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## A RESPONSE TO MICHAEL GAGARIN

I agree with Professor Gagarin that the Gortyn Code (GC) is true legislation whereas Codex Hammurabi (CH) is not.<sup>1</sup> The determining factor, in my view, is the conscious dating of the entry into force of certain provisions in GC. The style and organization of the text do not in themselves determine its purpose. In respect of these latter elements, there is a closer relationship between the two codes than he allows, a relationship that I wish to examine in more depth in these brief comments.

CH should not be seen in isolation, but as part of a long line of law codes, with close affinities of form and content. To date, seven codes have been discovered in cuneiform script, ranging from the 21st to the 6th century B.C. The unifying factor is their derivation from a common intellectual tradition. That tradition is also identifiable beyond the cuneiform sphere in the codes of the Hebrew Bible (Torah), and more faintly in the Roman XII Tables and GC.<sup>2</sup> The Gortyn Code, however, stands at the very end of this tradition: it retains some elements, but in others it represents a radical departure.

The intellectual tradition in question is that of Mesopotamian science, which found its finest expression in the relentlessly casuistic approach of CH. For Mesopotamian science was a science of lists: a way of classifying the universe through the accumulation of examples. It lacked two vital elements that would enable its classification to be comprehensive (and therefore universally valid): statements of general principles and definition of concepts.<sup>3</sup>

The examples in CH and the other oriental codes are not, however, cumulated at random. They are organized in topics, and within each topic, connected by associations of various kinds: object, transaction, offence, status of parties, positive and negative, etc.<sup>4</sup> Moreover, CH strives to provide a comprehensive treatment of each topic and, in order to overcome its conceptual limitations, uses certain ingenious techniques. Its method is to stake out the edges of a topic by suggestive examples, using maximal variation.<sup>5</sup> The Gortyn Code uses the same associations

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<sup>1</sup> The scholarship on this issue is reviewed in Fitzpatrick-McKinley 1999, Roth 2000, and Westbrook 2000 and 2003: 16-24.

<sup>2</sup> See Westbrook 1988.

<sup>3</sup> Bottéro 1992: 169-79.

<sup>4</sup> See Petschow 1965.

<sup>5</sup> Eichler 1987.

and techniques, but on a more sophisticated level. To illustrate this, I will examine the two topics discussed by Gagarin, trial procedure and adoption.

#### A. Trial Procedure

CH §§ 1-5 read:

1. If a man accuses a man of murder and does not prove it, his accuser shall be killed.
2. If a man accuses a man of witchcraft and does not prove it, the one accused of witchcraft shall go to the river and leap the river. If the river overcomes him, his accuser shall take his house; if the river purifies that man and he is saved, the one who accused him of witchcraft shall be killed and the one who leapt the river shall take the house of his accuser.
3. If a man in a lawsuit gives false testimony and does not prove what he said, if that case is a capital case, that man shall be killed.
4. If he gives testimony on grain or silver, he shall bear the penalty of that case.
5. If a judge judges a case, renders a verdict and has a sealed document drafted, and subsequently changes his verdict, they shall prove that judge to have changed his verdict and he shall pay 12-fold the claim in that case...

The paragraphs present issues arising in a strict chronological order: pre-trial (false accusation), during the trial (false testimony), post-trial (tampering with the verdict). In order to cover more ground, the examples also vary along two different axes:

- 1) identity of the culprit: a) accuser, b) witness, c) judge;
- 2) substance of the claim: a) murder/witchcraft, b) capital/pecuniary, c) any case.

This is an illustration of the technique of maximal variation.<sup>6</sup> The result is that a series of intermediate cases are omitted – in theory, to be extrapolated by deduction from the cases treated; in practice, to be supplied from knowledge of the traditional law.

GC opens with the exact same topic, and the same chronological arrangement. To me, these are clear signs that it is drawing upon a long academic tradition. The treatment begins with pre-trial issues, moves on to matters arising in the course of the trial, and finally to issues and incidents arising after the verdict. It is true that it then steps out of chronological sequence, into the issue of status (if the culprit is a *kosmos*: I 51-55). The topic closes, however, with a typical technique of the oriental codes: the negative of the opening proposition (I 56-II 2). In CH, as Gagarin has shown, this is presented as opposing couplets. In GC, the approach is rather to use positive and negative poles as a framing device for the whole topic.

The major difference between GC and CH is that GC tightens the discussion by confining it to a single cause: the status of free or slave. In this way it gains more

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<sup>6</sup> Also to be noted in the second sequence is the rising level of generality.

coherence but at the same time it loses in breadth. How far these procedural rules apply to matrimonial or property law, for example, is not clear. Could one seize a disputed animal before trial? One cannot be sure, because GC, like its oriental counterparts and unlike a modern code, is still relying on casuistic examples.<sup>7</sup>

## B. Adoption

CH 185-193 read:

185. If a man adopts a child in its (amniotic) water and brings him up, that one who has been raised shall not be reclaimed.
186. If a man adopts a child and, at the time when he took it, it was searching for its father and mother, that one who has been raised shall return to his father's family.
187. The (adopted) son of a *girsequm*, a *muzzaz ekallim* or a *sekretum*-lady (types of courtier) shall not be reclaimed.
188. If a craftsman adopts a child in order to raise him and has taught him his craft, that one who has been raised shall not be reclaimed.
189. If he has not taught him his craft, that one who has been raised shall return to his father's house.
190. If a man has not counted among his sons a child whom he adopted and raised, that one who has been raised shall return to his father's house.
191. If a man establishes his house with a child whom he adopted and raised, but later acquires sons and decides to expel the one who has been raised, that child shall not leave empty-handed. The father who raised him shall give him one third of his inheritance from his moveable property; he shall not give him from his field, orchard, and house.
192. If the son of a *girsequm* or a *sekretum* has said to his father and mother who raised him: "You are not my father, you are not my mother," they shall cut out his tongue.
193. If the son of a *girsequm* or a *sekretum* identifies his father's house and hates his father and mother who raised him and goes away to his father's house, they shall tear out his eye.

Again, the arrangement is chronological: circumstances arising on formation of the adoptive relationship (185-86), during its course (187-90), and at its dissolution

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<sup>7</sup> Sealy (1994: 40) argues that GC's opening provisions are a general prohibition on self-help before recourse to forensic justice. This is an anachronistic approach, which artificially expands the scope of the language. Thus Sealey takes the sole object of these paragraphs – a slave – as paradigmatic of any property, an unjustified assumption. If a slave alone is mentioned, it is because only a slave is meant. The opposite rule which closes the topic (permitting seizure of debtors) amply demonstrates that it concerns only seizure of persons.

(191-93).<sup>8</sup> In this sequence, the result is the opposite from what we saw in the trial procedure sequence: while CH confines itself to the relatively narrow issue of validity of the adoption, with only a slight foray into punitive sanctions at the end, GC achieves a much a broader treatment. It does so, however, by stepping out of the mold of Mesopotamian science and applying broad statements of principle at the beginning and end:

X 33-34 Adoption may be from wherever one wishes...

XI 18-19 A woman may not adopt, nor a minor.<sup>9</sup>

Once again, it is a framing device based on positive and negative rules. This time, however, it uses maximal variation. There are two axes: valid and invalid adoption; natural parent/guardian and adoptee, covering a broader spectrum but leaving out the intermediate cases. From the second rule we cannot tell exactly who may adopt. It is all very well to say any adult male, but could an *oikeus* or a slave adopt, or an *apodromos*, or a son not yet in receipt of his inheritance share, or for that matter a son who had received his inheritance, while the father was still alive? The opening rule, on the other hand, is a more sophisticated statement of general principle. It is the first step towards modern legal science.

### C. Conclusions

The casuistic form is a defective form of presentation. It is defective irrespective of whether it is presenting academic discussion or legislation. In following that form, GC labors under a handicap. On the one hand, it uses the same time-honored techniques as CH to overcome the handicap. On the other, it goes beyond the Mesopotamian tradition by adopting more sophisticated methods, namely the formulation of general principles and (once, at least) definition of legal concepts.<sup>10</sup>

Nonetheless, it remains far from a systematic statement of the law, and it would be anachronistic to interpret its provisions as in any way comprehensive. In all the ancient societies under discussion, the vast bulk of the law was traditional law which was familiar to all. GC no less than CH presumes that knowledge in the reader (or listener) and only deals with certain cases because they make a particular point, whether it is that they are typical, unusual, or (and this is unique to GC) because it happens to be changing the existing rule.

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<sup>8</sup> Note that, as with the *kosmos* in GC I 51-55, CH 187 steps out of the chronological sequence into the sphere of status.

<sup>9</sup> I take the following provision about non-retrospectivity (XI 19-23) as a procedural coda to the substantive law topic.

<sup>10</sup> VIII 40-42: An heiress is one who has no father or brother from the same father.

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