Ancilla Iuris

The Thoughtful Judge: A Timely Reminder Under Populism

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Ancilla Iuris, 2019
Lagen des Rechts
Constellations of Law
Article
DOI 10.26031/2019.096
E-ISSN 1661-8610
DOAJ 1661-8610

Abstract

As populism is on the rise (and, so it seems, here to stay), judges are especially vulnerable to public criticism and political pressure. Their constitutional mandate is harder than ever to fulfill, as they must carry out their interpretative task regardless of these potentially overwhelming external influences. In other words, judges must keep exercising their legal authority in a thoughtful way.

What does thoughtfulness require from judges? In this short note, I start from Hannah Arendt's and Stuart Hampshire's accounts of thoughtfulness (I.), accounts which can be found in excerpts of their respective works Responsibility and Judgment[1] *(for Arendt) and* Innocence and Experience[2] *(for Hampshire), and which remain highly relevant in our populist time. I analyze what these two pieces – which I consider to be convergent and complementary – entail for judicial decision-making. Based on these authors' insights, I claim that judges, in order to be thoughtful, must adopt an approach to judicial interpretation that fosters case-by-case assessment, independence, impartiality, and an ongoing questioning of the legitimacy of existing legal norms (II.). They must also overcome the obstacles to thoughtfulness created by the legal system (III.).*

I. THOUGHTFULNESS, EVIL, AND JUDGMENT

Both Arendt and Hampshire establish links between thoughtlessness, evil, and judgment. Arendt's inquiry starts with the question of whether there is an "inner connection" between thoughtlessness and evil.[3] Hampshire argues that a thoughtful agent "is to some degree controlled by a standard of correctness and of mistake,"[4] while a thoughtless one is not.[5] According to him, "[a]n activity has become unthinking or thoughtless when we have neglected to apply any standard of rightness and mistake to the performance, when we have just gone ahead without reflection and control."[6] In other words, a thoughtful agent has judgment, i.e., the ability to tell right from wrong.[7] If judgment depends on thinking, it can, Arendt claims, be exercised by anyone regardless of knowledge or intelligence.[8] This also means that judges do not necessarily have judgment.

The archetype of the thinker, Socrates, often referred to himself by means of three analogies or *similes* (*infra,* II.). According to Arendt, each of these *similes* sheds light on the characteristics of thinking.[9] I argue that these analogies also capture what characterizes thoughtful judicial decision-making.

II. THOUGHTFUL JUDICIAL DECISION-MAKING

Firstly, Socrates compares himself to a *gadfly* whose bite prompts people to think.[10] Likewise, a thoughtful judge, whenever a case is brought before him or her, addresses the interpretative questions it raises, even those challenging the *status quo* or pertaining to politically sensitive issues. Instead of mechanically subsuming the facts under a legal norm, (s)he strives to determine what this norm means in this particular case, which may require some degree of judicial creativity.[11]

Socrates also likens himself to a *midwife* who "purge[s] people of their [...] unexamined prejudgments."[12] Thoughtful judges too encourage other members of their institution to rid themselves of their prejudices and to judge with independence and impartiality, with due regard to the specificities of the case. They question existing understandings of the applicable legal norm, the meaning of which is never fixed but rather continuously enriched by subsequent interpretations.

It is important to distinguish a prejudgment (or prejudice) from a preunderstanding (or "*Vorverständnis*"[13]). While the former consists in a normative position that precludes judges from approaching a given issue in an unbiased way, the latter can be defined as judges' preexisting knowledge and experience of the matter under consideration. This preunderstanding (or, as Klaus Röhl puts it, "sedi-

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1 *Hannah Arendt,* Thinking and Moral Considerations, in: Id.: Responsibility and Judgment (New York 2005), 159–189.
2 *Stuart Hampshire,* Innocence and Experience (Cambridge, MA 1989), 27–41 and 47–53.
3 *Arendt,* Thinking, 160 f., 166.
4 *Hampshire,* Innocence, 38 f.
5 *Ibid.*, 39.
6 *Ibid.*, 39.
7 *Arendt,* Thinking, 160.
8 On the distinction between knowledge and thinking, see *Arendt,* Thinking, 163 f.
9 *Ibid.*, 168 f.
10 *Ibid.*, 174.
11 *Ibid.*, 174.
12 *Ibid.*, 174.
13 *Gudrun Kühne-Bertram,* Vorverständnis, in: Ritter/Gründer/Gabriel (eds.), Historisches Wörterbuch der Philosophie (Basel 2005), bit.ly/31TgjDO, last access: 27 August 2019; *Josef Esser,* Vorverständnis und Methodenwahl in der Rechtsfindung (Frankfurt 1970).

mented knowledge"[14]) forms the necessary starting point – but not the end – of every interpretative act. This awareness of the problem that is at stake is a precondition for truly *understanding* (and settling) a given issue.

Thirdly, Socrates claims to be similar to an *electric ray*: he paralyzes others with his own perplexities.[15] This also applies to the judge who, because "general propositions do not decide concrete cases,"[16] often faces a horizon of interpretative possibilities. This interpretative freedom and the difficulties it raises should, instead of incapacitating her, encourage the judge to reexamine the legitimacy of existing legal concepts. The judge's perplexity will help her "unfreeze what language ... has frozen into thought"[17] instead of "hold[ing] fast to" existing practices.[18]

III. OVERCOMING OBSTACLES TO THOUGHTFULNESS

Thinking about objects removed from their senses may seem "unnatural" to human beings used to moving in "the world of appearances," Arendt warns.[19] Judges too may be prevented from thinking due to specific features of the institution they embody and of the world they live in.

First, judges may get used to chasing the *gadfly* away from other judges; they may also prefer to hold their own stings back. A system in which there is no clear separation between the different branches of government may distract judges from starting to think again with every new case that is brought before them.[20] Instead, they may be tempted to discard arguments that challenge existing legal institutions and the doctrines these institutions defend. They may also tend to draw swift analogies instead of attending to the specificities of the case at hand. Judges may even become cynical about the interpretative process altogether.[21] They may no longer take judicial reasoning seriously, using interpretative methods merely to cloak their intuitions in legal language.

Second, the judicial institution and its functioning may detract judges from reexamining their and other judges' prejudices instead of following the *midwife*'s example. When in the course of deliberations, a majority of judges supports a specific outcome, a judge may be discouraged from swimming against the tide. The wish to secure the votes of her colleagues may even compel her to adjust her arguments to please them, instead of standing for her personal views. A system of judicial election or appointment, be it by the executive or by the legislator, may deter judges from raising sensitive issues in individual opinions, or from challenging the acts of these institutions.

Of course, what constitutes the "best" method of selecting judges is an old and vexed issue,[22] and the way this question is answered varies from one legal order to another. In Switzerland, for instance, the judges serving on the Swiss Federal Tribunal are elected by the federal parliament; at the time of writing, citizens were collecting signatures in order to put to vote a proposal whereby judges of the Swiss Federal Tribunal would be chosen by drawing lots.[23] Bold as this proposal may seem, it is important to acknowledge that every mode of selection (e.g. partisan election, executive appointment, and drawing lots) has its virtues and its vices. Importantly, regardless of what method is chosen, judges will be subject to pressures of some kind, be they pressures internal to the court, popular pressures, or pressures coming from the other branches of government. Although such constraints are (at least to a certain extent) inevitable, they remain problematic from the perspective of thoughtfulness. Securing judicial accountability must, without doubt, remain a paramount consideration in every legal order, yet judges should not be precluded from carrying out their interpretative task in a thoughtful fashion. Judicial independence and impartiality must be taken just as seriously as judges' accountability.

Lastly, due to some features of the judicial system, judges may lose the willingness to go the extra mile to perplex others, like the *electric ray* would. Lifetime or long appointments may allow them to develop certain interpretative habits. Having

14 *Klaus F. Röhl*, Grundlagen der Methodenlehre II: Rechtspraxis, Auslegungsmethoden, Kontext des Rechts, in: Anderheiden et al. (eds.), Enzyklopädie zur Rechtsphilosophie (2013), http://www.enzyklopaedie-rechtsphilosophie.net/inhaltsverzeichnis/19-beitraege/77-methodenlehre2, last access: 27 August 2019, at para. 13.

15 *Arendt,* Thinking, 175.

16 Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

17 *Arendt,* Thinking, 175. See also *ibid.*, 172 f.

18 *Ibid.*, 178.

19 *Ibid.*, 165 ff.

20 Arendt compares thinking with "the veil of Penelope: it undoes every morning what it had finished the night before." See *Arendt,* Thinking, 166.

21 *Ibid.*, 176 f.

22 *Peter D. Webster*, Selection and Retention of Judges: Is There One Best Method?, Florida State University Law Review 23:1 (1995), 1–42. Webster discusses four methods: appointment, partisan election, nonpartisan election, and "merit" plans. See also *Charles G. Gyeh*, The Endless Judicial Selection Debate and Why It Matters for Judicial Independence, Georgetown Journal of Legal Ethics 21:4 (2008), 1259–1281.

23 Eidgenössische Volksinitiative, Bestimmung der Bundesrichterinnen und Bundesrichter im Losverfahren (Justiz-Initiative), https://www.bk.admin.ch/ch/d/pore/vi/vis486t.html, last access: 27 August 2019. For a critique, see e.g. *Andreas Glaser*, Die Justiz-Initiative: Besetzung des Bundesgerichts im Losverfahren? Aktuelle juristische Praxis / Pratique juridique actuelle 10 (2018), 1251–1260.

decided a range of what seem to be directly related issues in the past, they may be tempted to move on to the conclusion without further ado. In doing so, they may underestimate the intricacy of the issues before them and the importance, therefore, of carefully weighing each argument. Judges may go as far as to shun introspection altogether and convince themselves that an interpretation, however unjust its outcome, is legally and morally required and cannot be challenged. In such cases, the quest for meaning, which is characteristic of judicial interpretation, will have "turn[ed] against itself."[24]

It is worth noting that Hampshire's text, while published three decades ago, contains a strikingly topical passage on practical reasoning (e.g. a debate on policy matters), which he distinguishes from arithmetic. According to Hampshire, whether the outcome of an arithmetical calculation is correct or incorrect is "quite independent of the moves made in arriving at the conclusion":[25] some might need more moves than others, yet will still reach the same, true conclusion. By contrast, the outcome of practical reasoning hinges on the specific arguments which have guided the deliberative process. In this case, a good decision (one that can be "understood and evaluated"[26]) is a decision that fleshes out the reasons that have led to this specific outcome. Indeed, in the realm of practical reasoning, "[t]here is a call for articulateness and for distinct specification of the arguments for and against alternative policies."[27]

Through this comparison, Stuart Hampshire seems to foreshadow recent developments (and questions) pertaining to artificial intelligence: if we allow algorithms to become part of judicial decision-making, we risk eliding the steps whereby the various arguments at play are carefully "heard and evaluated."[28] In doing so, we can no longer guarantee that the deliberative process is not "cut off before all the arguments are in."[29]

IV.
CONCLUSION

While judicial decision-making deals with "invisibl[e]"[30] legal concepts, it applies to reality and leads to tangible results, thereby bridging the gap between thinking and the world of appearances. This result cannot be morally justified if it is not backed by sufficient reasons.[31]

How judges interpret legal norms is crucial to legitimizing their authority. Legitimacy can be enhanced through careful thinking, which includes case-by-case assessment, the aspiration for independence and impartiality, and a willingness to reexamine the legitimacy of existing legal norms.

Of course, being a good judge does not require being a *perfect* judge. As Hampshire notes, "a good philosopher, good politician, good poet do not necessarily have to exhibit all the distinctive features of all good philosophy and all good poetry, or to have all the distinctive virtues of a politician. But they do need to be free of a minimal set of gross defects if they are to be praised under these headings."[32] Likewise, a good judge may not have all the distinctive virtues of a good judge, yet a lack of thoughtfulness prevents us from praising him or her under this heading. "Above this minimum," there are many different and complementary ways of being a good judge.[33]

Admittedly, the law intends to be (and must be) general and abstract. In other words, it typically applies to a large number of persons and situations; in many cases, the law is not tailored to a particular addressee or factual situation.[34] Thus, individualized considerations may not always be warranted. In fact, there are compelling reasons for avoiding such individualization, including (and perhaps especially) in light of the principle of equality before the law.

Despite this unavoidable tension, the general and abstract character of most laws does not give judges a license to engage in thoughtless reasoning. Indeed, treating like cases alike demands that every decision be carefully reasoned, and the separation of powers requires that judges apply general laws to particular cases. Moreover, as Timothy Endicott convincingly shows, particularity is just as necessary a feature of law as generality.[35] As a matter of

24 *Arendt,* Thinking, 176.
25 *Hampshire,* Innocence, 52.
26 *Ibid.*, 53.
27 *Ibid.*
28 *Ibid.*
29 *Ibid.*
30 *Arendt,* Thinking, 188.
31 *Hampshire,* Innocence, 52.
32 *Ibid.*, 28 f.
33 *Ibid.*, 29.
34 On the different ways in which laws can be "general" (but also what I call "abstract"), see e.g. *Timothy Endicott*, The Generality of Law, in: Duarte d'Almeida/Edwards/Dolcetti (eds.), Reading HLA Hart's Concept of Law (Oxford 2013), 15–36.
35 *Endicott,* Generality.

fact, "in the application of the community's standards by judicial tribunals, of course, particularity is the norm,"[36] and this particularity is necessary to avoid arbitrariness.[37]

Judges finding themselves in an institutional structure and political context that prevents thoughtfulness face a difficult task. The heavier the pressures resting on their shoulders, the more difficult it becomes for them to be controlled by a standard of "correctness and of mistake."[38] In populist regimes, but also in other States where such pressures come to the fore, judges are induced to protect the *status quo*, to decide on the basis of prejudices rather than after a careful inquiry, and to give in to path dependence, often with dire consequences. Attempts to establish or to defend such trends should deeply worry us, and they should prompt us to react with the means at our disposal.

Whether thoughtlessness can be excused is a question that a (thoughtful) trial might answer, but not settle.[39] What remains certain is that because thoughtlessness does and has caused tremendous evil, we should never stop thinking about the features and requirements of her sister, thoughtfulness.

36 *Ibid.*, 22.
37 *Ibid.*, 24 f.
38 *Hampshire,* Innocence, 38 f.
39 On Arendt's alleged attempt to downplay Eichmann's "thoughtlessness," see *Richard Wolin*, The Banality of Evil: The Demise of a Legend, Jewish Review of Books (2014), https://jewishreviewofbooks.com/articles/1106/the-banality-of-evil-the-demise-of-a-legend/, last access: 27 August 2019.

