Eichmann in Jerusalem – a crisis of judgment?*

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Hannah Arendt is known as the most famous critic of the Eichmann Trial. But there is an ongoing debate as to how to interpret her criticism. Is it a warning against the political uses of law? Is it about the inherent limitations of criminal law to address the nature of "administrative massacres"? Or rather, is it about the failure of the court to understand the novelty in the new category of crimes against humanity, and the new type of criminal ("the banality of evil")? Although Arendt addressed each of these issues, we need to better understand her jurisprudential stance in order to see what brings these issues together as a coherent criticism of the Jerusalem court.

Arendt opens and ends her book *Eichmann in Jerusalem* with a criticism of the direction in which the Israeli prosecution took the trial. She is concerned first with what has come to be known as the "didactic purpose of the trial" – the attempt to use the trial to clarify historical truths and construct collective memory. For Arendt, the sole legitimate purpose of the Trial was to determine the guilt of the defendant Adolf Eichmann.

Second, she also criticized the Israeli prosecution's decision to put on the stand over one hundred Holocaust survivors, to testify about their personal experiences under the Third Reich. Such testimonies, she argued, were irrelevant to proving Eichmann's guilt, and threatened to overwhelm the trial with emotions of suffering, pain and rage, which undermine the ability to judge the defendant fairly and objectively.[1]

* Based on a longer article, Leora Bilsky, 'Truth and Judgment in Arendt's Writing,' in Richard J. Golsan and Sarah Misemer (eds.) *Troubled Legacies: The Eichmann Trial and Hannah Arendt's* Eichmann in Jerusalem *in Retrospect* (University of Toronto Press, forthcoming 2016).

[1] Arendt writes: "Mr. Hausner had gathered together a 'tragic multitude' of sufferers," Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Penguin Books, 2006 [originally published, 1963]), 209.

The conventional understanding of Arendt's jurisprudential stance is to see her as a "legalist",[2] following Judith Shklar's definition of legalism as an ethos that holds that law and politics must be separate.[3] However, a closer look at Arendt's arguments reveals difficulties viewing her as an advocate of legalism.

First, the opposition that Arendt erects between law and history is undermined by her own advocacy of an alternative historical narrative that the trial should promote, one that centers on the rise of the Totalitarian state instead of anti-Semitism. Thus, in a previous article I argued that in order to understand the controversy between Israeli prosecutor, Gideon Hausner, and Arendt, it is better to view it as a "competition of storytellers" – that is, a controversy over historiography, politics and law.[4] Arendt who seemingly opposed any "historical excursions" by the court devoted over ten pages[5] of her book to discuss the behavior of the Jewish Councils ('Judenrat'), a discussion with historical and political importance, but irrelevant to proving the defendant's guilt. Rather than a battle between justice and politics, or justice and history, Arendt's critique of Hausner should be understood as a controversy about the "right" kind of history needed in order to understand the novel crimes of the Nazi regime that involved the victims in their own victimization.

Second, Arendt's critique of the reliance on victims' testimonies in the trial is also not a clear indication of a legalist stance. Arendt portrayed the prosecutor Hausner and Judge Landau as two antagonists who asked to pull the trial in two different directions – the political and the legal.[6] Arendt sided with Landau, who for her represented the rule of law. A closer reading of the Eichmann judgment shows that the court in fact endorses victims' testimonies as relevant to the legal examination, while rejecting an expansive didactic role for the trial envisioned by the prosecution. In doing so the court articulates a victim-oriented jurisprudence for atrocity trials

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[2] See: Shoshana Felman, *The Juridical Unconscious: Trials and Traumas in the Twentieth Century* (Cambridge, Mass.: Harvard University Press, 2002), 120-121; Lawrence Douglas, *The Memory of Judgment* (New Haven and London: Yale University Press, 2005) ("Arendt's argument presupposed a strict separation between the legal and the extralegal, between the rule of law and the interests of collective instruction."), Douglas, *ibid*, 2. Both Felman and Douglas are critical of Arendt's legalism.

[3] Judith N. Shklar, *Legalism: Law, Morals, and Political Trials* (Cambridge, Mass.: Harvard University Press, 1964), 1.

[4] Leora Bilsky, 'Between Justice and Politics: The Competition of Storytellers in Eichmann Trial,' in Steven E. Aschheim (ed.), *Hannah Arendt in Jerusalem* (Berekley: University of California Press, 2001), 236.

[5] Arendt, *Eichmann in Jerusalem*, *supra* note 1, 115-126.

[6] *Ibid*, 4-5.

that responds to the nature of the new crimes without falling into pure didactics.[7] Thus, again, it is not 'law versus politics,' but rather different conceptions of criminal law that better explain Arendt's critique. Interestingly, since the 1990's we see a transformation of international criminal law towards a victims' friendly criminal law, one that is more in line with the conception pioneered by the Eichmann' trial.

Arendt's solutions to the legal problems that stood in the way of the court, such as retroactivity, extraterritorial jurisdiction and the interpretation of crimes against humanity, defy our conventional understanding of legalism. We see that on every issue, Arendt goes beyond a purely legalist position in offering ways for the law to properly respond to the novel crimes of the Nazi regime.[8] Still, she insisted that criminal law should be the idiom of law with which to judge the novel crimes that were committed by individuals who were law abiding citizens in Nazi Germany.

While "legalism" assumes that judging Nazi criminals does not pose a new challenge for the law (as all we need is to apply the correct rules), I would like to suggest that the question that concerns Arendt in her book is related to the very possibility of judgment, that is the moral foundations upon which the criminal law is based. Rather than assuming that the law already possesses the tools to judge, Arendt points to the crisis of judgment that the Eichmann trial exposes. In her view the totalitarian experience in general, and the Third Reich in particular, require us to rethink basic principles of criminal law and their relations to morality.

The Eichmann trial was a moment of crisis for Arendt, which helped her identify the questions that needed answers, among them: Can we think about the perpetrator of atrocious crimes, such as genocide and crimes against humanity, as a law abiding citizen, a person acting from banal motives? Can the law, that is, traditional categories of criminal law that require that the criminal act be accompanied by the proper mental state, convict such a defendant? And what if the most terrible crimes can occur without proper *mens rea* – does this signal the bankruptcy of our

[7] For elaboration see Leora Bilsky, 'The Eichmann Trial: Towards a Jurisprudence of Eyewitness Testimony of Atrocities,' *Journal of International Criminal Justice* vol. 12 (2014) 27-57.

[8] Arendt, *Eichmann in Jerusalem*, *supra* note 1, 253-279. For elaboration, see Leora Bilsky, *Transformative Justice: Israeli Identity on Trial* (Ann Arbor: Michigan University Press, 2004), 117-144; For Arendt's view on universal jurisdiction see, Leora Bilsky, 'The Eichmann Trial and the Legacy of Jurisdiction,' in Seyla Benhabib (ed.) *Politics in Dark Times: Encounters with Hannah Arendt* (Cambridge; New York: Cambridge University Press, 2010), 198-218.

criminal law, or is there a way to revise the fundamental requirement of individual guilt when we deal with collective crimes that are done under the authority of law?[9]

Arendt did not give a satisfactory answer to these questions in *Eichmann in Jerusalem*, but returned to them in subsequent articles, and in lectures she gave on Kant's *Third Critique*. Unlike those who see Arendt as criticizing all the participants in the Eichmann trial, whether prosecutor, witnesses, or judges from the standpoint of the one who knows better, I believe that the Eichmann trial was also a moment of crisis for Arendt. Reading *Eichmann in Jerusalem* together with her lectures on Kant allows us to identify this crisis, as well as the way she tried to resolve it.

In the postscript to *Eichmann in Jerusalem*, Arendt reconsiders the defense that was raised repeatedly at the Nuremberg trials, of "obedience to superior orders." The formal legal answer given at Nuremberg was the nullification of this defense for criminals of the Third Reich. The more substantive answer given in Israel in the Kafr Qasim trial in 1958 (regarding the massacre of inhabitants of an Arab village by Israeli soldiers) was the recognition of a duty not to obey an order that is manifestly illegal; that is, an attempt to re-connect law and morality.[10] However, Arendt believed that this legal doctrine could help judges only in a functioning democracy, when an illegal command sticks out clearly and is "manifest" in its illegality. This response is inadequate in the context of a regime that has turned criminality into state law; a legal system in which the exception has become law.

Accordingly, Arendt concludes

> "that Eichmann acted fully within the framework of the kind of judgment required of him: he acted in accordance with the rule, examined the order issued to him for its 'manifest' legality, namely regularity; he did not have to fall back upon his 'conscience,' since he was not one of those who were unfamiliar with the laws of his country. The exact opposite was the case."[11]

In contrast to the Jerusalem court, Arendt refuses to ground the obligation to disobey a manifestly illegal order in presupposing the existence of a universal conscience. This goes beyond the problem of legalizing crime and touches upon the core question of conscience presupposed by criminal law. How does one's conscience change in accordance with legal norms

[9] Arendt, *Eichmann in Jerusalem*, *supra* note 1, 276-277.
[10] For further discussion of this trial see, Bilsky, *Transformative Justice*, *supra* note 8, 169-197.
[11] Arendt, *Eichmann in Jerusalem*, *supra* note 1, 293.

and the norms of civil society? What can we make of the fact that German elites acquiesced with the Nazi regime? Arendt writes:

"He did not need to 'close his ears to the voice of conscience,' as the judgment has it, not because he had none, but because his conscience spoke with a 'respectable voice,' with the voice of respectable society around him."[12]

A legal system presupposes that ordinary people can distinguish right from wrong. That is, we assume that conscience is different and independent from society's norms. But what if it is not? How should criminal law deal with the process of "coordination" that German society underwent with the crimes of the Nazi regime? This is a question that moves us from law to moral theory.

Why, in the face of the crisis of law, did Arendt not choose to return, as a moral guide, to Kant's categorical imperative - "Act only in accordance with that maxim through which you can at the same time will that it become a universal law"[13]? Here we approach the depth of the crisis Arendt experienced at the Eichmann trial - the moment in which Eichmann himself referred to Kant's categorical imperative in his police interrogation and later in his court's testimony, showing the ease with which Kant's moral philosophy was turned on its head in Nazi Germany.

In the eighth chapter of *Eichmann in Jerusalem,* titled "Duties of a Law-Abiding Citizen", Arendt writes:

"The first indication of Eichmann's vague notion that there was more involved in this whole business than the question of the soldiers carrying out orders that are clearly criminal in nature and intent appeared during the police examination, when he suddenly declared with great emphasis that he had lived his whole life according to Kant's moral precepts, and especially according to a Kantian definition of duty. This was outrageous, on the face of it, and also incomprehensible, since Kant's moral philosophy is so closely bound up with man's faculty of judgment, which rules out blind obedience."[14]

How can Kant's categorical imperative, based on an autonomous independent moral judgment, be reconciled with Eichmann's obedience to superior orders? Can it be that his obedience was not blind, but was actually guided by conscience? In court, Eichmann explained that from the moment he was ordered to execute the "Final Solution", he ceased living according to Kantian principles. However, Arendt identifies a deeper difficulty, as the categorical imperative received

[12] *Ibid*, 126.
[13] Immanuel Kant, *Groundwork of the Metaphysics of Morals*, trans. Mary Gregor (Cambridge: Cambridge University Press, 1998), 31; Ak. 4:421.
[14] Arendt, *Eichmann in Jerusalem*, *supra* note 1, 135-6.

a new and distorted interpretation under Nazi rule, in the new wording provided by Hans Frank: "Act in such a way that the Führer, if he knew your action, would approve it."[15]

Arendt writes,

"In this household use, all that is left of Kant's spirit is the demand that a man do more than obey the law, that he go beyond the mere call of obedience and identify his own will with the principle behind the law the source from which the law sprang. In Kant's philosophy, that source was practical reason; in Eichmann's household use of him, it was the will of the Führer." [16]

In Arendt's view, it is precisely this combination of moral idealism and obedience to orders that accounts for "the horribly painstaking thoroughness in the execution of the Final Solution,"[17] which she traces to "the odd notion, indeed very common in Germany, that to be law-abiding means not merely to obey the laws but to act as though one were the legislator of the laws that one obeys. Hence the conviction that nothing less than going beyond the call of duty will do."[18]

To counter Eichmann's defense of obedience to superior orders, the prosecution brought evidence of Eichmann's refusal to follow Himmler's orders to stop deportations to Auschwitz. This could be an indication that Eichmann was lying, and that it was anti-Semitism and identification with Nazi ideology that guided his actions, not a sense of obligation to obey superior orders. Yet from Arendt's perspective there is no internal contradiction in this refusal. She writes, "[t]he sad and very uncomfortable truth of the matter probably was that it was not his fanaticism but his very conscience that prompted Eichmann to adopt his uncompromising attitude during the last year of the war… Eichmann knew that Himmler's orders ran directly counter to the Führer's order."[19]

Here we have a glimpse of the horror: in the interpretation of orders by law-abiding Eichmann, it is Himmler's order that was manifestly illegal. As a result, for Arendt both law and moral theory fail to respond to the particular challenge posed by the new subject of totalitarianism. She

[15] Cited at *Ibid*, 136.
[16] *Ibid*, 136-7.
[17] *Ibid*, 137. In recent years Arendt's thesis about Eichmann's banality was challenged by the historian Bettina Stangneth, *Eichmann Before Jerusalem: The Unexamined Life of a Mass Murderer* (Random House, 2014). However, a closer reading of Arendt shows that she was not concerned with blind obedience, but precisely with the mix of idealism and a sense of rule-following that allows one to go beyond the black letter of the law, according to his ideals.
[18] *Ibid*.
[19] *Ibid*, 146-7.

therefore believes that the most urgent challenge for post-Holocaust jurisprudence is to rethink our assumptions about the relations between law and morality. This is the crisis of judgment with which Arendt chooses to end the epilogue to her book.[20]

As we can see, the crisis does not derive from Kant's moral philosophy itself, as it is obvious that Eichmann does not take that philosophy seriously and misinterprets Kant's categorical imperative. The problem Arendt identifies is that Kant's moral philosophy is not sufficient to guide action in the world, and therefore a theory of judgment is required.

Interestingly it is Kant's third critique (his theory of aesthetic judgment), that provides her with a solution for the question of judging the particular without pre-given rules. Two characteristics of Kant's theory of aesthetic judgment make it especially attractive for Arendt's theory of judgment. First, aesthetic judgment is discriminatory by nature since it is connected to the most subjective senses of taste and smell, and hence can help orient actors in the political world of new beginnings.[21] And yet, Kant's theory shows that the subjectivity of judgment does not mean a collapse into arbitrariness. What enables us to make subjective judgments that are not merely idiosyncratic is our capacity for what Kant called "enlarged thought", that is, the ability to view one's own judgments from the standpoint of others.[22] In other words, it depends on men in the plural, on the judgment of others which we go visit in our imagination in order to critically examine our own subjective judgments.[23]

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[20] "There remains, however, one fundamental problem, which was implicitly present in all these postwar trials and which must be mentioned here because it touches upon one of the central moral questions of all time, namely upon the nature and function of human judgment. **What we have demanded in these trials, where the defendants had committed "legal" crimes, is that human beings be capable of telling right from wrong even when all they have to guide them is their own judgment, which, moreover, happens to be completely at odds with what they must regard as the unanimous opinion of all those around them.** Those few who were still able to tell right from wrong went really only by their own judgments, and they did so freely; there were no rules to be abided by, under which the particular cases with which they were confronted could be subsumed. They had to decide each instance as it arose, because no rules existed for the unprecedented." *Ibid*, 294-5 (emphasis added).

[21] "[T]hey [taste and smell] are quite clearly discriminatory senses: one can withhold judgment from what one hears or touches. But in matters of taste or smell, the it-pleases-or-displeases me is immediate and overwhelming." Hannah Arendt, *Lectures on Kant's Political Philosophy* (Chicago, Ill.: University of Chicago Press, 1989), 64.

[22] Arendt writes "You see that *impartiality* is obtained by taking the viewpoints of others into account; impartiality is not the result of some higher standpoint that would then settle the dispute by being altogether above the melée. […] It is accomplished by 'comparing our judgment with the possible rather than the actual judgments of others, and by putting ourselves in the place of any other man.' The faculty that makes this possible is called imagination". *Ibid*, 42-43 (emphasis in the original).

[23] For elaboration see Leora Bilsky, 'When Actor and Spectator Meet in the Courtroom: Reflections on Hannah Arendt's Concept of Judgment,' *History & Memory: Studies in Representations of the Past*, Fall-Winter, Vol.8(2), pp.137-73 (1996).

Judgment can become impartial with the help of the imagination and through a process of representative thinking. Arendt believes that the dialogic process of enlarged mentality can help orient the actor's judgments even under conditions brought about by totalitarianism – in which the exception becomes the norm, and society coordinates itself accordingly. Instead of being based on universal morality or existing norms, reflective judgement involves forming our judgment in the process of imagining trying to persuade others.

Arendt did not develop her theory of reflective judgment or "enlarged mentality" and she left many puzzles unanswered. Here, however, I would like to return to *Eichmann in Jerusalem* with the guidance of the theory of reflective judgment. We saw that the court found that Eichmann had lied about being bound by orders when he organized deportations to Auschwitz, since his acts did not result from literal obedience to orders (as he refused Himmler's order to stop the death march) but from ideological identification with the policy. In other words, the court found that Eichmann had the required *mens rea* for criminal liability. Arendt, in contrast, explored the possibility that Eichmann had not lied, since he believed Himmler's order to stop deportations was manifestly illegal. That is, Eichmann acted according to his conscience. What, then, would be the basis for morally condemning Eichmann, if he committed his crimes "under circumstances that make it well-nigh impossible for him to know or to feel that he is doing wrong?"[24]

If, following Kant's theory of reflective judgment, we understand judgment as requiring "enlarged thought", we see that even if Eichmann did not lie to the court, his actions involved a deliberate failure of judgment to which he has to give account. Eichmann, who was capable of imagining the perspective of his victims for instrumental or manipulative purposes, deliberately failed to do so for the purposes of reflective judgment – to enlarge his judgment so that it could encompass the point of view of his victims. Arendt provides three examples in her book for this failure, examples that seem trivial at first reading. However, if we read them in light of her later lectures on judgment, we can better understand their importance for her condemnation of Eichmann.

[24] *Eichmann in Jerusalem*, *supra* note 1, 276.

First, when Eichmann describes his activities in Vienna to organize the forced immigration of Jews, he uses the term “cooperation” to describe his work with Jewish leaders, as if there had really been a common interest and equality to both sides. Arendt writes:

"a more specific, and also more decisive, flaw in Eichmann's character was his almost total inability ever to look at anything from the other fellow's point of view. Nowhere was this flaw more conspicuous than in his account of the Vienna episode. He and his men and the Jews were all 'pulling together,' and whenever there were any difficulties the Jewish functionaries would come running to him 'to unburden their hearts,' to tell him 'all their grief and sorrow,' and to ask for his help."[25]

Second, his failure to understand the perspective of others stands out even more in his description of his meeting with one of the leaders of the Jewish community in Vienna, Mr. Storfer, with whom he had worked and who was later caught by the Gestapo and sent to Auschwitz when he tried to escape. Eichmann describes their meeting at Auschwitz like this:

"With Storfer afterward, well, it was normal and human, we had a normal, human encounter. He told me all his grief and sorrow: I said: 'Well, my dear old friend […], we certainly got it! What rotten luck!' And I also said: 'Look, I really cannot help you […]. I hear you made a mistake, that you went into hiding or wanted to bolt, which, after all, you did not need to do.' […] And then I asked him how he was."[26]

A third example of Eichmann’s inability to enlarge his thought and look at things from the perspective of others emerges from a recording of his interrogation at the police, when Eichmann unwraps before Captain Less, a Holocaust survivor from Germany, all the details of his biography, as if trying to obtain sympathy for his story of bad luck, without taking into account the perspective of his interlocutor. Arendt comments: "The presence of Captain Less, a Jew from Germany and unlikely in any case to think that members of the S.S. advanced in their careers through the exercise of high moral qualities, did not for a moment throw this mechanism out of gear."[27]

With the term "banality of evil" Arendt pointed to the way language (with its clichés etc.) loses its communicative function and is used to block the reality of the victim from the perpetrator. We see that each of the examples that I referred to above demonstrates this point, as Eichmann uses

[25] *Ibid* 47-48.
[26] *Ibid*, 51.
[27] *Ibid*, 50.

idioms and clichés to resist the process of enlarged mentality and to block the possibility of visiting through imagination the point of view of his interlocutor. The difficult question Arendt poses to law and moral theory, for which truth plays such an important role, is how to judge such persons that seem to blur our distinction between truth and falsehood, fact and fiction.[28]

It is interesting that to address this problem Arendt reintroduces the notion of "common sense" – but not in its usual use, of conventions or common social beliefs. Following Kant she refers us back to its origins in the Latin term "sensus communis."[29] Accordingly, she argues that the type of reflective judgment explored by Kant requires that the judging subject engages in a process of "enlarged mentality" as a basis for arriving at valid judgments. It is only when one's judgments become "common" that is – inspected from the point of view and opinions of others – that they gain their objectivity. It is in relation to such a notion of common sense that we can best identify Eichmann's flight from judgment. It allows us to notice that even if Eichmann was not lying, he nevertheless should be accountable for his failure of judgment, notwithstanding the changed legal and social norms in Nazi Germany.

At this point we can see the importance Arendt attributed to coming to terms with Eichmann's refusal to obey Himmler's orders. Arendt urges the Israeli judges to try and engage Eichmann's viewpoint, to see the world from his perspective in judging him. For this purpose Arendt uses the narrative strategy of citing Eichmann in the first person and letting his voice be heard in the book. She seems to be saying, "Don't fit the man to your own stories about monstrosity and sadism of the Nazis, but listen carefully to his words and use your imagination to understand his viewpoint." It is this act of reflective judgment that can provide the judges with a valid moral basis from which to condemn Eichmann's crimes. Arendt returned to this question of judgment time and again in later years, but died before she was able to write her third volume of the Life of the Mind, dedicated to the faculty of judgment. She left it for us, her readers, to try and imagine a post-Holocaust jurisprudence that is based not on applying legal precedents to new situations, but

[28] Arendt wrote earlier that "[t]he ideal subject of totalitarian rule is not the convinced Nazi or the dedicated communist, but the people for whom the distinction between fact and fiction, true and false, no longer exists." Hannah Arendt, *The Origins of Totalitarianism* (San Diego; New York; London: Harvest, 1973), 474.

[29] "By using the Latin term ["sensus communis"] Kant indicated that here he means something different: an extra sense – like an extra mental capability... – that fits us into community. […] It is the capability by which men are distinguished from animals and from gods. It is the very humanity of man that is manifest in this sense." Arendt, *Lectures on Kant's Political Philosophy*, *supra* note 21, 70.

on engaging in reflective judgment, and going visiting in our imaginations the other's point of view.[30]

[30] For an attempt elaborate the notion of Arendt's "reflective judgment" in situations of transitional justice, see Bronwyn Leebaw, Judging State-Sponsored Violence, Imagining Political Change (Cambridge University Press, 2011).