

【特別寄稿】

HOMERIC *HISTOR* (Il. 18., 497-508), *MNAMON* IN
GORTYN, *PRISTAV* AMONG THE SLAVS, *DORZON* IN
ALBANIAN CUSTOM — DIFFERENT LEGAL
SYSTEMS, SIMILAR INSTITUTION^{*1}

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Goal of this paper is not only to offer an additional interpretation of *histor* in the famous trial case in *Iliad* but to add a contribution to old methodological dilemma of legal history. The question is whether similarities between some legal institutions usually consequence of inter-influence among legal systems and some sort of legal transplants or the likeness often arose out of analogous social circumstances, level of development and alike societal needs. It goes without saying that anthropological parallels are useful in understanding and explaining similar institutions in different legal organisms, but it makes sense only when interpretation of old and new sources is completed. The anthropological approach in ancient Greek law was partic-

^{*1} This contribution is based upon a lecture that I gave at the University of Tokyo in January 2014 due to courtesy of Prof. Yasunori Kassai. I also owe gratitude to many Japanese colleagues for their valuable discussions, but in particularly to Omi Hatashin from Kyoto Institute for English and Japanese Laws for a fruitful correspondence. Most of all my debt goes to Prof. Gerhard Thür for his long lasting academic support and valuable comments on that paper.

ularly favored by David Cohen who claimed that “Strictly speaking, for the study of Athenian law, Homer is no more relevant than the Twelve Tables, or, for that matter, anthropological evidence from modern Africa”.^{*2} On the other side, Gerhard Thür is rightly warning that “home-made and second-hand anthropology” could be dangerous and that it should be performed in reasonable boundaries.^{*3} In case of Homeric *histor* it seems that all relevant sources from ancient Greece are already exhausted during the last two centuries academic debates. Therefore it seems that there is a good excuse to approach the issue by comparative analysis of similar institutions in societies with undeveloped legal systems during the process of their formation, no matter when they appeared in history.

There is no doubt that famous blood-money trial described by Homer in *Iliad* as a scene on the shield of Achilles has attracted attention of many generations of scholars. But a few same guessing are still circulating and it makes that fragment one of the most controversial and disputed places in Homeric law. The problem is strongly reflected in very diverse translations of provocative verses in *Iliad* 18, 497-508 as legal historians still did not resolve many important elements of the case.

This is why one may meet in all languages quite dissimilar explanations of that puzzling place in Homer. We will offer only some relevant English translations,^{*4} although the same problem appears everywhere.

^{*2} D. Cohen, “Late Sources and the ‘Reconstruction’ of Greek Legal Institutions”, *Symposium 1988, Vorträge zur griechischen und hellenistischen Rechtsgeschichte*, Köln – Wien 1990, 288. The same attitude Cohen repeats *ad verbum* in D. Cohen, “Greek Law – Problems and Methods”, *Zeitschrift der Savigny-Stiftung* 106/1989, 92.

^{*3} G. Thür, “Oaths and Dispute Settlement in Ancient Greek Law”, *Greek Law in its Political Setting* (ed. L. Foxhall, A.D.E. Lewis), Oxford 1996, 57-72.

^{*4} I am particularly grateful to Prof. Victor Castellani from the University of Denver, Chair of the Department of Languages and Literatures, for offering me some most relevant or influential English translations of the Homer *Iliad*. Selection of the best English translations is not

How to translate the word *istor* is an unavoidable headache particularly for linguists, as the support of legal historians is not decisive enough. However, the translation of that word causes many important consequences in understanding what *istor* really was and what was his role in the Homeric trial procedure.

1. HOMER, *Iliad* XVIII 497-508 — TEXT AND TRANSLATIONS

λαοὶ δ' εἰν ἀγορῇ ἔσαν ἄθροοι: ἔνθα δὲ νεῖκος
 ὠρώρει, δύο δ' ἄνδρες ἐνεΐκεον εἵνεκα ποινηῆς
 ἀνδρὸς ἀποφθιμένου: ὃ μὲν εὖχετο πάντ' ἀποδοῦναι
 δῆμῳ πιφαύσκων, ὃ δ' ἀναίνετο μηδὲν ἐλέσθαι: 500
 ἄμφω δ' ἰέσθην ἐπὶ ἴστορι πεῖραρ ἐλέσθαι.
 λαοὶ δ' ἀμφοτέροισιν ἐπήπυνον ἀμφὶς ἄρωγοί:
 κήρυκες δ' ἄρα λαὸν ἐρήτυον: οἳ δὲ γέροντες
 εἶατ' ἐπὶ ξεστοῖσι λίθοις ἱερῶ ἐνὶ κύκλῳ,
 σκῆπτρα δὲ κηρύκων ἐν χέρσ' ἔχον ἡεροφώνων: 505
 τοῖσιν ἔπειτ' ἥϊσσον, ἀμοιβηδὶς δὲ δίκασον.
 κεῖτο δ' ἄρ' ἐν μέσσοισι δύο χρυσοῖο τάλαντα,
 τῷ δόμεν ὃς μετὰ τοῖσι δίκην ἰθύντατα εἴποι.

W. H. D. Rouse (1938)*⁵:

A crowd was in the market-place, where a dispute was going on. Two men disputed over the blood-price of a man who had been killed: one said he had offered all, and told his tale before the people, the other refused to accept

an easy task, particularly for a lawyer, as very often a new English version of The *Iliad* comes out.

*⁵ W.H.D. Rouse, *The Iliad*, Cambridge 1938.

anything; but both were willing to appeal to an *umpire* for the *decision*. The crowd cheered one or the other as they took sides, and the heralds kept them in order. The elders sat at the Sacred Circle on the polished stones, and each took the herald's staff as they rose in turn to give judgment. Before them lay two nuggets of gold, for the one who should give fairest judgment.

E. V. Rieu (1950)*⁶:

But the men had flocked to the meeting-place, where a case had come up between two litigants, about the payment of compensation for a man who had been killed. The defendant claimed the right to pay in full and was announcing his intention to the people; but the other contested his claim and refused all compensation. Both parties insisted that the issue should be *settled* by a *referee*; and both were cheered by their supporters in the crowd, whom the heralds were attempting to silence. The Elders sat on the sacred bench, a semicircle of polished stone; and each, as he received the speaker's rod from the clear-voiced heralds, came forward in his turn to give his judgment staff in hand. Two talents of gold were displayed in the centre: they were the fee for the Elder whose exposition of the law should prove the best.

Richmond Lattimore (1951)*⁷:

The people were assembled in the market place, where a quarrel had arisen, and two men were disputing over the blood price for a man who had been killed. One man promised full restitution in a public statement, but the other refused and would accept nothing. Both then made for an *arbitrator*, to have a *decision*; and people were speaking up on either side, to help both men.

*⁶ E. V. Rieu, *The Iliad, By Homer*, Middlesex 1950.

*⁷ R. Lattimore, *The Iliad of Homer*, Chicago 1951.

But the heralds kept the people in hand, as meanwhile the elders
were in session on benches of polished stone in the sacred circle
and held in their hands the staves of the heralds who lift their voices.
The two men rushed before these, and took turns speaking their cases,
and between them lay on the ground two talents of gold, to be given
to that judge who in this case spoke the straightest opinion.

Robert Fitzgerald (1974)*⁸:

A crowd, then, in a market place, and there
two men at odds over satisfaction owed
for a murder done: one claimed that all was paid,
and publicly declared it; his opponent
turned the reparation down, and both
demanded a *verdict* from an *arbiter*,
as people clamored in support of each,
and criers restrained the crowd. The town elders
sat in a ring, on chairs of polished stone,
the staves of clarion criers in their hands,
with which they sprang up, each to speak in turn,
and in the middle were two golden measures
to be awarded him whose argument
would be most straightforward.

Martin Hammond (1987)*⁹:

The men had gathered in the market-place, where a quarrel was in
progress, two men quarrelling over the blood-money for a man who had
been killed: one claimed that we was making full compensation, and was

*⁸ R. Fitzgerald, *Homer, The Iliad*, New York 1974.

*⁹ M. Hammond, *Homer: The Iliad. A New Prose Translation*, London 1987.

showing it to the people, but the other refused to accept any payment: both were eager to take a *decision* from an *arbitrator*. The people were taking sides, and shouting their support for wither an, while the heralds tried to keep them in check. And the elders sat on the polished stone sears in the sacred circle, taking the rod in their hands as they received it from the loud-voiced heralds: then each would stand forward with the rod, and give his judgment in turn. And two talents of gold lay on the ground in the middle of their circle, to be given to the one who spoke the straightest judgment.

Robert Fagles (1990)*¹⁰:

And the people massed, streaming into the marketplace
where a quarrel had broken out and two men struggled
over the blood-price for a kinsman just murdered.
One declaimed in public, vowing payment in full—
the other spurned him, he would not take a thing—
so both men pressed for a *judge* to *cut the knot*.
The crowd cheered on both, they took both sides,
but heralds held them back as the city elders sat
on polished stone benches, forming the sacred circle,
grasping in hand the staffs of clear-voiced heralds
and each leapt to his feet to plead the case in turn.
Two bars of solid gold shone on the ground before them,
a prize for the judge who'd speak the straightest verdict.

Michael Reck (1994)*¹¹:

And a crowd had gathered where a quarrel

*¹⁰ R. Fagles, *The Iliad*, New York 1990.

*¹¹ M. Reck, *Homer: The Iliad*, New York 1994.

had arisen about the proper fine
for a murder: one man offered to pay,
another declined to accept the sum,
and both had requested *arbitration*.

The crowd stood cheering for their favorites
as heralds held them back, and the elders
sat on smooth stones in the sacred circle,
and each one held the herald's staff in turn
when he sprang up to announce his verdict.
and in the middle lay two gold pieces
for the one whose judgment was accepted.

Stanley Lombardo (1997)*¹²:

There was a crowd in the market-place
And a quarrel arising between two men
Over blood money for a murder,
One claiming the right to make restitution,
The other refusing to accept any terms.
They were heading for an *arbitrator*
And the people were shouting, taking sides,
But heralds restrained them. The elder sat
On polished stone seats in the sacred circle
And held I their hands the staves of heralds.
The pair rushed up and pleaded their cases,
and between them lay two ingots of gold
For whoever spoke straightest in judgment.

*¹² S. Lombardo, *Homer Iliad*, Indianapolis 2011.

Anthony Verity (2011)*¹³:

In the meeting-place a crowd of citizens had formed;
a dispute had arisen there, and two men were quarreling
over the blood-money of a man who had been killed.
One claimed he had paid it in full, appealing to the people,
while the other said he had received nothing; both were anxious
to go to an *arbitrator* for *judgement*. The people took sides,
shouting support for both; heralds were holding them back,
while the elders say on polished stones in a sacred circle,
holding in their hands the loud-voiced heralds' staffs.
The disputants rushed up to these men, and they gave their judgments
In turn; two talents of gold lay before them, to be given to
The judge who should deliver to them the straightest verdict.

Stephen Mitchell (2011)*¹⁴:

At the place of assembly, meanwhile, a crowd had gathered.
A quarrel had broken out, and two men were disputing
About the blood-price for someone who had been killed.
One man was claiming the right to pay for the death,
While the other refused to accept any compensation,
And each was eager to plead his case to the *judges*.
The people were cheering them on, some taking the side
Of one, some taking the other's side, while the heralds
Tried to control the crowd, and the city elders
Were seated on polished stone chairs in the sacred circle,
Holding the heralds' staffs. The men stood before them,

*¹³ A. Verity, *The Iliad*, Oxford 2011.

*¹⁴ S. Mitchell, *The Iliad*, New York 2011.

And each made his case, and the elders rose and gave judgments.
Two bars of solid gold, one from each side,
Were displayed in the center; they were to be awarded
To the judge who was thought to give the clearest opinion.

The adequacy and accuracy of the translated verses of the Homeric poem is very disputable and it exceeds general concern about exactness in translating ancient Greek legal texts. The old Italian male chauvinistic aphorism about translations and woman fits quite well to this situation: “Le traduzioni sono come le donne. Quando sono belle non sono fedeli, e quando sono fedeli non sono belle” (Carl Bertrand). But in Il. 18, 497-508 the attractiveness of translation it is not at stake. It is about something much more important - about its content. Translating legal terminology is particularly delicate as it depends on different legal cultures, distinctive terminology, specific legal concepts, diverse backgrounds, etc. And in the Homeric environment, which is not so well known to a modern reader in general, explaining exact meaning of some terms looks like a mission impossible at times. It refers particularly to the notion of the *istor*, as it is not only a linguistic issue but much more a matter of how to understand the essence of a legal institution.

Ending the overview of some routine English translations by linguists, let us see the offers by two prestigious English speaking scholars well acquainted with Greek history, culture and law. The first one is N.G.L. Hammond, the author of the famous *A History of Greece to 322 B.C.*, who suggests following:

”Men-at-arms were gathered together in assembly. There a quarrel had arisen between two men over retribution for the killing of a man. One promised to give full compensation, making his declara-

tion in public; the other refused to accept anything. Both were eager to obtain a *conclusion* at the hands of *one-who-knows*. Men-at-arms were speaking urgently in favor of each, supporting either side, and the folk were being held back by the heralds. And the elders were seated on polished stones in a sacred circle and they were taking hold of maces from the clear-voiced heralds. Then with the maces they were starting up and giving judgment each in turn. In the midst of them were set two talents of gold, to be presented to whoever among them should express his judgment in the straightest manner.”^{*15}

The second distinguishes scholar, basically a historian, but also one of the most knowledgeable modern authors in ancient Greek law, Douglas Mac Dowel, offers translation of the trial scene as follows:^{*16}

“In the assembly place were people gathered. There a dispute had arisen: two men were disputing about the recompense (poin) for a dead man. The one was claiming to have paid it in full, making his statement to the people, but the other *was refusing to receive anything*; both wished to obtain *trial* at the hands of a *judge*. The people were cheering them both on, supporting both sides; and heralds quieted the people. The elders sat on polished stones in a sacred circle, and held in their hands sceptres from the loud-voiced heralds; with these they were then hurrying forward and giving their judgments in turn. And in the middle lay two talents of gold, to give to the one who delivered judgment most rightly among

^{*15} N. Hammond, “The Scene in Iliad 18, 497-508 and the Albanian Blood-Feud”, *Bulletin of the American Society of Papyrologists*, 22 (1985), 81. Hammond believes that “one-who-knows” is the elder whom the parties choose who convenes the assembly, 85, n. 24.

^{*16} D. M. MacDowell, *The Law in Classical Athens*, London 1978, 19.

them” (18.497-508).

However, Mac Dowell discloses that lines 18.499-500 could be turned into: ”the one was claiming to have paid it in full ..., but the other *was denying that he had received anything*”.^{*17} It is clear that those two possible translations (interpretations, understandings) of the legal issue and essence of the dispute, can affect explanation of the role of *istor*. It means that many options could be under consideration.

2. RELATED ISSUES

The whole scene is very curious, it offers plenty of different questions and it generated diverse readings and hypothesis on many issues, apart of the query who was the *istor* and what was his role. But all those problems are interconnected in some aspects.

2.1

The first great, old controversy was mentioned by Mac Dowell in the passage quoted above. What was core of the case? Was it a question of facts: whether the blood-money for a homicide (*poine*) has been paid or not? Or it was a legal question – whether the blood-money is acceptable or not? Is it tolerable that a killer can pay a fine (ransom) for his act or not? Could a blood-feud be replaced with a recompensation?

The issue was opened many decades ago, but it is not yet closed. After a long relative accord that the scene is about accomplishment of a certain blood-price, Sidgwick wrote in 1894: “But during the last twelve years there has been a tendency to prefer an interpretation historically more

^{*17} *Ibid.*

impressive, according to which the dispute is not about a mere payment of money, but on the question whether a blood-feud shall be extinguished by the acceptance of a composition".*¹⁸ The battlefield is still open.

Curiously the older, traditional approach (issue of fact) was supported mostly by lawyers or those whose main field of expertise was ancient Greek law.*¹⁹ The second opinion (issue of law) was mainly favored by linguists and historians (of course, with considerable exceptions).*²⁰ Supporting that view, Leaf asked why should such a big social theatre be arranged if the issue is only whether the sum of money has been paid or not? However, the theory of legal issue appeared to have been more complicated, as new questions and possible options inevitably aroused out of it. In Gagarin's words the disagreement is between the relatives of the victim who can not agree about acceptance of the compensation.*²¹ Also, Gagarin points that the amount in that case must have been so high that such a payment would probably have been made in front of witnesses. A similar point was accu-

*¹⁸ H. Sidgwick, "The Trial Scene in Homer", *The Classical Review* 8, 1-2 (1894), 1-3.

*¹⁹ Just to mention some of them following Westbrook's selection: G. Calhoun, *The Growth of Criminal Law in Ancient Greece*, Berkeley 1927, 18; R. J. Bonner, G. Smith, *The Administration of Justice from Homer to Aristotle*, I, Chicago 1930, 31-35; H. Hommel, "Die Gerichtsszene auf dem Schild des Achilleus. Zur Pflege des Rechts in homerischer Zeit", in: *Palingenesia IV*, Wiesbaden 1969, 16; A. Primmer, "Homerische Gerichtsszenen", *Wiener Studien* 4 (1970) 11-13; E. Cantarella, *Studi sull' omicidio in diritto greco e romano*, Milan 1976, 73-74. G. Thür, "Zum *dikazein* bei Homer", *Zeitschrift der Savigny Stiftung* 87/1970, 426-444 is resolute that the dispute concerns a simple matter of facts, whether or not the poine has been paid, whether the obligation was fulfilled or not, 431.

*²⁰ W. Leaf, "The Trial Scene in *Iliad* XVIII", *Journal of Hellenic Studies* 8 (1887), 122-132; R. Köstler, *Homerisches Recht*, Wien 1950, 69; D. MacDowell, 19-20; M. Gagarin, *Drakon and Early Athenian Homicide Law*, New Haven 1981, 13-16; M. Gagarin, *Early Greek Law*, Berkeley 1989, 32-33; N. Hammond, 81; R. Westbrook, "The Trial Scene in the *Iliad*", *Harvard Studies in Classical Philology*, 94/1992, 53-76, etc.

*²¹ M. Gagarin, (1981), 13-16.

rately raised before him by Köstler.^{*22} Many other particular, additional issues on that ground remained vague.

2.2

Closely related dilemma is whether the litigants have voluntarily presented their dispute for settlement in front of the arbiter to avoid self-help? Gagarin is one of the most famous contemporary followers of the older, quite popular “Schiedsgericht Theorie” (arbitration theory).^{*23} According to his explanation the *basileus* or the group of elders offered conciliation through the middle solution acceptable for both parties. In that way the traditional arbitration theory was enhanced with the idea of compromise.

The other hypothesis is less complicated and speculative. It asserts that the killer has sought protection against the forceful use of self-help, claiming that he has paid a ransom – *poine*, and therefore he is supposed to avoid revenge? Consequently the subject is a matter of fact – whether or not the defendant has paid a wergild, blood-money, *poine*. Accordingly the case was not a private arbitration, but a kind of public control of self-help. This assumption has been raised by Wolff and was widely accepted for many years by the majority of scholars, particularly by legal historians.^{*24} On

^{*22} M. Gagarin, (1989), 28-33. R. Köstler, *Homerisches Recht*, Wien 1950, 69.

^{*23} M. Gagarin, (1989), 27. Arbitration theory was accepted by many important old authorities like J. H. Lipsius, *Das Attische Recht und Rechtsverfahren*, Leipzig 1905-1915, 6; R. J. Bonner, G. Smith, I, 31; K. Latte, *Heiliges Recht*, Tübingen 1920, 2f; M. Calhoun, *Introduction to Greek Legal Science*, Oxford 1944. 9, etc. General idea of that theory was that private arbitration has been gradually transformed into a compulsory trial before public authorities.

^{*24} H. J. Wolff, “The Origin of Judicial Litigation among the Greeks”, *Traditio* 4/1946, 31-87 (34 pp.). His approach was accepted by many famous scholars like A. R. W. Harrison, *The Law of Athens*, II, Oxford 1971, 69-72, E. Ruschenbusch, „Der Ursprung des gerichtlichen

the other hand Gagarin has revived the arbitration theory, together with the claims that a legal issue is at stake.*²⁵

After convincing criticism of Gagarin's contemplations considering arbitration concept, Thür turned back to Wolff's approach. But, Thür also opposed to some elements of Wolff's theory and tried to modify it. Wolff was claiming that the elders had to resolve immediately and definitely the case (taking into account reactions of the gathered people, who supported by shouting judgment of the most convincing elder). However, Thür believes that each elder proposed not a final decision but only formulated an oath (a method of proof, *Beweisurteil*) and decided which of the litigants had to submit it.*²⁶ Thus, Thür reiterates attitude that the issue is simply about the fact – whether or not *poine* has been paid. On the other side, on the basis of comparative data from the Near East legal systems and oriental legal traditions, Westbrook asserts that the court was not deciding only about the facts (accomplishing of *poine*), but also whether the plaintiff is entitled to revenge.*²⁷ Though, due to relatively recent contributions by Cantarella and Thür, it seems that in this moment

Rechtsstreits bei en Griechen“, in: *Symposion 1977, Vorträge zur griechischen und hellenistischen Rechtsgeschichte*, Cologne 1982, 1-8, etc.

*²⁵ M. Gagarin, (1989), 31-33. Before Gagarin it was H. Hommel, "Die Gerichtsszene auf dem Schild des Achilleus. Zur Pflege des Rechts in homerischer Zeit", in: *Palingenesia IV*, Wiesbaden 1969, 11-38 (p. 16) who reaffirmed the arbitration.

*²⁶ G. Thür, "Oath and Dispute Settlement in Ancient Greek Law", in: *Greek Law in its Political Setting: Justification not Justice* (ed. L. Foxhall, A. Lewis), Oxford 1996, 61: "the magistrate does not decide on guilt or innocence but only gives a judgement about the oath-formula which, if taken, will automatically resolve the dispute". His view was supported by R. Sealey, *The Justice of the Greeks*, Ann Arbor 1994, 100.

*²⁷ R. Westbrook, "The Trial Scene in the Iliad", *Harvard Studies in Classical Philology*, 94/1992, 53. His view was followed by G. Nagy, "The Shield of Achilles. Ends of the *Iliad* and beginning of the Polis", in: *New Light on Dark Age* (ed. S. Langdon), Columbia, London 1997, 194.

prevailing view is that the Homeric trial scene is not an arbitration process but public control of self-help, and that its subject matter was the issue of facts.^{*28}

2.3

The next controversial issue is who is entitled to get the two talents and who is paying them? This is also an old debate: “some understand that the two talents of gold are to go to the judge who gives the best judgment, others that they are to go to the litigant who pleads his cause best”, as Sidgwick also put it by the end of the last century.^{*29} We do not know much more today. Is it a blood-price that goes to the victim’s family, a bet of the two parties which will be taken by the winner, like a genuine wergild deposit?^{*30} Or it was a judicial wager (fee, award) that goes to the elder who gives the best verdict, a kind of a “court fee”?^{*31} Myres supposed that it was a customary fee for someone who gives a voluntary decision from the agora (crowd), if this decision was adopted by the elders as better than their own.^{*32} Wolff believes that the two talents were to go to the

^{*28} E. Cantarella, “Dispute Settlement in Homer: once again on the Shield of Achilles”, in: *Mélanges en l’honneur Panayotis D. Dimakis*, Athens 2002, 147-165 (= E. Cantarella, “Dispute Settlement in Homer: once again on the Shield of Achilles”, in: *Diritto e società in Grecia e a Roma*, Milano 2012, 171-192); G. Thür, “Der Reinigungseid im archaischen griechischen Rechtsstreit und seine Parallelen im Alten Orient”, in: *Rechtsgeschichte und Interkulturalität* (eds. R. Rollinger, H. Barta, M. Lang), Wiesbaden 2007, 179-195).

^{*29} H. Sidgwick, I. R. J. Bonner, G. Smith, 37-38 outline in details different explanations of the two talents purpose.

^{*30} J. H. Lipsius, 4. He was followed by many others in that view.

^{*31} G. Glotz, *La solidarité de la famille dans le droit criminel en Grèce*, Paris 1904, 128. Similar was the view of Sir H. S. Maine, *Ancient Law*, London 1861, 386. He argued that the amount was a deposit by the litigants for the judge who shall explain the grounds of his decision most to the satisfaction of the audience.

^{*32} J. L. Myres, *Political Ideas of the Greeks*, New York 1927, 64.

elder who won the greatest applause from the crowd.^{*33} But, there is also another controversial issue opened by Dareste a long time ago connected to that amount: are the two talents a sum of money that goes as an extra value to the winner, which he will take along with the initial amount which was at stake?^{*34} Those are very problematic, peculiar and extremely arguable topics to deal with in this moment, particularly as the list of question are not closed.

2.4

And, finally, the most important point for us here is: who is in charge to decide the case? Gathered *people*, a crowd, a kind of democratic body, as A. Lanni states, following Mac Dowell's and Wolff's basic reasoning?^{*35}

If not the people, *gerontes* were supposed to decide through a formal public procedure, as Gagarin and many others suggest. The source is quite explicit by saying that they, the elders *dikazon* (line 18.506) – give a verdict.^{*36} Also, as mentioned, Thür has offered an interesting compromising idea that *gerontes* do not propose a concrete settlement of the dispute but rather a method of proof (*Beweisverfahren*).^{*37}

^{*33} H. J. Wolff, (1946), 42.

^{*34} R. Dareste, "Sur un passage de l'Iliade", in: *Annuaire de l'Association pour l'encouragement des études grecques en France* 18/1884, 94.

^{*35} A. Lanni, *Law and Justice in the Courts of Classical Athens*, Cambridge 2006, 139 fn. 89. She claims that in the trial scene depicted on the shield of Achilles, „the crowd played a vital role in the decision making process: various elders take turns wielding the scepter and suggesting a ruling, but it is the *crowd* who decides by acclamation which ruling is accepted“; D. M. MacDowell, 21; H. J. Wolff, (1946), 41. Of course, the presence of people is not irrelevant, but it is quite doubtful if they had a final say in making decisions.

^{*36} Parties plead their case in a public forum (in the agora) to a circle of elders, each of whom in turn takes a scepter (a symbol of public authority), stands, and pronounces a settlement. Clearly this is a formal, public procedure, providing a means for litigants to bring their disputes to an authoritative body for settlement, M. Gagarin, (1986), 26-33.

^{*37} G. Thür, (1996), 57-73: *gerontes* offered a method of proof by means of which the dispute

But, what is then the role of *istor*? Why is he present at all? Why the people expect some say by him? Is his say a kind of verdict? And, consequently, is he a kind of judge or at least an arbiter? Mac Dowel suggests three possibilities. According to him, *istor* can be: a) the chairman of the proceedings (either the king, or an elder who presides over the others); b) the elder whose opinion is considered by the people to be the best (the opinion which receives the most applause is the one which is accepted); c) it refers to all the elders, and the view of the majority prevails. Although he claims that none of solutions can be definitely disproved, he inclines to b), and stresses the role of people who will decide which elder's judgment is to be accepted.^{*38}

Let us remember that almost all translations suggest that the *istor* is either a judge or an arbiter (nevertheless some translators try to soften the word "arbiter" with "umpire" or "referee"). However, both the first and the second theory (judge or arbiter) are facing with a great problem: how to explain the relationship between the *istor* and the *gerontes* then?^{*39} If the *istor* is a judge, what are the *gerontes* doing then? If the *istor* is an arbiter and his opinion ends the dispute, what kind of role should play a body of the distinguished elders? Or, as many scholars suppose, the *istor* is to be found amongst the elders: the *istor* will be the one who wins the award (Dareste, Wolff).^{*40}

will automatically be settled (and let us add: it could explain the presumption that one who suggested the best „method“ achieves the award, a kind of judicial wager). According to his opinion, the dispute is about a simple matter of fact, whether or not the *poine* has been paid.

^{*38} D. Mac Dowel, 20-21.

^{*39} This is also an old dilemma raised by H. J. Wolff, (1946), 37-38. He reveals Jolowicz's comparative law explanation based upon comparison of the *istor* with the English jury in its most primitive form and with the medieval Germanic law.

^{*40} G. Thür (1996), 67 is resolutely against that general assumption with sound reasons.

3. THE *ISTOR* – NEITHER A JUDGE NOR AN ARBITER

Let us try to add to the vivid discussion a bit different approach, which would not confront or merge the roles of the *istor* and of the *gerontes*. My presumption is that the *istor* was something else, a kind of a separate “institution”, a specific authority which is neither a judge nor an arbiter. The explanation is going to be based upon linguistic arguments, other verses in *Iliad* where *istor* was mentioned, and to some cases from comparative legal history.

R. Westbrook, in his comparative manner, tries to explain the trial scene in *Iliad* having in mind parallels with legal tradition and procedure in murder cases of Ancient East. He explains many controversial Greek terms from the trial scene (*eaikheto*, *apondoanai*, *panta*, *piphauskōn*, *anaineto*, *helisthai*),^{*41} but avoids to clarify *istor* and *gerontes* topic. No wonder, as there are many linguistic obstacles, apart from the difficulty upcoming from the common sense: if the *istor* decides, what is then the role of the elders? And, on the contrary, if the *gerontes* are those who are supposed to rule, why should be *istor* involved in the whole procedure? The only remaining rescue theory which became quite popular is that the *istor* was one of the *gerontes* (the one who gives the best verdict).^{*42} However, this popular attitude meets an unpleasant linguistic obstacle: the poet says *epi istori peirai elesthai*, not that the *istor* is supposed to *dikazein*. *Dikazein* is a job of the collective body of the *gerontes*, as clearly pointed in verse

^{*41} “The one was claiming (*eaikheto*) to pay (*apondoanai*) all (*panta*) expounding (*piphauskōn*) to the demos; the other was refusing (*anaineto*) to take (*helisthai*)”, R. Westbrook 73-76.

^{*42} To mention only H. J. Wolff, (1946), 38; Mac Dowell, 20; M. Gagarin, 31. But G. Thür, (1996), 67 rightly states that he would disassociate the *istor* from the elder winning the award.

18.506.^{*43}

This is probably why Fagles (1990) has found the best solution in his English translation by avoiding words like “decision” or “verdict” or “arbitration”, which was so frequently used by other translators. He opted for a more flexible wording for *peirai elesthai* - to “cut the knot”, similarly as Rieu (1950) translated it more neutrally with “should be settled”.^{*44} They do not take for granted in what capacity will the *istor* act (judge, arbiter or something else) and what kind of legal effect will his statement have (verdict, decision, judgment, or simply a statement).

Also, if one wants to keep more or less dependably with the phrasing of the original text, *epi (istori)* should be translated “in front of (*istor*)” or maybe “at the hands of (*istor*)”, like Mac Dowell translates. It is hardly related to a certain decision making procedure “by”, “from” the *istor*. The parties simply wanted to solve their case in his presence on the basis of his statement.^{*45} Shortly, at philological ground nothing suggests that the

^{*43} G. Thür, (1996), 67 has shown that theory about the *istor* as one of *gerontes* who gave the best ruling (as Wolff believed) is not convincing, as well as Mac Dowell’s statement that the *istor* is “the elder whose opinion is considered by the people to be the best”. It is a very speculative idea, particularly when it is connected with the role of the crown allegedly supposed to decide which decision was the best. The issue of how could it be done (through applause or cheers), as Mac Dowell suggests, is also very speculative. It was evidently not performed by some voting procedure.

^{*44} Or “to obtain a limit” as Elmer suggested recently, D. F. Elmer, *The Poetics of Consent, Collective Decision Making and the Iliad*, Baltimore 2013, 186.

^{*45} I am grateful to comment by Omi Hatashin during my lecture at the University of Tokyo, who pointed latter in our correspondence, that the Greek preposition *epi* takes the corresponding genitive case when it means ‘near’, ‘in the presence of’, or ‘by’ (locality). Therefore, the relevant text should read *epi istoros* (genitive case) in order to mean ‘in the presence of *istor*’. But, *epi istori* in dative suggests that *iēmi* in the context of *Iliad* XVIII 501 is a verb of motion, and it could rather be translated as ‘relying on the evidence (testimony) of a witness’. In that case, the *istor* could be a witness, but also any other person on whose statement depends the decision.

istor was a person who was supposed to give a judgment (*dikazein*). And, of course, as *istor* is used in singular, there is no room to compare him with a collective body of the *gerontes*, elders (except in very problematic theory that the *istor* is one of the elders, possibly the one who offers the best decision).

In consequence, it seems that proper philological argumentation for translation and understanding that the *istor* gives a final decision or a verdict is missing. It should imply that the *istor* was not a judge. He was probably doing something else.

3.1

The problem with translation is difficult as the word *istor* is quite vague and unclear. The root-value of the word, related to the irregular verb (*w*)*oida*, with the stem *wid-* indicates “awareness” or “knowing” of some kind - “seeing” as *correct* perception.^{*46} Application of the same word in Hesiod, and in tragedy centuries later as both Sophocles and Euripides use it, suggests that an (*h*)*istor* is “experienced, aware, in the know”, „one who knows“,^{*47} one who saw something. Worth mentioning is that many Slavic languages use the same root, better to say the same word – noun

^{*46} Digamma (w) was a part of the word (*w*)*oida*, so that *istor* was in Boeotian and maybe epic-Aeolian – (*w*)*istor*. I am thankful to Prof. Victor Castelani for this observation and discussions of the issue, particularly for explaining the use of *istor* in Hesiod, Sophocles and Euripides that follows.

Gagarin, 31 n. 37 also asserts that the word *hisor* (with initial h, and adds in brackets „arbitr“!) is deriving from a root meaning „to see, to know“. But, he is of opinion, without any argument, that it designates not a person who knows a particular fact but someone who has the general wisdom to settle disputes!

It is curious that in all editions of the Liddle-Scott Dictionary there is no translation for the word *istor* as a noun. There is only explanation of the verb *istoreō* with meanings of „examine, observe, inquire of, ask“, etc, but also „to give an account of what one has learnt, record“, G. Liddell, R. Scott, 842.

vid (to denote „eyesight“) and verb - *videti* („to see“), equally as *video* in Latin. In that sense *oida* could mean „I know what I have seen“. The *istor* is consequently the one who saw something and who therefore knows something well.

Does such etymology points to a judge or arbiter? Does the whole wording of the line 18.501 points to judicial decision? Maybe yes for a contemporary reader, but it is doubtful how it was perceived in the Homeric time.

Not only logical discrepancy in relationship *istor/gerontes*, as mentioned above, points that the *istor* can not be neither an arbiter nor a judge (or one of the elders who gave the best verdict). There is also an important philological ground - *istor* does not *dikazen* but *peirar helesthai*. The phrasing *peirar helesthai* (line 18.501), often translated as „decision“, should rather be „end“, „obtain a limit“ effected by means of hearing what will the *istor* say. He does not make a decision, but he „resolves“ the issue „cuts the knot“ by his statement. In my view, „to end the dispute“ would be the most convenient translation of that phrase. And after the *istor*’s *peirar helesthai*, the real, final decision is in the hands of the elders who are supposed to *dikazein*.

What could the statement by the *istor* deal with, what could it be about, what could be its content and purpose? Of course, the answer depends on the two main hypothetical general possibilities connected to the character of the dispute.

The first one is that the issue was one of facts. In that case the *istor* might have been a competent person to say (attest, confirm, report) if the amount was properly paid or not. If so, it would mean the end of the story and no further decision would be needed. But if he asserts that the amount was not

^{*47} R. J. Bonner, G. Smith, I, 35, n. 2 and H. J. Wolff, (1946), 38 state firmly that the word *istor* means „expert or one who knows“.

appropriate or was paid only partially, it opens the room for the decision of men of wisdom, respectable *gerontes*, what to do next. They should offer different possibilities on what will be the consequence in that case.

The second possibility – that the matter of controversy was a legal issue – includes at least two potential roles of *istor*. Firstly, as a person who was present during previous cases as a kind of an official in charge to memorize what he had seen, he could only give a statement on what he remembers about the similar cases (*istor* – a rememberer). Secondly, in the same time, he is supposed to remember the outcome of the actual case in order to attest in the future what the result was in this case at stage.

On these terms, *istor* would again be neither a judge nor an arbiter, but only a person who will offer a preliminary relevant statement about what he knows. Of course, this is a speculative presumption, but all other solutions of the trial scene in *Iliad* are more or less hypothetical as well. In any case, philology and wording of the poem does not favor conclusion about *istor* as a judge or an arbiter.

This is why in this moment, after so many different English translations, Thür's German attempt of translation offers the most moderate and sensible way. He avoids any modern term as a possible explanation for the *istor* and stays with the Greek specific word, suggesting some possible meanings in parenthesis: "Beide waren bereit, bei einem *istor* (einem 'Wissenden': Schiedsrichter, Richter, Zeugen?) die entgültige Entscheidung zu nehmen".^{*48} It fits well to Bonner-Smith's translation "expert" or "one who knows".^{*49} Cantarella made an important step forward by

^{*48} G. Thür, "Der Reinigungseid im archaischen griechischen Rechtsstreit und seine Parallelen im Alten Orient", in: R. Rollinger, H. Barta eds., *Rechtsgeschichte und Interkulturalität*, Wiesbaden 2007, 182. Just to add that Wolff, who argued against arbitration theory, did not find a better translation for *istor* apart of *daysman* (mediator), H. J. Wolff, (1946), 37.

^{*49} R. J. Bonner, G. Smith, I 35, n. 2; H. J. Wolff, (1946), 38.

suggestion that the *istor* was a person who had been present at the moment of payment, but not as a simple witness. Instead, he had played a specific role in delivering the *poine*, similar to the role played by Odysseus during the payment of the ransom to Achilles in *Iliad*, 19.^{*50}

Therefore, as Canteralla has clearly shown, “one who knows” might not only be an arbiter, judge or witness. Comparative legal history could offer other possibilities as well. So we come to the core of the issue. But, before that, let us shortly recall another place in the *Iliad* where *istor* was also mentioned.

3.2

A kind of help might come from the only instance left in the *Iliad* where Homer uses the same word *istor*, depicting another famous scene of the funeral games. In the *Iliad* 23, 486 Idomeneus and Little Ajax are in dispute over which of them has correctly recognized whose horses and chariot are in the lead, and they propose laying a bet on it and appointing Agamemnon as *istor*. But Agamemnon is also their superior, Achaeac commander-in-chief, and would be unlikely to decide until he can *see* for himself! Eyewitness, *testis*, observer, spectator, bystander fits well to this situation. It might resemble a modern reader to the function of witness. But he was surely not a witness in a juridical sense, as he was not produced by one party for the purpose of confirming his plea.^{*51} Gagarin believes that Agamemnon is an arbiter in this case and that he decides the outcome of the race.^{*52} However, it would be quite bizarre for the king Agamemnon to be a witness or an arbiter in such a trivial situation. He could only, at the very least, give

^{*50} E. Cantarella, (2002), 160-161; (2012), 186-187.

^{*51} It was rightly observed already by H. J. Wolff, (1946), 38.

^{*52} M. Gagarin, (1986), 37 n. 37.

a statement on his impression (knowledge) according to his perception of what he had seen.

In addition Thür claims quite plausibly that Agamemnon was not supposed to *decide* outcome of the race: in the event everybody will be able to observe who actually the first is. According to Thür, Agamemnon's only task would have been to hold the stake money and hand it over to the winner. That is why Thür believes that Agamemnon did not have to act as *arbitrator*, rather he was a *guarantor* for the bet's being enforced correctly.^{*53}

Some parallels could be detected between the two Homeric scenes, although word *istor* was used in the shield scene in a quite different context than in the chariot race (different circumstances, different social rank of *istor*, and different societal importance of the case). The *istor* is the one who knows something from his personal experience ("knower"), who acts as a person of public faith about something that he observed by his own eyes, and who is at some point supposed to give a statement on what he knows and who guarantees fair outcome. Nothing more than that. It depends on his authority what this statement will mean and what kind of power and effect his statement will have.

In any case, statement of the *istor* is not a judgment, a verdict in a legal sense. Verdict (as a possible outcome of *dikazein* in 18.506 and 508) is a result of certain procedure. The *istor* is only supposed to give a report (statement) which can help in solving the dispute due to his authority. In the same way Agamemnon was not formally a judge in the case of chariot race but only a person who saw the event and whose opinion is reliable. Therefore Hammond is strongly convinced that there is no doubt: *istor*

^{*53} G. Thür, (1996), 67.

in the Achilles' shield scene means "one who knows," as well as in *Iliad* 23.486.^{*54} I would put it in a more general and broader way: as a result of seeing something (*oida*), the *istor* is a person who knows something and reports on that as a person of public authority.

3.3

Finally, we come to the most sensitive point – possible arguments from comparative legal history and anthropology. Of course, the value of such material is often at question.^{*55} But, we evidently miss more secure explanations in Greek sources, etymology and literature of the real meaning of *istor* and in particular of his role in judicial procedure. This is why Wolff firmly believes that the shield scene "is one of the cases where the comparative method is the way to illuminate a story which is not told with sufficient precision".^{*56} Therefore it makes sense to take into account examples from other early, preliterate or mostly illiterate societies, socially and culturally corresponding to the Homeric world.^{*57} Similar problems often find similar responses in various civilizations. A great common problem of early societies and their judgments was oral ruling and lack of writing

^{*54} N. G. L. Hammond, 81.

^{*55} G. Thür, (1996), 57 rightly points that there is a risk in anthropological approach. Similarities could sometimes be misleading. But at some point anthropological and comparative approach remains the only way out if the evidence from sources has been fully exhausted. In Homeric shield scene, after many decades of disputes, there is not much left in Greek sources to be examined.

^{*56} H. J. Wolff, (1946), 35.

^{*57} M. Gagarin, (1989), 30-31 also tries to find some explanations of the trial scene in Homer using the analogy with some African societies. K. A. Raafaub, "Homeric Society" in: I. Mooris, B. Powell (eds.), *A New Companion to Homer*, Leiden 1997, 648 asserts that, generally speaking, customs in early societies have their analogies in other cultures and can be decoded with the help of anthropology and sociology.

and evidence.*⁵⁸

3.3.1

The first institution comparable to the *istor* comes from the Cretan city of Gortyn. Fortunately, its legal system is quite well known due to well preserved “Code of Gortyn” from the V century B.C.*⁵⁹ Nevertheless the time gap between Homeric period and the time of the Gortyn codification, some parallels could be legitimate, as those two societies shared similar difficulties in the time when writing was not widespread. So we find in Gortyn quite well-known and important court official – the *mnamon* (the Doric form of the word, having the root in *mneme*, *mnemoneuo* – “remember”, with a specific Doric “a” instead of Attic “e”). Therefore the *mnamon* is “remembrancer”, “rememberer”. “memorizer”, “recorder”, “a man of memory”.*⁶⁰ If one follows etymology, sense and logic of the word *mnamon*, its meaning is very close to the *istor* as “one who knows”.

One of the duties of the *mnamon* in Gortyn was to keep the record in his mind while he is alive and to give information of previous decisions when it is needed.*⁶¹ He is a person whose duty is to see, to watch, to follow the case and to remember its outcome.*⁶² He is a “living archive” of cases

*⁵⁸ A valuable book considering ancient Greek experience in law and writing produced M. Gagarin, *Writing Greek Law*, Cambridge 2011.

*⁵⁹ R. Willetts, *The Code of Gortyn*, Berlin 1967 is still the most useful edition with English translation.

*⁶⁰ A. Lanni, (2006), 126 n. 39 translates *mnamon* as “rememberer”, also in A. Lanni, “Precedent and Legal Reasoning in Classical Athenian Courts: A Noble Lie?“, *The American Journal of Legal History*, 43, 1 (1999), 27-51 (46). J. Davies, “The Code of Gortyn”, in: *The Cambridge Companion to Ancient Greek Law* (ed. M. Gagarin, D. Cohen), Cambridge 2005, 310 translates *mnamon* as “remembrancer”.

*⁶¹ *Code of Gortyn*, IX 31: “If the suit be with reference to a judgment won, the judge and the recorder... shall testify”. Therefore R. Willetts, 47 translates there *mnamon* as “recorder”.

*⁶² *Mnamon* is also mentioned explicitly in the *Code of Gortyn*, XI 16 but rather as a kind of

which were decided in the past, a person who keeps in his memory judicial processes. It is rightly claimed that the *mnamon* “share with the judge the potential power of being a witness to the results of past cases, hence both officials have authoritative knowledge”.^{*63} The *mnamon* was helping Cretan *kosmoi* and only in the long flow of legal history they ended up as scribes in Hellenistic inscriptions. Beside *mnamon*es in Gortyn and Crete, some other Greek places used *hieromnamones* with the same or similar function (Tyrins, Argos, Mycene, Delphi and in Peloponnesus).^{*64} It seems that a comparable institution was quite widespread all over Greece, probably as a remnant of a common, earlier legal tradition. Although there is no solid source to confirm connection between the two institutions, a kind of analogy sounds at least plausible. In the preliterate societies, nevertheless the time distance, the *istor* could have had a similar role like the *mnamon* in Gortyn and other parts of Greece centuries latter.^{*65} At least the *istor*

judiciary official: “...and he shall deposit ten staters with the court, and the secretary (of the magistrate) who is concerned with strangers shall pay it to the person renounced” (Willetts, 49 translates *mnanon* here as “the secretary”). *Mnamon* is mentioned for the third time in *Code of Gortyn*, XI 53: “and let the initiator of the suit make his denunciation to the woman and the judge and the secretary (of the court)” – Willetts’ translation is “the secretary” again.

^{*63} R. Thomas, “Writing, Law and Written Law”, in: *The Cambridge Companion to Ancient Greek Law*, Cambridge 2005, 48. M. Gagarin, „Written text and the Art of Literature“, in: H. Yunis, *Written Texts and the Rise of Literate Culture in Ancient Greece*, Cambridge 2003, 59-77 rightly observes that at Gortyn, the *mnamon* continues to remember oral judicial proceedings even after writing has been established, 63. He also rightly adds that they remembered the proceedings and outcomes of trials and certain other matters, but they did not remember rules, which were now preserved in writing. Nor is there any evidence that they remembered the outcomes of earlier cases as precedents or rules for new cases, 68.

^{*64} R. Thomas, “Written in Stone? Liberty, Equality, Orality and the Codification of Law“, in: *Greek Law in the Political Settings*, Oxford 1996, 9-32. This is one of the best overviews in the literature of the role and evolution of *mnamon*es in ancient Greece, 18.

^{*65} I am following here the path of thinking traced by L. Margetić, „Pokušaj pravne interpretacije sudske scene na Ahilovu štitu“ [An Attempt to Interpret the Trial Scene at the Schield of Achilles], *Zbornik radova posvećen Albertu Vajsu*, Beograd 1966, 51-58.

was a person of public authority, a person who knows (remembers) something and reports on that at the court in circumstances when there were no written records of any legal or judicial acts.

3.3.2

A very similar tradition is well attested within the old Slav customary law, among many Slavic people during the time of illiteracy. *Pristav* was a person of “public faith”,^{*66} engaged to assist to the judge in running judicial procedure. In the transitional period when the court decisions were not written, but given only orally by the judge, *pristav* “was given” to the person who won the case as a warranty, in order to have a valid proof in the future about the result of the trial. Although *pristav* assisted to the judge in some other procedural actions, his most important duty was to report about the outcome of certain cases.^{*67} *Pristav* was not a court official comparable to the judge, both in knowledge, social background and authority. But, he was usually a person from a well known family, with social respect and prestige, in any case a person of public faith. That institution and person were highly respected, as they helped society to avoid new quarrels and disputes about results of some earlier cases and to ensure a kind of judicial

^{*66} The most comprehensive book on *pristav* is M. Kostrenčić, *Fides publica (javna vera) u pravnoj istoriji Srba i Hrvata do kraja XV veka [Fides publica (public faith) in Legal History of Serbs and Croats up to the end of XV century]*, Beograd 1930. At some point Kostrenčić compares the functions of *mnamon* and *pristav*, 68. He claims that in the time when literacy was not yet well developed and when judgments were not written, it was a problem to fix the court rulings. Therefore *pristav* had to be present all the time during the court procedure, particularly when the judgment was given. At the end of the process the judge would attribute the *pristav* to the winning party to help him in the judgment enforcement or to help to interpret the essence of the court decision at some latter point, M. Kostrenčić, 21.

^{*67} This role of *pristav* is nearly the same as the role of *mnamon* in the Code of Gortyn IX 31. M. Kostrenčić, 5 defines *pristav* as a person whose oral statements were protected as those of public faith.

stability and continuity.

Pristav kept a condensed memory of courts and rulings in undeveloped, illiterate societies. Only gradually, during a long process, they were transformed into assistants of the judges.^{*68} It is clear that in the beginning *pristav* was not a permanent judicial position – he was only attributed by a judge to the winning party for a particular case as a guarantee, in order to facilitate enforcement of judgement or even to help in clarification of the court decision if necessary. If a problem arises *pristav* was there to give a statement about the facts that he had seen and knows, always in the presence of the interested parties. This is why Slavic medieval sources define *pristav* as *assertor veritatis* or the one who is used *pro testimonio* or “for a stronger conviction”.^{*69} He was not supposed to have any kind of professional experience but only to be recognized by the society as an honest and impartial person. As attested in sources from medieval Dalmatia they were latter also used to call upon parties to the trial, to perform preliminary investigation, to test witnesses, to be present during the oath taking procedure, etc. Only gradually, in the final development of the institution, *pristav* became a kind of the scribe and at the very end of development a kind of the notary public.^{*70}

Illiterate societies or those with a poor literacy had a serious problem of recording the court decisions. Although the corresponding institutions in the Gorton Code (*mammon*) and the old Slavic person authorized by

^{*68} The developed function of the *pristav* has a very significant parallel to *mnamon* in the Code of Gortyn XI 16. Therefore S. Novaković, *Zakonik Stefana Dušana cara srpskog [Code of Stephen Dushan, the Serbian Tzar]*, Beograd 1898 (commentary with the Art. 56) perceives *pristav* as an assistant of a judge.

^{*69} M. Kostrenčić, 16.

^{*70} S. Avramović, “Pravnoistorijski aspekti notarijata” [Aspects of Notary Public in Legal History] in: *Javnobeležničko pravo*, Beograd 2005, 35-83.

customary law (*presto*) are so distant in terms of time, their function, social environment, at least some analogy in logic and purpose of the two institutions is significant. Consequently they could be a kind of road sign to clarify the role of the *istor* in Homer.

3.3.3

Quite a long time ago Leaf had launched an idea, basically the one expressed before him by Sir Arthur Evans, that customary material from Northern Albania could be of some help in understanding the Homeric trial scene.^{*71} However, Leaf complained that the evidence is scarce and expected that Evans will report more on the blood-feud in North Albania. But it did not happen as Evans moved soon to Montenegro and Crete.^{*72} About a century latter, in 1980's, Hammond stressed again importance of studying Albanian habit as a possible source for better consideration of the trial in *Iliad* and gave an outline on that.^{*73} He had recalled his

^{*71} W. Leaf, "The Trial Scene in *Iliad* XVIII", *The Journal of Hellenic Studies*, 8 (1887), 122-132.

^{*72} Missing that, Leaf recalls examples from early Roman law to explain the trial scene in Homer. In the prevalent comparativist manner of that time, he believed that a signpost could be found in the interesting passage mentioned in Sir Henry Sumner Maine's *Ancient Law* (375-377 of the fifth edition). He connects the *Iliad* trial scene with the early Roman procedure of *legis actio sacramenti*. He believed that the "Roman *praetor* is represented here by the *istor*, referee or 'daysman', to whom both parties are anxious to leave the settlement of the dispute". But, as the case in the *Iliad* is not private one, which the *praetor* can decide without more ado, the *istor* therefore cannot determine it alone and he must call the council to his aid, W. Leaf, 127. Although this Roman parallel is very problematic, it clearly shows that efforts to explain the trial scene in *Iliad* by comparative primitive procedures in other legal systems are inevitable.

^{*73} He offered a short contribution with a similar approach – to link the trial scene from Homeric society with the Albanian customary law of a more recent time, N. Hammond, "The Scene in *Iliad* 18, 497-508 and the Albanian Blood-Feud", *Bulletin of the American Society of Papyrologists*, 22 (1985), 79-86.

travel and research in Albania in the 1930's and the researches of Margaret Hasluck.^{*74} He mainly accepts her findings, and his parallels are mostly based upon comparisons with the procedure as founded in the so called *Code of Leke Dukagjini (Kanuni i Lekë Dukagjinit)*.^{*75} Hammond mainly deals with the most controversial rules of the *Kanun* (on procedure how murder was handled to avoid blood-feud, particularly in book 10, articles 886-990). Nevertheless his great authority in ancient Greek history,^{*76} he used second hand sources for Albanian customary law and he missed to investigate more profoundly two important institutions, those which could be more closely connected to the Homeric trial scene. No wonder that he miss them. Many papers dealing with those old Albanian customary institutions are mostly published in languages which are not so easily accessible (Albanian, Serbian).

Indeed, there are some interesting and more compatible materials coming from the research of customary law of Albanians in the area of Kosovo and Metohia (not only Northern Albania). It comes from a few works written in Serbian language, including two PhD thesis defended at the University of Belgrade in 1973 and 1978. They have never been published so that their results are not easy accessible ^{*77} However, two customary institutions

^{*74} M. Hasluck, *The Unwritten Law in Albania*, Cambridge 1954, 210-60.

^{*75} The Code was allegedly formed in the 15th century by Leka Dukagjini, most probably in oral form. The rules were collected and written down only in the 19th century by a Catholic priest Shtjefën Gjeçovi. The full version was first published in Albanian as *Kanuni i Lekë Dukagjinit*, Shkodër 1933 after Gjeçovi's death in 1926. The translation in Serbo-Croat language appeared as *Kanon Leke Dukadjinija*, Zagreb 1986. An English version was published as *The Code of Lekë Dukagjini, Arranged by Gjeçov Shtjefën*, Translated with an introduction by L. Fox, New York 1989. See also G. Trnavci, *The Albanian Customary Law and the Canon of Lekë Dukagjini: a Clash or Synergy with Modern Law*, <http://www.design.kyushu-u.ac.jp/~hoken/Kazuhiko/2008Customarylaw.pdf>.

^{*76} Let us just mention N. G. L. Hammond, *A History of Greece to 322 B.C.*, Oxford 1986.

^{*77} M. Djuričić, *Lično jemstvo u običajnom pravu Arbanasa u severnoj Metohiji - dorzoniji*

thoroughly examined in those two dissertations are particularly interesting for the Achilles' shield trial scene.

The first one is *plechnija*, a court of elders, which was already mentioned by Leaf as *pljech*.^{*78} It can clarify the role of *gerontes* as judges to some extent. In important cases, particularly when blood-feud was at stake, a specific court of elders (*plechnija*) made the decision from case to case. It usually consisted of twelve people, but the number of members was not strictly fixed. Also elders (*plechniars*) were not necessarily the same persons, although they often came from the same circle of people.^{*79} They were sitting in a semi-circle with their legs crossed, faced to each another, leaving in the middle enough space for the parties and other persons supposed to speak during the trial.^{*80} Members of the *plechnija* receive a certain sum of money, but only when and if the case is solved. The judicial reward was usually called "compensation for the shoes".^{*81}

[*Personal Warranty in Customary Law of Albanians in Nothern Metohia – dorzon*], Belgrade 1973 (unpublished PhD thesis); H. Ismaili, *Plečnija u običajnom pravu Albanaca* [*Plechnija in Customary Law of Albanians*], Belgrade 1978 (unpublished PhD thesis). Also, those two interesting PhD thesis' were never translated in some more accesible language.

^{*78} W. Leaf, 126, n 1. says wrongly "*pljech* or village council (literally – *gerousia*)". However, sometimes there could be only one *plechnar*, M. Djuričić, 349.

^{*79} The most in debt analysis of *plechnia*, as a result not only of interpreting *Code of Leke Dukagjini*, but also based upon personal examination and interviews with the people still involved in the old habits, is H. Ismaili, (1978), 20. See also in Serbian R. Halili, "Plečnija u zakoniku Leke Dukadjinija" [*Plechnija in the Code of Leke Dukagjini*], *Anali Pravnog fakulteta u Beogradu* [*Annals of the Faculty of Law in Belgrade*], 5 (1978), pp. 531. See also M. Djuričić, „Veća staraca kod Albanaca na Kosovu“ [Council of elders at Kosovo], *Anali Pravnog fakulteta u Beogradu* [*Annals of the Faculty of Law in Belgrade*], 5 (1984), pp. 708-726; M. Djuričić, „Činioci krvne osvete kod Albanaca“ [Factors of Blood-Feud among Albanians], *Anali Pravnog fakulteta u Beogradu* [*Annals of the Faculty of Law in Belgrade*], 6 (1993), pp. 687-692.

^{*80} H. Ismaili, 62.

^{*81} H. Ismaili, 53; *Code of Leke Dukagjini*, art. 1021. Parties give the same amount for the elders "shoes". The term is evidently used in a figurative sense, stressing that the amount only

Most frequent cases that appeared before the *plechnija* were murder cases, but also cases dealing with wounding, debts, theft, property rights, family, marriage, etc.^{*82}

But the second specific institution in the procedure before *plechnija* leads us closer to the *istor*. It was called *dorzon*, *dorzanēt* (literally: guarantor, guarantors). The role of *dorzon* is closely connected with the “judgment” of *plechnija*, as *plechnar* or *plechnars* do not basically rule like judges. They do not give any verdict, but they only expose their opinion on what is right and how to determine the damage amount. However, without the *dorzon* their decision would be only a non-forcible legal opinion, and this is why the *plechnar* has the *dorzon* in order to fulfill the decision.^{*83} The *dorzon* is a guarantee that the opinion of the *plechnar* will be respected.

Dorzon is a person elected by the parties to take care of the decision to be properly fulfilled.^{*84} Each party acquired their own *dorzon*, but there are specific provisions for blood-feud *dorzon*. He has to take care that the decision of *plechnija* will be accomplished in time and as it was given. If the killer tries to escape or to prolong due payment, *dorzon* calls him in front of the gathered people to warn him.^{*85} Blood-money is always given to the *dorzon* by the murderer and *dorzon* passes it to the family of the victim – it is not tolerated that murderer pays the blood-money to the victim’s family directly.^{*86}

has to compensate costs of their arrival. However, in practice the amount was considerably higher, H. Ismaili, 54.

^{*82} H. Ismaili, 36.

^{*83} M. Djuričić, (1973), 351.

^{*84} H. Ismaili, 178. This example from comparative legal history might generally support an idea by E. Cantarella, (2002), 160; (2012), 186 that *istor* was a person who guaranteed that the blood-money will be correctly paid in accordance with the word given.

^{*85} Code of Leke Dukagjini, art. 980.

^{*86} Code of Leke Dukagjini, art. 981.

Shortly, *dorzon* had multiply functions as a person of public faith.^{*87} He is there to remember what was the opinion of the *plechnija*, to take care that it will be fulfilled, he is “one-who-knows” the case, who is a guarantee of the blood-feud contract and who is in charge of proper accomplishment of the compromise (opinion of the *plechnia*). And he is supposed to remember, and attest if necessary, the outcome of the case in the coming decades, until the end of his life. *Dorzon* is a warranty in many legal acts (inheritance, different contracts), but his role is particularly important in blood-feud cases. Blood-feud procedure is performed through two contracts.^{*88} The first one is an agreement about the blood-feud when one party permanently waives demand to seek for the blood-price, while the other party takes burden to pay certain amount as a compensation for the forgiven death. The second is a contract about protection of the agreement by the *dorzon* who takes care that the contract will be fully completed.

Although there are plenty of associations that may connect *plechnija* and *dorzon* with the Homeric *istor* in many aspects, there are probably also numerous differences between those institutions. However it seems that at least they served to a similar purpose – to have someone who will take care as a warranty of the contracts or decision of the Court of elders (to be fulfilled as ruled, and to keep all important details of the case remembered, similarly as *mnamon* was in charge to do in Gortyn or *pristav* among Slav people in Middle Ages).

^{*87} M. Djuričić, (1973), 175-214.

^{*88} M. Djuričić, (1973), 349.

4. CONCLUSION

Notwithstanding that most English translators take for granted that the *istor* is a judge or an arbiter, it seems that *istor* was not in charge to decide, particularly murder or blood-money cases. Those issues were probably not ruled by a single person, particularly in early societies. Also, it is quite doubtful whether a primitive democratic body, consisted of people gathered at random, was eligible to reach reasonable decision in complicated cases like this, as Mac Dowell and Lanni suggest. Homeric society is deeply aristocratic and eventual formal confirmation of elder's decision by the crowd was probably out of their capacity. The crowd can of course express their feelings and attitudes during the public judicial process but without any formal legal significance. Like in many other primitive societies the court of elders, the *gerontes* were authorized to give a final verdict. But, what was the role of the *istor* then?

The theory that the *istor* was one of the elders who gave the best judgment or that the *istor* was the chair-man of the *gerontes* has many deficiencies: it is in contradiction with the very sequence of Homeric verses, with comparative early law experience, with the whole settings, with the linguistic background, etc. So, the question remains what is responsibility of the *istor*? If the *istor* was one who decided the case (as plenty of translators suggest), why were *gerontes* needed at all? Or there were two types of judges involved? Having in mind primarily philological and comparative arguments, it seems that *istor* was only a person who helped to the *gerontes* to reach the best possible verdict. He was a person of public faith who knows what he has seen (*oida* as the root of *istor*) and his role was to report to the crowd and the elders what relevant elements he knows and

remembers. His statement was very important particularly considering an oral judicial procedure, which was not strictly fixed and could vary in many aspects.

But, even if so, there are two possibilities in our case. The *istor* was there either to help in solving a legal matter (if blood-money is acceptable or not) or a matter of fact (whether the blood-money was paid in a proper way).

Although theory that the issue was about a legal matter seems to be quite vulnerable, let us examine a possible role of the *istor* in that case. If the issue was controversial considering a tough legal question of blood-feud relevance, why was presence of *istor* so necessary? If his opinion was so important, what was the role of *gerontes* then? There is only a slight possibility that the *istor* was at hand to remember and remind the audience if the blood-money was accepted in some comparable cases before.^{*89} He might have reported in which way the blood-feud was replaced by blood-money (*poine*) in the concrete situation or, maybe, to add his remembrance and offer his information on some other important issue at stake. Blood-feud was not replaced with blood-price routinely, all at once, always and in all situations in the same way, but it almost certainly depended on some particular characteristics of the concrete murder. Only in that sense *istor* could conclude (*peirar*) the preliminary dilemma if blood-money was previously acceptable in comparable circumstances. But in any case he does not make a decision. Of course, that presumption about the role of the *istor* is quite susceptible, as much as the whole hypothesis on legal matter as a subject

^{*89} M. Gagarin (2003), 68 is right that there is no evidence that *mnamones* in Gortyn remembered the outcomes of earlier cases as precedents or rules for new cases. But *argumentum ex silentio* does not mean that something similar did not take place, particularly if one takes into consideration the role of *pristav* in Medieval Slavic law.

of the Homeric trial scene is vulnerable. The very presence of the *istor* and explanation of his role makes a great problem for that theory.

If the issue was the one of facts, namely if the blood-money was correctly disbursed or if it was paid or not, what sounds more plausible, makes the case more relaxed and the role of *istor* could be more easily explained. The responsibility of the *istor* was quite similar to the one of the *pristav* in the customs of Slavs or to the function of the *dorzon* among Albanians from Kosovo and Metohija. The *istor* does not rule as the case was already solved by a compromise during his presence. He only informs the *gerontes* about something that he knows (as a person of public faith), about something that he was supposed to supervise and as a guarantee/guarantor of the accomplishment of the decision. He is present in the Homeric trial scene to report what was wrong in accomplishing the blood-feud compromise, as he is one-who-knows. This is why the *gerontes* speak in turn about different possibilities *after* his statement. Sequence of verses clearly points to that.

In any case function of the *istor* was not to decide the case but to report about some relevant issues. His statement could be related to the history of the actual clash (about the content of the decision, about the details and manner of its enforcement, etc.), although it is not impossible that the *istor* was also free to mention other cases that he had observed before.^{*90} The *istor*'s statement could affect the final verdict and this is why the parties and the audience are so excited to hear what he is going to say. However, the final decision on how to solve the concrete dispute, depending on specific elements of the case, is in hands of the *gerontes* only.

Many societies without written judicial procedure used persons of public faith in a similar role of "rememberer", of a person "who knows" the facts

^{*90} Previous decisions were taken into account when *plechnija* was ruling, H, Ismaili, 152.

relevant for the process. This is probably one of the points of the phrase *epi istori* - facts that he has seen and remember are basically a non-written archive of the case. Therefore, the *istor* is an important person who is present during the process, a man of public faith whose knowledge could be decisive, but he is not a decision maker.

This is why Mac Dowell's translation sounds quite tolerable, but only in its first part: "both wished to obtain trial at the hands of *istor*". Mac Dowel is among the rare English speaking authors who avoided statement that parties wanted to obtain decision, verdict, judgment or something very binding by the *istor*. The only problem with Mac Dowell's approach is that he translated *istor* as a judge, merging the role of *gerontes* and *istor* (as many other scholars also did as well). But, Homer clearly says that the elders do *dikazein*, while *istor* is only related to *peirar helesthai*. They give the judgment based upon the facts of each specific case, taking seriously *istor*'s statement. His role in a preliterate society was surely very important. He was a "walking archive of judiciary", his report could strongly affect the final decision by the elders, but he was not a person authorized to come to a decision.

At the end here is a suggestion for the future English translators. The best solution in translating *istor* in the *Iliad*'s trial scene at the shield of Achilles should be to avoid either "judge" or "arbiter" or "witness". Having in mind comparative data depicted in this paper, particularly the role of *dorzon* among Albanians, a bit more acceptable term could be "warranty", or "guarantee" like *pristav* in old Slavic law, or "guarantor" like Agamemnon in the Homeric funeral race scene (in convincing Thür's interpretation). Of course, the easiest approach for translators would be to keep the original Greek word *istor*, like *mnamon* of the Code of Gortyn is never translated by any modern alternative term. "One-who-knows", as suggested by

Hammond (although probably with different connotations in his view) and “Wissenden” by Thür in German, could be also a good choice to translate Homeric *istor*, as it would fit better to his probable role in the judicial process. Modern legal terminology can not offer a better single-word translation for the Homeric *istor*.

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