



Jonathan Rée

Legal evil

The current trend in criminal jurisdiction is to shift emphasis away from the accused and towards the victims of crime. This reflects a broader trend which is concerned with shaping communal memory and forging political traditions rather than only holding individuals to account. The Adolf Eichmann trial in 1961, Jonathan Rée argues, set a legal precedent in the sense that the trial was foremost concerned with the retribution for the suffering of a people. Returning to Hannah Arendt's controversial book on the trial, *Eichmann in Jerusalem*, what are the implications and dangers of the "victim-centred" approach?

It is the received wisdom of legal theory that the point of any system of laws is that it takes the functions of vengeance and retribution out of the hands of individuals and entrusts them to the state instead. And the state, like the deity, must be no respecter of persons. It has to treat similar offences in similar ways: an assault is an assault, even if one victim is a saintly Christian determined to turn the other cheek and another an enraged fanatic demanding vengeance a thousand times over. The idea that individual victims have "rights" that need to be kept in some kind of equilibrium with those of alleged criminals shows a complete misunderstanding of the objectivity and impartiality that are essential to any sustainable system of law.

But that is quite a narrow way of looking at it. The purpose of the overall movement for "victim's justice" is not so much to make room for vengeful sentences as to shift attention from the punishment of criminal guilt towards the remembrance of innocent suffering - and not just the special sufferings endured by particular individuals, but the systematic sufferings of groups, societies, and collectivities of all kinds. Victim's justice is broad where ordinary justice is narrow: it is concerned not only with holding individuals to account but also with shaping communal memory and forging political traditions. While ordinary justice focuses on guilt and the criminal's mind, victim's justice is interested in evil and the state of the world.

Evil is a hard word of course, and apt to make the boldest lawyer nervous. The Nuremberg War Crimes Tribunal of 1945–6, which was conducted from the point of view of victors rather than victims, gave it a very wide berth, and the judges concentrated on breaches of the laws of peace and war rather than so-called "crimes against humanity". Half a century later, in 1995, the South African state took a bold initiative by setting up an inquiry into the injustices of apartheid - a process that would be concerned not so much with the guilt of criminals as with the sufferings of victims. The South African Truth and Reconciliation Commission, which has since been imitated by similar inquiries in East Timor, Sierra Leone and Peru, owed its success to the fact that it recognised that victim's justice may be better served by an open judicial

investigation than by a conventional court. It was more interested in documenting injustices than in laying blame, and it is notable that its final report did not shrink from describing the apartheid regime as "evil".

These victim-centred processes have learned some of the lessons, it seems, of the controversial trial of Adolf Eichmann. Eichmann was a Nazi functionary who took an interest in "the Jewish question" and had special responsibility for implementing the "final solution". In 1960 he was kidnapped in Argentina by the Israeli secret police and brought to Jerusalem to face accusations of crimes against humanity and against the Jewish people. The trial started in April 1961, and the chief prosecutor, Attorney General Gideon Hausner, a close associate of Prime Minister David Ben Gurion, immediately made it clear that he was not going to confine himself to the activities of the bald and bespectacled defendant sitting before the court in a bullet-proof glass cage. "Here with me at this moment stand 6 million prosecutors," he began; "but alas they cannot rise to level the finger of accusation in the direction of the glass dock and cry out *j'accuse* against the man sitting there."

Addressing himself not to the three judges who were trying the case, but to the members of the public who crowded into the court room and the tens of thousands of Israelis who were listening to continuous live coverage on Israel radio, Hausner spent months putting together the first really comprehensive survey of the holocaust. He relied on the testimony of scores of "sufferings of the Jewish people witnesses", seeking to prove that they had been so worn down by Europe's perennial anti-Semitism that they had no choice but meekly to accept their fate. He also made the argument that the real author of the final solution was not a German but an Arab - the Grand Mufti of Jerusalem - and that the poison of anti-Semitism, far from being destroyed with the defeat of the Axis powers, had been preserved throughout the Arab world. These arguments obviously had as much to do with the legitimacy of the Israeli state as with the activities of the man who was supposed to be on trial, and when Eichmann was hanged in May 1962 (his guilt had never been in doubt), no one was very interested.

The Eichmann trial had the privilege of entering history together with an extraordinary running commentary by a great political thinker. Hannah Arendt was born to Jewish parents in Hamburg in 1906 and received an education in the highest traditions of German philosophy before emigrating in 1933 and eventually settling in New York. She came to Israel to cover the trial for the *New Yorker*, and her reports were gathered together in *Eichmann in Jerusalem* in 1963. Arendt was very critical of the entire legal process, especially Hausner's digressive and self-indulgent conduct of the prosecution, but she supported both the verdict and the sentence. Eichmann himself was vain and ridiculous in her opinion - indeed his pompous and inept use of the German language was sometimes "quite hilarious" - but however stupid he was, he had taken part in "the greatest crime in recorded history" and no one could be expected to continue to share the earth with him. His trial, according to Arendt, had been a long demonstration of the nature of evil, and she was as keen as anyone to see him sentenced to death.

Eichmann in Jerusalem is a great book, even a great Jewish book, but it was loathed by leaders of Jewish opinion in Israel and New York. Arendt's descriptions of Eichmann's pettiness were seen as attempts to excuse or justify him, and her summaries of trial evidence about Jewish collaborators and about non-Zionist Jews and their role in the resistance were treated as attempts to blame the Jews for the holocaust and undermine the Zionist cause. Arendt was

subjected to a campaign of vilification by the Anti-Defamation League and other Jewish defence organisations, and had to get used to being called an anti-Semite and even a Nazi. In an open letter published in *Encounter*, her former friend Gershom Scholem denounced her as "heartless", "malicious", and lacking in "love of the Jewish people". Her calm and brilliant reply - surely one of the best public letters of the century - elicited no response. In Israel itself, she was effectively silenced.

A publisher who had procured a Hebrew translation of the book was persuaded not to issue it, and Scholem's denunciation was reprinted in Hebrew many times over, but always without Arendt's reply. (A fresh translation of *Eichmann in Jerusalem* was eventually made, and appeared in Israel in 2000.)

Arendt had used a brilliant phrase to sum up the philosophical conclusion she drew from the trial as a whole: "the lesson of the fearsome, word-and-thought-defying *banality of evil*." The words "banality of evil" were incorporated into the subtitle of the book, and readers seem to have had extraordinary difficulty in seeing what they meant. In particular, Arendt's invocation of banality has been repeatedly interpreted as if it were a rough and indirect way of saying that Eichmann's offences, and perhaps the horrors of the Holocaust as a whole, were really rather trivial, and not worth making a fuss about. But Arendt was a philosopher, and she did not express herself in approximations. Her reason for speaking about banality was, as she patiently explained to Scholem, not to minimise evil in general, still less that of the holocaust, but to suggest that it is always wrong to see evil as "deep" and "demonic". Evil may be devastating and extreme, but it can never be profound: hence its essential banality. And in insisting on the word "evil", Arendt was deliberately reaching back to pre-modern concepts, particularly Biblical ones: concepts, she thought, that would allow people to face up to their disasters and calamities with ruthless but unaccusing calmness, instead of impotent, vindictive rage.

Arendt's philosophical training in Germany (particularly with her mentor Martin Heidegger) had made her suspicious of the modern obsession with private subjectivity. She saw the drive to psychologise every problem as a threat to clear thinking not only in philosophy but in public life as well, especially in matters of crime and punishment. Public deliberations needed to be kept separate from private emotions, including the emotions of victims and offenders involved in legal processes. Arendt concluded *Eichmann in Jerusalem* by lamenting the fact that the trial had got hung up on "the subjective factor", or in other words on "the assumption current in all modern legal systems that intent to do wrong is necessary for the commission of a crime." She preferred the old-fashioned notion that a crime is a crime simply because it "offends nature", regardless of all the subtleties of motivation and personal circumstance that will inevitably attend it. Her conception of evil was designed to be sombre without excluding hope, and pitiless without excluding love. It is a shame that so many people would not or could not listen. The banality of evil is no excuse.

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