

## **The Eichmann Aporia: Derrida and Transitional Jurisprudence After Nuremberg**

### ABSTRACT

This paper offers a postmodernist critique of transitional justice in the post-World War II era. The author describes attempts at transitional justice in the wake of mass atrocity as an ‘aporia’ which encompasses broader debates about morality, power, and the nature of justice. In examining the case of *Attorney-General of the Government of Israel v. Adolf Eichmann*, the author problematizes the mechanisms through which tribunals mete out ‘justice’, and discusses the potential for alternative models of jurisprudence in the aftermath of genocide, war crimes, and crimes against humanity.

“If today there is no longer any one clear vision of sacred man, it is perhaps because we are all virtually *homines sacri*.”  
- Giorgio Agamben, *Homo Sacer*, p. 115.

## **Introduction**

On 11 May 1960, the Israeli Mossad kidnapped Adolf Eichmann - a Nazi SS bureaucrat who played a key role in orchestrating the transportation of Jews to concentration camps such as Auschwitz and Dachau - from his home in Buenos Aires, and brought him before an Israeli court on charges of “crimes against the Jewish people” (Benhabib 2000: 66). Hannah Arendt later described Eichmann’s role in the Holocaust as “terrifyingly normal”. For Arendt (1963: 129), Eichmann was “neither perverted nor sadistic”; rather, his crimes were horrifying precisely because he ‘committed’ them with a clear conscience. Indeed, when the Israeli police first interrogated Eichmann in Jerusalem, they were surprised by his repeated insistence that he “always carried out his duty to the letter”, as if the Israelis would interpret such diligence as a testimony to his upstanding character (Swift 2009: 66). Neither was Eichmann ‘banal’ just because of his freedom from psychopathy - Arendt repeatedly observed that the man was of “mediocre” intelligence, and thus prone to uttering both contradictions and clichés (Arendt 1963: 27). Despite the apparent fact that he was outstanding only in the extent of his mediocrity, the Israelis found Adolf Eichmann guilty chiefly of “crimes against the Jewish people with intent to destroy the Jewish people”, and finally executed him on 31 May 1962 (Benhabib 2000: 67).

For Arendt and many others, Eichmann’s trial and execution highlighted not the horrors of the Holocaust, but the failure of the Israeli tribunal to produce anything other

than an exceptionally retroactive and selective version of “victor’s justice” (Baade 1961: 410; Arendt 1963: 128; Minow 1998: 27; Turley 2000: 674; Bass 2002a: 1044). The tribunal attempted to mete out a symbolic punishment to Adolf Eichmann that would resonate on the international stage; instead, they created an enigma which I believe encompasses the insoluble problem or *aporia* of meting out true ‘justice’ in the wake of atrocities such as the Holocaust. This paper uses the ‘Eichmann aporia’ as a starting point from which to problematize attempts at transitional justice in the so-called “postmodern” or “late capitalist” era (Lyotard 1979; Mandel 1978). My thesis concerning the Eichmann aporia is two-pronged. First, I claim that the aporia’s insolubility arises from the unprecedented nature of crimes such as those that comprised the Holocaust; and second from the visibility of “determinant judgment” (Kant 2000 [1790]) in attempts to mete out punishment for such crimes. I will expound upon this assertion in three sections: first, I offer a brief exegesis of the philosophical and sociological schema that is relevant to my argument. Second, I solidify these perspectives with reference to substantive problems within the trial of Adolf Eichmann. Finally, I conclude with a discussion of the possibilities for a postmodern model of “reflective” transitional justice (Kant 2000 [1790]; Lyotard 1979).

### **Derridean Deconstruction and Juridical Aporiae**

Philosophers often invoke the concept of *aporia* to refer to a problem or paradox that is insoluble, but which does not involve irrationality or unreasonableness on the part of any of the actors involved. The philosopher Jacques Derrida was particularly interested in *aporiae*, as he believed an examination of the tensions involved in such

instances could yield a more sophisticated or de-naturalized understanding of the situation (Royle 2003: 92-93). In a famous essay entitled “Force of Law”, Derrida (1990) identifies three aporiae which he believes characterize the relationship between law and justice. In order of appearance in Derrida’s (1990: 961-967) essay, the aporiae are: “the *epoche* of the rule”, “the ghost of the undecideable”, and “the urgency that obstructs the horizon of knowledge”.

Notwithstanding his convoluted prose style, Derrida’s argument concerning each aporia is actually quite straightforward. The “*epoche* of the rule” (Derrida 1990: 961) concerns the commonsense observation that in order to “deliver justice” one must have free will; however, no judge ever freely delivers a ruling – each of her judgments are based upon an existing law.<sup>1</sup> In this sense, the law-abiding judge is always to some extent a “calculating machine”, doomed to simply apply and legitimate pre-existing laws (Derrida 1990: 961). On the other hand, judgments that do not follow a set of predetermined rules are arbitrary and thus also unjust; as such, the application of the law is always violent, because in its effort to avoid arbitrariness it forces each unique individual case to conform to what one can ironically describe as the prejudice of the law (Lawlor 2010: para. 26).

In referring to the “ghost of the undecideable”, Derrida (1990: 963) highlights the omnipresence of the insight extracted from the first aporia, which holds that true justice is in fact impossible. In one sense, this omnipresence is expressed in the metaphor of the ‘ghost’ that inevitably ‘haunts’ both judges and other subjects of justice; further, the undecideability of the aporia arises from the fact that it contains elements of justice and injustice, but cannot be ‘fully’ or ‘truly’ just as a result of the tension between the two.

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<sup>1</sup> In Derrida’s usage, the word ‘*epoche*’ is synonymous with ‘suspension’. See Lawlor (2010).

Finally, Derrida's "urgency that obstructs the horizon of knowledge" refers to the situation in which justice is indeed impossible, but constantly makes obvious the urgent need for its own presence, as evidenced by the suffering of oppressed peoples all around the world (Lawlor 2010: para. 26). In Derrida's (1990: 967) words:

"A just decision is always required immediately, 'right away' . . . [but] it cannot furnish itself with infinite information and the unlimited knowledge of conditions, rules, or hypothetical imperatives that could justify it".

As such, the moment of judgment in the face of the impossibility of justice is actually a moment of madness – it is doomed to never accomplish its own purpose.

In this binary juxtaposition of law and justice, Derrida accomplishes what he terms 'deconstruction'. Contradictory definitions of deconstruction abound in both philosophical and sociological literature, but Derrida (1985) does offer a fairly clear definition in his "Letter to a Japanese Friend". In the letter, Derrida first begins with a negative definition: he claims that deconstruction is not "destructive" (Derrida 1985: 2-3), neither is it "an analysis" nor "a critique" (Derrida 1985: 3). Similarly, deconstruction is not a "method", an "act", or an "operation" (Derrida 1985: 4). In this sense, the word 'deconstructionism' is an oxymoron. Indeed, Derrida purposely avoids the verb "to be" in his definition of deconstruction; however, he argues that deconstruction "takes place" when an observer can see "the blind spots within the dominant interpretation" (Critchley and Mooney 1994: 366). This is precisely what Derrida gathers from the deconstruction of the opposition between law and justice – from Derrida's account, it is clear that whatever we mean when we say 'transitional justice', we cannot mean 'justice' in its true sense. If we accept the above deconstruction, we know that true justice is in fact impossible, yet always urgently necessary.

Viewed in light of Derrida's deconstruction of the law-justice binary, transitional justice is thus a highly problematic exercise – one that is fraught with both political contestation and conflicting logics. Of all the attempts at international transitional justice since the Allied-backed trials of German WWI commanders at Leipzig in 1919 (Bass 2002b: 59), the state of Israel's prosecution of Adolf Eichmann in 1960 stands out as particularly controversial. I now turn to the specific details of Eichmann's case in order to illuminate the relevance of the above theoretical discussion.

### **Attorney-General of the Government of Israel v. Adolf Eichmann**

The cynical historian will posit that Adolf Eichmann's fate was sealed the moment an Israeli Mossad agent knocked him unconscious and bundled into a getaway car near his home on the evening of 11 May 1960. The agents held Eichmann in a makeshift cell at an Israeli safehouse in Buenos Aires and 'interrogated' him for nine days before sneaking him aboard an El Al flight to Tel Aviv on 20 May 1960 (Cesarani 2007: 233). After Eichmann's arrival in Israel, Prime Minister Ben-Gurion<sup>2</sup> announced to the Knesset that:

“One of the greatest Nazi war criminals, Adolf Eichmann, who was responsible together with the Nazi leaders for what they called ‘the final solution to the Jewish question’ . . . was found by the Israeli Security Services . . . [he] will shortly be put on trial under the Nazi and Nazi Collaborators Act” (Lippman 1982: 1).

It appears that as far as Ben-Gurion was concerned, there was no doubt that Eichmann was personally “responsible” for the Final Solution. As noted by several legal historians, such prejudice overshadowed the lead-up to Eichmann's trial – which was broadcast internationally on television - and threatened to delegitimize the entire process in the eyes

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<sup>2</sup> David Ben-Gurion was Israel's first Prime Minister; he headed the Israeli government between 1948-1954 and 1955-1963. The Knesset is the Israeli legislature.

of international audiences (Baade 1961; Lasok 1962; Fawcett 1963; Lippman 1982; Turley 2000). Prejudice, however, would prove to be neither the only nor the most salient problem with Eichmann's trial.

Aside from the international tort that Israel inflicted on Argentina by violating its territorial sovereignty (UN Security Council 1960), the Eichmann trial violated two foundational principles of the Continental legal tradition, of which the Israeli juridical system is mostly a product: *nullum crimen sine lege*<sup>3</sup> and *nulla poena sine lege*<sup>4</sup> (Green 1962; Chao 2006: 47). Eichmann was charged under the Nazis and Nazi Collaborators (Punishment) Act that the Knesset passed in 1950, even though neither the law nor the state of Israel were in existence at the time that Eichmann committed his crimes (Israel Ministry of Foreign Affairs 2008). Most controversially, the Act retroactively classified Eichmann's membership in the SS as criminal, in accordance with Article Nine of the International Military Tribunal Charter, which was first applied at Nuremberg in 1945 (International Military Tribunal 1945: Article 9). Since the Israeli prosecution could easily prove that Eichmann was a member of the SS (he was head of the SS "Office for Jewish Questions" between 1938 and 1945), his complicity in the crimes committed by the SS was established by default (Arendt 1963: 115); however, the prosecution also wanted to prove that Eichmann was *personally* responsible for 'crimes against the Jewish people with intent to destroy the Jewish people', 'crimes against humanity' and other war crimes (Chao 2006: 48). Indeed, Eichmann's membership in the SS automatically guaranteed that he would receive a minimum seven year prison sentence, but it quickly became apparent that the prosecution's goal was to pursue a strong enough conviction to

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<sup>3</sup> No crime can be committed except in accordance with the law.

<sup>4</sup> No punishment can be imposed without having been prescribed by a previous penal law.

warrant the death penalty (Green 1962: 458).

Dr. Robert Servatius was Eichmann's sole defense counselor for the entire trial, and pursued what can broadly be described as a "rupture defense" (Christodoulidis 2009: 3). The goal of a rupture defense is to exploit the "collision of worlds" which results in cases of revolutionary struggle, regime change, or transitional justice; or in a Nietzschean lexicon, the revaluation of values which occurs in the genealogical transition between semantic generations of 'the just'. A rupture defense highlights the arbitrary nature of the relation between 'accused' and 'accuser', and seeks to portray any ruling other than an acquittal as an outpouring of victor's justice (Vergès 1968: 97). In his brilliant reading of Hannah Arendt's (1963) *Eichmann in Jerusalem*, the philosopher Giorgio Agamben notes how within the context of the Israeli courtroom, one can actually view Eichmann as the Nazi equivalent of the Israeli prosecutor (Agamben and Butler 2009). Indeed, Dr. Servatius repeatedly insisted that Eichmann was a 'man of the law' who simply carried out "acts of state", not unlike the prosecutor and jurists they were faced with (Arendt 1963: 115). Servatius also tried to make the case that Israel did not have the jurisdiction to try Eichmann, since he was not Israeli, did not commit any offences in Israel, and had allegedly harmed individuals who were not Israeli at the time of the commission of the offences (Baade 1961: 416).

Since it became obvious in the early stages of the trial that Eichmann did not commit a single count of murder or assault with his own hands (Arendt 1963: 115), the prosecution spent a considerable amount of time attempting to reveal that Eichmann actually experienced a moral conflict about his role in the SS, but instead chose to ignore his conscience in favor of pursuing upward mobility in the Nazi party hierarchy. This



became an increasingly problematic position for the prosecution to pursue, especially as Eichmann's various statements and communications from the end of the war came to light. In an address to the SS men under his command in 1944, Eichmann allegedly stated that:

“I will laugh when I leap into the grave because I have the feeling that I have killed 5,000,000 Jews. That gives me great satisfaction and gratification” (Cesarani 2007: 197).

Perversely, Eichmann's apparent delight in his role in the Nazi Final Solution was perfectly legal under German law during World War II – in fact, Eichmann's superiors almost certainly encouraged it, and such zeal doubtlessly helped to advance Eichmann's career.

On 11 December 1961, the Israeli tribunal finally delivered its verdict. Eichmann was found guilty of fifteen counts of “crimes against the Jewish people with intent to destroy the Jewish people”, crimes against humanity, war crimes, and membership in three criminal organizations – the SS, SD, and the Gestapo (Arendt 1963: 114). It should be noted that Eichmann was found *personally* responsible for these crimes, even though he was not physically implicated in any of the acts themselves; as such, Dr. Servatius' claim that Eichmann only “aided and abetted acts of state” which resulted in crimes was dismissed in its entirety (Arendt 1963: 115). Instead, the court found that Eichmann had actually “acted as his own superior” (Arendt 1963: 116) and that his actions eclipsed those who were further up on the Nazi Party hierarchy – a claim that remains quite controversial to this day. Despite an appeal and pleas for mercy from both Eichmann and various Jewish and Gentile groups around the world, the tribunal sentenced Eichmann to death on 29 May 1962, and had him executed two days later.

As Hannah Arendt (1963: 130) would later cynically suggest, a more honest verdict for Eichmann might have read:

“You told your story in terms of a hard-luck story, and, knowing the circumstances, we are, up to a point, willing to grant you that under more favorable circumstances it is highly unlikely that you would ever have come before us or before any other criminal court . . . [but] in politics obedience and support are the same. And just as you supported and carried out a policy of not wanting to share the earth with the Jewish people and the people of a number of other nations - as though you and your superiors had any right to determine who should and who should not inhabit the world - we find that no one, that is, no member of the human race, can be expected to want to share the earth with you. This is the reason, and the only reason, you must hang.”

As such, an alternative way to interpret the tribunal’s ruling is that Eichmann’s true crime was not the autonomous commission of crimes against humanity, but the *failure* to resist both the orders he received and the ‘illegal’ organization that he worked for. Indeed, what is so chilling about the Eichmann case is that many (if not all) of us are implicated in power structures that we have to come to view as natural and legitimate, but which perpetuate oppression and inequality to some degree. However, it is only when these structures crumble – or are reversed – that we begin to truly awaken to the implications of our actions. To this day, I believe that much of the fascination with Adolf Eichmann’s trial in Jerusalem stems from the fact that – to their horror – many people are actually able to see a brief reflection of themselves in Eichmann, the genocidal bureaucrat.

### **Recognizing the ‘Differend’: Kant, Lyotard, and Reflective Judgment**

In the late eighteenth century, Immanuel Kant (2000 [1790]: 43) drew a distinction between ‘reflective’ and ‘determinant’ judgment which still resonates in debates on morality today. For Kant, a “determinant judgment” occurs when the outcome of individual cases are predetermined by an existing theory or structure; for example, when

“the structure of arithmetic determines the result of its internally generated problems, such as those of addition or subtraction” (Docherty 1994: 409). By contrast, Kant developed the idea of the “reflective judgment” to describe appraisals of beauty or other highly subjective qualities which are not guided by an overarching theory or structure (Swift 2009: 62). In other words, while the individual may have a certain set of aesthetic tastes, these tastes do not automatically generate a standardized judgment when presented with a new *objet d’art*. It is precisely this tension between determinant and reflective judgment that Hannah Arendt highlights in her seminal report on Adolf Eichmann’s trial in Jerusalem. As Arendt (1963:137) wrote:

“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 ... those [Germans] 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”.

In Arendt’s view, Nazi war criminals were not the only actors that failed to make reflective judgments - the Israeli postwar tribunal arguably made exactly the same mistake (Swift 2009: 63). In this sense, Eichmann’s trial was thus not about Eichmann at all - the latent function of the court was not only to judge Eichmann’s actions, but also the legitimacy of the fascistic *ideology* which influenced him prior to- and during the Second World War. By ignoring Eichmann’s banality, his normalcy, and his bourgeois predictability, the Israeli tribunal simply transformed him into a conduit through which they could retroactively channel a politico-moral appraisal of the insanity of the Holocaust. In doing so, the Israelis failed to take advantage of an opportunity to ask important ‘reflective’ questions about fascism and genocide *vis-à-vis* ideology and human

nature.

In reflecting upon the Holocaust, Jean François Lyotard (1988) advanced the notion of the “differend” to encompass the problem of passing determinant judgments in the postmodern age. In legal discourse, a ‘differend’ is a specific type of aporia which arises when two opposed parties in a dispute are in the right according to their own “terms of reference, but:

“cannot accommodate, or refuse to accommodate, with the other party; and there is no common ground or third set of terms of reference which will allow an adjudication between the two parties while respecting their terms of reference (Docherty 1994: 408).

In other words, the differend exists wherever those who are in a position to pass judgment lack a neutral framework through which to effectively process radically different narratives. This acknowledgement of judicial inadequacy stands in direct opposition to modernist conceptions of justice. Historically speaking, “the just” is often associated with “the true” - justice often depends on a “revelation of truth” or an uncovering of fact (Malpas 2003: 53-54). Under modernism, the task of judgment is essentially an epistemological one - it involves a process of stripping away illusory layers of appearance to reveal the true nature of reality beneath (Docherty 1994: 409). Much of modern thought is concerned with this project - from the Marxist task of shedding ‘false consciousness’, to the Ferdinand de Saussure’s semiological search for a ‘signified’ beneath each linguistic ‘signifier’, to Claude Lévi-Strauss’ attempts to uncover a universal structure of kinship relations in anthropology (Silverman 1994: 323-325).

Lyotard’s point is that such structuralism is no longer an adequate model for seeking justice in the postmodern present; after Auschwitz, the grand historical metanarratives of Enlightenment ‘Reason’ and ‘Progress’ are demystified as social

constructions, and history becomes a series of ‘events’ which are open to interpretation. Instead of the structuralist quest to distinguish between ‘appearance and reality’, Lyotard’s imperative to develop the capacity for reflective judgment highlights history as a relation between the “appearance and disappearance” of different forms of ‘the real’ or ‘the true’ (Docherty 1994: 409). This style of analysis acknowledges that Nazism did indeed contain its own style of ‘morality’ which guided the actions of its adherents (Koonz 2003) - notwithstanding how twisted such morality appears to contemporary observers - but stops short of careless relativism or nihilism. It is precisely this capacity for reflective judgment that I believe needs to be cultivated in order to develop a more legitimate transitional jurisprudence for the coming decades.

## **Conclusion**

In *Survival in Auschwitz*, Primo Levi (1986: 90) describes an identifiable category of concentration camp prisoners called the *Muselmänner* (Muslims):

“One hesitates to call them living: one hesitates to call their death death, in the face of which they have no fear, as they are too tired to understand . . . if I could enclose all the evil of our time in one image, I would choose this image which is familiar to me: an emaciated man, with head dropped and shoulders curved, on whose faces and in whose eyes not a trace of thought is to be seen”.

The Auschwitz prisoners called these people Muslims because of the literal translation of the word ‘Islam’: peaceful submission to the will of God (Agamben 1999: 45). Above all, the *Muselmänner* were resigned to their fate – a condition that Giorgio Agamben (1995) refers to as “bare life” – both physically and psychologically, they were totally exposed to the power of the state. Tragically, even the most casual perusal of history shows that Auschwitz was not the sole domain of the *Muselmänner*; in actuality, they

dwell wherever exploitation reigns supreme. Perhaps even more tragically, exploitation knows no ideological boundaries – neither capitalist, communist, nor fascist. It is not my intent to conclude that Eichmann’s willful adherence to Nazism absolves him of responsibility for his actions; rather, my point is that we should not judge Eichmann without simultaneously judging ourselves. A self-reflexive model of transitional jurisprudence is thus based on a politics of anxiety; it notes the self-affirming tendencies of all ideologies and constantly seeks to transcend its own descent into determinant judgment through a hermeneutics of suspicion. Such an approach may in fact be the only plausible way forward if transitional justice initiatives are to maintain their legitimacy throughout the coming decades.

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