The Interface of Greek and Roman Law (*).

Contract, Delict and Crime

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I. This paper is offered as a contribution to comparative law, a discipline that is much in vogue at the present time, and rightly so. Comparative law is able to shed light not only on the laws of different societies, but also on their history and the forces shaping historical change. There is, in addition, a special feature

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*) The following works will be cited by author's name only, or by name and date where more than one of an author's works are listed: APOSTLE, H.G., *Aristotle: The Nicomachean Ethics*, Dordrecht 1975; BAUMAN, R.A., *Impietas in Principem*, Munich 1974; *Lawyers in Roman Republican Politics*, Munich 1983; *Political Trials in Ancient Greece*, London 1990; *Women and Politics in Ancient Rome*, London 1992; BISCARDI, A., *Diritto greco antico*, Milan 1982; CALHOUN, G.M., *The Growth of Criminal Law in Ancient Greece*, 1927, repr. Westport 1977; COHEN, D., *Theft in Athenian Law*, Munich 1983; GAGARIN, M., *Drakon and Early Athenian Homicide Law*, Yale U.P. 1981; *Early Greek Law*, Berkeley 1986; GERNET, L., *Droit et société dans la Grèce ancienne*, Paris 1955; GLOTZ, G., 'Klope', *Dict. Antiquités grecques et romaines*, Paris 1900; HAMMOND, N.G.L., *A History of Greece to 322 BC*, 3 ed., Oxford 1986; HAMZA, G., *Comparative Law and Antiquity*, Budapest 1991; JONES, J.W., *The Law and Legal Theory of the Greeks*, Oxford 1956; JOLOWICZ, H.F. and NICHOLAS, B.,

to which not enough attention has been drawn. In its borrowed form a rule often encapsulates a coded description of the original, from which gaps in our knowledge of the latter can be filled in with some success.

Roman law borrowed extensively from the Greeks. The decemviral mission to Athens to consult the laws of Solon is probably legendary, but it is the tip of a real iceberg. To take only one example, it comes as something of a shock to Romanists to learn that the great aedilician remedies in sale had Greek antecedents which were administered by *agoranomoi*, those close counterparts of the *aediles* who controlled the Roman markets (1). Another striking parallel is the case of the Roman matron Claudia, whose derogatory remarks about the Roman plebs in 246 BC earned her the first ever charge of *maiestas minuta*, in clear imitation of the charges preferred against the Athenian tragic poet, Phrynichus, in 493 BC (2). Only the technical term *maiestas populi Romani minuta* was added by the Romans, with that gift for conceptualisation which distinguished their law from that of the Greeks.

Historical Introduction to the Study of Roman Law, 3 ed., Camb. 1972; KASER, M., *Das altrömische Ius*, Göttingen 1949; KUNKEL, W., *Unters. z. Entwicklung d. römischen Kriminalverfahrens in vorsullanischer Zeit*, Munich 1962; LIPSIUS, J.H., *Das attische Recht*, 1905-15, repr. Hildesheim 1966; MACDOWELL, D.M., *The Law in Classical Athens*, London 1978; MAINE, H.S., *Ancient Law*, new ed., London 1930; MOMMSEN, Th., *Römisches Strafrecht*, 1899, repr. Graz 1955; PRINGSHEIM, F., *The Greek Law of Sale*, Weimar 1950; VINOGRADOFF, P., *Outlines of Historical Jurisprudence*, vol. 2, Oxford 1922.

1) PRINGSHEIM, 472-83.

2) BAUMAN 1990, 14; 1992, 19-20.

The Greeks were past masters in the art of legal subtlety, but they lacked a legal science (3). The Romans were much better at detecting underlying similarities, lodging them in common pigeon-holes and providing them with common labels. Greek writers like Aristotle and Theophrastus had begun feeling their way towards something of this sort (4), but they had never quite got there.

II. The particular problem that has been chosen as the focal point of this paper commends itself both for its intrinsic interest and for its comparative potential. It stems from the presumed link, in early times, between contract, delict (5) and crime. The theory, which enjoys quite good support (6), is that originally all three notions were encompassed in an *Urdelikt* — an undifferentiated mass of wrongful acts drawing no distinction between doing wrong by failing to carry out what one has agreed to carry out, and doing wrong without any prior link between perpetrator and victim. The victim's remedy was simply retaliation, *talio*. It was only when a composition sounding in

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3) For some observations on this question see BAUMAN 1990, 7-11, 35, 122, 199 n. 95. I do not accept the claim of PRINGSHEIM, 2-3 that the authoritarian climate of the successor kingdoms inhibited creativity. Private law was not usually prominent in ideological confrontations.

4) BAUMAN 1990, *locc. citt.* in n. 3.

5) I use the word in the Roman sense of an actionable civil wrong, the tort of English law. The word can also denote wrongs in general, but I use it only in that sense in the word *Urdelikt* that I have ventured to coin.

6) See n. 7.

goods or money began being accepted in lieu of vengeance that a distinction emerged. The undertaking to pay compensation was, in effect, a novation, the creation of a debt in place of direct action, and the contract was born (7).

At the other end of the chain, doing wrong without any prior link, a distinction emerged between compensatory and non-compensatory remedies. In other words, when the community was strong enough not only to enforce mandatory compensation, but also to inflict punishment in the interests of the community rather than of the individual, criminal law emerged as a separate head, leaving delict as the repository of compensatory remedies (8).

Some of the evidence for the postulated *Urdelikt* will be worked into particular topics, but a preliminary example can usefully be noted at this point. At least one city, Knossos, required a contract of loan to be completed by the borrower snatching the money and pretending to run off with it, thus providing the lender with a delictual action if he needed to sue the borrower (9).

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7) These propositions are most clearly stated by JOLOWICZ & NICHOLAS, 160. See also MAINE, 331-88 with POLLOCK's note; JONES, 222. For a useful discussion of this and other theories see BISCARDI, 133-73 with earlier literature.

8) On the evolution of criminal law see MOMMSEN, 3-15, 55-64; CALHOUN, 1-14 and *pass.*; MAINE, 389-420 with POLLOCK's notes; BISCARDI, *loc. cit.* KASER, 42-53 proceeds in a different direction.

9) Plut. *Greek Questions* 303b. The action was the *dikē biaiōn*, robbery with violence. So LIPSIUS, 638 n. 7; JONES, 222 n. 7. *Dikē blabēs* (COHEN, nn. 12, 13) is not a persuasive alternative.

The demarcation line between crime and delict was more fragile than that which fenced off contract. Some wrongs, notably theft, generated both compensatory and retributive remedies. Theft is one of our most important pointers to the fragmentation of the *Urdelikt*.

III. We begin our discussion of the interface between Greek and Roman law with the classification of obligations. Here, and indeed throughout the paper, 'Greek law' means Athenian law unless otherwise indicated, and 'Roman law' means Justinian's *Corpus Iuris Civilis*, similarly unless otherwise indicated.

The benchmark for the classification of obligations is Justinian's formulation in *Institutes* 3.13:

> An obligation is a tie of law (*iuris vinculum*) by which we are constrained to render something according to the laws of our state. Obligations are divided into four categories, depending on whether they arise out of contract, quasi-contract, delict or quasi-delict.

The two quasi-categories are late concessions to the Roman passion for pigeonholes — they were unknown in the classical law (Gai. 3.88) — and the fundamental division is into contract and delict. Justinian derives that division from the ways in which obligations come into existence. Contractual obligations arise in four ways — by real, verbal, literal and consensual means (*Inst.* 3.13). Delict comprises theft, robbery, damage to property and

iniuria, and all four have a common origin; they arise from the wrongful act itself, *ex ipso maleficio* (*ib.* 4.1. pr.).

Justinian's formulation has no counterpart in Greek law. Its absence is one of the proofs of the Greek inability to devise general formulations. We begin with the passage that comes closest to a definition of obligations. It is in Aristotle (*Eth. Nic.* 5.2.13 p. 1131a). He is discussing τὸ ἐν τοῖς συναλλάγμασι διορθωτικόν — 'the redress of wrongs in obligations' ([10]). He divides such redress into two parts, corresponding to two classes of obligation, those which are *hekousia* and those which are *akousia.*

Aristotle's examples of the *hekousia* class are selling, buying, lending, pledging, depositing, hiring. These, he says, are called *hekousia* because their origin is *hekousios.* Clearly they are all contracts, but Aristotle has to list them individually. The first two and the last are *species* of Justinian's *genus* of consensual contracts, and the other three are real contracts (perfected by delivery), but there is no sign of the most comprehensive Roman category of all, the verbal contract of *stipulatio.*

Turning to the *akousia* category, Aristotle divides it into two groups: acts which are *lathraia* ('furtive, secretive') and acts which are *biaia* ('violent'). The *lathraia* group includes theft, adultery, poisoning, pimping, enticing slaves, murder by treachery, false witness. The *biaia* cases are assault,

10) Better than 'in exchanges' as favoured by APOSTLE, 82.

imprisonment, murder, robbery, mutilation, *propelakismos* and *kakēgoria* (11).

The translation of *hekousia* and *akousia* calls for a comment. The usual renderings are 'voluntary' and 'involuntary'. But if that means 'intentional' and 'unintentional' it does not make sense, besides being reminiscent of a Platonian paradox which implies something quite different, namely 'culpable' and 'excusable' (Plato *Nomoi* 860-2). More important, the *akousia* group is just as intentional, just as 'voluntary', as the *hekousia* group from the point of view of the perpetrator. The only way to make sense of the distinction is to translate *hekousia* as 'consensual', therefore contractual, and *akousia* as 'non-consensual', therefore delictual.

The *hekousia* group corresponds generally with Justinian's obligations *ex contractu*, but the *akousia* group does not enjoy the same affinity with the *ex delicto* category. For example, the separation of theft and robbery, allocating one to *lathraia* and the other to *biaia*, has no parallel in Justinian, where *furtum* and *rapina* are simply two of the four heads of delict. Even more disturbing, the two *akousia* groups consist largely of acts which the Romans identified as crimes with punitive sanctions rather than as delicts which generated compensation. That is to say, the whole of the *lathraia* group is criminal, except for theft which (in Greek law) gave limited compensation as well as punishment. The *biaia* group does somewhat better. The only item that is

11) Arist. *Eth. Nic.* 5.2.13 p. 1131a.

unequivocally punitive in its Roman setting is murder. With a possible question-mark against imprisonment, the rest of the *biaia* group can be accommodated under Roman delict quite comfortably (12).

Do any other texts add to Aristotle's formulation of *synallagmata* in the *Nicomachean Ethics* passage? For the most part they do not take it much further, but Aristotle's account of Hippodamus of Miletus (*Pol.* 1267b-1268b) needs to be noticed. Although best known as an architect in mid-fifth century Athens, Hippodamus is entitled to more recognition as a jurist than he has received. His tripartite governmental system included a classification of laws which he said were to be divided into three classes, and no more, since there were only three subjects of lawsuits, namely *hybris*, *blabē* and *thanatos* — insult, damage to property and homicide. In Roman terms this covers two delicts and a crime. It appears to omit contract, but Hippodamus was only talking about remedies, and *blabē* may have included damages for breach of contract. If so, it is a reminiscence of the *Urdelikt*, when there were no separate substantive rules for contracts but there was a remedy for breaches.

Hippodamus had covered the equivalent of the two main heads of Roman delict, *iniuria* and *damnum iniuria datum*. And although Aristotle criticises some of his tripartite arrangements, he does not attack the legal classification. This is not surprising, because Hippodamus's legal credentials are enhanced by two

12) Two anomalous cases, *propelakismos* and *kakēgoria*, will be dealt with later.

other proposals of his. He said that court decisions should not be recorded by voting pebbles, but by tablets on which any of three verdicts could be registered, namely condemnation, acquittal and part-condemnation/part-acquittal ([13]). This is a sophisticated idea — convicting for a lesser offence than that charged, or awarding a lesser amount than that claimed. It took the Romans many long years to domicile either of these notions in their law. Hippodamus also proposed a final court of appeal, which may have inspired the subsequent Athenian creation (during Hippodamus' residence in the city?) of a Privy Council with empire-wide jurisdiction.

There is room for the suggestion that Hippodamus deliberately framed his classification on the *Urdelikt* pattern in order to cut through the tangled web of actions that endemically threatened Athenian law with strangulation. He did not go further than the first tentative steps, but we would like to know more about Hippodamus of Miletus, who preceded Aristotle and Theophrastus on the legal scene by nearly a hundred years.

IV. A question of chronology arises at this point. Do we know anything about when the *Urdelikt* began splitting up into separate components? It probably started in the preliterate era, and was complete either by the mid-eighth century when the Greeks learnt the art of writing, or a century later when Zaleucus

13) Arist. *Pol.* 1267b-1268b.

was the first to write down laws ([14]). A closer approximation is offered by Ephorus' statement that Zaleucus simplified laws concerning contracts ([15]). This presupposes that by Zaleucus' time contracts already had a history of separate existence, though until then only in the oral tradition.

It is not nearly as difficult to picture the emergence of systematic legal rules in the period of orality as is sometimes believed. Cicero recalls learning the XII Tables by heart (*Leg.* 2.9). Indeed the oral tradition had surely been the only way to keep the venerable code alive between the sack of Rome by the Gauls in the early fourth century and the publication of a written second edition some two hundred years later ([16]). That primitive societies retain laws in the folk memory, often in the form of short maxims or tags, is a well-known fact. It is a mistake to suppose that rules embodied in short maxims or tags were not laws ([17]). Mnemonics have always been a feature of legal systems.

An interesting comment on law in Homer is furnished by the law of sale. Theophrastus noted a rule going back to Charondas

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14) On this cf. GAGARIN 1986, 19.

15) See *FGH* 70 F 39.

16) Cf. BAUMAN 1983, 129-48.

17) GAGARIN 1986, 10-14 claims that in Greece laws were recognized primarily by means of writing, and tags like 'as Homer says' did not vest a rule with authority. But in Rome, at any rate, 'as Homer says' had sufficient authority to generate a heated controversy in the law schools. See below on the price in sale. GAGARIN also argues that procedural rules evolved before substantive law. This agrees with the evolution of our *Urdelikt*, but it does not bear directly on the efficacy of oral law.

(seventh century) whereby goods had to be delivered and paid for on the spot, since sales on credit gave no right of action ([18]). This must be a survival from a time when sale was no more than an instantaneous exchange. This is supported by a passage in Homer in which Greeks give copper, iron and oxhides in return for wine (*Il.* 7.472). As PRINGSHEIM points out ([19]), the verb *oinizonto* means to acquire wine by barter; there is no word for 'to buy' in the *Iliad*. Barter involved immediate performance on both sides; there was no room for credit. The Homeric passage was adopted by Roman jurists (of the Sabinian school) in support of the view that the price in sale could sound in goods instead of money (Gai. 3.141). The opposing view of the Proculians, that payment in kind made a different contract, *permutatio* or exchange, ultimately prevailed ([20]), but the point is that Roman lawyers took law in Homer seriously. This answers GAGARIN's suggestion ([21]) that 'as Homer says' does not imply a law.

V. We turn to the other fragmentation of the *Urdelikt*, into delict and crime. The oldest description of a separate criminal process is in the *Iliad*, in the trial scene on Achilles' shield (*Il.* 18.497-508). The killer and the victim's family attend a public

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18) Plato *Nom.* 849e, 915d; Arist. *Nic. Eth.* 1162b; Stobaeus 4.2.20.

19) PRINGSHEIM, 97-9.

20) The controversy is discussed fully by the Severan jurist, Iulius Paulus. He concludes that the Proculian view is the better one. *D.* 18.1.1 pr., 1.

21) Cf. n. 17.

hearing on the *poinē*, the bloodprice or *wergeld* of the deceased. The issue is either a question of fact, namely whether the *poinē* has been paid as the killer maintains; or it is a question of law, as to whether the family are obliged to accept compensation in lieu of a vendetta.

There is no agreed solution to the crux (22), but two features of Homer's account deserve more attention than they have received hitherto. These are, first, that the resolution of the dispute appears to rest with a single investigator (*istor*) rather than with the assembled elders (*gerontes*). And second, that two talents of gold have been deposited, to be given to whichever party proves to have the better case. This looks like an embryonic version of the Roman *legis actio sacramento* which embodied both a single *iudex* and a deposit of money (23). This does not necessarily establish a fully fledged trial procedure in archaic Greece, but at least Homer reflects a time when communal regulation of private disputes was already making inroads into the vendetta system.

Moreover, the deposit of gold is virtually decisive for the view that the issue in the trial was whether the *poinē* had in fact been paid. In other words, the alternative of compensation was not being raised for the first time. To hold otherwise would mean that a monetary guarantee was used for the very first time in a test

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22) For a full discussion see GAGARIN 1986, 26-33; more briefly *ib.* 1981, 13-16.

23) On this action see KASER, 191-207; KUNKEL, 97-130; JOLOWICZ & NICHOLAS, 180-2.

case, which is unlikely. We again arrive at the mid-eigth century, and perhaps earlier, as the time when the fragmentation of the *Urdelikt* was well under way.

VI. Before leaving the subject of homicide we may usefully make one or two observations about Dracon's law. Besides possibly shedding some light on that very difficult statute (24), it is proposed to say something about the neglected topic of the influence of Dracon's law, and indeed of Greek law in general, on the Roman law of homicide.

Not enough weight has been placed on the fact that Dracon's law represents an enormous jump from the pre-Draconian situation. They moved from the private vendetta (even when commutable) to a sentence of exile regulated by the state, and ultimately that sentence replaced the vendetta as the alternative to monetary compensation (25). The question is, was state intervention a complete innovation in Dracon's law, or had there been previous moves in that direction? To assume that Dracon broke entirely new ground would be too facile (26). It crams too much into one move.

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24) See GAGARIN 1981, *pass.* on the problems. I find his arguments generally cogent, but the matters discussed below have either not been raised before or need further attention.

25) On the ultimate role of exile see GAGARIN 1981, 112-15.

26) HAMMOND, 156 would agree with this statement.

There are two possibilities. Either the state had started intervening prior to Dracon, or some great traumatic event precipitated Dracon into *terra incognita*. If there was a sudden traumatic event it was the conspiracy of Cylon in c.632, a decade before Dracon's law ([27]), when the Alcmaeonids killed the conspirators in violation of their pledged word. The curse that this brought down on their heads tends to be dismissed as religious purification, but there are traces of secular action. Thucydides says that the guilty men were driven out by the Athenians (1.126). Plutarch is more specific. He says that the trouble between the factions spilled over into Solon's time. Solon persuaded descendants of the guilty Alcmaeonids to stand trial before a jury of 300; the accused were convicted and exiled (*Solon* 12). The Solonic trial is, of course, post-Draconian ([28]), but a suggestion by HAMMOND may help. He thinks that prior to Dracon homicide was tried by the phratry courts, or by an inter-tribal court if the parties belonged to different tribes. Dracon's innovation will have been an appeal court of 51 *ephetai* which heard appeals against the verdicts of tribal courts ([29]). We can support this by the reference in Dracon's law to *basileis* in the plural. This probably means the *archon basileus* plus the four *phylobasileis* who presided over the intertribal court, the

27) On Cylon see HAMMOND, 155-6.

28) The dating of Cylon's conspiracy to the mid-590s by LEVY, *Hist.* 27 (1978), 513-21 is not persuasive.

29) HAMMOND, 156.

Prytaneion. The solution may have weaknesses, but it does respect logic by avoiding a drastic leap forward by Dracon.

Another crux is the question of why the surviving text of Dracon's law ([30]) begins with the case of unintentional killing: καὶ ἔαμ 'κ προνοίας κτένει τίς τινα — 'if (or 'even if') a man unintentionally kills another (he is exiled)'. Where, it has repeatedly been asked, is the case of *intentional* killing which ought to be the linchpin of the statute? There may be an answer that has not been tried before. Later on in the inscription it is said that the *basileis* are to judge both the one who is guilty and the *bouleusanta*, the one who planned it. I do not know why more use has not been made of *bouleusanta*. There could only be a planner in an intentional killing. This simple solution links up with HAMMOND's phratry courts, and Dracon is seen to have introduced two innovations. He made unintentional killing culpable, as it had been (extra-judicially) in the archaic period, though not judicially in the phratry courts. And he drew up new procedural rules for all kinds of killing, both intentional and unintentional. There was no need to specify intentional killing, for it was already an indictable wrong in the tribal courts.

I now offer a Roman postscript. The second king of Rome, Numa, is credited with two laws on homicide. The one penalized the killing of a freeman *dolo sciens*, with malice aforethought ([31]). The other laid down that if a killing was *imprudens*,

30) For which see GAGARIN 1981, xiv-xvii.

31) Fest. p.221.

unintentional, the killer could offer a ram to the victim's agnates at a public meeting ([32]). This should be compared with a rule attributed to the XII Tables: *si telum manu fugit magis quam iecit, aries subicitur* — 'if a weapon speeds from the hand further than it was aimed, a ram is given' (Cic. *Tull.* 51). This differs significantly from the rule attributed to Numa. There it is a generalized concept, *imprudens*, but in the XII Tables version it is only a particular case, carelessly throwing a javelin. It would seem that the general proposition attributed to Numa was in fact a much later development; it was an interpretation of the XII Tables rule. Thus although Dracon had framed a general proposition in his law, the XII Tables, compiled some 170 years later, only envisaged a particular case. But had Dracon framed a general proposition? What if the general formulation of unintentional killing was only added in the restatement of Dracon's law in 409 BC ([33]), some forty years after the XII Tables? In that case we might well conclude that the Roman code got specific examples — but no more — from Dracon's original law.

Homicide is our first example of an important phenomenon, incomplete fragmentation of the *Urdelikt*. It was incomplete because the alternative of compensation was not made mandatory by Dracon. He merely changed the form of the remedy to which

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32) Serv. ad Verg. *Ecl.* 4.43.

33) On the restatement see GAGARIN 1981, 65-79. It is too often overlooked that every restatement of a law opens the door to changes. The classic example is the XII Tables if, as is very possible, there was a second edition around 300 BC, some 150 years after the original. See for example BAUMAN 1983, 139-48.

compensation was the alternative; instead of revenge killing it became exile. It stayed that way; even in the developed Athenian law the wrongdoer could choose between exile and compensation ([34]).

VII. Sometimes incomplete fragmentation resulted in cumulative remedies — both compensation to the victim and punitive satisfaction to the community. The classic case is theft. Theft is one of the most difficult concepts in Greek law. No modern account is entirely satisfactory. LIPSIUS, GLOTZ and MACDOWELL provide serviceable accounts, but the scope of their works does not permit of detailed expositions. COHEN's full-length study dots too many i's, crosses too many t's, devotes too little space to conceptualization, and rigorously avoids any comparison with Roman law, although comparing English law with misguided enthusiasm.

Roman law gives a comprehensive definitition of theft:

> Theft is the dishonest handling of a thing (*contrectatio fraudulosa*) in order to profit (*lucri faciendi causa*) either from the thing itself or from its use or possession (*D.* 47.2.1, 3).

There is no corresponding definition in Greek law. Demosthenes lists five types of theft: stealing more than 50 dr by day, or any amount by night, or any amount from a public

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34) Cf. GAGARIN 1981, 112-15.

gymnasium, or more than 10 dr from the harbour, or less than 50 or 10 dr by day provided it was not from a gymnasium. The first four types carried the death penalty. The fifth generated compensation, by way of a penalty of double the value of the property; but even there the purely punitive aspect was retained, inasmuch as the pecuniary penalty could be supplemented by confinement in the stocks for five days (Demos. 24.113-14). Another mixed remedy, though not included in Demosthenes' list, was the *dikē biaiōn* where the property was taken by force; the jury assessed compensation for the victim and added a similar amount as a fine payable to the state (Demos. 21.44-5).

Demosthenes' catalogue bears no comparison to the Roman formulation. He merely notes some — and by no means all — of the types of theft. He thus applies the same case-by-case approach as Aristotle in his discussion of *synallagmata*. There is no point in looking for a Greek equivalent to *contrectatio fraudulosa*. Even at Rome the formulation was very late, being unknown to Gaius in the mid-second century AD (Gai. 3.182-3). But what can be done with profit is to examine some of the similarities in the two systems. This will lead us to a partial theory as to the content and fragmentation of the *Urdelikt*.

In the developed Roman law theft from private individuals nearly always generated a pecuniary action for multiples of the value of the property ([35]). As a rule, therefore, private theft had

35) The only exception is the possible survival of a XII Tables rule allowing the killing of the nocturnal or the armed diurnal thief. *Tab.* 8.12, 13. Cf. *FIRA* 1.57-8.

nothing corresponding to the non-compensatory (punitive) remedies in Demosthenes' catalogue. But the Romans did treat certain special types of theft as crimes which attracted public penalties. The typical case is theft from a temple — *hierosylia* to the Greeks, *sacrilegium* to the Romans. The Athenians punished it with death, denial of burial in Attica and confiscation of property (Xen. *Hell.* 1.7.22); the penaly was enforced by public *graphē*, not by the private *dikē klopēs*. The Romans also made it a public charge carrying a capital penalty, which meant death (partly commuted to exile) and confiscation (*D.* 48.13.7, 11). The correspondence is astonishingly close, given the general tendency of Roman law to assign theft to the private sector ([36]).

The link between *hierosylia* and *sacrilegium* goes even further. Xenophon specially points out that the punishment for *hierosylia* is the same as that for treason (*prodosia*) (*Hell.* 1.7.22). The Romans adopted exactly the same link between the two crimes: *proximum sacrilegio crimen est quod maiestatis dicitur* (*D.* 48.4.1 pr.). This statement by Ulpian writing at the turn of the second century AD, is on all fours with a passage in Cicero 250 years earlier: *sacrum... qui clepsit rapsitve parricida esto* (*Leg.* 2.22). *Clepsit*, an obvious derivative from the Greek *kleptein*, is not used in any of the legal texts dealing with Roman theft. With the archaic flavour that pervades much of *De legibus*,

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36) *D.* 47.2.1-92 makes an exhaustive examination of the civil *actio furti*, and only in the concluding fragment, 47.2.93 is it disclosed that criminal proceedings were common in the Severan period — not under the public criminal laws but *extra ordinem*. And even then, adds Ulpian, the victim can proceed civilly if he wishes.

Cicero has preserved the language of an ancient Roman borrowing of *hierosylia*. He has further maintained the ancient setting by using the archaic designation of the traitor as *parricida* (37).

There is also a close link between the public charge for *peculatus*, theft of public property, and the Greek *graphē klopēs dēmosiōn* (38). The Romans combined *sacrilegium* and *peculatus* in one and the same statute, the *lex Iulia peculatus et de sacrilegio* (*D.* 48.13), and if the *sacrilegium* part was borrowed from the Greeks, there is good reason to postulate a similar borrowing for *peculatus*.

The special treatment of temple and public property reflects wrongs which were probably shunted on to the criminal line rather than the delictual during the first fragmentation of the *Urdelikt*. In Greek law, of course, these two crimes were not unique in their criminal orientation, since nearly every type of theft attracted a punitive rather than a compensatory remedy. The transfer of most types of theft to the delictual pigeon-hole was a later Roman development. But the Greek pattern suggests that in the days of the *Urdelikt* punishment, not compensation, was the only remedy for theft. This is logical enough if communal ownership of land included farm animals and equipment, that is,

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37) I previously argued that Ulpian was not stating a similarity in *D.* 48.4.1 pr.; he was using *proximum* in a chronological sense. See my *The Crimen Maiestatis in the Roman Republic and Augustan Principate*, Johannesburg 1967, 288-9, 221-2. I now concede a more specific connection.

38) The latter is treated as a genuine category by MACDOWELL, 129.

the economically important movables. (Even in Roman law slaves and beasts of burden retained a trace of their communal origins by being classified as *res mancipi* (39)). Later on, with the emergence of private property, personal compensation became relevant and a delictual basis evolved. But even then it was, in Greece, of only limited extent. It was left to Rome to evolve a fully operational delictual system.

VIII. Our final topic is *iniuria*, one of the two main heads of Roman delict (40). Justinian does not define *iniuria*. He merely lists three different types, adding the Greek equivalent for each:

> Generally everything is called *iniuria* which is done illegally (*non iure*). Specifically it is sometimes *contumelia* which takes its name from showing contempt; the Greeks call it *hybris*. At other times it is fault (*culpa*), which the Greeks call *adikēma*; this applies to damage under the *lex Aquilia*. At other times it is injustice, *adikia* to the Greeks (Inst. 4.4 pr.).

The case that interests us is the first, *iniuria* as *contumelia*. If one wanted an extended definition, *iniuria* in this sense could be defined as a contumelious disregard of, or outrageous insult to,

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39) The ceremony of *mancipatio* regulated their sale and conveyance. Gai. 1.119. The five witnesses were originally there as representatives of the community.

40) The other, *damnum iniuria datum* or damage to property, corresponds broadly to Hippodamus' *blabē*. It was regulated by the *lex Aquilia*, to which reference is made in the *Institutes* passage below.

another's rights of personality, whether by physical assault or by insulting words or conduct. Justinian's compilers thought that the word *hybris* brought out the outrageous element very nicely. But in Greek law *hybris* was more of a measuring-rod than a delictual category. A working definition would be 'the self-indulgent misuse of energy or power, riding roughshod over the rights of others' (41). But *hybris* was not the equivalent of *contumelia* in the sense of a wrong giving rise to a private claim for compensation. *Hybris* was sanctioned by the *graphē*, the public charge, not by the private *dikē*. Sometimes, however, the two actions seem to have been concurrent. Common assault gave the *dikē aikeias*, an action for assessable damages. But if the purpose was to dishonour the victim he could resort to the *graphē hybreōs*, the public charge (42).

The limitations of the Greek delict are shown most clearly by the remedies for verbal insult (43). As already observed, *kakēgoria* and *propelakismos* are the anomalous cases in Aristotle's *biaia* group. *Kakēgoria* was concerned with verbal attacks, but only to a limited extent with slander as such. In its origins it involved violent outpourings of abuse in public, and was close to Roman *convicium*, the cat's concert outside an enemy's house. *Propelakismos* was any act of besmirching by deeds — throwing mud, for example — rather than by words.

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41) This definition is based partly on MACDOWELL, 129.

42) Arist. *Rhet.* 1374a 13-15, 1378b 23-25.

43) On this see LIPSIUS, 646-56; MACDOWELL, 126-32.

Unlike *kakēgoria* it does not appear to have received much attention from the legislature.

Specific laws against *kakēgoria* prohibited particular kinds of verbal attack. A law of Solon forbade speaking ill of the dead at all, or of the living in temples, lawcourts or public offices, or at festivals. The penalty was originally 3 dr to the victim, 2 dr to the public treasury ([44]). In the later sixth century a law forbade any disparagement of the tyrannicides Harmodius and Aristogiton ([45]). This was clearly a political law, and it created a public crime rather than a delict. But even under this law of Solon there was no general formulation of delictual liability, nor did subsequent developments alter the position. By the early fourth century Solon's law had been superseded by a law which detailed specific acts of defamation against the living, but it went no further than the specified acts. That is why, for example, Lysias had the utmost difficulty in persuading a jury that to accuse a man of killing was the same as accusing him of murdering, or that saying he had flung away his shield was the same as saying that he had thrown it away (Lys. 10.66-9).

The Romans avoided such pitfalls by general formulations. By the time of the Late Republic the *actio iniuriarum*, one of the most flexible of the many equitable instruments devised by the praetor, had achieved the ultimate generalisation through the edict *ne quid infamandi causa fiat* — 'Let nothing be done for the

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44) Plut. *Solon* 21.1-2; Demos. 20.104, 40.49; Hyp. *Phil.* 3; *Lex Xant.* s.v. *kakēgorias dikē*.

45) On this law see MACDOWELL, 127.

purpose of exposing to infamy'. Over time a wide range of affronts came to be measured by a common factor, namely that the wrong had been done *infamandi causa*, or was *ad infamiam alicuius pertinens.*

The Athenians not only lacked an equivalent common factor, they also do not appear to have ever legislated against written defamation; *kakēgoria* applied only to spoken attacks, as the etymology of the word suggests. But *infamia* aimed not so much at the mechanisms of the attack as at the motive or end-result. In a strange sort of way the Greek model supports the *Urdelikt* theory. In the primitive, preliterate phase you could only insult your enemy by word of mouth, not by writing. And for some reason Greek defamation never moved beyond its origins.