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Restoring relationships: an ethical approach to criminal justice

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This is such a rich title for a talk that we could spend 20 minutes just unpacking what the title means. But we are serious-minded people in a real situation here, and our focus under the heading of 'restoring relationships' has to be the continuing scourge of sectarianism, which has plainly not gone away since the Good Friday Agreement. Sectarianism feeds on the past, and the past seems to be inexhaustible for some people. So the question is, what can we do to facilitate normal, decent inter-communal relations?

That is a multi-dimensional problem for the Eames-Bradley group. There will be no one, single answer, as people's needs are different. People who say they want justice are often looking for very different things. The specific question for me as Chief Inspector of Criminal Justice is what contribution the justice system can make to that project. But as I have told the Group, I believe it would be a mistake to place too much reliance on the justice system. I shall say a little more about that later on.

As this series is called 'Moral Maze', and as it has kindly been organised by the Irish School of Ecumenics with the support of Belfast City Council, I am going to start with the ethical dilemma which is latent in the question. This is essentially a question about justice and forgiveness, and the interplay of those two is at the heart of theology. Jurisprudence is the secular counterpart of theology, and whatever culture you are in, jurisprudence always follows the prevailing theology.

What we call 'the justice system' is actually a public forgiveness system, in this sense: 'justice' or 'fairness' might imply that the punishment should be equal to the crime. But our punishments are always less than the offence. There is always a degree of letting people off – i.e. 'forgiving them' - and that is for a reason. The justice system aims to de-escalate conflicts. It aims to patch up grievances as quickly and painlessly as possible so that everyone can get back to normal life and be productive again.

Now that is partly because the theology points us in the direction of tempering justice with mercy, but it is also because it is what best suits the State. The 'Moral Maze' teaser is whether that represents an *ethical* approach. The *ethical* approach, you see, might be the punitive one, rather than the forgiving one. Justice might actually demand retribution, rather than reconciliation. The restorative approach we follow may be expedient, rather than principled.

For example, youth conferencing may help some victims, may have a salutary impact on some offenders and may (just possibly) help to reduce re-offending; all of which is good, but is it justice? Unless you can argue that the experience of conferencing is a punishment in itself (which is certainly not the aim of conferencing), it could be argued (and is argued by some critics) that justice has gone out of the window in the interests of practical benefits.

And we encounter this dilemma in spades when we come to the question of what we

should do about the offences of the Troubles. If people do not think the solution on offer is just - if it smacks of expediency - they will not accept it.

So what does the theology say to help us with the dilemma? I want to look first at the concept of justice in the Bible and then at the concept of forgiveness. I hope the reason for doing this will become clear.

There are two words for justice in the OT: a word for what a judge does, and a word for what a righteous man or *sadiq* does. Amos pairs them together in the famous prophecy from which CJI derives its waterfall logo: "Let justice flow down like waters and righteousness like a raging stream".

We translate it as 'righteousness', but that is an unpleasant word, which has connotations of Pharisaic self-righteousness. I think the word we would use nowadays is 'ethical': a *sadiq* is an ethical man. So, you see, Amos got it in one. The approach to criminal justice has to be ethical.

The thing that strikes you about the justice that you find in Exodus is that it is remarkably pragmatic. There is no sense of moral outrage about it. If you kill a neighbour's ox or servant girl or whatever these are simply the rules by which you make compensation. It's like 'no fault' car insurance: it's simply a practical matter that one member of the community has suffered a loss and it needs to be remedied promptly and in an orderly way so that the grievance doesn't fester and lead to tit-for-tat retribution and vendettas that would weaken the tribe.

You might be tempted to contrast with that the laws in Leviticus about unacceptable behaviour, especially in the sexual domain. Here the offences are not against an individual who can be compensated but against the community as a whole (because they are in danger of bringing down the wrath of God on everyone *à la* Sodom and

Gomorrah). And here we do get a sense of moral outrage and the threat of extreme penalties.

But even there you can see that there are practical considerations underlying the jurisprudence. Some of them are health and safety rules, some are about luxury which might weaken the moral fibre of the tribe, some are about conduct which would be seen as subversive of the moral order. They are all, in essence, about trying to keep together a viable community, with a distinct religious identity, in a hostile environment. The moral outrage is there more for effect, one suspects, than for acting upon.

And the theology supports that by teaching that, while justice and mercy are two sides of God's character, mercy always prevails. As the Moslems have it, the second and third names of Allah are 'the Compassionate'¹ and 'the Merciful'; and 'the Just' does not appear till number 30.

We have to have sanctions in our society to deter harmful behaviour, and those sanctions have to be exercised if they are to be credible and effective. But we always aim to punish without being punitive - in other words, taking no satisfaction from the punishment - and so far as possible we aim to judge without being judgemental. The aim is always repentance and reconciliation.

Let us turn quickly to forgiveness. There are two words in the OT which are translated as 'to forgive', and they are used interchangeably. There is a verb that means 'to spare', and one which literally means 'to

¹ *Al-Rahman*. The Hebrew word for 'compassionate' is the related word *rahum*, which comes from *raham*, to show compassion. *Raham* actually means to cuddle or soothe a baby, and is therefore the most feminine of words. In fact it is cognate with the word for womb, *rehem*. So the word we translate as 'compassionate' is much more human and intimate than the (Latin) English word.

raise up'. The idea is that you have the power of life, death or enslavement over the poor person in front of you; they fall on their knees begging for mercy; and if you decide to forgive them you physically raise them up.

Those are the only words for forgiveness *as such* in the OT. Please note that it is always forgiveness from a position of power.

Then we come to the NT, where the basic word for 'forgive' means to release or discharge, and the concept is that of cancelling debts, as in the Lord's Prayer: where we say, 'Forgive us our trespasses', the Greek says, 'Cancel our debts'. If you do something wrong you create an obligation to the person you have offended, and forgiveness is the cancelling of that obligation.

The brilliant move that Jesus made was to turn forgiveness on its head by making the powerless forgive the powerful, a totally subversive doctrine that reverses the power structure. This illustrates the point that forgiveness can involve a power struggle for the right to forgive. It is not enough to be willing to forgive: the other party has to be willing to be forgiven, and that can be difficult, because it involves an implicit acknowledgement that they were at fault. Question, therefore: is mutual forgiveness a logical impossibility?

Well, it would be if it were not for St Paul.² Paul brought compassion and cancelling

² Paul made his major contribution not with those catchy doctrines of 'justification by faith' or 'being in Christ' but with the family of *kharis* words he introduced into the Christian vocabulary. *Kharis* itself, which we translate as 'grace'; *kharisma*, the 'free gift' of Romans 5:15; and *kharizesthai*, a new word for forgiveness, a word of generosity, not a transactional sort of forgiveness - cancelling debts - but a forgiveness moved by the spirit: inward, as opposed to external, formal forgiveness.

debts together into something like our concept of forgiveness with a new word for forgiving, which comprises *both* wiping the slate clean *and* making the emotional move of being warm towards the person you have forgiven. You are not just quits, but there is an implicit offer of friendship, just as God forgives us in order to love us. And of course that *can* be mutual, doesn't have to be from a position of power, and need not involve blame.

What lessons can we draw from that for the current, pressing issue of sectarianism and the Past?

The problem the criminal justice system has in tackling the past is that there is no way, in the great majority of cases dating from the Troubles, that it is ever going to be possible to bring prosecutions and convict people in a court of law. People may want 'justice', but we cannot give them the sort of justice they want.

Partly this is because of the practical problems of integrity of evidence after the lapse of time, but there is also a more profound worry. The question is whether, even if we could bring charges, justice would be done if they were convicted as charged. Can the justice system really take full account of the circumstances in which the said offences were committed? This is not just a question of 'Was it a war?': it needs to take into account the whole extraordinary situation people found themselves in and the pressures to which they were subject, factors which were recognised in the GFA in the provisions leading to early release of those convicted for conflict-related offences.

Let us assume that relief for ex-prisoners is now part of the agreed settlement, even though some people are still deeply unhappy about it. The further problem is that a lot of the offences that were committed during the Troubles would have been war crimes even if it had been a war.

And then there were the outrages that you could not even dignify with the name of 'war crimes' – acts of sheer, blind insanity. Without attempting to assess and balance blame, all the parties to the Troubles have things to answer for which arguably have not been expunged by a generic provision for relief for 'honest ex-combatants'.

Our concept of justice will lean over backwards to make allowances. It will hear all these pleas of mitigation. But there will still be a residue of guilt which stands in need either of punishment or of forgiveness. And if punishment is ruled out, then forgiveness it must be.

If people do not think the solution on offer is just they will not accept it. They will not accept a fudge that involves simply drawing a line under the Past and moving on. People feel strongly about justice, and not just for reasons of self-interest, or as a way of carrying on the struggle by different means.

The prerequisite, therefore, is that each of the parties to the conflict should place on the table an admission (in generic terms) of things they regret doing and should accept the appropriateness of formally asking to have their obligations in respect of those past acts cancelled. That is hard, but I refuse to believe it is impossible.

There can then be mutual forgiveness in our two senses: an understanding that in all but exceptional cases offences will not be proceeded against (though that does not have to take the form of a legal amnesty, which would raise all sorts of problems); and an emotional step of accepting that as the basis for reconciliation. The past will no longer be allowed to poison the present.

Forgiveness does not depend on emotion. It certainly does not mean having to like someone. Forgiveness can be quite cool and hard-headed. It can involve doing deals because forgiveness on certain terms is a

better option than whatever else is on offer. If we can facilitate the hard-headed deal, then hopefully grace will supervene to provide the basis for a more profound reconciliation.

My submission to Eames-Bradley was therefore that we should neither rely on the justice system, which is a broken reed in this context, nor place too much weight on the scope for individual reconciliation – we certainly should not press people into emotional forgiveness if they are not ready for it. What we should do first is to put in place a negotiated framework of official forgiveness, by inviting each of the parties to the conflict, including the authorities, to acknowledge responsibility in generic terms for things done during the conflict which with hindsight they regret.

The criterion should be neither the legal one of 'unlawfulness' (which would be one-sided in this context) nor the criterion of individual blame (which would be too restrictive) but a wide definition of 'things one could wish had been done differently'. I strongly support the judicial inquiries which are currently in progress and in prospect. But there are limitations to what inquiries can achieve. They are very costly, not least in the burden they place on the justice agencies; there will be diminishing returns as time goes by; and in the long run we shall need to find a better way of rolling up the legacy of the past.

The alternative, of course, is Samuel's approach to reconciliation. Samuel, as leader of Israel, welcomed King Agag to a peace conference, and Agag smiled and said, "Surely the bitterness of death is past". And Samuel hewed Agag in pieces before the Lord (1 Sam. 15).

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