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Public shaming can't replace justice

HENRY ERGAS

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By **HENRY ERGAS**, COLUMNIST

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As extremely serious accusations proliferate about behaviour by senior politicians that is claimed to have occurred years or even decades ago, the greatest damage is likely to be to the cause of justice itself.

To say that is not to contend that the allegations, which have been strenuously denied, are necessarily ill-founded. But there are good reasons the Athenians, whose legal system allowed any citizen to act as a prosecutor and press claims on behalf of alleged victims, introduced a five-year limit on the time that could elapse between when crimes (other than murder) allegedly occurred and when an accusation was launched.

Underpinning the restrictions, which pioneered the modern notion of statutes of limitations, was the harm being done to the city's integrity by "sycophants" — a term that, in classical Greek, referred not to flatterers but to those who used the right to press charges on behalf of others as a way of advancing their own interests. Originally, the sycophants primarily aimed at enriching themselves by blackmailing the alleged perpetrator or by obtaining a share of the winnings should the claim proceed and succeed.

However, as Athenian politics turned poisonous, sycophancy became as focused on vilifying rivals as it was on pursuing alleged breaches of the law.

That change led to sycophants being known as "borborotarax" — stirrers of muck or

excrement — who spread scurrilous rumours in the city's main meeting places, inflaming partisan tensions and fuelling the rise of the demagogues many of them served.

Characterised, according to Aristotle, by rancour, slander and malice, the sycophants relied on digging up old claims, which were inevitably hard to disprove, and then used the pretence of assisting a victim's search for justice as an excuse for their defamatory attacks. As Demosthenes, one of Athens' greatest patriots and orators, put it in commenting on a prominent case, "Nikomakhos, (were you genuinely seeking justice,) you would have brought matters forward when they occurred — but that was 20 years ago."

Whether the constraints that were eventually imposed on the sycophants proved effective is controversial; what is certain is that even after Athens' glory had faded, time limits on initiating criminal proceedings remained, though they sank into irrelevance when the collapse of the Roman Empire threw Europe back into tribal law.

However, as modern systems of justice evolved, time limits once again became a major concern of legal scholars and of political philosophers. Central to that re-emergence was a new conception of justice that came out of the renewal of Christian scholarship that began in the 11th century.

In tribal law, justice was mainly a private responsibility, pursued by individual families and clans, often to the point of mutual destruction. But for Anselm of Canterbury and later for Thomas Aquinas, justice's role was not to satisfy the private demand for revenge; it was to restore the "right ordering" of human affairs by punishing those whose actions not only harmed others but defied the law itself, threatening the divine gift that made human coexistence possible.

Justice was therefore a public responsibility whose task was to use the community's power to preserve its material and spiritual foundations, including by giving victims their due. However, if public powers of coercion were to be used on victims' behalf, the victims themselves had an imperative obligation to facilitate justice's effective operation, not least by pressing claims in a timely manner and allowing their own credibility to be tested.

The importance of timeliness came even more sharply into focus as the absolutist monarchies of the 18th century dramatically expanded the state's coercive powers, exposing citizens to the danger that they would be disgraced and horrifically punished for crimes allegedly committed long ago.

It was precisely so as to prevent those abuses, and protect the presumption of innocence and the right to a fair trial enshrined in the 1789 Declaration of the Rights of Man and of the Citizen, that the French liberals who drafted the criminal code of 1791 gave new life to the Athenian statutes of limitation.

While that code was swept aside in the Terror of 1793-94, the need for strict limits on how far back the law could reach was prominently recognised in 1808 as an integral part of the great Napoleonic codification of criminal procedure, which influenced legal systems worldwide.

“Civil peace cannot persist if claims for vengeance are allowed to remain eternally armed and active, hanging over social life,” Pierre-Florent Louvet explained, in presenting the draft provisions to parliament; “instead, wisdom requires that the passage of time should lead society to remove legal culpability from events (whose contours) have blurred into the distant past.”

The restrictions time limits imposed on human justice were, no doubt, easier to accept in an age universally convinced that a far higher justice than that which could be secured in this life awaited both the guilty and the innocent in the next; and which was also convinced that where there was sin, there could in time be remorse and redemption.

Now those convictions have all but disappeared. And what has filled the vacuum is a renewed culture of retribution, in which those who rightly or wrongly define themselves as victims assert a moral right to be vindicated, quite regardless of whether they have respected their own moral obligation to assist, where they reasonably could, in justice's timely pursuit.

Aided and abetted by a media that, while claiming to act in the public interest, repeatedly ignores the fundamental Roman axiom of justice — *Audi alteram partem*, hear the other side — public shaming is replacing the judicial establishment of guilt. And with these

contemporary sycophants leading the search for charges that can neither be proven nor rebutted, politically motivated scavenging through the detritus of the past is overshadowing the impartial ascertainment of legally actionable facts.

No one could deny the heart-wrenching torment real or imagined wrongs that have long been left to fester can cause. But Franz Kafka was right when he emphasised in *The Trial* that the justice “which never forgets” — yet is also incapable of accurately remembering — is no justice at all; it is, as he graphically put it, an ambush perpetually waiting to happen, a disease from which there may be temporary remission but no cure, a nightmare weighing even more heavily on the entirely innocent than on the irretrievably guilty.

It is, in other words, the essence of the Kafkaesque. And in reverting to it, we are not advancing into a brave new world but descending into a very ancient one, for which the Athenians also had a name: barbarism.