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## RESPONSE TO MICHAEL GAGARIN

When I wrote to Michael Gagarin that I would be his respondent, he promise that he will try to make sure he won't say anything I will agree with him. I must tell him he succeeded only in part. In spite of my own efforts to totally disagree with him, I must confess that I share many of his points.

In this paper, that represents a further important step in the progress of his research dedicated to the interaction of writing and Greek Law, Gagarin faces one of the most important moments in legal history, the first appearance of written Laws.

Gagarin approaches this difficult and highly controversial topic asking a preliminary question: why, after a century or more of private writing, did the Greeks decide to write down the laws?

According to some scholars, laws were written down in order to guarantee a minimum of "equal justice". According to others, laws were not written to be read, but in order to make a visual impression on ordinary people and to strengthen the control of the ruling elite.

Gagarin endorses the opinion that they were written to be read; and rightly so, in my opinion. The "control-of-the-ruling-class" theory might deserve to be taken in account, perhaps, for other historical periods and countries. The visual impact of Hammurabi's law is really imposing and I would say frightening (not to speak of the content of the code, as well as of other Near Eastern Law Codes); but Gagarin interest is explicitly limited in Greece, and I think that he has more than sufficiently demonstrated that Greek laws were written to be read.

The further question is: why the Greeks wanted the laws to be read? To answer this question Gagarin turns to the first Athenian written law, whose original was lost, but whose copy, made in 409 B.C., reproduces, in Gagarin opinion, Draco's actual word (we will go back to this problem, later on). With strong arguments, that I don't need to repeat, he rejects the hypothesis that this law was written down in order to resolve a crisis stemmed from the failed attempt of the Cylonian, as well as the hypothesis that it was aimed to resolve a more general situation of crisis or feuding in Athens, at that time.

His analysis of the law is very accurate and original. In order to understand the reasons why it was written, Gagarin proceeds with a two steps method: the first step consists in the illustration of the non written traditions regulating homicide in the poems of Homer and Hesiod (the tradition of the oral laws period, as he calls it).

The second step consists in the comparison of these traditions and the Draconian provisions, in order to register analogies and differences, and find out if they were such to suggest or request the necessity of a written code.

Gagarin's conclusion, at the end of this comparison, is that Draco wrote a law whose aim "was not to solve specific conflicts in the past, but to provide a comprehensive set of rules for homicide cases that would arise in the future". And I fully agree with his opinion: I am not certain, instead, to share his opinion concerning the relation between the law and oral tradition.

According to Gagarin, Draco's law reaffirmed the basic oral laws (provisions 1 and 2, in his handout) adding new rules that, again, followed traditional practice, but spelled out the procedures in greater details (provision 3, concerning reconciliation), or addressing contingencies for which almost certainly no earlier rules existed (provisions 4 and 5). In other words, Gagarin thinks that the law combined general rules, which were traditional, with detailed new rules.

This poses a first question: did really the new provisions concern only detailed, non general rules? In my opinion, some of the Draconian new rules were so general that the homicide law may be considered the moment of a fundamental passage in the legal history of Athens. The reasons of my opinions are tied to these considerations: in Gagarin's interpretation, the basic oral rules reaffirmed by Draco were the followings:

- 1) the person who has committed an homicide flees into exile leaving his kinsmen and country (*Od.*, 23, 118-120)
- 2) the killer should be reconciled with the victim's relatives (*Il.*, 9, 632-636)
- 3) the accomplice is equated to the actual killer, as demonstrated by the story of Clytemnestra, being killed by Orestes along with Aegystus, in the various account of the *Odyssey*.

Furthermore, notes Gagarin, in Homer already existed a pacific dispute-settlement system (the system followed in the trial on Achille's shield), and it is very likely that in the pre-Draconian period the Athenians followed the traditional Homeric practices.

As far as this last point is concerned (the fact that in pre-Draconian period the Athenian followed the traditional Homeric practices) I share Gagarin's opinion, but I would like to add that the traditional Homeric practice did not consist only in the alternative between exile and the possibility of compensation. In Homer a person who had committed an homicide fled the country in order to avoid to be killed in revenge by the victim's relatives. This was the first, basic Homeric rule. Voluntary exile was only a *de facto* remedy to avoid to be killed.

Therefore, when Draco stated the penalty of exile for the *phonos mê ek pronoias*, he was not following the Homeric practice. By the way, the Homeric practice did not distinguish voluntary and involuntary homicide: self revenge, exile or compensation were alternatives offered (so to say) to any person who had

committed an homicide, either voluntary or involuntary. When Draco stated the penalty of exile for homicide he was introducing some very important innovations: he introduced a distinction between *phonos ek pronoias* and *phonos mê ek pronoias* (we don't have here the time, nor the need, to discuss which was the penalty for homicide *ek pronoias*); he prohibited revenge, a basic Homeric rule; he stated a civic (the first civic) penalty for homicide.

A second doubt that I want to express concerns the possibility that in the oral law period the accomplice was treated just like an actual killer. I don't think that we can deduct the existence of a legal rule (an oral legal rule) from the dramatic narrative of a mythical event such as the killing of Clytemnestra, in the *Odyssey*. Finally, connected with the character of Clytemnestra, I think that it is necessary to discuss a problem, connected with the meaning of provision 2 of Draco's law .

According to Gagarin this provision "follows the Homeric practice in declaring that an accomplice would be treated just like an actual killer". But provision 2 does not mention an accomplice. The Greek word to be translated, in order to understand this provision is *bouleusas* (which follows, line 11 of Draco's law, a lacuna of 17 letters, which has been filled in many different ways) translated by Gagarin with "planner" ("the kings judge guilty of homicide the killer or the planner, and the *ephetai* decide").

This translation, however, raises serious questions: which is the technical meaning of the expression "to plan" a crime? Is a planner an accomplice, as Gagarin seems to suggest, if I did not misunderstand his line or reasoning? Is he rather a person whose criminal behavior is different from the behavior of an accomplice, as I believe? In the second case, provision 2 of Draco's law does not reaffirm the Homeric rule, whose existence would be proved by the case of Clytemnestra. It introduces a new criminal behavior, called *bouleusis*, a crime that in my opinion was not connected with involuntary, but only with voluntary homicide.<sup>1</sup> Again, a very controversial problem, that deserves to be discussed, as well as the moment when the crime of *bouleusis* was first previewed by the Athenian law.

In my opinion, the conceptualisation of a crime such as *bouleusis* is too sophisticated to be present in the first Athenian law: *bouleusis* was introduced when the *anagrapheis*, in 409-408, copied the law. It was in that moment, in my opinion, that *bouleusis* was equated to *phonos mê ek pronoias*, as far as the penalty was concerned. That is to say from a procedural point of views.

Had Draco been the author of such a rule, he would have stated it in a substantive rule, not in a procedural one; he would have said something like "*ean mê ek pronoias kteine tis tina, ê ean bouleuse, feugen*". He would not have equated *bouleusis* to *phonos mê ek pronoias* only in an indirect way, through the statement, for both, of the competence of the *Ephetai*. But this is a secondary point, not central

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<sup>1</sup> As I wrote many years ago (E. Cantarella, *Studi sull' omicidio in diritto greco e romano*, Milano, 1976, p. 92-93) and as I still believe.

to the topic addressed by Gagarin. Going back to his main topic, I agree with the following points:

- a) Draco's law was written to be read;
- b) it was aimed to provide a comprehensive set of rules for homicide cases that would arise in the future;
- c) the knowledge of the Homeric traditions is indispensable to understand Draco's Law: Draco's law is a further step in the process of dealing with the homicide cases, already present in Homeric times.

However, as I said, in my opinion Draco did not introduce only details, but many substantial innovation. The function of Homeric courts (I am speaking of course of the court in Achilles' shield), was not to decide if the accused person had or had not committed an homicide, as the Draconian courts did. The *gerontes*, in Achilles' shield, were not summoned by the relatives of the victim, as the Draconian courts: they judged on demand of the murderer pursued by the relatives of the victim and claiming that the revenge was unjust, because in contrast with the rules governing the system of the vendetta.

The Draconian trial, therefore, differed from the Homeric justice for substantial reasons. Both the Areopagus and the Ephetic Courts had to decide if the accused person had committed the homicide (voluntary or involuntary not to speak of the so called *phonos dikaios*), and they had the power to condemn him to the prescribed penalty, if proved guilty.

The Homeric trial belongs to a world where the concept of crime did not yet exist, where the same behavior was acceptable or unacceptable according to the balance between the honour of the persons involved. In other words, it belonged to a world where the necessity to react was a matter of honor, not of justice.

The Draconian law, therefore, was a turning point in the history of Athenian punishing system. This was the reason why it was necessary to write down the law. My explanation of the reason why laws were written down, then, is different from Gagarin's. For Gagarin, the reason for writing is to be found in the new details: oral tradition may be adequate for expressing general rules, not details; details need to be written down. In my opinion, instead, new rules need to be written down, in order to be read, known and observed, when they are general and revolutionary, such as the ones which in my opinion were enacted by Draco.