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Hannah Arendt

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Introduction

Hannah Arendt (Germany 1906 - United States 1975) is one of the most important political thinkers of the 20th century and is mostly known for her writings on political action, evil and totalitarianism. She studied philosophy in Marburg and Heidelberg, Germany, with such renowned German philosophers as Martin Heidegger and Karl Jaspers (Young-Bruehl 1982, 44, 48). Arendt's political awakening took place when the Nazis ascended to power in Germany, and she joined the resistance movement. In 1937, she fled the Nazi regime first to France and then to the United States, where she lived the rest of her life and produced the majority of her intellectual work. (Arendt 2000, 6–7; Young-Bruehl 1982, 92, 113)

Arendt never systematically developed a theory of law. However, nearly all her works deal with some aspect of law, and in recent years scholars across academic disciplines have brought to light the insights and importance of Arendt's legal thought (for instance Goldoni & McCorkindale 2012; Volk 2015). Arendt lived through the Second World War and saw how traditional political and legal concepts became unable to respond to the horrific events. She was concerned to find novel ways of orienting ourselves politically and legally in a post-totalitarian world. This article introduces key aspects of Arendt's jurisprudential thinking through three themes that all shed light on the boundaries of law: law and politics, the problem of human rights, and law and evil, exemplified by the trial of Adolf Eichmann.

Law and Politics: Arendt's Constitutionalism

Arendt traces to ancient Greece the roots of the conception of law as a stabilizing and polity-constitutive force. In her reading, for the Greeks, law, *nomos*, was the ground of the political life in the *polis* that had to be erected before politics could take place (Arendt 2005, 182–183). Laws are artefacts comparable to houses, public squares and books. They form the stable, non-political foundations of the public space in which political action and freedom may continuously appear, and demarcates this space from what lies outside it, the private sphere and other polities. In *The Human Condition* (1958), Arendt distinguishes lawmaking from politics and emphasizes that for the Greeks "the lawmaker was like the builder of the city wall, someone who had to do and finish his work before political activity could begin" (Arendt 1998, 194).

However, Arendt does not simply claim that law is prior to politics and establishes its condition of possibility (see Barbour 2012). She is also inspired by the Roman notion of law, *lex*, which, she explains, came about through the explicitly political act of peace treaties, the binding of new contracts between different, formerly hostile peoples (Arendt 2005, 179). The notion of law as a durable tie and relation between people emerging from mutual contract fascinates Arendt, for in her understanding, political action of a plurality of people forms "an in-between," binds them into acting in concert, and the task of law as a contract is to maintain this bind across time (Arendt 1998, 243–245).

According to Arendt, the roots of legitimate political power lie in "[t]he mutual contract by which people bind themselves together in order to form a community," and such a contract "is based on reciprocity and presupposes equality; its actual content is promise, and its result is indeed a 'society' or 'cosociation' in the old Roman sense of *societas*, which means alliance" (Arendt 1990, 170). She is particularly interested in the American constitution, which she sees as a historical – and thus factual as opposed to fictional – example of John Locke's horizontal social contract. Locke criticized Thomas Hobbes' vertical social contract, which transfers all powers to the sovereign, and according to Arendt, the American constitution follows Locke as it "limits the power of each individual but leaves intact the power of society" (Arendt 1972, 86).

For Arendt, the American Revolution exemplifies political freedom in its act of founding a new polity. It shows how a polity can emerge out of political freedom to begin something new and be made a durable entity through "promises, covenants, and mutual pledges" (Arendt 1990, 181). In her famous argument, the French Revolution turned out to be a pale shadow of the American one and succumbed to terror. This was ultimately because the French were attached to the idea of the sovereign, to the idea of the One People that overrode the plurality of individuals and opinions the expression and appearance of which are, for Arendt, the quintessence of politics and political freedom and "precisely the quality that makes men human" (Canovan 1992, 27).

Societas is, as we can see from its aspect of alliance, ultimately reliant on the obligation to keep promises. Arendt emphasizes the importance of the human capacity to make and keep promises in several of her writings: promises are the foundation for continuity and the only possibility humans have – often to a very limited degree – to determine the future (Arendt 1972, 92–93; Arendt 1998, 244–254). As a basis for the continuity of *societas*, promises serve the same purpose as laws, but on a more fundamental level. Arendt emphasizes that *societas* is prior to government: it is an alliance between individuals "who contract for their government after they have mutually bound themselves" (Arendt 1972, 86). *Societas* is not only prior to, but also to a certain extent independent of government. Like Locke, Arendt holds that *societas* can remain intact, and thus ground the possibility of resistance and/or a new contract, when a government dissolves or degenerates into tyranny (Arendt 1972, 87; Locke 1967, 429).

Societas does not survive totalitarianism, though, and its destruction forms an important aspect of Arendt's analysis of how totalitarianism destroys politics. True alliances do, according to Arendt, require plurality and as she argues in *The Origins of Totalitarianism* (1951), it is significant for the particular kind of terror exercised by totalitarian regimes that they destroy the public space – be it the free press or the freedom of associations – that makes the emergence of plurality possible (Arendt 1976, 465–466).

In her essay "Civil Disobedience" (1972), inspired by ongoing protests against the US involvement in the Vietnam War, Arendt discusses the conditions under which it is justified to break the law. She emphasizes that it is essential to distinguish consent to *societas* from consent to individual laws and specific policies: there are situations where *societas* may justify breaking the law. Arendt considers civil disobedience to be an American phenomenon, closely tied to the American legal system and its distinctions between the constitution, federal law and state laws (Arendt 1972, 83). She criticizes the idea that representative democracy in itself creates

an obligation to obey the law by giving people the right to vote. The idea is particularly flawed when representative government is in crisis, as Arendt claims it was in the US in the early 1970ties (Arendt 1972, 89). She holds that the only way to revitalize the foundation for consent to law is to revitalize institutions of actual participation, such as voluntary associations (Arendt 1972, 94–96).

Arendt reworks the Republican constitutional tradition in thinking that the authority of the Republic and its law lies in the beginning, in the Founders' act of foundation and constitution-making, and that this "beginning" cannot simply be something in the past. Rather, the Constitution must be "augmented" by new acts in the present that express its prevailing authority by renewing it. Civil disobedience ought to be added as a fundamental right to the American Constitution, Arendt argues, because the voicing of one's opposition to a particular law is a way of both participating in the political debate concerning the form that laws as the "worldly artifice" ought to take and showing one's respect for the Republic as a whole. In that sense, civil disobedience is part of the "caring for a world that can survive us and remain a place fit to live in for those who come after us" (Arendt 1993, 95). This political care for the world is the only possibility that we have in our time to preserve its authority and stability.

The Problem of Human Rights

The Nazi regime stripped Arendt of her German nationality. She lived in exile as a stateless person for years, until she finally received new citizenship in the US (Young-Bruehl 1982, 113). Arendt thus personally experienced what it is to live as a refugee outside the legally protected membership in a political community. In *The Origins of Totalitarianism*, Arendt presents her influential analysis of the structural "decline" that European states underwent after the First World War; a decline ultimately intertwined with what she calls the "end of the Rights of Man" (Arendt 1976, 267–302). Arendt identifies two aspects that were particularly striking in this decline: the creation of new national minorities as an effect of the Versailles Peace Treaties, such as Germans in Poland or Macedonians in Albania, and the phenomenon of mass refugee movements. The appearance of these two groups, minorities and refugees, and the state response to their appearance, constituted, for Arendt, an unprecedented legal-political situation in Europe. The plight of refugees and minorities differed from the "usual" sufferings of the unemployed or those whose civil rights had been violated, as they rather had

no rights recognized by the state at all: they were rightless (Arendt 1976, 269). The displacement the minorities and refugees "forced people to live outside the scope of all tangible law" (Arendt 1976, 293). Regardless of the recognition of minority rights as an element of the Versailles Treaties, both groups had lost the protective bond of *equal* citizenship in a nation-state.

The refugee was also an anomaly in the eyes of international refugee law of the time that only knew religiously motivated persecution and political dissidence as grounds for recognizing someone as a refugee. The new refugees were however persecuted because of their ethnic identity, not because of their political actions. The unprecedentedness of their condition in the history of forced migration consisted of the fact the refugees could not find a new home anywhere else, thus being forced outside the legal world completely. In Arendt's analysis, the plight of interwar refugees was an unprecedented situation of displacement: they were, Arendt writes, "depriv[ed] of a place in the human world which makes opinions significant and actions effective" (Arendt 1976, 296).

According to Arendt, such loss of one's own place left individuals in an exceptional position of "abstract nakedness of being human and nothing but human" (Arendt 1976, 297). Suddenly there were millions of people that European states did not recognize as their full-fledged members. States only protected the rights of those they selected for protection, not the human being as such. Arendt analyzes how old European democracies became incapable of re-connecting themselves to their own constitutional principle of legal equality at the moment when they faced people whose presence challenged the nationalist principle "one nation, one state." Arendt's analysis is a poignant description of state-action that responds to the unwanted presence of people by, first, depriving them of equal legal statuses or refusing to recognize that they have any, and then resorting to "legally emancipated" means of police violence, or in the best of cases to humanitarian aid, to deal with the stubborn presence of these people (Arendt 1976, 287; see also Agamben 1998).

The "kill[ing of] the juridical person in man" (Arendt 1976, 447) was one of those elements that, according to Arendt, in time crystallized into the totalitarian regime. Arendt observed that concentration camps were not prisons, but rather spaces of legal exception. Their inmates were precisely "merely human" and "absolutely innocent": they could not be considered criminals, guilty or not guilty of illegal actions (Arendt 1976, 447–448). Arendt observed that to be made "merely human" is a horrific form of de-individualization and dehumanization, and the stripping individuals of their meaningful place in a political-legal community opens the door

to the possibility of their physical destruction. The blind spot of the Enlightenment idea of inalienable natural rights was that rights in actual reality are forms of recognition and inclusion of the individual into legal, political and social institutions. "Inalienable" human rights turned out to mean nothing the moment people lost their membership in established legal-political institutions, national or international. Arendt's radicality vis-à-vis the Western jurisprudential tradition rests on her claim that becoming recognized as a juridical person is a condition for any meaningful notion of human rights. The citizen grounds a recognizably human life, rather than the other way around (Balibar 2007, 732).

It is against this background that Arendt argues for the existence of "the right to have rights", the right to "belong to some kind of organized community" (Arendt 1976, 296). What she calls for in response to the horrors of the 20th century is not unfettered universalism of a single global political community without borders (Arendt 1976, 302), but rather a novel understanding of the political-legal community that preserves both the humanity of the individual human being and the plurality of their communities.

An important part of recent scholarship on Arendt has focused on interpreting the meaning of the enigmatic notion of "the right to have rights." Scholarly understandings and uses of this notion can roughly be divided into three groups. The first group of scholars reads this notion against the background of Arendt's oeuvre as a whole and articulates it as a novel moral or ethical foundation of human rights (Birmingham 2006; Michelman 1996). The second group takes from Arendt's analysis heuristic tools with which to analyze contemporary refugee and human rights law as well as the continuing plight of refugees and the persisting "rightlessness in an age of rights," as one commentator puts it (Gündoğdu 2015). The third group understands "the right to have rights" politically, as pointing to political struggles of the excluded for inclusion and recognition of their juridical personality (Barbour 2012; Beltrán 2009). The "right" to rights is about politically claiming or taking one's rights in a situation where one has been found by the state authorities as entitled to none (see Rancière 2004). Whichever approach to Arendt's fascinating but enigmatic idea we choose, however, "the right to have rights" clearly is a notion that highlights the crucial importance of independent judgment and critique of the extant limits of positive legal rights and the framework of recognizing humanity and membership they provide.

Law and Evil: Adolf Eichmann on Trial

In *The Human Condition*, Arendt connects the faculty to make and keep promises, discussed above, with the faculty of forgiving: these are the two faculties by which humans can come to terms with the unpredictability and irreversibility inherent to action (Arendt 1998, 237). She emphasizes that forgiving is "the exact opposite of vengeance," which is a mere "re-acting against an original trespassing" (Arendt 1998, 240). Forgiving is "the only reaction which does not merely re-act but acts anew and unexpectedly, unconditioned by the act which provoked it" (Arendt 1998, 241). Arendt distinguishes forgiving from punishment as well, but here we are not speaking about opposites. Forgiving and punishment are both attempts to "put an end to something that without interference could go on endlessly." They are intimately interconnected because humans are, according to Arendt, "unable to forgive what they cannot punish and […] unable to punish what has turned out to be unforgivable" (Arendt 1998, 241).

In *The Origins of Totalitarianism* and *The Human Condition*, Arendt connects the unforgivable and unpunishable with Immanuel Kant's concept of radical evil (Arendt 1976, 459; Arendt 1998, 241). Later, in *Eichmann in Jerusalem* (1963), these remarks on evil are developed into her controversial claim that Adolf Eichmann's deeds exemplify "the fearsome, word-and-thought-defying *banality of evil*" (Arendt 1994, 252; also Birmingham 2003; Rae 2019). Arendt argues that evil deeds do not require evil motives: except for looking out for his own advantage, Eichmann "had no motives at all" (Arendt 1994, 287). In her interpretation, the trial against Eichmann came to question the juridical assumption that the seriousness of a crime depends on the subjective factor of intent (Arendt 1994, 277). Eichmann may have lacked evil intentions, but this was certainly not an extenuating circumstance. Arendt argues that he was just as responsible for his deeds regardless of whether they were motivated by evil intentions or not.

Arendt's analysis of Eichmann's trial is above all a fierce criticism of what she calls "the cog theory," according to which the Nazi perpetrators, including Eichmann, were mere cogs in a machinery. Arendt does not deny that "the essence of totalitarian government […] is to make functionaries and mere cogs […] out of men, and thus dehumanize them," quite the contrary, but she emphasizes that the "cog theory is legally pointless" (Arendt 1994, 289). The trials against the Nazi perpetrators where of crucial importance exactly because "all the cogs in the machinery, no matter how insignificant, are in court forthwith transformed back into perpetrators, that is to say, into human beings" (Arendt 1994, 289).

Arendt develops her discussion of the de- and re-humanizing of the Nazi perpetrators in her posthumously published lectures on moral philosophy from the mid-1960ies. Here she points out that when perpetrators on trial claimed that they had not acted on their own initiative, they "renounced voluntarily all personal qualities, as if nobody were left to be either punished or forgiven" (Arendt 2003, 111). This voluntary dehumanization is, according to Arendt, what makes limitless evil possible. She continues: "the greatest evil perpetrated is the evil committed by nobodies, that is, by human beings who refuse to be persons" (Arendt 2003, 111). In these lectures Arendt concretizes the banality of evil by describing it as rootless evil. A person is someone who is rooted in the world by using her capacities of thinking and remembering (Arendt 2003, 100). Arendt emphasizes that though a person may be vicious as well as stupid, thinking and remembering will impose some "limits to what he can permit himself to do […] limitless, extreme evil is possible only where these self-grown roots […] are entirely absent" (Arendt 2003, 101).

Arendt discusses the crucial importance of memory and remembering throughout her writings (also Herzog 2002; McMullin 2011). In *The Origins of Totalitarianism*, she compares memory and law: "the boundaries of positive law are for the political existence of man what memory is for his historical existence: they guarantee the pre-existence of a common world" (Arendt 1976, 465). Nobody can be forced to think and remember, but a court in its judgment declares even those renouncing the common world as well as their personhood responsible for their deeds. This is why the trials against the Nazis included an important aspect of re-personalization, not just of the victims, but also of the perpetrators.

Conclusion

In her legal thought, Arendt thus tries to bring together two ideas (see also Honig 1991; Lukkari 2020). First, the idea of law as a precondition and guarantee of the durability of a space within which political action may appear and all members are recognized as equals. Second, the idea of politics, the acting together of a plurality of individuals, as the ultimate source of law. Laws guarantee equality, but a legitimate legal order also requires concerted political action between equals in order to arise. Equality thus is both inside and outside the law, its product and precondition.

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