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ARISTOTLE, *ATHENAION POLITEIA* 57.4: TRIAL OF ANIMALS AND INANIMATE OBJECTS FOR HOMICIDE

The author of the *Athenaion Politeia*, here to be called Aristotle without prejudice to the question of his true identity, provides a section on the *basileus*. The latter's tasks include conduct of trials for homicide (*phonos*) and wounding (*trauma*). The types of cases are outlined, and information is given about the composition and meeting-places of the courts. The section on the *basileus* ends with the sentence (57.4): 'The *basileus* and the *phylobasileis* try also cases of homicide by inanimate objects and by animals.' δικάζει δ' ὁ βασιλεὺς καὶ οἱ φυλοβασιλεῖς, καὶ τὰς τῶν ἀψύχων καὶ τῶν ἄλλων ζῴων. In describing conditions current in his own time Aristotle probably drew on the code of laws which had been drawn up in 403–399 B.C. So his evidence is good. To the modern mind a practice of trying animals and inanimate objects on charges of homicide and perhaps wounding is strange. Explanation is required. The first purpose of this study is to attempt an explanation of the practice. But there is also a second purpose, namely to illustrate method. Here caution is needed. If a historian devotes a writing wholly to considering method, he may descend into fruitless and undignified charges against his predecessors without advancing the understanding of history. Discussion of method should be tied to enquiry into problems, because the test of a method is its success in solving problems. Criminal trial of animals is a problem which will serve to test a method. So some preliminary remarks on the method will be made.

METHOD AND H.-J. WOLFF

In approaching a feature of Athenian law the first question to ask is, what do extant texts say about this feature? Texts must be collected and scrutinized. The occurrence of the same or related words in other texts may need to be noted, because the language is no longer spoken. For the same reason one can hardly ever be sure that one has ascertained the meaning definitively.

Yet even after this philological task has been performed, there remains a second task, which will here be called juristic: one must ask, how did the feature studied fit into the way the Athenians conceived an orderly society? Or to put it another way, what part did this institution play in the body of Athenian law as a whole? The pursuit of this juristic question may have a historical dimension: one may need to ask, how did this feature originate? The character of the juristic task may be clarified by considering as an example a theory propounded by Hans-Julius Wolff.[1] That theory will also have a bearing on a topic to be considered later in this article.

Wolff addressed the question, how did it come about in Greek cities that people were required to take their disputes to court instead of relying on self-help? His

[1] H. J. Wolff, 'The origins of judicial litigation among the Greeks', *Traditio* 4 (1946), 31–87. His theory has been challenged by M. Gagarin, *Early Greek Law* (Berkeley, 1986), 19–50. Gagarin reasserts the older hypothesis of a gradual development through mediation but does not meet Wolff's objections.

predecessors had supposed that well-disposed disputants had recourse voluntarily to mediation, and as time passed, public opinion recommended this recourse with growing urgency. Wolff offered various objections to theories of this kind. It cannot, for example, be explained how the mere force of public opinion could induce a bitterly aggrieved person to give up his acknowledged right of recovery or retaliation. Instead Wolff offered a scenario of the following type.

Suppose that, in a community where there are no courts, one man believes that he has been wronged, in property or in person or in any way, by another. He pursues the presumed offender for the purpose of recovery or retaliation; that is, he initiates an act of self-help. But suppose that the man pursued goes to a public officer and asks for protection. The officer, solicitous for the peace of the community, extends temporary protection to the fugitive and calls a group of men into session to judge the issue. If this group, the embryonic court, finds for the defendant, it and the officer will do what they can to protect and help him. If on the other hand the court finds for the plaintiff, the public officer withdraws protection from the fugitive and the plaintiff is authorized to continue his interrupted act of self-help.

As Wolff pointed out, his hypothesis explains features in the fully developed practice of Athenian courts of the classical period. Notably it explains why, after a trial was complete, the plaintiff, if successful, had the burden of executing the judgment. Execution completed his act of self-help. The theory also explains why the plaintiff was called 'he who pursues' (*ho diokōn*) and the defendant was called 'he who flees' (*ho pheugōn*). Later studies inspired by Wolff's hypothesis have answered further questions. For example, under the Athenian laws of homicide a man found to have killed involuntarily was required to leave Attica by a stated route within a stated time. Why? If a man was sued for homicide but convinced the court that his deed had been involuntary, a safe-conduct to the border was the most that the state could do to help him, while public power in the archaic period was weak.[2]

Wolff stated his central conclusion thus (n. 1, 82): 'judicial litigation came about . . . through the substitution of controlled self-help for uncontrolled self-help'. It is to be noted to what a large extent modern belief differs from Greek assumptions. To the modern mind self-help is an abomination, to be avoided because it threatens to disrupt the public peace. This outlook springs from the ambitions of medieval kings, who asserted a right to preserve the peace; the legal profession arose in conjunction with monarchical ambitions. In countries that no longer have a monarch his pretensions have been inherited, together with the legal profession, by an abstraction, the state. In Greek cities, on the other hand, self-help was acknowledged as in principle legitimate, but it could get out of hand, and so it was subjected to control by public officers and courts.

From the example of Wolff's theory it may now be clear what was meant by asking how a feature of law fitted into the way the Athenians conceived an orderly society (or what part the institution played in the body of Athenian law). In consequence of more recent research into the history of archaic Athens something, though not much, has to be added to Wolff's theory. It has been shown to be likely that Greek communities began in the archaic period without any public officers. There were families or households of varying power, but all power was the private power of those units. Yet sometimes a task had to be performed for the benefit of the community. If

[2] Dem. 23.72; E. Ruschenbusch, '*Phonos*. Zum Recht Drakons und seiner Bedeutung für das Werden des athenischen Staates', *Historia* 9 (1960), 129–54.

there was war against another community, a commander was required. If an epidemic occurred, a priest would be needed to appease an offended god with sacrifice. If a disruptive dispute arose within the community, someone had to intervene in the hope of resolving it. Such tasks were public, since they concerned the interests of the whole community, but the people performing them were private persons respected for power, wealth or wisdom. Various words were employed to designate a private person thus performing a public task; one of the words widely used was *basileus*. Later, as communities grew in size and prosperity, occasions for performing public tasks became frequent. At least the tasks generated public officers, and the old designations were retained. Meanwhile, some communities became so large that the gatherings of their members became differentiated into a small council and a large assembly.

This reconstruction of early development has been propounded by Michael Stahl.[3] If one follows it, one may return to Wolff's theory on the origin of judicial litigation and reckon with the possibility that at an early stage a defendant, threatened by an incipient act of self-help, sought protection from someone who was not a public officer but a private person who could be expected to perform a public task. The possibility must be noted but it does not bear on the merits of Wolff's hypothesis.

TEXTS

Enough has been said about method. The most informative text bearing on trial of animals and inanimate objects is the sentence of Aristotle quoted above in the opening paragraph. Orators have a little to say about the practice. Demosthenes mentions a procedure for homicide, 'if a stone or a piece of wood or iron or anything like that falls on someone and strikes him, and the identity of the person who threw it is not known'. Demosthenes says that the court meets at the Prytaneion; he omits trial of animals. Aeschines, also omitting animals, says that 'pieces of wood and stones and iron' are cast beyond the borders, if they fall on someone and kill him.[4]

More value attaches to a remark of Plato in the *Laws*. The Athenian participant in the discussion proposes laws for the imaginary colony called Magnesia. He deals with homicide at some length (9.865A–874C). The passage requiring attention here runs thus (9.873E–874A):

> If a beast of burden or other animal kills someone (except for such occurrences in the course of public competition for a prize), let the relatives open actions at law for homicide against the killer, let judgment be given by those of the land-stewards whom the relative selects and as many of them as he selects, and when the animal has been defeated in the trial, let them kill it and throw it beyond the borders of the land. If an inanimate thing deprives a man of life, except for a thunderbolt or any other missile of supernatural origin, but among other things if any object kills a man, whether by falling itself or because something fell on it, let the relative by descent appoint the nearest of the neighbors as judge for the occurrence; let him thus acquit himself and his whole kin of obligation, and when the thing has been defeated in the trial, let it be expelled beyond the borders just as in the case of animals.

[3] M. Stahl, *Aristokraten und Tyrannen im archaischen Athen* (Stuttgart, 1987), 137–232, esp. 150–75. M. Gagarin, 'The *Basileus* in Athenian homicide law', in P. Flensted-Jensen, T. H. Nielsen and L. Rubinstein (edd.), *Polis and Politics. Studies in Ancient Greek History presented to Mogens Herman Hansen on his Sixtieth Birthday, August 20, 2000* (Copenhagen, 2000), 569–79, has rejected this theory. But he overlooks Stahl's presentation and addresses himself solely to the summary offered by R. Sealey, *The Justice of the Greeks* (Ann Arbor, 1994), 114–16.

[4] Dem. 23.76; Aisch. 3.244. Pollux (8.90, 120) and Paus. (1.28.10) mention trial of inanimate things causing death; they may draw on Aristotle, but they mention the Prytaneion as the place of the trials, a matter absent from the preserved papyrus of the *Ath. Pol.*

Ἐὰν δ'ἄρα ὑποζύγιον ἢ ζῷον ἄλλο τι φονεύσῃ τινά, πλὴν τῶν ὅσα ἐν ἀγῶνι τῶν δημοσίᾳ τιθεμένων ἀθλεύοντά τι τοιοῦτον δράσῃ, ἐπεξίτωσαν μὲν οἱ προσήκοντες τοῦ φόνου τῷ κτείναντι, διαδικαζόντων δὲ τῶν ἀγρονόμων οἷσιν ἄν καὶ ὁπόσοις προστάξῃ ὁ προσήκων, τὸ δὲ ὀφλὸν ἔξω τῶν ὅρων τῆς χώρας ἀποκτείναντας διορίσαι. ἐὰν δὲ ἄψυχον τι ψυχῆς ἄνθρωπον στερήσῃ, πλὴν ὅσα κεραυνὸς ἢ τι παρὰ θεοῦ τοιοῦτον βέλος ἰόν, τῶν δὲ ἄλλων ὅσα τινὸς προσπεσόντος ἢ αὐτὸ ἐμπεσὸν κτείνῃ τινά, δικαστὴν μὲν αὐτῷ καθιζέτω τῶν γειτόνων τὸν ἐγγύτατα ὁ προσήκων γένει, ἀφοσιούμενος ὑπὲρ αὑτοῦ τε καὶ ὑπὲρ τῆς συγγενείας ὅλης, τὸ δὲ ὀφλὸν ἐξορίζειν, καθάπερ ἐρρήθη τὸ τῶν ζῴων γένος.

But for this passage one might have supposed that the Athenian procedure at the Prytaneion was an archaic relic, which had ceased to have significance by the fourth century.[5] Yet the inclusion of this provision in the *Laws* of Plato suggests that he thought that homicide by animals or by inanimate things was a matter deserving trial. Indeed he has modernized the procedures by substituting the land-stewards of Magnesia, in the case of homicidal animals, or the neighbour, in homicide by inanimate things, for the Athenian *basileus* and *phylobasileis*. It may also deserve note that the procedure as understood by Plato was applicable to domesticated animals.

For the sake of completeness two stories told by Pausanias must be noted.[6] One of them concerns Olympia. The Corcyraeans dedicated a bronze image of an ox there. A child, playing beside it with his head bent down, raised his head suddenly and struck it against the image. He died from the injury a few days later. The Eleans considered expelling the image, but a response from Delphi told them to keep it after performing the rites customary for involuntary homicide. Again, at Thasos, a bronze statue was set up in honour of Theagenes, an athletic victor. After his death his enemy came and whipped the statue every night, until it fell on him and killed him. His sons opened an action for homicide against the statue. The Thasians dropped it into the sea. These traveller's tales add nothing beyond the remarks of Aristotle and Plato toward understanding Greek ideas about liability of animals and things.

Before leaving the texts one may turn to standard commentaries. On the Aristotelian passage Sandys observed: 'We may compare, in general, the obsolete English law of Deodands.' The deodand will receive attention later and will be recognized as relevant. More recent commentators (Levi, Rhodes, Chambers) have not attempted juristic explanation. On the passage in the *Laws* of Plato Saunders says:

> The justification for these elaborate procedures is presumably that all the 'offenders' have inflicted damage on the community; pollution is an issue in each case; and the rituals serve some didactic and social function.[7]

That comment elucidates the thought of Plato. The Athenian practice has still to be explained.

[5] Thus E. M. Carawan, *Rhetoric and the Law of Draco* (Oxford, 1981), 649 says of the courts meeting at the Prytaneion and at Phreatto: 'As compulsory adjudication superseded the older means of settlement, these courts became little more than curiosities.'

[6] Paus. 5.27.9–10, 6.11.6. The Thasian story is also told by Dio Chrysostom 31.96.

[7] T. Saunders, *Plato's Penal Code* (Oxford, 1991), 243. The Athenian material is also collected by D. M. MacDowell, *Athenian Homicide Law in the Age of the Orators* (Manchester, 1963), 85–9.

POLLUTION

The question must be faced, whether concern for pollution was decisive in Athenian law on liability of animals and inanimate things. The enquiry has been facilitated by the work of two recent predecessors. Studying the religious role of pollution and purification, Parker found that the Athenian law of homicide was determined by such considerations as vengeance; pollution was an added refinement. He called it 'a kind of shadowy spiritual *Doppelgänger* of the law. Not just Draco's but all surviving homicide laws ignore it almost entirely.'[8]

On the specific matter of the cases judged at the Prytaneion Parker wrote:

> In Athens, animals or inanimate objects that had caused death were tried at the Prytaneum and, if found guilty, expelled beyond the boundaries of Attica. The accidental killer had therefore to try to demonstrate, not that he was morally innocent, but that he was not causally responsible for what occurred at all. But the basis of the institution seems not to be fear of pollution but the urge to exact retribution, and be seen to exact it, for an injury that has been received. Similar practices are found in societies which lack the metaphor of blood pollution, and the reason why the irrational or inanimate killer is 'cast outside the land' is by assimilation to the fate of the rational killer. (By a similar assimilation homicidal pigs in the middle ages were hung.) The idea that the homicidal axe is polluted, or that the victim would be angry if his accidental killer were not expelled, is a secondary elaboration upon the primary desire for retribution.[9]

The other predecessor to whom a debt must now be acknowledged is Ilias Arnaoutoglou. He has carried out a thorough enquiry into the place of pollution in Athenian procedure for homicide. Recognizing revenge and deterrence as the purposes of the procedures, he finds pollution absent from the laws; that includes the Dracontian law inscribed in 409/8.[10] Some kinds of homicide—such as involuntary homicide in athletics, killing by mistake of identity in warfare, and killing a sexual intruder taken with a woman of the household—were held to be justified and Demosthenes says that the killer is 'pure'.[11] Arnaoutoglou examines and rejects arguments which purported to find in pollution a major preoccupation of the law of homicide. Instead he finds that in procedure pollution should be considered 'in the first stage as a supplementary means of the pursuit of the killer, and in the second stage, as a social substitute for revenge and deterrence'.[12] Pollution was 'on the one hand an accessory penalty, a kind of restrictive measure, when the killer was arrested, and on the other hand, when the killer escaped, a functional substitute for revenge and deterrence'.[13] On trial of animals and inanimate objects he concludes:

> In the procedure in the Prytaneion the revenge for the dead person who was killed by an animal or by an inanimate object was taken at a symbolical level, by the punishment of the animal or object, as a form of retribution.[14]

[8] R. Parker, *Miasma* (Oxford, 1983), 116. 'Almost entirely': Parker thought that he detected at Dem. 23.72 'the only Attic exception'. Demosthenes says there that someone found to have killed involuntarily is required to leave Attica within a stated time by a stated route. A better explanation of this provision was offered by Ruschenbusch (n. 2), 139: it is a safe-conduct to the border. So it is not an exception to Parker's findings; if any thought of pollution was present, it was 'a shadowy spiritual *Doppelgänger* of the law'.

[9] Parker (n. 8), 117–18. Medieval treatment of homicidal animals will receive attention shortly.

[10] *IG* I^3 104.

[11] Dem. 23.53, 55.

[12] I. Arnaotoglou, 'Pollution in the Athenian Homicide law', *RIDA* (3rd ser.) 40 (1993), 109–37.

[13] Ibid. 134.

[14] Ibid. 129–30.

To reinforce the conclusions of Parker and Arnaoutoglou something, though not much, can be added by distinguishing three kinds of literature. They are tragedy, the speeches extant from trials for homicide, and the *Tetralogies* attributed to Antiphon. Pollution, with the related ideas of spirits of vengeance and purification, is a central concern in some tragedies. Thus in the *Libation Bearers* of Aeschylus, Orestes and Electra pray to the dead Agamemnon for help in avenging him. When Orestes has killed Clytaemestra, he is pursued by Furies. In the ensuing play he is purified.[15] Again, the story told by Sophocles in *Oedipus the King* depends on pollution of Thebes by the deeds of patricide and incest.[16]

Six speeches are preserved from trials for homicide and they make a wholly different impression on the reader. They are: Antiphon 1, 5, 6; Lysias 1, 12 and 13.[17] In these speeches reference to pollution and spirits of vengeance are singularly rare. To be precise: in the speech *On the Murder of Herodes* the defendant says that the courts designed for homicide meet in the open air, so that the judges shall not go into the same place as persons with impure hands (Antiph. 5.11). He also says that often people travelling by ship have suffered disaster because someone with impure hands boarded the same vessel, yet no disaster overtook those who sailed with him (5.82). Again, in the speech *Against Eratosthenes* Lysias says that the dead listen to the judges and will observe how they vote (12.99). These three passages are all that the speeches have to say about pollution and spirits of vengeance. The three passages are not central to the arguments. If Athenian *dikastai* had had a lively sensitivity to pollution, surely pleaders would have had far more to say about the matter and would have drawn on it for pivotal arguments.

The conclusion should be that the Athenian citizen brought one set of expectations (beliefs, values, mentality) when he went to the theatre of Dionysos to watch a tragedy but another when he went to court to judge a case. This distinction demands clarification, but before attempting that, attention must be given to the *Tetralogies*. In them remarks about pollution and spirits of vengeance are pervasive, so much so that it would be otiose to specify passages. But it is by no means clear what the *Tetralogies* are. Their nature has often been debated. A good and recent hypothesis is that they were composed toward the middle of the fourth century as a contribution to contemporary discussion of the five traditional courts for homicide.[18] The only certainty about the *Tetralogies* is that they were never delivered in any trials.

The conclusion stands that the Athenian citizen brought markedly different expectations to the courts and to the theatre. This conclusion may cause surprise, but the surprise can be diminished. With few exceptions the tragedians drew their subjects from the legendary past. In the fifth century talented Greeks devoted much thought to ascertaining the relationship between the past of legend and the present of everyday life. Herodotus, telling of Minos, thought that he did not belong to 'what is called the

[15] The question, how the purification is accomplished, is disputed; see e.g. A. L. Brown, 'Some problems in the *Eumenides* of Aeschylus', *JHS* 102 (1982), 26–32.

[16] The word *miasma* at lines 97 and 1012 is to be noted.

[17] In all six speeches the issue was homicide. Not all of them were delivered before the five traditional courts, listed at *Ath. Pol.* 57.3–4. Before the end of the fifth century the Athenians had found ways of bringing deeds of homicide before the regular *dikasteria*; see E. M. Carawan, '*Ephetai* and the Athenian courts for homicide in the age of the orators', *CPh* 86 (1991), 1–16; Carawan (n. 5), 143–7, 313–14.

[18] E. M. Carawan, 'The *Tetralogies* and Athenian homicide trials', *AJPh* 114 (1993), 235–70; cf. Carawan (n. 5), 171–215, esp. 214. Carawan gives reference to previous studies. By calling his hypothesis 'good', I mean that I cannot improve on it.

human race', but Herodotus did not mean that Minos had not existed. Thucydides tried to discern a modicum of truth in legends about the Trojan War, about Minos, about Pelops and the Heracleidae.[19] The problem was not wholly new. Hesiod had recognized five cosmic ages, and Homer knew that the men who fought at Troy were bigger and better.[20] But in the fifth century the problem of reconciling tales of the distant past with knowledge of the near present became acute; it was accompanied by a desire to discover what events had happened before or after others (in modern terms: the development of chronology). The past of legend could not be dismissed as fiction but it had to be recognized as different. So different, perhaps, as to explain the different expectations which the honest and intelligent citizen brought to the theatre and to the courts.

TRIAL OF ANIMALS ELSEWHERE

Now that pollution has been dismissed as the explanation, one may set out in a different direction in the hope of understanding the Athenian procedure under consideration. The practice of trying animals was widespread in medieval and early modern Europe. It was studied comprehensively by Karl von Amira; superseding his predecessors, he collected and analysed the material with enviable erudition.[21] The practice is most fully attested for the period from the thirteenth to the seventeenth centuries, but a few cases still occurred in the eighteenth and nineteenth centuries. Amira distinguished two procedures, secular and ecclesiastical. The former concerned single domesticated animals, such as oxen, pigs, horses, and dogs, and their owners. The ecclesiastical procedure was directed against groups of wild animals, of types commonly considered vermin or pests, such as rats, mice, moles, caterpillars, snails, snakes, toads, and lice.

The ecclesiastical procedure is first attested for 1338. It began to decline in the sixteenth century. It was practised in territory extending from Portugal and Spain through France into parts of Switzerland, with isolated occurrences in Tirol, Saxony, and Italy. Its aim was to protect the community against future (or further) harm, whereas the secular procedure sought to punish for harm already inflicted. A trial was held before a deputy of the local bishop. The community appeared as plaintiff and an advocate was assigned to defend the accused. Often the judgment took the form of an order to the animals to depart to a specified parcel of wasteland. If they did not comply within a prescribed time, the culminating step followed. This was the solemn utterance of a curse (malediction or anathema). This procedure spring from the belief, pre-Christian in origin, that demons or evil spirits were embodied in the animals.

The secular procedure, which is more likely to throw light on Greek practice, was mostly employed when an animal had killed or wounded a human being. There was some local variation. Thus in Burgundy the owner had the choice of surrendering the animal or defending the action, but in France he ran the risk of losing the animal and

[19] Hdt. 3.122.2; Thuc. 1.3–4; cf. B. Williams, 'What was wrong with Minos? Thucydides and historical time', *Representations* 74 (2001), 1–18.

[20] Hes. *Op.* 109–201; Hom. *Il.* 5.304; 11.636–7, etc.

[21] K. von Amira, 'Thierstrafen und Thierprocesse', *Mittheilungen des Instituts für Oesterreichische Geschichtsforsching* 12 (1891), 545–601. He took note of the *Athenaion Politeia*, first published from the London papyrus in the same year. But he attributed the Greek practice to fear of pollution (577–8). The later work of E. P. Evans, *The Criminal Prosecution and Capital Punishment of Animals* (New York, 1906), noted by Parker (n. 8), 118, n. 56, is disappointing. No later study has been found.

being required to pay a fine. The usual outcome of the trial was capital execution of the animal, carried out by the public executioner in a public place. The execution was regarded as punishment of the animal. That it was so regarded is apparent from the objection made by its earliest known critic, the jurist Philippe de Beaumanoir. He argued that an animal has no understanding of punishment; it cannot know that it suffers a specific punishment because it has performed a specific deed.[22]

The English variant, the deodand, may be noted briefly. An animal or inanimate thing that caused the death of a human being was forfeited to the king or his representative; it or its value was to be applied to charitable purposes. 'Horses, oxen, carts, boats, mill-wheels and cauldrons were the commonest of deodands.'[23] In 1653 abolition of the deodand was one of the many reforms voted by a body variously called the Nominated Assembly, the Little Parliament, and the Barebones Parliament, but its measures were not carried out.[24] The deodand was abolished by act of parliament in 1846.[25]

In seeking to explain criminal accountability of animals Amira succeeded in distinguishing two strands. One of them was the Mosaic provision given at Exodus 21.28: 'If an ox gore a man or a woman, and they die, he shall be stoned: and his flesh shall not be eaten, but the owner of the ox shall be quit.' Amira was able to trace in detail how this rule came to be accepted and developed in medieval books of law. But apart from this strand of 'public punishment of animals' (*öffentliche Thierstrafe*), Amira discovered a strand of 'liability of a thing in private law' (*privatrechtliche Sachhaftung*). This strand, with notably Germanic, Celtic and even Persian illustrations, could be recognized as Indo-European. Amira explained it by employing a concept or 'real liability' or 'liability of a thing' (*Sachhaftung*) as distinct from personal liability. He was able to clarify this concept by drawing on the noxal surrender of Roman law. If a slave committed a delict, the Roman owner had a choice. He could pay the victim the value appropriate to the delict, or he could surrender the slave to the victim. If before the settlement the slave became the property of a new owner, for example in consequence of sale, the new owner had the same choice. If before the settlement the slave was manumitted, the victim could proceed directly against the freedman for the delict. *omnes autem noxales actiones caput sequuntur* ('all noxal actions adhere to the person').[26] A slave being a thing, noxal surrender would illustrate liability of a thing.

At this point criticism may be voiced. A better analysis of noxal surrender can be offered. If a slave commits a delict, the victim has a right of vengeance against the slave. But the master still has his right of ownership over the slave. The two rights against the slave come into conflict. The conflict would be resolved, either if the master pays the victim the amount due for the delict or if he surrenders the slave to him.[27] So the concept of 'liability of a thing' must be abandoned or modified.

[22] F. R. P. Akehurst, *The Coutumes de Beauvaisis of Philippe de Beaumanoir* (Philadelphia, 1992), 712 (=*Coutumes* 69.6). Philippe de Beaumanoir was born *c.* 1247 and died in 1296.

[23] F. Pollock and F. W. Maitland, *The History of English Law before the Time of Edward I* (Washington, DC, 1959), 2.473. See also J. W. C. Turner, *Kenny's Outlines of Criminal Law* (Cambridge, new edn 1952), 7; A. K. R. Kiralfy, *Potter's Outlines of English Legal History* (London, 1958), 157. Turner and Kiralfy note the Anglo-Saxon origin of the practice. They recognize objects as deodands but overlook animals.

[24] G. Davies, *The Early Stuarts, 1603–1660* (Oxford, 2nd edn, 1959), 175; A. Woolrych, *Britain in Revolution, 1625–1660* (London, 2002), 539–58.

[25] E. Jenks, *A Short History of English Law* (Boston, 1922), 181.

[26] Gaius 4.75–7; *Inst. Iust.* 4.8.pr.-5.

CONCLUSION

From Amira's work it appears that trial of animals in different places did not conform to a rigid pattern. There were many local variants. They had enough similarities to indicate a common set of underlying ideas. Comparative study need not be content to notice similar things in different places. Sometimes it can also make progress by noticing where no variant of the pattern studied occurs. Trial of animals was absent from the legal systems of the Chinese empire and of pre-modern Japan.[28] So following Amira, one may well suppose that the underlying ideas are Indo-European.

In order to understand the underlying ideas and the Athenian variant one may start, with Wolff, from an imagined condition where there are no courts and aggrieved persons have recourse to self-help. Some Homeric stories come to mind. For example, after killing Agamemnon, Aegisthus ruled in Mycenae for seven years, but in the eighth Orestes came back from Athens and killed him.[29] There was no court, but self-help was carried out in the form of vengeance. In such a condition of society someone who suffered detriment could require satisfaction from its source. The detriment might be of any kind: injury to the person, diminution of status, harm to dependents, or deprivation of property. The degree of satisfaction to be required was not limited. When Odysseus slew the suitors, no consideration was given to balancing the act of retribution against the loss and insult which they had inflicted. The source of detriment might be human, animal, or inanimate. The person who suffered detriment had no occasion to discriminate.

The emergence of judicial litigation, studied above, altered the situation. It is likely that in Athens homicide was the matter first subjected to court-procedure and hence to articulated laws. For the Solonian law of amnesty, which has a good chance of being authentic, alludes to the homicidal-courts as already existing.[30] When compulsory recourse to courts was imposed, the consequence was not only that the aggrieved person could not engage at once in self-help but also that a limit was put on the extent of the retribution he could exact. In the classical period suits for property mostly led to simple restitution. The few exceptions, such as the *dikē blabēs* and the *dikē exoulēs*, can be explained.[31] On injury to the person one might expect to find at an early stage the *lex talionis*, attested in Rome, as a restriction. The principle of the talion was discussed in schools of rhetoric in the fourth century,[32] but one cannot affirm or deny that early Athenian law had recognized it.

Whatever the form taken, compulsory litigation limited the retribution to be exacted. It had a further consequence germane to the present enquiry. The session of the court, however rudimentary, provided an opportunity for the defendant to assert

[27] B. Nicholas, *An Introduction to Roman Law* (Oxford, 1962), 223.

[28] On China see W. Johnson, *The T'ang Code*, 2 vols (Princeton, 1979 and 1997); D. Bodde and C. Morris, *Law in Imperial China* (Cambridge, MA, 1967). On Japan see O. Rudorff, *Tokugawa-Gesetz-Sammlung* (Berlin, 1889), 32–104 (the code of 1742 as revised in 1767).

[29] *Od.* 1.298–300; 3.195–8; 3.304–8.

[30] Solon F 70 Ruschenbusch from Plut. *Sol.* 19.4. The lack of symmetry in the law suggests authenticity, as pointed out by Ruschenbusch (n. 2), 134.

[31] On the *dikē blabēs* see H. J. Wolff, 'The *dikē blabēs* in Demosthenes, OR., LV', *AJPh* 64 (1943), 316–24; on the *dikē exoulēs* see Sealey (n. 3), 126–7.

[32] Arist. *Rhet.* 1.1365b17-19; Dem. 24.139–41. For Rome see *XII Tables* 8.2. Needless to say, one should not necessarily suppose that judgment authorizing infliction of an injury equal to that suffered ('an eye for an eye') was ever carried out in a literal way; it gave the successful litigant a chance to extort a large payment.

considerations mitigating or even wholly annulling his liability. That is, when the aggrieved person(s) sued the aggressor for homicide or bodily injury, the defendant might in reply say something amounting to 'I did not mean to do it.' That English expression approximates to the classical Athenian word *akousios*.[33] A defence of this kind might take several specific forms, recognized in Athenian law. The defendant might, for example, say that there had been mistaken identity, or that he had administered a fatal draught in the belief that it was medicine.[34] The modern enquirer may incline to say that, when pleas to diminish liability were admitted the law learned to recognize intention (*mens rea*) as an element of the offence. But to say that would be to put the matter the wrong way round. The law learned to recognize that absence of intention diminished or even annulled liability.

But only a human defendant could say that he had not meant to do the deed or could allege any of the justificatory pleas. The person who had suffered detriment remained entitled to exact retribution from its source. The Athenians developed a series of courts to hear the pleas of articulate defendants. Animals and inanimate objects were subject instead to the simple procedure of the Prytaneion, because the aggrieved person was entitled to require satisfaction from the source of the detriment.

EPILOGUE

In the nineteenth century travel by railway with steam-locomotives increased the frequency of collisions. As late as 1840 and 1841 deodands were taken by administrators or assigned by courts in England because of accidents on railways.[35] But the traditional practices were inadequate, and the law responded to the new predicament by developing the concept of (liability for) negligence. Recognizing this innovation, one should acknowledge that the older practices, including the Athenian procedure for trying animals and inanimate objects, were not grounded in mere tradition or in a metaphysical notion of pollution. Instead there were material problems to address. Apart from collisions questions could arise about responsibility for harm inflicted by a domesticated but powerful animal, such as a bull. The analytic jurisprudence of the Romans dealt with this matter more successfully.[36]

Illustration of method was promised early in this enquiry and has perhaps been achieved. It can even so be added that a feature of Athenian law can sometimes be explained by calling to mind that in the words of Hans-Julius Wolff: 'judicial litigation came about . . . through the substitution of controlled self-help for uncontrolled self-help'. In the context of this development one can discern the interplay of ideas which produced a practice as strange as criminal trial of animals. The practice arose from reasoned attempts to meet real predicaments and disasters arising from social behaviour.

[33] Arist. *Ath. Pol.* 57.4; Dem. 23.71. The notion has been clarified by G. Rickert, *Hekon and Akon in Early Greek Thought* (Atlanta, 1989).

[34] Dem. 23.53; Arist. *Ath. Pol.* 57.3; cf. (n. 11). The specific reference to poisoning in the law on intentional homicide shows that the Athenians were alive to the difficulty of proof: Dem. 23.22; Arist. *Ath. Pol.* 57.3. Antiphon 1 illustrates the difficulty. Assertions that a deed had been unintentional may have been made in feuding and negotiation before the emergence of judicial litigation. cf. D. Daube, *Roman Law: Linguistic, Social and Philosophical Aspects* (Edinburgh, 1969), 164–75. But a session of a court was an institutionalized opportunity for argument.

[35] Turner (n. 23) 7.

[36] *Inst. Iust.* 4.9; Dig. 9.1 (*si quadrupes pauperiem fecisse dicatur*).

To the modern mind the Athenian mode of addressing some problems is unfamiliar and criminal punishment of animals is abhorrent. Yet one must be aware of asserting progress and assuming that modern ways of thinking are *sub specie aeternitatis* better. The law has to adapt itself to different types of society and different ways of thinking. Often it can only provide a makeshift solution, because the problem addressed is not susceptible of perfect solution. The humanitarianism which has developed since the eighteenth century is occasion for gratitude, but not for boasting. But one may admire the wisdom of Philippe de Beaumanoir.

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