

Torture: banality of evil or radical evil?

Tortura: banalidade do mal ou mal radical?

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ABSTRACT

The text aims to explore legal and moral aspects of torture. Under the legal aspect the text compares three definitions of torture: UN definition, Brazilian definition, and Spanish definition. In this regard, neither the UN formulation nor the Brazilian formulation are ideal, because the Brazilian legal definition restricts the element of action by the part of the perpetrator of torture, and the UN convention restricts the effect on the victim, given that pain or suffering should be severe. The hypothesis is that a better proposal could be linked to the Spanish Penal Code, which in its art. 174 defines torture as the submission of someone "to conditions or procedures that, due to their nature, duration or other circumstances, involve physical or mental suffering, the suppression or decrease of their faculties of knowledge, discernment or decision, or that otherwise undermine their moral integrity". The Spanish definition seems more encompassing in both aspects, on the act of the perpetrator of torture, and on the effect on the victim, since the suffering involved is not characterized as severe. Concerning the moral meaning of the repulse to torture it is intended to defend the paradigmatic character of the human right to not be tortured in at least two respects. The first aspect refers to its universalizing vocation in the full sense, since it can be extended to all sentient beings. In this regard, the prohibition of torture goes beyond the dominion of personality to advance in the direction of a domain of suffering not determined by the mask of personality. The second aspect is that the prohibition stands for an absolute right with no exceptions, precisely because of its deeper moral content. The study goes on to claim that there are good reasons for this absolute moral character of the prohibition of torture due to a fortunate coincidence that follows from utilitarianism and Kantian deontological moral theory, the two main moral theories of modernity. The text scrutinizes the effects of torture not only on the person of the tortured human being, but also on their body. Stated clearly, torture destroys two basic elements of humanity, personality and corporeality. What will be left of the human being after being tortured is, at best, a heap of sentient flesh. Maybe for this reason, language loses its significance in correlation to torture, precisely because all signification is nullified in the face of the hypertrophy of the physical body in pain, which absorbs all the sensations. Established these terms, then, the text turns on the personality and responsibility of the perpetrator of torture. The hypothesis is that if something like a moral absolute can make sense, torture will surely be one of these absolutes, so that the personality of the perpetrator of torture and his responsibility for the acts of torture can hardly be explained by the thesis of the banality of evil, as contend by Arendt, except on the proviso that the banality of evil thesis be coupled with fundamental aspects of the Kantian radical evil thesis, especially its self-deceit character. It is intended to demonstrate that the degrees of wickedness described by Kant, especially that stage of the radical evil, are the best to enter in the fullest depths of the torturer's personality. In this context all excuses evaporate, including those of legality. For the torturer, therefore, has no excuses, not even in front of

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his own conscience. So, the main point is to explain the act of torture, especially considering Arendt view concerning Eichmann, according to which "The deeds were monstrous, but the doer – at least the very effective one now on trial – was quite ordinary, commonplace, and neither demonic nor monstrous". For such purpose/goal, three hypotheses are raised. The first is psychological. In this view the torturer is described as perverse, as a kind of sadist. The second explanation is sociological or political. According to this approach, there is an ethos and a social context that reinforces such actions and gives them meaning. However, it seems something is lacking in these approaches. Because of the insufficiencies of the two previous perspectives a moral explanation that goes deeper into the personality of the perpetrator of torture becomes necessary. In this regards the Kantian thesis about the radical evil seems to be a good initial approach for a third view in order to explain such atrocities. Arendt is well known for defending the thesis of the banality of evil in his text on Eichmann. However, she seemed to defend, in earlier works, a more fortified conception of evil, of a radically close to demonic evil, certainly envisioned by Kant but rejected by him. However, Arendt eventually rejected this interpretative thesis of evil close to a demonic will because attributing such an extraordinary character to evil would weaken the responsibility for it. To think the act of torture as incomprehensible threatens to put it beyond any comprehension, any significance, and consequently entails insurmountable difficulties to hold their authors responsible. As Derrida recalls, it is not possible to criticize violence except in relation to a symbolic sphere that makes sense, be it law, justice or morality. Finally, the text tries to demonstrate that Arendt conception of the banality of evil can be reconciled with the Kantian formulations concerning radical evil, especially if the aspect of self-deceiving is highlighted.

Keywords: radical evil, torture, perpetrator.

RESUMO

O texto visa a explorar aspectos legais e morais da tortura. Sob o aspecto legal, o texto compara três definições de tortura: a definição da ONU, a definição brasileira e a definição espanhola. Nesse sentido, nem a formulação da ONU nem a brasileira são ideais porque a definição legal brasileira restringe o elemento da ação por parte do autor da tortura e a convenção da ONU restringe o efeito sobre a vítima porque a dor ou o sofrimento devem ser severos. A hipótese é que uma proposta seria aquela do Código Penal espanhol, que em seu art. 174 define tortura como a submissão de alguém "a condições ou procedimentos que, devido à sua natureza, duração ou outras circunstâncias, envolvam sofrimento físico ou mental, a supressão ou diminuição de suas faculdades de conhecimento, discernimento ou decisão, ou que de outra forma prejudicam sua integridade moral". A definição espanhola parece mais abrangente em ambos os aspectos, naquele do ato da tortura e naquele do efeito sobre a vítima, uma vez que o sofrimento envolvido não é caracterizado como grave ou severo. Com relação ao significado moral da repulsa à tortura, pretende-se defender o caráter paradigmático do direito humano de não ser torturado em pelo menos dois aspectos. O primeiro aspecto refere-se à sua vocação universalizante no sentido pleno, uma vez que pode ser estendido a todos os seres sencientes. Nesse sentido, a proibição da tortura vai além do domínio da personalidade para avançar na direção de um domínio de sofrimento não determinado pela máscara da personalidade. O segundo aspecto é que a proibição representa um direito absoluto, sem exceções, precisamente por causa de seu conteúdo moral mais profundo. O estudo prossegue afirmando que existem boas razões para este caráter moral absoluto da proibição da tortura, as quais se devem a uma feliz coincidência decorrente do utilitarismo e da teoria moral deontológica kantiana, as duas principais teorias morais da modernidade. O texto examina os efeitos da tortura não apenas na pessoa do ser humano torturado, mas também em seu corpo. Dito claramente, a tortura destrói dois elementos básicos da humanidade, a personalidade e a corporeidade. O que restará do ser humano após ser torturado será, na melhor das hipóteses, um amontoado de carne senciente. Talvez, por esse motivo, a linguagem perca sua significação em relação à tortura, precisamente porque toda significação é anulada diante da hipertrofia do corpo físico em dor, que absorve todas as sensações. Colocado nesses termos, então, o texto trata da personalidade e da responsabilidade do autor da tortura. A hipótese é a de que, se algo como um absoluto moral puder fazer sentido, então, a tortura certamente será um desses absolutos, de modo que a personalidade do autor da tortura e sua responsabilidade pelos atos de tortura dificilmente poderão ser explicadas pela tese da banalidade do

mal, como afirma Arendt, exceto sob a condição de que a tese da banalidade do mal seja acompanhada de aspectos fundamentais da tese kantiana do mal radical, especialmente seu caráter de autoengano. Pretende-se demonstrar que os graus de maldade descritos por Kant, especialmente o estágio do mal radical, são os melhores para adentrar nas profundezas da personalidade do perpetrador tortura. Nesse contexto, todas as desculpas evaporam, inclusive as da legalidade. Para o torturador, portanto, não há desculpas, nem mesmo diante de sua própria consciência. Portanto, o ponto principal será o de explicar o ato de tortura, especialmente considerando a opinião de Arendt sobre Eichmann, segundo a qual "os atos eram monstruosos, mas o executor – pelo menos o mais efetivo agora em julgamento – era bastante comum, comum e nem demoníaco nem monstruoso". Para esse objetivo, três hipóteses são levantadas. A primeira é a psicológica. Nesta visão, o torturador é descrito como um perverso, como uma espécie de sádico. A segunda explicação é a sociológica ou política. De acordo com essa abordagem, existiria um *ethos* e um contexto social que reforçaria essas ações e lhes daria sentido. No entanto, parece que falta algo nessas abordagens. Por causa das insuficiências das duas perspectivas anteriores, torna-se necessária uma explicação moral que se aprofunda na personalidade do autor da tortura. Nesse sentido, a tese kantiana sobre o mal radical parece ser uma boa abordagem inicial para uma terceira visão, a fim de explicar tais atrocidades. Arendt é bem conhecida por defender a tese da banalidade do mal em seu texto sobre Eichmann. No entanto, ela pareceu defender, em trabalhos anteriores, uma concepção mais forte do mal, de uma radicalidade próxima ao mal demoníaco, certamente prevista por Kant, mas rejeitada por ele. No entanto, Arendt finalmente rejeitou essa tese interpretativa do mal aproximado a uma vontade demoníaca, porque atribuir um caráter tão extraordinário ao mal enfraqueceria a responsabilidade por ele. Pensar o ato de tortura como incompreensível ameaça colocá-la além de qualquer compreensão, significado e, conseqüentemente, implica dificuldades insuperáveis para responsabilizar seus autores. Como Derrida lembra, não é possível criticar a violência, exceto em relação a uma esfera simbólica que faça sentido, como o direito, a justiça ou a moralidade. Finalmente, o texto tenta demonstrar que a concepção de Arendt sobre a banalidade do mal pode ser conciliada com as formulações kantianas relativas ao mal radical, especialmente se for destacado o aspecto da autoilusão.

Palavras-chave: mal radical, tortura, perpetrador.

Legal aspects of torture

Art. 5 of the Universal Declaration of Human Rights says that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment".² A more precise definition of torture entry into force in 1987:

1. For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on

*discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.*³

Article 2 determines no exception.

According to the definition, torture *presupposes control* over the victim's body and involve *severe physical pain or suffering*. Notwithstanding, there are cases where there is no *physical pain*, like sleep deprivation, but yet it is extreme *suffering*. And there are the cases in which the body of the victim is not under the control of the torturers, as in the separation of parents and their kids. Maybe in these cases it is possible to say that the *psychological/mental suffering* is such that could

² The Declaration was proclaimed by the United Nations General Assembly in Paris on 10 December 1948 (General Assembly resolution 217 A).

³ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984, entry into force 26 June 1987, in accordance with article 27 (1).

also be classified as torture. But in cases like these the physical integrity of the suffering person is not harmed.

Of course not all cases of physical pain or physical suffering or psychological suffering are cases of torture. What seems relevant is the subjective dimension involved in the action of the torturer. Indeed, all of them involve necessarily the *intentional* infliction of *severe physical pain or suffering* on some *non-consenting* and *defenseless* person. This means that for an act to be considered torture it must be intentionally inflicted and must not be consenting.

In addition, it should be stressed the last part of the definition, according to which, torture "(...) does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions". One point is that the definition of torture implies *severe physical pain or suffering*, and the mention to lawful sanctions only excludes from the concept of torture *pain or suffering*, meaning, a normal pain or suffering caused by lawful sanctions. But, it is possible to ask: when a lawful sanction involves *severe pain or suffering* would it be torture? For instance, would it be torture to condemn someone to death penalty, and submit the condemned to wait for long years for the execution? Long term incarcerations, as life imprisonments, are torture? And what to say about realities, as in Brazil, where the conditions of jail facilities are overcrowded and permits all kinds of violence against the incarcerated population? Because of these conditions, last July 3rd, the Turin Court of appeal denied the extradition of a Brazilian lawyer, also a Portuguese citizen, condemned in Brazil. Weighted in the decision of the court the substitution in Jun 2019 of all members of the National Mechanism for the Prevention and Combat of Torture (MNPCT) of the National System of Prevention and Combat of Torture by police officers and militaries notoriously antagonists to human rights. Maybe, in cases like these where the suffering is so intense or severe that it becomes torture, not being a case of normal pain or suffering inherent in or incidental to lawful sanctions, but a case of *severe suffering* incidental to lawful sanctions.

As seen, the UN convention assigns two elements for torture: on the side of the perpetrator of violence, any act that intentionally causes...; and, on the side of the victim, *severe* pain and suffering. The Brazilian law 9.455/1997 also required two elements in order to have the crime of torture: on the side of the perpetrator, an act of violence or serious threat; and on the side of victim, physical or mental suffering. UN definition is more comprehensive on the side of the perpetrator of violence, because it includes any act that intentionally causes... Brazilian

definition is more comprehensive on the effect on the victim, because it is not necessary the pain and suffering to be severe (Brennand; Volpato Dutra, 2019, p. 37-50).

Diagram comparing the definition of torture UN/Brazil:

So neither the UN formulation nor the Brazilian formulation are ideal, because the Brazilian legal definition restricts the element of action by the part of the perpetrator of torture, and the UN convention restricts the effect on the victim, given that pain or suffering should be severe.

Maybe a better proposal could be similar to the one in the Spanish penal code, which in its art. 174 defines torture as the submission of someone:

(...) to conditions or procedures that, due to their nature, duration or other circumstances, involve physical or mental suffering, the suppression or decrease of their faculties of knowledge, discernment or decision, or that otherwise undermine their moral integrity.

The Spanish definition is more encompassing in both aspects, on the act of the perpetrator of torture, and on the effect on the victim, since the suffering involved is not characterized as severe.

Moral/ethical aspects of torture

The prohibition of torture and rape are considered moral paradigmatic cases: "Torture and rape are thus considered not only in themselves, but centrally as paradigms of moral injury" (Bernstein, 2015, p. 1). Waldron (2012) qualifies them as *moral absolutes*. In fact, it is almost impossible to find a justification for rape and torture. Even slavery could be justified in some cases, for instance, as a possible substitute for genocide, or as a justification to not kill someone depending on the circumstances, but it's almost impossible to think of an exception in relation to torture or rape. Even if some violence could be justified, for example, as resistance against those that are acting against human rights, torture and rape will never be allowed.

One of the reasons for the absolute moral prohibition of torture and rape is due to a fortunate coincidence that follows from utilitarianism and Kantian deontological moral theory, the two main moral theories of modernity: "(...) perhaps because their specific mode of suffering cannot be accounted for by reigning moral theories (...)" (Bernstein, 2015, p. 1)⁴.

	UN CONVENTION	BRAZILIAN LAW
PERPETRATOR'S ACT	any act	violent or serious threat
EFFECT ON THE VICTIM	severe pain and suffering	physical or mental suffering

⁴ Incidentally, certainly this is a point that curtails the incommensurability thesis: "A and B are incommensurate if it is neither true that one is better than the other nor true that they are of equal value" (Raz, 1986, p. 322).

Indeed, utilitarianism would hardly approve torture, even for pragmatic reasons, as exemplified by Beccaria who defies justly the efficiency of torture as a method of inquiry:

Therefore, the impression made by pain may grow to such an extent that, having filled the whole of the sensory field, it leaves the torture victim no freedom to do anything but chose the quickest route to relieving himself of the immediate pain. Thus the criminal's replies are as necessitated as are the effects of fire and boiling water. And thus the sensitive but guiltless man will admit guilt if he believes that, in that way, he can make the pain stop. All distinctions between the guilty and the innocent disappear as a consequence of the use of the very means which was meant to discover them (Beccaria, 2000, p. 41).

In another direction, perhaps with even more reasons, a deontologist refuses torture:

(...) torture violates human dignity in both senses described above: it inflicts suffering to make visible the victim's helplessness and it does so to assert absolute inequality" (Luban, 2014, p. 450); By humiliation I mean treating humans as nonhumans. There are many forms of such treatment; torture is one of them. So torture is an extreme form of insult and injury, of pain and humiliation (Margalit, 2002, p. 119).

Furthermore, in relation to other rights, there are exceptions, indeterminacy and controversy admitted frankly. It is the case concerning the right to life in relation to which the death penalty is admitted, as in the positive law of many states, not counting the cases in which it is possible to kill without crime. In relation to the right of liberty, it is admitted the penalty of imprisonment. Even in relation to slavery there is casuistry, as mentioned. Rawls theory of justice is an example: "Now it is this restriction that makes it practically certain that slavery and serfdom, in their familiar forms anyway, are tolerable only when they relieve even worse injustices. There may be transition cases where enslavement is better than current practice" (Rawls, 1999, §39, p. 218).

There is no such casuistry in relation to torture or rape. There is no notice of any legal system that admits explicitly torture or rape. What happens, sometimes, as in the case of Guantanamo during the Bush administration is the discussion of whether the determined action is torture or not. So the Bush administration didn't admit torture, they plead that what they did was different (Waldron, 2010, p. 8, 16).

According to Améry the pain of torture is such that reduces the person to their body: "But only in torture does the transformation of the person into flesh become complete. (...) the tortured person is only a body, and nothing

else besides that" (Améry, 1980, p. 33). So, the torture undresses the human being from his personality, his autobiography, his liberty, reducing him to his physical body. Maybe for this reason, language loses its significance, precisely because all signification is nullified in face of the hypertrophy of the physical body in pain, which absorbs all the sensations. As seen, according to Beccaria, the pain fills the whole of the sensory field. The pain inflicted could become so severe that there is no linguistic expression capable of describing it. Because it is an unspeakable experience, the pain of torture "(...) marks the limit of the capacity of language to communicate" (Améry, 1980, p. 33). Stated clearly, at least in the case of physical pain, it destroys language and returns the human being to a state prior to language, a state of sounds and screams, that is, "Intense pain is world-destroying" (Scarry, 1985, p. 29).

The perpetrator of violence

How to explain the act of torture, especially considering Arendt's view concerning Eichmann, according to which "The deeds were monstrous, but the doer – at least the very effective one now on trial – was quite ordinary, commonplace, and neither demonic nor monstrous"? (Arendt, 1978, p. 4). At least three hypotheses are possible.

The first is psychological. In this view the torturer is described as perverse, as a kind of sadist in three senses: by the radical negation of the other, by the negation of the social principle and by the negation of the reality principle (Améry, 1980, p. 35). For the act of torture to be successful, the torturer must "(...) have the capacity not to recognize the humanity of the one who is subjected to torture" (Gonçalves, 2014, p. 124). Torture exemplarily represents violence in its most radical sense. It depersonalizes, dehumanizes and even denies animality when the pain no longer causes any empathy on the side of the torturer. The torturer is stripped of any human recognition and any identification with the pain (Scarry, 1985, p. 36). Milgram experiment is a warning for us all, because the majority of us seems ready to torture if ordered by a competent authority, even if torture is incompatible with our concrete moral sense.

The second possible explanation is sociological or political. According to this approach there is an ethos and a social context that reinforces such actions and gives them meaning, for instance, an ethos that sees the other as the enemy. The torturer must learn to torture. He must learn to move from one state to another, from depersonalization, through dehumanization, and finally into denial of the animality of the body. And he can only go through these stages if there is a group with whom he can identify with and have a cause to fight, so that he can make sense of his own actions.

However, it seems to be lacking something in these approaches. Améry, when presenting the first approach, says that the evil the torturers perpetrated against him was not banal:

But this still does not mean that the evil they inflicted on me was banal. If one insists on it, they were bureaucrats of torture. And yet, they were also much more. I saw it in their serious, tense faces, which were not swelling, let us say, with sexual-sadistic delight, but concentrated in murderous self-realization. With heart and soul they went about their business, and the name of it was power, domination over spirit and flesh, orgy of unchecked self-expansion (Améry, 1980, p. 35-6).

On the other hand, Arendt, that seems to spouse the contextual hypothesis, also points out to something else. Referring to Eichmann, she observes that it was that kind of bureaucratic normality implied in such acts that made impossible for Eichmann to know or feel that what he was doing was wrong⁵, although, she observed that the Nazis at the end of the war tried to destroy evidences of what they had done, which implies some conscience of the wrongness concerning the act they were perpetrating⁶. When Arendt reports to her thesis concerning the banality of evil she restricts it to the strictly factual sense of the case she was reporting. According to her, Eichmann "(...) never realized what he was doing" (Arendt, 1963, Postscript).

Meanwhile, Eichmann was brought to court, and the bureaucratic machinery of Nazism had to take the form of a human action to be accountable for: "But insofar as it remains a crime - and that, of course, is the premise for a trial - 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, 1963, p. 134). Considering these problems, a moral explanation that goes deeper in the personality of the perpetrator of torture becomes necessary. In this regard the Kantian thesis about the radical evil seems to be a good initial approach for a third view, in order to explain such atrocities. In fact, maybe it is necessary to conjugate all of them to try explaining such acts.

Kant seems to be a good start for studying the perpetrator's acts of violence, so much so that Card accuses him of not taking the victims into consideration: "Kant locates evil exclusively in the perpetrator's character. He presents radical evil as the overarching choice to subordinate morality to self-interest. Evil, on his view, has no essential connection with harm; victims are incidental" (Card, 2002, p. 24).

The banality of evil in Arendt

Arendt is well known for defending the thesis of the banality of evil in his text on Eichmann. However, she seemed to defend, in earlier works, a more fortified conception of evil, an evil radicality close to demonic evil, certainly envisioned by Kant but rejected by him.

Indeed, *The Origins of Totalitarianism* reverberate a more robust conception of evil, an absolute evil: "(absolute because it can no longer be deduced from humanly comprehensible motives), it is also true that without it we might never have known the truly radical nature of Evil" (Arendt, 1976, p. IX). Such acts break all known standards "(...) breaks down all standards we know" (Arendt, 1976, p. 459). Kant suspected this conception of the radicality of evil, but ultimately rationalized it in the concept of wickedness (Arendt, 1976, p. 459). Arendt seems to have taken the notion of radical evil in Kant as a demonic evil. For her, the radicality of evil is characterized by its incomprehensible motivation, as stated in *The Origins of Totalitarianism*. The reasons are incomprehensible because all could eventually become superfluous, even the perpetrators: "They not only treat their victims as superfluous; they treat themselves as if the laws of nature and history transcend them as well" (Bernstein, 2002, p. 19-20). Moreover, the radicality of evil is characterized by the impossibility to punish it and forgive it: "It is therefore quite significant, a structural element in the realm of human affairs, that men are unable to forgive what they cannot punish and that they are unable to punish what has turned out to be unforgivable. This is the true hallmark of those offenses which, since Kant, we call 'radical evil'" (Arendt, 1958, p. 241).

However, Arendt eventually rejected this interpretative thesis of evil close to a demonic will.

The fact is that today I think that evil in every instance is only extreme, never radical: it has no depth, and therefore has nothing demonic about it. Evil can lay to waste the entire world, like a fungus growing rampant on the surface. Only the good is always deep and radical (Arendt, 2017, p. 209)⁷.

Arendt seems to have adhered to Jaspers' thesis on the banality of evil. Indeed, in a letter to her in 1946 Jaspers wrote:

⁵ "The trouble with Eichmann was precisely that so many were like him, and that the many were neither perverted nor sadistic, that they were and still are, terribly and terrifyingly normal. From the viewpoint of our legal institutions and of our moral standards of judgment this normality was much more terrifying than all the atrocities put together for it implied - as had been said at Nuremberg over and over again by the defendants and their counsels - that this new type of criminal, who is in actual act *hostis generis humani*, commits his crime - under circumstances that make it well-nigh impossible for him to know or to feel that he is doing wrong." (Arendt, 1963, Epilogue).

⁶ "But although the bad faith of the defendants was manifest, the only ground on which guilty conscience could actually be proved was the fact that the Nazis, and especially the criminal organizations to which Eichmann belonged, had been so very busy destroying the evidence of their crimes during the last months of the war" (Arendt, 1963, Epilogue).

⁷ Em Letter to Scholem from 1963, ela continua: "As I said, however, I don't want to go into this here, since I intend to deal with these issues in a different context and in greater depth. If you were to look up the concept of 'radical evil' in Kant, you'd find that he doesn't mean much more than ordinary baseness, which is a psychological rather than a metaphysical concept. But, like I said, I don't want to say much more about these things, for in a different context I'm intending to return to the topic and elaborate on it. But Herr Eichmann will certainly remain as the concrete model for what I have in mind" (Arendt, 2017, p. 209).

You say that what the Nazis did cannot be comprehended as 'crime' – I'm not altogether comfortable with your view, because a guilt that goes beyond all criminal guilt inevitably takes on a streak of 'greatness' – of satanic greatness – which is, for me, as inappropriate for the Nazis as all the talk about the 'demonic' element in Hitler and so forth. It seems to me that we have to see these things in their total banality, in their prosaic triviality, because that's what truly characterizes them (Koler; Saner, 1992, p. 62).

Probably the letter refers to Arendt's 1945 text about the guilt of the Germans (Arendt, 1994, p. 121s). Jaspers himself published his text on German's guilt in 1947 (Jaspers, 2000). In any case, *Eichmann in Jerusalem* (1963) seems to have adhered to the thesis of his author's master, Jaspers, to whom attributing an extraordinary character to evil weakens the responsibility of it (Koler; Saner, 1992, p. 702, n. 6). Thus, Jaspers' point, which certainly echoes Kant, is that of the responsibility for the evil of totalitarianism. To think the act of torture as incomprehensible threatens to put it beyond any significance. As Derrida recalls, it is not possible to criticize violence except in relation to a symbolic sphere that makes sense, be it law, justice or morality:

The concept of violence (Gewalt) permits an evaluative critique only in the sphere of law and justice (Recht, Gerechtigkeit) or the sphere of moral relations (sittliche Verhältnisse). There is no natural or physical violence. We can speak figuratively of violence with regard to an earthquake or even to a physical ailment. But we know that these aren't cases of a Gewalt able to give rise to a judgment, before some instrument of justice. The concept of violence belongs to the symbolic order of law, politics and morals. And it is only to this extent that it can give rise to a critique. Up to this point this critique was always inscribed in the space of the distinction between means and end (Derrida, 1992, p. 31).

The consequence of this impossibility or difficulty in criticizing violence has insurmountable implications for it to be punished by those responsible for such acts. As the commentator of Kant attests, a being acting in a manner analogous to a demonic being would be declared insane⁸.

The radical evil in Kant

A fundamental point for Kant in *Religion* is precisely that of imputability. Evil must be imputed to the human being. P. 35 of *Religion* opens a threefold perspective to this thread.

Evil, according to the first perspective has its foundation in human sensibility, that is, in its inclinations, especially that of self-love which strongly includes self-preservation. However, this possibility is too small, since it would make a human being a "purely *animal* being," not free. Then the evil could not be imputed to him.

According to the second possibility, the ground of evil lies "(...) in a *corruption* of the morally legislative reason, as if reason could extirpate within itself the dignity of the law itself" (RGV, AA 06: 35)⁹. However, the reciprocity thesis between (a) the transcendently free legislative a priori reason and (b) the moral law forbids this possibility. This second possibility to explain evil is really strong, because it implies an absolutely evil will, a diabolical being.

For Kant, the problem with a diabolical will is that the acts emanating from it could not be imputed to the agent. Just as deeds cannot be imputed to nonhuman animals, they cannot be imputed to diabolical beings. Both are not aware of moral law and both are not free in their actions. A nonhuman animal does not know the moral law and its actions are determined by its animal nature. One of the definitions of a diabolical being, as Kant uses it in *Religion*, is justly that such a being does not know the moral law, since its reason is corrupted in such a way that, as said, extirpates within itself the dignity of the moral law itself. Such a being would necessarily act by its corrupted nature. As resumed by the commentator:

Our bodily senses by themselves cannot be the basis of evil, because evil arises only as a result of our free choice. Yet reason, by itself, cannot be the basis of evil either, be-

⁸ "We must assume that even the most heinous criminal acts - such as gruesome terrorist murders, serial rapes, and the like - are at some level performed on the basis of a *perverted* sense of what is 'good' rather than out a commitment to *malice* as a lifestyle, because the latter could only occur in a being who lacked the freedom to choose between animality and personality. When someone *does* appear to be acting without such freedom, we declare that person insane, thus implying that he or she cannot be rightfully held responsible for his or her evil deeds. Ironically, then, our *embodiment* - the very aspect of our nature that many readers think Kant *blames* for our evil nature - is what keeps us from being devils: by grounding us in self love, our animal nature insures that at some level, albeit perverted, our evil behavior is motivated by a desire to do what is 'good' (at least for ourselves); a devil, by contrast, would exhibit preprogrammed behavior that would be ultimately self destructive. Identifying the deepest form of human evil with perversity involves another point Kant has already addressed: that the evil heart characterizing human nature is more a sign of frailty (weakness due to our embodiment) and disingenuousness (weakness of will) than of utter wickedness, *because* our propensity to start our moral life with an evil heart does not destroy the essential goodness of our will" (Palmquist, 2016, p. 98).

⁹ References to Kant follow the standard proposed by the Kant-Studien Redaktion available in [<http://www.kant.uni-mainz.de/ks/abhandlungen.html>].

cause, if our will (i.e., our predisposition) were evil, then we would actively disrespect the moral law and in so doing would lose access to genuine free choice. Neither animals nor devils (if they exist) enjoy free choice the way we do: the former are determined by nature and the latter by a compulsion to disobey the moral law (Palmquist, 2016, p. 92).

Therefore, only a third feasible way remains to account the imputability of evil, namely, depravity or wickedness [*Bosartigkeit*], which takes the form of perversity [*Verkehrtheit*], not of malice [*Bosheit*]. After all, it is from Kant's own letter:

The depravity of human nature is therefore not to be named malice, if we take this word in the strict sense, namely as a disposition (a subjective principle of maxims) to incorporate evil qua evil for incentive into one's maxim (since this is diabolical), but should rather be named perversity of the heart, and this heart is then called evil because of what results (RGV, AA 06: 37).

In this case, the authority of the law is not annihilated and, therefore, the choice remains between the law and the inclinations or self-love. This way, the radical evil occurs by the subordination of the maxims, that is, by the inversion of the moral order of motives, with self-love placed above the moral law. In this formulation the reasoning function of reason remains intact, and evil is only interpreted as an exception:

If we now attend to ourselves in every transgression of a duty, we find that we actually do not will that our maxim should become a universal law, since that is impossible for us, but that its opposite should rather generally remain a law; we just take the liberty of making an exception to it for ourselves, or (just for this once) to the advantage of our inclination. (...) Now, even though this cannot be justified in our own impartially employed judgement, it still proves that we actually acknowledge the validity of the categorical imperative, and permit ourselves (with all respect for it) just a few exceptions that, as it seems to us, are immaterial and wrenched from us (GMS, AA 04: 424).

In the terms delegated by *Religion*, there is an incorporation of the maxim by the power of choice, being (a) the preponderance of self-love over moral law or (b) the preponderance of moral law over self-love:

(...) freedom of the power of choice has the characteristic, entirely peculiar to it, that it cannot be determined to action through any incentive except so far as the human

being has incorporated it into his maxim (has made it into a universal rule for himself, according to which he wills to conduct himself); only in this way can an incentive, whatever it may be, coexist with the absolute spontaneity of the power of choice (of freedom) (RGV, AA 06: 24).

Therefore, the conception of Kantian radical evil is the logical consequence of the combination of the reciprocity thesis and the incorporation thesis (Allison, 1996, p. 175).

If the thesis of radical evil is applied to the perpetrator of torture it is possible to sustain that he can know precisely that torture is evil, and can choose to torture someone for some kind of contentment linked to self-love, for instance, sadistic pleasure: "(...) radical evil can be understood from a conscious inversion of the moral order. (...) it is credible to think someone acting immorally and acknowledging its fault" (Pavão, 2011, p. 55-6). This possible understanding is in agreement with thinking of torture as a moral absolute, whose moral prohibition could not be ignored, especially after human rights declarations, as well as after many positive laws around the world condemning it. In this particular, its possible do to attribute to the perpetrator of torture a *dolus malus*, such that he would at most make some exception for himself, justified for some putative reason.

The moral self-deception thesis

There is a paragraph in Kant's text that also looks promising for analyzing the perpetrator of torture. It is the figure of self-deceiving [*betrügen*], of defrauding about one's own moral intentions, provided that they do not result in evil, in such a way that one considers his own intentions as justified under the law. It is a kind of perfidy [*Tücke*], insidiousness, of human heart [*dolus malus*]. In this regard, it is possible to point out the Peace of Conscience, Peace of Mind, of having avoided bad consequences, not for the merit of virtue in struggle, but for good luck, the fortune of the environment, and the favorable conditions. This throwing dust into our eyes, smokescreen to fool ourselves, resides in human nature's radical evil, not only "(...) hinders the establishment in us of a genuine moral disposition (...)" (RGV, AA 06:38), but also extends to the falsehood and deception of others, thus taking a social configuration. This dishonesty disturbs the moral faculty of judging what a human being should be, which ultimately also makes uncertain the imputation of actions.

How to explain this self-deception? When Kant explains the degrees of the natural propensity to evil there is something lousy, because the first two degrees, that of fragility of will and that of impurity of motives, reflect a certain turpitude, since they seem to function as a kind of excuse. Yet, in the two first grades there is only unintentional guilt [*culpa*], but, what happens in the third grade is deliberate guilt [*dolus*], meaning that in the third degree of evil one seeks consciously to deceive himself.

In order to explain how self-deception is possible there are two plausible theses. For Allison, self-deception is a way to confront moral conscience in the sense of presenting the maxim as universal and not as an exception:

And since even at this last stage of humanly possible evil the authority of the moral law is recognized, Kant indicates that this is only possible insofar as the agent engages in a kind of systematic self-deception. Basically, the idea is that one tells oneself that one is doing all that morality requires, as long as one's overt behavior (taken under some description) accords with the law (Allison, 1996, p. 175).

According to this reading, the deceptive character is given by taking as virtue what is really due to good moral luck. Allison's thesis applied to Eichmann sounds like:

In addition to their common rejection of any diabolical motivation, the main point is presumably the way in which Eichmann's character was supposedly molded and corrupted by his social context. Indeed, Arendt does remark that Eichmann was a product of a society in which mendacity had become an ingredient of the national character that evil in the Third Reich was so deeply ingrained as to lose the capacity to tempt; and that Eichmann committed crimes under circumstances that made it virtually impossible for him to recognize that he was doing wrong (Allison, 1996, p. 178).

Arendt, as is well-known, characterizes Eichmann for his thoughtlessness, which has led him to ignore important moral aspects, to not acknowledge his duty, and to not feel guilty. Allison uses the self-deception thesis to explain Arendt's characterization of Eichmann. For him, precisely, the thesis of self-deception does not justify an exception made, but explains how false universalization is generated by hiding its exception character, just like the case of Eichmann: "In short, immoral maxims appear to pass the universalizability test only because they ignore or obscure morally salient features of a situation" (Allison, 1996, p. 181).

The second explanatory thesis of self-deception takes Kant's emphasis on virtue in struggle and connects it to a cogent point of Kantian moral philosophy, namely, the unknowable character of moral actions (Pavão, 2011, cap. 2). As a kind of compensation for this "Kantian (...) agnosticism about the knowledge of moral actions" (Pavão, 2011, p. 41), moral agents seek rules, rituals, externalities, standards, that can function as a kind of guarantor of morality. Indeed, Eichmann claimed to be doing his duty. This sense of fulfillment of duty formed in the case of Eichmann is a kind of shield that protected him from being responsible for his actions, that is, misled his moral conscience. For Burdman it was these rituals that trivialized evil.

Indeed, as we have seen, one of the aspects rooted in radical evil is that it deceives itself and that it presents itself as something good. The point is that it is not a question of obscuring or ignoring an important aspect of the situation in such a way as to generate a false universality, as intended by Allison, but to find externalities that could mark the certainty of virtue, - as said, something unknowable for Kant - which led to obliterate that virtue must to be always be in battle, always on alert: "In moral matters, certainty amounts to deception" (Burdman, 2019, p. 189). Hence, the commentator can approximate Kant and Arendt on this subject: "Kant's insight agrees with Arendt's in that evil is linked to an incapacity of thinking about and judging our deeds anew, independently of objectified rules" (Burdman, 2019, p. 189).

However, as Kant says, there is deliberate guilt [*dolus malus*] in the self-deception, because it is generated intentionally by the subject himself (Pavão, 2011, p. 55): "This fundamental deception allows evil to be radical, in the sense of willfully corrupting the choice of a moral maxim for our actions, while concealing such choice - thus becoming 'banal'" (Burdman, 2019, p. 189). In fact, self-deception is a mechanism by which evil becomes banal, for it relieves the responsibility for a virtue in struggle, that is, to judge at any moment if the action is right or wrong. Regarding Eichmann, the author concludes:

Following Kant, we can see Eichmann's unreflective self-sacrifice as a deceptive mechanism by means of which he obtained certainty about his own virtue, without any need of further self-interrogation. It is this self-deception, consisting in a complete submission of the capacity to choose to the ritualised displays of morality of his surrounding world, that made him appear as incapable of making moral judgments and, thus, as lacking evil intentions altogether. Precisely because this form of evil stems from an intention that conceals itself, as an 'intention not to have intentions', it is 'radical' and 'banal' at the same time (Burdman, 2019, p. 190).

Put plainly, Eichmann can be held responsible for his own negligence.

Conclusion

The psychological and sociological approaches as explanatory of the perpetrating act of violence are adequate to the point they make, but they lack a certain depth, which can only be attained by the moral standpoint.

Concerning this moral way, the research scrutinized Arendt's studies and accompanied her in the sense that the thesis of a diabolical will to explain evil seems too much, since it risks putting such acts in a non-significant dimension. As Derrida points out, violence can only be criticized if it is in the

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