

# Lucretia and the Historical System of Noxality

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## 1. Introduction.

Lucretia's case is extremely relevant for Roman mythology. It puts an end to monarchy and opens the Republic. It symbolizes patrician morality, raped by the arrogant family of Rome's last king, Lucius Tarquinius Superbus.

Nevertheless, there is a significant fact in the story which is not always considered. Although Lucius Tarquinius felt for the incident, he did not participate in it. The author, according to all sources<sup>1</sup>, was his son Sextus Tarquinius. In other words, the king, although did not participate in the rape, is considered responsible for the deeds of his son, and, what is even more interesting, his whole *gens* is expelled from Rome as a consequence. The son's crime makes not only the *pater* responsible, but his clan too.

The case agrees substantially with the *gens'* collective responsibility and the so called pure noxality, that part of the doctrine<sup>2</sup> postulates for Pre-Republican Archaic Rome.

The affaire is quite fascinating, especially because the final period of roman monarchy is historically better known to us than the precedent phases. Although city's central power has gained control

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<sup>1</sup> Lucius Ampelius Mem. 29.1; Calpurnius Flaccus Decl. 3.10; Cic. Rep. 2.46, Leg. 2.10, Fin. 2.66; Dion. Hal. 4.64; Annus Florus Epit. 1.1.211; Hyg. Mith. 256.2; Iuvenalis S. 10.293; Livius AUC 1.57; Ovidius Fast. 2.682 y ss; Val. Max. 6.1.1. Nevertheless, in some versions the son is called Arruns, specifically in Servius A. 6.818 and 8.646.

<sup>2</sup> F.DE VISSCHER, *Le régime romain de la noxalité*, Bruxelles 1947, p.20 and F.DE VISSCHER, *Il sistema romano della noxalità*, IURA XI (1960), p.7.

over the gentilician clans<sup>3</sup>, it is still earlier than the XII Tables, when the historical or legal system of noxality was created. This is a transitional moment between the old federation of *gentes* and the new unified city. Responsibility is evolving from a collective and clanical system, to an individual one.

Legal critic has usually assumed that noxal responsibility appears when Rome was rather a gentilician confederation, than a unified city. The origins of noxal responsibility tend to disappeared in the darkness of gentilicial past. There are two fundamental positions on the problem, one belonging to Girard and the other one to De Visscher. Both offer different explanations for its classical development, especially for the principle *noxā caput sequitur*.

According to Girard<sup>4</sup>, there are three phases on the evolution of noxality. On a first moment, the crimes committed by a member of a clan against a member of another *gens*, would generate the urge for a vendetta. The members of the victim's clan, represented by its *pater*, would pursue the author. He, been under the power and protection of his own *gens*, could only be punished if he is surrendered by the leader of his clan. Otherwise, the author's responsibility would fall on the clan and his *pater*, as representative of the *gens*. The offense would generate a conflict between the criminal responsibility of the author and the domestic power of the *pater*<sup>5</sup>.

There would be two alternatives, clanical war one side, or the *noxae deditio* of the author. This second alternative would permit the victim's clan to execute their revenge. The obligation of the author's *pater* is to deliver the criminal, but he can make gentilicial solidarity prevail and confront the victim's *gens*.

On a second phase, clanical war would be replaced by a simple *poena* for smaller crimes. Meanwhile, on important offenses, the *crimina*, the city would take over and execute public violence against the author. The *poena* is established through a *pactum*, and therefore

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<sup>3</sup> F.SERRAO, *Diritto privato economia e società nella storia di Roma*, 1, Napoli 2006, p.35; L.CAPOGROSSI COLOGNESI, *Diritto e potere nella storia di Roma*, Napoli 2007, p.79 and F.DE MARTINO, *Intorno all'origine della repubblica romana e delle magistrature*, in *Diritto e società nell'antica Roma*, Roma 1979, p.99 and *Storia della costituzione romana I*, Napoli 1972, p.117.

<sup>4</sup> GIRARD, *Les actions noxales*, NRH (1887), pp.409-449.

<sup>5</sup> M.KASER, *Das römische Privatrecht I*, München 1971, p.163.

is facultative for the victim. The delivery of the author is owed *in obligatione*, but a *poena* can be covenanted.

The third and final phase of the evolution corresponds to the XII Tables. According to Girard, the *poenae* established by the legal text are the objects owed (*in obligatione*). Nevertheless, the author's *pater* can surrender the offender through the *noxae dedito* (*in facultate*) to avoid the payment of the *poena*. This evolution would be showed on Gaius' explanation for noxal surrender:

Inst. 4.75

*Ex maleficio filiorum familias seruatorumque, ueluti si furtum fecerint aut iniuriam commiserint, noxales actiones proditae sunt, uti liceret patri dominouae aut litis aestimationem sufferere aut noxae dedere. erat enim iniquum nequitiam eorum ultra ipsorum corpora parentibus dominisue damnosam esse.*

Girard's thesis has turned traditional. It is still influential and with some variations it is sustained by most jurists<sup>6</sup>.

Against the traditional hypothesis, De Visscher created an alternative theory on noxality. According to him<sup>7</sup>, noxality would be a common institution among Ancient People. It would appear in a clanical phase of development. It would come from Public Law and it would tend to regulate international relations.

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<sup>6</sup> Maybe, the most elaborated version is Pugliese's. He believes that an offense of a member of one group, involves the responsibility of the whole *gens*, unless the group executes an act to exclude gentilicial solidarity. This solution became mandatory when vengeance was substituted by an *obligatio ex delictio*, that is to say, the obligation to pay a pecuniary *poena*. This could not be assumed neither by a slave or other *alieni iuris*. So, in exchange for the pecuniary *poena*, the victim could satisfy his need of vengeance physically on the author. This physical satisfaction was always contemplated as an alternative to the payment. His fundamental thesis, up to here, is equivalent to Girard's. The author believes that the explanation of noxality simplifies if one renounces to the identification of two different systems, noxal system and noxal actions, as De Visscher does. Vid. G.PUGLIESE, *Appunti in tema di azioni nossali*, in *Scritti giuridici in onore di F. Carnelutti* 2, Padova 1950 = *Scritti giuridici scelti*, Napoli 1985, p.119. Also shares Girard's thesis, although with some modifications H.LÉVY-BRUHL, *Sur l'abandon noxal*, in *Mélanges Philippe Meylan I*, Lausanne 1963, pp.193-209.

<sup>7</sup> F.DE VISSCHER, *Le régime romain de la noxalité*, Bruxelles 1947, p.20 and F.DE VISSCHER, *Il sistema romano della nossalità*, IURA XI (1960), p.7.

In its most Ancient phase, pure noxality would be previous to individual responsibility<sup>8</sup>. The victim's group, carried by its solidarity with the victim and its need for vendetta, would declare war on the author's clan. This would create a need for vengeance, now among the author's *gens*, which has been under attack. The situation would carry on in a succession of vendettas until one of the clans is extinguished<sup>9</sup>.

Noxal surrender would not be a way to obtain responsibility from the author, but a way of cutting the solidarity ties with him, followed by a formal renunciation of the need of vengeance, on the victim's side. It would be equivalent to extradition.

Collective responsibility would be both, political and prejudicial, while noxal surrender would give birth to legal and individual responsibility. Before noxality, responsibility, as a principle, would not exist. Noxality would not be based on the responsibility of the *pater* or the leader of the clan<sup>10</sup>, as Girard puts it. The principle *noxa caput sequitur*<sup>11</sup> would put the responsibility on the author<sup>12</sup>, not the *pater*.

In later evolution, this characteristic would be kept and the *pater* would not compromise his own responsibility, unless he accepts the

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<sup>8</sup> F.DE VISSCHER, *Le régime romain de la noxalité*, Bruxelles 1947, p.33 and F.DE VISSCHER, *Il sistema romano della noxalità*, IURA XI (1960), p.9.

<sup>9</sup> Sargenti has qualified this phase as pre-judicial. Vid M.SARGENTI, *La responsabilità noxale in diritto romano*, in *Contributo allo studio della responsabilità noxale in diritto romano*, Pavia 1949, p.72. Equally, see B.BIONDI, *Sistema della noxalità ed azioni noxali*, in *Scritti giuridici III*, Milano 1962, p.393.

<sup>10</sup> F.DE VISSCHER, *Il sistema romano della noxalità*, IURA XI (1960), p.17.

<sup>11</sup> Gai.4.77

<sup>12</sup> The evolution that follows from De Visscher's system is less relevant for our work. According to the author, a second phase of the system is the historical system of noxality. It would appear with the XII Tables. This system would establish the necessity to surrender the author, but creating the possibility to rescue him through pre-fixed *poenae* established by Law. The final phase corresponds to the creation of noxal actions. In these *actiones*, the *poena* is owed *in obligatione*, while the surrender is facultative. This final system would coexist with elements of the historical system of noxality.

*litiscontestatio*<sup>13</sup>. De Visscher's theory is very influential and has still many followers<sup>14</sup>.

On this essay, we will compare the case of Lucretia and the subsequent expulsion of the Tarquins with both theories and determine whether the existence of a pure noxality system can be established from it or not. Although Lucretia's case has a mythological character, it shows what Romans thought of their remote past, and this can give us some useful information not only on the evolution of criminal responsibility on the Archaic Period, but also on the centralization of the city's power over the clans.

## 2. Lucretia's story in the traditional version.

Etruscan monarchy is a much more historical period than the legendary Latin kings of the first Rome. It's even superior, archeologically speaking, to the first century of the Republic. "When we come to the sixth century... there are coincidences between the literary and archeological evidence which are hard to explain<sup>15</sup>."

The existence of a monarchy in early Rome is one of the safest elements of tradition. Its reality is confirmed by the calendar<sup>16</sup>, the existence of a *rex sacrorum* and even some epigraphic evidence as the *lapis nigra*<sup>17</sup>.

On the possibility that one of the dynasties that ruled Rome was named Tarquin, we also have archeological evidence. The tomb

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<sup>13</sup> This is the most controversial part of De Visscher's theory. As Lenel puts it, the presence of the word *oportere* in the *formula* can not be explained, if the pater had not compromised his own responsibility previously. Vid O.LENEL, *Die Formeln der actiones noxales*, ZSS 47 (1927), p.25.

<sup>14</sup> A third and different view was proposed by Biondi. According to him, noxality is not connected with any solidarity principle, but with the verticality of roman family and the subordination of its members. The will of the *pater* is compulsory to the group. Roman families are not groups formed by solidarity, but by submission to *patria potestas*. Therefore, noxality is also founded on submission. Solidarity imposes the defense of the members of the group, while noxality is exactly the opposite. Vid B.BIONDI, *Sistema della noxalità ed azioni noxali*, in *Scritti giuridici III*, Milano 1962, p.393.

<sup>15</sup> C.J.SMITH, *Early Rome and Latium*, Oxford 1996, p.150.

<sup>16</sup> Especially by the celebration of *regifugium*, a solemnity celebrated on February 24th. Also, by the days March 24th and May 24<sup>th</sup>, marked as Q(uando) R(ex) C(omitavit) F(as).

<sup>17</sup> On archeological evidence of monarchy, see C.J.SMITH, *Early Rome and Latium*, Oxford 1996, p.186.

François, in Vulci, discovered on 1857 seems to prove it. There, we find an odd scene where a Cneve Tarxunies rumax (Gneus Tarchinus Rumach or Roman) is been murdered. If we should identify this Gneus Tarquin with an intermediate king<sup>18</sup>, between the Tarquin the Elder (founder of the dynasty) or Superbus (the last roman king), or not<sup>19</sup> is a secondary matter, compared to the fact that this tomb confirms the existence of the dynasty<sup>20</sup>.

On the real occurrence of the fell of Tarquin dynasty around 509 B.C., now a day, it is considered an historical fact<sup>21</sup>. The decay of Etruscan power over Campania and the defeat of their fleet by Greeks from the south of Italy opened the possibility.

What seem problematic are the consequences of the fell on Rome's constitutional order. That is, whether the fell of the Tarquins means the beginning of the Republic or not.

On Lucretia's story, the critic is rather scant. It is usually considered too simplistic to imagine that the rape of a woman would cause a change on roman constitutional order<sup>22</sup>. This is evidently true, but the tradition does not intend say so. Livius states that economy had decayed because of the numerous public constructions, that the plebe was uncomfortable with monarchy, that there still was resent for the murder of Servius Tullius and that the king was unpopular for his excessive pride<sup>23</sup>. Lucretia's rape was not the cause of the fell of

<sup>18</sup> G.FRANCIOSI, *Esogamia gentilizia e regalità latina*, in *Ricerche sulla organizzazione gentilizia romana III*, Napoli 1995, p.66ss.

<sup>19</sup> J.MARTINEZ-PINNA, *Los Orígenes de Roma*, Madrid 1999, p.192.

<sup>20</sup> F.DE MARTINO, *Storia costituzionale romana*, Napoli 1973, p.129.

<sup>21</sup> On the problem, with abundant bibliography on the discussion, see F.DE MARTINO, *Intorno all'origine della repubblica romana e delle magistrature*, in *Diritto e società nell'antica Roma*, Roma 1979, pp.92-99 and F.DE MARTINO, *Storia della costituzione romana I*, Napoli 1972, p.224. Also interesting A.GUARINO, *La rivoluzione della plebe*, Napoli 1975, pp.92-93; F.SERRAO, *Diritto privato economia e società nella storia di Roma*, 1, Napoli 2006, p.79 and L.CAPOGROSSI COLOGNESI, *Diritto e potere nella storia di Roma*, Napoli 2007, p.79.

<sup>22</sup> F.De Martino, *Storia della costituzione romana I*, Napoli 1972, p.224.

<sup>23</sup> Liv. AUC 1.57. *rex romanus cum ipse ditari, exhaustus magnificentia publicorum operum, tum praeda delenire popularium animos studebat, praeter aliam superbiam regno infestus etiam quod se in fabrorum ministeriis ac seruili tam diu habitos opere ab rege indignabantur.*

AUC 1.59.9-11 *addita superbia ipsius regis miseriaeque et labores plebis in fossas cloacasque exhauriendas demersae; Romanos homines, uictores omnium circa populorum, opifices ac lapidas pro bellatoribus factos. indigna Ser. Tulli regis memorata caedes et inuecta corpori patris nefando uehiculo filia, inuocatique ultores*

monarchy, as the murder of Franz Ferdinand was not the cause of the First World War. The real causes are, in both cases, deeper and more complex.

We agree that the patrician *coup d'état* that putted an end to monarchy can not be conceived as a simple defense on Lucretia's sexual liberty. Its causes are deeper. On the internal aspect, they relate to the pressure that Etruscan kings putted on gentilician clans, and on the external side to the decay of Etruscan power in central Italy.

Nevertheless, these profound causes need an occasion to be expressed, an excuse. This excuse can well be the rape of a young patrician woman by one of the king's sons, as the traditional account states.

On the facts, main versions agree. Lucretia is the daughter of Spurius Lucretius, the *praefectus urbis*<sup>24</sup> and leader of the powerful Tricipitina gens. She had married Lucius Tarquinius Collatinus, son<sup>25</sup> or grandson<sup>26</sup> of Tarquinius Egerius, nephew of Tarquinius Priscus. Tarquinius Priscus had given govern of Collatia to Egerius<sup>27</sup>. In fact, the action does not occur in Rome, although the *gentes* involved are all Roman.

Sextus Tarquinius goes to Collatia, according to one version on a bet<sup>28</sup> or on an official mission, following Dionysius<sup>29</sup>. Sextus spends the night at Collatinus' house, who is his relative, although Collatinus is far from home. Sextus takes advantage of the situation and tries to force Lucretia with a sword. When she refuses, he threats to kill her and put a dead slave beside her. This way, he would argue that he discovered her committing adultery. The woman, fearing for what in

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*parentum di. his atrocioribusque, credo, aliis, quae praesens rerum indignitas haudquaquam relatu scriptoribus facilia subicit, memoratis incensam multitudinem perpulit ut imperium regi abrogaret exsulesque esse iuberet L. Tarquinium cum coniuge ac liberis.*

<sup>24</sup> Liv. AUC 1.59.12 *imperium in urbe Lucretio, praefecto urbis iam ante ab rege instituto, relinquit.*

<sup>25</sup> Liv. AUC 1.57.6.

<sup>26</sup> Dion. Hal. 4.64.

<sup>27</sup> Liv. AUC 1.38.1.

<sup>28</sup> Liv. 1.57.

<sup>29</sup> Dion. Hal. 4.64.

the XVI century would have been called “honor”, gives up and accepts Sextus<sup>30</sup>.

The following day, Lucretia<sup>31</sup> or her *pater* Lucretius<sup>32</sup>, depending on the version, calls a *consilium domesticum* to decide on the matter. In the *consilium* are summoned: Spurius Lucretius, father of the woman, who is also *praefectus urbis* and leader of her *gens*; Valerius Publicola, leader of the *gens* Valeria, invited as a friend of Lucretius; Lucius Junius Brutus, her uncle (*avunculus*<sup>33</sup> more exactly) and tribune of the *celeres*<sup>34</sup> and, in some versions, also the husband, Lucius Tarquinius Collatinus.

Livius makes the *consilium* say *mentem peccare, non corpus*, underlining the need of free will to commit adultery. Immediately after the innocence verdict, she kills herself, claiming for revenge against Sextus Tarquinius<sup>35</sup>, the author of the crime. Lucretia willingly is suffering the penalty for adultery, although she is innocent.

Now follows a very interesting scene for our research. The *consilium* decides to tumble Lucius Tarquinius Superbus and to expel from the city his sons and his whole *gens*<sup>36</sup>. On Brutus requirement, an

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<sup>30</sup> According to Guarino’s curious theory, Lucretia would have been seduced by Sextus, rather than raped. Her case would have been simply an adultery case. Later, legend would have turned it into a rape. Vid A.GUARINO, *Il dossier di Lucrezia*, in *Pagine di Diritto Romano*, v. II, Napoli 1993, p.193.

<sup>31</sup> Liv. AUC 1.58 *quo terrore cum uicisset obstinatam pudicitiam uelut <ui> uictrix libido, profectusque inde Tarquinius ferox expugnato decore muliebri esset, Lucretia maesta tanto malo nuntium Romam eundem ad patrem Ardeamque ad uirum mittit, ut cum singulis fidelibus amicis ueniant; ita facto maturatoque opus esse; rem atrocem incidisse. Sp. Lucretius cum P. Ualerio Uolesi filio, Collatinus cum L. Iunio Bruto uenit, cum quo forte Romam rediens ab nuntio uxoris erat conuentus. Ovidius Fast. 2.682 iamque erat orta dies: passis sedet illa capillis, ut solet ad nati mater itura rogum, grandaevumque patrem fido cum coniuge castris evocat: et posita venit uterque mora. Maurus Servius Honoratus 8.646 et altero die convocatis propinquis, marito Collatino, patre Tricipitino, Bruto avunculo, qui tribunus equitum celerum fuerat, rem indicans, petiit ne violatus pudor, neve inultus eius esset interitus, et coniecto gladio se interemit.*

<sup>32</sup> Dion. Hal. 4.66-67.

<sup>33</sup> See Servius version on note 31.

<sup>34</sup> According to Livius, Collatinus invites him.

<sup>35</sup> Liv. 1.58 *sed date dexteras fidemque haud impune adultero fore. Sex. est Tarquinius qui hostis pro hospite priore nocte ui armatus mihi sibi, si uos uiri estis, pestiferum hinc abstulit gaudium.*

<sup>36</sup> Cic. Rep. 2.46 *Quo auctore et principe concitata civitas et hac recenti querella Lucretiae patris ac propinquorum et recordatione superbiae Tarquini multarumque*



oath is pronounced with the bloody sword that killed Lucretia against the king and his family<sup>37</sup>.

Not even Collatinus, Lucretia's husband, is free from the council's wrath, for he is exiled too. Although the tradition puts Collatinus as first republican consul, sharing the office with Brutus, finally he is expelled too in an unfriendly way and replaced by Valerius Publicola on the consulship. This last character, Valerius, is much more historical than Collatinus, for his name appeared on an inscription of the V B.C.

A little further, the action gets a bit confusing and contradictory. According to Dionysius, in Lucretius house is decided that Brutus, as tribune of the *celeres*, will summon the people to decree the expulsion of the Tarquins. Then, Lucretius is made *interrex*, something only the Senate could do.

When Brutus summons the *Comitia*, he asks the people to ratify the Senate's decisions<sup>38</sup>, which has not formally acted still. It seems like Dionysius assumes that the *consilium* has transformed into the Senate.

*iniuriarum et ipsius et filiorum exulem et regem ipsum et liberos eius et gentem Tarquiniorum esse iussit.*

<sup>37</sup> Liv. AUC 1.59.1 *Brutus illis luctu occupatis cultrum ex uolnere Lucretiae extractum, manantem cruore praesetenens, 'per hunc' inquit 'castissimum ante regiam iniuriam sanguinem iuro, uosque, di, testes facio me L. Tarquinius Superbum cum scelerata coniuge et omni liberorum stirpe ferro igni quacumque dehinc ui possim exsecuturum, nec illos nec alium quemquam regnare Romae passurum.'* cultrum deinde Collatino tradit, inde Lucretio ac Ualerio, stupentibus miraculo rei, unde nouum in Bruti pectore ingenium. ut praeceptum erat iurant; totique ab luctu uersi in iram, Brutum iam inde ad expugnandum regnum uocantem sequuntur ducem.

Dion. Hal. *Antiq Rom* 4.70.5. Ταῦτ' εἰπὼν καὶ λαβὼν τὸ ξιφίδιον, ᾧ διεχρήσατο εαυτὴν ἢ γυνή, καὶ τῷ πτώματι προσελθὼν αὐτῆς: ἔτι γὰρ ἔκειτο ἐν φανερῷ θέαμα οἰκτιστον: ὤμοσε τὸν τ' Ἄρη καὶ τοὺς ἄλλους θεοὺς πᾶν ὅσον δύναται πράξειν ἐπὶ καταλύσει τῆς Ταρκυνίων δυναστείας, καὶ οὐτ' αὐτὸς διαλλαγῆσεσθαι πρὸς τοὺς τυράννους οὔτε τοῖς διαλλαπτομένοις ἐπιτρέψειν, ἀλλ' ἐχθρὸν ἠγήσεσθαι τὸν μὴ ταῦτα βουλόμενον καὶ μέχρι θανάτου τῇ τυραννίδι καὶ τοῖς συναγωνιζομένοις αὐτῇ διεχθρεύσειν. εἰ δὲ παραβαίῃ τὸν ὄρκον τοιαύτην αὐτῷ τελευτὴν ἠράσατο τοῦ βίου γενέσθαι καὶ τοῖς αὐτοῦ παισίν, οἷας ἔτυχεν ἢ γυνή.

<sup>38</sup> Dion. Hal. *Antiq Rom* 4.84.2.3-9 καὶ ὁ Βρούτος ἠσθεῖς, Ἐάν γε πρότερον, ἔφη, τὰ δόξαντα τῷ συνεδρίῳ μαθόντες ἐπικυρώσητε [τὸ δοχθέν.] δέδοκται γὰρ ἡμῖν φεύγειν Ταρκυνίους πόλιν τε τὴν Ῥωμαίων καὶ χώραν, ὅσης ἄρχουσι Ῥωμαῖοι, καὶ γένος τὸ ἐξ αὐτῶν ἅπαν: καὶ μηδενὶ ἐξεῖναι περὶ καθόδου Ταρκυνίων μῆτε πράττειν μηδὲν μῆτε λέγειν, ἐὰν δέ τις παρὰ ταῦτα ποιῶν εὐρίσκηται τεθνάναι.

On Livy's version, there is no trace of senatorial intervention. The people are summoned and agree on the expulsion of the Tarquins. According to Livius, Lucius Tarquinius Superbus flees to Ceres, together with two of his sons, while Sextus goes to Gabies, where he is murdered<sup>39</sup>. Dionysius states that all of the Tarquins would have gone to Gabies, but, after a revolt, they must run away<sup>40</sup>.

### 3. *Internationality and Noxality.*

From the just analyzed traditions, we can extract several useful elements. Firstly, there is the international flavor of the whole story. The main characters do not belong to any specific city. The members of gentilician clans live on different cities and move indistinctly among them. Sextus Tarquinius governs Gabies, Lucius Tarquinius Collatinus, governs Collatia, Lucretius is *praefectus urbis* from Rome. Each of them have one of these cities as their main center of activities, but the *gentes* comprehend all three cities.

According to Livy, the fall of the Tarquins starts in Collatia, and then develops in Rome and Gabies. In a way, cities seem less important than *gentes*. Sextus Tarquinius is both, Roman and Gabian, as Tarquinius Collatinus has also this double citizenship. The main adscription seems to be to *gens*, rather than to cities. In fact, cities appear only as residence places.

This fits with what we know of Italian society in VI B.C. Latin and Etruscan societies from the VII and VI B.C. were porous and migrations frequent. Epigraphic studies of Etruscan cities and necropolis gave surprising results<sup>41</sup>. On Orvieto's VI B.C. necropolis, for example, only sixty five per cent of the names on tombs are Etruscan. The reminding thirty five per cent correspond to italics from different origins.

In Caere<sup>42</sup>, an inscription from the late VII B.C. naming a Kalator Phapenas (Calator Fabius) was found. That is to say, an inscription from a Latin, who is member of a well known *gens*, the Fabii.

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<sup>39</sup> Liv. AUC 1.60.

<sup>40</sup> Dion. Hal. 4.84-85.

<sup>41</sup> Vid. M.TORELLI, *Dalle aristocrazie gentilizie alla nascita della plebe*, in *Storia di Roma*, I, *Roma in Italia*, Torino 1990, p.254.

<sup>42</sup> TLE 65.

There is even some evidence of Greek immigration, as the case of a certain Rutile Hipocrates (a Greek named Hipokrates, with a Latin name, Rutilius) in a tumulus from the city of Tarquine<sup>43</sup>.

The *gens* and not the city seems to be the main community. Although the Tarquins established a unified urban center, the gentilician power is steel strong and it imposes itself over the city's sovereignty.

This is international and gentilicial aspect from Lucretia's story is exactly what we would expect for an event of the VI B.C. where the noxality system was involved.

A second element of interest is the war declared by the Tricipitina *gens* against the Tarquin *gens* for the rape of a woman married with a member of the same Tarquin family.

If in Lucretia's marriage *conventio in manum* had taken place, it is improbable that responsibility could have followed, for the rape would have been an internal affaire of the Tarquin family. Was Lucretia married *sine manu*?

Rizzelli<sup>44</sup> believes Lucretia is married *cum manu*. Nevertheless, we can not be sure of it. There is no mention of *manus* in any of the texts regarding Lucretia and we believe to have proof *sine manu* marriages are previous to Law of the XII Tables<sup>45</sup>, so there is a possibility that Lucretia was free of *manus*. On the other hand, there is some evidence that is incompatible with marriage *cum manu*. The family council summoned does not seem compatible with a marriage *cum manu*. According to the versions of the story we got, the Tricipitina *gens* is always present in the council, represented by Lucretius, the *pater*. The husband, on the other side, is not always in the council. In one of the main versions, Lucretius summons the *consilium* at his own house<sup>46</sup> on request of Lucretia, his daughter, while Collatinus is not even summoned.

If Lucretia was married with *manus*, she would be in her husband's *gens*, the Tarquins, so the rape would be an internal problem. Although it is possible that for a family council of the Tarquins to treat the matter, Lucretius would have been summoned, it is highly

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<sup>43</sup> TLE 155.

<sup>44</sup> G.RIZZELLI, Le donne nell'esperienza di Roma antica, 2000, p.19.

<sup>45</sup> Vid C.P.AMUNÁTEGUI PERELLÓ, *El divorcio y la manus en la comedia del siglo II a.C.*, in *Iustel*, Revista General de Derecho 10 (2009), www.iustel.es.

<sup>46</sup> Dion. Hal. 4.66-67.

unlikely that neither her husband nor the gentilian leader, Lucius Taquinius Superbus, were. What is even more unlike for a *cum manu* marriage is that Lucretius would be the one to summon the *consilium*.

A third question is the need of intention, *dolus*, for criminal responsibility. The whole plot is about the need of intention to commit a crime. The *consilium* puts it very clearly: *mentem peccare, non corpus*. This contradicts De Visscher's theory<sup>47</sup>, which considers that subjective responsibility only emerges after the XII Tables, while in the previous period only a pure noxality system would exist. De Visscher's uncontrollable need for revenge, either against people or animals, not concerning about the intentionality of the act, even against beings that do not possess a will, seems incompatible with Lucretia's story.

It could be argued that this intentionality is simply one of Livy's many anachronisms. But we find this argument to be unconvincing. Lucretias' story would lack sense if responsibility was not depending on subjective elements. The whole point of the plot is that Lucretia was raped. If responsibility was not subjective, then this would be a plain and simple case of adultery<sup>48</sup>, a situation that was well regulated in the *leges regiae*<sup>49</sup>, but lacked an intergentilian projection.

Further more, there are some regulations from the royal Rome that apply to crime considering the intention of the author. There is a *lex regiae*, allegedly from Numa, which regulates murder. If murder is voluntary, the author should be sacrificed by the members of his *gens*<sup>50</sup>, while if murder is not intentional, only an animal should be sacrificed<sup>51</sup>.

<sup>47</sup> F.DE VISSCHER, *Il sistema romano della noxalità*, IURA XI (1960), p.9.

<sup>48</sup> Vid A.GUARINO, *Il dossier di Lucrezia*, in *Pagine di Diritto Romano*, v. II, Napoli 1993, p.193.

<sup>49</sup> Dion. Hal. *Ant. Rom.* 2.25.6.

<sup>50</sup> Festus-Paul. sv. *Parricidio quaestores* (L. 247) *ita fuisse indicat lex Numae Pompili regis composita verbis "si qui hominem liberum dolo sciens morti duit, paricidas esto"*.

Vid B.SANTALUCIA, *Dalla vendetta alla pena in Storia di Roma*, I, Roma in Italia, Torino 1990, p.428.

<sup>51</sup> Festus sv. *Subigere arietem* (L:476) *Subigere arietem, in eodem libro Antistius esse ait dare arietem, qui pro se agatur, caedatur*.

Serv. *Ecl.* 4.43.9 *sane in Numae legibus cautum est, ut, siquis inprudens occidisset hominem, pro capite occisi agnatis eius in cautione offerret arietem. ergo hic bene videtur arieti dignitatem dare dicendo 'ipse', qui oblatu homicidam crimine homicidii possit exsolvere*.

A fourth matter that should be analyzed is the attribution of responsibility. For the crime of the son, a collective vendetta against the whole *gens* is decided, even against Lucretia's own husband that ends up in exile. This is exactly what De Visscher postulates. Collective revenge is blindly executed against the whole *gens*, and not even the death of Sextus in Gabies controls the fury<sup>52</sup>. Even the wealth of the *gens* is damned and their *ager gentilicium* is consecrated to Mars. With the bloody sword that killed Lucretia, revenge is promised against the whole *gens*<sup>53</sup>.

We seem to finally meet the pure system of noxality. Responsibility is not individual and juridical, but collective and political. The principle of *noxam caput sequitur* has not been born yet.

The surrender of Sextus is not required at any time, just as De Visscher would have expected. Nobody even considers the possibility of a limited revenge only on him. Gentilician solidarity is expressed against the whole Tarquin clan, while individual responsibility is out of the question.

Crime seems to demand intention for its existence, but the responsibility that emerges is political and collective. In a way, we find ourselves at an intermediate stage of evolution, which is not quite compatible neither with De Visscher's theory nor Girard's. It seems as individual subjective responsibility is developing, but the evolution is not still complete.

Finally, we would like to call the attention on the Senate's roll on the story. As we have seen, in some versions the Senate's participation is insinuated.

Tarquins' Rome is not a simple federation of *gentes*. From the time of Tarquinius the Elder, Rome has developed a public architecture<sup>54</sup>. Some relevant works, as the pavement of the *Forum*, the construction of the *Regia*, the *Forum Boarium* or the Temple of Jupiter on the

<sup>52</sup> Liv. AUC 1.60.2. Anyway, according to Dionysius, Sextus lives longer and dies only at the battle of Lake Regilius. Dion. Hal. *Ant. Rom.* 6.12.5.

<sup>53</sup> Liv. AUC 1.59.1 '*per hunc*' inquit '*castissimum ante regiam iniuriam sanguinem iuro, uosque, di, testes facio me L. Tarquinius Superbum cum scelerata coniuge et omni liberorum stirpe ferro igni quacumque dehinc ui possim exsecuturum, nec illos nec alium quemquam regnare Romae passurum.*'

<sup>54</sup> V.GJERSTAD, *Early Rome I*, 1953; *Acta Instituti romani Regni Succiæ 5, Opuscola archeologica 2*, Lund, 1942; F.COARELLI, *Il foro romano. Periodo arcaico*, Roma 1983, pp.56-79 and *Il Foro Boario*, Roma 1988; C.J.SMITH, *Early Rome and Latium*, Oxford 1996, p.179ss.

*Capitolium*, were made in this period. Public architecture is a physical manifestation of a change in mentality. A new unified city is been constructed, and new constitutional reforms were carried out by Tarquinius Priscus and Servius Tullius<sup>55</sup>.

In this context, the intervention of the Senate, as the council of all the *patres gentium*, to regulate the consequences of a clanical war, seems appropriate. From Dionysius' version, we can infer that the Senate's intervention probably appeared in at least one of the sources he used, although it was not fully received on his text.

A clanical war is a fundamental event that affects the unity of the city. It is expectable that some public intervention of the other *gentes* of the community takes place before declaring it and taking the *vindicta* this far. Before declaring the only other clanical war we know of, the Fabii against Veii in the 479 B.C., the Senate intervenes and sanctions it<sup>56</sup>.

We believe the Senate possibly had a roll in conflicts between clans. In fact, according to Dionysius, a hypothetical *lex Romuli* gave criminal jurisdiction to the Senate<sup>57</sup>, although for smaller offenses. It is probable that this *lex Romuli* is a testimony of a large preetruscan custom, reduced in its original significance by Etruscan kings. The original Preetruscan Senate was an assembly of kings<sup>58</sup>. The faculty to judge the offenses a member of one clan inflicted on a member of another would have been appropriate for it.

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<sup>55</sup> F.SERRAO, *Diritto privato economia e società nella storia di Roma*, 1, Napoli 2006, p.35; L.CAPOGROSSI COLOGNESI, *Diritto e potere nella storia di Roma*, Napoli 2007, p.79 and F.DE MARTINO, *Intorno all'origine della repubblica romana e delle magistrature*, in *Diritto e società nell'antica Roma*, Roma 1979, p.99 and also in *Storia della costituzione romana I*, Napoli 1972, p.117.

<sup>56</sup> Livius AUC 2.49; Dion. Hal.9.15.

<sup>57</sup> Dion. Hal. Antiq Rom 2.14.1. Καταστησάμενος δὴ τὰ ταῦτα διέκρινε τὰς τιμὰς καὶ τὰς ἐξουσίας, ἃς ἐκάστους ἐβούλετο ἔχειν. βασιλεῖ μὲν οὖν ἐξήρητο τὰδε τὰ γέρα: πρῶτον μὲν ἱερῶν καὶ θυσιῶν ἡγεμονίαν ἔχειν καὶ πάντα δι' ἐκείνου πράττεσθαι τὰ πρὸς τοὺς θεοὺς ὅσα, ἔπειτα νόμων τε καὶ πατρίων ἐθισμῶν φυλακὴν ποιεῖσθαι καὶ παντὸς τοῦ κατὰ φύσιν ἢ κατὰ συνθήκας δικαίου προνοεῖν τῶν τε ἀδικημάτων τὰ μέγιστα μὲν αὐτὸν δικάζειν, τὰ δ' ἐλάττωνα τοῖς βουλευταῖς ἐπιτρέπειν προνοοῦμενον ἵνα μηδὲν γίγνηται περὶ τὰς δίκας πλημμελές, βουλήν τε συνάγειν καὶ δῆμον συγκαλεῖν καὶ γνώμης ἄρχειν καὶ τὰ δόξαντα τοῖς πλείοσιν ἐπιτελεῖν. τὰ ταῦτα μὲν ἀπέδωκε βασιλεῖ τὰ γέρα καὶ ἔτι πρὸς τοῦτοις ἡγεμονίαν ἔχειν αὐτοκράτορα ἐν πολέμῳ.

<sup>58</sup> We follow F.DE MARTINO, *Storia costituzionale romana*, Napoli 1973, p.102.

Our theory is that, in regal Rome, when a member of a *gens* committed a crime against the member of another *gens*, before the declaration of a vendetta and therefore a clanical war, the Senate, as an Assembly of *patres gentium*, intervened to regulate the vengeance.

Now, we can summarize our conclusions on criminal responsibility by the end of Etruscan monarchy. We believe crimes needed intention, *dolus*, but the responsibility that emerged from them was more political than juridical and therefor it fell on the whole *gens* of the author. In order to permit collective vengeance, an intervention of the Senate was required. Probably, the Senate would offer a reasonable arrangement, maybe through *talio*, maybe by the surrender of the author. Anyway, none of these alternatives were offered to the Tarquins. The hate of the old clans for their centralizing policy was too strong and forced immediate war.