



GERHARD THÜR

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Oaths and Dispute Settlement in Ancient Greek Law

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gerhard.thuer@oeaw.ac.at

<http://www.oeaw.ac.at/antike/index.php?id=292>

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*Oaths and Dispute Settlement in Ancient Greek
Law*

GERHARD THÜR

1. INTRODUCTION

As a lawyer I feel a little uncomfortable when addressing historians. Our common interest is, generally speaking, human behaviour. The historian is interested in its descriptive aspect, 'as it is or was', the lawyer in a normative one, 'as it ought to be' (cf. Foxhall, this volume). A legal historian falls between the two stools; my field of study is law as part of everyday life in Greek antiquity—'law as it was'. Naturally I am also concerned with the ideas the ancient Greeks had about what law ought to be. One might expect to find such ideas in the writings of the Greek philosophers, but in fact the Greek philosophers never considered everyday legal problems in the ways ancient Roman jurists did and modern jurists continue to do. Consequently one has to reconstruct both the details and the principles of Greek law by studying every available source: literature (including philosophy), inscriptions, papyri—evaluating every piece of evidence in its special local and temporal context. The so-called legal texts—laws (*nomoi*), contracts, judgements, and forensic speeches—are no more significant than epic, lyric, tragic, or historiographic writings. References to the principles of Greek law as an everyday phenomenon may be found in all sorts of statements of ancient Greek contemporaries. From the beginning of this century legal historians, particularly Ernst Rabel and Hans Julius Wolff, have emphasized that modern legal categories are not adequate tools with which to understand ancient Greek legal sources.

To reveal the disguised structures of individual human communities is the common task of both legal history and anthropology. Why should they not be combined? Louis Gernet, who was above

all a superb classicist, achieved it very successfully. Efforts are now being made by David Cohen and Michael Gagarin, in very different ways, and also by Uwe Wesel. Some of these adopt approaches which appear to me to be dangerous. There is in particular a risk in turning to anthropological analysis before all the evidence of the Greek sources has been exhausted. It is easier to consult an anthropological textbook for quick information than dozens of Greek lexicons and indexes, even if these are computerized. Similarly, comparative legal history, for instance the ancient Near Eastern cuneiform law, is increasingly ignored. Serious legal anthropology in the field of ancient Greek law must, therefore, be kept within reasonable bounds, whilst home-made and second-hand anthropology must be kept outside them. What is required for legal history is first-hand discussion between the two disciplines.

I am first going to deconstruct some reconstructions of legal procedure in Homeric times. Dispute-settlement theories are closely linked to theories on the beginnings of the state, the *polis*. Here too some ideas need to be deconstructed. Secondly I will try to reconstruct early Greek dispute settlement in a more convincing manner, but whether this should lead to a reconstruction of the origins of the *polis* is beyond my purpose here.

2. DECONSTRUCTION

The central sources to be discussed are Homer, *Iliad* 23 and 18, the law of Drakon, and the code of Gortyn, ranging from 700 to 450 BC. Before considering these texts, however, I will summarize the three main streams of interpretation which have held sway during the last hundred years. Until 1946 the common opinion was as follows: in order to settle disputes in prehistoric times individuals could voluntarily waive self-help and resort to arbitration. Gradually, under the influence of public opinion, the litigants were deprived of the use of private force and compelled to submit their disputes to the authorities. The leaders of the primitive community were determined on as the arbitrators. After the consolidation of the state, this jurisdiction became a legal institution and passed from the early monarchs to aristocratic city magistrates before finally falling to the popular courts. What a wonderfully evolutionary picture! The main authority is Homer, *Iliad* 18. 501: 'and each desired to win the case on the word of an *istor*' (ἄμφω δ' ἰέσθην ἐπὶ

ἵστορι πείραρ ἐλέσθαι), where *istor* is understood to mean 'arbitrator'.¹

In a pioneering article Wolff (1946) objected that it seemed unlikely that a mere tendency towards arbitration would have been sufficient for successfully suppressing anarchy. If, on the other hand, such a success had been achieved, why should the state have troubled to put its authority behind a working system of private arbitration? Further, Wolff drew attention to the fact that everywhere in the Greek *polis* self-help had existed for a long time even up to the historic period. In his opinion the princes had never acted as arbitrators. They ensured social peace by granting an accused person a kind of temporary 'police protection' from acts of revenge. The princes, as public authorities, controlled self-help; after examining the legal position they would either permit or prevent recourse to self-help. Wolff supposed a direct development from Homeric times to the classical *polis*. In his opinion the *istor* of *Iliad* 18. 501 is not an arbitrator but a person with direct knowledge of the facts who is a means of bringing about an immediate decision.

Wolff's theory won considerable support amongst legal historians. The first objection was raised by a philologist, Hildebrecht Hommel (1969).² For Hommel *Iliad* 18. 501 can only be understood as a voluntary submission to arbitration. In the Homeric *polis* disputes were settled by compromise; each litigant had to meet his opponent half-way. They both had to choose from amongst several settlements proposed by the elders (*gerontes*). The dispute was settled when the litigants both accepted one of the proffered settlements. In 1970 I made some, apparently ineffective, objections to Hommel's theory (Thür 1970; cf. now, Thür 1989 and 1990). How can the method of dispute settlement he assumes work if each plaintiff compromises whether right or wrong, and more or less automatically obtains a half of what he demands, for simultaneously the defendant loses to the same extent? My proposed solution, differing from both Wolff and Hommel, was that normally disputes were settled by decisory oaths. Further discussion, by amongst others Talamanca (1979), has followed this particular path.

Recently two scholars, Gagarin (1986) and Stahl (1987), have

¹ Hesiod, *Works and Days* 35-6, is taken to represent an intermediate stage of 'obligatory arbitration' found especially in Boeotian society.

² Hommel (1928) first advanced this view; see now van Effenterre (1994) and Thür (1994).

independently returned to Hommel's arbitration theory. The main difference from Hommel is that neither relies on nineteenth-century evolutionary models but rather upon anthropology: forced by public opinion, litigants voluntarily submitted their dispute to the elders of Homeric society. Jointly both litigants chose one of the proposed settlements to decide the dispute. Gagarin (1986: 20) understands this arbitration to be a 'formal, public procedure', whilst Stahl calls it a 'pre-state procedure' (1987: 167)—the difference seems mererly a matter of definition. Gagarin may have in some ways the better case, but I do not want to insist on this. More important is the manner in which both deal with the question of the oaths.

Gagarin discovered some examples of oaths of denial. In his list of eight main elements of procedure in what he calls 'pre-written-law society', oaths figure as number 6: 'an oath of denial may be sworn or asked for by one of the parties, though this oath does not necessarily decide the case' (1986: 43). One should note, though, that a lawyer only speaks of an 'oath of denial' or exculpatory oath when the defendant is automatically exonerated by swearing it. Gagarin is correct to say that no early literary source explicitly states that a certain oath, if sworn, will be decisive. He gives only one example of an oath of denial sworn by a defendant and, as he says, this does not settle the case (1986: 40). But this is not at all conclusive. In the *Homeric Hymn to Hermes* the new-born god does not swear the great oath of innocence as Gagarin implies but is only said to be ready to swear it (4. 383). Hermes clearly does not interrupt his speech for a swearing ceremony. So we may ignore Gagarin's non-decisive oath of denial.

Stahl (1987: 166, 168) explains the oaths of his 'pre-state procedure' in another way: as in classical Athens, in the earlier procedure each party had to swear a preliminary oath. Consequently, these two opposite oaths sworn at the commencement of an arbitration could by no means be decisive. But Stahl is not able to provide a single piece of evidence for such preliminary oaths in Homer. I shall demonstrate later that the double oath is nothing other than a relatively late institution created especially to avoid the decisory oath taken by one litigant only. It is very unlikely to date back to Homeric times.

To sum up, Wolff's argument that there is no development from Homer to the self-help in the later Greek *polis* is conclusive against

the various theories based upon arbitration. Furthermore, the proposition that in *Iliad* 18 the litigants themselves jointly choose a settlement from amongst several proposed has no parallel in legal anthropology. So far as I can see, Tiv litigants—quoted by Gagarin (1986: 31) as his best comparative example—go around from one elder to another until they find a convenient person, not a settlement. Just as unconvincing are the ‘big men’ cited by Stahl (1987: 169—without a source; perhaps a quotation derived third-hand from Wesel).³ On the other hand Wolff’s theory that in early Greek society the authorities granted the defendant temporary police protection has no better support. In later times sanctuaries protected accused persons by giving them asylum, and, as mythology teaches, this was an old custom.

3. RECONSTRUCTION

I now proceed to adduce evidence for a better theory, which goes further than my previous attempt. First I shall briefly summarize. Voluntary resort to arbitration or compromise did no doubt play an important part in early Greek society and later on as well. If no peaceful agreement could be achieved the prosecutor was allowed to use private force against his opponent; but before he was allowed to do so some authority had to decide in a formal procedure whether self-help was legal or not in that case. In democratic Athens the magistrates brought the cases before a popular court. By voting the defendant guilty the jurors opened the way for the private use of force. In contrast, in early Greece magistrates did not decide cases themselves. Rather they would formulate an oath and decide which of the litigants was to submit to taking it. This—as I shall show—is the meaning of *dikazein* (‘to decide’). *Dikazein* in fact means to swear to the facts of the case by an appropriate deity, sometimes with the addition of sanctions for falsity. If the oath was successfully taken the party swearing won the case and no further judgement was necessary. Technically I call this type of judgement a *Beweisurteil*, for which the term ‘medial judgement’ has been used in analysis of the early common law. It is so called because

³ Gagarin is generalizing his model. But starting from his own premisses, there could never be an unjust judgement of the kind of which Hesiod (*Works and Days* 219, 250), for example, speaks. How can a judgement be ‘crooked’ if either party is free to reject it?

the magistrate does not decide on guilt or innocence but only gives a judgement about the oath-formula which, if taken, will automatically resolve the dispute. Wolff understood *dikazein* differently: the authorities ‘allowed or forbade self-help’ after a formal proof. In my opinion, self-help was not controlled by police protection or any question of permission or prohibition by any authorities. A prosecutor was only allowed to use private force after he had obtained divine legitimation by an oath. Punishment by an offended god was a real threat to people in archaic times.

What evidence can be provided for my theory that oaths played a substantial part in early Greek dispute settlement? Before discussing the earliest sources it might be of some interest to ask how Greek authors of the fourth century BC saw their own legal history. Both Plato and Aristotle wrote about early dispute settlement. One must keep in mind, however, that in their time *dikazein* was used merely for the verdict given by a popular court. No Athenian magistrate was competent to *dikazein* a lawsuit. Terminology and principles of legal procedure certainly had changed during the 350 years since Homer. Did fourth-century writers know more about it than we do? Clearly they knew a lot, but they may have misunderstood much also.

The source generally considered the most important is Aristotle, *Constitution of the Athenians* 3. 5 (but cf. also *Politics* 1298^a9–31):

κύριοι δ' ἦσαν καὶ τὰς δίκας αὐτοτελεῖς κρίνειν καὶ οὐχ ὡσπερ νῦν προανακρίνειν.

They also had the power to give final judgement in lawsuits and not as now merely to hold a preliminary trial.

In the fourth century BC there were two stages leading to a verdict by a popular court: first, the litigants had to meet before a magistrate in a preliminary session, called *anakrasis* (examination) or *prodikasia* (preliminary hearing)—Aristotle combines both words in a neologism *proanakrinein* (preliminary examination); second, the litigants pleaded before a popular court of at least 200 jurors, who gave their verdict by voting simply ‘yes’ or ‘no’. Before Drakon, Aristotle says—and modern scholarship agrees with him—the Athenian archons (magistrates) had the authority to settle disputes within their own competence: *krinein* (to decide). Solon was the first to introduce the decision by a popular court, the Heliaia. But to me

it seems suspicious that Aristotle does not use the word *dikazein* which we find in the law of Drakon (IG I³ 104. 10-11); furthermore a law of Solon entitles the archons to act as *dikastai*, judges' (Demosthenes 23. 28). So we should expect to find *dikazein* in Aristotle too. It seems probable that some of the detail given by Aristotle is also misleading.

In the third book of his *Politics* (1285^b9-12) Aristotle is dealing with the monarchy. In ancient times, he says, kings also gave judgements in lawsuits; *krinein* ('to decide') again.

κύριοι δ' ἦσαν τῆς τε κατὰ πόλεμον ἡγεμονίας καὶ τῶν θυσιῶν ὅσαι μὴ ἱερατικάι, καὶ πρὸς τούτοις τὰς δίκας ἔκρινον· τοῦτο δ' ἐποίουν οἱ μὲν οὐκ ὀμνύοντες οἱ δ' ὀμνύοντες, ὁ δ' ὄρκος ἦν τοῦ σκήπτρου ἐπανάτασις.

And they held the supreme command in war and had control over all sacrifices not in the hands of the priests and moreover decided lawsuits; some gave judgement without an oath some on oath, the oath was taken by holding up a sceptre.

Here the philosopher goes into some detail. Judgement is said to be given partly on oath. Such an oath taken by a judge is known only from a single archaic Greek source, the law code of Gortyn (IC IV 72), e.g. col. I 17-24:

αἱ δέ κ' ἀντὶ δόλοι μολίωντι πονίοντες Ἐὸν Ἐκάρτερος ἔμεν, αἱ μὲν κα μαίτυς ἀποπονέι, κατὰ τὸν μαίτυρα δικάδδεν, αἱ δέ κ' ἔ ἀνποτέροις ἀποπονίοντι ἔ μεδατέροι, τὸν δικαστὰν ὀμνύντα κρίνεν.

And if they are in dispute about a slave each declaring that it is his, the judge is to give judgement according to the witness, if there be witness but the decision is to be on oath if the evidence be for both or for neither.

The Cretan *dikastas* (judge) belongs to the board of supreme magistrates, the *kosmoi*. In matters uncertain or of minor importance he is allowed to decide the case by giving a judgement on oath: *omnynta krinein* (I 21-4). If there are good witnesses on one side or the case is more important the magistrate has to give a *dikazein*, judgement (I 18-21). Aristotle, above, may be referring to an archaic system of legal procedure like that of Gortyn. In the very next line he calls the king *dikastes*, judge. The parallels in Gortyn suggest that *omnyon krinein* 'to give judgement on oath' is but a subsidiary way of settling disputes. In the usual way judgements are 'not on oath', the *dikazein* which Aristotle never mentions.

Although Plato does not use the verb *dikazein*, in one passage in

the *Laws* (948b) he gives an exact account of it. Until now this evidence has been ignored. The mythical king Rhadamanthys made short work of disputes: he imposed an oath on the litigants and so disposed of the matter. Because in his time people did not commit perjury his method succeeded. In the following lines Plato complains that in his own time both litigants had to swear, so that in every lawsuit there must necessarily be one perjurer. Consequently in his state Plato forbids the double preliminary oath. Rhadamanthys must therefore have imposed an oath on only one party. Dispute settlement by imposing a decisive oath is well known from the law code of Gortyn. Lines III 1-12 forbid a divorcee to carry away anything belonging to the husband. If there was a dispute the *dikastas* had to impose on her an oath of denial (III 5-9). Artemis, whom women had reason to fear above all, was the deity competent to guarantee her oath. The verb used here is *dikazein*: the magistrate decrees what kind of oath has to be taken and which of the litigants or whose witnesses have to take it and what the consequences should be. It is not unlikely that Plato had similar ideas about the judgements of Rhadamanthys. He might have avoided using the verb *dikazein* because his fellow Athenians were likely to understand it as referring to the verdict given by the popular court, the *dikasterion*. Significantly, the Platonic myth seems to offer better evidence of Heroic times than the scholarly efforts of Aristotle.⁴

The crucial texts, however, are the dispute between Antilochos and Menelaos and the lawsuit depicted on the famous shield of Achilles, *Iliad* 23. 573-85 and 18. 497-508 respectively. In both cases we find dispute settlement by *dikazein*. On the basis of my earlier considerations one may supplement the wordless scene pictured on the shield with the epic narrative of the other.

ἀλλ' ἄγετ', Ἀργείων ἡγήτορες ἠδὲ μέδοντες,
 εἰς μέσον ἀμφοτέροισι δικάσατε, μηδ' ἐπ' ἄρωγῇ,
 μή ποτέ τις εἴπησιν Ἀχαιῶν χαλκοκιτώνων·
 Ἄντίλοχον ψεύδεσσι βησάμενος Μενέλαος
 οἴχεται ἵππον ἄγων, ὅτι οἱ πολὺ χείρονες ἦσαν
 ἵπποι, αὐτὸς δὲ κρείσσων ἀρετῇ τε βίῃ τε.

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⁴ I draw attention in passing to King Minos, Rhadamnathys' colleague. In the *Odyssey* (II. 569-71) we find him 'laying down the law', *themisteuein*. Neither *dikazein* nor oaths are mentioned. But he is holding the sceptre like the other authorities who *dikazoun*.

εἰ δ' ἄγ' ἐγὼν αὐτὸς δικάσω, καὶ μ' οὐ τινὰ φημι
 ἄλλον ἐπιπλήξειν Δαναῶν· ἰθεὶα γὰρ ἔσται. 580
 Ἄντιλοχ', εἰ δ' ἄγε δεῦρο, διοτρεφές, ἧ θέμις ἐστί,
 στὰς ἵππων προπάροιθε καὶ ἄρματος, αὐτὰρ ἰμάσθλην
 χερσὶν ἔχε ῥαδιηνήν, ἧ περ τὸ πρόσθεν ἔλαυνες,
 ἵππων ἀψάμενος γαιήοχον ἐννοσίγαιον
 ὄμνυθι μὴ μὲν ἐκὼν τὸ ἐμὸν δόλω ἄρμα πεδῆσαι. 585

Come now, ye leaders and rulers of the Argives,
 judge aright betwixt us twain having regard to neither
 lest later some of the brazen-coated Achaeans say:
 'Over Antilochos did Menelaos prevail by lies,
 and left with the mare for though his horses were the worse he himself was
 mightier in worth and power.'
 But I myself will decide rightly and none of the Danaans will reproach me
 for my judgement will be straight.
 Antilochos, come forward, beloved of Zeus, as is customary, stand before
 thy horses and chariot taking the whip wherewith you did drive and lay-
 ing thy hand upon the horses swear by the holder and shaker of the earth
 that
 not of thine own will did thou hinder my horses by guile.

Antilochos had overtaken Menelaos in the chariot race by means of a foul trick. In the presence of the Achaean assembly Menelaos claims the second prize, a mare, of which Antilochos has taken possession. Menelaos, sceptre in hand, addresses the other kings. Most striking in this speech is that Menelaos first asks the leaders to give judgement (*dikazein*) and then gives a judgement (*dikazein*) himself in his own cause. For this reason Wolff regards the controversy as remaining throughout within the context of self-help. Gagarin and Stahl do not like these two references to *dikazein* at all. They each stress that the episode as a whole is an illustration of dispute settlement by compromise. However, at the start we have quite a normal lawsuit. The *dikazein* of Menelaos is irrefutable: he formulates an oath, which everybody would regard as the correct way to settle a dispute about a chariot race. Poseidon is to charioteers and their horses what Artemis is to women. Perjury would be dangerous, Poseidon would not allow a perjurer further success in chariot racing. So Antilochos gave in and did not risk the god's punishment. The judgement 'Antilochos is to swear' would have been the result of the session, since none of the other leaders had 'blamed' Menelaos (l. 580). Such blame could have prompted a

new *dikazein*, judgement: for instance that Menelaos was to swear rather than Antilochos. But Antilochos at once withdrew, so Menelaos' judgement remained at the stage of a proposal. To sum up, the two *dikazein* in this text seem to harmonize best if we assume that the other leaders formulated oaths too, as Menelaos did. An oath according to the *dikazein* sworn by one of the litigants would have settled the dispute. The best parallel is the *dikazein*, judgement, in the law code of Gortyn (ll. III 5–9).

In the shield scene we find *dikazein* in line 506 and *diken eipein* (to propose judgement) in line 508. We are not told of one word spoken by the judges, but we can witness the scene.

λαοὶ δ' εἰν ἀγορῇ ἔσαν ἀθρόοι· ἔνθα δὲ νεῖκος
 ὠρώρει, δύο δ' ἄνδρες ἐνεΐκεον εἵνεκα ποινῆς
 ἀνδρὸς ἀποκταμένου· ὁ μὲν εὔχετο πάντ' ἀποδοῦναι
 δῆμῳ πιφαύσκων, ὁ δ' ἀναΐνετο μηδὲν ἐλέσθαι· 500
 ἄμφω δ' ἰέσθην ἐπὶ ἴστορι πείραρ ἐλέσθαι.
 λαοὶ δ' ἀμφοτέροισιν ἐπήπυον, ἀμφὶς ἀρωγοί.
 κήρυκες δ' ἄρα λαὸν ἐρήτυον· οἱ δὲ γέροντες
 ἦατ' ἐπὶ ξεστοῖσι λίθοις ἱερῶ ἐνὶ κύκλῳ,
 σκῆπτρα δὲ κηρύκων ἐν χέρσ' ἔχον ἠεροφώνων· 505
 τοῖσιν ἔπειτ' ἦϊσσον, ἀμοιβηδὶς δὲ δικάζον.
 κεῖτο δ' ἄρ' ἐν μέσσοισι δύο χρυσοῖο τάλαντα,
 τῷ δόμεν ὃς μετὰ τοῖσι δίκην ἰθύντατα εἴποι.

But the people were gathered in the assembly place, for there strife stirred, for two men struggled over the blood-price of a man slain, the one entreated that he had paid everything, proclaiming to the community, but the other refused to take anything; and each desired to win the case on the word of an *istor*. And the people cheered both, being supporters of each side in turn. But the heralds restrained the people. And the elders sat on polished rocks in the sacred circle, and they held in their hands the sceptres of the loud-voiced heralds. Then they would dart out and give judgement (*dikazon*), each in turn. And there lay in the middle two talents of gold, to give to whoever among them should speak the straightest judgement (*dike*).

Two men have brought their dispute before the assembly of the elders sitting in a sacred circle in the agora. Most probably the issue is whether the defendant had paid blood money or not. After the litigants have pleaded, some elders, holding their sceptres, stand up and give their judgements. An award is to be made for that elder who speaks *dike*, the straightest way. I will discuss three questions

only: (1) who wins the award (ll. 507-8)? (2) what is the meaning of *dikazein* (l. 506) here? and (3) who is the famous *istor* (literally 'one who knows') of line 501?

1. We are on relatively firm ground in answering the first question. Larsen (1949) has shown that in Homeric assemblies the leaders went on discussing a problem until no further objections were made and one proposal prevailed. Gagarin (1986: 31, 36) provides some anthropological parallels. We do not need Hommel's artificial solution that the litigants themselves jointly designated the winner.

2. The meaning of *dikazein* is more speculative. In order to maintain his theory of arbitration Gagarin constructs some sophisticated issues the litigants might have been quarrelling about. He cannot imagine how on such a simple question as whether a *poine* (sum of blood money) has been paid or not there could be any competition between the elders of the city. Gagarin thinks nobody pays except in the presence of witnesses. In my opinion only the most simple events harmonize with the idyll of peaceful life Hephaistos modelled on the shield. Considering line 499: 'the one entreated that he had paid everything', dispute may have arisen for instance about some of a number of beasts, the usual fine for killing. Some of them may have been sick or stolen property, or have run back to their former owner, or perhaps payment might simply have been partly postponed. No dramatic issue at all, but amongst peasants reason enough for a quarrel. More serious is the question how could the elders compete in giving the best answer if the dispute admitted of only two, alternative, answers? Wolff's suggestion that much depends on the reasoning given for each solution cannot satisfy. For me, it seems best to follow the meaning of *dikazein* discussed above: the elders formulated different oaths, each trying to reflect most appropriately the details of this particular case. The question whether the fine was paid or not admits of only two answers. But the elders were not concerned to answer this question at all. They simply competed for the best way to find the right answer. More exactly, their problem was which of the litigants should swear and to what form of oath? In the same way Menelaus proposed an oath about a question in the alternative: should he or Antilochos carry away the mare? Here several oath-formulations were possible; one leader may blame the other. The shield scene makes clear that

oaths are proposed until one is indisputably accepted. This is the 'straightest' way to settle the dispute.

3. Up to this point my interpretation has found no room for the *istor*. There is a general assumption that he is to be found amongst the elders: the *istor* will be the one who wins the award. That each litigant resorted to the *istor* is by no means an argument for voluntary submission to arbitration. Wolff correctly pointed out that the same words would be spoken within a context of public control over self-help. There was no other way for the defendant to obtain protection or for the plaintiff to obtain permission to resort to private force than to go before the authorities. If litigants of today say 'let's go to law' nobody thinks in terms of voluntary arbitration. So the solution depends upon the meaning of the word *istor* itself. Gagarin's translation 'arbiter' relies on *Iliad* 23. 450-98, a passage he has clearly misunderstood. In the chariot race Ideomeneos and Ajax disagree as to who is in first place at the moment. Ideomeneos proposes laying a bet on it and appointing Agamemnon as *istor* (23. 486-7). Gagarin (1986: 37 n. 37) says: 'Presumably Agamemnon would decide the outcome of the race.' In my opinion there is nothing to decide: in the event everybody will be able to observe who is actually first. Agamemnon's only task will have been to hold the stake money and hand it over to the winner. Therefore he does not have to act as arbitrator, rather he is a guarantor for the bet's being enforced correctly. In some accord with the meaning 'guarantor' is the scholion to line 486 (Maas 427): *istora] synthekophylaka* (depository of a contract). Indeed, on inscriptions from Boeotia of the third century BC there is mention of *istores* at the end of private documents. But these do not, of course, explain the *istor* on the shield of Achilles.

Wolff relies on etymology: *istor* is an expert, the one who knows. Nevertheless his theory that the elder winning the award decides the case 'on the ground of (his) knowledge of the facts involved' seems to be far-fetched. Nowhere else in Greek law do we have parallels to the Anglo-Saxon jury Wolff presumes to find in Homer.

My solution is to disassociate the *istor* from the elder winning the award. If the winning elder has to formulate a decisive oath, *diken eipein* or *dikazein* cannot be the end of the trial. Only when the oath which has been formulated is taken is the dispute between the parties settled. Consequently, the *peirar*, the end (l. 501), must follow

the *dikazein* and take place beyond the scene depicted on the shield. None of the elders is to be identified with the *istor*. Rather I would suggest linking the *istor* of line 501 with the *istores* known as gods who 'witness', that is to say guarantee, archaic oaths. Examples are the famous Athenian ephebic oath (Lykourgos I. 77; cf. Tod 1948: 204) and the Hippocratic oath. The *istor* in the shield scene is none other than the deity or deities by whom the litigants are going to swear. Having pleaded their case (l. 499-500) each litigant has asked the elders to award him an oath, the exact wording of which he has suggested.

Litigants' resorting to oaths commonly occurs as a theme in epic literature. Hermes, for instance, offered an oath of denial: 'I did not drive the cows to my house' (*Homeric Hymns* 4. 379 ff.). Because he had hidden them in a cave the oath could have been truthfully sworn. But it is a good example of a 'crooked *dike*' of the type we later find in Hesiod. On the contrary, the *dikazein* of Menelaos is certainly a 'straight *dike*' (*Iliad* 23. 580). From the shield scene we learn that each party proposes an oath favourable to his own position. The elders have to decide which of them is 'straight' and may even propose 'straighter' ones; the 'straightest' will win the award. The Hermes story makes clear that in such a system of litigation much can depend on a single word. Generally people will not have wished to perjure themselves. But their relations with the gods were very formal. A screwed but true oath would not result in harm. To settle disputes, the authorities of the early *polis* must have kept in their minds a considerable repertory of oath formulae. Beyond that they required great skill to adapt them to particular situations. During the negotiations to find the straightest oath a litigant must often have seen his case disappear. Like Antilochos, many others will have resorted to compromise. Dispute settlement by imposing a decisory oath strongly encouraged peaceable agreement.

Leaving aside Aristotle I have followed a trail leading back from the Platonic myth of Rhadamanthys, where I found a decision made by imposing an oath, to the law code of Gortyn, where in the fifth century BC this procedure was practised and labelled *dikazein*, and finally to the two crucial Homeric texts. Neither voluntary arbitration nor control of self-help by police power was the principle of early Greek dispute settlement, rather control by supernatural means, by the imposition of decisive oaths. The authority of the

leaders consists in their exclusive competence to utter the correct formulae for these oaths.

These findings are by no means surprising. Ries (1989) has recently published a detailed survey of early Babylonian medial judgements. In the cuneiform documents he finds two types of judgement: only if the defendant confessed his guilt or the plaintiff produced documentary evidence would the lawcourt immediately give its verdict. Normally a judgement imposed on one of the parties was a decisory oath to be sworn some time later in a sanctuary. Oriental influence on the early Greek *polis* is not impossible; the well-known *Beweisurteil* of the old German customary procedure, on the other hand, suggests the possibility of independent parallel development.

By way of conclusion I will summarize the advantages and disadvantages of this system, which was finally transformed either as democratic jurisdiction as in Athens or within aristocratic models as, for example, in Gortyn.

Hesiod's *Works and Days* deserves a full and independent treatment. It is beyond dispute that the work reflects a deep distrust of the jurisdiction administered by the authorities, the *basileis*. There are some references to 'medial judgements', but they cannot be followed up here. The main dangers of jurisdiction by giving an oath to one litigant were that the magistrates might favour one of the litigants by imposing upon him an oath he could swear without any risk (for example by imposing upon Hermes the crooked oath that the cows of Apollo were not in his house), and, secondly, that the litigant might simply commit perjury. Against both these risks the archaic Greek *poleis* took measures.

In Gortyn, as we have seen, the system works on the basis of full trust being placed in the supernatural force of the oath. The only problem was to prevent the magistrates in charge of the jurisdiction indulging in arbitrary acts. This is the political background to the codification of the law in the first half of the fifth century BC. The law code strictly regulates the *dikazein* of the magistrate, as in the example (IC IV 72 col. I 17-24) quoted above. If two persons contend about a slave the *dikastas* is ordered to decide that the witness produced by one of the parties has to take the decisive oath. If both parties produce a witness no double oath is allowed: the *dikastas* has himself to give the final decision (*krinein*) on oath. This system presupposes that perjury hardly ever occurs.

About 150 years previously the Athenians had discovered a different solution. From very early on they distrusted oaths sworn by litigants. In every lawsuit each party had to take an oath formulated by the magistrate. Afterwards in special session a jury voted whose oath was the better. These two stages are the basis for Drakon's law of homicide of 621 BC. First we have a *dikazein* by the kings, most probably the *archon basileus* (magistrate) and the leaders of the four *phylai* (clans/tribes), then a *diagignoskein* (resolution) by the fifty-one *ephetai* (court). Wolff assumed that the kings announced the verdict given by the fifty-one *ephetai*; *dikazein* for him was 'the final and authoritative admission of the execution'. Recently (Thür 1987) I have shown that nowhere in ancient Greece did a magistrate announce a verdict given by a jury. I am suspicious also of the assumption that direct control prevails over self-help here. Rather this text fits with those already discussed. Additionally in the fifth and fourth centuries BC in homicide suits each party had to take a solemn oath, called *diomosia* (oath), which was sworn in a preliminary procedure before the *archon basileus*. The name given to this procedure, *prodikasia* (preliminary hearing), reflects *dikazein*. In the main hearing the fifty-one *ephetai* had to decide which of the two oaths was the better. Going back to Drakon, we can assume that in his time also the magistrates imposed the *diomosia* on both litigants—*dikazein*—and afterwards the *ephetai* gave the final decision. There are a few hints that, homicide cases apart, *dikazein*, imposing double oaths by an *archon* (magistrate), and *diagignoskein*, the final decision by a jury, were the most common way of settling legal disputes in archaic Athens (Demosthenes 23. 28; *Lex. Seq.* (Bekker 1965) 242. 19–22, both purporting to date from the time of Solon).

The notion of giving the final decision to a jury of fifty-one citizens, after imposing a double preliminary oath, almost perfectly remedied the abuses complained of by Hesiod. As each party had to swear, neither of the oaths can have been decisive, so no magistrate could favour a single party and perjury does not automatically result in a wrongful judgement. On the other hand an upstanding person would have avoided lawsuits as far as possible so as not to incur the risk of perjury. Again, legal procedure was the last resort. We have seen that the double oaths date from the time before Drakon, so this procedure was not originally connected with democracy. But it led directly to the popular courts of democratic Athens.

Double oaths on the one hand and codification of the law on the other were the first steps taken to break down the divine power of the leaders in the early *poleis*. I do not see an evolution from anarchy to the early Greek state. A more realistic picture is a transition from a sacral to a more secular government. It is amazing to observe how the institutions of legal procedure remained in principle unchanged during this period.⁵

⁵ I am grateful to the participants of the seminar I addressed in London for discussion and comments, and especially to the editors of this volume, my colleagues Lin Foxhall and Andrew Lewis, for assistance in the preparation of the final version of this paper.

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