The Ancient Concept of Restitution: An Historical Analysis of Restorative Practices of Punishment in England

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Since the publication of Howard Zehr's (1990) *Changing Lenses* there has been a growing interest in restorative approaches to criminal justice which has resulted in a greater consideration of the ancient and indigenous practices in which these restorative traditions are seen to have their roots. Restorative approaches have been described as a 'new paradigm for doing justice' but advocates have also relied on ancient practices of restitution to victims to support their claims for legitimacy. Often this has involved presenting 'origin myths', which rely on partial truths based on a strict dichotomy between opposing concepts, in order to present a story which overcomes some of the inherent contradictions involved in the relationship between restoration and punishment, both in the past and within contemporary society. The Anglo-Saxon legal system was based on Germanic practices, which Braithwaite (1999: 1) has associated with restorative traditions. This paper is based on an examination of references to punishment in Anglo-Saxon law with the aim of producing a more '*authoritative*' history of restoration in this period which attends to the 'murk and constraints' which Daly (2002: 62, 72) considers is essential for producing less mythical interpretation of restorative practices in ancient societies.

The Anglo-Saxon period in England ran from the fifth century to the Norman conquest of 1066. It followed the collapse of the Roman Empire in Western Europe and was an era in which dramatically altered political and social infrastructures developed across the lands of the former empire. In England, the period saw the conversion from paganism to Christianity, the eventual union of a large territory under a single monarch, the long struggle against Viking attacks and consequent absorption of a large Scandinavian population, and the development of a more advanced culture. Alongside these social and political changes were two important legal developments which make the period of particular utility in addressing the role of restoration in ancient forms of justice: first, the introduction of written law with the first English law code issued in c.602-3 by King Aethelberht of Kent. Between then and the Norman conquest eleven further kings produced twenty-two extant codes and it is these which form the basis of this analysis.

The second legal development was the initial emergence of limitations to the right to pursue feuds, or the beginnings of the shift from victim-centred to state-controlled justice which has been pivotal to the historical claims of restorative justice advocates. A degree of controversy has developed within discussions of this transition which is well summarised by Weitekamp:

> "One side praises the Middle Ages for its wise use of restorative justice as a humane penal sanction perceived as being beneficial to the offender and his kinship, the victim and his kinship, and society in general. Such approaches argue that restitution disappeared as a penal sanction after the state took over the criminal

> justice system, thus leading to an inhumane and brutal system of criminal justice where the victim had no place. Conversely the other side contends that restorative justice in its applied forms was abused by people in power, misused by the rich people as a cheap way out of trouble, and led to chaos in society. They consider that the state moved in and took control of the criminal justice system because of the public outcry about the horrors of the existing system."

Weitekamp (ibid.) wisely observes that this controversy "appears to be unsolvable" before going on to suggest that the focus of authors on different periods of the Middle Ages has contributed to the disagreement. He is contending, therefore, that the first interpretation is fitting for the period prior to the erosion of restorative justice (c.500 to the twelfth century) and the latter for the period from then until about 1500.

This paper provides an analysis of references to punishment and restoration within the Anglo-Saxon law-codes. The establishment of written law by successive Anglo-Saxon kings provides some, albeit imperfect, evidence through which to examine ancient traditions of restoration in England and so enables the construction of a more "*authoritative*" history. It also allows for an assessment of penal methods in the period which Weitekamp suggests offers greater support for the arguments of restorative justice advocates.

The analysis adopts a loosely Foucaultian perspective in that it draws loosely on Foucault's approach to studying penality, particularly in the sense that punitive mechanisms are

understood as techniques for exercising power which exist within a certain regime of rationality. This focuses attention on exploring the conditions which made particular penal techniques acceptable and effective within a particular social context, an approach which is constructive for analysing restoration in Anglo-Saxon punishment for two reasons. First, it enables *all* penal practices to be recognised as rational at a given historical period, thus guarding against the tendency to view the social practices of our distant ancestors as either barbaric and uncivilised or idealistic and romanticised. Secondly, it focuses attention on punishment as a political tactic which exists within a wider system of power relations, thus enabling a critical analysis of ancient forms of restitution.

The restorative practices associated with Anglo-Saxon law essentially involve the negotiation of a settlement between the kinship groups of the victim and the offender which usually involved the exchange of some form of material property and often a public apology. This was actually part of a wider form of feud-centred justice because feud and negotiated compensation were inseparable elements of the same system. Without some restorative settlement there could be no peace in the feud but without the threat of vendeatta there was no incentive to pay in stateless societies. These were not different forms of achieving justice but two sides of the same coin. Both rested on a "foundational metaphor based on debt, obligation, and the exchange of gifts" in which the wronged person had a duty, and not just a right, to seek recompense for an injury sustained. An offence was an attack on the honour of the kin which, if left unavenged, would lead to a reduction in their social status.

Feud was just one possible option for continuing and exchange and many disputes are likely to have ended in an informal settlement involving the exchange of property and some form of public apology. The importance of compensation can be seen in the first extant law-code – considered by Patrick Wormald to consist almost entirely of "established custom" which was "largely an elaborate tariff of compensations for injuries of various kinds". Indeed, throughout the Anglo-Saxon period financial restitution for injury remained the most frequently mentioned penalty. This restitution, however, was not so much restorative as reciprocal, resting on inter-relationships and exchange rather than the replacement of something lost or harmed. This system of feud-centred justice – of which both feud and compensation were a part – had multiple functions, acting not only as a technique for responding to infringements of social norms but also as a mechanism of social control and a way of exercising power within society.

Feud and settlement involved the whole of a kinship group and operated on the what Miller has called the "principle of group liability" which acted to socialise decision making so that the consequences of any kin member's behaviour were inextricably bound up with the fate of the kinship group as a whole. Feud-centered justice, therefore, was a technique for exercising power; a means of affirming authority in the absence of an institutional power structure, and in this sense a political tactic in the way implied by Foucualt. They were dependent on the idea of honour as a source of social power and situated within a definite hierarchical social structure.

Power in early Anglo-Saxon society was only partially determined by material wealth and was also dependent on personality, including the possession of valued traits such as freedom, loyalty and honour. A fundamental distinction existed between those who were free and slaves, with only freemen having honour and the protection of kin which was the source of their rights and status. Even within free society there was a strict hierarchy which was fundamental to punishment. The higher status of the noble was expressed in a higher value or price in any negotiated settlement. This social hierarchy is evident in the law codes and the scale of payments contained there indicate that this was finely graded with at least three classes of semi-free commoners, three classes of slaves and four classes of noble. Noblemen received a greater amount when they had been a victim and slaves generally received physical punishments. Status was the most important determinant of punishment and it is clear from the codes that English law was finely attuned to the question of reputation.

Any negotiations which followed transgressions did not, therefore, occur in an egalitarian society. Restoration was concerned with restoring "right relationships but these were relationships which were unequal in the first place; a fact which is given scant recognition in many discussions of ancient forms of restoration. Restitution – whether through an agreed financial settlement or the vengeance of the feud – was an aspect of feud-centred justice, but more central was the idea of reciprocity and exchange, with both the offender and the victim considered as debtors. Inter-relationships were of key importance, and so justice was "an encounter process guided by certain values" – one definition which has been given for restorative justice in the modern era. However, the values which guided and constrained the

process were those of loyalty to the kin, heroism, honour and gift-exchange rather than the more benevolent values currently associated with restorative justice – there was little place for non-domination, compassion, forgiveness or mercy. Status did not just affect punishment but ran through the entire legal process affecting the likelihood that an individual would be accused and considered blameworthy, the ways in which this would be decided, and the amount that an offender would have to restore or a victim would receive. If this was the "golden age of the victim", as suggested by Schafer (1968, cited in Weitekamp, 2003: 118), then it was so only for some victims and was more of a dark age for the poor or friendless falsely accused.

One of the areas of controversy in discussions of ancient forms of justice identified by Weitekamp is whether the state took control of criminal justice in an attempt to further its own interests or because of problems with the existing system. In the law-codes produced from the ninth century onwards there is evidence of attempts to deal with some of the perceived problems with feud-centred justice, particularly in terms of the influence of wealth and status on the process of restitution.

Attempts to bring powerful kinship groups within the mechanisms of justice and social control can be interpreted in two ways, both of which have some validity. On the one hand it is a reflection of the conflict between feud- and sovereign-centred justice and represents an attempt to demonstrate the power of royal law over all – "noble or commoner" alike. However, it also indicates some of the problems associated with a system of restitution which was so

heavily dependent on status and the payment of financial compensation: those of high status, with large amounts of power, were less firmly controlled by the justice system, just as those of low status were less well protected. This or similar phrases reiterating that justice is for all whether rich or poor become a standard aspect of the codes from the laws of King Edgar onwards.

As well as limiting the indemnity of powerful kinship groups there were also attempts across the law codes to protect weaker members of society. Much of these efforts involved the clarification of procedures for judging and achieving restorative settlement for those who were unable to engage in the exchanges and relationships which were at the core of feud-centred justice, for example those who were unable to swear an oath (slaves, the deaf and dumb), or those who were not protected by the bonds of kinship, usually foreigners, slaves, lordless men and those without relatives. There is also a concern within the tenth and eleventh century codes that justice should be available to all regardless of wealth or status and phrases reiterating this become a familiar feature within the later codes.

Such attempts lend some support to those who argue that the decline of restorative justice and its replacement with penalties enacted by central authority was the result of “horrors”, or at least problems, within a feud-centred approach. The king and his agents are given an important role in ensuring justice for weaker members of society, partly through an increased role in making judgements and facilitating arbitration, but also by assuming the role of kin for the

friendless or strangers. A generic extension of sovereign power over punishment can be identified within the codes and this operated on three levels: first, through an escalation of attempts to regulate, constrain and limit the pursuit of feud and encourage the payment of compensation; secondly, through the extension of the concept of the king's peace and the appropriation of a greater share of the financial settlement by the sovereign and his agents; and thirdly, through increasing references to the use of sanctions involving alternative penalties to those of feud and financial restitution. An analysis of these changes demonstrates that royal power was inserted into criminal justice processes not just to protect the poor, weak and socially excluded but also to assert the power of the sovereign over that of the kin. Feud was associated with kinship as a central social institution. However, feuds were not conducive to the internal peace necessary for the stable authority of one sovereign over a large territory. This was increasingly the aim of kings in the tenth and eleventh centuries as the smaller kingdoms associated with the migratory process became amalgamated to form the single territory now known as 'England'.

Attempts to regulate and reduce engagement in feuds combined with the appropriation of a greater share of compensation by the king and his agents led to greater control over the pursuit of feuds, reducing the choice of victims and their kin to pursue this form of justice, and a decrease in the amount of any restorative payment that was allocated to the victim. The imposition of royal authority into traditional forms of justice and an increased role for royal agents in the process of dispute resolution within the law codes constitutes an ideological

statement that the right to punish was one which belonged to the king and that the law was something which he provided for his territory and its population.

One important example of the extension of sovereign power within the law codes is the introduction and increase in references to alternative penalties and the construction of these as sanctions which were carried out under royal authority. The most common forms of alternative punishment inolved the infliction of physical pain or death, exclusion through banishment, outlawry and imprisonment and spiritual penalties which were inflicted for both ecclesiastical and secular offences. It is impossible to determine whether these penalties were entirely novel but it is clear that they are referred to more more frequently from the tenth century onwards and in shifting tone. It is also evident that the mechanism which these alternative penalties performed was to act as a replacement for the coercive threat of the feud.

These alternative penalties were often mentioned in relation to problematic offenders who fell outside important social bonds or who refused to comply with traditional forms of justice – foreigners, offenders who escaped, failed to make amends, reoffended, or interfered with the processes of justice by committing perjury or bring false accusations. They were, in many respects, a punishment of last resort used in response to those who fell outside of the bonds of social control or who refused to co-operate with justice or desist from offending. Just as the feud was the coercive threat which acted to bring about resolution through restitution in

traditional forms of justice, banishment, outlawry and death came to take this role as the right to feud became increasingly restricted.

Spiritual punishments operated with the same basic rationality which underpinned both feud-centred justice and the use of alternative penalties. Penance was the most frequently mentioned of the three and it resembled in many ways the lists of compensation payments within the early law-codes. Excommunication and unconsecrated burial figured less frequently but functioned as a coercive threat to encourage wrongdoers to undergo penance, excluding an offender from the Church and condemning them to a "future death in everlasting hell" if they did not do so. Spiritual punishments brought the Christian religion into the process of justice in a way which mirrored the formula which underpinned secular ideas of justice: a process of restitution with God or man backed up by a coercive threat of death or exclusion; a formula which had been adapted from that which formed the foundations of feud-centred justice.

The history of the role of restoration in the past needs to be a more qualified one. Weitekamp's suggested dichotomy between an earlier 'positive' experience of ancient restorative practices and a later 'negative' experience once the state began to intervene in traditional justice processes is an example of the oppositional nature of the origin myths which have developed around restorative justice. There is much we can never know about ancient practices of punishment but the evidence of the Anglo-Saxon law-codes cautions against an oppositional interpretation which sees restoration as *either* a humane penal sanction beneficial to all *or* a

system which was abused by the rich and powerful that led to chaos within society. In fact, a more accurate interpretation rests in the murk which lies between.

Restoration was an important element in Anglo-Saxon justice but it was not the sole form of justice even in the early period between the seventh and tenth centuries, always behind restoration lurked the threat of the feud. The opposition between humane or brutal is flawed. The basic penal rationale throughout the period altered but it was not fundamentally transformed. Both feud-centred justice and the more sovereign-centred justice which can be seen developing in the tenth and eleventh century codes rested on the idea of a process of restitution backed up by a coercive threat (which essentially rested on the threat of violence, usually death). The coercive threat shifted from a vendetta played out between kinship groups to an increased emphasis on death and exclusion enforced by the community as a whole but the use of coercion was always available to be used for difficult offenders who persisted in their wrong doing or refused to co-operate with the process of justice and restoration.

As well as a reliance on oppositions, origin myths tend to portray an idealised image of restoration rather than a critical analysis. Negotiations over restoration did not take place in a power vacuum and Anglo-Saxon society was not homogenous but a strictly hierarchical society finely attuned to gradations of status. It is impossible to say whether the system was abused by those with greater wealth and influence but it is patently obvious that the potential for such abuse did exist. Further evidence for this comes from attempts within the law-codes to protect

vulnerable people and to guard against the potential immunity of powerful groups from effective social control. Feud-centred justice was also dependent on strong social bonds in order to be effective and the problems generated by those who were excluded from such bonds are also evident within the codes. However, this does not necessarily meant that state intervention in justice processes was motivated entirely by public outcry or problems with the system. The restriction of feud-centred justice which occurred during the period and the introduction of, or at least greater emphasis, on, alternative forms of punishment were also calculated moves to assert and increase the power of the sovereign in opposition to that of the kin.

The idealisation of restoration has focused attention away from issues such as power and has produced a story which tends to over-emphasise the violence involved in later non-restorative punishments and to under-estimate the violence involved in feud-centred justice. The issues of power and the necessity for a coercive threat to encourage compliance and to deal with those who refuse to engage with a restorative approach have not figured as prominently in contemporary discussions as they should have. A reasoned debate about restorative justice needs to include a frank discussion of the ways in which reluctant offenders and victims can be encouraged to engage with restorative processes and how they are to be dealt with if they fail to do so. There is also a need to consider how persistent offenders are to be responded to. There is a conflict between the idea of severe exclusionary or other measures to deal with problematic offenders and the values of forgiveness, empowerment and inclusion which have been important in the advocation of restoration as an alternative approach to criminal justice.

A consideration of the effects of power and social inequality is an essential part of debates about restorative justice. Just as the hierarchical nature of Anglo-Saxon society has been only minimally acknowledged in considerations of ancient restoration, so too the unbalanced, unequal and exclusionary nature of our own society has been played down and the effects of this on any processes of restoration has not had a prominent enough place. Negotiations over punishment in the Anglo-Saxon period were embedded in the hierarchical social structure of society. Those who were weak or socially excluded struggled to achieve justice either as victims or offenders in a system which was inherently reliant on status, reputation and social embeddedness. The restoration involved in returning to a 'right relationship' meant a return to the relationship which existed prior to the offence, whether this had been equal or unequal. Contemporary Western societies may have a significantly different social structure – one with more equality, or perhaps simply more pretences to equality – but it is itself a hierarchic society with unevenly distributed wealth and the effects of this for processes of restoration need to be more widely recognised and subject to debate.