

# RESTORATIVE JUSTICE

## Exploring its theological roots

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### Introduction

A new movement has been emerging within the justice systems of a number of countries in the last decade, the *restorative justice* movement. The key element of restorative justice is to seek to frame our justice practices so that, as far as possible, they will re-build relationships that have been broken by criminal law-breaking activity rather than worsen them.

It is the purpose of this article to explore the religious connections in historical terms with the restorative justice movement, and develop some of the possibilities for the church in seeking to enhance restorative justice principles.

### The theological critique

Over twenty years ago a damning critique of the role of the churches in monitoring criminal justice conditions appeared.

“Throughout its history, the Christian Church ... has endorsed, tacitly approved, or at the very least been shamefully ignorant of, the inhumanities of our criminal justice system. Even after the explicitly religious penal models of the penitentiary movement have faded into history, it was (and is) widely assumed that the punishment of criminal is in some way a holy duty ... And where Christians have been concerned with justice, it has all too frequently been the selective vengeance we have all sanctioned as retribution, as opposed to the all-encompassing righteousness which is known as justice in the bible. It is not at all unusual to hear a Christian minister decry the rising tide of crime and immorality in print or in the pulpit, but it is rare indeed to hear a Christian minister exhorting the faithful to actually dare to love their enemies.”<sup>1</sup>

There is no reason today for churches not to become involved in seeking to challenge policy-makers to embrace restorative justice outcomes. In fact, it would be a failing of our duty if we were not to administer to the bruised and broken-hearted of the *injustice* system. By way of example, the Australian prison population has seen an increase of 50% in the last ten years, and the over-representation of Indigenous people in the prison statistics (up to 37 times in Western Australia) is a national embarrassment. The USA

currently has over 1.7 million people behind bars, and 60% are from racial or ethnic minorities. Black and white people are the victims of violent crime in roughly equal numbers, yet in 82% of cases since 1977, according to the latest Amnesty International figures, where a murderer has been executed the victim has been white<sup>2</sup>. In both countries examples of racist policing practices are legion. Victims feel abandoned. The *selectivity* of the justice system reveals no shortage of examples of injustice.

### **What is restorative justice?**

The principles of restorative justice are often expressed in different ways, but some clear themes emerge. In models of restorative justice, there is

1. a shared responsibility for resolving crime and for one another,
2. the use of informal community mechanisms in addition to the involvement of criminal justice professionals,
3. the inclusion of victims as parties in their own right,
4. an understanding of crime as injury, not just law breaking, which encourages repair of the injury (including restitution) and reconciliation of the wrongdoer and victim,
5. an understanding that a state monopoly over the response to crime is inappropriate.

Embracing theological themes and experiences - especially those employed and told by the more communitarian of religious fellowships - in the pursuit of restorative principles provides an opportunity, I suggest, to bring restorative principles to the center, rather than the periphery, of life in modern societies.

### **A theological link?**

A brief historical overview of the mixture of law and theology of centuries past, at least in European terms, reveals an interesting shift away from restorative models that occurred in the 16<sup>th</sup> century but which had, until that time, been in place for millennia. Until the seventeenth century, European academic interest in law, crime and punishment was completely dominated by theologians. The great legal (indeed, philosophical and scientific) scholars, and the colleges and universities where they were housed, were found predominantly within religiously based orders. This is hardly surprising, given the history of the church and its relationship with the state. At least until 1642<sup>3</sup>, there was never any doubt that a monarch ruled by divine right. Nor was there, for at least two more centuries, any *official* doubt that God existed. The church provided the forum for any announcement of official government policy. The clergy occupied a central role in the political and social lives of people. Any attempt to doubt the church and its authority was tantamount to treason. The consequence was a mingling, indeed interdependency, of theological and legal notions. Religious leaders continued to hold the highest positions of societal authority for at least the first three centuries of the American colonies. Of course, the historical waters, mixing power, religion, money and politics, have never been anything but muddied<sup>4</sup>.

In the Christian tradition, churches and courts were almost one and the same. Guilty persons had the right to confess their sins before God and receive acquittal or pardon, in so far as there was restitution or reparations available for the wronged, and atonement or reconciliation (literally at 'one-ment') with God. According to the teachings of the Holy Roman Church, pardon came through faith and good works.

By the advent of the sixteenth century, however, this requirement had been widely abused by the sales of 'indulgences' (corrupt payments to officials to expiate sins) a practice that Martin Luther, himself a lawyer and theological professor, opposed. His view was that salvation came by faith alone, not good works or reparations. Grace, he said, could not be conferred by a corrupt clergy, but was a free gift of divine love. Luther posted his 95 'theses' to the church door in Wittenberg in 1517, for which he was later ex-communicated<sup>5</sup>. These theses later became foundation tenets of the Lutheran Church. While Luther's action seems to have been based upon a reasonable response to theological abuse, and had the effect of shaming corruption in the ranks of the clergy, its effects were to alter two of the central planks of the criminal law: the notion of reconciliation with the victim, and restitution. Now that it was no longer possible to buy one's way into heaven, it was no longer possible to be seen to be buying one's way into legal exculpation, except to provide evidence of extenuating circumstances sufficient to invoke clemency or mercy<sup>6</sup>.

The courage of Martin Luther was not the only reason, of course, for the demise of restorative emphases in criminal law following the sixteenth century. As the scientific age, along with the rise of 18th century humanism, pushed matters numinous into the background, so too did theologians adopt a lesser role in the educational and legal processes. Gradually scientists began to separate themselves from theologians. Scientists took the somewhat arrogant stand that their studies revealed, in an objective fashion, ultimate 'truth'. Religious fundamentalists responded, affirming their 'truth', for example, that the earth was created in the manner described in the biblical book of Genesis. In 1859, with the publication of *The Origin of Species*, the writings of English naturalist Charles Darwin (1809-1882) were quickly branded heretical by scriptural literalists, and accepted unquestioningly by secular scientists. The battle lines were drawn. This period may have completed the sealing off of theological input into the newly emerging European 'positivist' (scientific) criminology. Theologians who did engage in open-ended dialogues were nevertheless forgotten or ignored in the rush towards empirical certainties and rational explanations.

### **Judaism and Christian theology today**

I believe that the tide has now turned. Many theological issues are now well and truly established as legal, political and public-policy issues. It would not take long to develop a significant list of examples of modern community-enhancing mass-movements that were premised upon theological premises. The legacy of Reverend Martin Luther King's vision for racial equality in the United States, and the work of the Bishop Desmond Tutu in the transformation of South Africa, as it abandoned the policy of apartheid and created a Truth and Reconciliation Commission, provide two immediate examples. It is essential that the theological underpinnings of these movements – especially their restorative themes - be explored. These examples are growing by the day. It is incumbent upon churches to expand them.

### ***Judaism***

There are significant restorative features in Jewish law, which dates back many thousands of years. Relationships are integral to social reality in Judaism. The term widely used by Jews and non-Jews alike, *shalom*, means 'peace', combined with 'right relationships'. Coupled with this notion is the need to restore and renew the sacred covenant that the people had with their God, Yahweh. A broken covenant needs repairing. The rabbinical *teshuva* refers to a believer's 'turning around', a conversion, a

yearning to restore good relations. Reconciliation, for example, is the purpose of the Day of Atonement celebrated, as described in Leviticus 23:26-27 as *Yom Kippur*. Restoration of property is the purpose of the *jubilee principle*, described in Leviticus 25:8, where all debts are set aside in the fiftieth year (the *year of restoration*), and all slaves are to be set free. The *Years of Jubilee* also seek to bring mercy, healing, new life and a fresh start<sup>7</sup>.

### ***The Christian churches***

There are many parallels in Christian theology. There is a long history of reconciliation and restorative themes in Christian traditions. Faith is expressed in terms of relationships, and when those relationships are broken, faith falters. In pre-Victorian England days, at least, one was not permitted to take the Eucharist without formally reconciling himself or herself with others who may have been wronged by the penitent. Confession has a long history in Christian theology. Notaries, writing formal declarations of penitence and seeking forgiveness on behalf of the wrongdoer, were kept busy in the days prior to the 'communion'. If we are to rely upon the 2 Corinthian (2:6-8) interpretation, the very word 'forgiveness' means 'to give away' or seek restitution.

#### ***i) The Mennonites***

The Mennonites have a long 'restorative' tradition. They began in the sixteenth century, during the Reformation. Named after their first leader, Menno Simons, a Dutch ex-Catholic priest drawn into the Anabaptist movement, their leaders stressed the separation of church and state and the rejection of all forms of violence. In 1979 the Mennonite Conciliation Service (MCS) began, inspired, in part, by the work of two key Methodists. The MCS is grounded in a theology that closely links the need to achieve both individual peace and social responsibility.

#### ***ii) The Quakers***

The Quakers, too, have had a significant influence upon the development of a modern theology of repentance and reconciliation. It was Quakers in Philadelphia in 1790 who convinced that city to establish a place of penitence ('penitentiary') as an alternative to corporal punishment. The report *Struggle for Justice* in 1971 provided a watershed for non-retributive punishment. It is the view of the authors that a criminal justice system that values relationships, reconciliation, restoration, hope and forgiveness would have a very different structure than the current one<sup>8</sup>.

#### ***iii) Progressive Catholics***

Pastoral letters have been written by the Catholic Bishops of England and Wales (1996) and New Zealand (1995), if not elsewhere, highlighting the possibilities for the 'common good' of restorative approaches to justice. Thomas Aquinas developed a notion of morality rooted in the notion of fairness, respect, forgiveness (justice) in relationships. Confession, healing and forgiveness are essentially elements of modern Catholic doctrine.

### **What are the possibilities for the future?**

Some progressive theologians have taken up the challenge to build upon religious concepts of restoration, reconciliation and repentance as part of their restorative justice role. Our church has not yet taken this as an issue, although it should fit in well with the notion of peace and justice, which we espouse. Perhaps this could be a quest for the

new millennium. Perhaps it could be a precursor to a name change. What possibilities lie ahead for the *Restorative Church of Jesus Christ*?

To build an effective theory of restorative justice, the quests of 'restorative' theologians should not be overlooked, for modern interpretations of ancient theological perspectives have the potential to offer fresh insights that may qualify, complement and enlarge the notion of restorative justice. Our church should not allow this opportunity to pass.

## Notes

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<sup>1</sup> McHugh, GA (1978) *Christian Faith and Criminal Justice: Towards a Christian Response to Crime and Punishment*, New York, Paulist Press, p 133.

<sup>2</sup> The USA is the only western nation that still has the death penalty and the only country in the world that has no ban on execution of the mentally ill, mentally disabled and juvenile offenders. The USA and Somalia are the only two countries in the UN not to have signed the Convention on the Rights of the Child, possibly for this reason.

<sup>3</sup> In 1642 the forces of the supporters of Oliver Cromwell began a Civil War against Charles I, King of England, who had until that time continued to have the support of the church in pronouncing the Divine Right of Kings.

<sup>4</sup> eg. Henry VIII, in 1533, broke with the papacy, compelled the clergy to declare him (Henry) supreme head of the church, and transferred church revenues and properties to the Crown. Even today the Queen of Great Britain's legislative authority and her role as 'Defender of the Faith' in the Church of England are still inextricably mixed.

<sup>5</sup> He later married a nun and had 6 children.

<sup>6</sup> Mercy is not, at its heart, restorative. It is simply something that arises out of compassion and pity and may provide mitigation of the outcome.

<sup>7</sup> The aim was to settle disputes so that prosperous co-existence in Jewish communities was possible.

<sup>8</sup> Given the very great divide between, for example, the Calvinist (Lutheran) theology of atonement with God, and the Quaker (Anabaptist) tradition of reparation with one's fellow citizens, it should never be presumed that the expression of Christian restorative principles has always been, in some manner, uniform.