accommodation. From this situation, I will infer that an application of Arendt's theory of judgment may lead to a space where homelessness, poverty or class disempowerment can be addressed, ultimately resulting in a new sense of justice in post-apartheid South Africa. I will apply Arendt's theory alongside the theories of Boyd White exemplified in his reference to 'tensions',² Dugard's disillusion with the formalism within the South African judiciary³ and Klare's notion of 'transformative constitutionalism'.⁴ These four theorists will collectively demonstrate how the decision in the court in the *Three Rivers* case⁵ failed to employ a more careful process of judgment thus neglecting an important opportunity to encourage the development of judgment as an art where the creation of justice is a real possibility.

2 Judgment as a process; identifying a shift

An important departure point and essentially the crux of this essay which must be understood, is the notion of judgment as a process. The belief that judgment is an end result arrived at by a mechanical and

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¹ 2000 4 SA 377 (W) (*Three Rivers*).

² This essay will pay close attention to only some of the tensions discussed fully in J Boyd White 'Justice in tension: An expression of law and the legal mind' (2012) 9 *No Foundations: An interdisciplinary journal of law and justice* 1.

³ J Dugard 'The judicial process, positivism and civil liberty' (1971) 88 *South African Law Journal* 181.

⁴ This essay will look only at selected aspects of the term "transformative constitutionalism" which is extensively examined in K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146.

⁵ *Three Rivers* (n 1 above).

faultless application of generic rules to a variety of problems, is a belief which harbours a false sense of justice. This belief finds its foothold in the illusions of objective judges, fault free judgments and statutes created to serve all members of society, equally. The success of such false justice is highly dependent on the application of rules without regard. Thus as part of a post-apartheid judiciary, underpinned by a new Constitution,⁶ judgment must transform from a recipe to an undertaking of the mind. The theories hereunder illustrate elements of judgment which can assist in the transformation of judgment from a stagnant end-product to a living system.

3 Examining Boyd White, Dugard and Klare

Boyd White's analysis of the law and legal systems, centres around the instability of law; a structure prone to unpredictable movement. Boyd White explains the existence of several tensions apparent in law as an unstable structure, more specifically the tensions that arise around the process of judgment.⁷ Boyd White importantly notes two tensions, one 'between the opposing lawyers' and a second 'between competing but plausible readings of the law' where the process of judgment is paramount.⁸ It is these tensions that illustrate most comprehensively Boyd White's understanding of judgment.

Firstly, the tension between opposing lawyers refers to a tension inherent in the legal practitioner herself. This tension comes into existence when the lawyer employs introspection during a legal dispute. With this introspection comes a judgment of the self, resulting in an assessment of the eventual justice which the case will or will not achieve. Boyd White notes that while in the process of litigating the lawyer must ask herself what she is becoming.⁹ Why this introspection? The moment the lawyer introspects through the lens of judgment, she realises the process and what it entails. She comes to know that what she is taking part in has an effect on some or another person, be that herself or others. Because of this potential effect, the process is an important one and the importance comes in the form of the time and energy taken to reach a decision and the respect afforded to the process of judgment.

Secondly Boyd White refers to a tension between plausible but opposite readings of the law. In this identification of numerous readings of one set of legal facts, Boyd White employs the concept of plurality in the nature of legal disputes. Each dispute, whether consisting of similar or different facts have many different readings

⁶ The Constitution of the Republic of South Africa (1996) ('the Constitution').

⁷ White (n 2 above) 1.

⁸ White (n 2 above) 8.

⁹ White (n 2 above) 9.

within them and thus can lead to numerous different decisions. In this plurality the judge experiences a tension which is only resolvable by employing judgment. The judgment employed consists of different facets; thinking, discerning and deliberating.¹⁰ Important to note is Boyd White's insistence on judges taking responsibility for their decisions. This insistence on taking responsibility places a specific importance on the process of judgment and the careful thinking it demands as this process has real consequences not only for the parties involved in the dispute but also for the legal system as a living and developing organism.¹¹

Boyd White regards judgment as an art invoking an imaginative thought process. Through these two specific tensions, Boyd White highlights his interest in the importance of judgment. Most noteworthy in this regard is Boyd White's identification of a judgment as not only important to the specific case but that 'it matters to the world how cases are debated and resolved'¹² thus allowing members of the legal community to understand that the creation or destruction of justice depends on the daily workings of lawyers and judges. Such an understanding has the potential of creating a 'topoi' or as Arendt describes it 'a common place or shared reference' where members can judge the judgments of others'.¹³

By way of examining Dugard's disillusion with the positivistic tradition of the South African judiciary, it is clear how judges are not only avoiding the tensions exposed by Boyd White but also refusing to engage with them, resulting in a reinforcing of an already fractured and ill-suited system of adjudication. The Constitution attempts, however, to remedy this situation by forcing the judiciary to evolve from a largely mechanical system of application to a system more sensitive to the duty they are tasked with in developing a post-apartheid livelihood for an entire country. However, as Dugard notes, this duty has been largely ignored by the judiciary and where progress has been made, such progress has been slow.¹⁴ Dugard heavily critiques the still apparent positivist interpretation methods employed in court decisions in present day South Africa.¹⁵

Dugard notes that positivism as a means by which to interpret law allows judges to 'apply the harshest of laws with an easy conscience'¹⁶ leading to a process of judgment that is devoid of

¹⁰ These elements of judgment are emphasised in the Legal Philosophy 311 (RFF311) tutorial notes (2013) *Specific theories on judgment*.

¹¹ White (n 2 above) 3.

¹² White (n 2 above) 4.

¹³ DL Marshall 'The Origin and Character of Hannah Arendt's Theory of Judgment' (2010) 38 *Political Theory* 383.

¹⁴ Dugard (n 3 above).

¹⁵ Dugard (n 3 above) 182.

¹⁶ Dugard (n 3 above) 187.

careful thinking, discernment and deliberation.¹⁷ The tensions discussed by Boyd White are ignored and processes by which to avoid them are encouraged. The judiciary has bought into the premise that judges are expected to be 'purely passive'¹⁸ and have no creative power whatsoever. This premise is one which enforces empty judgment, judgment lacking in consideration and responsibility. Filtering decisions through mere legislation and precedent is thoughtless and this thoughtlessness leaves no space for a move into a post-apartheid context but rather inches closer to the legal system of pre-1994 South Africa.

An important instrument by which to encourage 'process driven' judgment is the Constitution. Klare describes the current Constitution as 'transformative'¹⁹ which implies that in order to bring about a realisation of the founding principles of the Bill of Rights, the South African judiciary must change its manner of adjudication so as to develop and establish the imperative mandate that the Constitution prescribes. This change in the manner of adjudication moves away from Dugard's description of a 'mechanical judiciary'²⁰ by compelling the judiciary to employ a creative type of judgment and an engagement with Boyd White's 'tensions'²¹ as described above.

The Constitution according to Klare, opens up a new 'imagination and self reflection'²² in respect of legal methods (including adjudication). This new process (including the process of judgment) is necessary because the Constitution makes provision for new socio-economic rights (for the purposes of this essay one should consider the section 25(1) and section 26(1) rights especially) and these rights require a different approach to adjudication. According to Klare, 'transformative adjudication'²³ is a form of adjudication that employs a process of judgement. However, he also notes that the judiciary's 'balking'²⁴ at the idea of transformative adjudication slows down true transformation in a post-apartheid South Africa as judges are weary of acknowledging their own participation in political projects by way of creative judgment. Klare notes that there is need for 'conscientious judges'²⁵, judges who carry out their professions in a manner that fulfills the founding principles of the Constitution. After all, a transformative Constitution is worth little if adjudication within

¹⁷ White (n 2 above) 9.

¹⁸ J Frank *Law and the modern mind* (1930) 32 as mentioned in Dugard (n 3 above) 182.

¹⁹ Klare (n 4 above) 146.

²⁰ n 3 above, 187.

²¹ White (n 2 above) 1.

²² Klare (n 4 above) 156.

²³ Klare (n 4 above) 157.

²⁴ As above.

²⁵ Klare (n 4 above) 149.

the judiciary does not suit the document which encapsulates the basic principles upon which the legal system is founded.

According to Klare, transformative adjudication in line with the Constitution requires value judgments.²⁶ It is by way of these value judgments that Klare identifies a tension of his own; one between freedom and constraint.²⁷ Judges of the post 1994 era are faced with the challenge of balancing public interest and individual rights (especially in cases such as *Three Rivers*²⁸ where the interests of the homeless and that of homeowners were pitted against one another). Furthermore they find themselves in the push and pull of creative decision making while still following the legal texts. This challenge can only be resolved through employing careful judgment influenced by the understanding of the responsibility and holistic impact of judicial decisions on an entire community of persons.

Boyd White, Dugard and Klare have each, in a unique manner, discovered elements of adjudication which destabilise the notion of judgment as rule bound and impartial. These three theorists resonate in Arendt's notion of judgment which stretches far beyond the application of rules but rather towards an exercise of 'enlarged mentality'²⁹ by which the judge employs plurality in an attempt to reach a just decision. Thus her complex theory deserves discussion hereunder.

4 Hannah Arendt's theory of judgment

Arendt's theory of judgment is a theory centered about the element of 'natality' existing in the human species as the base of what will 'save the world' from 'human affairs'.³⁰ Arendtian judgment is unique in that it explores the process of judgment from the starting point of creating something anew. The judging of any set of facts or any problem must be undergone afresh, free from the constraints of tradition rule-bound judgment. This form of judgment, which does not balk at new crises, is a potentially valuable tool to be used in the challenges facing a post-apartheid South African judiciary.

For Arendt, judgment is a process whereby the decision maker must endeavor to approach a problem as a wholly different set of facts, each time. The decision maker or judge cannot fall into the trap of attempting to find old rules or precedent by which to judge a case (again reinforcing the notion of judgment not as fixed rules imagined

²⁶ Klare (n 4 above) 164.

²⁷ Klare (n 4 above) 149.

²⁸ *Three Rivers* (n 1 above).

²⁹ MP D'Entrèves 'Arendt's theory of judgment' in D Villa (ed) *The Cambridge Companion to Hannah Arendt* (2000) 250.

³⁰ H Arendt *The human condition* (1998) 247.

by Boyd White, Klare and Dugard). Applying old rules to new situations and attempting to find an already existing mold by which to judge, however, deceptively easy, bears pitfalls. It lacks a development component. It stagnates our ability to create and this in turn results in a lack of thinking as noted by Arendt.³¹

Judgment poses specific challenges because of its placement within the realm of action. This realm can be seen as one filled with a tension noted by Arendt as one between theory and practice.³² Judges may see one path of action as theoretically sound while another seems like the practically efficient path. Judgment must then be employed to decide which path to follow and even further, whether it might be possible to follow a combination of both.

Arendt also notes a further, closely linked tension; one between Aristotle's focus on the 'particular' and Kant's focus on the 'universal'. Judgment as a process entails that the judge first draws the problem close to her in order to truly grasp the intricacies of the lived experiences of the participants while in the same instance driving the problem away from her in order to obtain an unbiased and holistic view of the issues apparent in the problem.³³ Judging as well as understanding must exist within this process. Arendt however, does not leave the judge without any recourse. She responds to the challenge posed by these tensions in her construction of the tool of 'imagination' when judging.

'Imagination' is the core tool to be used in order to achieve Arendt's goal of judging anew.³⁴ Judgment of contemporary problems requires thinking based on imagination. Without this imagination the judge will fall back on rules, precedents and predetermined molds leading to a lack of thinking. Arendtian 'imagination' entails that the judge employs a 'enlarged mentality'.³⁵ This is a difficult task but because of a human's ability to create, Arendt believes that this is indeed possible. An enlarged mentality combined with imagination stems from being able to imagine a plural community when making decisions. The judge must fathom all the different decisions to be made in order to make the most informed and thoughtful one possible. Arendt calls this process 'thinking representatively'.³⁶

Representative thinking entails that the judge attempts to find the 'universal' and apply this 'universal' to the 'particular'.³⁷ Thus this type of thinking employs 'imagination' because it requires the judge to create a plural community in her mind as the way in which

³¹ D'Entrèves (n 29 above) 248.

³² D'Entrèves (n 29 above) 245.

³³ D'Entrèves (n 29 above) 246.

³⁴ D'Entrèves (n 29 above) 247.

³⁵ D'Entrèves (n 29 above) 250.

³⁶ As above.

³⁷ As above.

to find the 'universal'. Furthermore, representative thinking enables the judge to acknowledge the tensions present in judgment while employing 'nality'³⁸ in order to reach a decision based on careful thought and which will facilitate justice within the problem faced by her.

5 The *Three Rivers* decision; a possible lack of judgment

In the case of *Three Rivers*³⁹ the applicants sought an eviction order against occupiers of an informal settlement in their vicinity. They averred that the settlement and its occupiers constituted a public nuisance in that the settlement suffered from lack of water and sanitation combined with an increase in crime. Furthermore, the applicants averred that the creation of the settlement caused a decrease in the value of their property as well as an increase in anxiety amongst the residents of the area. The court considered the definition of a public nuisance and specifically considered whether the respondent, the Municipality, had taken reasonable steps to abate the nuisance. Although the court took cognisance of the dire situation in which the occupiers were plunged, the court decided that the occupiers did indeed constitute a public nuisance and ultimately ordered their eviction within 48 hours.

In this case the rights of a group of individuals were pitted against the individual rights of each property owner. The Constitution allows certain rights regarding property and housing in terms of section 25(1) and section 26(1) respectively. Firstly the Constitution provides that 'no one may be deprived of property except in terms of law of general application ...'⁴⁰ and secondly that 'everyone has the right to adequate housing.'⁴¹ These two rights often collide because of their stark public versus private elements and the effect this contrast has on the private rights of the individual while attempting to redress issues of public welfare among the impoverished in South Africa (as can clearly be seen from the *Three Rivers*⁴² case). It is this collision that charges courts with a difficult instance of adjudication. However, as difficult as these challenges may appear, it is because of their complexity that they offer a unique opportunity to develop a slower paced process of judgment concerned with not merely the rights of individuals but moving as far as to protect the rights of the

³⁸ Arendt (n 30 above).

³⁹ *Three Rivers* (n 1 above).

⁴⁰ Sec 25(1) of the Constitution.

⁴¹ Sec 26(1) of the Constitution.

⁴² *Three Rivers* (n 1 above).

group above such individual rights (employing a type of 'transformative adjudication').⁴³

The *Three Rivers*⁴⁴ decision was made shortly after the new Constitutional dispensation in South Africa. The judiciary of the apartheid era faced a new challenge in the way in which they understood the law and adjudicated disputes. A post-apartheid judiciary did not yet exist and thus judges found themselves in a modern crisis similar to the 'crisis in understanding' as envisaged by Arendt.⁴⁵

Arendtian judgment requires that when a new problem arises the adjudicator must resort to 'imagination'⁴⁶ in order to conceive the multiple decisions that could be made, discerning between them and ultimately choose a single one. Boyd White further requires the judge to take responsibility for such a judgment. Judgment is thus clearly a slow and important process. However, what is apparent in the *Three Rivers*⁴⁷ decision is the manner in which the judge used the common law principle of 'public nuisance' and applied this definition to a group of homeless individuals to come to a decision. The decision to force the occupiers to vacate the area within 48 hours could be seen as a 'thoughtless'⁴⁸ end to a complicated set of facts. Mention of the dire situation in which the occupiers found themselves was briefly made however, no real attempt was undertaken to imagine the concrete affects which homelessness would have on any human being.

Had the theory of Arendtian judgment been employed in this case, transformative adjudication been strived towards, the positivistic trend among the judiciary been challenged and the inherent tensions in the law been recognised and confronted, this decision would have differed. It was possible for justice to be found in the problems faced by the occupiers of Three Rivers but it is clear that a lack of engagement with the process of judgment combined with a lack of thought cannot accommodate justice in its new form struggling in a post-apartheid South Africa.

6 Conclusion

It is this essay's claim that judgment in this case was undertaken in a rushed manner. The theories presented above have each attempted to show that judgment is detailed, complex and wrought with the danger of injustice and a repeating of past injustices.

⁴³ Klare (n 4 above) 157.

⁴⁴ *Three Rivers* (n 1 above).

⁴⁵ D'Entrèves (n 29 above) 247.

⁴⁶ As above.

⁴⁷ *Three Rivers* (n 1 above).

⁴⁸ D'Entrèves (n 29 above) 248.

This essay has shown that an application of Arendt's theory of judgment leads to an addressing of poverty issues by way of a closeness and distance to those affected by it. The tensions described by Boyd White can assist in understanding the role of members of the legal community and their partaking in the process of judgment not only in the public realm but also in their private actions and thoughts. However, it becomes clear that the only way to employ this theory of judgment is by a doing away of formalist approaches identified by Dugard and truly embracing the concept of transformative adjudication suggested by Klare.

The absence of thoughtful judgment and the affects it carries along with it is apparent in the *Three Rivers*⁴⁹ case which reminds all too strongly of past injustices towards the poor and destitute members of South African society.

⁴⁹ *Three Rivers* (n 1 above).