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**TOTALITARIANISM AND JUSTICE:
HANNAH ARENDT'S AND JUDITH N. SHKLAR'S POLITICAL
REFLECTIONS IN HISTORICAL AND THEORETICAL PERSPECTIVE**

Samantha Ashenden and Andreas Hess

Abstract: We locate Arendt's and Shklar's writings within what Katznelson has identified as an attempt to create a new language for politics after the cataclysm of the 20th Century and Greif has called the new 'maieutic' discourse of 're-enlightenment' in the 'age of the crisis of man'. More specifically, we compare and contrast two related, but in many ways also differing, ways of thinking about totalitarianism and its legal repercussions. To this end, we examine two sets of studies: Arendt's *Origins of Totalitarianism* and *Eichmann in Jerusalem: A Report on the Banality of Evil* and Shklar's *After Utopia – The Decline of Political Faith* and *Legalism: An Essay on Law, Morals, and Politics*. While *Totalitarianism* and *After Utopia* discussed totalitarian ideology and its consequences for modern political thought, the *Eichmann* report and *Legalism* dealt with the question whether and how justice is possible after the extreme experience of totalitarianism. We argue that the maieutic impulse led Arendt and Shklar to find distinct routes to address a common concern. Our paper ends with a discussion of some of the surplus meaning that was generated by the different maieutic performances of the two thinkers.

Keywords: *Hannah Arendt, Judith N. Shklar, justice, law, maieutics, political trials, re-enlightenment, totalitarianism.*

Introduction: From Desolation and the Crisis of Man to the project of Re-Enlightenment

The cataclysm of World War II left its marks on the intellectual landscape, not just in those countries that had directly experienced totalitarian regimes but also in countries that remained outside their control. The experiences of totalitarianism and of destruction on a scale never seen before, as manifested in the extermination of the European Jews and the double-use of the nuclear bomb, together with the continued existence of Stalinism, raised questions as to the limits of not just a few Enlightenment thinkers' conceptualisations of progress for mankind. To be sure, a crisis had already been detected from 1933 onwards, particularly – but not exclusively – by those who had been forced first into French and British, and later American, exile. Yet only after the end of World War II do we see a proliferation of public

debate, in academic journals, magazines, newspapers, and in the form of books. In this debate, identified first by Ira Katznelson in his study *Desolation and Enlightenment* (2003) and taken up again more recently and more cogently and coherently by Mark Greif in *The Age of the Crisis of Man* (Greif 2015), the very conception of man was questioned, as can be seen by title-checking the numerous books and essays that spoke of his (sic) fundamental crisis.

However, as Katznelson and Greif have argued, the debate also contained contributions that seemed to constitute attempts at re-enlightenment (Greif 2015: 22f), a form of enlightenment that was modest, self-reflective and critical of the promise of built-in progress that some advocates of the classic Enlightenment tradition had signalled (Katznelson 2003: 4ff). Instead of throwing out the baby with the bathwater through a dialectical but in effect totalising critique of the Enlightenment (as in the case of Horkheimer/Adorno or Lewis Mumford), such contributions conceded that something had gone wrong and that man was in need of protection, restraint and badly in need of “a new science for a new world” (ibid, 2). Such re-orientation or, in the words of Greif, re-enlightenment did not produce towering figures along the lines of Rousseau, Hume, Kant or Voltaire and certainly never took the form of comprehensive system-building; rather this new generation of post-war scholars and writers purported to protect or attempt to restrain man from his own extreme thought and actions, yet without seeking help from a God or Supreme Being and without a sense of inevitable progress towards the betterment of the human race.

Often this reasoning took on the form of maieutic discourse (24f). Maieutics refers to a classic rhetorical tool that employs the Socratic method of “insistent and forceful questioning” in order to “bring to birth *in another person* answers that will reward the questioner’s own belief in the character of the universal capacity for thinking – and do something to the other person’s character, too” (ibid). Greif points out that there is a strong normative dimension in this: “Maieutics are *shoulds* in discourse or within the intellectual life that help to say what must be addressed and talked about, what stands up as a serious or profound question or contribution, regardless of its ability to solve or determine the inquiry” (ibid 25). As the main subject of such a discourse he identifies the new transatlantic intellectual community, and within it particularly those emigrants who had direct experience of totalitarian regimes and/or had managed to

escape them just in time. In the post-war years these émigrés and exiles from Continental Europe gave a sense of authenticity and credibility to the American debates.

Greif identifies a number of tropes and concepts and a certain nomenclature when it came to the émigrés' maieutic discourses. These involved discussion of 'the human condition', 'situation(s)' and their 'existential' dimensions, the 'crisis of the individual', new and insightful discussions of the meanings of 'guilt' and 'fear' (or freedom from fear) and – perhaps most pronounced – a new conception of 'human rights' (ibid 68ff), including, for the first time, 'the right to have rights' (ibid 95).

Whereas Greif's study focuses, with a handful of exceptions, on literary figures and fiction writing, Katznelson's earlier study identified an American circle of politically and theoretically motivated 'reconstructionists' who took on the challenge of promoting and practising a new form of political study (Katznelson 2003, 35). These scholars pursued 'a pathway to knowledge about how humankind might secure the benefits of Enlightenment without staggering into unreasoning by seeking 'to create a new knowledge base for a more capable political liberalism' (ibid, 4). The latter in particular implied tackling two problems: the question of evil and the creation of a realistic political science.¹

In this paper we compare and contrast two related, but in many ways also differing, ways of showing, at least in outline, that a new world also needs a new mode of understanding. Arendt and Shklar, both émigré scholars, thought about totalitarianism and its legal repercussions and participated in the postwar maieutic turn that Greif (and less sharp Katznelson) identified. In order to reveal the distinctiveness of their respective contributions, we take a closer look at the two sets of studies they published between 1951 and 1964: Arendt's *Origins of Totalitarianism* and *Eichmann in Jerusalem: A Report on the Banality of Evil* (the former released in 1951, the latter

¹ Thanks to four anonymous referees for their insightful comments and to James Brown, Philip Spencer and Albert Weale for their help in honing the argument. Katznelson's selection of social scientists and scholars remains highly eclectic. His distillation owes much to the conceptual toolbox of Karl Mannheim's *Ideology and Utopia* (Katznelson 162ff), producing badly aggregated ideal-type groupings in the process. As a consequence his 'American political studies enlightenment' remains a metaphysical club, a *post festum* sociological-theoretical construction that is based, if at all, on very thin empirical and historical evidence.

in 1963) and Shklar's *After Utopia – The Decline of Political Faith and Legalism: An Essay on Law, Morals, and Politics* (the first one published in 1957 and the second one in 1964). While *Totalitarianism* and *After Utopia* dealt with totalitarian ideology, the *Eichmann* report and *Legalism* dealt with the question whether justice is possible after the extreme experience of totalitarianism.

Both Arendt and Shklar can be seen as responding to the same problem: the catastrophe in Europe and the political extremes it produced had overstepped the limits of legal and philosophical thinking and required something new. But their respective maieutic discourses, whilst addressed to this same problematic, evince distinct strengths and face different limitations. Arendt, the older of the two émigré women, came into contact with the catastrophe more directly than did Shklar, and this direct experience seems to have made her more attuned to and afflicted by the contingency of moral norms and juridical structures. Shklar, on the other hand, was still a young adolescent when she left Europe, and her orientation to the task of thinking about the limits of law and the requirements of politics is less marked by extremity than is that of Arendt. Moreover, Shklar's maieutic practice was conducted overwhelmingly within the context of teaching, so that she was called to trace out the latent logic of the arguments of others from within the parameters of an established academic context. On the other hand, Arendt, whilst engaging in some teaching, to a considerable extent practised maieutics on herself – her work is an attempt to understand what she has witnessed and has an existential quality. This can be registered by noting that while Arendt wrote about the 'human condition' and 'crisis', Shklar does not adopt this terminology. She remains more circumspect and her work points toward an antifoundational politics of law. Arendt's observations sometimes lack the consistency of Shklar's, but they have greater directness and therefore can be seen to fulfil a different role. Together, their work makes an important contribution to thinking about justice and law after totalitarianism.

Before we delve into a more detailed discussion, a caveat needs to be mentioned: our aim is to clarify how the two thinkers in question tried to re-conceive the critical task of enlightened thinking. It is not an intellectual history (or proper history writing for that matter) but an attempt to argue that a particular historical constellation, combined with direct émigré experience, produced ideas for re-enlightenment that had a

‘surplus’. Each author, and the comparison between them, deserves much more space and detailed attention than we have at our disposal here. Hannah Arendt and Judith N. Shklar both used maieutic discourses but did not primarily employ fiction (like Greif’s feature writers) or scholarship from the social sciences or humanities (like Katznelson); notably though both make occasional use of literary sources to demonstrate their argument. Rather their work consisted, at least for the time period that interests us here (1945-1965), of political-theoretical reflections of two sorts: (1) analyses and critiques of ideologies and forms of understanding that lend themselves to major misunderstandings and, potentially, to political abuse by totalitarian powers; and (2) discussions of whether law and legal procedures such as political trials could provide answers to the problem of how to address the major injustices that victims had suffered at the hands of totalitarian regimes. It is to these two main tropes that we now turn.²

Biographical and Historical Background

Before discussing the studies in detail, we would first like to point out briefly and in each case where the publications can be located in the authors’ respective careers. This does not mean that we intend to reduce Arendt’s or Shklar’s arguments to mere biographical details. The purpose of mentioning such details is to demonstrate that there is indeed some connection between their respective life experiences and the distinct appellative dimension of each of their writings. The change of perspective required for re-enlightenment and the radical questioning of traditional thinking proposed by both Arendt and Shklar – part of what Greif understands by maieutics – only seem explicable by looking at their experiences as refugees and exiles. (As we will see in both cases, there are also considerable individual differences in how these

² We are interested here mainly in a limited juxtaposition of Arendt and Shklar that covers their reflections on totalitarianism and justice and that is marked by many joint or overlapping epistemological interests, some interesting parallels in their argumentation and rhetoric, and also some finer, yet important, distinctions. In this paper we make only occasional reference to a second juxtaposition in which other themes become more important, such as Arendt’s republicanism vs. Shklar’s conceptualisation of the liberalism of fear, particularly in relation to the American political-intellectual tradition. In this latter encounter Shklar takes a much more critical stand toward Arendt; however, this discussion is, at least in this paper, only briefly hinted at. For a more comprehensive discussion see Hess 2014, particularly 135-176. For a brief overview of Shklar’s life and oeuvre see Hess 2015.

conditions were experienced, mainly due to differences of biological age and political generation, but also because of their distinct locations vis-à-vis their respective publics).

Most readers will be familiar with the name Hannah Arendt (1906-1975), so let us here only briefly refer to her experiences until writing *The Origins of Totalitarianism* and the book on the Eichmann trial. Arendt, of Jewish origin, was born in Hannover but spent most of her childhood and youth in Königsberg.³ In 1924 she became a student at Marburg University where she made the acquaintance of Karl Jaspers, an encounter that would later develop into a life-long friendship. From 1926 to 1927 Arendt attended Freiburg University where she met Edmund Husserl and Martin Heidegger. The encounter with Heidegger in particular proved to be a formative experience that would resonate for some time to come, not just because of similar approaches to *Existenzphilosophie* but also because of the complex personal relationship between Arendt and her mentor. Having completed her doctoral dissertation, Arendt became involved in Zionist politics.

After an arrest in Berlin (and subsequent release) in 1933, she decided to flee to Paris where she became secretary general of Youth Aliyah, a Zionist project that organised emigration to Palestine. In 1940, Arendt was arrested and sent to Gurs, a detention camp in the southwest of France. She luckily managed to escape from there and with the help of Varian Fry's American Emergency Rescue Committee she took the clandestine Fittko route over the Pyrenees. She made it to Lisbon and soon afterwards arrived safely in New York. In New York she worked as a columnist for the German exile paper *Der Aufbau* until the end of World War II. Her editorial experience as a newspaper writer and columnist led to an offer from Schocken books, a Jewish publisher in New York, to work as their commissioning editor. After three years with Schocken, Arendt briefly returned to a political job as an organiser for Jewish Cultural Reconstruction.

The main bulk of Arendt's totalitarianism book was conceived between 1944 and 1947 while she worked as a columnist and editor. The book, finally published in

³ Unless otherwise indicated we rely here on the standard biography of Arendt by Young-Bruehl (1982).

1951, was widely reviewed. It catapulted Arendt into the limelight and made her famous beyond political émigré circles. A fresh US citizen now (she had passed the citizenship test the same year that the totalitarianism book was published), she was invited to lecture at Princeton, Berkeley and Chicago. Her years in academia and on the academic circuit allowed her to return to full-time writing and, particularly, to re-think some fundamental assumptions of the modern social and political condition. 1958 saw the publication of *The Human Condition*. It was followed in 1961 by an essay collection entitled *Between Past and Future*, which contained some further reflections on political theory and key political ideas. These two studies were then topped by two very different books both of which appeared in 1963, one on America, perhaps mistakenly entitled *On Revolution*, and the book that she wrote whilst working as a reporter in Jerusalem and which dealt with the trial of one of the main organisers of the Shoah, Adolf Eichmann. It was the latter book, *Eichmann in Jerusalem*, with the provocative subtitle *A Report on the Banality of Evil* that would make her famous, something that was not without repercussions.⁴

Judith Shklar's life evolved differently, although some parallels can easily be detected.⁵ Born later than Arendt, in 1928, she was too young to have been engaged in similar political activities to those that occupied Arendt. Originally named Yudita Nisse she stemmed from a German-speaking Jewish family in Riga, Latvia. In 1939 she emigrated with her family, while she was only eleven years old, to Sweden; from there the Nisse's had to travel through the Soviet Union to reach the United States. After a short detention in Seattle, they decided to move to Canada and finally settled in Montreal. The family, it must be pointed out, had luckily managed to escape a politically dangerous trap. Earlier, the Baltic States had become subject to the Russian-German 'non-aggression' pact only to be invaded and occupied soon after by the Red Army. However, the Nisse's managed to flee before the German invasion of Latvia. This, presumably, saved their lives. In 1945, Judith enrolled in Philosophy at Montreal's McGill University. Frederick Watkins, her instructor at the time, was so impressed with his student's performance that he encouraged her to go to Harvard. Judith N. Shklar – she acquired the last name from her husband whom she had met in

⁴ For more details on the discussion that Arendt's Eichmann book caused and its intellectual repercussions see Smith (2000) and therein particularly the contributions from Amos Elon, Anson G. Rabinbach, Anthony Grafton, Dan Diner and Avishai Margalit and Gabriel Motzkin.

⁵ We rely here mainly on Hess 2014, 23-74.

Montreal – followed the advice and under the tutelage of her supervisor, Carl Joachim Friedrich, began to write her PhD dissertation. Later she also worked as an instructor at Harvard's Department of Government. By her own account, Shklar was not impressed with the climate in Harvard at the time. She thought that giving in to McCarthyism was odd for an institution like Harvard; in particular the Cold War mentality on the part of some members of faculty, without their ever having personally experienced totalitarianism, appeared to her to be somewhat presumptuous, perhaps even dishonest. (Equally, it should be stressed here that Shklar did not remember the later radical student movement kindly: while she was against the Vietnam War, she was opposed to the often foolish student protests of the 60s). 1957 saw the publication of Judith Shklar's first book that dealt with the ideological origins of totalitarianism, *After Utopia: The Decline of Political Faith*. For the next few years she kept busy, taking her work as an academic instructor seriously, keeping her head down and writing her next book, *Legalism: An Essay in Law, Morals, and Politics* (1964).

In contrast to Arendt, who had become truly a public intellectual, Shklar would always remain within academic confines, writing for a much narrower intellectual readership, despite refusing a specialist academic language: she observed that political theory is the 'elucidation of common experience' (Shklar 1964: 28). It is probably justified to describe her as an 'intellectual's intellectual', somebody who does not stand in the limelight but who provides other people with ideas. It should also be stressed here that Shklar's main body of work appeared much later in her life compared with that of Arendt. While Arendt's major output and substantive contribution to intellectual debate occurred in the middle of her life and career, Shklar's major works such as *Ordinary Vices* and *Faces of Injustice* appear toward the latter part of her life. We should also take into account that, although both had been refugees and exiles, they were so at different ages: in Arendt's case this occurred as a young but experienced adult, while Shklar was a young adolescent. While Arendt had some first-hand experiences of being politically engaged in resistance activities, the same cannot be said for Shklar because she was simply too young. Arendt had also experienced National Socialism directly and consciously and moreover had a pretty good insight into how Stalinism worked since she was together with Heinrich Blücher, an ex-communist who discussed the matter of Stalinism with her. Both

experiences are clearly reflected in her writings. Shklar, in contrast, had become a refugee and exile at an early age and her experiences were more related to the traumatic flight and narrow escape together with her family. Only later, at Harvard, and there mainly through Carl Joachim Friedrich, did she become aware of the deeper problems of totalitarianism, including the difficulty of its conceptualisation and the problems this caused for the understanding and explanation of this extreme phenomenon. As we know, she also became an astute follower of the news reports concerning the legal trials and debates that followed World War II, including the increasing differences between western democracies and Soviet Union style dictatorship, some of which was expressed in debates about legal norms and practices.

Let us just add a few words about the order in which the books appeared. In Arendt's and Shklar's works we can see a similar pattern: each published a book on the ideological origins of totalitarianism, and each followed it up with a discussion of the legal repercussions of the totalitarian experience. This fact is complicated by a difference in terms of publication record. Arendt also published other books between the totalitarianism book and the Eichmann report, while Shklar did not. It is here that we have to take into account the different life paths, experiences and departure points in terms of writing. However, as we will see, while many views are shared in relation to such matters as epistemological starting points or perspectives, mainly due to the shared experience of having been refugees and exiles, there are also important differences. These differences particularly affect the way each of them employed maieutic rhetoric; on this they would not always see eye to eye.

Arendt and Shklar on Totalitarianism and Political Utopias

Origins of Totalitarianism is a book that with hindsight appears to have been given the wrong title. The book originally consisted of three more or less interlinked 'crystallizations' (Antisemitism, Imperialism and Totalitarianism); yet, later paperback editions have published these parts in three separate volumes. The original thick volume (containing almost 600 pages) that was published in 1951 reflected Arendt's conflicting intentions: first, to write about nineteenth century political ideas; and secondly, to study what was truly new in the twentieth century, namely Stalinism and National Socialism. Together these historical and epistemological concerns were

treated as two appearances of one and the same new phenomenon – totalitarianism. As is evident from the finished product, the three parts don't really link up, particularly not in terms of historical causality – hence Samantha Power's critical remark that the title of the book should have been *Originality of Totalitarianism*, referring to what was indeed Arendt's major pre-occupation after the experiences of World War II and on the outset of the Cold War (see Power in Arendt 2004 [1951]: xii). While finishing the book, Arendt must have become aware of the dilemma of the different interests running through it. We get an indication of this from the last chapter; it is here that she finally delivered in terms of the real origins of totalitarianism, which were not anti-Semitism or imperialism (Arendt 2004 [1951]: 593ff). Instead, totalitarianism was a new form of political ideology, which pretended to have 'discovered' new forms of natural and historical laws of motion. In the case of National Socialism this comprised a radical variant of Social Darwinism, a mix of the Darwinian principle of the 'survival of the fittest' applied to race and culture; in the case of Stalinism it combined Marx and Engels' unique discovery of what makes history 'tick' – class struggle, with capitalism as the latest 'stage' of development, 'naturally' superseded and replaced by a 'just society' called socialism or communism. Yet, as Arendt stresses the main novel feature of both totalitarian regimes was that they were no longer based on class or national belonging alone but appealed instead to the masses and mass action.

One of the most interesting discussions in this context is Arendt's juxtaposition of, on one hand, the supposed discovery of the laws of nature and history in the ideologies of Stalinism and National Socialism and, on the other hand, the notion of positive law in liberal democracies. Arendt argues that to claim to have discovered the eternal laws of nature and history gives the believer the aura of a higher form of legitimacy. The holders of such ideologies indeed think that their 'insight' into the laws of natural and societal motion provides them with a new authority, which is more legitimate than that of those who have not yet seen the light (like the supposedly 'doomed' bourgeois class), or those who will never be able to see the light (because of their inferior biological race). Appealing to an abstract humanity – sometimes Arendt uses the term 'One Man' –, such views disregard the rights of concrete individuals. Individual men and women are seen as social dupes, acting out the will of Man; their individuality is disregarded and they are only treated as means towards larger ends. To make an

omelette one has to break eggs, Stalin is supposed to have said – a comment that Arendt returned to more than once in her work. Once such logic becomes accepted, anything is possible. When every individual is just treated in terms of how he or she fulfils the ‘grand plan’ and how far he or she contributes to the completion of the laws of nature and history, the capacity to act and think for oneself becomes secondary, as do individuals’ rights. Citizen rights that protect the individual against the state are rejected because they constitute a threat to the new totalitarian regime; the insistence on negative rights and lawful procedures contradicts and challenges the ‘big law’ and its prescriptive tendencies. ‘The greatness, but also the perplexity of laws in free societies’, writes Arendt echoing Montesquieu, ‘is that they only tell what one should not, but never what one should do’ (2004 [1951]: 601). In contrast, the totalitarian state and its ideology know no such respect or protection of the individual. As Arendt argues, it is indeed crucial to the existence of totalitarian states to abolish the separation between public and private altogether, leaving the individual citizen in a condition of loneliness and uprootedness. The difference between the twentieth century and the nineteenth consists in a radical modernisation and ‘socialisation’ of loneliness and uprootedness: it is now experienced *en masse*. The creation of massive indifference to the other was, as we now know, the most important precondition for the creation of victims. Once those protective levees had been breached, the rule of law abolished, the distinction between private and the public spheres rendered meaningless, and individuals isolated and lonely yet readily identified in either class or race terms, there was no stopping the evil that followed and for which the extermination and concentration camps became symbols.

Judith Shklar published *After Utopia – The Decline of Political Faith* in 1957 with the intention of getting over what she considered to be a complete stand-still of political theory, something that became manifest with the experience of totalitarianism and the Cold War years, a time when the two superpowers were locked into a major confrontation and when no renewal was in sight. Like Arendt, Shklar notes the fragility of post-war conditions, which was not helped by ideological stasis; however, unlike Arendt who put her hopes into anything from rather metaphysical-sounding new beginnings (‘natality’ is the key word here) to the radical proposal of council-based forms of governance, Shklar pursued a more realistic project by pointing to the need for some clear-headed political theory at a time when old-fashioned ‘liberalism

has become unsure of its moral basis, as well as increasingly defensive and conservative' (Shklar 1957: viii). The latter remark was directed at Cold War liberals like her own supervisor Carl Joachim Friedrich and intellectuals like Hannah Arendt who were very good at repeating the mantra of totalitarianism, almost ad nauseam, but not very good at explaining what post-war democracy could do in order to become more attractive and convincing in its arguments and in the ideological race against the Soviet Union and its allies. In short, Shklar was not into political romanticism of any kind – unlike Arendt who worshipped the American Founding Fathers as if they were latter-day republican Catos.⁶ While Shklar saw some clear benefits in Atlantic democracies, including traits and traces that prevented them from falling into barbarism, she wanted to put more teeth into the modern democratic project.

This is not the place to re-run or recall the entire argument of *After Utopia*. Suffice it to say that, like Arendt, Shklar locates the beginning of the decline of political theory and philosophy in the nineteenth century in the wake of the Enlightenment, particularly with a critique of the anti-political stand of intellectuals who thought that enlightened education and an enlightened citizenry alone would provide for a better society and that once the unhappy consciousness (Hegel) has experienced its *Aufhebung*, progress would automatically be achieved. Shklar saw a gap developing: liberalism became separated from democracy, while socialism – that new nineteenth century child of the Enlightenment that pretended to hold an answer to the contradictions of liberalism and capitalism – only identified with the labour movement but did not hold an answer ready that would have been able to appeal to all citizens. The romantic mind, one answer to the somewhat mechanical and naïve views of the Enlightenment, with its anti-systemic and anti-rational attitude, didn't help either. It emphasised art, religion and the cultivation of inner life as substitutes for politics and democratic theory. To illustrate her point Shklar refers to Heinrich Heine who famously stated that democracy was bad news for poetry (1957: 102).

From the romantic and ultimately 'tragic way of life' it was just a short step to the 'unpolitics' of a Burckhardt, Nietzsche or Spengler, all of whom developed subjective and artistic answers to the modernisation process but fell remarkably short in

⁶ Though see Benhabib (1996) for an interpretation of Arendt as a 'reluctant modernist'.

responding to the question of how a modern and functioning democratic system could operate. This was not where the decline stopped. To reach the final stage of defeat and defeatism more was necessary than an unhappy consciousness and the flight into art. While all this did not help to erect any barriers against the totalitarian threat a new low was only reached with a generation of philosophers who would come to dominate philosophy and critical thinking for much of the twentieth century – *Existenzphilosophen*. Here, Shklar directly attacked those thinkers that Arendt held dear. What was missing in the arguments of such thinkers as Heidegger and Jaspers and *Existenzphilosophie* and its later derivative Existentialism? For Shklar, these thinkers and their philosophies were deeply a-political and contributed absolutely nothing to the furthering of political theory; rather, they promoted a sense of man being nothing but a victim, ‘of the world’, of time, of death, of history, of society, of everything external to himself’ (1957: 120). The notion of the absurd, the meaninglessness of modern life, the metaphysical guilt of being in the world, disgust, futility – all these ideas contributed very little or nothing to democratic thinking and the development of political theory. If society was indeed ‘part of the “world” that draws us all down’ (1957: 133), then politics and the political system could just turn into another institutionalised expression of that thought. If the other was perceived only as signifying hell, as constituting a ‘degree of obstruction’ to authenticity, in short, if the other continued not to be regarded as an end in him- or herself, then there was no point in developing a democratic political framework that would appeal to all citizens. Even the radical position of existentialists – turning into rebels and becoming resistance fighters of the *maquis* – remained mere romantic posturing and was just another gesture toward authenticity, which actually contributed nothing to the development of political theory, never mind democratic political practice. Shklar concluded that in existential philosophy and existentialism all politics were seen as mere barriers (1957: 151).

Similarly, post-war reflections about ‘the masses’, conceiving – as Arendt did - the masses as irrational crowds and identifying them with totalitarian movements, contributed little to an understanding of modern society and politics (1957: 161).⁷ In Arendt’s conception the state continued to be seen merely as an instrument of either

⁷ See also Pitkin (1998).

class or mass existence, and only the nation prevents society from becoming an ‘amorphous mass’ (1957: 162). Shklar identifies Arendt as one of the few thinkers who at least had no romantic notions when it came to totalitarianism. However, Shklar’s criticism that ‘everything has become incomprehensible’ (1957: 163) is hard-hitting and aimed especially at Arendt who had more than once referred to the limits of understanding destruction for the sake of destruction. This had particular implications for what can be called ‘institutionalisation’. As we will see later, a gap opened up here between the two thinkers: Shklar showing a more measured attitude toward political practice while Arendt seems to have veered between visions of radical new beginnings and political romanticism (as expressed, for example in her admiration for the Greek classics or crucial founding periods, like that of the American republic).

At this point we can see a difference between Arendt and Shklar when it comes to the institutionalisation of practices of politics. While Arendt held onto the Greek *polis* as the archetype for political discourse, Shklar was more attuned to the necessity for the organisation and dispersion of political power in complex systems in modern democracies. In this respect one might say that Shklar offers herself as a thinker for the modern world while Arendt is nostalgic for a world we have lost, with consequences for what is regarded as ‘the political’ as opposed to ‘the social’. Where *On Revolution* famously links the rise of the ‘social’ with the entry of necessity into politics, such that politics is replaced by administration, Shklar appreciates modern liberal democracies for providing individuals with space and security, which allows them to pursue their lives in a kind of sheltered pluralist and relatively tolerant way. On Shklar’s account this is already an achievement and needs cultivating as a seed-bed for more inclusive forms of true civic citizenship, something that she would elaborate upon much later in her life (actually towards the end of her life, in a short book on *American Citizenship*).

Of course, it is not the case that Arendt gives us no criteria for thinking about the stabilising effects of law and its importance in providing regularity in order that politics can take place. Toward the end of *The Origins of Totalitarianism* she refers precisely to this feature of the operation of law in commenting on the way legal systems proscribe rather than prescribe behaviour: they tell us what we should not do,

rather than documenting what we should do (Arendt 2004 [1991]: 601). This is an important prelude to recognising the ways in which a pluralistic polity will need to be underscored and lived through law since it is the legal apparatus that can deliver the ‘right to have rights’ (376ff). Arendt also refers to the need to ‘reconstruct the juridical person in man’ after its attempted obliteration. But her work pays surprisingly little attention to the actual operation of law.⁸ This might be explained by Arendt’s rather theatrical conception of politics; a more systemic, institutional understanding would have allowed for a different appreciation of law precisely for its de-dramatising role in modern societies.

In contrast to Arendt, Shklar takes issue with theatrical politics and the emptiness of radical postures, particularly the a-political attitude of modern thought. She was concerned that most thinkers seemed to have got lost in the ‘jargon of authenticity’ and radical subjectivity.⁹ Challenging such thinking, Shklar called for a sense of political realism in terms of developing a political theory that would actually help to address some burning questions resulting from the new experience of totalitarianism. She prompts us to ask, in truly maieutic fashion, yet without ever appealing to some kind of romanticism: What kind of political democracy do we want? Have moderns contributed, found or learnt something new that will help us avoid repetition of the extreme experiences that we have witnessed? And finally, how can political theory contribute in producing up-to date versions of liberal democracy?

Both Arendt and Shklar argue that politics plays a major role in helping to constitute law; further, there is a nod to decisionism in both their positions. But Shklar is more comfortable with this than is Arendt.¹⁰ Arendt struggles to find ground for politics in the modern world, and notes that the time she occupies is one of unprecedented contingency: all previous ways of going on (both politically and philosophically) have fallen into doubt.¹¹ This makes Arendt attentive to the problem of the foundations of the polity: how, she asks in *On Revolution*, can a people be deemed a people before being declared as such by a founding constitutional document? (1973 [1963]: 163).

⁸ And when she does this arguably does not answer to the problems of modernity. See Christodoulidis and Schaap (2012).

⁹ Today this would perhaps be called ‘identity politics’.

¹⁰ See her essay ‘Decisionism’ in Friedrich’s *Rational Decision* (1964b).

¹¹ On this point see Jerome Kohn’s introduction to Arendt’s *Responsibility and Judgment*, in Arendt 2003: xxvi.

But this recognition of what has been called the ‘paradox of constitutionalism’ (Loughlin and Walker 2008) also produces a moment of romanticism on Arendt’s part. In contrast, Shklar – commenting on Kant’s arguments for the necessity of obedience to the state – observes that ‘curiosity about the origin of political authority is inevitably dangerous’ (1998: 133). Shklar thus avoids confronting the paradox of constitutionalism. Perhaps this is because she was more comfortably situated than Arendt and more appreciative of some of the achievements, and potential, of modern American democracy. Or perhaps her reluctance to engage in such thinking stems from her richer appreciation of the sociological preconditions of political order, including the dilemmas these create. Something can be learned from the contradictions of democratic birth pangs, a thought Shklar would return to in her later essays on the conditions and developments of the American polity.

In sum, both maieutic positions can be understood as reflecting different emphases in reaction to the predicament of the mid-twentieth century: Arendt’s republican discourse is a constant reminder of the importance of new beginnings – and of the often fugitive character of these beginnings. It is an attempt at re-enlightening in the sense that nothing ever remains guaranteed, particularly not when people no longer act and understand society solely as a natural Darwinian process. In turn Shklar’s maieutic argument is more liberal. It argues against radical utopias, including that of republican new beginnings. It is more geared towards defending a realist sense of what can be achieved in terms of lasting liberal institutions. Interestingly both positions find their deeper expression in the discussion about political trials, injustice and legalism. It is to this discussion that we now turn.

Arendt and Shklar on Justice, Law and Political Trials

In her Eichmann book Arendt returned to the role that law played in the context of coming to terms with a totalitarian past. The book itself was a strange hybrid. Most of it recalled the mass extermination of the European Jews and how it was organised by the Nazis, most prominently by the Reichssicherheitshauptamt (RSHA) with which Eichmann was associated. This part of the text was not so new; to a considerable extent it merely summarised what Raul Hilberg had already published in his

comprehensive and groundbreaking book on *The Destruction of the European Jews* (1961). Arendt added to that account just a few details on Eichmann, a bureaucrat in the RSHA, who, as far as the evidence produced in the course of the Jerusalem trial showed, had personally never laid a hand on his Jewish victims, but who had been responsible for organising the mass deportation and the final solution from his office in Vienna. It was this indifference to the results of his laborious efforts, his cold and abstract way of participating in the bureaucratic killing machine with no readily identifiable personal motivation whatsoever – Eichmann had explained to the jury that he was ‘just doing his job’ and ‘executing the will of the Führer’ – that led Arendt to coin the term ‘banality of evil’. The term had, as we now know, first been suggested by her husband Blücher and had subsequently been taken up by Karl Jaspers in an exchange of letters. This constituted a move away from the rhetoric used in her totalitarianism book, where she had elaborated on Kant’s notions of ‘absolute’ or ‘radical evil’. (In fact, she had taken issue with the limits of Kant on this account in her earlier book; for her, Kant’s interpretation was still based on Christian assumptions which suggested that evil could be rationalised). Most readers of Arendt’s Eichmann book could not see her point about banality: in fact many survivors pointed out that they had not experienced their suffering as banal (despite having been the result of Eichmann’s mediocrity and conformist personality). However, it was another shift in emphasis in Arendt’s argumentation, i.e. the revelation concerning how the desperate actions and decisions of some Jewish community leaders and councils had unwillingly, and against all intentions, contributed to making the Shoah work even more efficiently – that caused a major row. The book was heavily criticised and even condemned by not a few Jewish American and Israeli intellectuals, some of them close friends of Arendt.

Beyond such perhaps legitimate worries and protests, where Arendt’s Eichmann book was strongest and where it remains as provocative – and perhaps maieutic in the true sense of the word – today, as it was at the time of writing, was in addressing the question of whether it was possible to use legal means in response to a totalitarian plan to eradicate people from this planet; and if so, what legal form was appropriate in order for justice to prevail. In her important epilogue Arendt mainly compared and contrasted the trial in Jerusalem with the Nuremberg trials (Arendt 2006 [1963]: 253ff). She argued that the importance of the Nuremberg trials lay in their symbolic

resurrection and application of the rule of law; the trials demonstrated to the world that totalitarianism had not prevailed in Germany. However, Arendt also listed the contradictions that the Nuremberg trials never solved properly. Three accusations played a role in Nuremberg, that of a violation of peace or 'crimes against peace' in the sense of starting and conducting a war without reason or provocation, that of war crimes, and that of crimes against humanity. While the first two accusations were part of the familiar territory of international law following World War I and the creation of the League of Nations, the third accusation was new and applied *post factum* to the conditions and experiences of the totalitarian rule of the Nazis. In relation to this important distinction Arendt pointed out that most of the rulings and convictions of the Nuremberg Court were actually based on war crimes evidence, while crimes against humanity only came to bear in one case – that of Julius Streicher. Arendt stressed that the Russian judges could have been content since the Soviet Union, which had never signed the Hague Convention on war crimes, got off lightly. When the Katyn Massacre came up during the trial the principle of *tu quoque* (you too) was mentioned, yet it led to no further questioning. Finally, Arendt mentions that the Nuremberg judges appeared to have been in two minds about the final sentencing and how it applied to the reason for conviction. They applied the death penalty to those who were guilty of starting a war, assuming that most of the accused were also guilty of crimes against humanity – yet they abstained from basing their final verdict on such crimes against humanity; crimes against peace and war crimes remained the leading ideas.

When it came to discussing whether the Eichmann trial should have taken place in Jerusalem and in an Israeli courtroom or whether it should take place somewhere 'neutral' and in front of an international court, Arendt was equally outspoken and pointed towards further contradictions. She argued that a strange *quid pro quo* logic prevailed: true, the trial in Jerusalem took place because of the physical extermination of Jews, but in this respect an Israeli court was as good as any nation's court; however, Arendt also pointed out that in attempting to exterminate the Jews as a group, the Nazis (and Eichmann) had committed a crime against humanity. While the selection of victims was due to anti-Judaism and anti-Semitism, the actual crime against humanity (including its administrative dimension) is something of such general and universal importance that it deserved an international court or tribunal. If

there was one major lesson to be learned from Nuremberg then it was that the Nazis had disrupted the human order and needed therefore to stand trial and be convicted – not because of the sheer number or the specific selection of victims. Arendt argued further that once it had been established that the Jerusalem court was *zuständig* (legitimate and appropriate) to hear the Eichmann case such arguments as the ones mentioned above unfortunately became of secondary importance. Arendt concluded that while one could of course debate both the location and the different legal rationalities, from a human standpoint, and from the standpoint of the newly conceived crimes against humanity, Eichmann nonetheless deserved to be punished (and to die): he and the Nazis had assumed a god-like position when they determined which groups of people deserved the right to live on this planet and which did not. In contrast to Arendt, this was not the reason the Jerusalem judges gave in their ruling and for Eichmann’s conviction but they hanged the man nevertheless.

In fact, Arendt’s reflection on the judges’ deliberations reveals something interesting about her position on law generally and natural law in particular; for Arendt law and morals are distinct, yet they require a relation. She refers to the ‘helplessness’ of the Jerusalem judges, faced with a man they struggled to understand in order to judge. She observes that Eichmann was evidence of a ‘new type of criminal’ who ‘commits crimes under circumstances that make it well-nigh impossible for him to know or to feel that he is doing wrong’ (2006 [1963]: 276). So Arendt’s ascription of ‘thoughtlessness’ to Eichmann produces a problem for her: how can it be right to convict him? We should note that whilst this might make for a prosecutorial problem, *mens rea* being a fundamental part of criminal law, nonetheless on legal grounds he could (and was) of course convicted of crimes committed. The problem for Arendt seems to be that, along with Jaspers, she held to a subjectivist account of moral guilt (see also Ashenden 2014). Arendt agrees that Eichmann should receive the death penalty, but to justify this she – somewhat surprisingly – refers to the Bible (2006 [1963]: 277ff).¹² In other words, to justify the attribution of criminal guilt to Eichmann, Arendt goes back behind modern prosecutorial approaches to look to a conception of guilt as an objective offence against collective order, irrespective of the defendant’s subjective capacity to comprehend his own wrongdoing. It is obvious that

¹² This is somewhat surprising since Arendt suggested that the new dark and totalitarian times were marked by the absence of religious or theological connotations of guilt.

Arendt's appeal to natural law and her emphasis on pluralism pull her argument in different directions.¹³ A different response than the one given by Arendt can be found in Shklar's treatment of legalism and political trials.

In what follows we argue that Shklar has not only developed a critique of modern thought which resembled in intention and partly in its execution Arendt's totalitarianism study, but that she has also helped to detect some of Hannah Arendt's dead ends. In *Legalism: Law, Morals, and Political Trials*, which appeared in 1964, only one year after the publication of Arendt's Eichmann report, Shklar attempts to clarify how our thinking about legal procedures can be linked to multiple and competing ideologies of the Cold War and to address whether legalism can provide an answer to the problem of totalitarian regimes and ideologies. She takes issue particularly with the question of whether it is actually possible for those liberal proponents and defenders of the rule of law to escape political conflict. For Shklar, this is impossible, as she tries to show in the case of the Nuremberg and the Eichmann trials. Legalism is, for her, 'an ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules' (Shklar 1964: 1). She asks us to imagine a continuum in which we have at one end personal conduct and morality, and at the other end the institutions and those legal procedures that kick in if and when rules are broken (1964: 3). In between we find a whole set of arrangements and institutions that deal with moral issues, rights and duties, and so on. Since conflict is programmed into modern pluralistic societies, the referral to legalism has become a kind of refuge, a way of settling conflict by peaceful, democratic and legitimate means. However, it has also become subject to political debate: How responsive is the legal system in a democracy? Are the courts not necessarily that part of society that is most interested in maintaining order, despite the fact that societies and their laws are always subject to change?

To these questions Shklar holds an answer ready. With reference to Max Weber she describes the rationality behind lawful procedures and how these developed in the western world. Shklar also points out that there is not one universal rationality but rather a number of different legal traditions in the West; legalism is in other words a

¹³ Note, for example, her insistence on writing of the 'human condition' rather than 'human nature' and her emphasis on the fact that men not 'Man' occupy the earth.

‘tradition of traditions’. Shklar also stresses that the development of legalism has led to a situation where law and politics appear to have become separated, making it particularly difficult to conduct trials in which politics figure largely, either in the sense that legalism has to deal with political regimes and ideologies such as National Socialism and Stalinism, or that legal trials are conducted that have themselves a political character. Both were obviously the case at Nuremberg. Here Shklar maintains that there are rare occasions ‘when political trials may actually serve liberal ends, where they promote legalistic values in such a way as to contribute to constitutional politics or a decent legal system’ (1964: 145).

Shklar continues: ‘To be sure, within a stable constitutional order political trials may be a disgrace, a reversion to the politics of repression, but it is not the political trial itself but the situation in which it takes place and the ends that it serves which matter. It is the quality of the politics pursued in them that distinguishes one political trial from another’ (1964: 145). As pointed out earlier, for Shklar there cannot be such a thing as law totally free from political conditions and purposes. At the same time, it is important in circumstances such as political trials to realise the limitations of legal procedures and to distinguish between different ends. As Shklar observes, ‘there is politics and politics’ (ibid), meaning that as a consequence formal justice should not be regarded as an end in itself; it cannot create the democratic order. This, according to Shklar, was the illusion and the fallacy of the judges at Nuremberg: If only the laws were seen to be operating, the illusion of functioning democratic institutions and politics could be created. On her account, the situation became even more complex when dealing with politically important charges such as crimes against humanity. It was a legalistic illusion, maintains Shklar, to think that in the end the Nuremberg trials could provide for the future of international criminal law. She notes: ‘the trial was a tribute both to the intellectual limitations of legalism as an ideology and to the real political value which legalism has in practice, even if it refuses to recognise this clearly’ (1964: 147).

The problem was in other words: How do trials that deal with extreme situations fit into our normal continuum? How do liberal democratic governments react to a modern crisis in values and morals? It is true that the trials took place in something of a legal vacuum. As Shklar rightly stresses, at the time there was (and continues to be)

debate as to whether there is a properly functioning system of international criminal law (see e.g. Moyn 2013, Schabas 2000, 2011). Unlike domestic criminal trials, international ones have to constitute the conditions for their own legitimacy as they work. Nonetheless, to all observers at Nuremberg it was self-evident that something had to be done with the Nazi perpetrators, and it is in this context that the newly invented crimes against humanity emerged. It is interesting though that this invention still did not come to be radically applied as law during the trials; as Arendt had stressed, only one of the accused actually was found guilty of such crimes.

Like Arendt, Shklar maintains that a sense of justice was the main driving force behind the trials both in Nuremberg and in Jerusalem. This is very much against the notion of positive law that maintains that legal procedure and justice are not the same and may not even be connected. Shklar emphasises that the new crimes committed and the trials conducted led to an interpretation that again put together what had become separated. She stresses that after the experience of totalitarianism it became harder to maintain that legal procedures, justice and politics were not linked at all (though the tenacity of natural law and positivist approaches to legal autonomy suggest a continued desire to separate them). However, as Shklar also notes, such new thinking was still marked by differences in the way we think, for example, about causality. The bureaucratic effort to exterminate all Jews and its causes will still continue to be defined differently by lawyers, historians – and, indeed, political theorists. In contrast to Arendt, Shklar's argument has another maieutic dimension. For Shklar, the main purpose of political theory is the art of distinguishing, in this case, between different degrees of legalism. In that respect she is interested in the refinement of legal reasoning and judgment and the politics that support such reasoning or judgment. This is very much in contrast to Arendt who thought that it was more human judgment itself that was the problem.

We might further ask where Shklar's presumption of a sense of justice comes from. As we have seen, Arendt gestures toward morality being innate and pre-social in the human being.¹⁴ It is not clear that Shklar can reasonably make this assumption, but perhaps her argument is protected in avoiding the question by being seated in a

¹⁴ See also Robert Fine (2013)

relatively functioning democracy. She uses the term 'legalism' to refer to an ideology. For her, in well-functioning legal democratic orders legalism inures against too much political contestation; in Nuremberg it imposed the possibility of a conversation about what had happened. But it remains a double-sided weapon: legalism can make possible the peaceable resolution of conflict, but it also occludes the necessarily political framing of law. It thus contains what Samuel Moyn refers to as a 'noble lie' (2013: 493). Shklar remains ambivalent about this, and attentive to the differential consequences of legalism depending on context, perhaps one of the reasons why later in her life she turned more to the discussion of injustice, something she thought could never be fully addressed by rights and legalism alone.

Shklar closed her reflections on legalism by referring to the position she was writing from. She called it 'the liberalism of minorities' (Shklar 1964: 224). In an essay written many years later, towards the end of her life, Shklar was convinced that the entire history of political thought could actually be written from the perspective of refugees and political exile. Arendt harboured similar thoughts and more than once reflected on the condition of refugees and exiled people allowing for distinct perspectives on political and social problems and the modern condition. Both Shklar and Arendt were prime examples of such reflections. We have juxtaposed them here because we think that in terms of maieutic discourse the experience of exile sharpens and accentuates both thinkers' positions concerning how courts and the legal system can deal with injustice. On this the two did not exactly see eye to eye. The important thing is, however, that in comparison and retrospectively each can illuminate the other.

Conclusion: Some Inferences from Arendt's and Shklar's Reflections on Totalitarianism and Justice for the Contemporary Context

Hannah Arendt and Judith Shklar can be read as responding to the same problem: totalitarianism. Something had been overstepped, which threw up the limits, but also the importance, of a legal response. Both provide interesting reflections on natural law arguments, the possibilities of politics, and the need for political decisions, wrapped up in a healthy scepticism about utopian conceptions of justice. This is, in large part

and as we've seen, because both lived through the middle of the twentieth century and the crisis for law entailed by the need to judge the results of Nazism (and, to certain degrees also the results of Stalinism, although not in court, as we have seen with the dismissal or relegation of crimes committed by the Soviet Union, such as the Katyn massacre, during the Nuremberg trial).

As stated at the outset, like Greif we see Arendt and Shklar as émigré scholars and as being moved and motivated by a strong maieutic impulse, i.e. the need to state what should be done, not just practically but also theoretically, in the sense of specifying the conceptual terms on which the debate should proceed and which direction it should take. This does imply, as we have seen, a radical critique of twentieth century ideological currents (such as totalitarianism) and other ideologies (such as the recourse to the rhetoric of rights, lawful proceedings and trials, or, in short, to legalism). We hypothesise that while such a maieutic impulse had ground-breaking effects and was absolutely crucial for the time of the post-war discussion in America and Europe – Greif's 'Age of the Crisis of Man' and a healthy sceptical form of 're-enlightenment' as the answer to it – the debate about extreme injustice and rights has not abated. On the contrary, it continues. To put it differently, Arendt's and Shklar's interventions and observations produced a kind of surplus effect and argument that cannot be seen as being solely confined to the time of their first appearance. What we would like to do by way of conclusion is to end with some observations on the stakes of their thinking for political and legal debate now.

Both Arendt and Shklar reconcile themselves somewhat uneasily with the political character of the Nuremberg trials. They do so, we think, out of a sense of necessity (necessity, after all, is said to make its own law – just not the way Hegel, Marx or Lenin imagined it). However, their respective assessments of how this manifests itself are distinct. Arendt recognises that in a legally unprecedented situation something new was necessary; Shklar recognises the political expediency of the 'noble lie' involved in the exercise of legalism of the trials.

When after the war Arendt returned to Germany as a reporter she found a country in which all had collapsed (Arendt 2007 [1945, 1950 and 1954]). Thus it is not surprising that at the beginning of *Responsibility and Judgment* she frames one of the core problems of the post-war moment as the contingency of judgment. She argues

that old ways of judging have ceased to operate, there is a pressing need to act, and yet this action (including the establishment of the Nuremberg trials) is demonstrably arbitrary: there was no internationally agreed prohibition on genocide prior to 1948, and crimes against humanity were invented at Nuremberg – thus those involved had literally to make up categories of crime to ‘fit’ phenomena that had already happened, retroactively. By any measure, both liberal and republican thinkers usually refuse to license that someone can be held responsible for a crime that was not a crime when they committed it. In fact this is a core feature of justice that both liberals and republicans hold dear. And yet the crimes of the Second World War called out for this – not least in order to put politics back on the road.¹⁵

So one problem highlighted by Arendt is the simple one of judgment after the fact that something is a crime. But on her account there’s a second problem too: the positivism of twentieth century jurisprudence had increasingly undermined direct links between law and morals. Thus Arendt’s comments on the unprecedented contingency of the post-war moment chimes with Harold Berman’s observations concerning the twentieth century more generally as one in which religion has been privatised and law reduced to its positive form (Berman 1983). This compares interestingly with Shklar’s account of the increasing importance of natural law arguments in *Legalism*. Of course, a rush to both positivism and natural law can occur simultaneously, both heightened by the pressing need to re-establish the rule of law as such, but the divergent evaluations of Arendt and Shklar on the post-war predicament tell us much about their respective thinking on the relation of law and politics. Like Arendt, Shklar alights upon the legal arbitrariness of Nuremberg, but she draws from this different conclusions. Insofar as Nuremberg works to establish liberal principles, Shklar claims it can be justified. After all, on her account all legal procedures contain a politics, especially those of political trials. According to Shklar, ‘it is the quality of the politics pursued in them that distinguishes one political trial from another’ (145). She observes approvingly that Nuremberg drew not from natural law but from ‘the fiction of positive international law’ whereas in Tokyo natural law arguments were introduced with ‘very unfortunate results’ (156). Shklar’s text can in fact be read as an

¹⁵ See Giesen (2004) on the ways in which the Nuremberg process symbolically separated war leaders from others and thus contributed a small part to the resurrection of Germany as a functioning nation.

ideological invective against the assumptions of unity built into legalism via natural law arguments. On one hand her liberalism and positive evaluation of pluralism make her a fierce judge of what Bentham decried as ‘nonsense upon stilts’; on the other hand, she also refuses the apolitical movement inherent in legal positivism. Arendt’s conception of politics also privileges plurality, but as we’ve seen she resorts to the Bible to justify judgment of Eichmann in a move that gestures to natural law forms of argumentation.¹⁶ Shklar thus remains more steadfastly than does Arendt with the idea that there is a necessary politics of law.

Plurality was an abiding concern of both Arendt and Shklar. For Arendt, as is well known, this took the form of a suspicion of claims to sovereignty for their unifying tendencies, and a conception of politics as a space of appearances in which men (plural, but masculine) could act. Arendt’s politics thus looks backwards at least as much as it looks forwards. Some have seen in this a normative vision to be held up against the empirical realities of twenty-first century power. A different consideration of the implications that follow from pluralism is suggested by Shklar.

As pointed out above, in the last page of *Legalism* Shklar speaks of her epistemological interest and the way her book had been driven by the desire to articulate a ‘liberalism of permanent minorities’ (Shklar 1964: 224). Later this term would turn into her conceptualization of the ‘Liberalism of Fear’. The defence of the latter comes through most strongly in her writings on justice and in *Ordinary Vices*. But her theorising of plurality is there already in *Legalism*, a book about legalism as ideology. In this early text Shklar provides a somewhat over-determined reading of natural law arguments as necessarily premised on and heading toward consensus. She comments that such arguments are oppressive of the pluralism of liberal societies, shutting down debate and coercing consensus. Nevertheless, this case has some merit: if we look at how modern natural law arguments were initiated in the seventeenth century we find they gained ground insofar as they promised to fix the problems of non-consensus in countries torn by religious and civil war (see Tuck 1979). And one of the abiding problems of natural law arguments ever since has been how to deal with change.

¹⁶ See also 2004 [1951]: 299, where Arendt argues that without ‘transcendent measurements of religion or the law of nature’ there is no measure of things.

The intractable problem of how to generate and maintain a political community whilst at the same time not forestalling dissent is one of which Shklar was very well aware, especially as a student of Rousseau. For Rousseau the problem was one of how to move from society as an aggregation of individual wills – the will of all, to the General Will, a condition that transcends and unifies us, the body politic. This, according to Rousseau, requires our ‘denaturing’. Some, not least Arendt, have read *The Social Contract* as a guide book to totalitarianism (see Arendt 1963; Talmon 1952). This is not right, but the radicalism of Rousseau’s solution does highlight the problem of how the many are to become one. We’ve still not managed to come up with models of political community that depart very far from this (see I. M. Young 1990). Of course this need not take the form Rousseau prescribes (after all, we can hardly move to eighteenth century Corsica) but the issue of how to constitute viable community is an abiding one for political theory, and is tied to the legitimacy or otherwise of legal structures.

This concern was at the root of Arendt’s resistance to ideas of sovereignty and her insistence on thinking of politics in terms of plurality. Note that proceduralism in law does not resolve this, since this still leaves an absence where some substantive determination of the people must be.¹⁷ So it is surprising that Shklar rides over these matters so freely in asserting that in the present (1964) natural law arguments are coercive of consensus. She’s clearly playing devil’s advocate, not at least in the context of her colleagues at the Harvard Law School (some of whose students and later faculty she had taught). The trouble is, absent some version of natural law, the decisionism of Shklar’s political reasoning threatens to leave her stranded, or confined in importance to contexts that already benefit from established rules of procedure. Perhaps at some level coercion of consensus is constitutive of liberalism?¹⁸

Arendt and Shklar both make arguments suggesting that politics is in some sense constitutive of law. For Arendt, action is fundamental to humans, we are *zoon politikon*; for Shklar, it is rather that no legal system on its own can secure the liberty

¹⁷ Both Schmitt and Luhmann have discussed this, albeit in two very differing ways; see the papers collected in Thornhill and Ashenden 2010.

¹⁸ Shklar would later revisit and rethink the problem in the context of dealing with the founding of the American republic, whose promises had been hampered and contradicted by slavery. Only the fight for civil rights, which she saw as a struggle for positive liberty, would solve these problems – and even that fight she saw still as being far from over or as being a lasting achievement on which one could rest or rely upon (Shklar 1998b).

of citizens. Shklar gives us more than Arendt in terms of thinking through how law structures modern politics, and as such she is a better guide to the ways in which law can have an important depoliticising role in complex and differentiated social formations. Arendt oscillates between thinking that all is up for grabs, dissolved, and reaching for natural law arguments. Shklar is more sceptical, more thoroughly critical of legalism in all its forms, but perhaps rests more easily in a settled political context. She doesn't face the same turmoil as Arendt, something perhaps due to generation, but also to temperament.

Finally, both thinkers offer a helpful dose of scepticism toward utopian ideals. This is linked to their respective refusals to imagine procedural solutions to thorny political problems. We've seen this in Arendt's reflections on evil and its domestication in western political philosophy. Her criticism of Kant for his attempt to rationalise evil, to find comprehensible motives for it, is a criticism of Kant's proceduralism. This sits nicely with Shklar's resistance to legalism as pure procedure and observation that there's always a substantive situation to be dealt with in any political conflict. This, in turn, is what makes both resistant to producing systematic political theory. We can see this in the way that they each address the matter of justice.

We have seen that in *On Totalitarianism* Arendt takes up the totalitarian claim to obey the laws of nature and of history; she observes 'totalitarian lawfulness pretends to have found a way to establish the rule of justice on earth' (2004 [1951]: 462), thus overcoming the discrepancy between legality and justice. Stretching forward across later work that could not be fully considered here, Arendt's comments would warrant comparison with Shklar's emphasis on injustice and the *summum malum* in *The Faces of Injustice* and *Ordinary Vices*. Conceived thus, Arendt and Shklar might be said to offer different parts of the same argument, rather than totally opposed positions: Arendt provides a way of comprehending the sense of crisis that often attends beginnings, Shklar resists the language of crisis, but is perhaps the better guide to the matter of how political democracy can be lived in a complex society.

To conclude then we have argued here that it makes little sense to treat Arendt's and Shklar's opinions and ideas as developing totally independently of their respective experiences of totalitarianism, escape, exile and new beginnings in the US. There exist obvious links between experience, ideas and maieutic performance, something

that manifested itself, as we have further tried to show, in two very peculiar and idiosyncratic modes of argumentation. These in turn are indicative of the different and subjective ways in which two thinkers responded to the same challenges identified. This does not mean to simply reduce different ideas to different circumstances. As we've tried to argue particularly in the last part of our discussion there will always remain maieutic impulses and intellectual surpluses which transcend the circumstances under which they first emerged. It's up to the next generation(s) to make sense of such distinctions in altered social and political contexts.¹⁹

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¹⁹ The current debate on transitional justice can serve as a demonstration of how this can be done sensibly. See, for example, Duncan McCargo's essay (2015), which draws on some of Shklar's distinctions.

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