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Criminal Law since Saxon Times

The Common Law owes a great deal to its Saxon origins. One of the great virtues of the Saxon state was the judicial system of local courts. These continued long after the conquest until from the twelfth century onwards the reorganised royal courts took over more and more of the judicial work. Saxon legal remedies were by no means perfect. Some punishments we would now regard as barbarous, and things got worse after the Conquest with the introduction of the cruel Norman Forest Laws and Trial by Battle. But the concept underlying punishment in Saxon England is remarkable, and might well teach a lesson for today. The idea seems to have been: 'If you don't keep the rules of the club, then you lose the right to its benefits; and if the matter is serious enough you must be asked to leave, or expelled'. It is interesting that this same philosophy in modern times has inspired the trade unions' rule books in their treatment of discipline - fines, loss of benefit, and expulsion. In Old English law except for High and Petty treason, the usual punishments for serious crime were banishment, outlawry, abjuration of the realm, or monetary penalties, even for manslaughter and murder²⁵. "Imprisonment would have been regarded in these old times as a useless punishment;

it does not satisfy revenge, it keeps the criminal idle, and, do what we may it is costly. Imprisonment was not thought of as a common law punishment".²⁶

After Henry II established the circuit system, his judges used imprisonment as a means of ensuring the presence of the defendant at the trial, and to compel obedience to orders of the court. The judges on circuit all over the country assumed power to imprison indefinitely after conviction. It swiftly became their practice to use this power to extract money from the defendant:

The justices do not want to keep him in gaol, they wish to make him pay money. [After 1215 they had no power to fine. The imposition of a fine would have been an evasion of Magna Carta. But] What the judges can do is this:- they can pronounce a sentence of imprisonment and then allow the culprit to 'make fine', that is to say make an end (*finem facere*) of the matter by paying or finding security for a certain sum of money. In theory the fine is a bilateral transaction, a bargain; it is not 'imposed' it is 'made' ... The wrongdoer rarely goes to prison even for a moment. On the plea roll the *custodiatur* which sends him to gaol is followed at once by *Finem fecit per unam marcam* (or whatever the sum may be), and then come the names of the those who are pledges for the payment.²⁷

We point out later that the mediaeval courts, far from costing money, were at one time a source of considerable revenue to the Crown. In Plantagenet times when the Kings took over the local jurisdictions, receipts from 'fines and amercements' in the King's courts brought in revenue which was dubbed a *magnum emolumentum* of

the Crown. By Elizabeth's reign, the introduction of imprisonment had reduced this to about £2000, although even that was not a small sum in those days. It certainly makes one wonder how such a lucrative system could have turned into today's administration of justice which is a considerable drain on the exchequer to be met by the taxpayer, with legal aid alone costing (1996) £1.4 billion a year. Surely a consideration of legal history would bring a little more light to the debates on this subject. The flow of money should be towards the Crown, not towards the criminal. How did this come about?

In Saxon times, and later, death was a rare sentence, even for murder. It was usually redeemable by a suitable money payment. In Northumberland in 1256, out of seventy seven convicted murderers, only four were hanged, although in that rather wild county most of the others were outlawed. Imprisonment was a means of keeping the prisoner secure whilst awaiting trial. Serious crime was visited with banishment, with lands escheating to the Crown. Failure to appear in court brought outlawry - the loss of the law's protection. Fines and forfeitures were a commonplace punishment. The flow of money was from the wrongdoers to the Crown. Statutes of Edward I freely distributed short terms of imprisonment in local gaols. But even in these cases the longest imprisonment was three years, and was as a general rule preparatory to a fine, i.e. a money payment to make an end (*finem*) of it. The Statute of Westminster I (1275: chapters 9, 13, 15, 29, 31, and 32) deal with the duty to pursue felons, the ravishing of women, unlawful bailment, excessive tolls (40 days imprisonment), and purveyors to the Crown not paying for what they take.

Chapter 20 is interesting. It was made necessary because the baron who had formerly "lived with his warriors on a mound behind a ditch lay far behind. Now he was a country gentleman, passed from one house to another, and enjoyed the amenity of parks and fishponds."²⁸ Chapter 20 ordered trespassers upon enclosed private fishponds and parks to be imprisoned for three years, and then if they could not pay their fines, to abjure the realm.

Today the burden of private debt makes the old punishments impracticable. As already indicated building societies and banks as mortgagees own most of the private housing, and finance companies own many of the expensive chattels provided under hire-purchase or similar arrangements. The result is that the courts cannot forfeit the motor bikes, television sets, music centres etc. of young offenders, or the houses and furniture of the more prosperous. Instead, over the last half century, expensive provision has been made to avoid imprisoning young people. They have been confined in Borstals, Reform Schools, Detention Centres (mild or tough); or put into care in hostels, or under local authority social workers, or probation officers. The cost is high. The taxpayer pays. Victims of crime have to be compensated too. Again the taxpayer pays through the Criminal Injuries Compensation Board. Would not a new light be shed, and a new direction given to the argument if more attention were directed to the ancient powers of the Sheriffs to seize and sell the criminal's chattels on behalf of the Crown? How would public opinion react to this? Or to the idea of criminals, as a kind of partial outlawry, losing part of their entitlement to welfare benefit - income support for example - on

conviction for multiple burglaries? The trend has swung between deterrence and reform; between education and punishment. But little notice has been taken of history as a guide to what could be done.

Substantial fines are mostly used for punishing motorists; and this causes resentment when they are treated more harshly than burglars. When real criminal offences are dealt with by fine, most Magistrates' Courts today have to set aside one day's sitting each week for fine enforcement. They have to deal with defendants who have a number of small unpaid fines outstanding. They often find it impossible to recover any substantial amount of the money due. That has to be set against the cost of sittings and their administration. At the trial there would often have been witnesses giving enthusiastic evidence in favour of the defendant and his good character. They are not called upon to write a cheque to keep their protégé out of prison. Their forefathers would have had to pledge the money to obtain his freedom.

Apart from short prison sentences expected, as already mentioned, to be brought to an end by payment of a fine,

Imprisonment as a punishment has had a place in the British penal system for a comparatively short time, although prisons have been used throughout history by those who would be rid of their enemies or confine an embarrassing rival. Every mediaeval castle had its dungeons for the incarceration of enemies or the punishment of idle serfs. But this was a private or political use of imprisonment ... The first use of prison as a means of punishment came at the end of the 16th century when the vagrancy laws provided

for the imprisonment of those who were idle or found wandering.²⁹

Why then were there people at this time in England idle and wandering? Had they no work to do? Had they no homes to go to? "Hark, hark, the dogs bark, the beggars are coming to town!" They had been turned out of their villages, out of their homes, and from the land they worked, by the enclosures. These had been going on sporadically for a long time, but had been accelerated by the Black Death of 1346/7, and the Wars of the Roses following the Hundred Years War. The vagrancy laws arose out of "the great question which agitated rural England in the sixteenth century - the question of the enclosures".³⁰ The early Tudors attempted to deal with them by prohibitive Statutes, but without success. Wolsey appointed 15 commissions to enquire into them, but with no result. By Elizabeth's reign the problem had become explosive.³¹

The great floating population of vagabonds who used [the roads] presented a problem which could not be ignored. Here the need for action on a nationwide scale was more than ever apparent, for in spite of all previous attempts to control the plague of beggars their numbers had increased so greatly as to constitute a grave menace to public order ... the 'vagabonds' or 'sturdy beggars' alone numbered 10,000 ... There were no fewer than twenty-three categories of thieves and swindlers ... Such was the composition of this 'merry England' that slept in hay lofts, shepcotes, or on doorsteps, spreading terror in the country and disease in the towns.

The official attitude to the whole fraternity of vagabonds had always been, and still was, one of fear-ridden ferocity: they were the true 'caterpillars of the commonwealth', who lick the sweat from the labourers' brows. But the impotent poor, the poor by casualty, who were 'poor in very deed', were acknowledged to be a charge on public benevolence.

Pauper enactments in 1563 and 1572 eventually established the rating system to support the 'impotent, aged and needy'. "For the rogues it was whipping, and in the last resort if they continued in their roguery, death for felony".³² The descendants of the dispossessed, wrenched from their connection with the land, and often parted from their families, were sucked into the towns to work, if they could get work, and to inhabit slums. Within a few generations respectable families were reduced to working as wage slaves, or having to live by their wits.

From this time forward capital punishment became more and more common. As a result of rigorous Tudor and Stuart enactments to curb the menace of rogues and vagabonds rendered landless by ecclesiastical and lay enclosures, in Charles II's reign (1668) about 50 offences carried the death penalty, and transportation began. By the eighteenth century "almost all serious crimes (felonies) were punishable with death, but only a small proportion of those who were convicted of felony were actually executed. The majority of those sentenced to death were pardoned by the King, but their pardon was granted on condition that they consent to be transported to one of the colonies where labour was required - in the 17th and 18th centuries this was America, and following American

independence, Australia. Eventually the courts were given power to pronounce sentences of transportation themselves".³³

Transportation represents a terrible extension of the Saxon ideas of 'outlawry' and 'abjuring the realm'. The procedure at its inception harks back to the 'bargain' made by the judges in earlier centuries to allow the prisoner to pay for his release from prison. The horrors of imprisonment in the hulks anchored in the river Thames are well enough known. Transportation became impossible when the American War of Independence broke out, but the sentences of transportation continued to be passed until, according to Burke, 100,000 untransported prisoners were being retained in gaol, with 558 of them packed into Newgate. Not until 1784 did Parliament authorise the prescription by Order in Council of 'any place it thought fit as a penal colony'. The Botany Bay expedition arrived in Australia in 1787.

Again, when capital punishment is debated today, although 19th century history is often referred to, little attention is given to how and why the death sentence became so frequent. In 1821 Sir Thomas Buxton told the House of Commons:

Men there are living today, at whose birth our code contained less than 70 capital offences; and we have seen that number trebled. It is a fact that there stand upon our code 150 offences, made capital during the last century. It is a fact that 600 men were condemned to death last year upon statutes passed within that century. And it is a fact that a great proportion of those who were executed were executed on statutes thus comparatively recent.

This was at a time when parliament had completely changed its policy. Enclosure Acts under the Tudors were Acts to *prevent* enclosure. Now they had become Acts to *authorize* enclosures, which were turning more and more of the common people out of their villages to make way for 'improvement'. The General Report of the Board of Agriculture on Enclosures³⁴ gives the acreage enclosed from the time of Queen Anne down to 1805 as 4,187,056.

Closer to Nature, Closer to God

The sickness of society today is the result of a falling away from Nature. Man no longer has an affinity with the land and his environment. He is divorced from them. The very word 'land' has come to be used for the broad country acres, there for all to see, whilst the land which has disappeared under buildings as towns and cities grew ever larger passed into oblivion. Yet it was town land that yielded the greater wealth, and city land the greatest to those who work on it. Working in Lombard Street produces far, far more wealth (no matter who gets it) than working on a Welsh hillside. The strictly *country* landowner today is often a relatively poor man.

People feel the loss, and long to be closer to Nature. Wrenched from what he knows as 'land', the first desire in the heart of a successful townsman is to find a place in the country where he can pretend to be a countryman. The poorer office and factory workers, who haven't the means to do that, flee to 'get away from it all' for holidays at home or abroad in places where society is more primitive. As Marcus Aurelius wrote in his *Meditations*:

Men seek out retreats for themselves, cottages in the country, lonely seashores and mountains. Thou too art disposed to hanker after such things: and yet all this is the commonest stupidity; for it is in thy power, whenever thou wilt, to retire into thyself: and nowhere is there any place whereunto a man may retire quieter and more free from politics than his own soul; above all if he have within him thoughts such as he may regard attentively to be at perfect ease: and that ease is nothing else than a well-ordered mind.³⁵

This indicates the way back to individual sanity, and to a healthy society. History shows how Greed, Envy, Wrath, Pride and Lust have powered wars, rebellions, and the snatching and seizing of land among all classes. What is needed is a change of mind - a *metanoia*, especially among our rulers. But since our rule is ultimately to a certain extent democratic, the change has to be in at least a considerable body of people. We need a society without deceit: where people think as they feel, speak as they think, and do as they say. But from the very start the feeling has to be pure. The devices and desires of our hearts have to be watched, and we need a defence from our enemies - the desires which are inimical to us. It is the Church which should be giving the lead in this. They have the custody of the scriptures and the duty of explaining them. They used regularly to teach the divine law including Thou shalt not steal; which means we should take from the universe only what we deserve, considering everyone else as equally deserving. If we take and accumulate extra, that is theft - theft from the divinely created universe. We

should not take anything more than is available to everybody else.

Helped by the Church to right feeling, right thinking should follow, with the intellectual classes genuinely exploring the means of bringing the scriptural teaching into practice.

Those who speak - in today's world the media are the mouth of the body politic - should carry right thinking into right speaking; and those who rule us could then carry this into right action in legislation and administration.

It has to be through a well-ordered mind which accepts the teaching of religion that the motherland is our common inheritance, allotted to all; through philosophy, bidding us share the gifts of Nature, and the blessings of co-operation which comes to us from the rest of the community. Since these gifts and blessings fall in different degree on each inhabited spot; science has to search diligently for the Justice of what is nowadays called a 'level playing field'. This is a condition where the opportunity anyone has is equal to that of everyone else, because he shares equally with everyone else in the common inheritance. What good he makes of it, how hard or efficiently he works is his concern alone. In such a society, where the natural rights of the individual have been restored to create a meaningful system of liberty, 'Welfare' is only necessary to support those who are so severely disabled in body or mind that they cannot be expected to work. The fiscal basis of such a society will be considered in more detail after first investigating in depth the process by which our communities were impoverished and our primary civil liberty (that of access to nature) was eliminated.