

## Slave Witnesses in Antiphon 5.48

Alexander Tulin

Ant. 5.48 presents a well-known crux. The passage runs as follows:

καίτοι οὐδὲ οἱ τοὺς δεσπότης ἀποκτείναντες, ἐὰν ἐπ' αὐτοφώρῳ ληφθῶσιν, οὐδ' οὔτοι ἀποθνήσκουσιν ὑπ' αὐτῶν τῶν προσηκόντων, ἀλλὰ παραδιδόασιν αὐτοὺς τῇ ἀρχῇ κατὰ νόμους ἡμετέρους πατρίους. εἴπερ γὰρ καὶ μαρτυρεῖν ἔξεστι δούλῳ κατὰ τοῦ ἐλευθέρου τὸν φόνον, καὶ τῷ δεσπότη, ἂν δοκῆ, ἐπεξελεῖν ὑπὲρ τοῦ δούλου, καὶ ἡ ψήφος ἴσον δύναται τῷ δούλον ἀποκτείναντι καὶ τῷ ἐλεύθερον, εἰκός τοι καὶ ψήφον γενέσθαι περὶ αὐτοῦ ἦν, καὶ μὴ ἄκριτον ἀποθανεῖν αὐτὸν ἢ τῶν ἡμῶν. ὥστε πολλῶ ἂν ἡμεῖς δικαιότερον κρίνοισθε ἢ ἐγὼ νῦν φεύγω ἢ τῶν ἡμῶν ἀδίκως.

In a recent discussion,<sup>1</sup> Michael Gagarin chose to endorse the traditional interpretation of the disputed clause, taking the dative δούλῳ with ἔξεστι. The passage will then be rendered thus: 'for, if it is permitted for a slave to testify against a free man about a killing ...' (i.e., when a murder has been committed by a free man ...). Gagarin supports his position by adducing the syntactical parallelism of the clause that follows: καὶ τῷ δεσπότη, ἂν δοκῆ ἐπεξελεῖν ὑπὲρ τοῦ δούλου ...<sup>2</sup> Parallelisms, however, are not always a reliable guide in the case of Antiphon, as Gagarin elsewhere notes.<sup>3</sup> Moreover, the traditional interpretation suggests that slaves were actually competent to appear in court as witnesses, a view that sits poorly with our general conception of Attic procedure, which (with an exception or two) otherwise restricted such competency to the citizenry.<sup>4</sup> For this reason, MacDowell and others would take δούλῳ as the

<sup>1</sup> M. Gagarin, ed., *Antiphon: The Speeches*, 1997, 200; see A. Tulin, *BMCR*, 9.8, 1998, 730-37 (= 98.6.19).

<sup>2</sup> For this standard use of ἔξεστι with dative and infinitive, see Ant. 5.13, 16, 90; 6.14, 18, 26, etc. (Of course, the dative need not be the subject to the infinitive; cf. 6.25 καὶ ἐξείη μὲν τοὺς ἐλευθέρους ὄρκους καὶ πίστεσιν ἀναγκάζειν ... ἐξείη δὲ τοὺς δούλους ἐτέρας ἀνάγκαις κτλ.)

<sup>3</sup> Gagarin (n. 1), 31, citing Ant. 1.28 ἀλλ' ὡς μάλιστα δύνανται λαθραιότατα καὶ ὡς ἀνθρώπων μηδένα εἰδέναι.

<sup>4</sup> On the question of competency, especially as it applies to slaves, see R.J. Bonner, *Evidence in Athenian Courts*, 1905, 27ff.; R.J. Bonner and G. Smith, *The Administration of Justice from Homer to Aristotle*, 1930-38, 2.118, 125ff., esp. 223-9; A.R.W. Harrison, *The Law of Athens*, 1968-71, 1.170f., 2.136f.,

indirect object of μαρτυρεῖν, and would translate “[a]nd if it is permissible ... to give evidence for [i.e., ‘in support of’] a slave against a free man of his [sc. the slave’s] being killed ...”.<sup>5</sup>

Of course, Gagarin is correct. But he fails to cite the decisive evidence, which is Plato *Laws* 937AB, esp. A5-B1:

γυναικὶ δ' ἐξέστω ἐλευθέρᾳ μαρτυρεῖν καὶ συνηγορεῖν, ἐὰν ὑπὲρ τετταράκοντα ἔτη ἢ γεγονῶτα, καὶ δίκην λαγχάνειν, ἐὰν ἀνανδρὸς ἦ. ζῶντος δὲ ἀνδρὸς ἐξέστω μαρτυρῆσαι μόνον. δοῦλη δὲ καὶ δοῦλῳ καὶ παιδί φόνου μόνον ἐξέστω μαρτυρεῖν καὶ συνηγορεῖν κτλ.<sup>6</sup>

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147ff. Also S.C. Todd, *The Shape of Athenian Law*, 1993, 96, 187, 192ff. The principal exception lay in the sphere of commercial law (δίκη ἐμπορική; see E.E. Cohen, *Athenian Economy and Society*, 1992, 96ff.). For slave-witnesses at Gortyn (*ICret* 4. 72 col. 2.12ff.), see I. Arnaoutoglou, *Ancient Greek Laws: A Sourcebook*, 1998, 24f., who cites much of the relevant bibliography.

<sup>5</sup> D. MacDowell, *Athenian Homicide Law in the Age of the Orators*, 1963, 103f.; Harrison (n. 4), 1.170 n. 3; M. Edwards and S. Usher, *Greek Orators 1: Antiphon & Lysias*, 1985, 90f. MacDowell claims that his interpretation of the clause is driven by a close consideration of the context, a claim that is subsequently echoed by Harrison and by Edwards. As MacDowell puts it (104): “The speaker is talking about the killing of a slave; he is saying that killing a slave is an offense for which a free man may be tried. Talk about evidence given by a slave would be quite irrelevant.” This argument is ambiguous. It is pointless to press the difference between the *procedural* terms, μαρτυρεῖν and ἐπεξελεθῆναι, for the contrasts contained in the passage obviously reside elsewhere (e.g., whether it is the murder of a slave or the murder of a free man that is at issue; the ‘prosecution’ of or for or by or with a slave against a free man in contrast with the prosecution by a master on behalf of his slave, etc.). On the other hand, if MacDowell objects that it is irrelevant to discuss actions taken *by* a slave *against* some free-status murderer, when the context is otherwise concerned largely with the *murder* of our slave (by some free-status culprit), then the argument is not cogent. The passage illustrates the claim that slaves have rights too – regardless of who killed whom. As such, it is not necessary that *every* clause refer to slaves as victims; cf., notably, 48 init. οὐδὲ οἱ τοὺς δεσπότας ἀποκτείναντες; also τῷ ἐλεύθερον [sc. ἀποκτείναντι]. At any rate, it is clear enough that this entire matter is really driven more by *a priori* considerations, i.e., by a desire to avoid the awkward implications for Attic procedure thought to inhere in the traditional interpretation.

<sup>6</sup> So E. Maetzner, *Antiphontis Orationes* XV, 1838, 224. For these regulations in Platonic law, see G.R. Morrow, *Plato’s Law of Slavery in its Relation to Greek Law*, 1939, 77-89 (on συνηγορεῖν, however, cf. E.B. England, *The Laws of Plato*, 1921, ad a5f.). Clearly, the stipulations of this passage contain innovations that do not reflect actual Attic procedure: see J.H. Lipsius, *Das attische*

Either Plato is echoing the language of Ant. 5.48 — in which case, *Laws* 937A proves that Plato, at least, took δούλω with ἔξεστι; or, far more likely, both Plato and Antiphon *independently* reflect the language of some actual Attic code,<sup>7</sup> in which case, once again, *Laws* 937A proves that the code (and, consequently, passages such as 5.48 that are, *ex hypothesi*, derived from it) would also have taken — in the eyes of Plato, at least — δούλω with ἐξεῖναι. Either way, the standard translation of Ant. 5.48 is thus secured.

We might try to emend our way out of the resulting difficulties. MacDowell thinks the traditional interpretation does not suit the context of the passage as a whole. But his own interpretation, which takes the clause to refer to the *murder* of a slave, creates logical difficulties of its own: in view of what follows (καὶ τῷ δεσπότη, ἂν δοκῆ, ἐπεξελεθῆν ὑπὲρ τοῦ δούλου), it is *redundant*.<sup>8</sup> What is actually needed, if one were to seek for balance and logical consistency, ought instead to be parallel to τῷ ἐλεύθερον [sc. ἀποκτείναντι],<sup>9</sup> just as τῷ δεσπότη κτλ. parallels τῷ δούλον ἀποκτείναντι. Indeed, καὶ ἡ ψῆφος ἴσον δύναται κτλ. (and note the resulting chiasmus) would then be explicative, not conjunctive. To achieve this effect, we would have to take κατὰ with the accusative (τὸν φόνον) rather than the genitive, as in Hdt. 2.3 κατὰ μὲν δὴ τὴν τροφὴν τῶν παιδίων τσαυτὰ ἔλεγον, and take δούλω as a *dativus incommodus*.<sup>10</sup> More elegantly, perhaps, we might emend the reading of the mss. to κατὰ τὸν φόνον τοῦ ἐλευθέρου. Slave witnesses will now have vanished conveniently. But even apart from the fact that such an emendation is strictly unnecessary and hard, once again, and for precisely the reasons stated above, it cannot be squared with *Laws* 937A. The passages are too close, both in language and in context (and, most likely, also in their historical origins), to be variously interpreted.<sup>11</sup>

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*Recht und Rechtsverfahren unter Benützung des attischen Prozesses*, 1905-15, 874 n. 32; also Morrow, 83.

<sup>7</sup> This would, presumably, have been a homicide code; cf. 5.48 κατὰ τοῦ ἐλευθέρου τὸν φόνον, with 937A8-B1 φόνον μόνον. The provision in question need not have been inscribed on IG i<sup>3</sup> 104 (Drakon's stele). There were, apparently, multiple copies of the homicide code scattered about the city, quite possibly containing some minor variations among them; see A. Tulin, *Dike Phonou: The Right of Prosecution and Attic Homicide Procedure*, 1996, 25n.e.

<sup>8</sup> See above, n. 5

<sup>9</sup> Cf. οἱ τοὺς δεσπότης ἀποκτείναντες.

<sup>10</sup> The translation would be: "if it is permissible to bear witness against a slave as regards the murder of a free man". Needless to say, this idiom is unparalleled in Antiphon: see F.L. Van Cleef, *Index Antiphonteus*, 1895, s.v. κατὰ; also ἀδ καταγιγνώσκω, καταμαρτυρέω, καταψεύδομαι, προκαταγιγνώσκω, etc.

<sup>11</sup> The addition of δούλη at 937A8 (see Morrow [n. 6], 89) is typical of Platonic egalitarianism (674A7f., 794B6, 936C8, etc.), though such contrastive 'mobility' is also a quirk of Platonic idiom (see, e.g., *Rep.* 395E5; on 'mobility' of

I do not know what evidentiary function slaves were supposed to play in homicide proceedings. In general, Attic law, and especially Attic homicide law, was largely concerned (even into the fourth century BC) only with its citizen body, while others – women, children, slaves, even metics and aliens – were relegated to the procedural margins.<sup>12</sup> Indeed, competency also must be presumed to have been restricted, with an exception or two, to citizens of standing. Whatever “desperate attempts” are needed to reconcile these facts with “the traditional translation” of Ant. 5.48 may remain an open question.<sup>13</sup> That this translation is correct, however, is shown conclusively by simple comparison with the relevant lines of Plato’s *Laws*. As such, it is *Laws* 937A that proves, in the current instance, to be decisive.

Howard University, Washington DC

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gender, cf. G.L. Cooper and K.W. Krüger, *Attic Greek Prose Syntax*, 1998, 43.0.1.B, 43.1, etc.).

<sup>12</sup> See Tulin (n. 7), ch. 1 *passim*, esp. 17f., also 30-32. For a similar bias in Plato’s homicide code, see E. Grace, ‘Status Distinctions in Plato’s Homicide Law’, *VDI* 1977.1, 71-81 (Russian, with English summary). In this, as in so many other features, Attic homicide law reveals its essentially archaic nature.

<sup>13</sup> The language in quotation marks belongs to Harrison (n. 4), 1.170f. n. 3. For the most likely solution to the problem, see Bonner-Smith (n. 4), 2.223ff.