

Devin O. Pendas. *The Frankfurt Auschwitz Trial, 1963-1965: Genocide, History, and the Limits of the Law*. Cambridge: Cambridge University Press, 2006. 340 S. \$65.00 (cloth), ISBN 978-0-521-84406-2.

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## Law, Not Justice: The Criminalization of the Holocaust

Are Nazi murderers just a bunch of criminals? Can a legal system be the appropriate tool or its courts the venue for dealing with the traumas of past atrocities, the legacy of the Holocaust, or the unprecedented sufferings of millions of victims? Is a trial of perpetrators of mass atrocities just another episode of “Law and Order”?

Devin Pendas’s book *The Frankfurt Auschwitz Trial, 1963-1965: Genocide, History and the Limits of Law* is an excellent place to begin pondering these questions. The Frankfurt trial was perhaps sovereign West Germany’s most important trial of former Nazi criminals (if we keep the legal terminology and indeed call them “criminals”). The trial is well documented in Germany, but only two new original studies have been published in English. Published at almost the same time as Pendas’s book was Rebecca Wittmann’s *Beyond Justice: The Auschwitz Trial* (2005).

Questions connected to the Nuremberg Trials and about the “criminal nature” of Nazism were debated immediately after the war and Germany’s defeat. Hannah Arendt and Karl Jaspers defined the terms of this debate in an exchange of letters in 1946. Arendt, who later became notorious for her own published account of another Nazi trial, the one against Adolf Eichmann in Jerusalem in 1961, did not really believe in the capacity of legal language to deal with crimes that can be called “crimes against humanity.” Such crimes, in her opinion, ruptured the limits of the law. She inquired into whether we are

really equipped to deal with a type of guilt that is beyond any crime (at the same time she saw the Jewish victims as endowed with an innocence beyond goodness). Karl Jaspers was well placed to answer her. His book *The Question of German Guilt* (1946) remains not only a contemporary product of Germany’s handling of the past, but has recently turned into a paradigmatic reference point for a political and philosophical analysis of guilt, especially Jaspers’s distinction between criminal, political, moral, and metaphysical guilt. Jaspers distinguishes between criminal and political guilt, which are public and external, and moral and metaphysical guilt, which are private and internal. *Criminal guilt* refers to those acts for which one may be held liable in a court of law; *political guilt* refers to the responsibility one bears for the political system in which one lives by virtue of being a citizen. In the case of *moral guilt*, the individual must come to terms with the breakdown of his or her conscience after the fact; it refers to whatever personal failings one has exhibited, where only one’s conscience can be the judge. This is a type of guilt that grows out of having decided to make one’s conscience subservient to the state. Metaphysical guilt is even further removed from the human realm. It is a cherishing of one’s guilt as a quasi-religious experience through which one can rise to greater spiritual heights. In metaphysical guilt, one is only answerable to God. Thus, Jaspers answered Arendt that he did not wish to bestow any form of “satanic greatness” on the Nazis. Rather, they should be treated for exactly what they were: criminals, in all their banality and

triviality.

These are the claims that need to be aired and elucidated in any kind of trial that deals with the atrocities of past criminal regimes. Pendas's book on the Auschwitz Trials, which took place in Frankfurt between 1963 and 1965, tackles these issues. German law formed the framework for the trial, the defendants were treated as common criminals, Auschwitz became a crime scene, and the lawyers occupied with crime scene investigations. Pendas expresses dissatisfaction with this scenario. He would have preferred a trial that took into account the enormity of the acts and the violation of human rights and dignity instead of treating the Auschwitz guards in the dock like mere murder suspects—as the court had to treat them. Thus, in Frankfurt, only criminal guilt was on trial.

The juridification of Holocaust memories and by extension genocide has its origin in the Nuremberg Trials in the immediate postwar period. These trials were the beginning of historical knowledge about the Holocaust even though this was not their prime intention. Pendas is clearly aware of this tension and it underlies every page of his gripping book. Clearly, more is at stake than the operation and administration of justice. Trials are also moments where issues of guilt, sacrifice, and renewal are played out. As Pendas demonstrates in his chapters on the indictment, the taking of evidence, and the closing arguments, this was not really the case in Frankfurt. Pendas is, of course, not alone in his desire to treat juridification not merely as a legal judgment, but as a socially embedded, meaning-producing act. Trials that deal with political evil should be allowed to become transformative opportunities where memories of grave injustices are addressed in rituals of restitution and renewal. Here, Pendas joins a rather large number of scholars outside the legal community who take an extra-legal view on such procedures. Whereas the Nuremberg Trials appealed to a universal language of human rights, the Frankfurt Auschwitz Trial ignored human rights and ruled within the confines of the German law alone. Voices of survivors as witnesses were scarcely heard in Nuremberg. In Jerusalem's Eichmann trial they constituted the main voice. But his trial took place in the state of the victims. In the land of the perpetrators, witnesses were heard (359 altogether), but as part of a larger procedure of evidence gathering. Pendas's book unfolds along the lines of this tension. How can one use domestic criminal law to come to terms with the Holocaust? Over this hovers, of course, the question of why it took until 1963 for this trial to occur at all. Had not West Germany already come to terms

by then with the fact that the murderers were an integral part of society and Germany's reconstruction? What happened then and there truly happened in a different universe. Why would a German court think it necessary in 1963 to begin prosecuting good Germans of the past? Was the time of "democratization via integration" coming to an end? Pendas seems to suggest just that. He looks at the trial from four different and interrelated contexts: through the constraints of the law in general and German law in particular, through the international political context of the Cold War, and the general politics of the past in West Germany. Clearly justice cannot be rendered in such a setting. Seven of the 22 defendants were convicted of murder, ten of being accessories to murder (Pendas gives the interested reader a well-documented account of the distinctions in German law between murder and accessory to murder), three were acquitted, and two did not stay to the end of the trial.

Since there was no definition of guilt beyond the criminal one, questions of mass participation and complicity, questions of anti-Semitism, questions regarding personal and collective responsibility in deeds committed by criminal states were all excluded. On the other hand, the trial established a basic liberal principle: individual actions are the result of individual decisions. However, can this explain how Auschwitz became possible in the first place? Rightly so, Pendas responds in the negative. Pendas demonstrates that for the defendants there was more at stake than establishing their "innocence," even though none of them claimed to know of anything criminal that went on in Auschwitz. In addition, there was a representational threat to them as well. They wanted to preserve their moral worth. What did they do? They were good Germans who followed orders like everybody else. If they could establish that they were acting in a morally justifiable way, the entire German nation could look at itself in the mirror without shirking and the Holocaust could be turned into a natural catastrophe with no one held responsible except perhaps Hitler. He was responsible for the destruction of the Jews. By extension the defendants working the ramps in Auschwitz bore no responsibility. They actually tried to save lives—so claimed the defense in their closing argument. Towards the end of the book, Pendas looks at the public perception of the trial. Clearly there was inner resistance to the trial, as though the trial was confronting Germans almost two decades later with their collective guilt. As Pendas clearly shows, this tendency was reinforced by the press coverage.

This is a very rich book and an important addition to

the literature of “transitional justice,” which has attracted renewed attention after the collapse of various dictatorships in the 1990s. Reading Pendas, one can draw connections between the post-World War II era and today. After all, new democracies frequently rely on the same people who were around when the totalitarian system was in power. Reconciliation with those who supported past dictatorships can be a necessary precondition for democracies to rebuild. In Germany, it was only during

the late 1960s—when successful reconstruction and political stability were achieved—that the pervasive failure to punish former Nazis became unacceptable. It took another two decades before the historical spotlight focused directly on the deeds of the perpetrators as opposed to the routine official ritual of mourning its victims. The Frankfurt Auschwitz Trial was a vector of transition and provided a taste of justice. For some, it was a bitter taste indeed.

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