
PROSECUTING ANIMALS IN MIEVEAL EUROPE: POSSIBLE EXPLANATIONS

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Thy currish sprit
Governed a wolf, who, hanged for human slaughter,
Even from the fallows did his fell soul fleet,
And whilst thou layest in thy unhallowed dam,
Infused itself in thee; for thy desires
Are wolfish, bloody, starved, and ravenous.

(William Shakespeare *The Merchant of Venice* Act 4 Scene 1)

1 Introduction

The above passage from Shakespeare's *Merchant of Venice* suggests that animal trials must have been a common feature in Elizabethan England. Although the play itself contains no reference to a trial, this reference is curious, as trials against animals were indeed common in medieval Europe and even elsewhere. Familiar also is the Biblical verse from the book of *Exodus*¹ dictating that if an ox were to gore a man or a woman and they were to die, the ox must be stoned and its flesh may not be eaten.

From the ninth to the nineteenth century, more than two hundred well-recorded animal trials took place in Western Europe. Of these, the majority took place in the thirteenth to the seventeenth centuries² and were limited to certain regions. Animals known to have been prosecuted during this period include asses, beetles, bloodsuckers, bulls, caterpillars, chickens, cows, dogs, dolphins, field mice, flies, goats, grasshoppers, horses, mice, moles, pigs, rats, sheep, snails, termites, wolves, worms and miscellaneous vermin.³ For example, in 1474 in Basle, Switzerland, a cock was tried on the charge of laying an egg. The valiant efforts of the defence council who claimed that laying an egg was an involuntary act and

1 Chap 21 verse 28.

2 See Hyde "The prosecution and punishment of animals and lifeless things in the Middle Ages and modern times" 1916 *University of Pennsylvania Law Review* 709, cited by Ewald "Comparative jurisprudence (I): What was it like to try a rat?" 1995 *University of Pennsylvania Law Review* 1903-1904 n 17.

3 These are examples taken from a list provided by Evans *The Criminal Prosecution and Capital Punishment of Animals* (1988) 265-285. Evans states over 200 cases, with dates, locations and the species of the defendants.

therefore not punishable in law, could not prevent the cock from being burnt at the stake.⁴

What appears to have been acceptable acts in these times are today seen as puzzling and bizarre. It is strange that in the case of these animal trials, guilt (both in a moral and juridical sense) appears to have been attributed to these animals. We may rightly ask what purpose these sentences could serve, seeing that no other form of meaningful "communication" between humans and beasts existed. Also, is there a connection between these prosecutions and the Roman law actions, namely the *actio de pauperie* and the *actio de pastu*, both forms of strict liability, allowing compensation for harm done by domesticated animals of an owner in certain circumstances?⁵ It is indeed strange that intellectuals in late medieval and early modern Europe regarded acts such as filing a suit against mice, or officially punishing pigs by the hangmen of local towns, as perfectly reasonable.

Before some explanations for what we today perceive as a unusual phenomenon are examined, it is necessary to take a closer look at how these creatures were tried and punished. There is a paucity of literature on animal trials and the prosecution of animals, the exceptions being the late eighteenth and early nineteenth century contributions of Evans,⁶ Von Amira,⁷ D'Addosio⁸ and Tobler.⁹

2 The nature of some animal trials

Animal trials were held in many parts of Europe, particularly in France, Switzerland, Tyrol, Germany, the Netherlands, the southern Slavonic countries, and occasionally in Italy and Spain.¹⁰ The juridical formalities and legal terminology that applied to trials involving humans were followed and adopted in these trials. Judges, advocates, bailiffs and hangmen were paid their normal fees,

4 Bresler *Beastly Law* (1986), under the heading "Animals in the dock" (unpaginated). This case and similar others are referred to in Evans (n 3) 162-164. Today, such an occurrence can be explained, as hens sometimes assume cocks' plumage or the cock in question may have been a hermaphrodite.

5 See Neethling, Potgieter & Visser *Deliktereg* (1996) 357 f; Van der Walt & Midgley *Delict: Principles and Cases* (vol 1) (1997) paras 25-26.

6 Evans (n 3).

7 Von Amira *Thierstrafen unter Thierprocesse* (1891).

8 D'Addosio *Bestie delinquenti* (1892).

9 Tobler *Thierprocesse in der Schweiz* (1893).

10 See Dinzelbacher "Animal trials: A multidisciplinary approach" 2002 *Journal of Interdisciplinary History* 405-406. Interestingly, the majority of witch trials during the same period took place in France, Germany and Switzerland.

as are evident from the examples cited by Dinzelbacher.¹¹ Examples include those of the hangman of Falais for the execution of a pig in 1386; the Parisian "maître des hautes-oeuvres" for the expense of his journey from the capital to execute yet another criminal swine in 1403; and the experts who inspected a piece of land in order to determine its suitability for the relocation of vermin summoned to leave the cultivated soil they were inhabiting in 1546.

A distinction was drawn between trials involving individual domestic animals for wounding or killing a human being, which were brought before secular courts, and those lawsuits against collections of noxious insects and rodents who were capable of large-scale damage to such victuals as grain or grapes, which were summoned before an ecclesiastical tribunal. Domestic animals summoned before secular courts were usually sentenced to death, often by hanging or live burial.¹² Wild animals were never subject to legal action, and interestingly enough, neither were dogs.¹³ Animals capable of goring were frequently tried, and where these animals caused destruction of lifeless goods, a civil suit for compensation could be laid against the owners of these animals.¹⁴ Ecclesiastical Courts, on the other hand, employed measures such as excommunication and exorcism when dealing with insects and rodents, as an ecclesiastical judge was not competent *in causa sanguinis* and could impose only canonical punishments. For this reason, the Catholic Church, for example, never condemned heretics to death, but if they were of the opinion that such a person should die, he or she was handed over to the secular power for formal condemnation.¹⁵

The *modus procedendi* in ecclesiastical tribunals was to name a proxy, who, with the help of an official messenger, had the task of ordering the vermin to appear in person before the court on a given date. On the date of the hearing, one of the accused vermin would be held by the judge and be commanded to inform his fellow delinquents to depart the affected area within a certain time. Surprisingly enough, this sometimes worked and if the vermin complied, the beleaguered community would praise God in prayers. But most often, as could be expected,

11 See Dinzelbacher (n 10) 407, and the sources cited in n 2.

12 One example is the decision of the Law Faculty of Leipzig to condemn a milk cow to death for killing a pregnant woman on 20 July 1621. Under an institution known as *Aktenversendung*, German law faculties were often asked to render judgment in intricate cases. See Evans (n 3) 313 (Appendix S).

13 This suggests that there must have been a different relationship in medieval times between humans and dogs, with the result that a dog responsible for the death of a child was regarded in a different light than an infanticidal pig.

14 Evans (n 3) 140.

15 Evans (n 3) 31.

this did not happen and the process continued. This time, the judge would curse the vermin, excommunicate them and organise a procession aimed at destroying them.

In 1522 the Autun rats were tried by an ecclesiastical tribunal. This trial not only established the reputation of Chassenée, the local jurist, as an animal defense lawyer, but led to the publication of his book, entitled *Consilium primum, quod tractatus jure dici potest, propter multiplicem et reconditam doctrinam, ubi luculenter et accurate tractatur quaestio illa: De excommunicatione animalium insectorum* (A Treatise on the Excommunication of Insects).¹⁶ His book must have filled a legal need, because it was reprinted twice: in 1581 and again in 1588.¹⁷ This treatise covers a broad range of topics, ranging from the proper form of the complaint, issues of notice and of adequate representation by counsel, procedures to be followed at trial, to the execution of sentences. Apart from citing various Old and New Testament sources, Chassenée refers to Virgil, Ovid, Cicero, Aristotle, the *Institutes of Justinian*, and various patristic theologians. In case doubt may arise as to the juridical weight of this treatise on the excommunication of insects, one learns that Chassenée is also the respected author of a commentary on the customary laws of Burgundy, the *Commentaria super consuetudinibus Burgundiae*, which was a standard work of reference for French lawyers of the Renaissance. Chassenée, in fact, spent his last days as the *Président du Parlement de Province*.¹⁸

Turning now to the Autun trial, sources cited by Evans¹⁹ indicate that when the rats were summoned to appear before the ecclesiastical court, Chassenée challenged the original writ for having failed to give the rats due notice, as the defendants were dispersed over a large stretch of the countryside and lived in many villages. The court next ordered a second summons to be read from the pulpit of every local parish Church, this time correctly addressing all the local rats. The rats again failed to appear on the second occasion, which prompted Chassenée to plead with the court to grant a delay to enable his clients to make preparations to migrate to the area where they were being summoned. The reasonableness of this request led to a third date being set for the rats'

16 Very little is known of Chassenée and his work. A copy of Chassenée's *Treaty*, reprinted in 1581, is kept in the State Library of Munich.

17 See Evans (n 3) 21-33.

18 Esmein *A History of Continental Criminal Procedure with Special Reference to France* (1968) Part I Title I § 3 describes the development of the royal jurisdictions in France and the subsequent introduction of the "provincial Parlements".

19 See Evans (n 3) 19-20.

appearance. Chassenée was well prepared when his clients failed to appear for a third time. This time he launched a convincing argument relating to procedural fairness, explaining that if a person is cited to appear at a place to which he cannot come in safety, he may lawfully refuse to obey the writ. His clients were not only very unpopular in the region; they were terrified of their natural enemies, the cats. The cats, of course, were not neutral in this dispute according to him, as they belonged to the plaintiffs, and he accordingly requested that the plaintiffs be enjoined by the court to restrain their cats and prevent them from badgering his clients. The court again could not find any fault with this argument, but, unable to settle on the correct period within which the rats must appear, adjourned on the question *sine die*. Judgment for the rats was granted by default.

Not long after the trial of the rats, in 1545, wine growers from a village in the region of St Julien instituted legal proceedings against a species of snout-beetle that infested vineyards.²⁰ The case never came to trial, but forty-one years later, in 1587, the beetles were summoned to appear before the court. After lengthy deliberations, the defendants were offered a piece of barren ground on which they could live. Legal counsel for the defendants, however, refused this offer on the basis that the land was in fact barren, and that the mining rights of the plaintiffs would be detrimental to the pasturage of the defendants. It is uncertain what the outcome of the case was, as the last few pages of the court proceedings, consisting in total of twenty-nine *folia*, were subsequently eaten by bugs.²¹ It is indeed curious that these animals (non-professing creatures) were subject to excommunication.²²

A closer look at the court documents reveals a few interesting notes scribbled in the margin of the last page. A list of expenses incurred include three *florins* paid to the experts for visiting the place assigned to the insects (*pro visitatione III flor.*), as well as sixteen *florins* paid for clerical work, including seals (*solverunt scindici Sancti Juliani incluso processu Animalium sigillo ordinationum et pro copia que competat in processu dictorum Animalium omnibus inclusis XVI flor.*), and finally another three *florins* for the vicar who acted as the bishop's official (*item pro sportulis domini vicarii III flor.*).²³

20 The facts of this case are stated by both Hyde (n 2) 705-506 and Evans (n 3) 37-49.

21 See Evans (n 3) 49.

22 Dinzelbacher (n 10) 409.

23 Evans (n 3) 49-50.

In cases of bestiality, the animal in question was put to death together with its guilty human counterpart, as appears from the reference to the execution of a man named Potter, who was hanged with a cow, two heifers, three sheep and two sows.²⁴ In 1642, a teenage servant who confessed to carnal relations with a mare, a cow, two goats, several sheep, two calves and a turkey, were executed shortly after each of these animals were put down.²⁵ The crime of buggery, also known as the "nameless crime", appears to have been a common crime from the historical records and was severely punished, at times also by burning alive both man and beast involved.

The execution of animals took place in various ways.²⁶ Some animals were buried alive and others strangled and the bodies buried. Imprisonment was not uncommon: pigs, apparently, were incarcerated in the same prisons and under the same circumstances than their human counterparts.

3 Explaining the animal-trial phenomenon

Although both ancient Greece and Rome had witnessed a few capital punishments of animals, these had no influence on those of the Middle Ages.²⁷ The Roman emperor Caligula was perhaps the only person who thought more of animals than of human beings, for he made his horse, Incitatus, a senator.²⁸

Explanations for the animal-trial phenomenon will inevitably have to consider medieval attitudes relating to sin, guilt,²⁹ fear and superstition. The Middle Ages can indeed be described as an epoch of crisis, as extreme measures were necessary to ensure law and order and official legal processes were established by the authorities to maintain law and order. Dinzelbacher³⁰ asserts that animal trials, which took place under extremely unusual circumstances, created the impression that the authorities were assiduously maintaining law and order in a firm and cooperative manner, even if the delinquents were not human beings. This, in turn, made nonhuman beings members of one community of justice.

24 Evans (n 3) 148-149. Evans cites this reference from Cotton Mather's *Magnalia Christi Americana* (Book VI, III, London 1702), in which Mather explained that Potter's actions were the result of a "diabolical possession".

25 Ewald (n 2) 1905.

26 *Ibid.*

27 See Düll "Zum Anthropomorphismus im antiken Recht" 1944 *Savigny Zeitschrift für Rechtsgeschichte (Romanistische Abteilung)* 346-350.

28 Bresler (n 4) unpaginated.

29 For more on the Catholic guilt culture, see in general Delumeau *Sin and Fear: The Emergence of a Western Guilt Culture* (1990); Dinzelbacher *Angst im Mittelalter* (1996).

30 Dinzelbacher (n 10) 406.

Berman³¹ believes that the trials allowed the medieval community to apply its notions of justice to the animal kingdom by constructing a narrative that could harmonise the needs of society with the natural forces it could not control.

It may also be no coincidence that the frequency of witch trials in the sixteenth and seventeenth centuries corresponds to those of animal trials in the same period,³² as similar social considerations must have applied in both instances.

3 1 Communication

It is indeed unusual that those instituting legal proceedings truly believed in the ability of animals to comprehend the whole process and the verdict. Historians believe that this must have been the case, as appears from a document dated 1452 in which the officials of Lausanne summoned noxious vermin to appear before the court at a certain hour, in order to respond to those matters of which they were accused (*responsura de his quae sibi obiiciuntur*).³³ Another court document stated that cockchafer larvae contaminating the food supply of Berne in 1478 were invited to appear before the bishop in order to tell their story (*zuo erschinen und iren glimpf zuo erzellen*).³⁴ This implies that the animals in question were not only believed to be capable of comprehending what was happening, but it also suggests that they were free to respond to the summons and to appreciate the gravity of possible excommunication, even though they were not officially members of the Catholic Church. For example, the explicit assumption underlying the verdict of guilty of murder of a pig that killed a child is that there was an understanding that the action in question was in contravention of the law. This would make the pig's action neither arbitrary nor accidental, and consequently the child's death could be explained. The child could be said to have died as the result of some intentional act of wickedness, which must, traumatic as it were, have provided finality and certainty. Animal trials could have had the purpose of establishing some sort of cognitive order or control of inexplicable events, which must have been very threatening to the superstitious medieval populace.

31 Berman "Rats, pigs, and statutes on trial: The creation of cultural narratives in the prosecution of animals and inanimate objects" 1994 *New York Law Review* 309 314-315.

32 See Dinzelbacher (ed) *Europäische Mentalitätsgeschichte* (1993). Both animal and witch trials seem to have become increasingly common in Switzerland, France and Italy during the 15th century.

33 See Desnoyers "Excommunication des insectes et d'atours animaux nuisibles à l'agriculture" 1853/54 *Bulletin du comité historique des monuments écrits de l'histoire de France* 46-47, cited by Dinzelbacher (n 10) 412.

34 Dinzelbacher (n 10) 412.

Interestingly enough, examples of communication with animals do exist. One reads in Numbers³⁵ of an ass that spoke to her master and up to the nineteenth century, it was customary in some places to verbally inform animals of the death of a farmer. In late medieval times, a belief existed that animals were capable of talking to their masters at Christmas time.³⁶ The public sentencing of guilty beasts suggests that these animals were capable of being dissuaded from future crimes by witnessing the execution of their fellow creatures. Clearly this could not have been the case, as it is inconceivable to imagine the voluntary attendance of animals at these events!

3 2 Social dangers

An obvious advantage of sentencing certain animals to death is to rid society of a dangerous animal that may kill again. Today killing rabid dogs or dangerous animals for the same reason is a common practice. This, however, does not explain the lengthy process of establishing the animal's culpability in medieval animal trials, nor does it account for the types of sentences that were imposed. Pigs that trampled small children to death were often maimed or whipped prior to being executed, which suggests that there must have been an intention to punish the animals for their actions. As mentioned already, the deterrent effect of these punishments on other animals is questionable. One wonders whether the public nature of execution of animals' sentences could perhaps have been aimed at the impressionable local human population of these medieval towns, in the sense that it conveyed an idea that even animals are not exempted from obeying the law. This is supported by evidence that, in some instances, the convicted animal was dressed up in human clothes in order to underline the seriousness of the proceedings — as if the accused were human.³⁷ In this regard it seems plausible that the theatrical impact of these trials could lead us to label them as morality plays, aimed at demonstrating to the townsfolk the power of the Church and state in rooting out crime wherever it occurred.

Historians have traditionally referred to the views and assumptions of the educated medieval élite as constituting a general medieval world-view or *Weltanschauung*, with the result that the beliefs and views of the uneducated populace regarding their spiritual and material worlds have remained in large part

35 Chap 22 verse 28.

36 See, eg, the sources cited by Dinzebacher (n 10) 413 n 15.

37 Humphrey's "Foreword" in Evans (n 3).

terra incognita.³⁸ What is well-known, however, is that the bulk of the medieval populace was uneducated and relied heavily on external observances, relics, pilgrimages and rituals. It is a pity that sources from the fourteenth and fifteenth centuries do not permit an exhaustive analysis of the social context of animal trials. Recent research has indicated that there appears to have been some sort of breakdown of the traditional family structure specifically in the towns of certain parts of Europe during the fourteenth and fifteenth centuries.³⁹ This could, in turn, have contributed to the anxiety and search for certainty and structure amongst these people. An animal sentenced to death and executed in public would illustrate with great dramatic impact the elimination of a social danger.

3 3 Personification and symbolism

The Swiss jurist, Eduard Osenbrüggen, in his 1868 contribution on German and Swiss legal history, attempted to explain the animal-trial phenomenon in terms of a theory of personification.⁴⁰ In terms of this theory, animals, by an act of personification, were placed in the same category as man and could be subjected to the same penalties. His theory is based on the medieval practice in terms of which domestic animals were viewed as members of a household. This accords with certain practices involving domestic and farm animals, such as the medieval practice of verbally informing farm animals of the death of their owner, referred to above. Writing on the role of animals in the Middle Ages, Joan Salisbury⁴¹ argues that during the twelfth century, contrary to views held in Christian antiquity and the early Middle Ages of man's *dominium* over lower order beasts, people began to realise that certain analogies were possible between man and beast. Examples are found in numerous animal epics that presented the animal world as a mirror of human virtues and vices, as well as combinations of human/animal bodies in the illuminated manuscripts and architectural sculpture of the Gothic era. Animal trials could therefore have been instrumental in reducing the ontological distance between man and beast.⁴²

38 Kieckhefer *European Witch Trials: Their Foundations in Popular and Learned Culture, 1300-1500* (1976) 47.

39 See Herlihy "Mapping households in medieval Italy" 1972 *Catholic Historical Review* 1-24.

40 Osenbrüggen *Studien zur deutschen unter schweizerischen Rechtsgeschichte* (1868) 139-149, cited in Evans (n 3) 10-11.

41 See, in general, Salisbury *The Beast Within: Animals in the Middle Ages* (1994) 71.

42 Dinzebacher "Mittelalter" in Dinzebacher (ed) *Tier und Mensch in der Geschichte* (2000) 181-294 586-606.

Another personification theory may be construed from the writings of an eighteenth-century Jesuit, Guillaume-Hyacinthe Bougeant in his *Amusement Philosophique sur les Langages des Bêtes* of 1739. Bougeant wrote some centuries after animal trials took place and although he did not write on the prosecution of animals, his controversial *Amusement Philosophique* sought to illustrate that beasts have understanding and language. However, in order to deal with the resulting contradiction that if animals are like us, then there should exist a heaven and hell for them, an idea that would have gone against Christian teaching, Bougeant consequently argued that animals are devils, put in animals' bodies in order that they "may carry their hell along with them everywhere".⁴³ There is no evidence that such a belief could have existed in the minds of those who prosecuted animals in medieval Europe. There can be no doubt that Bougeant would have been in trouble with the Church for propagating the idea that animals are rational beings possessing highly developed linguistic skills. In fact, pigs are seen to be particularly attractive to devils in Biblical examples! In the book of *Mark*, chapter 5, Jesus is said to have commanded many devils to leave a besieged man, after which the devils entered a herd consisting of almost two thousand swine which ran off a steep cliff into the sea.

As proper trials, animal trials were conducted publicly and officially. The administration of criminal justice in general during these times may perhaps assist in explaining where these trials could have originated from, as well as how it received judicial recognition.

3 4 Criminal procedure in medieval Europe

In the early Middle Ages, disputes were generally settled by ordeals and rudimentary court procedures based on written and oral evidence.⁴⁴ Animal trials, as was noted above, took place most frequently in the ecclesiastical and secular courts in France, Germany, Switzerland and Italy. A logical question relates to the nature of the procedural formalities followed in these courts against the background of the intense activity of jurists in resurrecting Roman law as was found in Justinian's *Corpus Iuris Civilis* from the eleventh century onwards.⁴⁵

43 *Amusement Philosophique* at 6-13, cited by Garrett. Garrett discusses Bougeant's work in an essay entitled "Animal rights and souls in the eighteenth century" (2000), which can be accessed at: http://www.thoemmes.com/18cphil/animal_intro.htm.

44 See in general Davies & Fouracre (eds) *The Settlement of Disputes in Early Medieval Europe* (1986).

45 See Pennington "Roman and secular law in the Middle Ages" in Mantello & Rigg *Medieval Latin: An Introduction and Bibliographical Guide* (1996) 254-255.

During the feudal age, no distinction was made between the civil and criminal aspects of a complaint of injury to one's interests, and the victim or the victim's family or liege lord had to initiate proceedings against the wrongdoer.⁴⁶ Once the issue between the two parties was settled and joined, proof was required and the accused could testify to his liability on oath and with the assistance of oath-helpers, known as compurgation. Alternatively, a battle was waged between the parties or the ordeal was undertaken to determine who was telling the truth.⁴⁷ Different judicial ordeals existed for testing a person's oath, namely that he be required to carry a hot iron, or to immerse his arm in boiling water, or to be placed in a river or pool of cold water to see if the water received him.⁴⁸ In the absence of a complaint made by the victim or his relatives, the feudal lord was permitted to seize an offender and announce by the sound of trumpet that a certain wrongdoer is held on a specific crime and he could call upon the victim or his relatives to constitute themselves accusers.⁴⁹ Justification for this, particularly in the case of murder, could very likely be attributed to the belief that the blood of the slain man "cries out" or "complains".⁵⁰

The accusatorial procedure of feudal times was later replaced by an inquisitorial procedure, which was a creature of canon law. It is not entirely clear how the Roman-canonical process, the *ordo iudiciarius*,⁵¹ became the model for the courts

46 Watkin *A Historical Introduction to Modern Civil Law* (1999) 409.

47 For a detailed report on the accusatory procedure of the feudal courts, see Esmein *A History of Continental Criminal Procedure (with special reference to France)* (1968) Title II Chap 1.

48 Henderson *Select Historical Documents of the Middle Ages* (1910) 314-317 as reproduced in the *Medieval Source Book* <http://www.fordham.edu/halsall/sbook/html> (visited 20 October 2003). The judgment of the glowing iron describes how after three days of fasting and prayer, a priest would order the accused to carry a heated iron (which had been put into a fire by the same priest after praying to God to reveal the truth) for a distance of nine feet. The accused's hand would thereafter be covered under a seal for three days, and if "festering blood was to be found in the track of the iron", he was judged guilty. If no injuries were visible, he was believed to be telling the truth. Another ordeal, that of boiling water, required the accused or witness to celebrate the ordeal mass with the priest and other churchgoers and thereafter to put his hand into a kettle with boiling water inside the church. His hand was to be sealed and re-opened and examined after three days to see whether his wounds were bleeding. The priest specifically asked God to let the water boil violently and let the kettle swing to and fro if the accused were not telling the truth.

49 Esmein (n 47) Title II Chap I § 5.

50 Esmein (n 47) Title II Chap I § 5 and the sources cited in n 1. See, eg, the *Compilatio de Usibus Andegaviæ*, § 7: "Custom and law is that no man be arrested without 'plaintiff' (accuser) if he be not arrested on the spot or apprehended by judges on suspicion. A murderer can properly be arrested without accuser when he has slain the man, for the blood cries out. This was shown us in the killing of Abel by his brother Cain, to whom God said: 'Cain, the voice of Abel thy brother's blood, whom thou hast killed crieth unto me from the ground'."

51 From the middle of the twelfth century, the term *ordo iudiciarius* was used to describe the new procedure of Roman-canonical process in ecclesiastical letters. Litigants obtained letters from the papacy that guaranteed that their cases would be heard according to the *ordo iudiciarius*, which would protect them against other forms of proof, such as the ordeal that violated the principles of the *ordo iudiciarius*. See Pennington *Due Process, Community, and the Prince in the Evolution of the Ordo Iudiciarius* (1) at 4, accessed at <http://faculty.cua.edu/~pennington/Law508/procedure.htm> (visited 3 August 2003). This article also appears in 1998 *Rivista Internazionale di Diritto Comune* 9-47.

of continental legal systems, but legal historians believe that its roots predate the Fourth Lateran Council of 1215, which forbade clerical participation in the ordeal.⁵² Canon law was seen to offer better justice than the old system, despite the fact that Roman law of procedure was originally also accusatorial in nature.⁵³ Under the influence of Germanic custom, canon law from the ninth century onwards began to introduce inquisitorial features. By 1300 this had been brought about by decretals of Pope Innocent III. In addition, as the papal court became the court of last resort, ecclesiastical court procedure had to adapt to a system of proof that was based on evidence.⁵⁴ A small glimpse of court procedure is supplied by papal letters that often referred to witnesses and their testimony.⁵⁵

The change in the mode of proof governed by the customs of the community to those prescribed in terms of the *ordo iudiciarius* must have created many uncertainties for ordinary folk living in the twelfth century, not to mention the twelfth century jurists.⁵⁶ It is therefore not clear whether a person's objective right to receive justice or his subjective right to have his case fully heard in court, was the underlying feature of the *ordo iudiciarius*. In the absence of any clear indications relating to the norms governing judicial process in the Middle Ages it would be difficult to find an exact answer. Evidence from the ninth century onwards indicate that there was general acceptance of a defendant's right to a trial,⁵⁷ although this by no means implied any specific procedural rights.

The origin of the inquisitorial procedure, as was pointed out, can be traced to the ninth century, with Ecclesiastical Courts initiating proceedings against a person

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- 52 Pennington (n 51) 3. More than seventy decrees or canons were presented at this Council, of which two should be noted: Canon 8 which formulates the procedure in regard to accusations against ecclesiastics, and Canon 19 which forbids the blessing of water and hot iron for judicial tests or ordeals. See the *Catholic Encyclopaedia* on the Fourth Lateran Council, available at <http://www.newadvent.org/cathen/09018a.htm>, visited 6 August 2003.
- 53 Esmein (n 47) Chap II § 6. Inquisitorial elements gradually developed in criminal procedure during the period of the Republic, particularly through the functions of *quaestores* and *pontifices* in the prosecution process. The foundation of Roman procedure, however, always remained accusatorial. See also Esmein (n 47) Title II Chap II § 1.
- 54 Esmein (n 47) Title II Chap II § 2.
- 55 Pennington (n 51) 3. Pennington refers to Bulgarus, the famous doctor of Roman law, who sometime before 1141 wrote a short *ordo* summarising the rules of procedure for Haimeric, the papal chancellor.
- 56 The concept of a person's inherent right to a trial was most likely unfamiliar, as twelfth century jurists worked with the Roman law term *actio* which could have more than one meaning, ranging from a reference to the whole judicial proceedings or trial, the particular formulary of Roman procedure by which the plaintiff brought suit, to "the right of an individual to sue in a trial for what is due to him", as appears from Justinian's *Institutes* 4 6 *pr*: "*Actio autem nihil aliud est quam ius persequendi iudicio quod sibi debetur*." *Actio* in this sense, as Pennington observes (n 51) 6, could mean *ius* or right.
- 57 Beckerman "Towards a theory of medieval manorial adjudication: The nature of communal judgments in a system of customary law" 1995 *Law and History Review* 6-8 (dealing with the rights of litigants).

by reason of that person's bad reputation and in the absence of a formal complaint. By the eleventh century, proceedings could *ex officio* be instituted by an ecclesiastical judge from his own knowledge, or by private individuals who could denounce the accused to the court. In the last instance, the accused was allowed to challenge the charge, as the denouncer had to establish that a wrong had been committed.⁵⁸ However, in contrast to the more formal procedure of the *ordo iudiciarius*, old local customs persisted and in some instances, probably due to some influence of Germanic customary law, the local community was consulted when evidence was heard in certain Ecclesiastical Courts.⁵⁹ Both the accusatory and inquisitorial procedure remained in use during the 1200s and first part of the 1300s, aided by the force of custom.⁶⁰ The procedure *per inquisitionem*, as it came to be described, meant that the bishop, acting as ecclesiastical judge on his visits to certain places within his jurisdiction, assembled all members of the clergy and the faithful, and from the latter a few were chosen and made to swear and denounce those whom they knew to be guilty of offences.⁶¹

An extraordinary inquisitorial procedure was followed by the Church during the thirteenth century in reaction to the Waldensian and Albigensian heresies. A much feared special tribunal, run by the members of the Dominican and Franciscan Orders, known as the Holy Office of the Inquisition, proceeded *ex officio* against accused persons without informing them that they had been denounced and arresting them without divulging the nature of the charges. The interrogation of accused persons took place mostly under torture.⁶² If the charges were proved, the judges who had investigated and interrogated the accused passed ecclesiastical sentence and handed the accused over to the secular powers for punishment. As explained above, it was a principle of canon law that the Church could not shed blood, nor could it inflict capital punishment.

58 Watkin (n 46) 410.

59 Pennington (n 51) 3-4 refers to a letter sent by Pope Innocent III, who ordered Wolfger, the bishop of Passau, not to consult the community when deciding ecclesiastical cases, as this practice was an "irrational custom" because it obviated canon law and rendered judgments on defendants by judges who were "not their own". As Pennington points out, Innocent saw the episcopal court and his diocese as being under the bishop's jurisdiction alone, just as the Pope was the ordinary judge of the entire Church. A group of laymen and clerics did not represent the corporate church. The role of the community as participant in the judicial process was clearly frowned upon in Ecclesiastical Courts, and a conscious effort was made to take papal law and procedure out of the hands of the community, and to place it under the authority of the ecclesiastical prince (4-5).

60 Esmein (n 47) Part I § 1.

61 Esmein (n 47) Title II Chap II § 2. A distinction is sometimes made between inquisitorial and denunciatory procedure, depending on whether the basis of the charge stemmed from public repute or an individual information. This distinction is not crucial for the purposes of this paper, and the term "inquisitorial procedure" is used to cover both types.

62 Watkin (n 46) 411.

Following the demise of the ordeals, torture played an important role in ecclesiastical trials. In the preliminary trial phase it was aimed at obtaining the names of accomplices from the accused, and during the preparatory phase at facilitating confessions from accused persons against insufficient evidence to convict.⁶³ Confessions obtained under torture had to be ratified on a later day, otherwise the proof obtained was invalid.⁶⁴ Popular suspicion, the testimony of witnesses and a range of presumptions assisted as kinds of evidentiary proofs. If full proof of a crime could not be obtained, no conviction followed, but this did not prevent the imposition of an extraordinary punishment on the basis of suspicion. No acquittal for lack of proof existed. A person was presumed innocent until suspected rather than until proved guilty.⁶⁵

Prior to the development of inquisitorial justice, severe judicial penalties existed for accusers who failed to substantiate their charges, as he or she might have to face the same punishment that the accused would have had to suffer.⁶⁶ The absence of a plaintiff in the inquisitorial procedure contributed to a surge in prosecutions, fuelled by the movement of people into the cities during and after the Black Death.⁶⁷ Fear of death, superstition, anxiety and disorientation as a result of the plague and the social transformation that followed no doubt also contributed to the rise in prosecutions. What better social mechanism to restore order and at the same time display authority than by initiating prosecution against someone? From a functional anthropological view, taking into account the above legal developments relating to inquisitorial trials, animal trials can be explained as efforts to address and relieve the menacing, inexplicable and uncontrollable elements of the medieval world. This was done by asserting the accustomed moral order and using a public ritual through which these elements could be integrated within an intelligible and orderly framework. Berman⁶⁸ points out that the regularity, as well as the formal language of the juridical proceedings, might have exercised the same soothing qualities to the illiterate masses that magical rites did.

63 Watkin (n 46) 415.

64 *Ibid.*

65 Watkin (n 46) 416.

66 Esmein (n 47) Title II Chap II § 6.

67 On the Black Death, see Marks *The Medieval Plague: The Black Death of the Middle Ages* (1971) 1-5 29 45-49.

68 Berman (n 31) 292 f.

The public execution of guilty beasts, or the excommunication of rodents and insects, assisted in restoring in the minds of the people the moral and legal order of their times.

As was suggested above, clues to explaining the animal-trial phenomenon can perhaps be sought from research relating to medieval European witch trials. The same problem confronting the historian of witchcraft applies to those searching for explanations for animal trials, namely that it is notoriously difficult to glean the beliefs of the illiterate masses when the only sources are texts drawn up by the literate élite.⁶⁹ Writing on witch trials, Rossel Hope Robbins asserts that the practice of witchcraft was a fiction, devised by theologians and inquisitors, with no foundation in popular belief and practice.⁷⁰ This idea is further expounded by Kieckhefer⁷¹ who maintains that theologians and jurists played a prominent role in witch trials as they were the ones who actually changed the nature of the charges from sorcery in general to diabolism, resulting "from a desire of the literate élite to make sense of the notion of sorcery".⁷²

Animal trials and witch trials have many things in common. They occurred in similar geographical locations during the same time period and, in both instances, offenders were brought before ecclesiastical and secular courts. Considering Kieckhefer's claim that the educated élite of the Middle Ages was influential in giving shape and more precise definition to witch trials, the question arises as to what the position of medieval jurists in relation to the prosecution and excommunication of animals was. From the above discussion on the administration of justice in medieval Europe it becomes clear that legal action could be instituted without a plaintiff, which became a very useful tool against suspected sorcerers as well as accused animals. In addition, the influence of learned notions added to the rise in prosecutions in general. One of the main tasks of secular and ecclesiastical dignitaries was the extirpation of heresy, and as jurists started to view witchcraft as a form of heresy, acts committed by beasts leading to loss of life or destruction of crops became equally intolerable. It must

69 See Kieckhefer (n 38) 2.

70 Robbins *Encyclopaedia of Witchcraft and Demonology* (1959) 9.

71 Kieckhefer (n 38) 79.

72 *Ibid.* See, eg, the work of Jacobus Sprenger and Henricus Institoris *Malleus Maleficarum* (1669) and Joannes Nider *Formicarius*, published in vol I of Sprenger & Institoris *Malleus Maleficarum*. It is interesting that the first well-authenticated series of trials for diabolism occurred in Italy where legal scholarship during the Middle Ages was most developed, and it was in Italian courts that one might expect to see the ideas of the literate élite reflected in judicial practice. The pre-occupation of intellectuals with these topics must have fostered a climate that strengthened the need to eradicate these "menaces".

be kept in mind that, in contrast to prosecutions in secular courts against single animals, like pigs, prosecutions of vermin in Ecclesiastical Courts mostly occurred as a result of petitions from a community to a bishop.

Reference was made in the above introduction to two actions under Roman law allowing for strict liability for damage caused by animals, namely the *actio de pauperie* and the *actio de pastu*. An interesting feature of both these actions was the owner's duty either to surrender the animal which had caused the loss to the injured person or to make good the damage by the payment of a sum of money. This harked back to the original feature of all delicts which afforded the victim the opportunity to take revenge on the animal.

3 5 **Revenge**

In Roman law, when an animal caused damage or injury to persons and property *contra naturam* and in circumstances in which no one else could be held at fault (*pauperies*), the noxal action (*actio de pauperie*) provided that the victim be compensated for the value of the damage done.⁷³ Originally, this action applied only in the case of damage caused by domestic animals like dogs, horses, pigs and bulls, but this was later extended by the praetor to include damage caused by two-legged animals, as well as wild animals in captivity. The owner of the animal, if sued, had a choice to either pay the damage or surrender the offending animal. The *actio de pastu* — also a noxal action — was available for damage caused by grazing. Again the owner, if sued, could pay the damage or surrender the beasts to allow for vengeance. It appears, however, that the payment of damage was invariably the preferred option, and that the choice of surrendering the animal fell into disuse as early as classical Roman law.⁷⁴

The prosecution and excommunication of animals in medieval Europe was a unique phenomenon, seemingly unrelated to the Roman law actions. The execution of animals in both instances, however, allowed for some form of revenge to "set the record straight" literally.

73 See Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* (1977) 353; Thomas, Van der Merwe & Stoop *Historical Foundations of South African Private Law* (2000) 394-395. *D 9 1 1 pr* (Ulpian *libro octavo decimo ad edictum*): *Si quadrupes pauperiem fecisse dicetur, actio ex lege duodecim tabularum descendit: quae lex voluit aut dari id quod nocuit, id est id animal quod noxiam commisit, aut aestimationem noxae offerre. D 9 1 1 11* (Ulpian *loc cit*): *... aut noxam sarcire aut in noxam dedere oportere.*

74 Thomas, Van der Merwe & Stoop (n 73) 396.

3 6 Juristic opinion

St Thomas of Aquinas, one of the most prominent philosophers of the medieval period, stated in his *Summa Theologiae* that animals could not be charged because they could not be guilty as they could not understand words or think rationally and hence had no control over their actions.⁷⁵ Turning to Holy Scripture and tradition, he cited Jesus' curse of a fig tree.⁷⁶ St Thomas concluded that direct petitions to God and incantations against the devil were sensible because the devil could lead an animal astray.⁷⁷ If God curses a beast, the curse must not be regarded as a curse of the animal *per se*, but as an indirect way of cursing a rational agent. For him, God's purpose in recommending kind treatment of animals is to dispose men to pity and tenderness for one another.⁷⁸ Human cursing of animals as irrational beings serves no purpose and will be unlawful (*est odiosum et vanum et per consequens illicitum*), whereas cursing them as part of God's Divine Plan could potentially be blasphemous. However, if they are cursed as instruments of Satan, then the curse could indirectly be construed as a cursing of Satan. Evans⁷⁹ writes that this notion seems to have been generally accepted in the Middle Ages, and references in the Bible to evil spirits metaphorically or symbolically as animals (eg the adder, the dragon, the lion, the leviathan, the serpent) confirm this view. Is it hence possible to conclude that the animal, not capable of *culpa*, was therefore punished not in its own capacity for the transgression, but through some sort of religious symbolism to intimidate Satan? (It is, however, doubtful that Satan would for one moment be deterred by even the cruelest form of criminal justice of some animals, which were hung, suffocated, buried alive, maimed or butchered!)

Such an explanation seems plausible, particularly in light of the Catholic belief that demons or fallen angels retain their natural power as intelligent beings, and can act on the material universe in using material objects and directing material forces

75 Thomas Aquinas *Summa Theologiae* II 76 2 (1613); 90 3 (1697) (Cinisello Balsamo (1988) (2nd ed) 1401-1402.

76 *Matthew* 21:19.

77 This is confirmed by some of the anathemas pronounced by certain Ecclesiastical Courts. In Mâcon in 1481, the following pronouncement against caterpillars was made: "If they are, by virtue of Satan's instigation, not obedient to this our order, or rather the order of the Church and God, we curse and excommunicate them on the part of God Omnipotent and all saints, and on these [animals] thus cursed and excommunicated we heap the sentence of anathema in these writings." D'Addosio *Bestie Delinquenti* (n 8) 54 gives the date as 1488: *Quodsi precepto nostro huiusmodi, imo uerius ecclesiastico et diuino, instigante sathana [non obediunt]... ex parte dei omnipotentis et omnium sanctorum eius maledicimus et excommunicamus et in eas [sc. bestias] sic maledictas et excommunicatas anathematizationis sententiam ferimus in his scriptis.*

78 *Summa Theologica* I-II 102 6.

79 Evans (n 3) 55.

for their own ends. The medieval Catholic Church commonly accepted the idea that places, animals, persons and things were naturally liable to diabolical infestation. Through the exorcism in regard to these things, for example water and salt, God was asked to endow these elements with a supernatural power of protecting those who used them with faith against all attacks of the devil.⁸⁰ One suspects that these rituals played a role in fostering the notion that all things, including the inanimate, were subject to some kind of religious subordination. Taken further, it would be perfectly possible to have had faith in the effectiveness of anathematising also vermin and other animals. The same argument would apply in relation to the public execution of animals.

Writing in the time of the Enlightenment, Leibniz⁸¹ states that the capital punishment of animals, where the purpose is not to correct the animal that is punished, could serve as an example or may serve to inspire terror in other animals or assist in preventing them from evildoing.⁸² The hanging of wolves in Germany to drive away other wolves is a good example. Leibniz is referring to a different phenomenon that did not have any association with a juridical procedure, and hence does not help to provide any explanation for the medieval animal trials, as animals sentenced by secular courts were often publicly executed and their executions were not attended by animals of the same kind. Its deterrent value was therefore limited to the town folk.

3 7 *Deodands*

A peculiar, but abandoned institution of English law, *deodand* (etymologically things "given to God"), deriving partly from Jewish and partly from old German usages and traditions, stipulated that any personal chattel which was found by a jury of twelve to have immediately caused the death of any reasonable creature was forfeit to the king and that the proceeds were to be applied to "pious uses and

80 *Catholic Encyclopaedia* (1914) "Exorcism" available at <http://www.newadvent.org/cathen/05709a.htm> (visited 13 August 2003). Exorcism is defined as the act of driving out, or warding off, demons or evil spirits from persons, places, or things which are believed to be possessed or infested by them, or are liable to become victims or instruments of their malice.

81 Leibniz *Theodicy* (abridged), with an introduction by Allen (1966) paras 68-70. *Theodicy* consists of an essay "Preliminary dissertation on the conformity of faith with reason", followed by "The freedom of man in the origin of evil" in three parts. The phrases referred to appear in last-mentioned essay of which Leibniz has numbered the paragraphs (except for the "Preliminary dissertation").

82 Leibniz (n 81) par 70.

distributed in alms by the high almoner".⁸³ The institution of *deodand* was originally intended to expiate the souls of the dead who were suddenly snatched away, according to Blackstone.⁸⁴ Certain distinctions applied. For example: no *deodand* was due if an infant fell from a cart or a horse, so long as the cart or horse was not in motion, but if an adult fell and was killed, the cart and horse were forfeit. If a horse or an ox of its own motion caused the death of an infant or an adult, or if a cart ran them over, the thing shall be *deodand*.

Blackstone's theories of the origin of *deodands* are not satisfactory, as in many instances it was the owner who was innocent or often himself the victim of the accident. The object could have been to atone for the taking of a life in accordance with crude conceptions of retribution, or to appease the wrath of God, who might otherwise punish mankind with famine and pestilence.⁸⁵ This would explain why the property of a suicide, however severe punishment this would inflict upon the family of the deceased, was *deodand*.

It is difficult to determine whether similar considerations, whether as expiation for the souls of those who died as a result of contact with an animal or out of fear for God's retribution, could have allowed animal trials to flourish. It could have achieved two things in both instances, namely to restore the moral-legal imbalance caused by the animal's conduct, and to provide comfort to the soul of the victim. The institution of *deodands*, however, does not shed any light on the animal-trial phenomenon as such. *Deodands* appear to be a creation of English common law,⁸⁶ whereas most animal trials took place on the Continent. Very little is in fact known about the origin of *deodands*.

4 Conclusion

The above exploration of possible explanations for the phenomenon of medieval animal trials has revealed a combination of factors, which in conjunction with each other, bring us closer to understanding why these trials could have taken root. Briefly, these factors can be summarised as follows:

83 Blackstone *Commentaries on the Laws of England* (1765-1769) vol I Book I Chap 8. The relevant section can be accessed at <http://www.yale.edu/lawweb/avalon/blackstone/bk1ch8.htm> (visited 16 October 2003).

84 Blackstone Book I Chap 8 (not paginated).

85 Evans (n 3) 190.

86 Kynell Saxon and *Medieval Antecedents of the English Common Law* (2000) 214.

- (1) The socio-economic background of the medieval populace, characterised by insecurity and general anxiety arising from the Black Death and other epidemics, economic depression, social migration, breakdown of family structures and social conflicts in general.
- (2) The need for effective and visible administration of justice in order to maintain law and order and to establish some sort of cognitive order of control of inexplicable events.
- (3) The idea of the animal world as a reflection or mirror of human virtues and vices, and hence the need for animal trials in order to reduce the ontological distance between man and beast. This is closely related to a personification theory in terms of which transgressing animals could be punished in a similar fashion than their human counterparts; or alternatively, that the punishment of these beasts through hanging or excommunication may have a deterring and intimidating effect on Satan.
- (4) The replacement of the accusatorial procedure by the canonical inquisitorial criminal procedure, which allowed proceedings to be instituted *ex officio* in the absence of a formal complaint. This led to a general surge in prosecutions, which were extended to include certain animals and vermin. The judicial ordeals were also replaced by torture as a method to obtain evidentiary proof. This corresponds to the cruel manner in which guilty animals were tortured during their public execution.
- (5) The influence of and belief in the effectiveness of religious rituals, such as exorcism, through which all animate and inanimate things were subjected to some kind of religious subordination. This would be particularly relevant in the context of the excommunication and anathematising of vermin.
- (6) Finally, the influence of the Catholic Church in strengthening its power by allowing the prosecution of animals and displaying its legal authority over man and beast. The Church played into the hands of the superstitious illiterate masses by giving legal recognition to animal trials, yet at the same time managed to play on the fear, anxiety and superstition of these people, which in turn made them more reliant on the Church, its rituals and legal processes.

Animal trials can perhaps best be explained as efforts to address and relieve the menacing, inexplicable and uncontrollable elements of the medieval world by asserting the accustomed moral order and using a public ritual through which these elements could be integrated within an intelligible and orderly framework.