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A Restorative Justice Approach between the Past and the Future

Eras of political or social life that have caused major injury are either forgotten or remembered. However, if there is going to be a will to terminate the forgetting or to remember, this will also begin to shape a quest for 'calling to account/accounting for.'

To make up for the loss instigated through a wrongdoing, or if possible to seek for ways to return to the previous state in the case of an individual or social injury, has been a common humane effort since the ancient ages of the history of humanity. Dealing with a suffering in the individual sense, striving to survive despite it, is probably a situation that falls more under the field of clinical psychology. But justice policies that recognize this humane reaction and that are devised based on this are essentially grounded upon such a principle as well, and share this aim. In short, the aim is to efface that injury or alleviate its effects.

However, the return to the state before the emergence of the cause leading to that injury (*restitutio in integrum*) may not be possible in all cases even if it is desired. Here what I am trying to emphasize is not only human losses; even in the loss of a physical asset, there may not be the chance to return to that pervious state. Therefore, the acceptance of a legal (and political) assumption takes, or is at least expected to take, precedence. This is an assumption towards filling, overcoming the gap constituted by that loss. And a "retributive**1** justice" policy that is widely accepted is thus begun to be established.

With modern times, the efforts to recognize and restore a loss, a damage resulting from relationships between people as I depicted above have become one of the essential public functions of state mechanisms. In the context of modern penal justice policies, this implies the punishment by the state of a person who has caused injury. Even though the causality between that injury and the act of the person (perpetrator) causing that injury has to be taken into consideration in the appointment of the sanction (penalty) to be issued, in fact the main reason necessitating the execution of that penalty is the fact that the given act violates a prohibition defined by law.

The punishment of a person, who has violated an interest safeguarded by law, by the state implies the perpetrator and the state becoming in a sense the two parties in this 'accountability' relationship. With this act causing an injury, damage, the perpetrator has in fact violated the laws of the state and the state is bestowed with the power to demand accountability. But what about the aggrieved? The aggrieved or his or her loved ones have to assume that the injury inflicted by the loss is compensated through the execution of a sanction on the perpetrator as a result of this calling to account process.

A legal baseline is sought at the root of this process shaped by legal definitions and positions. In other words, in our relations defined per law, there is an act, a behavior that does not comply with, conform to this situation. Therefore, for that an act of 'violation' to be really qualified as such, there has to be a situation such as a breach of an interest defined and safeguarded by law or the disruption of a legal relationship. In short, that state of injury also becomes the violation of a legal obligation. But even this decree does not make things easier. Because the limits of the effort to find a legal response to injury are also defined by the law. Especially if major sufferings, injuries of the past that are under the influence of time are

concerned, the meaning of such power to appoint and decide according to law becomes more crystallized and begins to be questioned.

For instance, in the issue of whether or not the losses in the 1915 Armenian deportation will be recognized as genocide in legal language, a discussion that is once again reliant on the tools of law emerges in order to make headway in the legal universe.

As evident, the prevention and punishment of such a crime of genocide in the normative sense was rendered possible in the world order established after the foundation of the United Nations through an international convention adopted in 1948 regarding this issue. In the adoption of this convention, there are traces of the major atrocities experienced in Germany and nations that have actively or passively partaken in the war during the 2nd World War, and of course the Holocaust. Yet in the cases before the International Military Court where major war criminals of the offensive war of those years were tried in Nuremberg, it is not easy or even possible to find traces of a Holocaust (or genocide) from a legal perspective.

As such, is the meaning of seeking retribution to those sufferings in the law delimited by the definitions the law ascribes to those situations? Even if rendering law identical to life is the quest of an eternal struggle, how or to what extent is this possible? Could it be possible to claim that this state of injury, which cannot find a place for itself in the law in the form it in effect exists in life, does not actually exist, solely for this reason?

The tragedy of 1915 that I touched upon above, even if not recognized as genocide in the law of that era, could be suited to be discussed in the context of crimes against humanity and civilization from the perspective of the law of the era. Or there could be those who also object to that argument. In these interpretations, again remaining in the realm of law and around the discussion in particular of the intent to commit a crime, even if the existence of an injury is acknowledged in terms of physical phenomena, the discussion of whether or not there is an underlying will to cause the outcome of creating an injury subjectively is another matter. And of course, as I mentioned above, this may constitute grounds for the manifestation of different emerging assertions and the clash of arguments to rebut the other side's assertion. This is a discussion that pertains to the subjective side of the perpetrator front of the issue that is presented as imputability in law.

This general situation in the law front, in the context of the state of 'forgetting' or 'remembering' I mentioned in the beginning of this article, is grounds to be utilized by both politics of 'forgetting' and 'remembering' in their own way.

Bernard Schlink, in his book *Guilt about the Past*, under the chapter "Mastering the Past through Law?" asserts the following approach as the form of deciding how the society can construct and reconcile the past:

> (…) Somehow the law plays an important role in whatever society decides; it supports forgetting in repressive cultures and remembering in cultures of remembrance. But its real work is providing forms and procedures in which decisions about construction and integration are made. (...) In coming to terms with the past, the law's specific contributions are the forms and procedures it provides. They are its contributions to coming to terms with the past and to political culture in general.**2**

But since we are treading the waters of the legal realm, we must also discuss who can tread those waters and how. The law takes as its basis the relationship between people who are proprietors of their acts, who can understand and foresee the outcomes of their decisions, transactions and actions. These are regulated by laws, and certain legal outcomes are determined and adjudicated.

In that case, focusing on only certain cases, and of course also bearing in mind that there are other similar ones, for instance the 1915 Armenian deportation tragedy and related massacres; 6-7 September incidents in 1955; the Kahramanmaraş massacre in 1978; the inhuman penitentiary conditions in the Diyarbakır Military Prison during the 1980s rule of martial law; the tragedy of the torching of the Madımak Hotel in Sivas in 1993; the intervention of security forces on prisons with the operation under the name of "Return to Life" in the last days of 2000; the loss of human life caused by the military attack on Uludere/Roboski in the final days of 2011; the losses and major injuries instigated by the stringent measures, prosecutions, trials and subsequent penal sentences in all the military coup and intervention periods that have occurred in effect over a period of more than 50 years, is it possible to claim that these do not rest on decisions taken by people who are "responsible for their actions, who can understand and foresee the outcomes of their actions" in the legal framework I referred to above?

The losses that have resulted from these human inflicted disasters and many others may be sought to be compensated and to this end it is possible to appeal to the law. But to what extent will the law and judiciary be apt to meet such a demand? I am not asking this question because I belittle the right to legal remedies, but it should not be disregarded that a rights struggle in the judicial sphere, especially if it pertains to certain cases that have occurred in the past, might be overshadowed by certain technical difficulties or even impasses that might arise in the process of seeking legal remedy.

Even if an effort is really being made to compensate for an injury, the opportunity to benefit from people who would be necessary in the trial process or certain essential legal tools may no longer be there in the period that this confrontation is taking place; even if this is not deliberate, it might be the case due to the effect of time. And this situation may also express an inadequacy in terms of criminal proceedings in the process of access to justice.

Therefore, at this point, we cannot overlook the possibility that the state of 'focusing on a criminal liability that bears significance for the judiciary and the state of 'focusing on the solution of the actual problem' that is beyond the limits of the law's own reality, do not necessarily need to overlap. In an effort dominated by a retributive (or punitive) justice policy, this situation is highly probable and a junction presents itself: Whether or not to press criminal charges about the relevant person.

In the framework I mentioned above, as an expression of the thought underlying the focus on such a criminal charge, subsequently an allegation is made to the party claimed to be at fault. However, even in the resultant situation of legally determining the scope and outcome of the responsibility, the compensation for the injury may persist to be a problem. Fundamentally this situation pertains to the manner of voicing the existence of a state of extensive responsibility and expressing, rendering visible the distress, and even a sense of regret.

This problem takes on an even more poignant form in efforts of calling to account for injuries of the past where major losses have been suffered on a mass scale.

In his book *I Was Wrong: The Meaning of Apologies*, Nick Smith emphasizes the responsibility for the "recognition of victim as a moral interlocutor" and draws attention to the states of pursuing the discussion with such a responsibility:

> The simple act of naming the victims of mass wrongs goes some way toward recognizing their suffering and establishing a record of the breadth of the harm. If the victim is alive, this gestures towards engaging her as a moral interlocutor rather than as merely an objectified statistic. Naming the victim differentiates her from the mass of unnamed sufferers, better enabling us to view her as an individual and sensitizing us to the particularity of the harm she endured. We can experience difficulty empathizing and sympathizing with a group of millions of refugees or thousands of civilian casualties, but when we learn the names and stories of each particular person the gravity of the loss exerts a greater pull on us. If our brutal history has desensitized us to the sufferings of others, apologies can reawaken us to the horrors of mass violence. If the victim has died, naming her also increases the likelihood of drawing her successors into the moral discourse. This later benefit could be especially important when distributing reparations owed to the deceased's heirs.**3**

Unlike the 'retributive justice' approach, rather than paying a debt owed to the society through public authority, the state of accentuating and assuming a responsibility that should be fulfilled towards the victim or victims and making this an issue of concern, implies the appraisal and discussion of the events through the lens of another justice approach: 'Restorative justice'.

At this point I want to quote a passage that I used in one of my earlier studies**4** on restorative justice. This is a quote from the historian Stefanos Yerasimos' article titled "First World War and the Armenian Issue" published in 2002 in the journal *Toplumsal Tarih*. Yerasimos states:

> The current disagreements or rather the turmoil around the Armenian issue can in essence be defined as a history-law contradiction. (...) The aim of law is to prove something, while history aims to explain. The law judges; whereas history avoids value judgments. Its main objective is to present events within a cause-effect relationship by getting as close to the truth as possible, and leave the value judgment up to the reader. (...) In this case, law uses the data of history; however this requires a historiography independent of the law. On the contrary, historiography does not employ concepts of the law, and history is not an auxiliary component, a sub-branch of law. Therefore, the first order of business in order to escape the contradiction in terms is to separate the historical thought system from the legal thought system. In other words, it is to write a history independent of legal concerns and ulterior motives.**5**

The situation Yerasimos describes as a contradiction in the context of law and history makes itself felt also in a perspective of justice that focuses on the identification and punishment of

the perpetrator. Efforts geared towards the comprehension and compensation of an injury caused by a loss are determined in the circle of the language and implementation of the laws.

As Yerasimos also underlines in a different context, if the discussion is whether or not to hold accountable the people and their social groups, which in a broad sense can be recognized as the parties of an event resulting in an injury, for their different roles in those events, then that responsibility must be assigned based on legal definitions. The foremost issue is about the categorization of those actions in light of the laws. It is thereupon to make a definition, identification and decision regarding the roles and positions of the people in question.

As I have emphasized above, taking the parameter of the violation of the state's law as the actual determinant in the appraisal process of these positions, relations and actions can also be read, in a sense, as the intercession of the state (and its law) in this relation. Therefore, in my opinion in Yerasimos' analysis along the lines of "[t]he law judges; whereas history avoids value judgments. Its main objective is to present events within a cause-effect relationship by getting as close to the truth as possible", there is the expression of a concern with the comprehension and perception of a truth within its own being, character and entirety.

This is also the way to approach a state of injury with the perspective of restorative justice. In other words, it is necessary to rethink the meaning and consequence of the communication (calling to account/accounting for) process taking place before the judiciary, between the perpetrator who violated the state's law and the state whose law has been violated. The truth of that state of injury under investigation can be comprehended primarily not through legal definitions but through the victim him/herself having an active role and position in this process.

Such an effort can also be explained as a confrontation. The victim is not the passive party of this process and s/he is face to face with the one who caused his/her injury. The perpetrator is also not forced to remain in a limited position of mere defense; s/he is impelled to see the injury s/he has caused and think about and discover the ways of actual restoration. In short, instead of a relation format wherein the state faces the perpetrator in the name of the victim, the objective is to provide the opportunity for a process of relations through which the victim can make his/her own voice heard directly by the opposing party as well.

While striving to accomplish this, effort is also made to remember the incidents that caused the injury and the actions in those incidents. Since the aim is not to have them forgotten. However, the aim is not to assume that the victim's loss has been compensated by way of merely observing the laws and appointing a price (or punishment) for that action and to be contented with that either. The victim is a human being and the relationship of wrongdoing is actually between the victim and the perpetrator. This is an effort that prioritizes a consensual communication and the provision of opportunities that value mutual restorative efforts. Restorative justice emphasizes that the aforementioned victim-perpetrator relationship (and the injury arising from this relationship) is actually an issue also connected with the demolition of relationships in the societal sense.

Therefore, the actual issue of engagement in such a restorative effort resulting from an injury should not be the labeling of right-wrong, guilty-innocent, faulty-blameless or perpetrator-victim attained at the end of a result oriented evaluation or interrogation. The value born by the concept of justice cannot be considered to have concentrated at the end of a calling to account/accounting for process; it is important to understand and consider this value with a perspective spread across the process of relationships.

A research conducted a few years ago revealed that such an expectation is valid also for the people who had a judicial experience by being in positions of either calling to account or accounting for.

In this research (*Adaletgözet – Justice Watch*) realized by Istanbul Bilgi University Human Rights Law Research Center, a field study was also conducted with the aim of understanding the citizens' views regarding the operation of the judiciary. The result emerging from this study that was conducted through face to face interviews with three thousand people across Turkey revealed the existence of an expectation contrary to the assumption: As a result of going before the judicial mechanism as a party, rather than the attainment of an outcome pertaining to the acknowledgement of their rightfulness, people have a more different expectation and seek its existence. This search implies a situation beyond being the absolute winning party of a case. In other words, the expectancy is not an 'outcome justice' but rather a situation that could be referred to as 'procedural justice' along an axis covering that entire judicial experience from beginning to end.

This is a state of association observed, sought, expected and highly regarded at every stage of the judicial process. I think that for discussions on justice, even in the judicial method that aims for the resolution of the problem between the perpetrator and the victim before a third party, the value of an expectation regarding the process reflects the importance and meaning of the entirety of relations between the parties.

Actually a language or manner of 'apology' can also find itself a place and take shape in context of the humane communication process that can become meaningful within the restorative justice approach.

This emphasis on the 'process' also implies a state of 'transition', as it can simultaneously entail the transformation from one situation to another situation. Through such a perspective, the restorative justice approach and a language of apology that can emerge and flourish in a climate enabled by this approach, is perhaps at the same time an issue of 'mode' that can also be inspired by Edward Said's 'mode of transition' interpretations embroidered through examples in music.

The 'mode of transition' in this respect is not a hybrid of both modes emerging from the state of transition from one to another as observed especially in the field of art; however, it is the vocal or silent expression of a perseverance, a concern regarding the sustainability of a restorative communication process between the parties. I think that the language of 'apology' has a strong bond to such a state of 'transition' as well; but in the sense of a bond that is aware of the past and the future.

That gesture of Federal Germany Chancellor Willy Brandt, who placed a wreath and then expressed a silent apology by kneeling before the Warsaw Ghetto Heroes Monument on December 7, 1970, during his official visit to Poland, was a strong message towards peace with the East of the future, as much as a language of apology for sensing that even the state of standing on his feet before this grave injury of the past would imply a power and superiority under the shadow of the past. And it was thus immortalized as a restorative transition mode between that past and the aspired future.

1 Or 'punitive', 'reparative'-T.T.

2 Bernard Schlink, *Geçmişe İlişkin Suç ve Bugünkü Hukuk*, trans. Reyda Ergün, Ankara: Dost Kitabevi, 2012, p. 96 [quotation taken from: Bernard Schlink, *Guilt about the Past*, Toronto: House of Anansi Press, 2009, p.66].

3 Nick Smith, *I Was Wrong: The Meaning of Apologies*, Cambridge: Cambridge University Press, 2008, p.168.

4 Turgut Tarhanlı, "Hukuk ve Adalet Arasında Bugün ve Gelecek: Ermeni Sorununun Tartışılması Üzerine Bir Yaklaşım Önerisi", ("Present and Future Between Law and Justice: Proposal for an Approach in the Discussion of the Armenian Issue") in *Uğur Alacakaptan'a Armağan (Essays in Honour of Uğur Alacakaptan)*, edited by: Mehmet Murat İnceoğlu, volume 2, Istanbul Bilgi University Press, Istanbul, 2008, pp. 625-634.

5 Stefanos Yerasimos, "First World War and the Armenian Issue", *Toplumsal Tarih*, September 2002, 18(105): 10-11 (in Turkish).