ANNUAL LECTURE

Justice caught between *being* and *having*

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Abstract

This article proposes a new philosophical framework for restorative justice: restorative justice is concerned with being*, whereas conventional justice is implicitly focused on* having*. I will take two examples to illustrate that this quest for new forms of justice is more focused on being than on measures and on equivalences: mass atrocities on the one hand, and widespread sexual violence on the other (committed either within the Catholic Church, or in society in general that provoked strong reactions as shown recently by the #MeToo movement). These two situations seem very different from one another, but they reveal common features. In both examples, the aim of justice is to re-establish the individual and the political into their being. Massacres and rape have long existed, but there were traditional healing processes and an usnchallenged patriarchal order. Liberal societies decided to do without the consoling role of religion (that still exist but emigrated in privacy), and to contest violence even in the intimacy of societies such as patriarchal order. This explains why courts pay an increasing and overall transformed role in our democracies: they became an instance for recognition and not only of arbitration on rights. Justice plays a more central role because it deals with the symbolic efficacy of* meaning*, the fact that we are affected by our common values in a shared understanding of life. The function of justice is neither to solve problems nor to provide care for individuals, but to re-enact the reasons why we go on living together and to eventually modify them for a better future.*

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Acknowledgements: This annual lecture for The International Journal of Restorative Justice was held online in December 2021. I am grateful to the respondents and participants as well as the reviewers of the Editorial Board for their insightful comments, and particularly to Ivo Aertsen, François Bernard, Tali Gal, Matt Lady, Jean Lassègue, Claudia Mazzucato, Kent Roach, Marlies Talay, Lode Walgrave, Andrew Wordsworth and Estelle Zinsstag. Many thanks to all of them for their support and patience!

1 Introduction

In this article, I would like to suggest a new philosophical framework for restorative justice: restorative justice is concerned with *being*, whereas conventional justice is implicitly focused on *having*. This distinction between *being* and *having* is not made frequently, neither in philosophy – apart from notable exceptions such as Gabriel Marcel (1949) and Erich Fromm (1976) – nor in law. This wording sheds new light on aspects already revealed elsewhere and opens the field to further issues. The opposition between *being* and *having* should not be taken in an overly dichotomic way, but rather as two poles between which several forms of justice take place; some features of conventional justice, as well as of restorative justice, may be linked to one of these dimensions.

2 *Being*, the rejected (repressed?) pole of Western legal tradition

All of Western legal philosophy implicitly assumes that justice is a matter dealing mostly with *having*, through distribution of goods, social statuses, places in family and honours. This initial link between the idea of justice and *having* can be seen as early as Greek philosophy, for which there are two kinds of justice: *distributive* and *retributive*. Both are based on the notions of equivalence and proportionality, both of which relate to having: allocation and quantification. This link between justice and *having* is obvious – even intensified – in contemporary liberal theories of justice (e.g. Rawls) and utilitarianism (e.g. Bentham). The economic way of thinking has extended to all areas of social and personal life, with neoliberalism further exacerbating this tendency. For the law and economics approach, justice is reduced to rational choices; in this view, justice has never been closer to mathematics. This trend is fuelled today by digital justice.

The aims of justice are to balance the rights of everyone, which is a task associated with distribution, separation, and stability. These aims are represented by the symbol of lady justice with her scale to measure weights (i.e. quantities). Conversely, issues about *being* seem confused, based on beliefs and intuitions, so vast that they become unmanageable. But quantification not only brings certainty, not only makes reciprocity possible through a common criterion, but also gives form to reality. *Being* is that which has no form or which form we cannot grasp. Behind this opposition between *being* and *having*, we find other distinctions: between intuition and form, between the undetermined and the determined, between the unlimited and the circumscribed. The sense of justice is an intuition, whereas law is a form.

A similar opposition can be found in procedural justice between rites and procedure, rituals and processes. The rite is the archaic and mythical form that engages the body, which is performed without precisely knowing what it is for; the procedure, on the other hand, is a method that leads to reason, such as law which has its own logic. Justice must engage in the work of reason through the logos, that is, through formulation. Therefore, the distinction between *being* and *having* echoes the one between justice (which is a matter of individual conceptions and the

diversity of cultures) and rights. Rights are always associated with *having*: we say, for example, 'I have the right to do…' or 'I have rights.'

Such an approach focusing on *being* rather than *having* goes against the current, because the history of Western conceptions of justice since Athens and Rome has been centred on measuring, i.e. the ability to convert issues related to *being* (life, honour, violence, etc.) into *having* through solutions that could equate them according to common benchmarks exterior to relationship (Simmel, 1978). Courts appeared at the same time as currencies, i.e. when the possibility of quantifying became available.

Quantification signalled a huge progress of the liberal criminal law: citizens must be punished for what they have *done*, never for *who* they are. This basic principle has to be preserved today against a preventive criminal based on dangerousness. Whereas in the frame of restorative justice the category of *being* is not 'risky', provided restorative justice remains a non-punitive and caring approach, in *retributive* systems of criminal justice, it may open the door to criminal law of the enemy and 'vengeful' practices.

The business of judging has been concerned with finding as precisely as possible the right proportion between a deed and its legal value; in order to compensate every loss, life itself must be given a price. Marcel Hénaff describes the long process through which a commodification of everything occurs, including justice (Hénaff, 2010). He quotes Montesquieu who wrote in *The spirit of laws*:

> The spirit of commerce produces in men a certain feeling for *exact justice*, opposed on the one hand to banditry and on the other to those moral virtues that make it so that one does not always discuss one's own interests alone and that one can neglect them for those of others (Montesquieu, 1750: book 20, chap. 2).

Justice can no longer be reduced to principles of distribution of goods or of retribution of acts but must be considered as an institution that brings back both the subject and the power into *being*. Without justice, power would be doomed to an oppression that would disqualify it as power, just as a person who excepts himself from justice would abuse others, and ultimately fall into madness. Justice must thus be understood as a condition of political *being* and of the *being* of the person. The purpose of restorative justice is to restore into *being* either persons or power.

In addition to the two categories of distributive and retributive justice, a third one is needed: constitutive justice. Constitutive justice does not really add to those two categories but seems to be a condition of both distributive and retributive justice.

I will argue in this article that restorative justice cannot be understood without the instituting dimension of justice, and then without thinking the ontological role of justice, i.e. approaching justice as a condition of being. Ignoring this role obscures the understanding of restorative justice; it is as if we try to get at the second phase of a process by jumping over the first. Restorative comes from the French *restaurer*, but in French this verb has a correspondent *instaurer* (to establish). These words

express the link between the operation of establishing and also of re-establishing something that has been severely damaged; in both verbs, 're' and 'in' prefix the verbal root 'st' which in all Indo-European languages signifies the idea of being (such as *esse*, *est*, third person of the singular in Latin, which gave *estar* in Spanish, *être* in French, but also *state* and *status* or *to establish* in English). The best translation into English of *instaurer/restaurer* would be establishing/re-establishing. Getting at the restorative function given to justice without considering the previous 'instorative' function of justice is doomed to err.

If justice can be said to be *generative* in philosophical terms, in a pragmatic perspective this role appears through a *regenerative* role, because justice, as an institution, comes into play when the being of individuals or of political entities has been destroyed.

3 Re-establishing the individual and the political into their being

I will take two examples to illustrate that this quest for new forms of justice is more focused on *being* than on measures and on equivalences: mass atrocities on the one hand, and widespread sexual violence on the other (committed either within the Catholic Church, or in society in general that provoked strong reactions as shown recently by the #MeToo movement), two fields I was involved in. These two situations seem very different from one another, but they reveal common features. In both situations, the question is: how do we repair a situation that collapsed? The challenge is to rebuild – to repair if I may say so concerning abstract entities – a political community or singular person. It is no longer a problem of *having* but an issue of *being*, either the *being* of power or the *being* of a person, to put it in broader philosophical categories.

In both examples – mass atrocities and widespread sexual violence by institutions – justice is considered as the last resort to rehabilitate the *being* of individuals and *being* of states, but not through existing courts and procedure. Several truth and reconciliation commissions adapted the same idea of restorative justice to different contexts. As far as sexual abuses are concerned, victims do ask with great insistence for an adaptation of common criminal procedure to their specific situation.

These examples put us in front of a paradox: justice is required but at the condition of departing from its traditional way of doing things. This paradox could be overcome by taking restorative justice seriously and not taking it as just a complement. The choice is between a *thin* conception of restorative justice, restricting it to a last resort (to come back as soon as possible to ordinary justice) or a *thick* conception calling for a justice, more concerned with being. The first one considers justice as accessory, transitory, alternative and the second one, on the contrary, considers it as a tool for a major transformation of politics, of institutions (and in particular of the Catholic Church) and of society.

3.1 Crime against humanity, a collapse of polity

Ordinary crime can be considered as a *problem* because it consists of an anti-social behaviour, but some of the crimes that transitional justice deals with are different. In most cases, violence and crimes became policy, which is the reason why they are no longer a 'problem' but demonstrate a major political collapse that requires to be dealt with on a political basis (and not technical). Justice is called for a re-assertion of polity, i.e. what holds people together. By confining itself to an issue of governance, transitional justice is not able to face the main challenge, that of the *perversion* of the law.

Totalitarianism distorts the Rule of Law, using substantive law for perpetrating mass atrocities. In this respect, it must be distinguished from tyranny, for example, which bypasses openly and unashamedly the Rule of Law (in Rome, dictatorship had to be voted by the Senate for a specific period).

Transitional justice should be more than an extension of criminal law to deal with the conduct of war or the development of a policy. A new mission of justice is needed: to protect politics from its totalitarian germs. These germs seem exacerbated by totalitarian regimes but remain buried in our democracies, so inherent are they to politics itself.

Mass atrocities pose the issue of evil. Political evil is linked to a rationality that cannot be reduced to the individual psyche. Paul Ricœur writes,

> Specific rationality, specific evil – such is the double paradoxical originality of polity. The autonomy of polity seems to consist of two contrasting features. On one hand polity works out a human relationship which is neither reducible to class conflicts, nor to socioeconomic tensions of society in general … On the other hand, politics fosters specific evils which are precisely political evils, evils of political power. Humanity, [adds Ricœur] comes to man by means of the body politic (Ricœur, 1965: 250).

The crime against humanity is not a terrible and ferocious repression or an iron dictatorship, it corresponds to a collapse of the polity.

3.2 Sexual violence, an obstruction to being

Sexual violence inflicts an irreducible wound to the victim, a wound that exceeds suffering because it is an obstruction to *being*. Harm must be approached in terms of life: it is a life prevented, wasted, sometimes killed. Sexual abuse, to varying degrees if committed during childhood or in adult life, devastates entire lives and more precisely prevents the ability to love. Victims will not be able to realise the full possibilities of living, to enjoy life. Life remains blocked by this unsurpassable act. It is as if sexual violence anchors an entire life in this initial misfortune. Sexual violence causes an invisible and infinite inner devastation of the *being*.

More precisely, the damages are done to *intimacy*. Rape is not only a violation of consent but also the introduction of a foreigner, more an enemy, to the inner self. A part of oneself is at war against oneself (such as in the case of the crime against humanity); the oppressor invades the deepest part of the *being*; he forces the victim to betray him/herself.

This crime against intimacy consists of the violent intrusion of an executioner into the closest and most constitutive relationships of the personality. It is therefore the imposition of a detestable part of oneself on oneself, something like the confinement to oneself but with an intruder. Is this only an attack on consent? No, because it does not take into account the duration and the destructive character of the attack, which spreads for a long time, not directly but through a malaise.

The relationship with oneself passes through others. The inner self (*intime* as opposed to *intimité*) is the space not as the private space or the space of the conscience but in fact a package of relations: from the deepest with the invisible (God) to those with close relations. Sexuality adds a degree of intensity, because it represents what is most intimate in the intimate, an exacerbation of the intimate. It opens up an experience of the sublime or, conversely, of being enclosed within oneself by oneself.

Intimacy should not be confused with interiority: the Latin *intimus*, which is the superlative of interior, refers to the quintessence of interiority. Michaël Fœssel characterises it as an 'exacerbated depth' (Fœssel, 2008: 12). For Saint Augustine, who gave the notion its philosophical recognition, intimacy is God in that he is 'more interior to me than my most interior self' (St Augustine, 1992: 6). Today, in a secular society, intimacy is no longer linked to God, but it has retained a relational characteristic that is consubstantial with it, and essential for our subject.

> If intimacy may be invisible, it is nonetheless illuminated by a particular light emitted by another. In other words, it is a relational concept, which distinguishes it from the concept of interiority (Fœssel, 2008: 12).

Intimacy refers to 'a connection rather than a thing, a relationship rather than an enclosed space'. Unlike the idea of moral consciousness, 'one is never alone in intimacy, but one finds oneself there within a community of chosen ones' (Fœssel, 2008: 13) (one speaks of 'one's intimates'). But there are some cads who have invited themselves, and they are the most difficult to dislodge.

This definition of intimacy shows the way for justice: its tasks consist not only of separating the victim from the perpetrator but also separating the victim from a detestable part of him/herself, or in other words separating the perpetrator who has remained within him/herself, who has established him/herself there. This is what recognition consists of.

3.3 The public, the private and the civic

Let us start with what might appear as a contradiction. We are witnessing the demand for a non-standardised intimacy, definitively free of any hold by the established order, understood as an implicit order, which refuses to see its own sphere colonised by norms (in particular religious norms) that it has not chosen: the demand to grant equal recognition to all sexual orientations. But at the same time, the #MeToo movement is demanding a more appropriate intervention to put an end to the many cases of sexual violence that have gone unpunished by a judicial institution (too entangled in the categories of *having*?). Justice is called upon, less to seek punishment than to provoke recognition, an attestation that beyond

suffering it is a denial of dignity that affects the patient of an action (I avoid using the term victim here, which could create a misunderstanding by ontologising the status of victim in some way). The denunciation of this impediment to *being* is indeed a political act in that it challenges, beyond an individual act, a social order described as patriarchal or clerical.

There is a civic relationship that should not be confused with the traditional understanding of the public sphere, because it unfolds out of sight while posing as the collective condition of people's *being*. A zone cut off from the social space, but which only imprints its marks on the deepest structuring of the modern subject: the relation of self to self.

Lawyers are used to reasoning in opposition to the private and the public; today they must conceive that politics is composed not of two but of three spheres: the public, the private and the civic. The civic forbids reducing the human experience to the duality of the private and the public. The private refers to two things: firstly, to the idea of a quasi-absolute separation, an impassable space. Secondly, it is based on 'property', which refers to what the individual has an exclusive right to, but which he or she can nevertheless exchange or alienate in contracts. It is in this way characteristic of the register of *having*. It is therefore not what concerns the individual in his singularity, but what makes him commensurable with others. Digital technology and the quantified self can only accelerate this evolution.

The category of the civic is autonomous and must be thought of as such. The civic sphere that justice must take charge of should not be confused with the psychological, nor with politics in their traditional sense. A thick polity[1] is an autonomous sphere not to be confused with psychology, nor with the juridical, nor with the social, but which makes the link between the three. It is the category of the civic as *philia*. The protection of the inner self is therefore a political matter, but it does not fit very well with the rules of criminal or civil justice, and indeed not so much with the institutions: recognition is social in nature. Indeed, it is related to the plasticity of life itself.

A civic justice is therefore not the new name of a therapeutic justice but must be thought in terms of ontology, of this depth of societies as well as of individuals that must agree. The complexity and centrality of this civic sphere renew the way justice thinks about itself; it provides it with a new vocabulary that invites it to focus on the heart of its mission. Restorative justice is of course part of this.

All this invites us to renew our conceptions of the link between subject, society and institutions. Civic justice must venture beyond the categories of law and procedure that seemed unsurpassable. This opposition between *being* and *having* does not cover the more classic opposition between public and private, which has nevertheless been a structuring factor in our thinking on law and institutions.

1 Following Ricœur, I contrast polity (le politique) with politics (la politique). By polity, I refer to the shaping of the bond connecting a given people (what Montesquieu called 'mœurs' and Rousseau 'contrat social'), which is deeply rooted in history, whereas politics designates the empirical and concrete manifestations of this unformulated pact (Ricœur, 1965: 248). The differentiation between polity and politics echoes that of *being* versus *having*.

An approach through intimacy refreshes old oppositions such as self and others, the subject and the norm, the private and the public, freedom and the state, and invites us to take a fresh look at the role of law and justice. There is a need to rethink the fundamental oppositions of public and private, power and fundamental rights, rights and duty, form and substance, state and individual, which are thought of as separations, whereas constitutive justice must think of them as the right distance between separation and reunion.

3.4 Re-establishing the individual

Consideration of these three spheres of law, namely public, private and civic, invites us to go beyond a very deeply rooted representation based on an irreducible opposition between the self and power, with norms not being mediators but rather relays of power. Distinguishing between these three levels allows us to understand the demand for norms present in many contemporary movements such as #MeToo or climate change. The freedom of morals, i.e. of the inner self, cannot exempt itself from a total emancipation from justice, but on the contrary presupposes it. Fœssel writes,

> Love and freedom rather mean the act of recognizing oneself in the other: either in the concrete other whom one loves, or in that objective form of otherness which are political institutions (Fœssel, 2008: 85).

The re-establishing role of justice originates in the political nature of the innermost.

For Hegel, the edifice of the spirit-world, that is, the set of rules, norms and institutions in which we live and act, as Fœssel writes,

> must not be considered alien to men, but they are the expression of their interiority … The free subject must not only accept the political norms but must recognize himself in them. This recognition can only take place if the political institutions coincide in some way with his personal aspirations … Thus intimacy is not the other of the public space and of the freedom of citizens, but a condition of their emergence in the modern world (Fœssel, 2008: 70).

What these 'new movements' mean is not a desire for radical emancipation from all law, which would give free rein to the desire to expand one's being, necessarily at the expense of other beings,[2] but a radical aspiration to be what should no longer be hindered by norms. They call for other norms, a modernisation of the legislative apparatus and the functioning of institutions that has heard the aspirations of this 'cultural revolution'. The classical jurist is disappointed because he must handle a freedom of a somewhat particular kind that is not confused with that of the isolated individual which 'designates rather a freedom of links: that of entering

2 This is an ambiguity of these movements on social networks that exposes them to becoming violent and to fuelling phenomena such as scapegoating, and ultimately to creating injustice when their cause is just. In Tillich's terms, love confronts power by nullifying justice.

into relationships that can transform us … or restore us to our intimacy, that is to say, to the capacity to create new links that liberate'.

We could draw a parallel between the requirement to persevere in being 'in one's lane' between the subject and sovereignty. Sovereignty too has an aspiration to increase its *being* until it collapses; and it is no coincidence that one of the consequences of this experience is to re-establish post-catastrophic power in principles of justice expressed in constitutional rules.

By remaining at the level of perception, the danger is to reduce the law (and justice) to the constraint that is required for its implementation. Justice not only has a structuring role [on which a Pierre Legendre or the structuralists insist a lot (Legendre, 1997)], but it must also be explored in ontological terms. Each person has, by virtue of his or her being which demands affirmation, an intrinsic claim to be.

> It is not compulsion which violates justice, but compulsion which disregards the intrinsic claim of a being to be acknowledged as what it is within the context of all being (Tillich, 1954: 67).

This leads us to the ontological dimension of justice.

4 Beyond the re-establishing role, the establishing function of justice

All theories of justice have presupposed till now people *already* living in *pre-existing* political entities. None of them contemplated the possible contribution of justice in *constituting* both individuals and cities. The two previous examples highlighted the fragility of being of both individuals and polity. That is the reason why I assume, against the mainstream, that justice must be considered as primary and not secondary, constitutive and not subordinated, establishing and not only established. Although legal institutions are concerned primarily with *having*, the dimension of *being* – i.e. of what people and cities are, and not only have – has not been eradicated, and cannot be.

One of the main difficulties in getting at the relations between political power, the individual and its capacity to love or to destroy, and the role of justice, comes from the interplay between the metaphysical level, which is the right one to think about the issue of *being*, and phenomenological level which is the one through which we can approach it. So, the articulation between those two levels is crucial. The idea of *space* will act as a mediator for the ontological level and the pragmatic level.

4.1 Providing a place to everybody

One could stop to think about the term that has been found for crimes committed by the politician against a part of his own population, that is to say, the whole of the people from whom power emanates: crimes against humanity. The reference to 'humanity' indicates that every *being* has an intrinsic right to be respected in his or her *being*, and that for this he or she must have a place in the world. For Hannah

Arendt, having a place is the condition for *having* rights (Arendt, 1951: 475): it opens the possibility of the right to have rights. The justice of *being* is 'the demand to treat every person as a person' and not as a thing.

4.2 Delimitating a separation and a reunion

Every being 'wants to increase its power of being in forms that include and conquer more non-being' (Tillich, 1954: 54) and finally towards the form that includes everything. 'Everything really drives beyond itself. It is not satisfied with the form in which it finds itself. It urges towards a more embracing, ultimately to the all-embracing form. Everything wants to grow. It wants to increase its power in forms which includes and conquer more non-beings (Tillich, 1954: 54).

Applied to power, such a definition of *being* inevitably leads to a confrontation with other powers and beings animated by this same dynamic. The same applies to subjects: justice separates beings from each other by distinguishing them, not in a static way, nor by letting their dynamics destroy each other.

Justice gives 'form to the encounters of being with another being' (Tillich, 1954: 38). Justice is the reunion of beings that remain different, separate and between which it is necessary to find adequacy, equality, mutual freedom and even fraternity (since 'if justice is the reunion of what is separate, it must include the separation without which there is no love and the reunion in which love is realized') (Tillich, 1954). Justice, from an ontological point of view, gives every being its place and therefore assigns its limits; it is the form in which the power of being is realised without going as far as destruction.

> Justice is not a social category far removed from ontological inquiries, but it is a category without which no ontology is possible … According to Plato, justice is the uniting function in the individual man and in the social group. It is the embracing form in both cases. Their power of being depends on it (Tillich, 1954: 55).

The *being* of justice is a condition inherent to *being* an individual, and also inherent to the social group. Both can exist, and are linked together, by justice. It is the form that includes everything, that is, that arranges the self and others in the same space: the part and the whole. The power to be of the individual as well as the group depends on it. Justice is thus a condition of both individual and political being, i.e. of social being. There is an ontological link between these three terms because neither the inner self nor the polity can exist without justice.

4.3 Designing a space, even in the self

What is the common constitutive role of justice in all these relations (to oneself, to others, to polity)? *Setting up a space*: 'the legal system performs its vital functions by establishing a *space* in which we may simultaneously take into account the good, the obligatory, and the wise', writes Francis J. Mootz III commenting on Ricœur (Mootz, 2022: 145). Justice is not just an extension or a regulation of interpersonal relationships, but instead a delimited forum through which they are positioned one to the other.

Justice also introduces a space for the self. This ontological role of justice must be the same, whether it contributes to the existence of individuals or to political power. For understanding this role, we must take into consideration a third field in which justice is vital: the self. Applying justice to social relations and to political decisions is easy and intuitive. Extending justice to the relations to oneself is not obvious. Nevertheless, it is a prerequisite to understanding the ontological role of justice. 'Promise', 'oath', 'conscience' (translated in French as *for intérieur*, literally: 'innermost forum' or 'conscience as a court'), *ipseity* (Ricœur, 1992), *urteil* (which has a common ground with 'ordeal' in English) (Hölderlin, 1795): all these words express the same idea of a divided self, between the self and the one it appears to be.

4.4 Thriving to find the 'just distance'

For Ricœur, the conception of 'just distance' signifies the most substantive aspiration of legal institutions: to overcome vengeance by pacifying conflicts through a 'third' party, offering a 'distanced' impartial view, and institutions for which all are equal under law. Simultaneously, both victims and perpetrators share and recognise the same symbolic system of authority whose obligations and verdicts they accept, even if it amounts to violence (penal sanctions) against them.

To put conflicting parties at a spatial and communicative distance allows a recognised set of mutually agreed upon legal procedures, performances and practices to step in and transfer the cycle of violence into a clash of legal argumentation and reasoning in court (de Leeuw, 2022: 134).

The conception of a 'just distance', drawn from the experience of being in court, is also relevant to understand the role of justice in social relations as well as in political ones. The 'having' dimension is a tool to try to find – and measure – the 'just distances'.

With the institution of the tribunal, the trial brings into confrontation parties who are constituted as 'others' by the judicial procedure. What is more, the institution is incarnated in the person of the judge, who, as a third party between the two parties, takes on the figure of a second-order third party. The judge marks out the *just distance* the trial establishes between the parties in conflict (Ricœur, 2022: 33).

That is what Francis J. Mootz III calls 'the unbearable between-ness of law' (Mootz, 2022).

Ricœur defines justice in spatial terms: justice is assimilated to a place which defines a distance between everyone, such as a courtroom, putting away those who are too close in a confusion of roles or a fusional relationship, and bringing into a common space those who are excluded, such as migrants today, for example. Designated places in a common space, equidistance to the third party, which are conditions for a peaceful and rational exchange, must be taken both as practical setting of courts, and the metaphor of the in-depth function of justice in a liberal society. There is a continuity between court and symbolic role of justice.

This is important then for restorative justice that will be in a capacity of performing this very function through other means than conventional justice.

5 Means of a being-centred justice

This section redefines the function of restorative justice. 'Restorative' is perhaps not the appropriate adjective. It is too weak to ask justice to return one to the original position, to 'restore' polity, social or personal links. We ask of justice not to rebuild but to generate again the power or the subject. From my personal experience dealing with victims of sexual abuse by the French Catholic Church, and with people indicted of terrorism offences, I would like to summarise the main features of the regenerative function of justice.

5.1 Replaying the original pact

The link between the performance of justice and its generative function is contained in the word *urteil*, i.e. original sharing, which refers to the ontological position of justice (Hölderlin, 1795). This sharing is reactivated in every trial, and particularly in those that involve political society, such as terrorism. This function is common to all cultures, whether democratic or not.

Whereas ordinary trials refer to an original division as indisputable, inalienable and sacred, during the Truth & Reconciliation Commissions, due to the collapse of the institutions, this original division must be reactivated, the pact must be re-enacted. The judicial ritual or specific ceremonies (such as in South Africa) provide access to 'foundational time' once more.

The aim is to reactivate this foundational moment by staging it in order to regenerate, in the primary sense of the term, the pact between individuals, power and justice [having in mind that it was never a separate event (Ricœur, 1965)]: it is the alliance between the three that makes the polity. Because of its ontological dimension, justice can play this regenerative role.

Whereas law is by nature ahistorical, reconstructive justice seeks, on the contrary, to be a founding event for a nation as well as for an individual. The project of restorative justice is to regenerate time, i.e. to ensure that this immobile time, which does not move forward and does not make history, becomes available for collective action, open again. With this, it can break with the uniform continuity of the time of confinement in traumatic silence, which has the same value as the time of the sentence – an unproductive time when nothing happens.

France provides us with a very good illustration of this function of justice. The whole country is following day by day the trial of the attacks in Paris of 13 November 2015, which killed more than 130 people in a series of terrorist attacks. Expectations for this trial are very high in the community. After the attacks, a thought was on everyone's mind: 'The terrorists did not want to punish us for what we *do* but for what we *are*.' So, it is a matter of *being*, and the answer must consist in a re-assertion of what we are: for them and for us. What does that mean to belong to the French nation? This trial must reactivate the democratic and republican values that we all share and that bind us together. This function can be clearly seen in the two statues of the courtroom: one is an allegory of France, and the other of fidelity. It could not be more explicit! This regenerative function is symbolically indicated, and speaks directly to the public, bypassing their conscience.

Trials for rape should have the same function to recognise the victim, i.e. to re-assert beyond its fundamental rights, its fully legitimate *being*. The problem is that old judicial ritual is no longer adapted to perform this function. It is too formulaic, too focused on procedural points and it has forgotten the *being*.

5.2 Recognition (not quantification) as the main objective

The most common thing that victims expect from justice is recognition. To put an end to the suspicion of unworthiness that indiscriminately envelops the predator and his victim. Therefore it is vital, in the eyes of the latter, to recognise that he or she has been a victim. This fact is certified by a third party representing the community (*the third party as a 'generalised other'*).

Recognition becomes the primary purpose of regenerative justice. Whereas recognition is a side effect of traditional justice, it becomes the primary objective of this form of justice. This recognition is achieved by giving credit to the victim's account; not total credit, of course, which would distort justice, nor a greater weight to the word of the other, but the possibility of placing these two accounts within the framework of a non-intimidating encounter for the victim, more difficult for the suspected perpetrator, and non-judgmental, if one can put it that way.

Intimate justice must fight against crimes – for they are crimes! – but without offending, or by offending as little as possible, the intimacy that must be preserved. Since it is an attack on the *being* rather than the *having*, the reparation organised by the justice system must be oriented more towards the arrangement of a possible recognition by the perpetrator, or even a mutual recognition, than towards a quantified reparation or a prison sentence. What is offered to the accused perpetrator is precisely to escape the time of the sentence by the moment of recognition. Recognition of the facts and of their wrongfulness is equivalent to recognition of the victim. Recognition, writes Ricœur, 'is an equivalence that cannot be measured or computed' (Ricœur: 322). The justice of the intimate must give priority to a non-quantitative form of justice.

5.3 Stimulation of being through ceremonial speech acts

A justice system that is truly centred on the needs expressed by victims would aim to restore their capacity to enter a relationship with others (Le Goaziou, 2019). To achieve this, justice should perhaps abandon its punitive reflexes and move towards a justice of recognition. How?

One remedy is to give him or her the right to speak.

The regenerative moment proceeds from a symbolic exchange: access to speech for the victim in exchange for a confession from the perpetrator.

The aim is to enable the victim to speak again, to come out of silence. But one might ask, is speaking not a daily activity, including for victims? We must shift the attention to the symbolic environment that gives speech its weight and strength. We could even reverse the order of priorities. Whereas in an ordinary trial, what counts is the quantity, i.e. the quantum of the sentence, the amount of compensation, in 'regenerative' justice, the sum is there only to give credibility, to give weight to the public word. The quantitative is put at the service of *being*, whereas it is the opposite in a trial: the length of the punishment or the amount of

the fine is doomed to proportionate the damage caused to the victim, whether he/she feels it or not. For restorative justice, recovering its own *being* requires an access to speech, to fully effective speech.

This is true not only of the individual but also of institutions: politics, the collapsed institution, must once again have access to speech, it must be believed, it must generate trust and support. The credibility of the word of the Catholic Church in France has been weakened by a strategic use of religious vocabulary (especially forgiveness).

If, in fact, what the victims are waiting for is a confession from the mouth of their aggressor, justice must rethink its use of coercion. Perhaps it should move away from a direct exercise towards the search for incentives to confess, taking inspiration from the forms practised by restorative justice (the various truth and reconciliation programmes have experimented with forms of 'confession incentives'). Confession is an expression of being. These speech acts require a symbolic setting. Ceremony must be taken seriously and not just as the trappings of justice.

This new perspective would be part of the search for a civic sanction for rape as well as its criminal repression. The sanction would be understood here as a *public statement*, i.e. a speech act, that certifies the reality of a fact, and makes it official. The epithet 'civic' refers to a register of public life that no longer involves the mediation of a criminal law but a horizontal confrontation between citizens, and citizens and their institutions. Such an approach would stem from a renewed conception of public power, which aims not only to punish but also to empower; it is the idea of empowerment that is imposed as an imperative after an aggression, perhaps even independently of the identification of the author.

5.4 How to 'repair' the being?

A *being*-oriented justice faces the difficulty of finding remedies. Monetary compensation has a symbolic as well as practical meaning for many victims. But for some crimes, judicial remedies do not work: how to compensate for a whole lifetime devastated by sexual abuses in youth, by the massacre of the family or by the sharp separation from its own culture, language, spirituality? Money may appear not only insufficient but may be felt as a provocation or even a repetition of the harm. Money is indeterminate, it has no value in or of itself. It suffers from the intrinsic ambiguity of signs; it must receive its meaning from a social consensus. A victim of sexual violence from a priest receives as compensation an amount of money. What does it mean? The price of his or her silence? Or, even worse, an agreed cost for the trick? Damages are wholly inadequate for human rights violations, because they are unable through a measure to reach the *being* of victims. Would it be enough to decide that money should be preceded by a word of justice pronounced by the judge? Is it enough to prevent people wondering if money is not the very reason for litigation? Traditional justice centred on *having* is captured by the mediator it relies on, money.

The mediator of a *being*-oriented justice is not primarily money, but the possibility given to speak by oneself. And reciprocally, to ask perpetrators to do the same. *Being* is reactivated by this essential capacity of saying 'I'.

5.5 A victim, assisted but not substituted by a lawyer

The justice system runs the risk of dispossessing the victim of the singularity of her story, her experience, her way of telling things. This is true of police officers who want everything to 'fit' absolutely, of lawyers who use bizarre terms in their statements, of militant associations that take over an individual's story and use it to fight a battle that reduces the singularity of the case (and goes beyond what the victim wanted). Conventional justice runs the risk of displacing the case into a ritual in which the victim does not find herself at all, and even more so, in adversarial systems, where the public prosecutor replaces the victim altogether, the victim is not a party to the process, but a side player. Regenerative justice puts the recognition of the victim, or mutual recognition, at its centre.

Members of legal professions are enjoying themselves (once again, it is their pleasure, not mine), they are talking to each other. The publicity of debate places the intimate in the public light and, as a result, threatens it.

The aim of the proposed meeting is to be less 'substitutive' than the one that takes place through the spectacle and the lawyer. We must explain this term 'substitutive' and to do so we must take a diversion. The judicial institution is the distant product of a system of substitutions, of multiple substitutions (Dénouveaux & Garapon, 2019). Substitution of the prosecutor and the prince for the victim in order to avenge and control revenge; and dispossession of forgiveness (which is not a substitution but a blockage, the prohibition of vigilantism). Substitution of the lawyer for the party he represents, substitution of words for gestures and acts, but also substitution of the accused for the society he will purify by his sentence, by his expulsion. The exemplary nature of the sentence is another form of substitution. The objective of non-substitutive justice raises a profound question about the relationship between justice and sacrifice. It does not take advantage of a woman's suffering to create a spectacle that adds to her pain. Conflict must stay in the hands of people involved in them (Garapon & Hackler 1987), as Nils Christie (1977) put it in his famous article 'Conflicts as property'.

The victim is, of course, first and foremost a victim of the act s/he has suffered, but his/her defence in court and the handling of his/her case will generate a kind of symbolic, muted violence, which comes precisely from this substitution. The victim may not want his/her complaint to be treated according to a brutal and, all in all, rather crude logic of punishment, adding suffering to suffering. How does one denounce both patriarchal domination and the scandal of prison? Perhaps s/he does not want to feed a repressive logic.

Non-substitutive justice tries to limit these substitutions as much as possible by giving the victim a direct voice without having to go through a spokesperson. The victim may be assisted by a lawyer, of course, but not substituted. The victim is the author of a directly effective, clean statement. This new form of justice avoids the dispossession by ritual through the prior encounter. It prefers a sort of parallelism of forms: the evil has taken place in intimacy, its solution is found in a face-to-face but safe encounter, in which the law intervenes, which confers a public dimension, triangulated by others, by the presence of the group but without the trauma. There is no substitution of logic either since we remain in the face-to-face

situation. The bad encounter of crime is of the same nature and symmetrical to the encounter of justice and to justice as an encounter.

5.6 An encounter mediated by a third party rather than imposed by procedure

The regenerative moment needs a public acknowledgement. This should not be confused with transparency. 'The relationship to publicity for sexual violence committed by an institution is different. Intimacy is what is cut off from the social sphere of exchange', it 'is lost in being offered to the eyes of all' (Fœssel, 2008: 16). The risk of open-door justice (publicity is the best disinfectant of biases) is to destroy what it wanted to preserve. The dissuasive effect of the sentence acts, but against the complainant! Here we find one of the difficulties that underlies restorative justice, namely that the normal application of justice does more harm than good, it distances the victim even more instead of lifting her up. With the paradox that publicity is not confounded by the gaze of all but by the significance of the presence of the 'generalised other'. It is the same paradox that a judge's chambers closed to the public can be a public space.

The register of *having*, the quantitative, standardises by giving a compatible form to everything and every event. This is its very function. It rekindles social exchange by giving it form. The quantitative is the second moment of the process of symbolic shaping: in order to master its shattering power, the event is no longer simply represented in order to be averted, but is put into language, requalified in legal terms and quantified in order to be overcome. It is both liquidated and somewhat trivialised. The fact of relating it to a general category neutralises its uniqueness.

5.7 The conversion of violence

Regenerative justice leads to a reconsideration of its relationship with violence. Justice, whatever it may be, always exorcises violence by punishing it without responding to it as revenge would have done. But, following mass violence, restorative justice proceeds less by expelling violence than by converting it. Negative force is placed at the service of respect for the law. Violence provides regeneration with the strength it needs. The primacy of politics, says Pierre Hassner,

> which is contested in practice, is all the more important to resurrect, especially in relation to physical, economic or ideological violence. The essence of politics is not to suppress force, but to domesticate it in order to make it serve its own negation (Hassner, 2004: 338).

The idea of a conversion of violence as a guarantee of peace is embedded in the very architecture of the South African Constitutional Court. Built under the inspiration of Albie Sachs, architects decided to nestle its walls in those of a prison; not just any prison, but the one where Nelson Mandela and Gandhi were incarcerated. The memory of this prison has the effect of a collective oath. The solemn commitment not to sink back into the horrors of colonial or apartheid repression is set in stone.

The architect of this constitutional court has thus learned the lesson of Aeschylus. Such an association of the symbol of injustice with the heart of justice leads us to a central but buried meaning of justice, a meaning present from the founding myth of Aeschylus' trilogy. 'The Eumenides sleep, but crime awakens them', says Hegel (1991: 129). What the Erinyes are saying is that violence is always there, that it cannot be eliminated and that we must therefore think of justice with violence, in relation to violence – which is what we want to do – and not in a divided manner.

When everyone expected a bloodbath in South Africa, the wisdom of Nelson Mandela was to renounce arms and accept negotiation. While he could have avenged the mistreatment he suffered in the apartheid jails, he made Robben Island penitentiary a place of memory. The violence that must be stopped is not just any violence: it is revenge, that is to say, a retaliation that risks tipping the scales into an infinity of violence (Girard, 1977). The very nature of justice is to put an end to a cycle, that of the Atreids, i.e. to an infernal chain, by founding a new institution.

It is possible to draw a parallel once again between such a conversion of violence on the political level and the path to the recovery of being on the individual level. To paraphrase Georges Canguilhem (1991), just as physical healing is not a return to physiological innocence, healing the trauma caused to the victim cannot be a return to 'biographical innocence'. She experiences the 'same direct and concrete feeling of suffering, a direct and thwarted feeling of life' from which she will only emerge by accepting that this shock opens up a 'new dimension of life'. Thus, by relying on their being and accepting the loss of their assets, victims are called upon to convert their wound into fruitfulness, in the image of the Japanese technique of *kintsugi*. This is a method of repairing ceramics with gold powder, where the damage is not hidden but rather highlighted: a philosophy that leaves the cracks of the past visible while proudly giving a future to objects by trying to make them more beautiful.

Restorative justice can be considered neither as a palliative form of justice, which would compensate for the rigidities of criminal procedure and legal positivism, nor as an alternative to ordinary criminal justice. It is a way to revive the other dimension of justice, that of *being* as opposed to that of *having*. *Being*-oriented justice is not an alternative but the very opposite of ordinary criminal justice: recognition, i.e. distinction, is the opposite of equality, singular forms adapted to the situation are the opposite of the idea of procedure; the rehabilitation of one's own verbal capacity is the opposite of representation: principled reconciliation versus punishment (Ricœur, 2005).

6 Why being-oriented justice is becoming a crucial issue in liberal societies

The call for a *being*-oriented justice can be understood as an end of the seemingly infinite expansion of quantitative justice and the demand to pay more attention to being. Restorative justice is therefore a major event in the history of Western legal tradition because it reconnects with a neglected, or even repressed, dimension,

that which combines the regeneration of *being* with the restitution of *having*. This irruption (or return) is certainly linked to the moral collapse of civilisation in the Shoah and in the mass crimes that marked the bloody twentieth century.

Being was for a long while not an issue for law, but for religion. It had something to do with rituals expressing and stimulating the 'symbolic debt', maintained by ceremonial gift exchange by which Marcel Hénaff explains the difference between traditional and modern societies, and even between Protestant and Catholic cultures in the West (Hénaff, 2000). 'It is a total social fact because it involves the entire society and society as a whole … it is not marginal or private phenomenon but an institutional one.' It is doomed to impoverish, even to disappear 'in political societies in which public statuses are defined by law, under which all citizens *have* equal rights' (Hénaff, 2010: 153). Our contemporary political societies, then, think they could get rid of symbolic exchanges; they only rely on civic bonds defined by law or on bonds based on self-interest generated by commercial exchange, but the price for this is 'a symbolic deficit that constitutes the major problem of modern democracies' (Hénaff, 2010: 154). Here comes into play the *being*-oriented justice, asked to substitute of this defective symbolic function. What was taken through an alliance with God or through rituals cannot be totally absorbed by law, economy and politics. The collapse of politics, of mass atrocities and totalitarianism, as well as the psychological devastation caused by a rape demonstrates that *having* is not enough to solve the *being* of both individuals and polity. Something remains that cannot be compensated for by ordinary legal remedies, i.e. *having*-oriented justice.

In liberal societies,

> Debt tends to be entirely secularized, which is to say subject to accounting; it has become a technical issue. To set a price in a marketplace amounts to affirming a world under control, a strictly human and functional world. For every loss, insult, or favour, compensation exists, transforming symbolic debt into financial debt, individuals responsible for damages or offences (or their insurance compagnies) pay a financial amount, sometimes considerable, and the debts erased – until the very possibility of evil has been forgotten and what prevails is the arrogance [and ambiguity could we add] of settlements without remains (at the cost of exacerbating guilt without cause) (Hénaff, 2010: 240-241).

A world in which everything can be measured and exactly and definitively compensated is an illusion, as shown by those two examples. Something remains – *being* – which is perhaps more essential than the judicial financial exchange. *Being* can be defined as both the same, i.e. what is permanent, and *energeia* and *dynamis*, something that cannot be captured by numbers because it is dynamism, desire to live, opening future, self-assertion (Ricœur, 2011).[3] This is exactly what *being*-oriented justice tries to reactivate.

3 The same and the other, the movement and the rest, *Energeia* and *Dunamis* are part of a major debate between Plato and Aristotle about *being*, that I have neither place nor competences to get into it in this article.

Problems about *being* are increasing for individuals as well as for political entities which inevitably grow in societies resting more and more on contracts. But this trend has been even intensified during those lost decades because of globalisation, which commodifies everything, and because of digitalisation, which creates uncertainties about the space [what I called a 'despatializing process' (Garapon & Lassègue, 2021)]; in short, justice which poses a link between *being* and space.

Massacres and rape have long existed, but there were traditional healing processes and an unchallenged patriarchal order. Liberal societies decided to do without the consoling role of religion (that still exist but emigrated in privacy), and to contest violence even in the intimacy of societies such as patriarchal order. This explains why courts pay an increasing and overall transformed role in our democracies: they became an instance for recognition and not only of arbitration on rights (let us think about gay rights which were first understood as the right to be left alone and became the right to be socially recognised). Modern societies rely on the law for ensuring mutual public recognition, on the market for organising existence in neoliberalism and restrict gifts to private relationships for generating a social bond.

> But without this social bond, without this founding relationship and mutual recognition in which everyone ventures something that is part of oneself into the space of the other, no communication can exist (Hénaff, 2010: 154).

Courts, then, must play a role unknown until now: to establish and protect the *being* of both individuals and political cities. *Being* always was a matter of justice, but taken by rituals and religious beliefs, modernity must deal with it through courts; and it recently found out that the means of ordinary criminal justice are no longer adapted to this new task.

Some of my remarks may seem as though I am overemphasising the role played by justice as compared to other forms of social involvement. Indeed, it could be argued that whether justice takes a restorative form or not, it cannot completely respond to what many victims have suffered. After all, justice is only but one dimension of human interventions among other ones such as psychotherapy and caring or supportive relationships. If we stick to a *functional* approach, this is correct: restorative justice is only one solution among others. But I would argue that the difference should not be located at an empirical level governed by technical efficacy only. Justice plays a more central role because it deals with the symbolic efficacy of *meaning*, the fact that we are affected by our common values in a shared understanding of life. The function of justice is neither to solve problems nor to provide care for individuals, but to re-enact the reasons why we go on living together and to eventually modify them for a better future. In this respect, understanding justice as a tension between *having* and *being* may help redefine the place of justice in human affairs.

The International Journal of Restorative Justice 2022 vol. 5(2) pp. 148-167
doi: 10.5553/TIJRJ.000126

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