

# The Limitations of Justice

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Before undertaking a brief overview of the current state of international justice, I wish to share a number of general impressions on how the relationship between justice and society has evolved. In my view, justice has expanded its sphere of influence well beyond its traditional domain of investigating breaches in the social order, and punishing those responsible for them. Two phenomena in particular are at the root of this expansion: international justice and trials for crimes against humanity (one represents an extension in space; the other an expansion in time). However, neither of these events strikes me as being either necessary or desirable, but rather deviations that warrant further analysis.

The first deviation has political underpinnings, unrelated to our present situation, and is by no means a novel event. I was born in Bulgaria, whose modern history during my childhood was marked by three waves of political trials, which were unique in that the accusers in one wave became the defendants of the next. In 1945, the war-time members of government and parliament were judged, condemned and executed by the new government of the Patriotic and Antifascist Front. In 1947, it was the turn of the same Front's non-communist members to be judged, condemned and executed by their former communist colleagues. Then, finally, in 1949, the communists were put on trial; those who conducted the 1947 trial were, in turn, judged, condemned and executed by the other communists who had replaced them at the state's helm.

These decisions may have been handed down by courts of law, but was justice really done? In each wave of trials, the winner of a political conflict wished to have not just might, but also right, on its side. The political defeat of the adversary therefore had to be coupled with legal guilt. However, the legitimacy claimed by the victor was the very same as that previously claimed by the vanquished in its own time of glory, namely the political defeat of its enemy. This constitutes an illegitimate extension of justice beyond its traditional domain.

The second deviation from the traditional sphere of justice, often found in democracies, might be considered historical rather than political, in that justice encroaches on the field of history. I chanced upon a recent example of this (among many others) in an interview with the former prosecutor for the International

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Criminal Tribunal for the Former Yugoslavia, Louise Arbour.<sup>1</sup> She asserted that the role of justice is to ‘manifest reality’ and ‘be a forum for truth’.

It may be useful to recall that the term ‘truth’ holds (at least) two distinct meanings. The first is that of factual truth – the correspondence between words and their object, which one arrives at through fact-gathering and answering questions on the who, when, where, how and how many. At the same time, there is also the truth that we arrive at through interpretation, which concerns the very meaning of events, their place in human history, and their effect on both contemporary and future generations. Historians seek both truths but do not confer the same value to them. It is in their interpretation of truth – their effort to reveal the meaning of events – that great historians are distinguished from the rest.

Justice, however, is better equipped to contribute towards the establishment of the former kind of truth, rather than the latter. It has important means – the police, investigators and witnesses – to gather, verify and organize a great deal of information. Fabrication of evidence constitutes perjury – a punishable offence – which adds credibility to its findings. Justice can also facilitate historians’ work.

In contrast, justice is ill suited for establishing the latter form of truth – the meaning of events. Justice does not aspire to historical equity or balance; it considers both inculpatory and exculpatory evidence. Factual truth serves a certain purpose, and is instrumentalized accordingly. And justice can only proclaim one of two extremes – yes/no, guilty/innocent – whereas historical truth lies somewhere in the middle. Far from the black and white of truth in the courtroom, reality exists in shades of grey.

Judges cannot substitute for historians in this interpretive work; they have neither the preparation nor the appropriate forum to do so. They are no more suited to this than members of parliament, who are, likewise, called upon to ‘freeze’ historical truth by means of laws. However, trials concerning crimes committed well in the past or in a foreign land necessarily broach not only factual truth, but also the topic of historical truth – the truth of interpretation.

One may wonder whether seeking justice in the sense of punishing criminal acts and looking for the truth in the testimony of the actors involved, including those who themselves might be counted among the accused, are compatible endeavours. For example, following General Aussaresses’ publication of a book recounting the summary executions and torture sessions that he had organized with French soldiers during the Algerian war, a number of plaintiffs sought to initiate criminal proceedings against the alleged torturers, by filing complaints for crimes against humanity.

Setting aside other objections to such proceedings, can one not but acknowledge that they will probably encourage the participants in the crime to camouflage the truth, rather than seek to expose it? Can a meaningful labour of truth be expected if the author of it risks imprisonment for the content of his revelations? Prosecuting that war’s actors will not shed any more light on it, or enable us to comprehend its nature. Modern French society stands to gain more from what the historical truth can deliver, than from the conviction of a single and isolated individual, forty years after the fact.

1 *Le Monde des Débats*, 25 May 2001.

A third deviation that I fear is the supposed instructive function of justice. It makes me deeply uneasy when I hear that the aim of justice is to educate the public – to teach it the difference between good and evil. First of all, it is questionable whether lessons learned from such trials are of any great moral value. The first trials for crimes against humanity concerned Klaus Barbie, an officer of the Gestapo. Regardless of the prosecutors' intentions when initiating the trial, its lesson turned out to be the following: the criminals were German and the victims French. In this context, the French public could only identify with the hand wielding justice, to the exclusion of the culprit himself. Without any measure of identification with the guilty party, why should the public be expected to reflect on the crimes in such a way that could lead them to the conscious, moral rejection of that type of crime, or at least to an awareness of that part of themselves which is capable of committing it? Smoothly placing the public on the side of righteousness does not seem to further its education in any way. Perhaps, the lessons would have been better learned if the trial had taken place in Germany.

The subsequent trials concerned French citizens (Touvier and Papon), but they too left an ambiguous legacy. The very definition of crimes against humanity was amended several times to apply to each case; politicians explicitly expressed their opinion as to the accused's guilt; and the media did not restrain their attempts to influence both judges and jury. The outcomes of the trials seemed inevitable, based on political interests, where judgment was passed on a bygone generation with whom it was impossible to identify – on men who had been selected to represent a category of culprits rather than each his own singular narrative.

Are the lessons taught by international justice of any greater value? I am not so sure. Take, for example, the *Milošević* case going on in The Hague. Does the way in which he was surrendered to justice reflect the ideals of international law? Do methods where the ends always justify the means, where money can buy a verdict, illustrate impartial rules or rather the survival of the fittest? Moreover, at whom are such moral lessons aimed? The Dutch, the French, the Americans? Not quite: they escaped unscathed from such trials and remained on the righteous side of the fence. Rather, it is the populations of the Former Yugoslavia, or Rwanda, that stand to learn from such trials, in cases where they were the accomplices or passive witnesses to the massacres perpetrated on their territories. However, because the trials are conducted far from these countries, and without the support of the people, the lessons are lost, and the people instead feel justified in claiming that with these trials, they themselves have been wronged – that they are the victims of an injustice. As with the *Barbie* case, I am convinced that the educational value of such trials accrues when they take place in the accused's own country. The public, faced with the guilt of one of their own, thus has the opportunity to identify with the accused, and, upon reflection, consciously reject his criminal behaviour.

Why has justice encroached into these other domains? The underlying principle may be formulated as follows: society hates a vacuum. Individuals and entities which formerly proclaimed and defended common values have ceased to do so, although society needs them now, as ever before. Politicians have lost interest in such a role,

preferring instead to dwell on partisan battles. Historians no longer claim to reveal truth, or values, for that matter, seeking only to represent the various points of view adopted by different historical actors. A vacuum ensues, and justice is called upon to fill it. All hopes are pinned on judges; henceforth, the only source of certainty – the only arbiters of good and evil. One might call this the ‘judicialization of the public sphere’.

I am not sure what we gain from this confusion of roles. To me, it would be better if politicians dared to affirm what they believe is best for society, albeit with the state’s remaining neutral as regards morality; that educators and moralists openly defended their conception of good; and that historians asserted the truth without false modesty. Finally, I would prefer that judges remain faithful to their own vocation – that of rendering justice. Justice should not be confused with truth; nor should it be confounded with public peace or the common good. Each of them has a specific and sufficiently burdensome task to accomplish.

There is another means of collective education which resembles justice but is better adapted to its function, namely the investigative or truth commissions, such as those set up in Latin America or, more recently, in South Africa. All of these commissions were castigated for their shortcomings, but the principle underlying their existence deserves to be defended. Why? First of all because the crimes under these commissions’ jurisdictions involved too many actors to try them all, and the individual responsibility of each of the accused is mitigated not only by the force of superior orders, but also by the laws to which they were subject. In addition, the scope of these commissions is not punishment, but rather establishing the truth, which is seen as having greater collective and educational value than meting out a few individual punishments. Lastly, these commissions produce findings that place society squarely before its own responsibilities instead of allowing it to indulge in blame-shifting towards a few selected scapegoats. Thus, society, culpable in so far as it stood back and let events unfold, can identify with the accused and not only with the side of the righteous and the just.

What is the alternative? Is it realistic to cross our arms and sit back, just because existing justice is imperfect? Can we ignore the victims’ demands for justice – for them, a burning necessity?

This is not my wish. Nevertheless, I also believe that justice can remain just only if it goes forth, as Mireille Delmas-Marty puts it, in a modest and empirical manner, and not in pursuit of such lofty ambitions. International justice already exists, even if it does not proceed with a mathematical exactness. The Luxembourg Court has jurisdiction over the citizens of the European Union, and that of Strasbourg over all European countries. In this vein, establishing mechanisms of universal jurisdiction in national systems, as well as permitting investigations and prosecutions beyond the borders of each state, should be encouraged. Where mass crimes have been committed, truth commissions may prove to be particularly useful. I am speaking of genuine international justice, and not global justice – a justice which is carried out within and between nations, and not over them. Such justice is built bit by bit through addition or agglomeration, by tinkering with its elements from the ground up – not

through academic theorizing. It also means, regrettably, that certain crimes will go unpunished – that certain victims will not have the consolation of witnessing their former tormentors suffer as they once did.

Dreaming of absolute justice is both illusory and injurious. Human existence is an ‘imperfect garden’, as Montaigne once wrote,<sup>2</sup> and we should not forget it: moralistic drifting can prove dangerous. However, a life without justice is less than human. We would do well to avoid the two extremes: there is no shame in choosing the middle ground.

2 M. de Montaigne, *Essais* (Paris: PUF-Quadrige, 1992), vol I, 20, at 89.