THE UNIVERSE IS MADE OF STORIES, NOT OF ATOMS[1]

K van Marle

University of Pretoria

Introduction

In this paper I would like to highlight the significance of an Aristotelian concept of justice for South African legal and political transformation. I believe that if it is necessary in philosophy, political theory and other fields to emphasise the importance of focusing on the *particular* and on a specific context when we address the question of justice, it is even more important to do this in law. If it can be said that philosophy, political theory and other fields tend to generalise without adhering to the ethical questions of *difference* and *otherness*, it is even more true of legal theory and of the law. In what follows, the main point that I want to make is that in our search for justice the *particular* should be highlighted. Rights should be interpreted and phrased in such a way that not only universal ideals are addressed but concrete needs as well. In respect to the understanding and interpretation of rights, certain Aristotelian concepts of justice, practical wisdom and practical judgement are very relevant to the South African political and legal context.

Below I will address various seemingly unconnected ideas. The connection between the various discussions is the call for a focus on *particularity* and *contextuality*. The vision of the "poet-judge", the approach of an "ethics of care", a "relational" approach to rights and just administrative action and the experiences shared at the public space provided for by the South African Truth and Reconciliation Commission illustrate the shift in emphasis from universalisms to the particular in the search for new conceptions of justice, virtues and citizenship.

"Poets as judges"

> *Each one of those persons and each one of those houses and each one of those families is different, and they each have a story to tell. Each of those stories involves something about human passion. Each of those stories involves a man, a woman, children, families, work, lives.*[2]

Nussbaum[3] argues for "poets as judges" because she believes that poets are better equipped for the task of judging than judges. The poet-judge judges according to normative considerations that differ from conventional judging models. She supports the Aristotelian notion of judgement, namely a way of judging that does not rely only on abstract principles, but that takes notice of the specific context of a person. The poet will be a good judge because she will be aware of fairness and of history. Nussbaum's view of judgement/literary imagination is based on the Aristotelian notion of practical wisdom/judgement. Judgement should be made with an awareness of concrete situations. She refers to Whitman's[4] argument that poets will be better judges because they will take greater notice of the concrete life circumstances of people and do not rely only on abstract principles. A judge who, like the poet, takes notice of people's specific contexts has a greater affinity for fairness and for the influence of history. The complexity of human life should be acknowledged. To be just to a person one should notice every detail of her life. With reference to three court cases she shows the role that the literary imagination (an approach that focuses on the concrete context) can and should play in adjudication. The imagination, sympathy and humanity are essential characteristics for a judge, and generally for each citizen and participant in public life.

Firstly, Nussbaum refers to the case of *Hudson v Palmer.*[5] Palmer was a prisoner who was serving a sentence for forgery, grand larceny and bank robbery. He brought the case against Hudson, a police officer after he searched his cell and damaged some of his goods. Palmer argued that this search was done in order to harass and humiliate him. He argued that Hudson intentionally destroyed some of his legitimate personal property. The majority decided that a prisoner does not have "a reasonable expectation of privacy in his prison cell"[6] and that he is not entitled to protection against unreasonable searches. Justice Stevens for the minority did not agree with the majority view. He argued that maliciously motivated searches and intentional harassment of prisoners "cannot be tolerated by a civilised society".[7] Nussbaum argues that his decision, although not literary in the sense of being "stylisticly impressive", embodies some of the general characteristics of her vision of the "poet-judge". The judge confronts and recognises the individuality and concrete context of Palmer. He shows respect towards the prisoner's humanity and dignity.

> *Rather than treating the prisoner simply as a body to be managed by institutional rules, he treats him as a citizen with rights and with a dignity that calls for respect.*[8]

Secondly, Nussabaum discusses the case of *Carr v Allison Gas Turbine Division, General Motors, Corp.*[9] Mary Carr was the first woman who worked in the tinsmith shop of the gas turbine division of General Motors. She worked for five years during which she complained about sexual harassment. Carr eventually resigned because of the sexual harassment. The situation had become unbearable for her. She sued General Motors for compensation. On appeal Judge Posner decided in Carr's favour. Nussbaum argues that the judge gave great attention to the concrete circumstances of the plaintiff. The appellate court found error in the findings of fact of the lower court. Nussbaum argues that the facts in this case cannot be distinguished from values.

> *When we speak of "facts" in this case, we must be aware that these are not "facts" as distinct from values and evaluation. There is no dispute about the incidents that occurred in the tinsmith's shop. What is in dispute is their human meaning - how intimidating they were, how adversely they affected the climate in which Carr worked. The relevant facts, then, are human facts of the sort the literary judge is well equipped to ascertain.*[10]

The judge decided that there should be distinguished between "merely vulgar and mildly offensive" and "deeply offensive and sexually harassing" behaviour. He made this distinction in order to get a better understanding of the effect of this behaviour on Carr. Nussbaum notes that Justice Posner, without having disregard to the facts and the law, acted imaginatively and sympathetically.

In *Bowers v Hardwick* a man, Hardwick, was arrested for violating Georgia's sodomy law. Hardwick brought a suit to invalidate the sodomy law. The court had to decide about whether the alleged right to sodomy was protected by the Constitution. The court came to the conclusion that there was no constitutional right of homosexuals to engage in sodomy. Nussbaum asks how a literary approach could have influenced the outcome of the decision. She refers to the language employed by the judge as "distancing language" and how it illustrates the refusal to acknowledge the humanity that is hurt/infringed upon by this statute. The judge kept the human story at a distance and described the events as if they did not really happen to someone or could happen to someone. The court clearly followed a "non-narrative" approach. The effect of this

was to distance the court from the person's real context. Hardwick's humanity was denied and he was described as a hardened criminal.

Nussbaum argues that a judge is always restricted by the text of the statute, by precedent and by history. The literary imagination cannot have an influence on every case and the law should be applied in every case.[11] The literary imagination, however, can play a role in certain cases. For example, In *Hudson,* Palmer's concrete context was acknowledged in the literary approach; In *Carr,* the literary approach was applied to determine the gravity of the harassment and in *Hardwick* the judge could have acquired a better vision of the situation and the role of fundamental freedoms in society, if the literary imagination had been applied and the concrete context had been acknowledged.

An ethics of care

The well-known story of Antigone and Kreon is often used to illustrate the difference between an "ethics of care" and an "ethics of justice". In an essay titled "Antigone's daughters"[12] Elshtain criticises feminist theorists of the last several decades who aspired for women to be equal partners to men in public life. She notes that the effect of women entering the corporate world was that the male values of the public world were given higher value than the private values traditionally associated with women. The values that are regarded highly in the public world operate according to an "instrumental rationality" which is traditionally associated with the male identity. She argues that women's historical and social identity were to some extent formed by their roles as wives, mothers, nurturers etc. The values of friendship and community membership are associated with the feminine identity. The author argues for a notion of public life that incorporates the traditional feminine values.

Elshtain illustrates her vision by telling the story of Antigone. Antigone defied the decree of King Kreon in which he violated the sacred familial duty to bury and honour the dead. Antigone put the tradition and values of her family (in other words the particular context) before the (universal) law of the state. Elshtain argues that women, when they enter public life, must bring the values of family and community life (values of care) into the public sphere.

Carol Gilligan[13] distinguished between an "ethics of care" and an "Ethics of justice" after she experienced that women tend to have "a different voice" in answering moral questions. Gilligan argued that

an "Ethics of justice" should be supplemented with an "Ethics of care". Many academics from all over the spectrum entered into a debate about the notion of an "Ethics of care".[14] Although one must be wary of essentialisms and of substituting one inadequate vision with another, I believe that our understanding of rights and our search for justice can only be enhanced by an "Ethics of care".

Tronto[15] notes that care is a central, but devalued aspect of human life because society does not notice the importance of care and the moral quality of its practice. The effect of this is that the work and contributions of women and other disempowered groups who care in society are devalued. She argues that we should understand care as a Apolitical idea" which will require a "shift" in our values. The most fundamental change in our political ideals that will result from adopting a care perspective is in our assumptions about human nature. We will adopt other views in regard to *dependence* and *autonomy*, *needs* and *interests* and *moral engagement*. A political ideal of care would force us to reconsider the delineation of life into public and private spheres. Tronto refers to the descriptions of citizenship that emphasise the "work ethic" as a public good and argues that this image of what constitutes responsible human action neglects the importance of care that is necessary to keep human society functioning. There should not be a false dichotomy between justice and care. Tronto does not want to dismiss justice in favour of care, but argues that justice without a notion of care is incomplete. She believes that citizenship can be informed by an ethics of care - if humans can become better at caring we can become better citizens.

> *The qualities of attentiveness, of responsibility, of competence, or responsiveness, need not be restricted to the immediate objects of our care, but can also inform our practices as citizens. They direct us to a politics in which there is, at the centre, a public discussion of needs, an honest appraisal of the intersection of needs and interests.*[16]

For care to be realised as a political ideal we need to broaden our current conceptions of morality. Tronto[17] identifies three moral boundaries that must change in order for care to be taken seriously:

(1) The distinction between morality and politics makes it impossible to see the interconnection between our political conceptions and our morality. The effect is that care seems inevitably private because we structure our social and political

institutions in such a way that care only occurs in the social context. Care seems irrelevant to public life.

(2) Secondly, the moral boundary surrounding the abstract account of morality makes us suspicious of an ethic that starts from people's engagement with others, and of judgement that recognises the role of particularity.

(3) Thirdly, the moral boundary separating public life from private life stresses the importance of public life and makes the daily caring world less legitimate and less morally worthy.

Care, justification and transformation

South Africa and South African citizens have experienced and are still experiencing, and hopefully will be experiencing for the rest of their lives the processes and events of change, of transformation, of democratisation etc. One of the main ideals of our new deal is to achieve a *culture of justification*. The late Etienne Mureinik argued that the South African Constitution must serve as a "bridge between an authoritarian past and a new democratic society".[18] One of the most important characteristics of the new South Africa is that we must create a "culture of justification", in other words, the actions of the state against its citizens must be justified.[19] The actions of the state must be *virtuous*. The state must justify its actions and must be accountable for them.

Karl Klare[20] argues that in a constitutional dispensation, adjudication should play a significant role in ensuring a culture of justification. It is the task of judges to see that the state is held accountable for its actions. Klare[21] argues that *adjudication* and all legal practice must ensure this transformation from authoritarianism to democracy by actively promoting the values of *dignity*, *equality* and *justification*. In the context of judging the notion of an "Ethics of care" is of great importance. Judges and lawyers, in general, should not only be concerned with abstract rules and regulations (traditional approaches to justice) but should, like the "poet-judge" adhere to the concrete circumstances before them. Klare notes that the South African Constitution is a post-liberal document that moved away from the sole protection of individual autonomy to a commitment to the reconstruction of the society by encompassing the following: A substantive concept of equality and social rights; affirmative state duties; horizontality; political participation; multi-culturalism and a historic self-consciousness.[22]

The question of virtue, citizenship and justice in the South African context strongly relies on our ability to create a culture of justification and to reconstruct a public sphere where SA citizens can participate. It also relies on our judges to judge not only from a standpoint of "justice", but also from a standpoint of "care" where the concrete context of the particular person before them is taken into account. The interpretation and approach followed in regard to rights is connected with the notions of care and justice.

A "relational" approach to rights

Section 33 of the South African Constitution provides for "just administrative action":

(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

Subsection (3) provides for the enactment of national legislation. Until such legislation the section reads as follows:

Every person has the right to:

(a) lawful administrative action where any of their rights or interests is affected or threatened;

(b) procedurally fair administrative action where any of their rights or legitimate expectations is affected or threatened;

(c) be furnished with reasons in writing for administrative action which affects any of their rights or interests unless the reasons for that action have been made public; and

(d) administrative action which is justifiable in relation to the reasons given for it where any of their rights is affected or threatened.

Before the promulgation of the Constitution, administrative actions of government organs had to comply with the common law requirements for valid administrative action. These requirements also provided for procedural justice. The common law requirements consisted of the rules of natural justice that consisted of two Latin maxims, namely the *audi alteram partem* rule and *nemo iudex in sua causa*. The effect of these maxims, in practice, was that each and

every person had the opportunity to present her case before the state could act prejudicially against her; and that no one may be the judge in her own case, in other words that the arbiter must be unbiased and may not have a personal interest in the case. Other common law requirements for an administrative act to be valid are that an administrative act may not fulfil an illegitimate purpose; an administrative organ must apply her mind to the matter; and an administrative act may not have an unreasonable effect. Although these requirements existed before the Constitution, like all other rights, their entrenchment in the Constitution make them stronger and provides greater protection for citizens against state action.

Jennifer Nedelsky[23] argues that we should seek for new ways of understanding rights. The protection of just administrative action from the state against citizens could be a means of transforming the traditional "boundary-like" image of rights. Nedelsky subscribes to the vision of "rights as relationships".[24] In structuring rights as relationships the traditional liberal conception of autonomy and the opposition between the private and the public and between autonomy and collectivity will be displaced. She argues that in the structuring of "Rights as barriers" or "Rights as trumps" the metaphor for the relationship between the state and the individual could be critically investigated and undermined by focusing on relationships. Such an emphasis on the relationship between the state and the individual could enhance our own conception and actual transformation of the public sphere.

The structuring of rights as relationships depends on new conceptions of autonomy. Nedelsky[25] argues that the traditional liberal understanding of the atomistic individual fails to recognise the inherently social nature of human beings, namely that people come into being in a social context that is constitutive of themselves. Human capacity for language and the conceptual framework through which we see the world, are not made by us, but given to us through our interaction with others. Rights language must also take into account the importance of social context. Nedelsky[26] refers in this regard to the meaning of autonomy. The literal meaning of the word is to be "governed by one's own law". Thus, to become autonomous is to reach the point of being able to find one's own law and to live in accordance with it. Nedelsky emphasises the "become" and argues that one becomes autonomous within the context of social forms and relationships. The capacity to find one's own law can develop only in the context of relations with others who nurture this capacity. The content of one's own law is comprehensible only with reference

to shared social norms, values and concepts. Another dimension of the current conception of autonomy is the opposition between autonomy and collectivity. This opposition is grounded in the sense that individual autonomy is to be achieved by erecting a "wall of rights" between the individual and those around her. Nedelsky argues that what actually enables people to be autonomous is not isolation but relationships.

The relations between the state and its organs highlight the problem of interdependence, individual autonomy and collective power. Traditionally, it is believed that the individual must be protected against the collective, against the state. Nedelsky argues that there needs to be a shift in our traditional focus on protection of the individual from the collective. We are faced with a false choice between admitting collective control in the public sphere but preserving autonomy in the private sphere. She argues that:

> *This choice is not necessary. Despair about individual freedom in the face of collective power reflects a poverty of imagination about the possibilities for protection and control.*[27]

The false choice between the private and the public sphere, and the identification of freedom and autonomy with the public sphere, has been central to political conceptions of freedom and limited government. Nedelsky[28] finds the reason for this false choice between the individual and the collective in the protection of property. She explains how property rights served as the basis for independence and autonomy in the eighteenth century: The preoccupation with protecting property against tyranny by the majority led to a differentiation between civil and political rights. Political rights were perceived as merely a means to secure private or civil rights. Individual autonomy was understood as protected by the bounded sphere of property, into which the state could not enter. This opposition between private and public is linked to the opposition between politics and the market. Freedom and autonomy were placed on the side of the individual - private and market, and the coercive power of the collective on the side of the state - public and politics.[29] Nedelsky argues that this model of one's property as the basis for independence and autonomy can no longer serve its original function because it has lost its original political significance: Property was of greater importance for the farmer who owned his land or the craftsman who owned his tools than today where people earn salaries by which they are embedded in a "network of relationships fostered by interdependence, rather than isolation".

Although the opposition between autonomy and collectivity is misleading it also reflects some truth. There is a real tension between the individual and the collective, but that does not mean that one needs to make a choice between the two.[30] The collective is a source of autonomy as well as a threat to it. The challenge is to live within this tension. Like justice will never be achieved within a present system and will always be there as an "ethical ideal", the tension between the individual and the collective will never be solved. We can only reconstitute and transform the current conceptions to displace them on a continuous basis without again reverting to false choices and rigid dichotomies.

Administrative law mediates between organs of government and citizens. Nedelsky refers to the case of *Goldberg v Kelly*[31] as an example of how autonomy can be achieved within a context of dependence. In this case, the US Supreme Court accepted that welfare payments cannot be taken away without due process. In our context, this means that the government cannot take away such payments without fulfilling the requirement of just administrative action. The government will have to give notice, allow time for the citizen to prepare and present her case, must provide reasons for the decision and show that the effect of the decision is not unreasonable to the citizen. In this context of dependence on the state to make welfare payments a person can also find her own autonomy and demand that the state must fulfil the basic requirements for administrative justice. A danger of procedural models of justice is that the substantive content of decisions may be neglected. The requirement that reasons must be provided must be insisted on each and every time an organ of government infringes upon an individual's rights, interests or expectations. I have already mentioned Mureinik's call for a "culture of justification". The government must justify all its actions in terms of the Constitution and in terms of the underlying values of dignity, equality and liberty.

Administrative law plays a significant role in public law by regulating the organisation, powers and actions of the state administration. The relationship between the state and its citizens is created and recreated by administrative law. The state should have regard to *each and every individual's concrete experience*. This can be illustrated by the rule that an administrative organ must apply its mind to the matter. An administrative body or official may generally not adhere to a rigid, predetermined policy. Each decision must be treated individually. The argument is that adherence to rigid rules, standards and precedents will predetermine the outcome of an

individual administrative decision, with the result that the administrative official will fail to pay adequate attention to the facts before her.[32] The state should adopt a perspective of care in its dealings with individuals.

Citizenship, virtue, justice and The Truth and Reconciliation Commission

The event of the Truth and Reconciliation Commission was an example of the search for justice by way of a procedure. The TRC provided for individuals, victims as well as perpetrators, to come to the fore and tell their stories. The metaphor of a road was used to describe the TRC, the road to reconciliation. The TRC was criticised as being inadequate to find the truth; to reconcile a harsh divided society and to achieve justice, but I believe that the value of the TRC lies in the creation of a space where humanity that was denied for so long could be revalued. In this regard, I think too much emphasis is placed on *justice* in the approaches to the TRC. A *care* perspective on the workings of the TRC could provide a more positive picture of what actually happened during the months of the proceedings.

In the institutional process of seeking Truth and Reconciliation, Benhabib's[33] description of two conceptions of self-other relations that delineate both moral perspectives and interactional structures is significant. The first standpoint is of the *generalised other* and the second that of the *concrete other*. The standpoint of the *generalised other* requires us to view each and every individual as a rational being entitled to the same rights and duties we would want to have for ourselves. In assuming this standpoint we do away with the individuality and concrete identity of the other. We assume that the other is *like ourselves*. His or her moral dignity is constituted not by what *differentiates* us from each other, but rather what we have in *common*. Our relation to the other is governed by the norms of *formal equality* and *reciprocity* and *justice*. The norms of our interactions are primarily *public* and *institutional* ones. The standpoint of the *concrete other* requires us to view each and every rational being as an individual with a *concrete history* and *identity*. In assuming this standpoint, we do away with the commonality and focus on individuality, thereby seeking to understand the needs and desires of the other. This relation is governed by the norms of *equity* and *complementary reciprocity*. For example, in Rawls'[34] "veil of ignorance" the *other* as different from the *self*, in other words the *concrete other* disappears. The viewpoint of the *generalised other* is

disembodied and *disembodied* where the viewpoint of the concrete other is *situated.*

In the context of reconciliation and truth, it is essential to approach individuals as *concrete others* each with an own context, history and story to tell. An "ethics of care" will create a greater opportunity for the *concrete other* than a mere focus on justice that will rely on the view of the *generalised other.* The TRC forms an important part of our attempts to reconstruct the public realm, citizenship and justice. The TRC provided a public space for citizens to come together and engage in political action in telling their own stories. The ideal of a culture of justification is connected to a public realm where political action can take place. In dealing with the atrocities of the past, the TRC contributed to the creation of a culture of justification (reconstruction of a public realm) thereby contributing to the important questions of justice, virtues and citizenship in South Africa.

In *AZAPO and Others v President of the Republic of South Africa,*[35] the applicants challenged the constitutionality of section 20(7) of the National Unity and Reconciliation Act on the grounds that this section was in contravention of the constitutional right of each person to have justifiable disputes settled in a court of law, or where appropriate, another independent or impartial forum. They argued that the amnesty committee created by the Act was not a court nor an independent or impartial forum and was in any event not authorised to settle justiciable disputes. The central concern of the applicants was that they wanted the wrongdoers who harmed their families to be prosecuted and punished. Justice Mahomed, following a literary rather than judicial style, said that it is understandable why applicants want to insist that the wrongdoers who harmed their families must be prosecuted and punished. He focused on the ideals that inspired the Act in question, namely the hope to find truth, reconciliation and justice. The court's decision in this case was not based on conventional forms of justice and reciprocity but inspired by and based on the vision of transformation and reconciliation. The judge explored the metaphor of the constitution as a "historic bridge" in response to the applicants' claim that the culprits must be criminally liable:

> *Both the victims and the culprits who walk on the "historic bridge" ... will hobble more than walk to the future with heavily dragged steps delaying and impeding a rapid and enthusiastic transition to the new society at the end of the bridge ...*[36]

The judge said that if there was no mechanism provided for amnesty, the "historic bridge' itself might never have been erected.

> *... the bridge itself would have remained wobbly and insecure, threatened by fear from some and anger from others. It was for this reason that those who negotiated the constitution made a deliberate choice, preferring understanding over vengeance, reparation over retaliation, ubuntu over victimisation.*[37]

In our approaches to justice, virtues and citizenship we should also focus on broader perspectives that encompass the vision of the poet-judge, new understandings of autonomy, an ethics of care, a relational approach to rights and the concept of the concrete other.[38]

Notes

1. Muriel Rukeyser as quoted by André P Brink (1998) *Duiwelskloof.*
2. Nussbaum "Poets as judges: judicial rhetoric and the literary imagination" (1995) *The University of Chicago Law Review* 1477.
3. Nussbaum "Poets as judges: judicial rhetoric and the literary imagination" (1995) *The University of Chicago Law Review* 1477-1519.
4. Nussbaum "Poets as judges: judicial rhetoric and the literary imagination" (1995) *The University of Chicago Law Review* 1478.
5.468 US 517 (1984).
6. Nussbaum "Poets as judges: judicial rhetoric and the literary imagination" (1995) *The University of Chicago Law Review* 1497; 468 US 517 (1984) at 519.
7. Nussbaum "Poets as judges: judicial rhetoric and the literary imagination"(1995) *The University of Chicago Law Review* 1497; 468 US 517 (1984) at 528.
8. Nussbaum "Poets as judges: judicial rhetoric and the literary imagination" (1995) *The University of Chicago Law Review* 1500.
9. Nussbaum "Poets as judges: judicial rhetoric and the literary imagination" (1995) *The University of Chicago Law Review* 1502; 32 F3d 1007 (7th Cir 1994).
10. Nussbaum "Poets as judges: judicial rhetoric and the literary imagination" (1995) *The University of Chicago Law Review* 1503.
11. The tension between freedom and constraint in adjudication and the reality of legal indeterminacy have been a focus point for Critical Legal Scholars. Critical Legal Scholars like for example, Peter Gabel ("The phenomenology of rights-consciousness and the pact of the withdrawn selves" *Texas Law Review* 1984 1563-1599), refer to "reification" as the process by which traditional and formalist judges seek to deny legal indeterminacy and seek to give rights frozen and static meanings. In reifying rights judges do not focus on the specific context or relationship in which a right becomes significant but adhere only to the same static interpretations.
12. Elshtain "Antigone's daughters" in Daly (ed) (1994) *Communitarianism A new public ethics* 335-344.
13. (1982) *In a different voice.*
14. See amongst others Larrabee(1993) *An ethic of care*; Bowden (1997) *Caring*; Shogan (1992) *A reader in feminist ethics*; Held (1995) *Justice and care*; Held (1993) *Feminist morality*; Clement (1996) *Care, autonomy and justice*; Hekman (1995) *Moral voices moral selves*; Sevenhuijsen (1996) *Oordelen met sorg.*
15.Tronto (1993) *Moral boundaries* 161.
16. Tronto (1993) *Moral boundaries* 168.
17.Tronto (1993) *Moral boundaries* 178.
18. Murreinik "A bridge to where? Introducing the interim Bill of Rights" (1994) 10 *SAJHR* 31.
19. The notion of a culture of justification in my view can be connected with Hannah Arendt's ((1958) *The human condition*) insistence on participance and political action and human appearance in the public sphere. For citizens to participate in public life, to fulfil their purpose as political animals, to be truly virtuous citizens able to govern and to be governed they must have a certain trust in the state authority.
20. "Legal culture and transformative constitutionalism" (1998) 14 *SAJHR* 146-188.
21. "Legal culture and transformative constitutionalism" (1998) 14 *SAJHR* 149.
22.Klare "Legal culture and transformative constitutionalism" (1998) 14 *SAJHR* 151-154.

23. "Reconceiving autonomy: Sources, thoughts and possibilities" (1989) *Yale Journal of Law and Feminism* 7-36.
24. "Reconceiving rights as relationships" (1993) *Alberta Law Review* 1-17.
25. "Reconceiving autonomy: Sources, thoughts and possibilities" (1989) *Yale Journal of Law and Feminism* 8-11.
26. "Reconceiving autonomy: Sources, thoughts and possibilities" (1989) *Yale Journal of Law and Feminism* 10.
27. "Reconceiving autonomy: Sources, thoughts and possibilities" (1989) *Yale Journal of Law and Feminism* 15.
28. "Reconceiving autonomy: Sources, thoughts and possibilities" (1989) *Yale Journal of Law and Feminism* 19.
29. This story coincides with Hannah Arendt's (1958) *The human condition* 38 story of the rise of the social and the neglect of the public, of political action and of human appearance.
30. Critical Legal Scholars describe this tension as the Afundamental contradiction".
31. Nedelsky (1989) *Yale Journal of Law and Feminism* 27; 397 U.S. 254 (1970).
32. Burns (1999) 1996 *Administrative law under the 1996 Constitution* 83.
33. (1992) *Situating the self* 158.
34. (1972) *A theory of justice* 136-142.
35. 1996(8) BCLR 1015 (CC).
36. 1996(8) BCLR 1015 (CC) at 1028, par 18.
37. 1996(8) BCLR 1015 (CC) at 1029, par 19.

Bibliography

Arendt, 1958, *The human condition* Chicago: The University of Chicago Press
Benhabib, 1992, *Situating the self* Cambridge: Polity Press.
Elshtain, 1994 "Antigone's daughters" in Daly (ed) *Communitariansim A new public ethics* 335-344 Belmont: Wadsworth Publishing Company.
Klare, "Legal culrue and transformative constitutionalism" 14 SAJHR, 1998: 146-188.
Nedelsky "Reconceiving autonomy: sources, thoughts and possibilities", *Yale Journal of law and feminism*, 1989: I7-36.
Nussbaum "Poets as judges: judicial rhetoric and the literay imaginatio", *The University of Chicago Law Review*, 1995: 1477-1519.
Tronto, 1993, *Moral Boundaries*, New York: Routledge.