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The Myth of the Priority of Procedure over Substance in the Light of Early Greek Epos*

SUMMARY: 1. Introduction: is the chronological and logical priority of procedure over substance just a myth? – 2. Supporting the priority of procedure over substance: divine and human judgments, dispute-settlements by arbitral awards, justice as a process. – 3. Some preliminary general criticisms. – 4. The killer, the dead and the divine thief: δίκη and legal procedure. – 5. Δίκη beyond the trial: litigious scenarios and non-contentious contexts – 6. ‘Stating the straightest δίκη’; ‘selecting rules for straight δίκαι’; δίκη as a ‘personal sphere’; δίκη as a ‘principle’. – 7. On a recent critical review. – Bibliography.

1. *Introduction: is the chronological and logical priority of procedure over substance just a myth?*

In a remarkable – albeit not fully convincing – monograph about the role played by substantive law and, above all, legal procedure¹ in ancient and mod-

* This essay is based on two speeches: the first one – with the title *The concept of δίκη in archaic Greek epos* – was held in Athens on the 6th of September 2012 during the ‘Third International Meeting of Young Historians of Ancient Greek Law’; the second one – as a research seminar on *Legal procedures and substantive positions in the Homeric poems* – was held in Edinburgh, at the School of History, Classics and Archaeology, on the 10th of December 2013.

¹ On this divide, see, paradigmatically, KERLEY, HAMES, SUKYS, 2011, p. 6 f.: «a substantive law is one that creates, defines, or explains what our rights are. An example of a substantive civil law is the federal law making it unlawful for an employer to discriminate against any individual because of a person’s race, color, religion, sex, or national origin. The law also provides that if an employer is found to have engaged in such activities, that employer is liable to the employee for money damages. This law creates certain rights for employees who have suffered job discrimination. Substantive civil laws include such areas as contracts, real estate and construction, commercial and business transactions, intellectual property, and consumer rights. One of the most common areas of substantive law resulting in litigation is the area of tort law, especially the tort of negligence. This area, often referred to as personal injury litigation, includes lawsuits stemming from automobile accidents, injuries occurring on another’s property, and professional malpractice. Many other areas of tort law also result in litigation: for example, product liability, infliction of emotional distress, and defamation»; «the law of civil litigation is primarily procedural law. Procedural law sets forth the methods we use to enforce our rights. Procedural law answers questions such as these: What court should an action be filed in? What types of documents should be filed? What are the technical requirements for documents filed in court? How must the defendant be notified of the lawsuit? What are the time requirements for the various procedures?». See, moreover, for a more ‘iconic’ description, SALMOND, 1913, p. 438: «substan-

ern literature, the Belgian philosopher François Ost wrote that it is not forbidden to think – and, indeed, legal historians would urge to do so – that the judge was the original key player in the western world’s legal scenario, earlier than the law-maker and far earlier than the administrator². Ost’s idea has the advantage of not being clear-cut: in fact, ‘it is not forbidden’ does not mean ‘it is necessary’; it means instead ‘it is possible’. My aim in this work is to analyze the grounds of this possibility. My question is: can we agree that law, in the objective sense and also with regard to ancient Greece, was born as judge-made law, that is to say law made during a trial as a resolution of a specific and concrete case, which then settles into a general and abstract principle, only through the stratification of repeated judgments (judicial praxis) or through the *stare decisis* principle (binding precedent)? Is it correct to think that, also in ancient Greece, the idea of ‘action’ logically and chronologically precedes the idea of ‘substantive subjective position’ (first of all rights and duties), thus justifying – in terms of historical continuity – the alleged predominance of the procedural perspective in the Athenian legal and logographic settings? If the historian – according to Bloch – is like an ogre, who can smell fresh meat, the legal historian – I add – knows the instruments to dispose of the rotten meat he is delivered. And this issue has a smell that the legal historian cannot underestimate.

Usually the answer to such questions is yes, give or take a few provisos, and this approach supports the theory of the judicial origins of law and that of the priority of action. From the point of view of a macro-comparison between ancient legal systems, this also reduces the gap between the Greek legal experience and Roman law, at least according to the latter’s traditional understanding³. On the contrary, in accordance with the basic scepticism evidenced by Raphael Sealey, indeed, «law in its most comprehensive scope can be regarded in each of two ways. On the one hand it is a system of rights, and actions are the ‘instruments’ devised to uphold them. On the other, it is a system

tive law is concerned with the ends which the administration of justice seeks; procedural law deals with the means and instruments by which those ends are to be attained. The latter regulates the conduct and relations of courts and litigants in respect of the litigation itself; the former determines their conduct and relations in respect of the matters litigated. Procedural law is concerned with affairs inside the courts of justice; substantive law with matters in the world outside».

² OST, 2004.

³ Such an understanding can be considered as obsolete: indeed many scholars had interpreted the *prudentes*’ legal thought by applying to it current categories, that is categories which are often insufficient to appreciate the primeval monism that merged together substance and procedure in a single concept: *actio*. Thence, it seems to me better to assume that «der oft wiederholte Satz ‘Die Klassiker behandeln des Privatrecht von Standpunk des Prozesses ist ungenau’», since Roman legal science is not «prozeßrechtlich orientiert, sondern aktionenrechtlich» (SCHULZ, 1934, p. 28 f.): on this topic, see PELLOSO, 2011, with further bibliography, analysis of the Roman sources, and wider and further argumentation.

of actions, and when an action is made available, it generates a right. On the whole, the former view is modern and the other is Roman. Yet the difference is only one of emphasis. The question of the relative priority of procedural and substantive law is ultimately a chicken-and-egg question⁴. These words describe the issue of the relationship between substantive law and procedural law, where substance and procedure are considered as two interchangeable perspectives for the analysis of a legal system. On the one hand, while dismissing the problem of the historical and logical priority of action over subjective legal situations, the scholar declines to take a stance on the features of the most ancient Hellenic legal experience, as reconstructed on the basis of Homer's poems: in his opinion, while it is true that Homer recognises «*δίκη* in a procedural sense», it is equally true that «*δίκη* in the Homeric poems can have a substantive sense»⁵. On the other hand, he postulates the conceptual homogeneity between the perspective view that identifies 'objective law' in 'forms of actions' and the determination of 'objective law' through its substantive contents: thus, the categories of 'action' and of 'substantive right' become purely formal issues of point of view and methodology; they just seem to be provisional diatheses of legal problems and of relevant solutions, justified only in terms of contingent preferences, not the sign of fundamentally different *formae mentis*.

While Sealey adopts a banalizing attitude with regard to the categories at the basis of legal thought (and for this reason his argument is less than convincing), many other scholars have maintained a less cautious approach,

⁴ SEALEY, 1994, p. 138 f. (see GAGARIN, 1994, p. 276 ff., on Sealey's ambiguous use of 'justice' instead of 'law in action'). Such an approach resembles Talamanca's one with regard to the Roman system: the scholar, once remarked the common opinion that «nella prospettiva dei Romani prevalessse una visione processuale dell'ordinamento, onde la concessione dell'azione sarebbe il *prius* rispetto alla configurazione della situazione giuridica sostanziale protetta; mentre nella visione moderna ispirata al diritto sostanziale, avverrebbe proprio il contrario», maintains that «in effetti, non v'è una differenza essenziale: l'individuazione di una situazione giuridica sostanziale comporta sempre, per l'indefettibile coercibilità del diritto, l'esistenza di una protezione giudiziaria di tale situazione; e quando s'identifica un mezzo di tutela processuale, contemporaneamente si è individuata la situazione sostanziale in base alla quale esso può venire esperito», so that «la concettualizzazione può assumere ... come prioritario l'uno o l'altro aspetto, ma essi sono inscindibili» (TALAMANCA, 1989, p. 151 f.; for some arguments against this conception, see PELLOSO, 2011). On the contrary, it is true that «if laws were concerned mainly with procedure, then the aim of the legal system was simply to resolve disputes among individuals», while, «if laws provided clear and numerous substantive norms, that is, orders setting out rights and duties, our view of the legal system changes radically. Laws no longer restrict their aim to providing rules for procedure in court, but extend their sphere to all aspects of life in the community. They prescribe the duties of citizens and officials, provide regulations about economic life, establish rules about marriage and inheritance, restrict or outlaw the use of violence, and contain orders about religious rites and festivals» (HARRIS, 2009-2010, p. 8 f.).

⁵ SEALEY, 1994, p. 138 f.

mainly arguing about Athenian law, with regard to the first issue (which Sealey left virtually unresolved); instead, with regard to the second issue, even accepting the conceptual antithesis between the procedural and the substantive approach, their solutions are, at best, rough. For instance, Todd and Millett supported «a chronological and logical priority for procedural law»⁶, while Todd alone manifested a total disregard for the characteristics of the Roman legal experience and stated that «the priority of procedure over substance is characteristic of those societies in which theory remains latent» and that «where there are no jurists, law is formulated only to fit situations, and the primary concern is to enable a case to be heard, rather than to promote the autonomous development of legal doctrines», concluding in favour of «the procedural orientation of Athenian Law»⁷.

It is true that these two aspects can be interpreted, more or less explicitly, in the light of historical continuity and therefore can be included in a cause-effect relationship: the chronological antecedent and the logical foundation (which, until the recent critique by Harris, had been considered an incontrovertible fact for the Athenian system)⁸ should be found in the Homeric ‘beginnings’ of the Greek legal experience. Harris has already convincingly demonstrated that the *communis opinio*, which maintains the (logical) priority and the (statistical) prevalence of procedure, is a myth without any foundation in Athenian sources⁹: very probably the Roman ‘aktionrechtliches Denken’ has been *a priori*, if not intentionally, extended to the Greek world, and the Greek ‘otherness’ has been taken too lightly compared to the present legal culture and the past ones. This paper, therefore, is not aimed at expressing an opinion on the substance of the traditional interpretations based on the analysis of the logographic and epigraphic sources of the Classical era. It starts from the Homeric verses, where the primal concept of δίκη emerges, convinced that this very concept can help us retrospectively understand the issue of law for the Greeks¹⁰; this work shall test the thesis that, in the Greek legal experience as a whole, the most ancient law is created only within a trial, as well as the thesis – which originates by virtue and as a consequence of the first, prejudicial conviction – that denies that the organisation of (objective) law that occurred in later historical eras, which are however connected with the origins, be «according to content»¹¹.

⁶ TODD, MILLETT, 1990, p. 5.

⁷ TODD, 1993, p. 65; see, moreover, TODD, 2000; 2005, p. 98; cf. HANSEN, 1975, p. 10, 14, 21; 1991, p. 165; COHEN, 1995, p. 152, 190; CAREY, 1996, p. 41; FOXHALL, LEWIS, 1996, p. 3.

⁸ HARRIS, 2009-2010.

⁹ See the great amount of passages in the logographic speeches quoted in HARRIS, 2009-2010, p. 41 f.

¹⁰ See, for a similar approach, BISCARDI, 1982, p. 351.

¹¹ HANSEN, 1991, p. 165.

2. *Supporting the priority of procedure over substance: divine and human judgments, dispute-settlements by arbitral awards, justice as a process.*

Regardless of the approach adopted to tackle the issue (anthropological, sociological, etymological, historical-legal), the judicial theory of the law's beginnings and the chronological priority of procedure over substance is not a recent one. Indeed, the following alternative statements seem to be true in a general sense: 1) on the one hand, one can consider law as a relatively compact system, that differentiates between the recipients of the rules (for instance: the members of a family group; the members of the community at large), or between the sources of the rules (for instance: the king's will expressed in a general and abstract way or formulated for a single case; the customs; the popular resolutions and decrees), not considering its actually historical origins; 2) on the other hand, one can assume that the instruments for dispute-settlement, or even the judgments themselves, are the origin of a system that then, step by step, settles on customs.

Even since the XIX century, Henry Sumner Maine, departing from Savigny's interpretation (that dissolved law into 'Volksggeist') and from Austin (that reduced it to the imperative command of the Sovereign), as well as attempting to reconcile 'conjectural history', 'generalizing method', 'biological organicism' and 'diffusionism' within a not always consistent whole, thought that 'legal judgments' were the logical and historical *prius* of primitive law. Maine erroneously referred to the θέμιστες which, when mentioned in Homer (at least in terms of pure ideology), never seem to be human sources of law, or human judgments on particular cases¹². As witnessed in two passages from

¹² «When a king decided a dispute by a sentence, the judgment was assumed to be the result of direct inspiration. The divine agent, suggesting judicial awards to kings or to gods, the greatest of kings, was Themis. The peculiarity of the conception is brought out by the use of the plural. Themistes, the plural of Themis, are the awards themselves, divinely dictated to the judge. Kings are spoken of as if they had a store of Themistes ready to hand for use; but it must be distinctly understood that they are not laws, but judgments. Even in the Homeric poems, we can see that these ideas are transient. 'Zeus, or the human king on earth', says Mr. Grote, in his History of Greece, 'is not a lawmaker, but a judge'. He is provided with Themistes, but, consistently with the belief in their emanation from above, they cannot be supposed to be connected by any thread of principle; they are separate, isolated judgments. Parities of circumstance were probably commoner in the simple mechanism of ancient society than they are now, and in the succession of similar cases awards are likely to follow and resemble each other. Here we have the germ or rudiment of a Custom, a conception posterior to that of Themistes or judgments. However strongly we, with our modern associations, may be inclined to lay down a priori that the notion of a Custom must precede that of a judicial sentence, and that a judgment must affirm a Custom or punish its breach, it seems quite certain that the historical order of the ideas is that in which I have placed them. The Homeric word for a custom in the embryo is sometimes 'Themis' in the singular-more often 'Dike', the meaning of which visibly fluctuates between a

Homer¹³, they are ‘theo-genetic’ manifestations (that is to say provisions of divine origins) of a substantive order that, providing the kings with the rules and with the principles applicable to single cases, obviously predates the judicial activity aimed at resolving human disputes (in a context in which, even if the litigation background is apparent, it seems difficult to differentiate clearly, à la Montesquieu, between individual and autonomous powers). As for Homeric ideology, the θέμιστες, in short, are not described in terms of judgments¹⁴ given case by case on the ground of ‘compelling irrational methods of proving’; rather, they are principles and rules (*prius*) revealed upstream by the gods, kept for custody by the kings (perhaps, inside the palace, in a prototype of archive as suggested by the verb ἐρύω or ἔρυμαι), and inspiring as well as rooting the human judgments (*posterius*)¹⁵.

The ‘Wurzelbedeutung’-doctrine (what I would call those interpretations developed between the XIX and XX centuries in Germany) considers ‘trial’ (concluded with a formal and final declaratory judgment whose contents are completely compelled by irrational types evidence) one of the most ancient relics of the general objective order in force: in his famous study on

‘judgment’ and a ‘custom’ or ‘usage’. Nomos, a Law, so great and famous term in the political vocabulary of the later Greek society, does not occur in Homer» (MAINE, 1908, p. 4; see, moreover, WEISS, 1923, p. 21; BONNER, SMITH, 1930, p. 9 ff.; CALHOUN, 1944, p. 9 f.; JONES, 1956, p. 29 ff.). Against this reconstruction (that implies both the oracular nature of the primitive rules and the shift from ‘judgments’ to ‘customs’) see, *amplius*, PELLOSO, 2012, p. 29 ff.

¹³ Hom., *Il.* 2.204-206: οὐκ ἀγαθὸν πολυκοιρανίῃ εἰς κοίρανος ἔστω, / εἷς βασιλεύς, ᾧ δῶκε Κρόνου παῖς ἀγκυλομήτεω / σκῆπτρόν τ’ ἠδὲ θέμιστας, ἵνα σφίσι βουλευῆσι; 9.96-99: Ἀτρεΐδῃ κύδιστε ἄναξ ἀνδρῶν Ἀγάμεμνον / ἐν σοὶ μὲν λήξω, σέο δ’ ἄρξομαι, οὐνεκα πολλῶν / λαῶν ἔσσι ἄναξ καὶ τοι Ζεὺς ἐγγυάλιξε / σκῆπτρόν τ’ ἠδὲ θέμιστας, ἵνα σφίσι βουλευῆσθα (on these verses, see PELLOSO, 2012, p. 78 ff., 83 ff., 159). See, moreover, *Schol.* Hom., *Il.* 2.205 a 1: ᾧ ἔδωκε Κρόνου παῖς· εἰ μὴ γὰρ ἦν, φησί, καλόν, οὐδ’ ἂν οἱ θεοὶ αὐτῷ ἐχρῶντο. δηλοῖ δὲ ὅτι μισητὸν αὐτοῖς τὸ περὶ βασιλείας φιλονεικεῖν καὶ διαφέρεσθαι, ἅμα δὲ καὶ σημαίνει, ὅτι τὸ βασιλεύειν οὐκ ἔστιν ἄλλο ἢ θεόδοτον; 2.205 a 2: ᾧ ἔδωκε Κρόνου παῖς· εἰ μὴ γὰρ ἦν καλόν, οὐδὲ θεοὶ αὐτῷ ἐχρῶντο. ἅμα δὲ σημαίνει ὅτι θεόδοτόν ἐστι τὸ τῆς βασιλείας γέρας; 9.99 a: σκῆπτρόν τ’ ἠδὲ θέμιστας· σκῆπτρον διὰ τὸ κράτος, θέμιστας διὰ τὸ δίκαιον· οὐπω γὰρ εἶχον γραπτοὺς νόμους, ἀλλὰ τὸ πᾶν ἦν ἐν τοῖς κρατοῦσιν; 9.99 b: σκῆπτρόν τ’ ἠδὲ θέμιστας, ἵνα σφίσι βουλευῆσθα· ἵνα τούτοις χράμενος προβουλεύῃς τῶν ὑποτεταγμένων. ὡς τοῦ βασιλέως δὲ καὶ τῶν θεμίστων κρατοῦντος· οὐδέπω γὰρ ἐχρῶντο γραπτοῖς νόμοις.

¹⁴ In this erroneous sense, see, paradigmatically, GAGARIN, 1986, p. 106 nt. 16 and 19; and GAGARIN, 2008, p. 91, p. 20 nt. 14 (where θέμιστες are described in terms of «traditional rules and customs of a community»).

¹⁵ Hom., *Il.* 1.233-239: ἄλλ’ ἔκ τοι ἐρέω καὶ ἐπὶ μέγαν ὄρκον ὁμοῦμαι / ναὶ μὰ τὸδε σκῆπτρον, τὸ μὲν οὐ ποτε φύλλα καὶ ὄζους / φύσει, ἐπεὶ δὴ πρῶτα τομὴν ἐν ὄρεσσι λέλοιπεν, / οὐδ’ ἀναθλήσει· περὶ γὰρ ῥά ἐ χαλκὸς ἔλεψε / φύλλά τε καὶ φλοιόν· νῦν αὐτὲ μιν υἴες Ἀχαιῶν / ἐν παλάμῃς φορέουσι δικασπόλοι, οἳ τε θέμιστας / πρὸς Διὸς εἰρύαται· ὃ δὲ τοι μέγας ἔσσεται ὄρκος.

the main concepts of the primeval Greek legal dictionary (*Themis, dike, und Verwandtes*), Hirzel, while considering θέμις a particular oracular form of management of justice that is expressed through ‘Rathe’ (advices, counsels) whose substance is divinely inspired by the ‘Orakelgöttin’ (personification of the primitive abstract concept «des guten Rathes»)¹⁶, connected the etymology of δίκη to the verb δικάειν and thus to the symbolic regal act of «schlagen» or «ausstrecken» (rather than «werfen») the sceptre while pronouncing the «Richterspruch»¹⁷. On the other hand, Ehrenberg – convinced by Usener’s thesis that denies «die primitive Ursprünglichkeit der Abstrakta» and maintains that «die Vergöttlichung ist die erste Form der Abstraktion» – within the context of the most ancient irrational justice seen as an ordeal («Los und Kampf») according to which «in den Einschränkungen der Selbsthilfe ... die Gottheit wird Schiedsrichter», opines that, if θέμις primarily means ‘oracular binding decree’ (‘Gebot’)¹⁸, δίκη is the act of throwing a discus by the king or priest who «als Werfer im Gottesurteil wird er auch zum Richter», and who, according to the will of the gods, may or may not reach his target, so that the δίκη-throw takes on, by metonymy, the meaning of «Entscheidung vor dem Vertreter der Gottheit, dem Zauberer, Priester, König»¹⁹. According to this interpretation (in which δίκη is taken as a neuter term, or rather as a *vox media*), the references in Homer and Hesiod where δίκη is qualified as σκολιά or ἰθεῖα²⁰ should be read as a metaphoric description of the ‘throw’,

¹⁶ HIRZEL, 1907, p. 2 ff., 19 ff.; *contra* see GROTE, 1849, p. 111 f. and nt. 1.

¹⁷ «Nach den drei Bedeutungen von δικάειν, die hier in Frage kommen, kann daher δίκη entweder den Wurf oder den Schlag im engeren Sinn oder auch ein bloßes Ausstrecken des Stabes bedeuten. Immer es eine in das Auge fallende Handlung, in der sich die richterliche Entscheidung darstellte und die durch ihre sich einprägende Eigentümlichkeit es verhindert haben mag, dass nicht ebenso, wie κρίσις iudicium und unser Urtheil, auch die δίκη auf andere als richterliche Erkenntnisse und Aussprüche übertragen wurde» (HIRZEL, 1907, p. 94 f.; cf. 57 ff., 60 ff., 104 ff.).

¹⁸ See EHRENBURG, 1921, p. 1 ff., 42 f., 48 f.

¹⁹ EHRENBURG, 1921, p. 70 ff. (substantially according to Hirzel). The scholar, against «die übliche Ansicht» which interprets δίκη as «Weisung des Richters an die Parteien», assumes that, since δικάειν means «ausschließlich werfen» (EHRENBURG, 1921, p. 70 f. nt. 4), δίκη is a «Wurf durch den der Streit beendet wird», that «kann gerade und krumm sein», and that «kann auf einen bestimmten Punkt zugehen»: in Ehrenberg’s opinion, indeed, «gegen diese Etymologie spricht die Tatsache, daß δέικνυμι niemals in Beziehung zur richterlichen Tatsache verwendet wird, spricht vor allem, da unsere ältesten Belege mit der ‘Weisung’ nicht in Einklang zu bringen sind; weder liegt in ihr das den Streit Beendende noch Zuteilende; auch scheint ‘Weisung’ ähnlich dem Spruch der θέμις, durchaus nur dem Willen und der Überlegung des Richters zu entspringen, während die Iliasstellen darauf hindeuteten, daß das Geben der δίκη nicht vom Ermessen des Richtenden abhängt» (see, moreover, in a very similar fashion, WOLF, 1950, p. 85 ff.).

²⁰ See, on the one hand, Hesiod., *Op.* 219, 221, 250, 262, and, on the other hand, Hom., *Il.* 18.508, 23.580; *Hymn.* 2.149-152; Hesiod., *Theog.* 81-87; *Op.* 36, 225 f.

targeted or not, of the δίκη-judgment by the judge, similarly to the throw of a ‘stick-sceptre’, a ‘discus’ or an ‘arrow’, given that the adjective ἰθύς and the verb ἰθύνω suggest the movement of a dart in a straight line: however, this single-minded view urges us to translate δίκη with ‘judgment’²¹ and is based on a rushed etymological reconstruction, unanimously rejected by the best linguists (even if, as regards such an issue, a very *communis opinio* has not been reached yet)²².

Some scholars, indeed, maintain that the noun δίκη and the verb δείκνυμι share the same root²³: for example, developing an hypothesis already put forward by Gustave Glotz, Emile Benveniste conjectured that the original meaning of δίκη is ‘human objective order’, that is to say ‘authoritative verbal indication of what must be’, while the secondary sense is ‘legal formula preserved and implemented by a judge’²⁴. Thus, if θέμις is considered a system of rules that are *de facto* a ‘common law’, emerged within the most ancient family groups, for which either the ‘divine origins’ are underlined or the ‘targets of the rules’, aimed at regulating the clans, are underscored, δίκη is a ‘potentially political’ human order²⁵. From the primary semantic connotation of ‘direction’ and ‘indication’ (mainly in the form of a judgment), the sign, through the connotation in terms of ‘judicial formula’ that establishes the fate, shifted to a concept of ‘custom’, ‘usage’, ‘way of life’, as well as to that of ‘justice’. This

²¹ See, *amplius*, PELLOSO, 2012, p. 103 ff.

²² See GONDA, 1929, p. 224 ff.; LOENEN, 1948, p. 222 ff.; PALMER, 1950, p. 157 ff., 160; FRISK, 1960, sv. δίκη; CHANTRAINE, 1977, sv. δίκη; BENVENISTE, 1974, p. 107 ff. Cf., moreover, PAZDERNIK, 1976, p. 72, who – also in the light of Hom., *Il.* 18.508 and 23.574 – reminds, as regards the root *dik, «noch die weitere Bedeutung wägen», and for the noun δίκη the following semantic connotations: ‘Sitte’, ‘Naturgesetz’, *iustum, ius, iustitia*, ‘Rechtsentscheidung».

²³ See, among the others, GONDA, 1929, p. 224 ff.; LOENEN, 1948, p. 222 ff.; LATTE, 1968; LLOYD-JONES, 1971, p. 166 nt. 23; BEHREND, 1979; SCHMIDT, 1991, c. 30; JANIK, 2000, p. 9 nt. 19; GSCHNITZER, 1997, p. 6 f.; 2; PENTA, 2000, p. 677; Ostwald’s reconstruction is peculiarly *sui generis*: «*dike*, whose etymology links it to a stem meaning ‘show’, ‘point in a given direction’, usually describes the place assigned to individuals within human society: it seems originally to designate claims or rights which define the place a person occupies within a community, often with the connotation that this place is actually or potentially assigned by the verdict of a judge» (OSTWALD, 1973, p. 674). In Chantraine’s opinion, to be honest, the lemma δίκη, even if connected to δείκνυμι, at the beginning would stand for «direction»; then it would have shifted to «règle, usage», «justice», and finally to «jugement développé dans un vocabulaire technique» (CHANTRAINE, 1977, sv. δίκη).

²⁴ GLOTZ, 1904, p. 239; 1924, p. 118; BENVENISTE, 1974, p. 107 ff.; *contra*, see FRISCH, 1976, p. 38 ff., 45 f.; RUDHARDT, 1999, p. 104 ff.; PELLOSO, 2012, p. 139 ff.

²⁵ See GLOTZ, 1924, p. 118; JONES, 1956, p. 32; IMBERT, 1962, p. 17 and nt. 6; DELORME, 1964, p. 36 f.; DE ROMILLY, 1971=2005, p. 17; BENVENISTE, 1974, p. 107 ff.; LO SCHIAVO, 1994, p. 13, 31 ff., 35; GRIFFIN, 1995, p. 91; FASSÒ, 2001, p. 12; see, moreover, GIOFFREDI, 1962, p. 69 ff.; LLOYD-JONES, 1971, p. 166 nt. 23; KÖSTLER, 1979, p. 13.

reconstruction, in my opinion, may be considered too abstract and fanciful. From a general perspective, it is not grounded on a cogent historical analysis; from a particular perspective, nature, borders, and aims of the sphere of δίκη seem to be found out only *a contrariis*, that is by beginning from the pre-determined area of θέμις. First of all, it is not true that archaic sources limit the latter system exclusively to endo-family relationships (just think of the importance of θέμις in public assemblies and counsels)²⁶ and, while it may be true that epos stresses (also, but not only) the ‘divine nature’ of such a system, it is not equally true that the former is characterised as being a ‘human judicial order’ that turns into customary law regulating inter-familial relationships: as we will see later, the concept of δίκη, for the most part of its heterogeneous and multi-faceted uses, does not seem to be concerned with an ‘(objective) law’ whose source might be considered either the judgment, or the custom, but it rather copes with ‘(subjective) personal positions recognized by a prior positive order’.

As for Gagarin, his reconstruction must be considered together with his wider general theory of ancient Greek law. Indeed, he starts from the well-known dichotomy (more conceptual than chronological) of pre-law and law, postulated by Gernet, and develops, from an analytical perspective, quite a complex reconstruction. Gernet, as it is well known, is not only convinced that «un *minimum* d’Etat» is necessary for any legal system; he also maintains that only the existence of a ‘judicial system’, albeit a rudimentary one, proves that the boundary of pre-law has been passed: indeed, also and above all for the Greek world, he says, law exists only if the jurisdictional process exists, going so far as to maintain that the most ancient form of law was not the ‘legislative command’, but, rather, the ‘judgment’²⁷. Gagarin, instead, drawing on Hart’s positive theory²⁸, believes that Law is only the set of rules recognised as such, usually by being written down, and assumes for the Greek world the development of the pre-legal phase into the fully legal one through the proto-

²⁶ See Hom., *Il.* 9.29-33: “Ως ἔφαθ’, οἱ δ’ ἄρα πάντες ἀκὴν ἐγένοντο σιωπῆ. / δὴν δ’ ἄνεω ἦσαν τετιηότες υἷες Ἀχαιῶν / ὄψε δὲ δὴ μετέειπε βοῆν ἀγαθὸς Διομήδης: / Ἀτρεΐδῃ σοὶ πρῶτα μαχήσομαι ἀφραδέοντι, / ἢ θέμις ἐστὶν ἀναξ ἀγορῆ· σὺ δὲ μὴ τι χολωθῆς; 24.649-652: τὸν δ’ ἐπικερτομέων προσέφη πόδας ὠκύς Ἀχιλλεύς: / ἔκτοδς μὲν δὴ λέξο γέρον φίλε, μὴ τις Ἀχαιῶν / ἐνθάδ’ ἐπέλθῃσιν βουληφόρος, οἳ τέ μοι αἰεὶ / βουλάς βουλευούσι παρήμενοι, ἢ θέμις ἐστὶ. See, moreover, Hom., *Il.* 15.95, 20.4 ff.; *Od.* 2.69.

²⁷ GERNET, 1968, p. 175 ff.: the ‘*prédroit*’ is «un état où les relations que nous nommons juridiques seraient conçues suivant un autre mode de pensée que le droit proprement dit», while the ‘*droit*’ is «une technique autonome» implying «un *minimum* d’État», so that it is natural to suppose that the first ‘judicial’ meaning of δίκη is ‘judgement’ (GERNET, 1955, p. 2, 18, 69 f.).

²⁸ HART, 1961, 89 ff., basically distinguishes between ‘primary rules’ (which impose obligations) and ‘secondary rules’ (which are concerned with the creation proceedings and with the operation of the primary rules, above all in legal procedure).

legal phase²⁹. The first phase (pre-Homeric) is supposedly characterised by the absence of primary rules and secondary rules, while the second one (Homeric) by the existence of public and formal procedures and by the absence of a coherent, non-contradictory system of substantive rules (as supposedly demonstrated by the contradiction between the rule invoked by Agamemnon to support his taking of Briseis and the one invoked by Achilles to support the irrevocable nature of the joint resolution for the division of the booty and, so, the loss caused to himself by Agamemnon)³⁰.

This rough – even if fascinating – development does not seem to me to be fully convincing: just think of the fact that the dispute between Achilles and Agamemnon over Briseis is not a symptom of a conflict between (primary) rules with the same level of importance and belonging to the same substantive inconsistent system; in this case, there is only a violation of the rules for the division of the booty on the part of the Mycenaean king which, at the same time, injures the personal position of Achilles³¹; moreover, the poems attest rules, albeit loose ones, for the calling and holding of assemblies, as well as for their ‘provinces’ and ‘powers’³², and rules that envisage – with no

²⁹ All in all, GAGARIN, 1986, p. 8 f., suggests a three-stage model for the development of law in society: «the first, which I shall call the ‘pre-legal’ stage ... is where the society has no recognized (*i.e.*, formal and public) procedures for peacefully settling disputes among its members. I assume that every human society has some means of settling disputes or it could not remain together as a society, but it is possible that in a small group these may be only informal. Many preliterate societies, however, have recognizable procedures for settling disputes that meet the criteria I have set forth, and I shall designate this second stage of development, in which a society has legal procedures but no recognized legal rules (in Hart’s sense), as ‘proto-legal’. The third, fully ‘legal’ stage of development is where a society has recognized legal rules, as well as procedures, a step that almost always requires the knowledge of writing. I would certainly not insist on the universal validity of this or any other model. I claim only that it is a possible model for development, and I believe it will provide a useful framework for examining the emergence of law in early Greece» (see, also, GAGARIN, 1986, p. 2 f., 136, 144; GAGARIN, 1973, p. 81 ff.). From a purely logical perspective, Gagarin’s reasoning is not a persuasive one, given the patent inconsistency between his main premises and the conclusions that he reaches: if, in the Homeric poetry, voluntary ‘arbitration’ is supposed to be the only method of dispute settlement and if ‘primary rules’ do not coexist in a coherent and harmonious system, which is the rationality of the following outcomes: «despite the various ambiguities in the settlement of disputes in Homer, however, two very general principles seem to be universally upheld, however loose and unpredictable their application in a specific case: the adherence to, or restoration of, norms of proper behavior, and compensation for damages, whether by restitution, or retribution, or both» (GAGARIN, 1986, p. 100)?

³⁰ See, on these issues, the persuasive remarks pointed out by CANTARELLA, 1987, p. 158 ff.

³¹ See Hom., *Il.* 19.180 and 9.605, on which, see WILSON, 2002, p. 102.

³² A) Hom., *Il.* 2.48 ff., 9.9 ff.; *Od.* 2.6 ff., 8.7 ff.; B) *Il.* 18.246 ff., 19.50; *Od.* 2.1 ff., 3.173 ff., 8.1 ff., 9.170 ff., 10.178 ff.; C) *Il.* 9.33; D) *Il.* 1.118 ff., 1.135 ff., 1.161 ff., 9.330 ff., 11.704 ff., 12.310 ff., 16.53 ff., 18.444; *Od.* 7.150; *Il.* 7.489 ff., 1.11 ff., 3.94 ff., 3.209 ff., 7.345 ff.,

inconsistency – negative consequences for any violation of the ‘heroic code’ (either *ipso iure* in terms of authorized revenge, or *iure contractus* in terms of ‘Wergeld’, that is compensatory and punitive damages whose amount is agreed through a process of compromise reached by the injured party and the offender)³³. Indeed, even overlooking its evolutionist model (whose aporias are often filled with anthropological comparisons) and its unfounded optimism that finds eternal regularities and continuity in history, this thesis is to be rejected, in my opinion, for several other reasons. As shall be demonstrated, it is indeed contradicted by Homer: the evidence from the age of heroes on δίκαι, as well as on θέμιστες, does not speak in favour of the historical and logical priority of ‘procedural law’ over ‘substantive law’³⁴. Gagarin inappropriately flattens out the cultural, topographical, and chronological pluralism described in the poems, creating a ‘meta-historical’ *unicum*, peremptorily defined in terms of ‘proto-law’³⁵. Secondary rules are simplistically reduced to the ‘procedural’ ones (while, for instance, one should even consider, at this level, ‘attribution’ and ‘definition’ rules); traditional, non-written law seems to be not even taken into account and, at the same time, the role played by writing is overrated (since he mistakenly jumbles up the varying forms of law and its characteristic contents). In practice, the phenomenon of law is, in a very naïf way, exclusively confined to the ‘imperative order’³⁶, at the same time postulating (without any inside diachronic analysis) that in Homeric times, in the absence of consistent primary rules, the only process described is arbitration³⁷. Thus, neither Gernet’s well-known dichotomic version of the roots of

7.381 ff., 19.173, 19.229, 18.497 ff.; *Od.* 2.291, 4.630 ff., 8.36, 8.109 f., 8.258 f.; *Il.* 1.54 ff., 11.165; *Od.* 2.30 ff., 3.82, 4.314; *Il.* 7.345 ff., 9.1 ff., 1.118 ff., 1.184 ff.

³³ See, paradigmatically, Hom., *Il.* 5.265 ff.; 11.696 ff.; 13.410 ff.; 13.445 ff.; 13.656 ff.; 14.496 ff.; 14.478 ff.; 15.113 ff., 16.394 ff.; 17.34 ff.; 18.497 ff.; 21.26 ff.

³⁴ See PELLOSO, 2012, p. 76 ff., 102 ff.

³⁵ See CANTARELLA, 2001, p. 4 ff.

³⁶ See, against this conception, PATTARO, 2005, p. 9 ff.

³⁷ GAGARIN, 1986, p. 100: «the early Greeks probably did not distinguish sharply between a just procedure and a just final settlement. The word *dike* can designate either the procedure, or the settlement, or both. In the system for settling disputes that prevailed in early Greece, in which disputes were voluntarily submitted for settlement, a just settlement (that is, a settlement acceptable to both sides) would be the normal result of a just procedure». Actually, the topic is still *sub iudice*: see, on the one hand, WOLFF, 1946, p. 131 ff.; GERNET, 1955, p. 61 ff.; BISCARDI, 1982, p. 357 and nt. 34-37; CANTARELLA, 2002, p. 147 ff.; (for the theory postulating that legal procedure derives from self-help); *contra*, on the other hand, see STEINWENTER, 1925, p. 29 ff.; CALHOUN, 1944, p. 7 ff. (for the ‘arbitration theory’). Anyway, nobody can deny that the process described in Achilles’ shield (Hom., *Il.* 18.497 ff.) – whether one interprets it as a full legal procedure, or as an example of arbitration – is far from sharing cultural background and age, methods of deciding, nature, structure with the judicial processes elsewhere depicted or just implied in the Homeric poems: see, for instance, Hom., *Od.* 11.568-571 (ἐνθ’ ἦ τοι Μίνωα ἴδον, Διὸς ἀγλαὸν υἴον, / χρῶσειον σκῆπτρον ἔχοντα θεμιστεύοντα νέκυσι, / ἤμενον· οἱ

the Greek legal experience, nor Gagarin's more articulated tripartite schema, that invents the figure of the 'proto-legal' world, are fully convincing. This also because, with regard to the general theory of law, the flashiest datum of juridical phenomenology, that is procedure, is elevated to the ontological *quid* of the latter, and any non 'authoritative' form of law, *in primis*, the lively and warm 'Volksgeist'³⁸, *i.e.* the 'legal conscience of the people' (ideologically conceived in terms of tradition, rather than custom)³⁹ is mercilessly uprooted. Not every law, indeed, commands or forbids a human behaviour. Indeed laws can also authorise (*i.e.* 'they do not forbid') the autonomous carrying out of a particular behaviour (for instance, the hero, holding the sceptre in his hand, can contradict the king himself during the council of warriors)⁴⁰ or they can leave the subject free (*i.e.* 'they do not oblige him or her') to do or not to do something (for instance, an offended party can accept the *ποιινή* offered by the offender, or revenge)⁴¹. The primeval source of law must not be found in procedure alone, even in the absence of a law-maker: indeed, if Gernet and Gagarin were right, tradition (rather than custom, at least from an ideological point of view) would have had no part in the birth and development of the Greek legal experience and it would not be possible to explain institutions, already existing in Homer, that no one would hesitate to classify as legal, such as: the following rules: if not that one mandating the purification of the priest before a funeral, that of the pre-nuptial donations of the *μνηστέρες*, that of mourning by the wife, that of the payment of *ἄποινα* as a ransom for the liberation of a captive, that of the exchange of gifts between *ξεῖνοι*, those ones concerned with the stages of the legal process; moreover, it would not be possible to explain the binding force already conferred to private agreements.

Given this historical and theoretical framework of reference, Gagarin's thesis can be easily summarised: «*dike* and its derivatives have a broad set of applications and can refer either to the legal process and its proper functioning or

δέ μιν ἄμφι δίκας εἴροντο ἄνακτα, / ἤμενοι ἑσταότες τε, κατ' εὐρυπυλῆς Ἰδίοιο δῶ); *Il.* 1.237-239 (νῦν αὐτὲ μιν υἱῆς Ἀχαιῶν / ἐν παλάμῃ φορέουσι δικασπόλοι, οἳ τε θέμιστας / πρὸς Διὸς εἰρύραται); *Od.* 11.185-186 (Τηλέμαχος τεμένεα νέμεται καὶ δαῖτας ἔϊσας / δαίνυνται, ἃς ἐπέοικε δικασπόλον ἄνδρ' ἀλεγύνειν); 12.439-441 (ἦμος δ' ἐπὶ δόρπον ἀνήρ / ἀγορήθεν ἀνέστη / κρίνων νεῖκεα πολλὰ δικαζομένων αἰζηῶν, / τῆμος δὴ τά γε δοῦρα / Χαφύβδιος ἔξεφαάνθη). Thence, assuming in a general and undifferentiated way both that arbitration is the only type of proceeding for the settlement of disputes which emerges from the Homeric verses, and that compulsive legal procedure is totally unknown is, to say the least, a trivializing and superficial reconstruction.

³⁸ See VON SAVIGNY, 1840 a, p. 14 ff., 22, 35; 1840 b, p. 8 ff.

³⁹ See, on the difference existing between 'custom' and 'tradition', the important remarks pointed out by TALAMANCA, 2008.

⁴⁰ *Hom.*, *Il.* 9.29-33.

⁴¹ See CANTARELLA, 2002, p. 147 ff.

to social norms and proper behavior»⁴². In a more precise manner, this scholar (rightly) rejects the temptation to extrapolate *a priori* an original semantic unity from some sound positions by Palmer⁴³ and (erroneously) chooses to give precedence to the procedural dimension of δίκη, even at the cost of forcing the literal data of the sources. Indeed, Gagarin identifies two different meanings for the root *deik: on the one hand, «sign, mark, characteristic», from which the meaning of «characteristic, traditional, proper behaviour» derived, even though it is «confined to the Odyssey»⁴⁴; on the other hand, «boundary, dividing line, in particular the dividing boundary between two property claims, the line being either ‘straight’ or ‘crooked’»⁴⁵, which is connected to the secondary sense of «settlement or decision between two contestants, that is placing a ‘boundary line’ (straight or crooked) between them»⁴⁶, or of «ruling or settlement which might be made (or merely proposed) between two parties in any dispute»⁴⁷. This primitive structure is the basis from which a complex and further semantic sphere (‘rules’ and ‘behaviours’ concerning ‘traditional rights’) started evolving until, as Hesiod attests, the sense of «litigation process, legal system, law, rule of law» became common⁴⁸. To sum up, Gagarin believes that δίκη can be reduced to two «separate areas of meaning, characteristic and settlement» and, at the same time, that it is «an insignificant word in Homer»⁴⁹. Similarly, Havelock – by proceeding often through generic and allusive statements – reduces δίκη and δίκαι to procedures adopted, with a certain flexibility, in specific occasions that required a ‘direction’, as well as the ability to quote the appropriate precepts from memory: in Havelock’s view, justice

⁴² GAGARIN, 1986, p. 100 nt. 5.

⁴³ As regards Palmer’s opinion, once remarked that δίκη «is a derivative from the root *deik», as well as «there is little doubt about the basic meaning of this root *deik, which is exemplified in the verb ‘I show, point out’», this scholar underlines that «Greek shows no trace of the development ‘to say’, and so δίκη cannot mean ‘pronouncement’ of the judge» since «Greek is faithful to the primary significance of the root ‘mark, indicate’», and that «the idioms used in many passages in early Greek literature from Homer onwards» seem to suggest mainly the meaning «boundary or limit», *i.e.* a sign doomed to shift «to the sense ‘allotted portion, rightful portion, lot, fate’» (PALMER, 1950, p. 157 ff., 160; BISCARDI, 1982, p. 354; PELLOSO, 2012, p. 108 ff., 144).

⁴⁴ GAGARIN, 1973, p. 82 f. (Hom., *Od.* 4.691, 11.218, 14.59, 18.275, 19.43, 19.168, 24.255). See, also, OSTWALD, 1973, p. 677, who underlines the meaning «essential characteristic of a group on the basis of which a certain kind of conduct can be expected from the individual members belonging to that group».

⁴⁵ GAGARIN, 1973, p. 83.

⁴⁶ GAGARIN, 1973, p. 82.

⁴⁷ GAGARIN, 1973, p. 83, 84 ff. (Hom., *Il.* 16.542, 16.386-388, 18.508, 19.180, 23.542; *Od.* 3.244, 9.215, 11.570, 14.83 f.).

⁴⁸ GAGARIN, 1973, p. 87 (Hesiod., *Op.* 9, 192, 213, 217, 220, 249, 256, 269, 275, 278, 279, 283).

⁴⁹ GAGARIN, 1973, p. 87.

in early Greece was just «a procedure»⁵⁰, so that no Greek at that time would have thought to ask such a fundamental question: «what is justice?»⁵¹. In particular, besides making the *θέμιστες* signify ‘legal precepts’, ‘oral maxims’, he concludes that justice in the *Iliad* is not a principle or a set of principles: *δίκη* is ‘justice’ (that is the ‘formal *iter*’, the ‘procedural model’ that the parties have to follow through rhetoric negotiation) applied to a specific case (whether in a friendly transaction or in a dispute), while the *δίκαι* turn out to be public procedures, verbal decisions or transactions; in the *Odyssey*, the noun *δίκη* is used for general procedures and behaviours that are commonly accepted and required; *δίκη* would be, in short, the ‘code’ followed by the people⁵².

3. *Some preliminary general criticisms.*

The above mentioned interpretation seems to me less than satisfying for several reasons. As already noted, the poems’ internal diachrony is completely

⁵⁰ HAVELOCK, 1978, p. 137: «in sum, the ‘justice’ of the *Iliad* is a procedure, not a principle or any set of principles. It is arrived at by a process of negotiation between contending parties carried out rhetorically. As such, it is particular, not general, in its references, and can be thought of either in the singular or in the plural – the ‘right of it’ in a given case or ‘the rights’ as argued and settled in one or more cases. There is no judiciary conceived as an independent state authority, but there are experts on oral ‘law’ – men with specially equipped memories, one would guess. Judicial functions are mainly confined to presiding, listening, speaking, and sensing a consensus in the audience; they are shared or passed around indifferently between the experts, acting as ‘managers of justices’, the elders or the contestants themselves, according to circumstance. The procedure takes place in public, because in a preliterate society the memory of the public is the only available attestation as to what is promised or agreed to. However loose or vague the procedure may appear from the standpoint of literate practice, it worked effectively to preserve ‘law and order’ (*eunomia*) in the city-states of early Hellenism. It supplied those directive formulas which were also corrective, a necessary supplement to the *nomos* and ethos as normatively taught and accepted. Such procedures may have been of immemorial origin, invented to control the impact of individuation upon nascent human communities».

⁵¹ HAVELOCK, 1978, p. 248: «it would not have occurred to a Greek of the archaic age to ask himself ‘What is justice?’ or to get into an argument with his neighbor about its ‘nature’. Would he even be able to think about justice as anything except something that occurs or is stated incidentally in a procedure in which men gather to judge and arbitrate their differences? And if he could neither state it nor come to terms with it otherwise, how can we say that justice ‘existed’ for him, as concept or as principle?».

⁵² ALMEIDA, 2003, p. 177, sums up the *communis opinio* as follows: «lexicographically the uses of *δίκη* form two groups that appear at first to be unrelated. The first group consists of particular juridical uses. The second consists of more abstract uses which touch upon the norms of human institutions and customs. Most of the several juridical senses fall into one of the following categories: 1) the verdict by which certain kinds of claims are validated; 2) the process or forum of adjudication, *i.e.* the ‘trial’ or ‘court’ in modern parlance; 3) a claim regarded by the claimant as valid, but which has not been validated by adjudication; 4) a claim which, although adjudicated in some manner, is still open to legitimate dispute; and 5) punishment or retribution».

ignored⁵³, so that the scholarly operation that takes for granted the existence of an aoristic model of ‘dispute settlement’ is, at any rate, a mono-dimensional one that cannot give a sufficient account of the legal institutions sketched in the poems (for instance, the administration of justice by a ‘panel of judges’, such as the court painted on Achilles’ shield, looks as if it is much more recent than the Mycenaean ἄναξ presented several times as a ‘single-judge court’); the presence of cases in which δίκη becomes patently a principle and Zeus is not an unpredictable god, but a true tutelary deity of justice is calculatedly overlooked⁵⁴; with the exclusion of those few occurrences where it would be difficult to deny the alleged procedural meaning of δίκη⁵⁵, and where this noun suggests a full-fledged principle⁵⁶, it is my firm belief that δίκη is mainly found as ‘subjective situation’ (advantageous or disadvantageous), even though there is undoubtedly a wide range of semantic shades. Thus, if that is true, θέμις and δίκη should not be conceived as two homogeneous legal concepts hinting at two systems – both historically grounded on ‘judgments’ and ‘customs’ – whose disciplines and regimens differ in terms of ‘sources of the rules’ (gods vs human beings) or ‘addressees of the rules’ (members of the family vs members of the society)⁵⁷; rather, they are heterogeneous concepts, the former indicating the system in which human relationships must be placed, the latter showing the multiple situations capable of being ascribed to the individuals within such a system, and of being essentially described in terms of ‘rights’, ‘entitlements’, ‘interests’, ‘faculties’, ‘powers’, ‘claims’, ‘remedies’, and in terms of ‘duties’, ‘obligations’, ‘liabilities’. All in all, the antithesis between θέμις and δίκη, in my opinion, resembles the opposition existing

⁵³ See, synthetically, ERCOLANI, 2006, p. 56: «l’esame di alcuni fatti della cultura materiale e di alcuni codici etici permette di cogliere disomogeneità del quadro culturale descritto nei poemi omerici, che, come insieme, non coincide con nessuna delle epoche storiche a noi note», sicché «al di là della distorsione della realtà propria dell’elaborazione poetica, questa disomogeneità è sensatamente spiegabile solo come risultato di una stratificazione progressiva della tradizione poetica, che ha desunto elementi da ogni fase storica attraverso cui è transitata, affiancandoli – in maniera a volte contraddittoria – a quelli già presenti al suo interno». As Cantarella maintains, the diachronic analysis «consente di datare storicamente le informazioni omeriche», since «appiattite su un unico orizzonte temporale, queste si contraddicono al punto da costringere a negare loro valore storico» (CANTARELLA, 2001, p. 11; cf. EAD., 1994, p. 38 ff., 176 ff.).

⁵⁴ See LLOYD-JONES, 1971, p. 166 nt. 23, who quotes, at least, Hom., *Il.* 16.388 and *Od.* 14.84 (even if this scholar believes that the primeval meaning of the noun δίκη is «judgment given by a judge»). As far as the process of ‘abstraction’ (which would have characterized the evolution of the semantic sphere of δίκη) is concerned, see, *ex plurimis*, OSTWALD, 1973, p. 675 ff.; ALMEIDA, 2003, p. 2003, 175 ff.; JANIK, 2003, p. 13 ff., 89 ff.; LEWIS, 2006, p. 42 ff.

⁵⁵ See Hom., *Od.* 19.106-111.

⁵⁶ Beyond Hom., *Il.* 16.388 and *Od.* 14.84, one may consider *Il.* 16.541-543: see, *infra*, p. 255.

⁵⁷ See, *amplius*, PELLOSO, 2012, p. 129 ff.

between the ‘rules in force in a given system’ and the ‘(legal) situations recognized and/or protected by a given system’. Contrary to the view that confines the concept of δίκη to the legal process, as judgment or procedure, and only subordinately to customary order or individual character, I maintain that δίκη is neither a source of law (judgment; custom; statute; tradition), nor a rule, nor a procedure; indeed Homer’s *epos* conveys the different meaning of ‘subjective situation in or out of court’⁵⁸.

4. *The killer; the dead and the divine thief: δίκη and legal procedure.*

In the light of the previous general remarks, it is necessary to consider the Iliad first. With regard to a context of ‘civil litigation’, mention must be made of the very famous judicial scene depicted on Achilles’ shield (even though with the awareness of the inadequacy of the following observations compared to the importance of the topic)⁵⁹: as everybody knows, in the ἀγορή a dispute arose between a murderer and the relatives of the victim, with regard to the ποινή (‘Wergeld’, ‘blood-money’) to be submitted to a court of γέροντες, in front of the λαοί and with the participation of a ἕτωρ.

In primis, it is my firm belief that the ancient interpretation which refers the verses at issue essentially to the *quaestio facti* (i.e. whether the payment of the ποινή has been made) sounds quite convincing⁶⁰. The following arguments may prove my point.

1) The symmetric use of two *verba dicendi* followed by two aorist infinitives (πάντ’ ἀποδοῦναι: ‘I have paid all’; μηδὲν ἐλέσθαι: ‘I have received nothing’) is definitely eloquent. Εὔχομαι (‘I claim’, ‘I assume in the complaint/petition’, given the procedural context, more than ‘I declare’, ‘I state to

⁵⁸ Hom., *Il.* 1.237-239, 1.540-543, 8.430-431, 11.830-832, 13.3-6, 16.386-388, 16.541-543, 18.497-508, 19.178-180, 19.180-183, 23.539-542, 23.573-580; *Od.* 2.281 f., 3.52, 3.130-134, 3.244, 4.686-693, 6.117-121, 8.575, 9.175-177, 9.213-215, 11.185 f., 11.215-222, 11.541-547, 11.570, 12.439-441, 13.201, 13.209, 14.57-61, 14.80-84, 14.89-92, 18.274-280, 18.414 f., 19.35-43, 19.106-111, 19.164-170, 20.294-295, 20.322 f., 21.312 f., 24.249-255.

⁵⁹ Hom., *Il.* 18.496-508: λαοὶ δ’ εἰν ἀγορῇ ἔσαν ἀθροοὶ ἔνθα δὲ νεῖκος / ὠράρει, δύο δ’ ἄνδρες ἐνεΐκειον εἵνεκα ποινῆς / ἀνδρὸς ἀποφθιμένοιο· ὁ μὲν εὐχέτο πάντ’ ἀποδοῦναι / δῆμῳ πιφάυσκων, ὁ δ’ ἀναίνετο μηδὲν ἐλέσθαι· / ἄμφω δ’ ἰέσθην ἐπὶ ἵστορι πεῖραρ ἐλέσθαι. / λαοὶ δ’ ἀμφοτέροισιν ἐπήπυον ἀμφὶς ἀρωγοί· / κήρυκες δ’ ἄρα λαὸν ἐρήτυον· οἱ δὲ γέροντες / εἶατ’ ἐπὶ ζεστοῖσι λίθοις ἱερῶ ἐνὶ κύκλῳ, / σκῆπτρα δὲ κληρύκων ἐν χέρσ’ ἔχον ἠεροφώνων· / τοῖσιν ἔπειτ’ ἦϊσσον, ἀμοιβηδὶς δὲ δικάζον. / κεῖτο δ’ ἄρ’ ἐν μέσσοισι δύο χρυσοῖο τάλαντα, / τῷ δόμεν ὃς μετὰ τοῖσι δίκην ἰθύντατα εἴποι. For a contextualization of these verses, see SCHOLTEN, 2004; VÉLISSAROPULOS-KARAKOSTAS, 2003.

⁶⁰ Ancient commentators, for the most part, believe that the question concerns the payment of the blood-money: see NOACK-HILGERS, 1999.

have a right', 'I promise', 'I'm ready to swear') indicates – in my opinion – the procedural position of a 'formal claimant', who, in this particular case, is also a 'substantive defendant'. Most likely, by bringing the legal action explicitly for a 'judicial declaration' and implicitly for an 'injunctive relief', the offender: a) makes a formal attack on the enforcement initiated by the counterparty (*i.e.* a member of the victim's family) that asserts to be entitled to act in retaliation; b) refrains the counterparty from proceeding with the revenge till an official and binding judgment is given at the end of the procedure⁶¹. Ἀνάινωμαι ('I object in the answer', given the procedural context, more than 'I deny' or 'I

⁶¹ That the verse 499 describes the 'facts' alleged by the plaintiff (*i.e.* the murderer as the party that, taking the legal action, assumes to have performed its own duty) in the first plead (*i.e.* a sort of 'statement of claim') nowadays is not largely disputed (see CALHOUN, 1923, p. 18; BONNER, SMITH, 1930, p. 32 ff.; WOLFF, 1946; HOMMEL, 1969=1988; PRIMMER, 1970, p. 11 ff.; CANTARELLA, 1979, p. 224 ff.; GAGARIN, 1986, p. 27 ff.; SEALEY, 1994, p. 103; THÜR, 1996, p. 66 f.; CANTARELLA, 2002; FUSAI, 2006, p. 31 ff.). On the one hand, the interpretation that gives the verb εὔχομαι the meaning 'to claim the right to impose unilaterally on the victim's relatives the acceptance of the blood-money' (see CARAWAN, 1998, p. 55 and nt. 24; cf. MÜLLNER, 1976, p. 104; EDWARDS, 1991; WESTBROOK, 1992, p. 73 f.; NAGY, 1997) is both historically and semantically ungrounded. First, as for the Homeric poems, no offender has such a substantive right and, consequently, no judge – through a declaratory judgment and an injunction – can allow claims alike and force the injured party to accept the proposed blood-money (see, paradigmatically, Hom., *Il.* 9.636 ff., 23.83 ff.): *ergo*, either one must assume – from a procedural and substantive point of view – that this reconstruction is entirely implausible, or one must think – from a procedural point of view – that the murderer's claim, as it would be implied in the judicial scene depicted in the shield, is just a 'phony' one and, therefore, that the judgment is doomed to be given for the defendant, *i.e.* the victim's relative (this argument is overlooked by CANTARELLA, 2002). Second, the verb εὔχομαι does not present such a peculiar sense: indeed the only basis to make εὔχομαι mean 'to claim the right' is a supposed analogy between verse 499 and PY Ep 704, 5-6 (e-ri-ta i-je-re-ja e-ke|e-u-ke-to-qe e-to-ni-jo e-ke-e|te-o da-mo-de-mi pa-si ko-to-na|ke-ke-me-na-o o-na-to e-ke-e), where «the 'priestess' Eritha is recorded as 'holding' and 'claiming to hold' 'e-to-ni-jo' land 'for the deity' ('te-o' interpreted as a dative)», while this claim «is ... disputed by the 'damos'», that opposes «that she has an 'o-na-to' plot of the land category known as 'ko-to-na-o ke-ke-me-na-o' (partitive gen. plur.)» (PALAIMA, 2000, p. 8; NAGY, 1997). Instead, it is true that this assumption reveals a patent legal mistake, since it is clear that in PY Ep 704 the noun 'e-to-ni-jo' shows that the claim is concerned with a '*quaestio iuris*', while the verb 'e-u-ke-to' discloses the existence of a claim brought against the 'da-mo', without implying *per se* such an issue (see, *amplius*, PELLOSO, 2012, p. 127 f. nt. 72). On the other hand, the similar translation 'to offer, to promise' (see, for the quotation of the scholars following this opinion, FUSAI, 2006, p. 10 f. nt. 2, and only paradigmatically, among the most recent authors, MACDOWELL, 1978, p. 19 ff.) is just historically erroneous: indeed, notwithstanding this interpretation is semantically acceptable (even if the future infinitive would be more appropriate: see GAGARIN, 1981, p. 14), unless one thinks that the shield sketches a 'frivolous' or 'phony' action, it postulates a 'constituent judgment', which, even without any agreement between the parties, forces the 'promisee' (*i.e.* the injured party) to accept the blood-money proposed and paid by the 'promisor' (*i.e.* the offender), and/or a judgment which even determines the amount of the blood-price (what is neither attested nor foreshadowed in the poems).

refuse')⁶² is a verb that openly introduces the contents of the 'defence' of the aggrieved party and involves by implication its 'counterclaim': that means that the victim's relative is also a 'substantive claimant', *i.e.* the party whose self-help has been interrupted by a formal grievance that introduces a judicial procedure aimed at obtaining the pronouncement of a court order which, after the finding of facts, either definitively requires the defendant to refrain from avenging, or, if against the claimant, leaves the former to retaliate against the latter⁶³. In other words, two parties compete (the killer as a formal claimant vs. the victim's relative as a formal defendant); two claims are diametrically opposed to each other and only one between these two opposed claims will

Against the interpretation recently put forward by THÜR, 2007, p. 190 («der eine war bereit zu schwören»), see MAFFI, 2007, p. 198, on the ground of TAUSEND, 2001, and PERPILLOU, 1972. See *D Schol. Hom., Il.* 18.499-500 (Heyne): Εὐχέτο. Νῦν διωρίζετο. Δήμῳ πιφάυσκων. Τῷ κοινῷ παντὶ δεικνὺς καὶ ἐμφανίζων.

⁶² Criticizing at length this *opinio* seems to me pointless (for a recent revival, see VAN EFFENTERRE, 1994). Indeed, in the light of the previous considerations (see, *supra*, p. 239 nt. 61), the thesis followed by those scholars who, believing that εὐχομαι in a procedural context stands for 'I state to have a right', as a logical consequence, translate – implicitly or explicitly – ἀναίνομαι with 'I deny that the counterparty has the right', as well as the thesis followed by those scholars who, translating εὐχομαι with 'I offer/promise', accordingly maintain that ἀναίνομαι corresponds to 'I refuse', are both doomed to collapse automatically, once εὐχομαι has been translated with 'I claim'. Moreover, such an interpretation – as already pointed out – implies that the shield sketches an example of 'unfounded action' (what seems to be very unrealistic in the context of the 'peaceful city'), since the Homeric poems do not attest any substantive right of the offender to force the offended party to accept the ποινή (see, even if with a different reasoning, CANTARELLA, 2002, p. 154, 156). See *D Schol. Hom., Il.* 18.500 (Heyne): Ἀναίνετο. Ἀτηνεῖτο.

⁶³ See BISCARDI, 1982, p. 57: «nella Grecia arcaica ... il fenomeno processuale sboccia non dall'arbitrato ma dalla legalizzazione dell'autodifesa. Ecco perché la δίκη, nel concreto significato di 'azione', altro non fu nella sua genesi che uno strumento di autodifesa conforme a giustizia, onde in caso di resistenza da parte del soggetto passivo la tutela dell'ordine pubblico esigeva la pronuncia di un organo giudicante della πόλις per concedere o negare il nulla osta al compimento dell'atto esecutivo. Così la δίκη venne ad essere considerata il mezzo per ottenere, se necessario, la pronuncia dell'organo giudicante a sostegno della propria pretesa»; see, moreover, WOLFF, 1946, p. 131 ff.; GERNET, 1955 c, p. 61 ff.; BISCARDI, 1982, p. 357 and nt. 34-37; see, more recently, MAFFI, 2007, p. 200 f. I am persuaded by such a theory: at the same time, it is my belief that the party bringing the legal action interrupts the use of self-help started by the counterparty, while Wolff assumes – on the ground of inconsistent evidence, indeed – that the claimant is the person that starts retaliating. This scholar, as everybody knows, argues that the 'defendant', *i.e.* the killer, has sought protection against the use of self-help by the 'claimant', *i.e.* the victim's relative; the former has been protected by a powerful member of the society and this protection, sanctioned by the community, continues to be provided until the 'claimant' wins a judgment allowing him to re-start the use of self-help: that is to say that until the claimant wins, the community protects the defendant, and the victim's relative, therefore, intends to present the case in court. The reconstruction I put forward seems to better fit with the verses: it does not need the hypothetical presence of a powerful protector; it is consistent with the sequence of speeches described in v. 499-500.

be allowed by the judge (the killer: ‘Since, as your debtor, I have already paid all, I sue you to obtain a judgment declaring that you have no right to retaliate and an injunction refraining you from carrying out any retaliatory act’; the victim’s relative: ‘Since, as your creditor, I have not received anything, and so you are still my debtor, I have the right to retaliate against you’).

2) A procedure in which ‘one party states that, after settling the matter with the opponent, it has already totally performed its own obligation (*i.e.* to pay the previously agreed *ποινή*)’, while ‘the other party refuses to accept anything’ (Gagarin, Sealey) is not convincing, because, even regardless of some inexactness as for some translations of the verb ἀνάινωμαι, first of all if the dispute had been determined by a contrast between the relatives of the victim, then «the trial would have opposed the uncompromising and the compromising relative, rather than the uncompromising one and the offender»⁶⁴.

3) If one imagines that the dispute has arisen because, during the execution of the ‘Wergeld agreement’, the offended party (creditor-promisee of the *ποινή*) declares that the performance does not conform – on a quality or quantity level – with the originally agreed *ποινή* and, therefore, refuses to accept the assets as a whole, then it is absolutely necessary not only to postulate that the negotiation has been secret and that the community called to witness the

⁶⁴ In these terms, see CANTARELLA, 2002, p. 156 f. Anyway, her criticisms may be strengthened. One must underline that GAGARIN, 1981, p. 14 (basically followed by FUSAI, 2006, p. 31 ff. and by SEALEY, 1994, p. 103; see, moreover, GAGARIN, 1986, p. 27 ff.) assumes – just quoting Hom., *Il.* 18.450, 23.204 – that the only possible epic meaning of ἀνάινωμαι is ‘to refuse’. This assumption, in my opinion, sounds incorrect: ἀνάινωμαι means ‘I refuse’ only when it is used with the accusative case (*Il.* 9.679; *Od.* 3.265, 4.651; 8.212), while with the infinitive (even if implied) it may also assume the meaning ‘I deny’ (*Il.* 9.116; *Od.* 14.149). So, once established that εὔχομαι stands for ‘I claim’ (as both Gagarin and Fusai admit), it is natural to believe that the antithesis ‘to claim – to refuse’ (*in loco* of ‘to claim – to object/deny’), from a logical perspective, is implausible, at least until one can prove the contrary: and, actually, the hypothetical scenarios imagined by Gagarin to demonstrate his own hypothesis represent, in my opinion, insufficient evidence for several reasons. Gagarin suggests either the possibility of some disagreement among the relatives of the victim («perhaps one of them has accepted blood-money but another one does not wish to accept anything, and hence a dispute arises between the uncompromising relative and the killer»), or the possibility that the two litigants «really engaged in bargaining about the amount of blood-money acceptable to the relatives; the killer has already paid (or deposited with a third party) the amount normally paid in such cases, but the relatives think this is not enough and are seeking a larger payment», so that «the relatives adopt as a bargaining position a refusal to accept anything, and the two parties’ inability to agree on a sum forces them to resort to others for a settlement of their dispute» (GAGARIN, 1986, p. 33). Gagarin’s thesis, in general, postulates both the arbitration theory (what is not uncontroversial) and the court’s power to impose the acceptance of the blood-price (what is, on the ground of our sources, as just stated, indemonstrable); in particular, it is unconvincing since the first alternative fits better with a dispute opposing two members both belonging to the victim’s family (as already underlined in the text), while the second one is clearly vitiated by the belief of the existence of a valuable amount which was normally paid in such cases.

payment of the *ποινή* ignored the terms of the agreement, but also to make either the nexus *εὔχεσθαι* + *πάντ' ἀποδοῦναι* mean 'to claim to have brought everything with a view to the full performance' (as Fusai manifestly believes), or the nexus *μηδέν* + *ἐλέσθαι* mean 'to have received everything' (as Cantarella and Thür, implicitly, need to accept)⁶⁵: what is, even on the semantic level, quite difficult.

4) The *μετὰ τοῖσι* nexus (usually interpreted as a partitive complement by those who believe that the two talents should go to one of the *γέροντες* and that, therefore, *δίκην εἰπεῖν* means 'to judge' and is synonymous with the normal sense of *δικάζειν*)⁶⁶, in the presence of a *verbum dicendi*, can be

⁶⁵ As for Fusai's hypothetical reconstruction («la parte offesa dichiara che i beni presentati non corrispondono alla *ποινή* pattuita ... e pertanto si rifiuta di prendere anche solo uno dei beni esposti e pronti per la consegna»: FUSAI, 2006, p. 126 ff.; see, for further criticisms, MAFFI, 2006), it may be divided in four pre-trial stages: 1) secret agreement determining the amount of the blood-price; 2) public exhibition of the blood-price on behalf of the debtor (*i.e.* the murderer); 3) performance refused by the creditor (*i.e.* the victim's relative), as being 'partial performance'; 4) defense of the debtor (who assumes, against the creditor, to have fulfilled). This theory (basically grounded on the 'partial performance' of the debtor's obligation and on the creditor's refusal) implies that the murderer's plea is necessarily preceded by the counterparty's compliant, *i.e.* – as in Wolff – the murderer (debtor) is the defendant and the victim's relative (creditor) is the plaintiff (what may be excluded by the 'silence' about such conjectural stages, rather than by the sequence described in verses 499-500, where the murderer pleads first); moreover, the interpretation given to the nexus *εὔχεσθαι* + *πάντ' ἀποδοῦναι* ('to claim to have brought everything') sounds wrong if considered together with the meaning given to the nexus *ἀναίνεσθαι* + *μηδέν ἐλέσθαι*, *i.e.* 'to refuse to receive anything', since it does not set up a full performance of the 'contractual obligation' (as expected), but it implies just an 'attempt of fulfilment', given the creditor's refusal (what is impossible to infer from the context and from the normal meaning of the single words). To tell the truth, also Cantarella (changing her previous opinion) supposes a 'partial performance': the scholar, once pointed out that «as well known, the payment of the ransom ... was performed in public», writes that «it is difficult to imagine two parties disputing tout court whether the payment had been made. More believably, the dispute could concern the correspondence between the agreed amount and the amount in fact received» (CANTARELLA, 2002, p. 156 f.). One simple objection may be put forward: since Cantarella rightly thinks that *ἀναίνεσθαι* means 'to deny', her thesis is inexorably vitiated by the presence of the negative pronoun *μηδέν* which, without a doubt, stands for 'nothing' and not for 'all (that has been agreed)'. Similarly, the same criticism may be extended to THÜR, 1996, p. 67, who maintains what follows: «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».

⁶⁶ *Ex plurimis*, DARESTE, 1884; LEIST, 1884, p. 131 f.; LEAF, 1902=2013, p. 612 f.; GLOTZ, 1904, p. 128; MAINE, 1908, p. 386; EHRENBERG, 1921, p. 55 nt. 4; WOLFF, 1946, p. 39 f.; KÖSTLER, 1979, p. 74; *contra* see HEYNE, 1802, p. 533; SCHÖMANN, 1838, p. 73; LAURENCE, 1879, p. 125 f., 130; FERRINI, 1881, p. 45; LIPSIVS, 1890, p. 229 f.; BONNER, SMITH, 1930, p. 36; GAGARIN, 1986, p. 30; THÜR, 1996, p. 66 (see, moreover, the further bibliography quoted in FUSAI, 2006, p. 58 ff. and p. 88 f. nt. 15-18).

expressed by the phrase ‘in their presence; before them’ (and not by ‘among them’), once one notices that in the Iliad this nexus is never referred to parties that interact in a dialogue or a debate⁶⁷.

5) The thesis that assigns the two talents to some member of the court does not take into account the entity of the sum, as such, and it considers access to the judging function as something that must be remunerated, that is to say as something that does not share the logic of the ‘gift’, which is common in primitive societies⁶⁸.

6) It is quite implausible that within the same, small context, two different expressions (δικήν εἰπεῖν/δικάζειν) are used, at a distance of a few verses from one another, to describe the same activity (either by the parties [*i.e.* to plead; *causam dicere*]⁶⁹ or by the judge [*i.e.* to decide, *ius dicare*]⁷⁰). More specifically, as the active diathesis of the verb δικάζειν is consistently used either to describe the ‘administration of justice’ in the context of a trial, or to indicate the ‘adjudicatory power’ elsewhere, while the middle passive diathesis δικάζεσθαι is usually used to portray the position taken by opponents and/or challengers⁷¹

⁶⁷ See Hom., *Il.* 9.622 f.: τοῖσι δ’ ἄρ’ Αἴας / ἀντίθεος Τελαμωνιάδης μετὰ μῦθον ἔειπε; 10.250: τὸν δ’ εἰδόσι γάρ τοι ταῦτα μετ’ Ἀργείοις ἀγορεύεις; 22.475 f.: ἦ δ’ ἐπεὶ οὖν ἔμπνυτο καὶ ἐς φρένα θυμὸς ἀγέρθη / ἀμβλήδην γοῶσα μετὰ Τρωῆσιν ἔειπεν.

⁶⁸ See, on the economic value the two talents might have at that time, RIDGEWAY, 1888: it is definitely implausible to consider the two talents as the ‘Wergeld’ (see, paradigmatically, HEYNE, 1802, p. 533; SCHÖMANN, 1838, p. 72 f.; LIPSIVS, 1890, p. 228 ff.), since the amount was too small, as well as one may assume, at the same time, that two talents were «too large a sum to be a prize for a judge» (CANTARELLA, 2002, p. 159, who, against GAGARIN, 1986, p. 31, believes that, each party having deposited one talent, the sum, awarded in its entirety to the winning party only, could be conceived as a strong deterrent against ‘vexatious claims’ and ‘frivolous defences’). Obviously, once said that, also the analogy hypothetically deemed as existing between the two talents and some types of Athenian ‘costs and court fees’, such as παράστασις, παρακαταβολή, πρυτανεῖα (see HOFMEISTER, 1880, p. 451; NÄGELSBACH, 1884, p. 266; RIDGEWAY, 1888, p. 112), cannot be followed.

⁶⁹ HEYNE, 1802, p. 533, SCHÖMANN, 1838, p. 73, LAURENCE, 1879, p. 125 f., 130, believe that the verb δικάζειν in the verse 506, concerning the parties, does not mean ‘to judge’, but ‘to plead’ (what is quite impossible: see TALAMANCA, 1979): even in their opinion, thence, δικάζειν and δίκην εἰπεῖν are synonymous, since also the latter phrase must be referred to the procedural activity of the two opponents.

⁷⁰ See, paradigmatically, MAINE, 1908, p. 386; WOLFF, 1946, p. 39; EDWARDS, 1991, p. 217; SPRAGUE BECKER, 1995, p. 112; THÜR, 1996, p. 66.

⁷¹ Hom., *Il.* 1.540-543: τίς δ’ αὖ τοι δολομήτα θεῶν συμφράσσατο βουλᾶς; / αἰεὶ τοι φίλον ἐστὶν ἐμεῦ ἀπὸ νόσφιν ἐόντα / κρυπτάδια φρονέοντα δικαζέμεν· οὐδέ τί πώ μοι / πρόφρων τέτληκας εἰπεῖν ἔπος ὅτι νοήσης; 8.430-431: κείνος δὲ τὰ ἄ φρονέων ἐνὶ θυμῷ / Τρωσὶ τε καὶ Δαναοῖσι δικαζέτω, ὡς ἐπιεικές. *Od.* 11.541-547: αἶ δ’ ἄλλαι ψυχαὶ νεκῶν κατατεθνηῶτων / ἔστασαν ἀχνύμεναι, εἶροντο δὲ κήδε’ ἐκάστη. / οἴη δ’ Αἴαντος ψυχὴ Τελαμωνιάδαο / νόσφιν ἀφεστήκει, κεχολωμένη εἵνεκα νίκης, / τήν μιν ἐγὼ νίκησα δικαζόμενος παρὰ νησὶ / τεύχεσιν ἄμφ’ Ἀχιλλῆος· ἔθηκε δὲ πότνια μήτηρ, / παῖδες δὲ Τρώων δίκασαν καὶ Παλλὰς Ἀθήνη; 12.439-441: ἦμος δ’ ἐπὶ δόρπον ἀνὴρ ἀγορήθην

(for instance, the claimant, who εὔχεται, and the defendant, who ἀναίνεται, could be described as two litigants who δικάζονται), I believe that, if δικάζειν in verse 506 very likely refers to the members of the court (as it is confirmed by the *scholia vetera*)⁷², then it is necessary to infer that the phrase ‘δίκην εἰπεῖν’ (v. 508) and the verb ‘δικάζεσθαι’ are synonyms⁷³.

In secundis, it must be specified that probably the procedure under consideration is not an ‘arbitration’⁷⁴, but a ‘compulsory judicial procedure’⁷⁵: my opinion is based, more than on the public and formal nature characterizing the composite procedural scene described by the poet, on the following logical observations⁷⁶. Indeed, if the dispute concerned – as I believe – a *quaestio facti* (so that the panel composed by the γέροντες would be called to determine whether the ποινή had been paid in full), a voluntary agreement to settle the matter through arbitration would be quite improbable, as the lying party would not have been willing to agree to it. Moreover, it is not quite reliable that he who believes to have the right to exact revenge for the murder voluntarily accepts to interrupt the exercise of such a right, whether the issue brought to the court were a *de facto* question or not: moreover, in the latter case, the judgment would be focused on the existence of the right, on the part of the offender, to compel the offended party to accept the blood-price in place of the use of self-help; but such a circumstance is never attested in Homer. Finally, the verse 501 with its «natural implication»⁷⁷ (that is ‘both demanded a deci-

άνεστη / κρίνων νείκεα πολλά δικάζομένων αἰζηῶν, / τήμος δὴ τά γε δοῦρα Χαρήβ-
διος ἐξεφάνθη. *Il.* 23.573-580: ἀλλ’ ἄγετ’ Ἀργείων ἡγήτορες ἠδὲ μέδοντες / ἐς μέσον
ἀμφοτέροισι δικάσσατε, μὴ δ’ ἐπ’ ἀρωγῆ, / μὴ ποτέ τις εἴπησιν Ἀχαιῶν χαλκοχιτώνων·
/ Ἀντίλοχον ψεύδεσσι βησιάμενος Μενέλαος / οἴχεται ἵππον ἄγων, ὅτι οἱ πολλὸν χεῖρονες
ἦσαν / ἵπποι, αὐτὸς δὲ κρείσσων ἀρετῆ τε βίη τε. / εἰ δ’ ἄγ’ ἐγὼν αὐτὸς δικάσω, καὶ μ’
οὐ τίνα φημι / ἄλλον ἐπιπλήξειν Δαναῶν· ἰθεὶα γὰρ ἔσται. On these sources, see TALAMANCA, 1979.

⁷² *Schol.* Hom., *Il.* 18.506 d (Erbse): ἀμοιβηδὶς δὲ δικάζον· ἦτοι ἐκ διαδοχῆς οἱ δικάσται ἐκαθέζοντο, παρὰ μέρος τὸ ἐν πρᾶγμα δικάζοντες, καὶ ἕκαστος τὸ καθ’ ἑαυτὸν ἐν μέρει ἀπεφαίνετο. *D. Schol.* Hom., *Il.* 18.506 (Heyne): Ἀμοιβηδὶς δ’ ἐδίκασον. Ἐν μέρει δὲ ἀκούοντες ἐδίκασον. ὃ ἐστὶ κατὰ ἐναλλαγὴν ἀποφαίνων τὴν ἑαυτοῦ γνώμην ἕκαστος.

⁷³ See PELLOSO, 2012, p. 110 ff., 128 nt. 63; cf. HEYNE, 1802, p. 533; SCHÖMANN, 1838, p. 73; DÖDERLIN, 1863, p. 168; THONISSEN, 1875, p. 27 f.; FERRINI, 1881, p. 45; NÄGELSBACH, 1884, p. 266; LIPSIVS, 1890, p. 225 ff., 229; LAURENCE, 1879, p. 126; BUSOLT, 1920, p. 333 nt. 33; BONNER, SMITH, 1930, p. 39 f.; WESTRUP, 1939, 87 nt. 1; CANTARELLA, 1972, p. 259 f.; 2002, p. 159 f. See, paradigmatically, in this sense, Theogn. 1.687.

⁷⁴ See, in this sense, HOMMEL, 1969=1988, p. 46 ff.; GAGARIN, 1973, p. 31, 42 f.; STAHL, 1987, p. 167; ff.; PAPA-KONSTANTINOU, 2008, p. 32 ff.

⁷⁵ See, paradigmatically, WOLFF, 1946, p. 34 ff.; THÜR, 1970; HARRISON, 1971, p. 69-72; TALAMANCA, 1979, p. 110; SEALEY, 1994, p. 100; THÜR, 1996; CANTARELLA, 2002.

⁷⁶ For a useful survey of the precedent literature, see FUSAI, 2006.

⁷⁷ See GAGARIN, 1986, p. 27 f. Also for Hommel the verse 501 can only be understood as a voluntary submission to arbitration: disputes were settled only by compromise; indeed each

sion') is erroneously overestimated and does not postulate a fully voluntary submission of the dispute to an arbiter: indeed, nobody can deny that also a defendant – even if he is not the party that has taken the legal action – intends to obtain a judgment (obviously against the claimant). Notwithstanding the numerous, still obscure, issues, it is clear in my opinion that the hypothesis of an arbitration with regard to Achilles' shield denounces in a manifest way the «absolute lack of any consideration whatsoever – at a sociological level – of the needs the law is called to satisfy and of the consequent impacts»⁷⁸.

Thus, in the light of the previous remarks, it is plausible that the γέροντες are asked to express their authoritative opinion (δικάζειν) on the veracity of the formal claimant's allegations, or of the facts opposed by the formal defendant: to sum up, has the αἵδεσις-contract been performed, or has not it⁷⁹?

litigant had to meet his opponent half-way, choosing from amongst several settlements put forward by the γέροντες, so that the dispute was definitely settled once the parties accepted one of the proffered settlements (HOMMEL, 1969=1988). The thesis is illogical: «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?» (THÜR, 1996, p. 67; cf. THÜR, 1970; 1989).

⁷⁸ See TALAMANCA, 1979, p. 110 nt. 15, who imperatively qualifies this approach in terms of «assoluta mancanza di qualsiasi considerazione – al livello sociologico – dei bisogni a cui il diritto deve soddisfare e dei condizionamenti che ne derivano».

⁷⁹ Once specified that the so called αἵδεσις-contract is a bargain where the payment of the ποινή is 'consideration' given in return of the refraining from the use of self-help; once assumed that any reconstruction based on the hypothesis of a 'partial performance' of the contract cannot be followed (*contra* CANTARELLA, 2002, p. 156 f., and FUSAI, 2006, p. 126 ff.; cf. THÜR, 1996, p. 67); once assumed that the dialectics between the two litigants as sketched in the shield may be described in terms of dispute between a 'claim [implying *in se* a defence]' and a 'defence [implying *in se* a counterclaim]', both concerning – symmetrically and oppositely – just a 'question of fact' (*contra* GAGARIN, 1986, p. 27 ff.); once assumed that, as for the formation of a 'blood-money agreement' (αἵδεσις), this act requires a prescribed public form to be valid, as well as the fulfilment of the obligation (consisting in the payment of the ποινή) requires to be carried out in public (see GAGARIN, 1986, p. 31 f.; CANTARELLA, 2002, p. 156; MAFFI, 2006; see, moreover, THÜR, 1996, p. 67, who puts forward some doubts); once assumed that, after the judicial finding of facts, the definitive judgment may be, alternatively, either for the claimant (*i.e.* an injunction to refrain the victim's relatives from retaliating, grounded on the prior judicial declaration of the full payment), or for the defendant (*i.e.* a leave to proceed with the interrupted avenge, grounded on the prior judicial declaration of the non-performance); once assumed all this, since the dispute depicted in the shield obviously implies that something has gone wrong in the relation existing between the two opponents, in my opinion, this is the only plausible scenario that can be imagined: 1) a 'juridical act' of αἵδεσις is void, since it has been formed secretly and informally; 2) or/and the 'full performance' does not take place in public; 3) the victim's relatives lay a further (unfounded) claim, assuming to be entitled to act in retaliation, even if they have already received privately the blood-money (on the basis of either a void compromise or a valid one); 4) the murderer makes a formal attack on the enforcement of the right to use 'self-help', by taking a legal action aiming at obtaining a judgment which contains both a declaration (the ποινή has been paid in full by the debtor, who is the formal claimant)

In such a context δίκη (v. 508) is not other than a noun which synthetically identifies either the claim of the plaintiff or the answer of the defendant, or rather a noun which implies the substantive content of the pleadings of the parties, the substantive reason which founds each 'judicial act': it is not the judgment or the arbitration award. In other words, 'δίκην εἰπεῖν' does not stand for 'giving a judgment' or for 'deciding' (since, once presupposed a *quaestio facti* whether the ποινή was paid or not, which obviously permits only two alternative solutions, a competition among the various members of the 'panel of judges' sounds very unlikely, unless one follows either Thür or Gagarin), but for 'stating the right'⁸⁰. This is confirmed by the *scholia vetera*, according to which the two talents should be awarded to the party that expresses its own reasons (δίκην) verbally (εἶποι) in the straightest way (ἰθύντατα), that is to say in the most truthful way⁸¹. Already at the beginning of the Greek legal experience, a 'well-founded claim' and the 'right of action' seem to merge in a monistic view that places the person together with his or her reasons, rather than the judge with his authority, at the centre of the system.

So, it might be useful both to compare this passage with the verses describing Minos as judge of the dead and depicting him with the insignia of regal τιμή⁸², and to confront it with the implications suggested by some verses in

and an injunction (the victim's relative, who is the formal defendant, is not allowed to carry out any retaliation act against the murderer). See ROLLINGER, 2004, on the symbolism of the elements of the contract-procedure, as well as on the ceremonial way of behaviour (compared with analogous cases derived from the Orient, which is considered by the scholar the original historical 'sample' for the Homeric 'Vertragspraxis'; *contra* the approach implied in this work, see THÜR, 2006, p. 35 nt. 36).

⁸⁰ As I have already written, even if one interprets δίκην εἰπεῖν in terms of *ius dicere* and 'μετὰ τοῖσι' as meaning 'among them', «possono essere sviluppate alcune considerazioni dello stesso Wolff, secondo cui se è vero che i due talenti vanno a chi 'dà un giudizio' (e più precisamente a quello dei γέροντες che avesse dato il verdetto ritenuto giusto dalla folla), altrettanto vero è che δίκην εἰπεῖν, quale sinonimo di δικάζειν (giudicare), deve essere inteso come 'to say what is right' ossia, in buona sostanza, 'affermare il diritto della parte'» (PELLOSO, 2012, p. 129 nt. 63, in the light of WOLFF, 1946, p. 40, who refers the phrase to the judge stating authoritatively in his definitive pronouncement 'what is right'; see, moreover, PATTARO, 2005, p. 291, who translates δικάζειν with «to state the right»).

⁸¹ See *D Schol. Hom., Il. 18.497* (Heyne): Ἐνθα δὲ νεῖκος ὠρώρει. Ἐπιλονεῖκουν, ἡμισβήτουν. δικαστήριον εἰσάγει δύο τινῶν ἀνδρῶν. ὧν ὁ μὲν ἐγκαλούμενος, ἀποδεδωκέναι λύτρα ὑπὲρ τοῦ πεφονευμένου φησί· ὁ δὲ ἐγκαλῶν, ἔλεγε μὴ εἰληφέναι. δύο δὲ τάλαντα χρυσοῦ κατέθεντο, ὥστε τὸν ἀποδείξαντα τὸ ἀληθὲς λαβεῖν ἀμφοτέρω. ποινῆς οὖν λέγει τῆς καλουμένης παρὰ τοῖς Ἀττικοῖς, ὑποφόνια, ἃ ἐδίδοσαν τοῖς οἰκείοις τῶν ἀνηρημένων οἱ ἀνελόντες. λέγεται δὲ κοινῶς πᾶσα ἀντέκτισις, ποινή.

⁸² *Hom., Od. 11.568-571*: ἔνθ' ἦ τοι Μίνωα ἴδον, Διὸς ἀγλαὸν υἱόν, / χρύσειον σκῆπτρον ἔχοντα θεμιστεύοντα νέκυσσιν, / ἦμενον· οἱ δὲ μιν ἀμφὶ δίκας εἶροντο ἄνακτα, / ἦμενοι ἑσταότες τε, κατ' εὐρυπυλῆς Ἄϊδος δῶ (on these verses, see *amplius* PELLOSO, 2012, p. 59 nt. 141; p. 80 nt. 195; p. 85 nt. 206; p. 86 nt. 207; p. 90 nt. 217; p. 105 nt. 3; p. 109 nt. 13; p. 121 nt. 138; p. 127 nt. 58; p. 129 nt. 63; p. 134 nt. 72; p. 140 nt. 11; p. 143 nt. 18; p. 160; p.

the fourth Homeric hymn, despite the experimental nature of such an analysis⁸³. Coming in front of Minos and staying around the king himself (οἱ δέ μιν ἀμφὶ ... ἄνακτα), the dead εἶροντο δίκας, that is to say they ‘exposed their reasons’ (imperfect indicative from εἶρω, *i.e.* ‘I declare, I state, I tell, I speak’; rather than of ἔρομαι, ‘I ask’)⁸⁴ as mentioned by the scholiast, who uses δικάζεσθαι and λέγειν in his paraphrase⁸⁵. The hymn tells about the dispute arisen between Apollon and Hermes: the latter, as everybody knows, steals the former’s cattle, hides them in a cave, and slaughters two of them. Apollon then inquires about his cattle and accuses of theft the brother. The god of the sun, after an extra-judicial ‘oath-challenge’ (that is an ‘Eidesangebot’) proposed by Hermes by way of a πρόκλησις⁸⁶, relies on being immediately entitled to self-help, assuming to have been injured by the brother and to have suffered a damage; finally, by seizing Hermes and carrying him off, Apollon initiates to levy ‘execution on the person of the opponent himself’ (*i.e.* to proceed with a direct ‘enforcement of his own right’, even in absence of a judicial title empowering to levy execution). But, at that point, Hermes interrupts the execution: he makes an attack on Apollon’s self-help by raising a ‘formal objection’ against the legitimacy of the enforcement proceeding, what is, substantially, a ‘statement of claim’ involved in an action for a declaratory judgment (given by Zeus) against the brother and for a relief, such as an injunction which refrains the defendant from ‘proceeding *in executivis*’: indeed, Apollon is asked to give (δός) his own δίκη before Zeus (that is to state his own right, his own reason, as a formal ‘defendant’) and – from an adversarial conception of the judicial process focused on the right of controverting – to accept (δέξο) the one Hermes will give to him (that is, in the opposite sense, to hear the opposed reasons maintained by the formal ‘plaintiff’, even ready to swear

170; cf. SCHÖMANN, 1838, p. 72; DÖDERLIN, 1863, p. 167; THONISSEN, 1875, p. 28 nt. 3; LIPSIUS, 1890, p. 229 f.; BUSOLT, 1920, p. 333 nt. 3; CANTARELLA, 1972, p. 260; OSTWALD, 1973, p. 677; RUDHARDT, 1999, p. 104 ff.). The analogy with Hom., *Il.* 18.508, in my opinion, makes not much persuasive the following interpretations: STANFORD, 1948, *ad Hom., Od.* 11.570 (who believes that the dead are «inquiring about precedents, decisions»); GAGARIN, 1973, p. 85 and 1986, p. 33 (who translates δίκαι with «settlements» or «procedure for settling dispute peacefully, legal process», and is followed by ΠΑΡΑΚΟΝΣΤΑΝΤΙΝΟΥ, 2008, p. 148 nt. 24); JANIK, 2000, p. 30 (that interprets δίκαι in terms of «decision», «verdict»).

⁸³ Hom., *Hymn.* 4.312: δός δὲ δίκην καὶ δέξο παρὰ Ζηνὶ Κρονίῳ.

⁸⁴ See, in a similar fashion, Hom., *Il.* 1.513, 2.49, 23.226; *Od.* 2.162, 13.7, 11.137. On this point, see FUSAI, 2006, p. 88 and nt. 15, p. 176 and nt. 27.

⁸⁵ *Schol.* Hom., *Od.* 11.570 Dindorf: εἶροντο ἀντὶ τοῦ ἔλεγον ὅθεν καὶ ἱρά ἢ ἐκκλησία. ἄλογα· καθήμενος γὰρ οὐδεὶς δικάζεται.

⁸⁶ MAFFI, 2007, p. 242 ff. (who sums up Gagarin’s and Thür’s interpretations: GAGARIN, 1986, p. 40 f.; 1997, p. 132; 2005, p. 89; THÜR, 1996, p. 60; 2006, p. 41 nt. 50). On this topic (above all on Hermes’ sophistry in formulating both oaths proposed: v. 274-276, 383-389), see, moreover, FLETCHER, 2008.

an exculpatory oath)⁸⁷. I am confident that the noun at issue cannot be given the technical connotation of either ‘verdict’ or ‘dispute submitted to arbitration’⁸⁸. These interpretations, indeed, do not match the double imperative used by Hermes (who is neither proposing an arbitration, nor pronouncing a judgment, but rather performing a ‘private *interdictum*’ which is the introductory act of the primitive process); moreover, they do not take into a due account the scenario implied, what is very far from being a possible factual antecedent of a dispute voluntarily submitted to arbitration for a friendly settlement. Thence it is possible – as I imagine – to think of a ‘compulsory legal process’ (even though roughly simplified in the fiction sketched in the hymn), the beginning of which is a formal legal action against the enforcement already started by the counterparty for the immediate and direct satisfaction of its right⁸⁹.

⁸⁷ Hom., *Hymn.* 4.379-383 (see THÜR, 1996, p. 60).

⁸⁸ FRISCH, 1976, p. 46; GAGARIN, 1986, p. 41; ΠΑΡΑΚΟΝΣΤΑΝΤΙΝΟΥ, 2007, p. 90 f. («Hermes proposes to submit the dispute to arbitration with Zeus as the judge»); *contra*, see OSTWALD, 1973, p. 676; PELLOSO, 2012, p. 120 f. nt. 37.

⁸⁹ Also this source (dated at the end of the sixth century B.C.: JANKO, 1982, p. 140 ff., 143; VERGADOS, 2011, p. 82 f.), in my opinion, strengthens Wolff’s theory (WOLFF, 1946). Neither legal procedure derives – logically and historically – from the voluntary submission to arbitration, nor it is a ‘ritualizing’ and a ‘sophistication’ of self-help: in ancient Greece, compulsory legal procedure was originally initiated during a direct and immediate enforcement of one’s right (*i.e.* an execution which was not empowered by a previous judicial title), as a ‘formal attack’, an ‘objection’ in the form of an action for judicial declaration and injunction against the party asserting to be entitled to enforce *in executivis* its own right (see, *supra*, p. 239 nt. 61 ff.). What is more, the verse telling that, on top of Olympus, ἀμφοτέροισι δίκης κατέκειτο τάλαντα (Hom., *Hymn.* 4.324), should also be taken into account: αἶψα δὲ τέρθρον ἴκοντο θυώδεος Οὐλύμποιο / ἐς πατέρα Κρονίωνα Διὸς περικαλλέα τέκνα / κείθι γὰρ ἀμφοτέροισι δίκης κατέκειτο τάλαντα; the traditional version runs as follows: «soon they came, these lovely children of Zeus, to the top of fragrant Olympus, to their father, the Son of Kronos; for there were the scales of judgment set for them both» (EVELYN-WHITE, 1914, *ad Hom.*, *Hymn.* 4.322-324; cf. LIDDELL, SCOTT, 1996, *sv.* τάλαντα, who translate with «scales of justice»; ALLEN, HALLIDAY, SIKES, 1963, *ad Hom.*, *Hymn.* 4.324, who believe that «in that case the expression would be metaphorical, for Apollo and Hermes have of course deposited no fees. But it is far more probable that the hymnwriter, while possibly imitating the language of *Il.* 5.507, either misunderstood or consciously perverted the meaning of ‘τάλαντα’ here; he was, no doubt, familiar with the other sense of the word=scales»; furthermore, see NOTARI, 2005: «the idiom of the scales of justice is well-known, its use is widely spread, *Iustitia* can frequently be seen with scales in her hand in different representations. The scales as the symbol of justice and administration of justice can be encountered in various places in Greek literature, one of its earliest instances can be found in the Homeric Hermes’s Hymn»). In my opinion, this reconstruction underestimates the suggestions that might hypothetically stem from the comparison of the episode with the trial scene on the shield: τάλαντα, in a trial setting, may indicate a sum of money paid by the parties; the κείσθαι compounds, in a legal setting, show the creation of a security; nothing prevents from interpreting ἀμφοτέροισι as a ‘dative of agent’. In the light of these remarks, therefore, one can plausibly (if not definitely) maintain that the claimant, in the presence of Zeus, had to depose τάλαντα: this sum both represented a kind of fee, the payment of which was aimed at discouraging frivolous pleadings before a judge, and, at the same time, a ‘private penalty’ to the advantage of the winning party at the end of the process (see, *amplius*, PELLOSO, 2012, p. 120 f. nt. 37).

5. Δίκη beyond the trial: litigious scenarios and non-contentious contexts.

If δίκη is the ‘reason’ exposed by a party during a legal process, Homer attests many other examples of the use of this noun, both in the context of a non-judicial litigation, and with regard to ‘non-contentious’ relations. If one considers the out-of-court cases involving the concept of δίκη, first of all, the two following episodes from the Iliad are worth mentioning. In the so called book of reconciliation, Odysseus declares that the payment of ἄποινα by Agamemnon, together with the return of the items illicitly subtracted, the oath of denial and the sealing of the settlement with a rich banquet is to be made ἵνα μή τι δίκης ἐπιδευῆς ἔχησθα⁹⁰, that is to say so that the injury suffered by Achilles is healed and his δίκη (subjective sphere) fully reinstated⁹¹. In the book of the chariot race, the δίκη of Antilochus is potentially injured by Achilles’ determination to attribute the second prize to Eumelus (who finished last because of divine intervention) which by rights should have been attributed to Nestor’s son. Antilochus, therefore, opposes Achilles by stating his own ‘reason’, founded in the objective results of the race⁹².

As for the Odyssey, several verses can be quoted. It is true that the main sense of δίκη is coupled – but only in one *hapax* that in any case reflects a compound of the noun – with the secondary one of sentence and judgment (εὐδικία)⁹³, even though the sense of ‘personal sphere’ prevails (as for non-

⁹⁰ Hom., *Il.* 19.178-180: καὶ δὲ σοὶ αὐτῷ θυμὸς ἐνὶ φρεσὶν ἴλαος ἔστω. / αὐτὰρ ἔπειτὰ σε δαίτι ἐνὶ κλισίῃς ἀρεσάσθω / πιείρη, ἵνα μή τι δίκης ἐπιδευῆς ἔχησθα.

⁹¹ I do not agree with those who translate either with «Agamemnon accomplira ses promesses, parce que la justice l’exige» (VATIN, 1982, p. 276), or with «so that you (Achilles) may lack nothing of your settlement» (GAGARIN, 1973, p. 85: «δίκη itself retains its basic meaning of ‘ruling, settlement’, though this meaning is extended in various ways. First of all, in Hom., *Il.* 19.180, after Agamemnon and Achilles are reconciled, Odysseus bids the former give the latter a feast as well as the many gifts, ‘so that you (Achilles) may lack nothing of your settlement’. Here δίκη as ‘settlement’ takes on the meaning of ‘what is owed someone as a result of a settlement’»). See, on these verses, EHRENBERG, 1921, p. 55; WOLF, 1950, p. 85 ff.; NAGY, 1979, p. 128 f.; YAMAGATA, 1994, p. 63.

⁹² Hom., *Il.* 23.539-542: Ὡς ἔφαθ’, οἱ δ’ ἄρα πάντες ἐπήνεον ὡς ἐκέλευε. / καὶ νύ κέ οἱ πόρην ἵππων, ἐπήνησαν γὰρ Ἀχαιοί, / εἰ μή ἄρ’ Ἀντίλοχος μεγαθύμου Νέστορος υἱὸς / Πηλείδην Ἀχιλῆα δίκη ἡμείψατ’ ἀναστάς. For these verses, on the one hand, see FRISCH, 1976, p. 46 (who believes that δίκη stands for «legal proceeding»), and GAGARIN, 1973, p. 84 (who translates it with «proposed settlement»), substantially followed by ALMEIDA, 2003, p. 177); on the other hand, see FUSAI, 2006, p. 146; cf. LIPSIVS, 1890, p. 229 ff.; EHRENBERG, 1921, p. 56; GIOFFREDI, 1962, p. 74; JANIK, 2000, p. 21; PENTA, 2000, p. 681; PELLOSO, 2012, p. 118 (all more inclined to interpret δίκη in a substantive and subjective way). Cf., moreover, PAZDERNIK, 1976, p. 73, who interprets here δίκη as *iustitia distributiva* (as well as in Hom., *Il.* 19.180).

⁹³ Hom., *Od.* 19.106-111: τὴν δ’ ἀπαμειβόμενος προσέφη πολύμητις Ὀδυσσεύς: / ὦ γύναι, οὐκ ἂν τίς σε βροτῶν ἐπ’ ἀπίρωνα γαῖαν / νεικέου· ἦ γὰρ σευ κλέος οὐρανὸν εὐρὺν ἰκάνει, / ὥς τέ τευ ἦ βασιλῆος ἀμύμονος, ὅς τε θεοῦδης / ἀνδράσιν ἐν πολλοῖσι καὶ ἰφθίμοισιν ἀνάσσων / εὐδικίας ἀνέχησι.

litigation contexts, the following nuances are found: right, power, expectation, fate, allotted part). Besides the already mentioned verses dedicated to Minos and to the dead's δίκαι, those describing the Cyclopic civilisation are also relevant. A Cyclops, *in primis*, is defined as an ἀθέμιστος, that is to say 'he who denies any superior order' (he who does not recognise θέμιστες, he who θεμιστεύει on women and children without any divine mandate, makes sacrifices to the gods only for his own profit and has no ἀγοραί); moreover, he is considered ὑπερφίαλος, ὑπερβίος, οὐ δίκαιος, οὐ φιλοξείνος, ἄγριος (a savage who performs violent behaviours damaging the τιμή of others, whose acts are characterized by excessive βίη since he does not observe the rules of hospitality and carries out the most heinous of crimes in annihilating the subjectivity of others through anthropophagy)⁹⁴. Now, I think that one should compare the verse in which the Cyclopes are called at the same time ὑπερφίαλοι and ἀθέμιστες⁹⁵ with the parallel one in which Polyphemus is said not to know 'δίκαι and θέμιστες'⁹⁶: if ὑπερφίαλοι (equal to οὐ δίκαιοι) is an adjective that synthetically describes the excesses in horizontal relationships⁹⁷, and ἀθέμιστες describes – as for the vertical relationships – the breach of the theo-physical order⁹⁸, then saying that Polyphemus neglects both δίκαι and θέμιστες may imply that he violates the subjective and substantive sphere of human beings, as well as the dictates of the gods and the nature⁹⁹. In light of this, the interpretation that translates δίκαι and θέμιστες with 'justice' seems, at best, generic¹⁰⁰; the one that refers to human and divine rules seems arbitrary (as in Homer there is no space for human rules)¹⁰¹; and the one that contrasts the θέμιστες (*formulae* – formularies) with the

⁹⁴ Hom., *Od.* 9.106, 9.175, 9.187; see, moreover, *Od.* 9.107-115, 9.215-217, 9.259-271, 9.277-278, 9.347. Cf. HIRZEL, 1907, p. 26, 166; EHRENBERG, 1921, p. 14; CANTARELLA, 1983, p. 95.

⁹⁵ Hom., *Od.* 9.106-115: Κυκλώπων δ' ἔς γαῖαν ὑπερφιάλων ἀθεμιστῶν / ἰκόμεθ', οἳ ῥα θεοῖσι πεποιθότες ἀθανάτοισιν / οὔτε φυτεύουσιν χερσὶν φυτὸν οὔτ' ἀρώσιν, / ἀλλὰ τά γ' ἄσπαρτα καὶ ἀνήροτα πάντα φύονται, / πυροὶ καὶ κριθαὶ ἦδ' ἄμπελοι, αἳ τε φέρουσιν / οἶνον ἐριστάφυλον, καὶ σφιν Διὸς ὄμβρος ἀέξει. / τοῖσιν δ' οὔτ' ἀγοραὶ βουλευφόροι οὔτε θέμιστες, / ἀλλ' οἳ γ' ὑψηλῶν ὀρέων ναίουσι κάρηνα / ἐν σπέεσι γλαφυροῖσι, θεμιστεύει δὲ ἕκαστος / παίδων ἦδ' ἀλόχων, οὐδ' ἀλλήλων ἀλέγουσι.

⁹⁶ Hom., *Od.* 9.213-215: αὐτίκα γάρ μοι οἶσατο θυμὸς ἀγήνωρ / ἄνδρ' ἐπελεύσεσθαι μεγάλην ἐπιειμένον ἀλκίην, / ἄγριον, οὔτε δίκας εὔ εἰδότα οὔτε θέμιστας.

⁹⁷ CHANTRAINE, 1977, *sv.* ὑπερφίαλος («violente, arrogant»); EBELING, 1963, *sv.* ὑπερφίαλος («superbus, insolens»); AUTENRIETH, 1891, *sv.* ὑπερφίαλος («overbearing, arrogant, insolent»). As for the synonymy existing between ὑπερφίαλος and ὑπερβίος, see CANTARELLA, 1981.

⁹⁸ See PELLOSO, 2012, p. 70 ff.

⁹⁹ On these verses see, *amplius*, PELLOSO, 2012, p. 121 ff.

¹⁰⁰ GIOFFREDI, 1962, p. 73; LO SCHIAVO, 1994, p. 40.

¹⁰¹ OSTWALD, 1973, p. 674 f.; MITTICA, 1996, p. 193; ALMEIDA, 2003, p. 176; BOUVIER, 2003, p. 249.

δίκαι as ‘litigation procedure in general’ (or as ‘justice’, but in the only sense of ‘procedures’) is totally unfounded¹⁰².

In the *Odyssey*, moreover, the most relevant semantic field offers new shades. *In primis*, the noun should be translated as ‘that which is due’ in the verses in which Eumeus declares that servants are fated to live with the few resources available to them, always fearing that new lords shall replace the old ones, because this is their δίκη¹⁰³; and also in the verses where Telemachus, speaking to the father he has not recognised yet, says that it is the δίκη of γέροντες to rest peacefully¹⁰⁴. In the passage in which Penelope complains that her suitors never had the δίκη to devour the riches of others, but they were to compete with each other in bringing presents, cattle, goats, and organizing banquets, the noun at issue should again be interpreted as ‘that which is due’¹⁰⁵. And this is the meaning of δίκη when Odysseus, in front of his wife, states that the δίκη of a man who is far away from his home-land is to suffer when he is asked to say from where he comes¹⁰⁶, and also where it is affirmed that the δίκη of mankind is to die and have the body decomposed¹⁰⁷. *In secundis*, the sign δίκη can be translated with its nuance of power (*de facto*) when Penelope underscores that if kings are used to choose their friends and enemies arbitrarily and oppress the people (as that is their δίκη), Odysseus never acted this way¹⁰⁸. Finally, δίκη can be translated

¹⁰² GAGARIN, 1973, p. 86 («many settlements»); «‘litigation procedure in general’»; see, moreover, LÉVY, 1998, p. 76; HAVELOCK, 1978, p. 136, 180).

¹⁰³ Hom., *Od.* 14.57-61: πρὸς γὰρ Διὸς εἰσιν ἅπαντες / ξείνοί τε πτωχοί τε. δόσις δ’ ὀλίγη τε φίλη τε / γίνεται ἡμετέρη· ἢ γὰρ δμῶν δίκη ἐστίν, / αἰεὶ δειδιότων, ὅτ’ ἐπικρατέωσιν ἀνακτες / οἱ νέοι...

¹⁰⁴ Hom., *Od.* 24.249-255: αὐτόν σ’ οὐκ ἀγαθὴ κομιδὴ ἔχει, ἀλλ’ ἅμα γῆρας / λυγρὸν ἔχεις ἀρχμεις τε κακῶς καὶ ἀεικέα ἔσσαι. / οὐ μὲν ἀεργίης γε ἀναξ ἔνεκ’ οὐ σε κομίζει, / οὐδέ τί τοι δούλειον ἐπιπρέπει εἰσοράασθαι / εἶδος καὶ μέγεθος βασιλῆι γὰρ ἀνδρὶ ἔοικας. / τοιούτω δὲ ἔοικεν, ἐπεὶ λούσαιτο φάγοι τε, / εὐδέμεναι μαλακῶς ἢ γὰρ δίκη ἐστὶ γερόντων.

¹⁰⁵ Hom., *Od.* 18.274-280: ἀλλὰ τὸδ’ αἰνὸν ἄχος κραδίην καὶ θυμὸν ἰκάνει / μνηστήρων οὐχ ἦδε δίκη τὸ πάροιθε τέτυκτο, / οἷ τ’ ἀγαθὴν τε γυναῖκα καὶ ἀφνειοῖο θυγατρα / μνηστεύειν ἐθέλωσι καὶ ἀλλήλοισ’ ἐρίσωσιν / αὐτοὶ τοὶ γ’ ἀπάγουσι βόας καὶ ἴφια μῆλα / κούρης δαῖτα φίλοισι, καὶ ἀγλαὰ δῶρα διδοῦσιν / ἀλλ’ οὐκ ἀλλότριον βίον νήποιον ἔδουσιν.

¹⁰⁶ Hom., *Od.* 19.164-170: τὴν δ’ ἀπαμειβόμενος προσέφη πολύμητις Ὀδυσσεύς / ὦ γύναι αἰδοίη Λαερτιάδω Ὀδυσῆος, / οὐκέτ’ ἀπολλήξεις τὸν ἐμὸν γόνον ἐξερέουσα; / ἀλλ’ ἔκ τοι ἐρέω. ἢ μὲν μ’ ἀχέεσσί γε δώσεις / πλείουσιν ἢ ἔχομαι· ἢ γὰρ δίκη, ὀππότε πάτρης / ἦς ἀπέησιν ἀνὴρ τόσσον χρόνον ὅσσον ἐγὼ νῦν, / πολλὰ βροτῶν ἐπὶ ἄστε’ ἀλώμενος, ἄλγεα πάσχων.

¹⁰⁷ Hom., *Od.* 11.215-222: ὣς ἐφάμην, ἢ δ’ αὐτίκ’ ἀμείβετο πότνια μήτηρ / ὦ μοι, τέκνον ἐμὸν, περὶ πάντων κάμμορε φωτῶν, / οὐ τί σε Περσεφόνεια Διὸς θυγάτηρ ἀπαφίσκει, / ἀλλ’ αὐτὴ δίκη ἐστὶ βροτῶν, ὅτε τίς κε θάνησιν. / οὐ γὰρ ἔτι σάρκας τε καὶ ὀστέα ἴνες ἔχουσιν, / ἀλλὰ τὰ μὲν τε πυρὸς κρατερόν μένος αἰθομένοιο / δαμνᾶ, ἐπεὶ κε πρῶτα λίπη λεύκ’ ὀστέα θυμός, / ψυχὴ δ’ ἦντ’ ὄνειρος ἀποπταμένη πεπότηται.

¹⁰⁸ Hom., *Od.* 4.686-693: οἱ θάμ’ ἀγειρόμενοι βίον κατακείρετε πολλόν, / κτήσιν Τηλεμάχοιο δαΐφρονος. οὐδέ τι πατρῶν / ὑμετέρων τὸ πρόσθεν ἀκούετε, παῖδες ἐόντες, / οἷος Ὀδυσσεύς ἔσκε μεθ’ ὑμετέροισι τοκεῦσιν, / οὔτε τινὰ ρέξας ἐξάϊσιον οὔτε τι εἰπὼν /

as ‘power’ in the scene where Odysseus explains to his son the miracle of the light produced by Athena, that illuminates the walls and the architraves of the palace, as an expression of the δίκη of the gods¹⁰⁹.

6. ‘Stating the straightest δίκη’; ‘selecting rules for straight δίκαι’;
δίκη as a ‘personal sphere’; δίκη as a ‘principle’.

If all this is right, then I believe it is unlikely that the same verb δικάζειν can also have a generic meaning of ‘judging’, that is ‘giving a judgment’ (both in a legal and in a non-legal context)¹¹⁰. In my opinion, as well as the middle-passive voice ‘δικάζεσθαι’ is a synonym of δίκην ειπεῖν, the active voice ‘δικάζειν’ can be interpreted as ‘declaring which reason (δίκην) is well-founded’, with a clear semantic and conceptual pre-eminence of the ‘substantive rights’ of the parties on the authoritative act, even though the Homeric context and the etymology do not offer a clear view of the methods (either argumentative or irrational) followed to reach the final decision on the dispute. Therefore, *rebus sic stantibus*, it is not clear whether the judgment (here interpreted as a ‘Sachurteil’) is (1) either the direct result of the judge’s ‘intimate conviction’ (i.e. the free evaluation of the evidence introduced in the legal process), as Hom., *Il.* 18.506 (ἀμοιβηδὶς δὲ δίκασσον) seems to suggest by implying a ‘public statement of reasons’ – rather than, as commonly assumed, a plurality of ‘interlocutory sentences’¹¹¹ – pronounced by each γέρον;

ἐν δήμῳ; ἢ τ’ ἐστὶ δίκη θεῶν βασιλῆων / ἄλλον κ’ ἐχθαίρησι βροτῶν, ἄλλον κε φιλοῖη / κείνος δ’ οὐ ποτε πάμπαν ἀτάσθαλον ἄνδρα ἐώργει.

¹⁰⁹ Hom., *Od.* 19.35-43: δὴ τότε Τηλέμαχος προσεφώνεεν ὃν πατέρ’ αἴψα / ὦ πάτερ, ἢ μέγα θαύμα τόδ’ ὀφθαλμοῖσιν ὀρώμαι / ἔμπης μοι τοῖχοι μεγάρων καλά τε μεσόδ-
μαι / εἰλάτιναί τε δοκοὶ καὶ κίονες ὑψός’ ἔχοντες / φαίνοντ’ ὀφθαλμοῖσ’ ὡς εἰ πυρὸς αἰθομένοιο. / ἢ μάλα τις θεὸς ἔνδον, οἱ σὺρανὸν εὐρὺν ἔχουσι. / τὸν δ’ ἀπαμειβόμενος προσέφη πολὺμητις Ὀδυσσεύς / σίγα καὶ κατὰ σὸν νόον ἴσχανε μηδ’ ἐρέεινε / αὕτη τοι δίκη ἐστὶ θεῶν, οἳ Ὀλυμπον ἔχουσιν.

¹¹⁰ See AUTENRIETH, 1891, *sv.* δικάζω; cf. FRISK, 1960, *sv.* δίκη; CHANTRAINE, 1977, *sv.* δίκη; TALAMANCA, 1979, p. 117.

¹¹¹ See, in this sense, WOLFF, 1946, p. 38 ff. (according to his interpretation, each elder decides either for the claimant or for the defendant with a yes or no ‘Sachurteil’, while the people chooses the straightest decision, on the ground of the best argumentation); see, also, THÜR, 1996, p. 60 f. (that, actually, does not exactly determine the content of the supposed ‘Beweisurteil’; see, also, THÜR, 2007, p. 190). Moreover, in Carlier’s opinion «three institutions are mentioned as taking part in the trial. The *laoi*, divided into two groups of opposed supporters, listen to the discussion and shout loudly in favour of one or the other litigant; the elders express their opinion one after another; the *istor* says which of the elders has given the better advice, and consequently which of the litigants is right. The text does not say that the *istor* is a king, but his role is exactly parallel to the role the king plays in political discussion. In both cases, the decision is reached in the same way: after listening to the elders, in front of the assembled people, one man finally decides» (CARLIER, 2006, p. 106 f.; see, moreover, CARLIER, 1999, p.

or (2) a mere authoritative statement the content of which is *ipso iure* determined by the compelling outcomes of a ‘formal and binding evidentiary proceeding’ (for example oaths, ordeals, battles)¹¹². It is true – and nobody can deny it – that in the famous passage in which Antilochus and Menelaus face each other¹¹³, the act of δικάζειν performed by the latter takes – as Thür has several times underlined¹¹⁴, and as the scholiast himself implicitly acknowl-

278 ff.). CULTRARO, 2009, p. 138, both following Carlier’s reconstruction and comparing PY Ep 704 with the judicial scene depicted in the shield, assumes that «la principale differenza tra il sistema normativo della Grecia micenea e quello della società post-palatina risiede proprio nel diverso ruolo del *da-mo/damos*: nel primo caso ... questa entità collettiva interviene nella contesa, mentre nel sistema omerico si limita ad ascoltare», and that «è un dato saldamente acquisito che sia il sovrano – e solo il sovrano – ad avere il potere di trasformare una proposta o una richiesta in un’ordinanza esecutiva». Such two assumptions are unfounded: indeed, PY Ep 704 only attests – for the Mycenaean age – a particular case where the ‘*da-mo*’ is a defendant (without mentioning any institutional role regularly played by the ‘people’); afterwards, the Homeric lines cannot be used as evidence – for the Iron Age – of the impossibility for the people as a whole to be sued.

¹¹² In my opinion, one must reject the reconstruction put forward by Gagarin (GAGARIN, 1986, p. 26 ff.: each elder, as an arbiter, in competition with the others in the view of a prize, proposes a ‘compromise settlement’, and the parties jointly choose the best one for them), since this thesis sophisticatedly creates a bulk of artificial issues to strengthen the arbitration theory (what is, generally, very controversial, as well as even impossible in the specific context of the dispute as depicted in the shield) and unlikely denies that the question at issue is a simple *quaestio facti* (that, indeed, can postulate just two possible clear-cut decisions). One cannot follow Thür’s theory (THÜR, 1970; 1996: each elder either proposes a fully new ‘Beweisverfahren’, or chooses which oath – one proposed by the plaintiff, one proposed by the defendant – should be sworn; see, moreover, LATTE, 1920, p. 8; PRIMMER, 1970), since it suggests an improbable meaning of the verb εὐχομαι (‘I’m ready to swear’), it maintains the indemonstrable divine nature of the ἵστωρ, it arbitrarily extends beyond its borders the particular meaning that δικάζειν shows (just) in Hom., *Il.* 23.573-580, and, as concerns the possible contents of the several ‘Beweisurteile’ proposed by the elders, it postulates an alternative that does not find any support in the verses. Once said that, and once pointed out that the only possible judgment, since the question involved in the process is a *quaestio facti*, is a ‘yes or no’ decision (CANTARELLA, 2002), as well as that the γέροντες, as members of a ‘panel of judges’ having seisin of the case, likely give one final judgment, then, Hom., *Il.* 18.506 can be read as attesting: 1) the existence of a system where each γέρον pronounces in public his own ‘statement of reasons’; 2) that ‘dissenting opinions’ were possible; 3) that the principle of ‘intime conviction’ was in force; 4) that the final judgment was the result of the majority vote. This hypothetical reconstruction contradicts entirely WOLFF, 1946, p. 75, who, as everybody knows, believes that δικάζειν generally means ‘to allow or to forbid the use of self-help’ after a formal proof and that it is formalized in the «solemn statement of the outcome of the evidence procedure» (see ANDERSEN, 1976); *contra*, moreover, THÜR 2006, p. 48 f., who believes that only at the end of the seventh century a real ‘Mehrheitsentscheidung’ is actually attested (*IG* I³.104).

¹¹³ Hom., *Il.* 23.573-580 (see above).

¹¹⁴ «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

edges¹¹⁵ – the shape of a ‘Beweisurteil’¹¹⁶ (while nothing in the verses at issue prevents from assuming that the act of δικάζειν performed by the Achaean chiefs may correspond to a ‘Sachurteil’, even resolving the dispute in a biased way in favor of the king). Anyway, maintaining that this verb always implies a ‘judicial authoritative statement’ which proposes (or orders) a ‘compelling evidentiary procedure’¹¹⁷ that automatically resolves the dispute, in the light of all the other Homeric passages, seems to me an excessive and inconsistent generalization: as if one would attribute all the particular characteristics of a *species* to a broader *genus*¹¹⁸. The same reasoning is true for δικασπόλος (appellative referred to the sons of the Achaeans and to Telemachus)¹¹⁹: nothing prevents this expression from being attributed to the judicial activity aimed at protecting any ‘well-founded claim’. Those who interpret the Greek δι-

and decide which of the litigants was to submit to taking it ... *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 judgment was necessary ... the magistrate does not decide on guilt or innocence but only gives a judgment about the oath-formula which, if taken, will automatically resolve the dispute» (THÜR, 1996, p. 60 f.; see THÜR, 1970, 1989; against this hypothesis, see TALAMANCA, 1979, p. 116; cf., *amplius*, PELLOSO, 2009-2010; 2012, p. 3 f. nt. 5, p. 128 nt. 63).

¹¹⁵ *Schol. Hom., Il. 23.579-580*: αὐτὸς δικάσω, καὶ μ’ οὐ τινά φημι ἄλλον ἐπιπλήξειν Δαναῶν: ἔδειξεν ὅτι τῷ εἰς ὄρκον προκαλουμένῳ οὐκέτι δεῖ ἀπόσασθαι ἰκέτην.

¹¹⁶ See, *contra*, GAGARIN, 2005, p. 87 ff.

¹¹⁷ As for the particular context of the quarrel between the two heroes, in my opinion the verses are clear enough against Thür’s thesis: the δικάζειν of Menelaus (regardless of its nature) seems to be a ‘definitive’ and ‘alternative’ judgment, since the δικάζειν of the chiefs of the Argives is immediately replaced by the Menelaus’ one (and that means that the ‘ἄμοιβηδὶς δικάζειν’ mentioned in *Hom., Il. 18.506* seems not to take place). Moreover, if one interprets the δικάζειν of Menelaus in terms of a ‘Beweisurteil’, such as it is characterized by Thür (see, THÜR, 1996, p. 64), *i.e.* a judicial statement whose content provides (and it is not determined by) a formal and compelling evidence procedure (for instance the swearing of an oath) as a proposal submitted together with other ‘Beweisurteile’ to someone’s acceptance, who would be this ‘someone’? I believe that Menelaus in *Hom., Il. 23.579 f.* is not the first of many Achaean leaders who ‘propose an oath’ each by an interlocutory sentence; he is the only one who ‘orders an oath’ to resolve the dispute with Antilochus with a ‘definitive judgment’. An alternative interpretation, more conforming to Thür’s one, could be the following one: Menelaus is the first that proposes in his interlocutory sentence a method of dispute-settlement; then all the other Greek leaders, in their subsequent interlocutory judgments, convinced by the oath already formulated, follow Menelaus’ ‘Beweisurteil’, without proposing further and different methods of settling.

¹¹⁸ See, on this issue, TALAMANCA, 1979, p. 116; GAGARIN, 1997, p. 131 f.; MAFFI, 2007, p. 190 ff.

¹¹⁹ *Hom., Il. 1.237-239*: νῦν αὐτὲ μιν ὕψες Ἀχαιῶν / ἐν παλάμῃς φορέουσι δικασπόλοι, οἳ τε θέμιστας / πρὸς Διὸς εἰρύονται...; *Od. 11.185-186*: Τηλέμαχος τεμένεα νέμεται καὶ δαίτας εἴσας / δαίνονται, ὅς ἐπέοικε δικασπόλον ἄνδρ’ ἄλεγγυειν. As for the traditional view, see, among the others, GAGARIN, 1973, p. 85; HAVELOCK, 1978, p. 113, 179, 287; CANTARELLA, 1979 a, p. 249; JANIK, 2000, p. 9; STOLFI, 2006, p. 32, 200; *contra*, see PELLOSO, 2012, p. 126 f.

κασπόλοι as the board that ‘gives judgments’ do not realise that if the noun is formed similarly to αἰπόλος and βουκόλος, based on the verb πέλεσθαι (*colere*)¹²⁰, then, in the same way as a goat-herd or a cattleman does not create or distribute ‘goats’ and ‘oxen’, but protects his animals, the δικασπόλος cannot be the one who protects his own judgments (unless one thinks that the Mycenaean king was even a sort of ‘clerk of the court’), but must be the one who protects the party that has (and exposes) well-founded reasons.

Once said that, it is also impossible to accept the reconstruction proposed by Havelock and Gagarin on the grounds of the analysis of further verses that can be considered a milestone in the development of the concept of δίκη towards an abstract principle. A passage in the sixteenth book of the Iliad, also dedicated to the death of Patroclus and structured on the basis of the cycles on the death of Achilles, talks about Sarpedon as the king who ruled Lykia by means of δίκαι and σθένος¹²¹: here, the juxtaposition of δίκαι to the abstract noun σθένος, the context that seems to exclude a pure subjective connotation, the presumable recentness of the book, seem to me elements that can lead the interpreter to refer the mentioned δίκαι to a ‘summa of legal principles which provide what is due and what is right’ (independently of the nature of law in Homer)¹²², rather than to simple ‘procedures’, or to ‘judgments’, or to the ‘justice’ itself¹²³. Conversely, according to another interpretation that – at least in my opinion – has some merit, where the text says that Nestor περιόιδε δίκας φρόνιν ἄλλων (a case that is often considered similar to that of Sarpedon)¹²⁴, no mention is made of the existence of Nestor’s ‘superior knowledge’ of φρόνις and δίκαι (variously interpreted in the sense of law, of justice, of procedures, of judgments)¹²⁵, but the king of Pylos (whom Telemachus ques-

¹²⁰ See FRISK, 1963, *sv.* δικασπόλος («Richter»); CHANTRAINE, 1977, *sv.* δίκη («juge, qui rend des sentences»); *contra*, see LIDDELL, SCOTT, 1996, *sv.* δικασπόλος, who connects -πόλος with τελείν.

¹²¹ Hom., *Il.* 16.541-543: κείται Σαρπηδῶν Λυκίων ἀγρός ἀσπιστάων, / ὅς Λυκίην εἴρυτο δίκησι τε καὶ σθένει φῖ / τὸν δ’ ὑπὸ Πατρόκλῳ δάμασ’ ἔγχεῖ χάλκεος Ἕρης.

¹²² See OSTWALD, 1973, p. 677; CANTARELLA, 1979 a, p. 149; PENTA, 2000, p. 681; PELLOSO, 2012, p. 133 f.

¹²³ See EHRENBERG, 1921, p. 59; GIOFFREDI, 1962, p. 73; GAGARIN, 1973, p. 85 f.; FRISCH, 1976, p. 46; JANKO, 1990 (*ad Hom.*, *Il.* 16.541-547); LO SCHIAVO, 1994, p. 32 nt. 21; YAMAGATA, 1994, p. 70; JANIK, 2000, p. 22, 29.

¹²⁴ See FRISCH, 1976, p. 49, cf. 46; CANTARELLA, 1979, p. 149 and nt. 41; CANTARELLA, 1985, p. 218; LO SCHIAVO, 1994, p. 39; YAMAGATA, 1994, p. 63; *contra*, see PELLOSO, 2012, p. 134 f. nt. 72.

¹²⁵ LIDDELL, SCOTT, 1996, *sv.* φρόνις: «(sc. Nestor) knows well the customs and wisdom above other men»; cf. WALTER MERRY, RIDDELL, MONRO, 1886 (*ad Hom.*, *Od.* 3.244); *contra*, see EHRENBERG, 1921, p. 59, who believes that Nestor «kennt das Anrecht der anderen, er weiss, was ihnen zukommt», so that «beweist die pluralische Verwendung, daß an der konkreten Ursprungsbedeutung noch festgehalten ist, so ist doch deutlich, daß in den konkreten δίκαι das Abstraktum, die δίκη, schon beschlossen ist».

tions on the death of Agamemnon) is described as an expert of the mind and of the sorts allotted to the other men. Finally, there are at least two passages that describe the nascent *iter* that shall lead δίκη to be identified as a principle (and for this reason, the version that tries to extract here even a vestige of procedural meaning is simply self-serving): in the first one, Zeus is depicted as the punisher of those judges who banish δίκη from the ἀγορή, by ‘κρίνοντες σκολιὰς θέμιστας’ (that is, when carrying out the regal activity of ‘Rechtsfindung’, they choose theo-physical rules or principles that, just and right if considered *per se*, do not match the case, and for that reason they make the θέμιστες ‘wrong’ for the final decision of the dispute)¹²⁶; in the second one,

¹²⁶ Hom., *Il.* 16.384-388: ὡς δ’ ὑπὸ λαίλαπι πᾶσα κελαινὴ βέβριθε χθῶν / ἤματ’ ὀπωρινῶ, ὅτε λαβρότατον χέει ὕδωρ / Ζεὺς, ὅτε δὴ ῥ’ ἄνδρεςσι κοτεσσάμενος χαλεπήνη, / οἱ βίη εἰν ἀγορῇ σκολιὰς κρίνωσι θέμιστας, / ἐκ δὲ δίκην ἐλάσσωσι θεῶν ὅπιν οὐκ ἀλέγοντες (on the role played by Zeus, see, paradigmatically, Hom., *Od.* 1.376-380, 3.132-134, on which LLOYD-JONES, 1971, p. 2 ff., 28 ff.; moreover, in accordance with such a doctrine, see Hesiod., *Op.* 9, 221, 264, and, on the contrary, Hom., *Il.* 15.135-137). See, on these verses, GAGARIN, 1973, p. 86, who maintains that «the meaning ‘legal process’ is all that the context requires», and that «there is no evidence to indicate that we should extend the meaning of δίκη to something approaching ‘abstract justice’ or even ‘lawful behavior’»; HAVELOCK, 1978, p. 137: «there is no need to look for a late or post-Homeric source; the only difference is that elsewhere the procedure is memorialized by describing how it is applied, whereas here it is recommended by describing what happens when it is not applied» (see, moreover, MITTICA, 1996, p. 193, who makes δίκη mean «serie di sentenze date di necessità conformemente a quelle originarie divine»); this reconstruction seems to be so ‘unilateral’ and ‘frivolous’ that the Homeric context itself can be invoked against such a trend; see, moreover, JANKO, 1994, *ad* Hom., *Il.* 16.386-388, who translates δίκη with ‘case». On the contrary, see GERNET, 1917, p. 23; LLOYD-JONES, 1971, p. 6, 166 (even if he seems to me too peremptory when assuming that the doctrines implied in these verses «are in fact perfectly consistent with the theology of the Iliad as a whole»); PAZDERNIK, 1976, p. 73; DICKIE, 1978, p. 97; YAMAGATA, 1997, p. 91; LÉVY, 1998, p. 78: these scholars, among the others, rightly point out the necessity to see here the mention of a ‘principle’ (see, finally, PELLOSO, 2012, p. 132 f.). On the Hesiodic influences (see Hesiod., *Op.* 8 ff.) that these verses show, see WILLCOCK, 1984 (*ad* Hom., *Il.* 16.387); (while KRAFFT, 1963, p. 77, believes that the scenario is spurious, and, similarly, LATTE, 1968 a, p. 10, considers the picture as a *hapax* which has been later introduced in the original text). As regards the qualification of the θέμιστες in terms of ‘σκολιαί’, in my opinion, if one interprets these verses as a criticism directed by Homer to the contents themselves of the ‘theo-physical order’, this sounds completely wrong: the only target of such an attack is the kings-judges who with their judgments allow ungrounded or even phony claims, as well as reject well-founded defenses (for a criticism to the main interpretations of this noun with regard to such context, see PELLOSO, 2012, p. 91 f. and nt. 221). In other words, it is not the ‘justice *per se*’, but the ‘administration of justice’ as such that is censured by the poet: my interpretation is corroborated by the etymological meaning of κρίνειν, that is «séparer, choisir, trier, trancher, décider» (CHANTRAINE, 1977, *sv.* κρίνειν; see, moreover, YAMAGATA, 1997, p. 90; FARAGUNA, 2007, p. 77), and by *Schol.* Hom., *Il.* 16.387 b (οἱ βίη εἰν ἀγορῇ σκολιὰς κρίνωσι θέμιστας· οἱ κακῶς κρίνοντες σκολιὰς ποιήσουσι θέμιστας); see, for a different approach to the issue, ROUSSEAU, 1996, p. 107 ff.; BOUVIER, 2003, p. 267; BLAISE, 2006, p. 121 f.

Odysseus' servant Eumeus reiterates the *φιλία* of the gods towards what is *δίκη*, not towards the *ἔργα σχετλιά*, that is to say towards human behaviours that are *αἴσιμα*¹²⁷ and conform with the gods' will and the nature of the world¹²⁸.

If, as a final point, *δίκη* must be considered first of all an 'individual sphere', a 'subjective substantive situation', something that is owed, a claim, a reason, a power, thence it is groundless to espouse *toto coelo* the thesis supporting the primary and more wide-spread procedural meaning of the word; likewise, it is not convincing to identify *δίκη* (as against the order of *θέμις*) with an interfamilial law, with a human law or with a potentially democratic law. Actually, contextual analysis does not provide grounds for such 'objective' interpretations: *ex post*, therefore, the thesis that rests upon the use of the Indo-European root **deik* as a precursor of the basic idea of 'boundary'¹²⁹, or the opinion sustained by those who have stressed the subjectivity of *δίκη* turns out to be more persuasive¹³⁰. In fact, I believe that this concept can be found in two further famous Hesiodic passages respectively celebrating the idealised king, and criticizing the corrupt kings¹³¹: according to the *communes opiniones*, the noun *δίκη*, in its sense of either judgment or decision, or of content of a judgment, or of settlement, is opposed to *θέμιστες* in its sense of 'issues deduced into the process', 'legal cases', 'legal questions', 'law-sessions'¹³².

¹²⁷ See BIANCHI, 1969; HOROWITZ, 1975; GRIFFIN, 1986, p. 40.

¹²⁸ Hom., *Od.* 14.80-84: ἔσθιε νῦν, ᾧ ξεῖνε, τά τε δμῶεσσι πάρεσσι, / χοῖρε· ἀτὰρ σιάλους γε σύας μνηστῆρες ἔδουσιν, / οὐκ ὄπιδα φρονέοντες ἐνὶ φρεσὶν οὐδ' ἔλεητῶν. / οὐ μὲν σχέτλια ἔργα θεοὶ μάκαρες φιλέουσιν, / ἀλλὰ δίκην τίουσι καὶ αἴσιμα ἔργ' ἀνθρώπων. See DICKIE, 1978, p. 96 f.: «there is still no justification for taking *δίκη* there to mean 'legal process'», since «is contrasted with *σχετλιά ἔργα* and associated with *αἴσιμα ἔργα*» (accordingly, see GERNET, 1917, p. 23; EHRENBERG, 1921, p. 59; LLOYD-JONES, 1971, p. 166; FRISCH, 1976, p. 46; LÉVY, 1998, p. 71, 78). All in all, Hom., *Il.* 16.388 and *Od.* 14.84 are both clear examples of the noun *δίκη* used as a 'principle'; therefore, the verses themselves do not allow at all to assume that here *δίκη* is a «procedure for settling disputes» (GAGARIN, 1973, p. 85 f.; see, also HAVELOCK, 1978, p. 180: «the *dike* they also prefer is that procedure which preserves or restores propriety by peaceful adjustment of claims rather than indulging in ruthless or extravagant behavior»); other authors, as already mentioned, like to add even Hom., *Il.* 16.541-542 and *Od.* 3.244 (see CANTARELLA, 1979 a, p. 149): but this solution seems to me, as already pointed out, partially unconvincing.

¹²⁹ PALMER, 1950; BISCARDI, 1982, p. 354.

¹³⁰ JAEGER, 1936-1954=2003; RUDHARDT, 1999; JELLAMO, 2005; PATTARO, 2005; for further remarks cf. PELLOSO, 2012, p. 129 ff., 139 ff.

¹³¹ See Hesiod., *Theog.* 85-86 (πάντες ἐς αὐτὸν ὀρώσι διακρίνοντα θέμιστας / ἰθίησι δίκησιν); *Op.* 221 (δωροφάγοι, σκολιῆς δὲ δίκης κρίνωσι θέμιστας). On these verses see, *amplius*, PELLOSO, 2012, p. 131 ff.; see, moreover, *Op.* 35-36 (διακρινόμεθα νεῖκος / ἰθίησι δίκησιν), where the dative 'ptosis' 'ἰθίησι δίκησιν' may be interpreted, without a doubt, as meaning both 'with just judgments', and 'for [the] founded reasons'.

¹³² See, paradigmatically, BLAISE, 2006, p. 121, who believes that «the *dikai* refer to a concrete activity, legal proceedings, and designate the proceedings themselves or the sentence that

However, while it is true that in the Homeric epos the word θέμιστες is used only to describe authoritative acts whose source is the gods (not the parties in a dispute; not even the human judge), and that the first sense of (δια)κρίνειν is ‘to choose/to select’, the δίκαι quoted in this two opposite situations may be certainly interpreted as the ‘reasons of the opponent parties’ (as included in the respective judicial acts): on the one hand, the just βασιλεύς shall always allow well-founded claims (ἰθεῖαι: *i.e.* that proceed straight and find justly their target), on the other hand, the corrupt one, through the violation or the misconstruction of the rules and the principles codified in the θέμιστες, shall allow vexatious or simply unfounded claims (σκολιαί).

In short, the conceptual foundations of the Greek legal experience do not seem to draw on the judge and his authority, on the legal procedure and its rituals, but, rather, on the individual and, from an eminently substantive point of view, on his or her complex set of rights, duties, powers and freedoms. Being part of a system, that is the ancient order of θέμις, at first means entitlement to δίκαι, *i.e.* to ‘substantive positions’; ‘procedures’ are just over-structural and secondary devices aimed at protecting the claims previously recognized to the members of the system as such: and this – even if often forgotten, misunderstood, overlooked – represents one of the most significant lessons we can infer from early Greek epos.

7. On a recent critical review.

I hope the remarks developed in this paper may further improve and better clarify the explanations I had already endeavoured to illustrate in a recent monograph which, under the title *Themis’ e’ dike’ in Omero. Ai primordi del diritto dei Greci*, is focused on the relation existing between ‘substance’ and

is the result of them» (nt. 23), so that «two legal moments are distinguished: the king decides (διακρίνει) some *themistes* thanks to some straight (or crooked) *dikai*. Whatever its precise meaning may be, the word *themistes*, which derives from the same root as τίθημι (‘to place’), refers to the idea of fixedness, of established norms or decrees, while the plural *dikai* refers to an activity, the procedure through which the judge settles the dispute by deciding among the *themistes*». See, moreover, WEST, 1966 (*ad* Hesiod., *Theog.* 85-86); LATTE, 1968, p. 233 ff.; OSTWALD, 1973, p. 676; WEST, 1978 (*ad* Hesiod., *Op.* 221); VERDENIUS, 1985 (*ad* Hesiod., *Op.* 9, 36, 221); GAGARIN, 1986, p. 22 and nt. 16, 34; VAN WEES, 1992, p. 34 nt. 44; HUBBARD, 1995, p. 164 nt. 8, 171; RUDHARDT, 1999, p. 32 ff. What is more, in Gagarin’s opinion (GAGARIN, 1973, p. 89), δίκη, whose primeval meaning is thought to be «settlement», stands for «litigation process, legal system, law, rule of law» in Hesiod., *Op.* 9, 192, 213, 217, 220, 249, 256, 269, 275, 278, 279, 283. Actually, in the *Works and Days* δίκη reveals a multi-faceted semantic sphere (see GERNET, 1917, p. 16): it is a ‘principle’, even personified (*Op.* 9, 192, 220, 256, 269); it is a ‘judgment’ (*Op.* 36); it is a ‘proceeding’ (*Op.* 39); it is a ‘sanction’ (*Op.* 239, 249); in most cases it is obviously a ‘substantive subjective position’ (*Op.* 219, 221, 230, 250, 254, 262, 264, 272).

‘procedure’ in the Homeric poems¹³³. And I also hope to have been able, if not to totally persuade Maffi, at least to diminish the skepticism he did show, together with some gracious praise, in his review of my work (for instance, when he writes: «io non credo che il tentativo, condotto dall’A. con tenacia e intelligenza, di individuare un significato unico, o anche soltanto prevalente, dei due termini studiati conduca a un risultato convincente»); or, again, when he writes «nemmeno mi sembra che le interpretazioni proposte dall’A. forniscano un contributo significativo al problema da cui aveva preso spunto la sua ricerca, cioè il rapporto fra ‘azione’ e ‘diritto soggettivo’»)¹³⁴. Indeed, notwithstanding my reviewer’s authority, the criticisms put forward do not turn out to be strong enough to make me change my mind. In short, I will try to explain why.

Maffi starts off this way: «lo stesso A. è costretto a riconoscere, come i suoi predecessori, che nei poemi omerici (nonché negli Inni omerici e in Esiodo, occasionalmente inclusi nella trattazione) *themis* e *dike* presentano una gamma di significati, se non inconciliabili, quanto meno difficilmente riconducibili a un denominatore comune». Actually, these sentences do not exactly summarize my opinion, since I anyhow believe that – regardless of the undeniable polysemy that characterizes both concepts – a common and primeval semantic sphere can conceivably be retraced¹³⁵.

If I have not got Maffi’s thought wrong, the following statement looks like an overestimation of the expected outcomes of the diachronic approach to Homer¹³⁶, as well as an implicit adhesion to the by then outdated ‘amalgam-theory’¹³⁷: «è ... inevitabile, e nemmeno l’A. riesce ad evitarlo, tentare di spiegare i differenti significati e usi dei termini in questione collocandoli in una serie cronologica ... che però non trova corrispondenza in un mutamento coerente e parallelo del quadro politico, economico e sociale riscontrabile nei poemi». In reality, it is not a question of reconstructing all the data offered by Homer in a ‘coherent’ and ‘plain’ continuum (what would be a hubristic effort directed to an impossible result); it is a question of explaining (rationally, if and when possible) the Homeric ‘cultures’ in the light of the incontrovertible great amount of inconsistencies and contradictions, poetic exaggerations and mythical motifs. Thus, before the ‘high majesty’ of the poems, the ‘humble historian’ either may maintain «that Homer’s fictive universe remains immortal precisely because it never existed as such outside

¹³³ PELLOSO, 2012.

¹³⁴ MAFFI, 2013.

¹³⁵ PELLOSO, 2012, p. 139 ff.

¹³⁶ See CANTARELLA, 2001 (with further bibliography); cf. CANTARELLA, 1994; NAGY, 1995; ERCOLANI, 2006, p. 56 ff. Actually, the presence in the poems of description of material and cultural elements being prior to the eight century B.C. cannot be even denied by RAAFLAUB, 1997, 1998, 2006.

¹³⁷ See, for instance, LONG, 1970; SNODGRASS 1974; SHERRATT 1990; THOMAS, 1994.

the poet's or poets' fertile imagination(s) – in much the same way as Homeric language was a 'Kunstsprache' never actually spoken outside the context of an epic recital»¹³⁸, or he may make an effort to disentangle periods and societies, institutions and customs, rules and procedures. In the way forward the latter goal, setting each single evidence in an acceptable historical *processus* – even though inexorably characterized by many gaps and lack of fluid continuity – is indispensable, since otherwise «le informazioni ... appiattite su un unico orizzonte temporale ... si contraddicono al punto da costringere a negar loro valore storico»¹³⁹. So, once let apart elements of fantasy (such as Odysseus' tales of adventures, the description of Alcinous' palace, or human-divine relations), exaggerations (such as the descriptions of the heroes' weapons and their strength, or numbers and time frames), and all that aims at creating an 'epic distance' (such as omissions of more current times), I do not hesitate to repeat the following opinions. On the one hand, clear examples of the Bronze Age include the 'bronze weapons', the 'boar's tusk helmet', the 'use of chariots in battle', whereas Priamus' family and palace, as well as the use of siege machines on wheels reflected in the myth of the Trojan Horse, can be easily read as signs of the Dark Ages. On the other hand, the administration of justice by a 'single-judge court' (such as Minos and Agamemnon) and the administration of justice by a 'panel of judges' (such as the court portrayed on Achilles' shield, or the corrupted aristocrats that Hesiod blames) show *inter se* formal and substantial dissimilarities that lead – even if they do not force – to think of two antithetical paradigms of 'legal procedure', each likely corresponding to a precise and single dot in the time-line. All that said against the simplistic idea supporting a synchronic frame for the poems, I need to point out that, in my view, even regardless of any institutional and cultural shift, neither *θέμις* changes its meaning (since, in the Homeric poems, it represents an 'objective and undifferentiated order', the ideological sources of which are natural forces or supernatural ones)¹⁴⁰; nor, apart from three (quite easily explicable) exceptions¹⁴¹, *δίκη* does so (since, in the Homeric poems, it stands for a 'subjective position', even if

¹³⁸ CARTLEDGE, 2001, p. 151.

¹³⁹ CANTARELLA, 2001, p. 11.

¹⁴⁰ PELLOSO, 2012, p. 70 f., 141 f.

¹⁴¹ PELLOSO, 2012, p. 132 ff. Thence, Maffi assumes: «lo stesso A. non può fare a meno di riconoscere che, in determinati passi dei poemi omerici, *dike* assume un significato diverso, irriducibile a quello da lui considerato predominante. Mi riferisco in particolare a *Il.* 16.541-42, in cui Sarpedonte viene esaltato 'come re che preserva la Licia con *dikai* e *sthenos*'. Secondo l'A. qui sarebbe documentato l'avvio di un 'processo di astrazione' che conduce dal significato di *dike* nel senso di spettanza all'emersione di *dike* nel senso di 'principio di 'giustizia' (p. 133). Mi chiedo: in base a quali argomenti è possibile collocare questi diversi significati in una serie cronologica?». I have already explained at length my point in PELLOSO, 2012, p. 133 f. and nt. 72: so, it is deemed not necessary to return to this topic.

its wide and multifaceted use presents more than a few nuances depending on the circumstances)¹⁴². To tell the truth, afterwards, I only believe that the ‘role’ played by the *θέμιστες* in legal procedure (together with the ideology of judicial power) is doomed to change¹⁴³.

Maffi, with regard to the topic just above mentioned, wonders: «chi ci dice che la decisione giudiziaria del *wanax* miceneo non potesse essere considerata in contrasto con l’ordine ‘teo-fisico’? E, d’altra parte, visto che non sembrano esistere mezzi per impugnare una sentenza considerata ingiusta, o comunque non conforme all’ordine divino, che utilità poteva avere attribuire a *θέμιστες* l’efficacia di una ‘Rechtsfindung’ tutta umana?». Once made clear that *θέμιστες*, in my reconstruction, can never be given the effectiveness of a ‘Rechtsfindung’, since they are just the content (that is ‘non-human rules’ foregoing both legal process and judgment) of the ‘κρίνειν’ (that is human activity of ‘finding’ and ‘selecting’, carried out during the process with a view to the judgment itself), I think that my interpretation may gain support from this simple element: only in Hesiod¹⁴⁴ (and in Hom., *Il.* 16.384 ss.)¹⁴⁵ the administration of justice is sometimes labeled as a crooked one, whereas in all the other Homeric verses attesting the noun *θέμιστες* a monarchic legal procedure fits the context better than an aristocratic one, no form of poetic disapproval appears, divine power is constantly mentioned as basis and validation of human power (and, moreover, it must be remarked that such pictures convey an ideology and a theology of kingship much different from the Odyssey’s one)¹⁴⁶.

Maffi, after recalling my definition of Homeric *δίκη*, that is «sotto il profilo statico ... ragione di parte, spettanza, posizione ... sotto quello dinamico ... procedura attivata per far valere una propria posizione o far riconoscere una posizione altrui», goes on and states: «ora, a me pare che qui emerga una contrapposizione, se non una contraddizione, tra un’affermazione, appunto soggettivistica, di una propria pretesa o spettanza, e il riconoscimento di una pretesa o di una posizione altrui». Actually such an opposition, or such a contradiction, can be appropriately supposed and rightly maintained with regard to a given historical or meta-historical reference background only if one has demonstrated in advance that a dichotomy exists between procedure and substance and, at the same time, that ‘action’ is an autonomous, formal, and abstract concept: without any former explanation, the criticism conceals an approach that interprets ancient sources with modern and contemporary categories (since the theorization of a legal system both based primarily on ‘substantive rights’ and made effective

¹⁴² PELLOSO, 2012, p. 110 ff., 119 ff.

¹⁴³ PELLOSO, 2012, p. 81.

¹⁴⁴ See *supra*, p. 257 nt. 131 f.

¹⁴⁵ See *supra*, p. 256 nt. 126.

¹⁴⁶ See, for instance, CARLIER, 1984, p. 195 ff.

ex post through ‘legal procedures’, is the outcome of post-medieval speculations)¹⁴⁷. All in all, until otherwise proven, I have reason to keep on believing that, if «per i Romani era titolare dell’*actio* solo chi aveva ragione», since «chi afferma diritti o situazioni di fatto che non vengono riconosciuti sussistenti ... non ha l’*actio*»¹⁴⁸, likewise in the Homeric poems ‘one has δίκη, if he has δίκη’. What is more, the concrete example quoted by Maffi to support his view does not seem to me appropriate, since the point is founded on a singularly curious, if not wrong, interpretation of Hom., *Od.* 9.215 (interpretation which, given its wording, could also be read as if it ascribed to me a thought that actually I never expressed): «che ad es. di Polifemo si dica che ‘non conosceva né δίκαι né θέμιστες’ ... non implica evidentemente che non conosceva le proprie ‘pretese’, ma che queste pretese non erano conformi a ciò che per le regole delle relazioni umane gli sarebbe spettato». Provided that my ‘subjective interpretation’ of δίκη neither excludes that one can violate *de facto* another’s δίκη, nor implies that, when one rejects or accepts the existence of a δίκη, he is dealing just with his own δίκη, it is evident – at least to me – that the verse in question does not concern Polyphemus and his own claims: when reading it in its proper context, and once compared it with Hom., *Od.* 9.106, it is easy to realize, against Maffi’s understanding, that here the sign δίκαι stands just for human ‘subjective positions’, ‘reasons’, ‘rights’, ‘claims’, *i.e.* δίκαι which Odysseus and his fellows are entitled to, and which the Cyclops does not ‘see’, *i.e.* does not ‘acknowledge’ (and this and only this is the meaning I presented in my monograph and I have repeated in this paper in contradiction with other ‘objective’ interpretations)¹⁴⁹.

Maffi maintains: «se si ammette che ... i poemi ci attestano un uso diversificato in base ai contesti di questi termini chiave, non si potrà negare che δίκη ricorra *anche* nel significato di ‘procedura di giustizia’ (lo stesso A. parla a p. 149 della ‘permanenza di sfumature processualistiche’) o di ‘codice’ avente ad oggetto ‘modi di comportamento ... comunemente accettati e pretesi’ (così Havelock, citato dall’A. a p. 136)». It was not my aim to deny such semantic shades overall (undoubtedly existing in more recent sources). In the light of many deficiencies identified in Havelock’s and Gagarin’s thesis, I just tried to propose an alternative explanation of the noun δίκη and I suggested to read its earliest attestations from a subjective (that is ‘not characterized by objective connotations’) and monistic (that is ‘not directed to distinguish substance and procedure’) point of view: in effect, the so called ‘procedural thesis’ fails to make clear how the semantics of δίκη developed step by step, it is quite con-

¹⁴⁷ On the absence of a dichotomy between procedure and substance in ancient and medieval world, ORESTANO, 1959 is still essential; for a further bibliography and a wider analysis of the so called ‘Problem of Action’, see, more recently, PELLOSO, 2011, p. 127 ff., 131 ff.

¹⁴⁸ PUGLIESE, 1959, p. 27 f.

¹⁴⁹ PELLOSO, 2012, p. 122 f. and nt. 42.

fused in expounding the logical and historical link between δίκη and θέμις, it arbitrarily gives δίκη several meanings, either objective *per se* or tending towards an objective nuance (like ‘code’, ‘procedure’, ‘custom’, ‘behavior’), which could be straightforwardly replaced with one all-encompassing value (like ‘personal sphere’).

To conclude, I still have confidence in the final results of my work about early Greek *epos* and against the chronological and logical priority of procedure over substance. Indeed, the target has not been missed, even if I am persuaded that it may be helpfully adjusted: my explanation of δίκη is not contradicted by the Homeric verses, it is further corroborated by etymology, it gets harmoniously along the objective interpretation proposed for θέμις, it is perfectly consistent and coherent with a non-sophisticated culture which – as Maffi must admit himself – «non si poneva certo un problema che presuppone un ordinamento giuridico progredito e complesso, quale si avrà in Grecia ... non prima del V secolo a.C.».

Abbreviations

IG I³: *Inscriptiones Graecae*, I, *Editio tertia, Decreta et Tabulae Magistratum*, cur. D. Lewis, Berlin, 1981.

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The Myth of the Priority of Procedure
over Substance in the Light of
Early Greek Epos

*Il mito della priorità della procedura
sulla sostanza alla luce
dell'epos greco arcaico*

Abstract

Riassunto

Law can be shaped or considered in each of the two following ways: on the one hand, as a 'system of rights', so that actions are just the remedies created – on the subsidiary level of procedural law – to uphold them; on the other hand, as a 'system of actions', so that legal protection comes conceptually and operatively before legal acknowledgment, since, if an action is made available, that means that simultaneously an implicit right is given. In the light of such a basic distinction, some general questions *ipso iure* arise on the ground of both 'jurisprudence' and 'history of ancient Greek legal systems'. Is it exact to assume that the above mentioned difference is only one of emphasis? Is it exact to suppose the chronological priority of procedural law over substantive law? Is it exact to consider the State and its legal process as the essential requirements to meet in order to consider a given system of rules a very legal system? As regards the legal concepts emerging from Homer and Hesiod, the *communis opinio* interprets the sign δίκη at first as 'settlement or decision between two parties'; consequently once he one assumes that the so called 'forms of actions' are the primeval pillars of the archaic Greek legal systems, and that the 'judge' (or better the 'arbiter') is the prototype of the institutionalized creator of legal rules. Through the exegesis of early Greek *epos*, this article aims at demonstrating: the incorrectness

*È possibile strutturare e concepire il diritto oggettivo in due modi: da una parte, come un sistema di diritti soggettivi, di talché le azioni sono solo strumenti rimediali di natura processuale tesi a tutelarli; dall'altra, come un sistema di azioni, di talché la tutela giurisdizionale precede concettualmente ed operativamente il riconoscimento giuridico, in quanto, se un'azione è esperibile, ciò significa che al contempo un implicito diritto soggettivo è stato attribuito. Alla luce di questa fondamentale distinzione, sorgono ipso iure alcune domande che concernono tanto la teoria generale quanto la storia degli antichi ordinamenti giuridici greci. È esatto ritenere che la sopraccennata differenza ha valore solo formale? È esatto supporre la priorità cronologica e logica del diritto processuale su quello sostanziale? È esatto considerare lo Stato e il processo giurisdizionale quali indefettibili requisiti per un sistema, non di sole regole, ma propriamente normativo? Con riguardo ai concetti giuridici che emergono in Omero e in Esiodo, la *communis opinio* interpreta il segno δίκη in primo luogo come 'risoluzione o decisione di una controversia tra due parti'; conseguentemente si assume che le 'azioni' rappresentino i primordiali pilastri degli ordinamenti greci più antichi e che il 'giudice' (o, meglio, l'arbitro) sia il prototipo del creatore istituzionale delle norme. Attraverso l'esegesi dell'epos*

of the analysis that considers the antithesis between substance and procedure as a mere question of emphasis, and, above all, the original Greek monism (given that the opposite view, supporting the priority of procedure over substance, is just an anti-historical and aprioristic one, since it is deeply – perhaps unconsciously – influenced by the so called Roman ‘*aktionenrechtliches Denken*’ and it is founded on a partisan reading of the sources).

Keywords: δίκη, substance, procedure, legal procedure in Homer and Hesiod.

greco arcaico, questo articolo è volto a dimostrare la fallacia dell’analisi che ritiene l’antitesi tra sostanza e procedura come una questione di sola forma, e, soprattutto, l’originario monismo greco (atteso che la tesi opposta, in favore della priorità della procedura sulla sostanza, è antistorica e aprioristica, sia perché profondamente influenzata, benché in modo forse inconscio, dal cd. ‘aktionenrechtliches Denken’ romano, sia perché basata su una lettura partigiana delle fonti).

Parole chiave: δίκη, sostanza, procedura, processo in Omero ed Esiodo.

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