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THE LEGALITY PRINCIPLE IN ATHENIAN LAW: RESPONSE TO MICHAEL GAGARIN

As Michael Gagarin recalls in the first lines of his paper, several decades ago Sally Humphreys challenged the idea which considers Athenian witnesses as persons called to establish the facts, like modern witnesses. In her opinion in Athens they were acting as “supporters of the litigant, rather than offering independent corroboration of his account of the facts of the case”,¹ and in the following years her approach was, at least in part, accepted by many scholars, among them S. Todd (1990), D. Mirhady (2002), and very recently N. Siron, in whose opinion in Athens “les témoins apparaissent à la fois pour confirmer une affirmation et pour soutenir l’un des deux plaignants”.²

The topic needed revisiting, and Gagarin has done this, reaching the conclusion that “by far the most important function of witnesses in Athens, like witnesses today, was to confirm the facts of the case as presented by the speaker for whom they were testifying, in support of the view”.

Given that the place allotted to a response does not allow me to re-evaluate the sources that M. Gagarin discusses, and furthermore the fact that I fully share his analysis and his conclusions, I will only highlight the importance of his paper beyond the specific topic of the role of witnesses, for the discussion of the nature and the function of judicial litigation.

As I do not need to restate, the traditional view of civic litigation as the reaction to a behavior contrary to the legal rules has been questioned, following David Cohen’s path,³ by part of the academy, highlighting the tension between Athenian competitive values and the egalitarian spirit of the rule of law, and maintaining that the function of trials was not to obtain the recognition of one’s own rights, but rather a competition between persons animated by the desire for revenge, and/or who wanted to show and obtain a public recognition of their own superior strength and social status (see among the others M. Christ 1998; A. Lanni, 2006; and S. Todd, 1993). Within that line of thought has since emerged a radical stance that denies the existence of a conceptual distinction between civic punishment and revenge, shared

¹ Humphreys 1985, 322.

² Siron 2019, 267.

³ Cohen 1995, 82-83 and 2005. Against Cohen’s conclusions see Harris 2005, 125-141, part. 126-131 (= Harris 2013, 60-98, part. 61-66).

by among others in similar albeit not identical positions, Danielle Allen and some year later by David Phillips, whose arguments I happened to discuss extensively during the meeting held in Austin in occasion of Mike's retirement.⁴ Suffice it therefore to recall here a few aspects of one of their main points of argument, that is the say the role of emotions in judicial procedures.

According to Allen "punishment in Athens was not coolly distant from anger." It was not "a dispassionate, disinterested, wholly legal affair, carried out by state agents removed from the private passions and anger of those who had been wronged by a fellow member of the city".⁵ Trials were the reaction to a behavior considered a personal offence, involving emotions like anger and resentment that, as she writes "provided the *only* (italics mine) truly legitimate basis for an attempt to punish someone".⁶ As the function of punishment was to restore their offended honor and reassert their social status, prosecutors needed to, and were expected to show anger (albeit displayed in a proper way). The only difference between pre-civic punishment and revenge therefore consisted in the "forms of judicial proceedings".⁷

In David Phillips' view, the prosecutor's anger or enmity could be an emotion at the basis of trials, considered as the instrument that facilitated respect of the rules governing *echthra*, in his definition "a socially recognized state of private active mutual hostility, with established norms governing its proper and expected conduct", an "institution" which included characteristics of the institution of the feud in paradigmatic feud cultures⁸ and that was not abolished by Draco's law that sought to transfer that role to the courts, making them the "*primary locus*" (italics mine) for the satisfaction of the desire and social necessity to pursue the politics of *echthra*. As a consequence, in his opinion we should not "see the pursuit of *echthra* and the goal of law as opposing principles."

While it is not easy to summarize my own reasoning in a few lines, I must confess that I disagree with both Allen and Phillips' theses. Of course, I do not deny that the desire of the prosecutors to condemn was often inspired by their goal/objective to seek redress and that the manifestation of these emotions is present and important in their oratory. Centuries after Draco's law that prohibited revenge and criminalized homicides (with the exception of the so called "legitimate" ones), competitive values still co-existed and were shared by part of the Athenians, who were far from embarrassed to express them in front of the judges but were constrained by the desire to show that the main motivation of the trial was not the satisfaction of a private passion, but the civic desire to see the law respected and applied.

⁴ Cantarella 2018.

⁵ Allen 2000, 20.

⁶ Allen 2000, 35.

⁷ Allen 2000, 20-21.

⁸ Phillips 2008, 15.

As Edward Harris has demonstrated years ago the expression of the anger or enmity of the prosecutors is often accompanied by their statement that they are acting in defense of the laws, as demonstrated, among others, by a pair of speeches (namely *against Meidias* and *against Aristocrates*), where Demosthenes distinguishes between the personal motivation of the accusers and the role of the judges, whose institutional function was to decide the case according to the laws.⁹

In the speech *against Meidias* he does it by praising his capacity to control his anger in spite of the public hubristic behaviour of his enemy (*echthros*) and to have sought redress from the judges:

ἐγὼ μὲν οἶμαι παρ' ὑμῶν καὶ τῶν νόμων, καὶ παράδειγμά γε πᾶσι γενέσθαι τοῖς ἄλλοις, ὅτι τοὺς ὑβρίζοντας ἅπαντας καὶ τοὺς ἀσελγεῖς οὐκ αὐτὸν ἀμύνεσθαι μετὰ τῆς ὀργῆς, ἀλλ' ἐφ' ὑμᾶς ἄγειν δεῖ, ὡς βεβαιούντων ὑμῶν καὶ φυλαττόντων τὰς ἐν τοῖς νόμοις τοῖς παθοῦσι βοηθείας (Dem. 21.76)

I think that you should establish a precedent for all to follow, that no one who want only assaults and outrages another should be punished by the victim himself in hot blood, but must be brought before your court, because it is you who confirm and uphold the protection granted by the laws to those who are injured.

Exactly the same concept is expressed in *against Aristocrates*, in order to maintain the illegality of the decree introduced by Aristocrates in favor of Charidemus, that allowed an individual in certain cases to kill an *androphonos*. As only the Areopagus could convict an individual on the charge of *androphonia*, says Demosthenes, only a person convicted on this charge could be seized and killed with impunity.

To conclude, forensic speeches express a sharp distinction between the personal motivation of the accusers and the institutional role of the judges. The fact that personal motivations could be and were often expressed in the courts does not mean that the judges would take them into account: as is well known the Athenian judges were bound by the “heliastic oath” to judge according to the laws and the decrees of the city (and if no law existed according to the *gnome dikaiotate*). Of course, this did not mean (and I do not intend to suggest) that Athenian litigants based their cases strictly on the letter of the law and that the social status of the parties, their private lives, previous behavior and emotions were irrelevant. Unfortunately, we cannot determine to what extent strategies based on agonistic values influenced the decisions of juries. The lack of evidence does not permit speculation, and nothing authorizes us to exclude the possibility that jurors shared non-agonistic and violent values. But the fact that the “heliastic oath” might not be respected does not mean that the principle of legality did not exist.

⁹ Harris 2005, 129-138.

David Cohen's valuable highlighting of the competitive and agonistic nature of Athenian culture, is often considered one, if not the main reason for the identification between jurisdiction and revenge, although Cohen did not (in spite of the widespread appreciation of his work) include that identification: as Cohen writes, in the forensic speeches "the rational of punishment is expressed as advancing the public interest in deterring from committing wrongs",¹⁰ and even more explicitly, he denies that "litigation was no more than feud, or that Athenians were unaware of the values associated with the rule of law". Albeit convinced that "the ideology of the rule of law was just that: an ideology of equality, impartiality, and justice that existed in tension with countervailing values ... of conflict and judgment", Cohen believes in the existence of the rule of law and recognizes the conceptual difference between punishment and revenge.¹¹

There is no need, at the end of this summary recollection of the debate about the legality principle, to highlight once more the importance of Michael Gagarin's paper for the solution of the debate on the controversial existence of the legality rule. His conclusion, if shared (and as I said I totally share them), represents a further confirmation of the conceptual distinction of civic procedures from revenge, and require all of us to re-think and re-evaluate a topic that is central to our own research. As I said, we have many reasons to thank Mike for this paper.

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¹⁰ Cohen 1995, 221-222.

¹¹ Cohen 1995, 88.

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