

Legal procedure in the Homeric *Hymn to Hermes*¹

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The subject matter of the Homeric *Hymn to Hermes*, which according to specialists was composed in its present form in the late archaic period², is the dispute between two gods, the new-born Hermes and Apollo, and its subsequent adjudication by Zeus. As one might expect, because of its subject matter the hymn is rich in details about law and the administration of justice. Yet despite the fact that scholars have dissected the linguistic and literary qualities of the piece, as well as its importance for understanding archaic religious beliefs and ceremonial³, there is still no comprehensive evaluation by

¹ The following abbreviations are used throughout this paper : *IC* : M. GUARDUCCI, *Inscriptiones Creticae*, vol. I-IV, Rome 1935-50. *IGT* : R. KOERNER, *Inchriftliche Gesetzestexte der frühen griechischen Polis*, Köln 1993 (numerals refer to inscription numbers unless otherwise noted). *ML* : R. MEIGGS and D. LEWIS, *A Selection of Greek Historical Inscriptions*², Oxford 1988. *Nomima I & II* : H. VAN EFFENTERRE et Fr. RUZE, *Nomima. Recueil d'inscriptions politiques et juridiques de l'archaïsme grec*, vol. I-II, Rome 1994-95 (numerals refer to inscription numbers unless otherwise noted). *SEG* : *Supplementum Epigraphicum Graecum*, Amsterdam 1923-present. (References by volume, entry).

² E.g. R. JANKO, *Homer, Hesiod and the Hymns : Diachronic Development in Epic Diction*, Cambridge, 1982, 143 dates the extant version of the hymn towards the end of the sixth century B.C.

³ See e.g. JANKO, *op. cit.*, n.2, p. 133-50 ; C.A. SOWA, *Traditional Themes and the Homeric Hymns*, Chicago, 1984 ; J.S. CLAY, *The Politics of Olympus. Form and Meaning in the Major Homeric Hymns*², London, 2006, p. 95-151 ; D. FRÖHDER, *Die dichterische Form der Homerischen Hymnen untersucht am Typus der mittelgroßen Preislieder*, Hildesheim, 1995 ; Y.Z. TZIFOPOULOS, *Hermes and Apollo at Onchestos in the Homeric Hymn to Hermes : The Poetics and Performance of Proverbial Communication*, *Mnemosyne* 53 (2000), p. 148-63 ; S.I. JOHNSTON, *Myth, Festival*

historians of archaic Greek law⁴. The purpose of this paper is twofold. First, to examine in detail the evidence the *Hymn to Hermes* provides for archaic Greek legal systems. Secondly, to evaluate this evidence in the context of legal procedures, ideas about the law as well as strategies in coping with the legal system that are attested in other parts of archaic Greece. The conclusion is reached that even though the story of the hymn is mythological, to a great extent the details of adjudication as depicted in the hymn accurately reflect conditions of administration of justice that were largely familiar to the audiences of the poem. Moreover, the Homeric *Hymn to Hermes* elucidates some lesser known archaic legal practices and behaviours. Finally, a detailed analysis of the legal dispute and the adjudication proceedings in the hymn points to a fresh interpretation of other aspects of the poem that have long been disputed by literary critics.

Chronological and methodological concerns

Before proceeding any further, some preliminary remarks regarding the value of the Homeric *Hymn to Hermes* as evidence for archaic legal behaviours and practices are in order. The issue can be summed up in the following question: to what extent can the picture of legal proceedings adumbrated by the hymn be considered representative of actual conditions in the historical communities of archaic Greece? It is evident that this issue is not restricted to the *Hymn to Hermes* alone, and that the same question can be applied to most of the orally performed archaic poetry. In principle, one might argue that like Homer, Hesiod and other archaic literature, it is reasonable to assume that, mythological elements aside, the Homeric *Hymn to Hermes* reflects, to some extent at least, historical conditions of archaic Greece. An important qualification is the purpose and context of performance as well as the date of composition of the hymn in question. Based on the content of the hymn a cultic context of

and Poet: The "Homeric Hymn to Hermes" and Its Performative Context, CPh 97 (2002), p. 109-132. For the cultic associations of the Homeric *Hymn to Hermes* see also note 5 below.

⁴ E.g. M. GAGARIN, *Early Greek Law*, Berkeley, 1986, p. 40-1 offers simply a two page summary (with other occasional minor references in other parts of his book) of the Apollo vs. Hermes dispute. There is no discussion of the Homeric *Hymn to Hermes* in K.-J. HÖLKESKAMP, *Schiedsrichter, Gesetzgeber und Gesetzgebung im archaischen Griechenland*, Stuttgart, 1999.

performance is a strong possibility, perhaps at Panhellenic (or at least regional) religious gatherings. Recently Sarah Iles Johnston⁵ has persuasively argued for one of the Hermaia festivals as a possible performative context for the *Hymn to Hermes*. Other commentators prefer to dissociate the hymn from a cultic context. For instance, Jenny Clay has suggested the early archaic *dais* and the later *symposium* as possible contexts of recitation and performance⁶. Although I would personally favour a cultic context of performance, the exact location where the hymn was performed is of secondary importance for the purposes of the present paper. Most important is the fact that, as most commentators have recognized, due to its method of composition⁷ and theme, it can be reasonably expected that the contents of the hymn would have had a wider appeal in the Greek world⁸.

⁵ JOHNSTON, *op. cit.*, n.3 ; for other cultic connotations of the hymn see also S. SCHEINBERG, *The bee maidens and the Homeric Hymn to Hermes*, *HSPh* 83 (1979), p. 1-28 ; W. BURKERT, *Sacrificio-sacrilegio: Il "trickster" fondatore*, *StudStor* 20 (1984), p. 835-45 ; S.C. SHELMERDINE, *Hermes and the Tortoise : a Prelude to Cult*, *GRBS* 25 (1984), p. 201-8 ; J. LARSON, *The Corycian Nymphs and the Bee Maidens of the Homeric Hymn to Hermes*, *GRBS* 36 (1995), p. 341-57.

⁶ CLAY, *op. cit.*, n.3, 7. I do not find the argument very strong, particularly because it is mostly based on Clay's readings of some passages that she believes corroborate the assertion. This having been said, a sympotic context of performance is in theory a realistic possibility. See also FRÖHDER, *op. cit.*, n.3, p. 17-60.

⁷ The question of authorship and composition cannot be dealt with in detail here. In general I agree with Janko that even though the *Hymn to Hermes* does not appear to be as formulaic as other archaic poems belonging to a widely defined epic genre, it is quite plausible that the hymn in question, much like most of the extant archaic poetry, was orally composed and recited at least since the early archaic period before finally being committed to writing at some later date. See the comments by JANKO, *op. cit.*, n.2, p. 149-50.

⁸ This appeal could be achieved through the performance of the hymn, either in cultic or sympotic contexts. In the case of the former, the Homeric Hymns (including the *Hymn to Hermes* in particular) were thematically homogeneous because they were performed in religious festivals of similar orientation and, as JOHNSTON, *op. cit.*, n.3, 111 has pointed out, because they 'articulated the concerns expressed by the festival' in which they were performed. On the other hand, according to CLAY [*op. cit.*, n.3 and EADEM, *The Homeric Hymns*, in I. MORRIS and B. POWELL (ed.), *A New Companion to Homer*, Leiden 1997, p. 489-507], the primary intention of the Homeric Hymns was to create a unified Greek theology and cosmology that would correspond to the tendency towards cultural homogenization in the late archaic Greece. See CLAY, *op. cit.*, n.3, p. 9-16 (e.g. 10 arguing for a 'Panhellenic Olympian orientation of the Homeric Hymns') and EADEM, (this note), especially p. 506.

Such an assessment is in keeping with the view that sees orally performed archaic poetry embracing panhellenic attitudes and beliefs at the expense of strict, epichoral concerns. As Gregory Nagy has argued, the poems transmitted under the name of authors such as Homer, Hesiod and Theognis do not reflect strictly parochial ideas, but are the result of an oral cumulative synthesis of panhellenic appeal: ‘the pan-Hellenic tradition of oral poetry appropriates the poet, potentially transforming even historical figures into generic ones who merely represent the traditional functions of their poetry’⁹. As a result of this process ‘this poetic tradition synthesizes the diverse local traditions of each major city-state into a unified Panhellenic model that suits most city-states but corresponds exactly to none’¹⁰. This panhellenizing effect of most archaic poetry, including the Homeric *Hymn to Hermes*, was undoubtedly adopted, to a certain extent at least, in order to gain popularity and recognition for these poems in the circuit of poetic performances in the archaic world¹¹. On this basis, it can be argued that it is quite plausible that the *Hymn to Hermes*, and other archaic poetry of the same genre, portray legal behaviours and practices that would be readily recognizable by archaic audiences as

⁹ G. NAGY, *Greek Mythology and Poetics*, Ithaca, 1990, p. 48, n.40 and *passim*. For Homer see also G. NAGY, *Homeric Questions*, Austin, 1996; IDEM, *Poetry as Performance. Homer and Beyond*, Cambridge, 1996 and IDEM, *The Best of the Achaeans. Concepts of the Hero in Archaic Greek Poetry*², Baltimore and London, 1999. With particular reference to Hesiod, see G. NAGY, *Authorization and Authorship in the Hesiodic Theogony*, *Ramus* 21 (1992), p. 119-30; for Theognis see G. NAGY, *Theognis and Megara: A Poet’s Vision of His City*, in T.J. FIGUEIRA and G. NAGY (ed.), *Theognis of Megara. Poetry and the Polis*, Baltimore and London, 1985, p. 22-81; and for the Homeric *Catalogue of Women*, fr. 43 (significant for the evidence for dispute resolution through arbitration) see I. RUTHERFORD, *Mestra at Athens: Hesiod fr. 43 and the poetics of panhellenism*, in R. HUNTER (ed.), *The Hesiodic Catalogue of Women. Constructions and Reconstructions*, Cambridge, 2005, p. 99-117. My agreement with this line of argument should not be taken as a denial of the existence of historical poets named Hesiod and Theognis. On the contrary, in the chapters that follow I assume them both to be real individuals who had close encounters with the legal system of their communities. But due to the panhellenic appeal of their poetry, I take the attitudes towards law they portray as reflective of widely shared values and ideas in different parts of archaic Greece.

¹⁰ NAGY, *The best of the Achaeans*, *op. cit.*, n.9, 7.

¹¹ For the significance and contexts of poetic performance in archaic Greece see B. GENTILI, *Poetry and Its Public in Ancient Greece*, Baltimore, 1988; D. COLLINS, *Master of the Game: Competition and Performance in Greek Poetry*, Washington D.C., 2004.

akin to their actual legal experiences, even if such behaviours and practices as depicted in the hymn did not exactly correspond to substantive norms and procedures of administration of justice as experienced by each and every member of every audience that attended a performance of the hymn. By the same token, the same panhellenic features of orally performed poetry would render less likely the possibility that such poetry depicts the actual legal conditions of a single historical community (e.g. the place of origin of the poet or the location of the poem's original performance). Such features of some archaic poetry, and more specifically of the *Hymn to Hermes*, can explain why many of the features of adjudication attested in the hymn are closely comparable to practices and ideas that are attested in several other archaic sources and, by extension, in different parts of the Greek world.

With particular reference to the Homeric *Hymn to Hermes* it has been convincingly argued that, despite its relatively late date of written composition (if we accept as a working hypothesis the late sixth century date, following a long period of oral recitation and modification, see n. 2 above), it reflects 'the same formal public procedure we have seen in the earlier works'¹², meaning the poems of Homer, Hesiod and the *Catalogue of Women*, fr. 43. These sources, in addition to the *Hymn to Hermes*, focus on dispute resolution through arbitration, and all differ from much of the epigraphic record in that they do not envisage any standing courts of specialist judges (as opposed to persons of authority who occasionally acts as judges in arbitration) or any other formal methods of adjudication or appeal of the verdict. This lack of references to a more diversified legal system is particularly problematic for the *Hymn to Hermes* because we know that at the time the hymn was written down, standing courts of professional judges and juries as well as more sophisticated legal procedures were in place in a number of communities in archaic Greece and therefore constituted part of the legal experiences of some of the members of the audiences who attended recitations and performances of the hymn, especially if we accept that such

¹² M. GAGARIN, *op. cit.*, n.4, p. 40. Being in agreement with Gagarin's view on this issue, in the present paper I often contrast the evidence for legal perceptions and practices as presented in the Homeric *Hymn to Hermes* with similar evidence in Homer and Hesiod.

performances occurred in panhellenic religious settings. Perhaps the reference to legal procedures that are more in keeping with evidence provided by early archaic poetry is due to the overall “archaizing” character of the *Hymn to Hermes* – after all the birth of Hermes and other stories of theogony were supposed to have happened in the distant, primordial past. Moreover, the oral transmission of the hymn for some time before it was written down in the sixth century, might also account for some of the aspects and omissions of legal procedure that we encounter in the hymn. By the same token, and given all that we have said above regarding the value of archaic poetry as source for law and the administration of justice, archaic audiences of performances of the *Hymn to Hermes* must have certainly felt some degree of familiarity with the legal procedure adumbrated in the hymn.

Such arguments are also related to the methodological issue of whether one can justifiably attempt to detect common patterns of legal practices and beliefs in the archaic period or whether such practices and beliefs, as can be extrapolated by the extant epigraphic and literary evidence, were so diverse in nature and fragmented in their geographical distribution that it is misleading to refer to anything other than the legal systems of individual archaic communities, whenever elements of such legal systems are attested in our record. For decades the latter thesis has been considered an unassailable orthodoxy but recently scholars have begun to acknowledge that, despite the undisputed political fragmentation and the differences in positive law and legal procedure observed between various polities in the Greek world, common features in institutions, terminology, ideologies and practices suggest that the search for patterns of legal behaviour across parts of archaic Greece is a legitimate, and potentially profitable, scholarly exercise¹³. Such an assertion does not of course mean that one is entitled to use all archaic sources, literary

¹³ See L. FOXHALL and A.D.E. LEWIS, *Introduction*, in L. FOXHALL and A.D.E. LEWIS (ed.), *Greek Law in its Political Setting. Justifications not Justice*, Oxford, 1996, p. 1-8 ; M. GAGARIN, *The Unity of Greek Law*, in M. GAGARIN and D. COHEN (ed.), *The Cambridge Companion to Ancient Greek Law*, Cambridge, 2005, p. 29-40 (with a summary of the debate during the past decades); A. CHANIOTIS, *The Great Inscription, its Political and Social Institutions and the Common Institutions of the Cretans*, in E. GRECO and M. LOMBARDO (ed.), *La Grande Iscrizione di Gortyna. Centoventi anni dopo la scoperta*, Athens, 2005, p. 175-94.

and epigraphical, related to law in a synchronic and embracing manner. In other words, it would be absurd to claim that all ideas and practices of law attested in the archaic evidence were commonly shared across the archaic world. To return to the example that opened the previous paragraph, the ‘formal public procedure’ that Gagarin has detected in the *Hymn to Hermes* is the method of dispute resolution through voluntary submission to arbitration which was conducted in public. As the same author points out, similar methods of adjudication are described by other archaic poets, and even though aspects of the procedure often differ (e.g. arbitration is conducted by panels of *gerontes* and *basileis* in Homer and Hesiod respectively, but by a single arbiter in the *Hymn to Hermes* and the *Catalogue of Women*, fr. 43) the assumption behind all these narratives is that archaic audiences would recognize voluntary submission of disputes to public arbitration as a viable and commonplace method of dispute resolution. This is an example of a legal behaviour (both in the cognitive, *i.e.* an understanding on the part of legal actors of what law is, and the empirical sense, *i.e.* how law works in practice) that is detectable in more than one author or location in archaic Greece. Similar patterns of legal behaviour can be observed with regard to oaths, perjury and the role of witnesses, to limit ourselves only to some prominent legal features that emerge from the *Hymn to Hermes*.

The dispute

It is now time to turn our attention to the evidence for law and the administration of justice that the Homeric *Hymn to Hermes* provides. The main theme of the hymn is the theft of Apollo’s cattle by the newborn Hermes (18 : βοῶς κλέψεν ἐκηβόλου Ἀπόλλωνος)¹⁴ and the ensuing dispute between the two gods. The audience of the hymn is informed that the cattle of the gods were usually pasturing at ‘the shadowy mountains of Pieria’ (70). Hermes appeared at the scene one night and led off a herd of fifty which belonged to Apollo. In order to deceive even further, Hermes forced the cattle to walk backwards to make it appear that they were going towards the meadow instead of leaving it (74-78). In the process of stealing the cattle Hermes was

¹⁴ All references are to the Homeric *Hymn to Hermes*, edition by T.W. ALLEN, *Homeri Opera. Tomus V*, Scriptorum Classicorum Bibliotheca Oxoniensis, Oxford, 1912, unless otherwise noted.

observed by a neighbouring farmer tending his vineyard. As a result, Hermes attempted to make him acquiesce in the apparent theft by promising him that he would be rewarded with an extraordinarily rich harvest (86-93). Following these events, Hermes drove the herd and hid it in a cave by the banks of river Alpheius (101) and sacrificed two cows to the gods (115-37). The following morning he returned to his cradle (138-53) pretending to be oblivious of any wrongdoing. From that point onwards and until the settlement of the dispute Hermes assumes a consistent posture of deception in his dealings with the other gods. First, in response to the accusation of his mother Maia, he denies any malfeasance on his part (155-69)¹⁵. Similarly, at a later point when Apollo discovers the theft, Hermes persistently refuses to acknowledge his guilt (260-80 ; 307-11). Finally, after realizing that Apollo is determined to recover his cattle, Hermes proposes to submit the dispute to arbitration with Zeus as the judge (312 : δὸς δὲ δίκην καὶ δέξο παρὰ Ζηνὶ Κρονίῳνι). After the testimonies of the two parties had been heard (these and other procedural aspects will be examined in more detail below), Zeus bids Hermes reveal where the cattle are hidden and then urges both litigants to be reconciled. As is to be expected, both Hermes and Apollo comply with the wishes of Zeus and hence the dispute is peacefully settled¹⁶.

Procedure

After establishing the framework of the dispute, we can proceed to the question that constitutes the backbone of this paper : how does the Hermes v. Apollo judicial dispute square with what we already know about law and justice in archaic Greece? I intend to explore this

¹⁵ Note however that Hermes explicitly acknowledges (172-81) that if he is not honoured by the other immortals in a manner appropriate to a god, he will seek to become a ‘prince of thieves’ (φηλητέων ὄρχαμος ; cf. 291, where Apollo indeed dubs Hermes ἀρχὸς φηλητέων). He also warns that if Apollo seeks revenge, he will not hesitate to break into his house (*i.e.* the sanctuary at Delphi) and steal gold, iron, tripods and other precious items (176-81). Cf. also Hom. *Od.* 19, 395-7 where Autolycus, Odysseus’ grandfather, is described as one who excelled all men in thievery and oaths, skills that he learned from Hermes (ὅς ἀνθρώπους ἐκέκαστο κλεπτοσύνηθ’ ὄρκω τε· θεὸς δὲ ο αὐτὸς ἔδωκεν Ἑρμείας).

¹⁶ In typical Homeric fashion the settlement is consolidated through gift-exchange : Hermes gives Apollo his lyre as a gift (490) while Apollo promises Hermes glorious gifts (462 ἀγλαὰ δῶρα) and puts him in charge of his herds (498). As the anonymous poet puts it, Zeus ‘made them both friends’ (507 ἄμφω δ’ ἐς φιλότητα συνήγαγε).

question by focusing on three aspects of the dispute, namely the procedure adopted by the litigants (especially in initiating and settling the case), the role of witnesses, and finally the function of the oaths in the course of the dispute.

First, regarding the initial stages of the dispute and the procedures adopted towards its resolution : upon discovering the loss of his cattle, and after hearing the story related by the farmer/witness (201-11), Apollo suspects Hermes and directly confronts him with an accusation of theft (254ff.). Hermes, in keeping with his deceitfulness in the opening parts of the hymn, denies the charge and proposes that he (*i.e.* Hermes) shall swear an oath to prove his innocence (273-77 ; more on this oath below). Apollo ignores the oath-challenge proposal and after repeating his accusation, he snatches baby Hermes and begins roaming around looking for his cattle. At this point Hermes suggests another course of action : submit the dispute to arbitration by Zeus (312 : δὸς δὲ δίκην καὶ δέξο παρὰ Ζηνὶ Κρονίῳνι). Apollo agrees and the two gods (or litigants in a judicial sense) set forth for Olympus and Zeus.

These passages are important because they illuminate the initial phases of litigation, an aspect of the administration of justice that is scarcely attested in the communities of archaic Greece. It is clear that the first impulse in many disputes would be to settle the matter between the litigants without any recourse to an arbiter or a court of justice. Apollo and Hermes try to do exactly that (Apollo by trying to persuade Hermes to return the stolen cattle ; Hermes by proposing an oath-challenge as means of ending the dispute immediately). Other archaic sources suggest that such informal dispute settlement options were indeed open to litigants. For instance, in *Il.* 12.421-3, Homer describes an attempt of two neighbouring farmers, measuring rods in hand, to establish the border of their fields and settle a dispute. The scene is portrayed in a simile so we are never told what could have happened if the two parties failed to reach a settlement. One might reasonably presume that in such a contingency, they would have perhaps submitted their dispute to a board of *gerontes* for arbitration, similar to the one described in connection with a homicide case in *Il.* 18.497-508.

Another example of an attempt to settle a dispute outside the courts is provided in the *Works and Days* where Hesiod describes

aspects of the dispute with his brother Perses over the land bequeathed by their father. Hesiod claims that Perses appropriated a portion of Hesiod's land and exploited it as if it was his (ἤδη μὲν γὰρ κληῖρον ἔδασσάμεθ', ἀλλὰ τὰ πολλὰ ἀρπάζων ἐφόρεις *Op.* 37-8). The two brothers brought their dispute to adjudication and Hesiod lost. Throughout the *Works and Days* Hesiod is clearly dissatisfied with the outcome and blames the 'gift-devouring kings' (βασιλῆας δωροφάγους *Op.* 38-9 ; cf. 220-1 ; 262-3 ; fr. 361 Merkelbach-West δῶρα θεοῦς πεῖθει, δῶρ' αἰδοίους βασιλῆας) who heard the case¹⁷.

However, even though the case has been tried, for Hesiod it was not satisfactorily settled and he appealed to his brother offering an alternative arrangement regarding their dispute, namely a settlement outside the courts (*Op.* 35 ἀλλ' αὐθι διακρινόμεθα νεῖκος θείησι δίκης, αἳ τ' ἐκ Διός εἰσιν ἄριστα). These examples from Homer and Hesiod corroborate the impression one gets from the Hermes v. Apollo dispute, namely that the prospect of settling disputes out of court, especially given the simplicity and flexibility of such informal settlements, was quite appealing for many litigants. Moreover, one might be justified in conjecturing that such settlements constituted a quite popular method of dispute resolution across the archaic world and that many, if not most, disputes were settled in this fashion without recourse to the judicial authorities. The preceding evidence also suggests that often there was no strict order in exploring the various options of settlement dispute. In some cases, as the dispute between Hermes v. Apollo indicates, litigants might attempt to settle the matter before it reached an arbiter or a court. In other cases, as the Hesiod v. Perses dispute suggests, if one of the litigants felt dissatisfied with the outcome of the trial he might attempt to elicit a different, out of court settlement after a verdict has been delivered by the judges or jury. More options were at times available (for example, in some *poleis* of late archaic Greece legal appeals to other standing courts), but the point is that in all probability dispute settlement procedures depended mostly on the circumstances of each case and

¹⁷ One should not of course think of Hesiod's kings as absolute monarchs but as community 'big-men', similar in many respects to the kings in Homer. Cf. a scholion on *Op.* 37-38 (Augustinus PERTUSI [ed.], *Scholia Vetera in Hesiodi Opera et Dies*, Milan, 1955), which points out that βασιλῆας δὲ νῦν τοὺς δικαστὰς καὶ τοὺς ἄρχοντας οὕτως γὰρ αὐτοὺς ἐκάλουν οἱ παλαιοί, ὡς Ὅμηρος.

the strategies adopted by the litigants and not so much on a strict procedural protocol, supervised by judicial authorities, that had to be universally observed. And even in the case of those archaic communities where such a protocol was in place, litigants could obviously choose to ignore it (by settling their dispute out of court) or circumvent it (by reaching a different settlement after a court decision has been delivered). It also follows that, if the preceding suggestions are correct, all these different dispute settlement options were potentially equally valuable and binding in the eyes of the litigants and their communities at large (although not necessarily in the eyes of the state-sponsored judicial authorities).

To return to the details of the Hermes v. Apollo dispute, when the first attempts to settle the matter fails, then the alternative that suggests itself is the submission of the dispute to an arbiter, a person of authority and prestige who enjoys acceptance by both parties. In this instance such a person could only have been another god or even better Zeus himself (312), as the only god with a higher position and status than the two litigants. How does that compare with what is known about archaic adjudication? Once again, archaic sources suggest different courses of action available to litigants. One appears to be arbitration by a single arbiter just as in the case of the dispute described in the *Hymn to Hermes*¹⁸. Another possibility was the submission to a panel of arbiters similar to the Hesiod v. Perses dispute in the *Works and Days*¹⁹ and the trial depicted on the shield of Achilles in Homer (*Il.* 18.497-508)²⁰. Such panels were not

¹⁸ Cf. also the pseudo-Hesiodic *Catalogue of Women*, fr. 43a.31-57.

¹⁹ βῶσιλῆϊς in plural, *Op.* 38-9; 220-1; 248-64.

²⁰ In general I agree with those who interpret the trial on the shield of Achilles as a voluntary submission to arbitration. See e.g. M. GAGARIN, *Early Greek Law, op. cit.*, n.4, p. 26ff. with earlier bibliography; but cf. G. THÜR, *Zum δικάζειν bei Homer*, *ZSS [Trom]* 87 (1970), p. 426-44; IDEM, *Oaths and Dispute Settlement in Ancient Greek Law*, in L. FOXHALL and A.D.E. LEWIS (ed.), *op. cit.*, p. 57-72, who stresses the importance of oaths in settling disputes in archaic Greece. On the trial on the shield of Achilles see also R. WESTBROOK, *The Trial Scene in the Iliad*, *HSCP* 94 (1992), p. 53-76; Henri and Micheline VAN EFFENTERRE, *Arbitrages Homériques*, in G. THÜR (ed.), *Symposion 1993. Vorträge zur griechischen und hellenistischen Rechtsgeschichte*, Köln, 1994, p. 3-10; E. CANTARELLA, *Dispute Settlement in Homer: Once Again on the Shield of Achilles*, in J. STRANGAS (ed.), *Antike Rechte und Gesellschaft. Festschrift für Panayotis Dimakis*, Athens, 2002, p. 147-65, all with earlier bibliography.

technically speaking standing courts of justice (in the sense of the courts consisting of juries and/or specialist δικασταί found in late archaic and classical Greece) but rather they consisted of some of the most powerful and influential individuals of the community²¹.

Disputes adjudicated by a single arbiter or a panel of mediators shared a number of procedural features. In cases of disputes adjudicated before a panel, the litigants would deposit a fee (cf. the ‘gifts’ devoured by Hesiod’s kings who heard the dispute with his brother) then they would go on to relate their story before the arbiters who, according to the trial on the shield of Achilles (*Il.* 18.506-8), would pronounce their verdicts in turn. The litigants then had to comply with one of these verdicts and therefore settle the matter while the fee was either collectively claimed by the elders who heard the case or it was single-handedly awarded to the elder who pronounced the decisive (that is the most acceptable by the litigants) verdict. This reconstruction, based primarily on the trial depicted on the shield of Achilles, is in keeping with the information provided by Hesiod and, with the only significant exception of the number of arbiters involved, the Homeric *Hymn to Hermes*. In the latter, when the two litigants arrive in Olympus in order to present the matter for arbitration to Zeus we are told that ‘the scales of justice were set for them’ (324, κείθι γὰρ ἀμφοτέροισι δίκης κατέκειτο τάλαντα)²² and that the other gods had assembled in Olympus (325-6, ἀθάνατοι δὲ ἄφθιτοι ἠγηρέθεντο). The gods’ assembly is reminiscent of the public nature of judicial proceedings as attested by Homer, Hesiod, and indeed other archaic sources²³. During the lawsuit portrayed on the shield of Achilles, the

²¹ It is reasonable to assume that the elders and other persons of authority who manned the panels of arbiters in early archaic Greece also wielded political authority within the early *poleis*. This is suggested by the fact that in many instances in archaic Greece civic magistrates exercised judicial authority. See e.g. *BCH* 61 (1937), 334 (= *Nomima* I, 81 = *IGT* 90), Dreros, late seventh century B.C.; *ML* 8 = *Nomima* I, 62 = *IGT* 61, Chios sixth century B.C.; *IC* I, X, 2, 8 = *Nomima* II, 80 = *IGT* 94, Eltynia, early fifth century B.C.

²² Some scholars interpret the τάλαντα in l. 324 as the fee collected by the arbiter, similar to *Il.* 18, 497-508. See H.J. WOLFF, *The Origin of Judicial Litigation among the Greeks*, *Traditio* 4 (1946), p. 43; S. HUMPHREYS, *The Evolution of Legal Process in Ancient Attica*, in E. GABBA (ed.), *Tria Corda: Scritti in onore di Arnaldo Momigliano*, Como, 1983, 232, n.3., p. 229-56. This is likely.

²³ It is worth pointing out that, even though throughout the adjudication process Zeus acts as the arbiter, i.e. the indisputable authority responsible for settling the dispute,

spectators turn up in large numbers and take an active part in cheering in support of their favourite side (ἐπήτυον, *Il.* 18.502). The extent of the people's involvement is suggested by the fact that they had to be held back (ἐρήτυον, *Il.* 18.503) by heralds. Nothing similar is recorded for the assembly of the gods in Olympus, but their presence is still noteworthy and indicative of the public nature of judicial proceedings. Following the preliminary remarks regarding the assembly of the gods and the scales of justice, the litigants relate their stories in front of the arbiter Zeus (327-86). Zeus then suggests a reconciliation whereby Hermes will return Apollo's cattle and the two will become firm friends, a settlement that they agree to observe, thus bringing the dispute to an end.

Witnesses

The second aspect of the story that merits attention is the role of witnesses in settling the dispute. As far as the archaic period is concerned, the role of witnesses in the administration of justice of some archaic communities is only scarcely documented by legal

he refers to the quarrel between Hermes and Apollo as 'a grave matter that has come before the assembly of the gods' (332 : σπουδαῖον τόδε χρῆμα θεῶν μεθ' ὀμήγουριν ἦλθε), thus acknowledging the other gods' presence as spectators during the arbitration process. Other archaic sources also suggest that judicial proceedings were open to the public : *Il.* 18, 497 λαοὶ δ' εἰν ἀγορῇ ἔσαν ἀρθροοί ; Hes. *Op.* 29-30 (text quoted below), which implies that Hesiod's brother Perses and other members of Askra attended lawsuits in the *agora*. Archaic legal inscriptions corroborate the picture of judicial proceedings conducted in public as suggested by the literary sources, see e.g. *IC* IV, 13.g-i, 1-2 (= *Nomima* I, 1 = *IGT* 120), Gortyn, end of seventh century B.C. refers to a lawsuit (φαστίαν δίκαν) taking place in the *agora* ([λ]φάοι φαστίαν δίκαν [ἐν τῷ ἀγορῶν καὶ ἀ δίκαι) ; Draco's law on homicide, c. 620 B.C., *IG* I³ 104 (= *Nomima* I, 02 = *IGT* 11), p. 20-1 : προειπὲν δὲ τῷ κτεγγυ[τι ἐν ἀγορῶν] μέχρι ἀναφσιότετος καὶ ἀνεφσιδ] ; law from Phaistos, sixth century B.C. in A. DI VITA and E. CANTARELLA, *Inscrizione arcaica giuridica da Festòs*, *ASAA* n.s. 40 (1978), p. 429-435 (= *SEG* 32, 908 = *Nomima* II, 39) --- ἀποφεῖπαι ἐν ἀγορῶν ---. The importance of public deliberations in politics and law has been emphasized by E. HAVELOCK, *The Greek concept of Justice : From its Shadow in Homer to its Substance in Plato*, Cambridge Mass., 1978, p. 133, who pointed out that 'Justice can be applied only with the participation of the *agora* functioning as a forum for rhetoric addressed to the issues that have arisen'. More recently M. GAGARIN, *Letters of the Law. Written Texts in Archaic Greek Law*, in H. YUNIS (ed.), *Written Texts and the Rise of Literate Culture in Ancient Greece*, Cambridge, 2003, p. 60-4 also emphasizes the public and oral aspects of archaic Greek adjudication.

inscriptions, mainly of the sixth century B.C.²⁴ Even less survives from the early archaic period and therefore the clues provided by the Homeric *Hymn to Hermes* constitute a welcome addition.

The works of Homer and Hesiod contain only scarce and mostly indirect references to legal witnesses. In the Antilochus v. Menelaus dispute over the second prize of the chariot-race at the funeral games of Patroclus, there is no direct reference to witnesses although it is implied that anyone among the entire Greek army of spectators could perform that role if necessary (*Il.* 23.575ff.). However, since the dispute is peacefully settled between the litigants no testimony is ultimately necessary²⁵. Moreover, during the course of the chariot-race in question, a disagreement has arisen between Idomeneus and Ajax son of Oileus, when the former claimed that Diomedes was leading the race while the latter insisted that it was Eumelus that had the lead, as he did before the chariots went around the turn-post (*Il.* 23.448-98). Tempers heat up and Idomeneus suggests that they place

²⁴ The best evidence for the role of witnesses in the administration of justice during the archaic and early classical periods comes from Gortyn (e.g. *IC IV*, 21.2 [= *Nomima II*, 38 = *IGT* 123], Gortyn, mid-sixth century B.C.; *IC IV*, 41, *passim* [= *Nomima II*, 65 = *IGT* 127], early fifth century B.C.; and *IC IV*, 72, traditionally dated to the mid-fifth century, but quite possibly incorporating some earlier material), but inscriptions and literary sources occasionally provide evidence for other parts of Greece as well. For legal witnesses in the various communities of archaic and classical Greece see in general F. PRINGSHEIM, *Le témoignage dans la Grèce et Rome archaïque*, *RIDA* 6 (1951), p. 161-75; S. HUMPHREYS, *Social Relations on Stage: Witnesses in Classical Athens, History and Anthropology* 1 (1985), p. 313-369; M. GAGARIN, *The Testimony of Witnesses in the Gortyn laws*, *GRBS* 25 (1984), p. 345-349; *IDEM*, *The Function of Witnesses at Gortyn*, in G. THÜR (ed.), *Symposion 1985. Vorträge zur griechischen und hellenistischen Rechtsgeschichte (Ringberg, 14.-26. Juli 1985)*, Köln and Vienna, 1989, p. 29-54; D.C. MIRHARDY, *Athens' Democratic Witnesses*, *Phoenix* 56 (2002), p. 255-74; L. RUBINSTEIN, *Main Litigants and Witnesses in the Athenian Courts: Procedural Variations*, in M. GAGARIN and R. WALLACE (ed.), *Symposion 2001. Vorträge zur griechischen und hellenistischen Rechtsgeschichte*, Wien, 2005, p. 99-120, all with references to primary sources and earlier literature.

²⁵ One might note that despite Menelaus' allusions to the potential role of the spectators as witnesses, it would have been extremely difficult, if not impossible, for any of these spectators to substantiate the litigants' stories. This is especially so because the incident of overtaking that constituted the bone of contention of the dispute occurred at a spot of the racing-track that was clearly not visible by most members of the audience, as the disagreement between Idomeneus and Ajax as to who was leading after the half-way point of the race (*Il.* 23, 473-98) strongly suggests.

a wager and that they appoint Agamemnon as ἴστωρ (*Il.* 23.486). A scholion on this verse suggests that ἴστωρ can be interpreted as ‘witness’²⁶. This interpretation of ἴστορες as witnesses finds some confirmation in the prayer formula reported in *Il.* 19.258 ἴστω νῦν Ζεὺς πρῶτα... Γῆ τε καὶ Ἥλιος καὶ Ἐρινύες “let Zeus be my witness first... and Earth and Sun and the Erinyes”. But this is not the only meaning of the term : an ἴστωρ is also encountered in the trial depicted on the shield of Achilles when we are told that after the dispute has arisen ‘both litigants made for an *istor* to have a decision’ (*Il.* 18.501 ἄμφω δ’ ἰέσθην ἐπὶ ἱστορι πείραρ ἐλέσθαι). Similarly, one can interpret the role of Agamemnon as ἴστωρ in the Idomeneus-Aias dispute not as mere witness testifying the terms of the wager but as an arbiter deciding the winning side. The combined evidence of the Idomeneus v. Ajax dispute and the trial on the shield of Achilles suggests that, regardless of his exact legal position, at times the ἴστωρ played a more substantial role than a mere witness in deciding the outcome of an arbitration²⁷.

Besides the evidence reviewed above, there are no other direct references to witnesses in a legal context in the Homeric epics. In the trial depicted on the shield of Achilles we are told that the assembled spectators were ‘cheering both, showing favour to one side or the other’ (*Il.* 18.500 λαοὶ δ’ ἀμφοτέρωσιν ἐπήπυον, ἀμφὶς ἀρωγοί) but this is better interpreted as social pressure, not direct testimony. Similarly Hesiod implies that people in his community as well were in the habit of attending lawsuits conducted in public, a practice that Hesiod disapproves (*Op.* 27-32, ὦ Πέρση, σὺ δὲ ταῦτα τεῶ ἐνικάτθεο θυμῷ, μηδέ σ’ Ἔρις κακόχαρτος ἀπ’ ἔργου θυμὸν ἐρύκοι νείκε’ ὀπιπεύοντ’ ἀγορῆς ἐπακουὸν ἔοντα. ὥρη γάρ τ’ ὀλίγη πέλεται νεικέων τ’ ἀγορέων τε, ᾗτινι μὴ βίος ἔνδον ἐπηετανὸς κατάκειται ὠραῖος, τὸν γαῖα φέρει, Δημήτερος ἀκτὴν. ‘Perses, keep these things in your heart, and do not let the Strife who delights in mischief hold your heart back from work while you watch and listen lawsuits in the *agora*. There is

²⁶ See H. ERBSE, *Scholia Graeca in Homeri Iliadem*, vol. I-VII, Berlin, 1969-1988, vol. V, p. 443 : ἴστορα, ὅτι ἀντὶ τοῦ μάρτυρα, οἷον συνθηκοφύλακα. This interpretation of ἴστορες as witnesses also finds indirect confirmation in some late documents, e.g. a manumission decree of the Roman period from Thespieae *IG* 7, 1779.

²⁷ See also the comments by M.W. EDWARDS, *The Iliad : A Commentary*, Vol. V : Books 17-20, Cambridge, 1991, p. 216-7.

little interest in disputes and public proceedings for the man whose seasonal sustenance does not lie stored up, what the earth bears, Demeter's grain'). Yet, even though popular spectatorship of publicly conducted trials seems to have been a well-established practice in parts of early archaic Greece, it is important to emphasize that many of these spectators were undoubtedly curious bystanders not directly involved with the case and therefore not able formally to testify as witnesses. In the case of Hesiod, there is no reference to any participants in the inheritance dispute and the ensuing trial besides the poet himself, his brother and the gift-devouring kings. Why Hesiod does not mention any witnesses in connection with his trial is not known. One would have expected Hesiod to castigate any witnesses that might have testified in support of his brother, especially since he believed that Perses' claims were unjust and motivated by greed (*Op.* 37-9 ; 213 ; 315 ; 352).

However, in another part of the *Works and Days* Hesiod does refer to witnesses. In *Op.* 371-2 he argues that it is advisable to employ a witness when making a payment, even if the transaction is between siblings: Μισθὸς δ' ἀνδρὶ φίλῳ εἰρημένῳ ἄρκιος ἔστω. καὶ τε κασιγνήτῳ γελάσας ἐπὶ μάρτυρα θέσθαι. πίστεις γάρ τοι ὁμῶς καὶ ἀπιστίαι ὄλεσαν ἄνδρας ('Let a payment promised to a friend be fixed ; even with your brother smile and get a witness. For trust and mistrust alike ruin men')²⁸. It is evident that in this passage Hesiod contemplates the possible legal implications that might result from a disputed payment. In another passage he also refers to witnesses in lawsuits in the context of a rather generic but foreboding maxim against perjury *Op.* 282-4: ὃς δέ κε μαρτυρήσῃ ἐκὼν ἐπίορκον ὁμόσσης ψεύσεται, ἐν δὲ δίκην βλάβας νήκεστον ἀασθῆ, τοῦ δέ τ' ἀμαυρότερη γενεὴ μετόπισθεν λείπεται ('but whoever deliberately lies in his testimony and perjures himself and so hurts Justice and sins beyond repair, his generation is left obscure thereafter'). This might be an oblique reprimand to crooked witnesses in his trial but even if it is not, it is evident that by the time Hesiod composed his poems witnesses played an integral part in the settlement of disputes along the lines suggested by the more copious late archaic and classical sources. It is also quite apparent that, as *Op.* 282-4 shows, Hesiod

²⁸ *IC* IV, 72, 9, 43-54 from Gortyn provides a mid-fifth century example regarding the importance of witnesses in repayments. See further below.

firmly believed that witnesses in lawsuits were often capable of false testimony and even perjury²⁹.

Contrary to these scarce and mostly indirect references in Homer and Hesiod, the Homeric *Hymn to Hermes* describes in more detail the role of witnesses in litigation. Throughout the hymn we are reminded that there was indeed a witness to the theft, an old man who observed Hermes leading the cattle while he was tending his vineyard in Onchestus (87ff.)³⁰, a location half way between the original spot of pasture of the cattle in Pieria and their new hiding place by the river Alpheius in the Peloponnese. While he was leading the cattle away, Hermes acknowledged the old man and, in keeping with his policy of deception, promised him a bountiful crop³¹ if he had forgotten what he had witnessed. Hermes' suggestion sounds more like a warning and it is therefore not surprising that the old man keeps silent until the moment when Apollo heads to the same spot in search of his cattle, a short while after the discovery of the theft. In response to Apollo's inquiries, the old man pretends to be uncertain but he nevertheless identifies a child as the culprit (201-11). Hearing the old man's report Apollo departs without further ado to confront Hermes and, as we have already seen, the dispute is eventually submitted for arbitration to Zeus.

In the course of his speech during the arbitration proceedings Apollo indirectly employs the evidence provided by his conversation with the old farmer when he points out the fact that an eye-witness noticed Hermes driving 'the wide-browed cattle' (354-5). However, the witness in question never appears before Zeus. Following Apollo's speech, Hermes pleads his case for innocence (368-86). He is quick to emphasize that Apollo was not accompanied by any witnesses (μάρτυρας) or observers (κατόπτας) at the point of his unannounced entry into Hermes' home during the search for the missing cattle (372). Instead, Hermes argues, Apollo intimidated him with threats of physical violence in order to elicit from him a confession of guilt (373-6). But why did Apollo need to provide

²⁹ Also cf. the passages in n.45 below.

³⁰ For the encounters of Hermes and Apollo with the old man see also Tzifopoulos, *op. cit.*, n.3, p. 154ff.

³¹ Or according to another interpretation by CLAY, *op. cit.*, n.3, p. 115-6, based on a textual emendation, Hermes makes a sarcastic comment on the potential harvest of the old man.

witnesses while he confronted Hermes? We will return to this issue momentarily, but first it should be pointed out that there is a fundamental difference between the old man, whom we might call, following Gagarin³², an accidental witness, and the witnesses that Apollo fails to produce when he storms into Hermes' home, who were clearly meant to be formal witnesses (cf. also Hes. *Op.* 371-2 quoted above, which contains a clear reference to a formal witness). Whereas an accidental witness is occasionally called to testify on a fact or an aspect of a dispute that he happened to know or observe, formal witnesses were officially summoned by litigants to attest a procedural or contractual act, and were then called to testify about that act in court. The distinction is well illustrated in several late archaic/early classical laws from Gortyn³³, which also provide some clues as to why a litigant might need the use of formal witnesses in a situation similar to the one that Apollo found himself following the discovery of the theft. One possibility is that Apollo might have been expected to make a formal accusation against Hermes in the presence of witnesses (cf. *IC IV*, 72, 11, 50-5 for a formal accusation before a witness that results in adjudication) or he might have been expected to produce formal witnesses who could testify to the fact that, when confronted with the accusation of theft, Hermes refused to return the stolen cattle (cf. *IC IV*, 72, 9, 43-54 which alludes to witnesses who could testify to a litigant's refusal to repay an amount). Other explanations of the role of the alluded witnesses in verse 372 could be adduced (e.g. their presence might have been required for a house-search). Be that as it may, if our wider interpretation of the passage, on the basis of the comparative evidence provided by the laws of Gortyn, is on the right track, then the point Hermes appears to be making when he indicates Apollo's failure to produce any witnesses when he entered his home, is that Apollo has violated or overlooked a stage of the formal procedure leading to adjudication.

Finally, one might also note an additional aspect regarding the perception of the role of judicial testimony as portrayed by the *Hymn to Hermes* and Hesiod (see comments on *Op.* 282-4 above). In the

³² M. GAGARIN, *The Function of Witnesses at Gortyn*, *op. cit.*, n. 24, p. 30.

³³ E.g. *IC IV*, 41, 5, 4-11 (accidental witness) ; 41, 2, 6-16 (formal witness) ; 47, 21-2 (formal witness) and several passages from the Gortyn Law Code (*IC IV*, 72). The best discussion is provided by the two articles by GAGARIN, *op. cit.*, n.24.

former, although no witnesses testify in front of Zeus, both litigants conceal or evoke (for example Hermes' warnings to the old man noted above and his emphasis on the lack of Apollo's witnesses when the latter entered his home) witnesses and their testimonies (or lack thereof) according to their interests. And in Hesiod witnesses are presented as potentially crooked and mendacious. Hence, far from being idealistically viewed by litigants as stalwart, independent expounders of the truth, in these passages witnesses and their testimonies appear to be cynically perceived as participants (or at times as mischievous accomplices) in the litigants' strategy to present a most convincing case and win in court.

Oaths

The third aspect of judicial procedure that will be discussed in connection with the Homeric *Hymn to Hermes* is the use of judicial oaths³⁴. As with the function of witnesses, the *Hymn to Hermes* provides numerous insights regarding the nature of legal oaths, insights that illuminate what is only alluded to or described cursorily in other archaic sources.

In the course of the Hermes v. Apollo dispute there are two oaths that are volunteered by Hermes but are not actually sworn. Nevertheless, they are both important in the sense that they illustrate what a litigant might have thought as appropriate and acceptable with regard to oath-taking in a legal context. The first of these potential oaths comes when, following the discovery of the cattle theft, Apollo confronts Hermes. The latter claims innocence and offers to swear an oath (273-77) :

χθὲς γενόμεν, ἀπαλοὶ δὲ πόδες, τρηχεῖα δ' ὑπὸ χθῶν.
εἰ δὲ θέλεις πατρὸς κεφαλὴν μέγαν ὄρκον ὁμοῦμαι·
275 μὴ μὲν ἐγὼ μήτ' αὐτὸς ὑπίσχομαι αἴτιος εἶναι,
μήτε τιν' ἄλλον ὅπῃ βῶν κλοπὴν ὑμετέρων,
αἴ τινες αἰ βόες εἰσί· τὸ δὲ κλέος οἶον ἀκούω.

³⁴ *I.e.* oaths that were sworn or offered to be sworn in a legal context. This of course excludes oaths that were sworn for other purposes, i.e. the promissory oath that Hermes swears (513ff.) in order to consolidate his friendship with Apollo after the dispute has been successfully settled.

« I was born yesterday and my feet are soft and the ground beneath is
 « rough ;
 « nevertheless if you will have it so, I will swear a great oath by my
 « father's head
 « [275] and vow that neither am I guilty myself,
 « neither have I seen any other who stole your cows
 « whatever cows may be ; for I know them only by hearsay. »

The second attempt to swear an oath comes after the dispute has reached the stage of arbitration by Zeus. In his rebuttal to Apollo's speech Hermes, addressing Zeus, pleads his innocence and volunteers to swear an oath of denial (378-86) :

παίθεο, καὶ γὰρ ἐμεῖο πατήρ φίλος εὐχεται εἶναι,
 ὥς οὐκ οἴκαδ' ἔλασσα βόας, ὡς ὄλβιος εἶην,
 380 οὐδ' ὑπὲρ οὐδὸν ἔβην· τὸ δέ τ' ἀτρεκέως ἀγορεύω.
 Ἥελιον δὲ μάλ' αἰδέομαι καὶ δαίμονας ἄλλους,
 καὶ σὲ φιλῶ καὶ τοῦτον ὀπίζομαι· οἶσθα καὶ αὐτὸς
 ὥς οὐκ αἰτίος εἰμι· μέγαν δ' ἐπιδαίομαι ὄρκον·
 οὐ μὰ τὰδ' ἀθανάτων εὐκόσμητα προθύραια.
 385 καὶ ποτ' ἐγὼ τούτῳ τίσω ποτὶ νηλέα φωρὴν
 καὶ κρατερῶ περ ἔόντι· σὺ δ' ὀπλοτέροισιν ἄρηγε³⁵.
 « Believe my tale, for you claim to be my father,
 « that I did not drive his cows to my house, so I may prosper,

³⁵ There are some textual problems associated with verses 378-86. I follow the traditional reading by ALLEN, *op. cit.*, n.14 against a recent reconstruction by M.L. WEST, *Homeric Hymns, Homeric Apocrypha, Lives of Homer*, Loeb Classical Library 496, Cambridge, Massachusetts and London, 2003. West prints ll. 383-6 as follows: ὥς οὐκ αἰτίος εἰμι· μέγαν δ' ἐπιδάσομαι ὄρκον· / οὐ μὰ τὰδ' ἀθανάτων εὐκόσμητα προθύραια / μὴ ποτ' ἐγὼ τούτῳ τίσω ποτὶ νηλέα φωρὴν / καὶ κρατερῶ περ ἔόντι· σὺ δ' ὀπλοτέροισιν ἄρηγε. With these emendations, West makes the crux of Hermes' oath in verse 383 not his self-proclaimed innocence but rather his refusal in 385-6 to compensate Apollo in the future for the theft, even though Apollo is stronger. If West's reading is accepted, then verses 384-6 would constitute a promissory oath and Hermes would therefore not be risking committing perjury on the facts of the case (on this point, see further below). However, Allen's reading is overall preferable because it is much closer to the manuscript tradition (especially the *consensus codicum* on καὶ at the beginning of l. 385), compared to West's rather bold emendations. L. RADERMACHER, *Der homerische Hermeshymnus*, Wien and Leipzig, 1931, prints ll. 383-6 s.: ὥς οὐκ αἰτίος εἰμι· μέγαν δ' ἐπιδάσομαι ὄρκον· οὐ μὰ τὰδ' ἀθανάτων εὐκόσμητα προθύραια. καὶ ποτ' ἐγὼ τούτῳ τίσω ποτὶ νηλέα φωρὴν καὶ κρατερῶ περ ἔόντι· σὺ δ' ὀπλοτέροισιν ἄρηγε, a reconstruction that is in keeping with the interpretation advanced here.

« [380] nor crossed the threshold ; this I say truthfully.
 « I respect Helios greatly and the other gods,
 « and I love you and him I dread. You yourself know that
 « I am not guilty : and I will swear a great oath upon it
 « No! by these rich-decked porticoes of the gods.
 « [385] And some day I will punish him for that ruthless inquisition,
 « strong though he is ; but now do you support the younger. »

There are a number of issues related to these oaths that Hermes proposes to swear, that merit further discussion. First, the format of oath-taking in both instances follows the pattern of oath-challenge³⁶ as is documented in other literary and epigraphical sources. According to these sources, one of the litigants in a dispute could exculpate himself by swearing an oath of innocence or an oath of denial as Hermes offers to do. As the *Hymn to Hermes* suggests, this process could take place either while the litigants were exploring the possibilities of an out-of-court settlement or after the dispute had reached the stage of formal arbitration. Moreover, in other instances of arbitration in archaic Greece where an oath-challenge is used or at least offered, it is usually the self-perceived injured party that brings forward the oath-challenge to the opponent. An example of this practice is the dispute between Antilochus and Menelaus discussed above (*Il.* 18.581ff.) in which Menelaus, who feels cheated by Antilochus, imposes on the latter the oath-challenge. On the contrary, in the *Hymn to Hermes* the guilty party himself twice volunteers exculpatory oath-challenges, thus risking perjuring himself (on this point, see further below). On both occasions Hermes' oath-challenges are ignored by Apollo and Zeus, so there is no way of knowing whether Hermes really meant to swear these false oaths or whether he was offering them simply for rhetorical effect. Be that as it may, the *Hymn to Hermes* corroborates *Il.* 23.566-85 (Menelaus v. Antilochus dispute) in portraying oath-challenges as versatile legal tools and buttresses the arguments of scholars like Gagarin who has maintained that the oath-

³⁶ For a discussion of the evidence for oath-challenges in parts of archaic and classical Greece see M. GAGARIN, *Oaths and Oath-Challenges in Greek Law*, in G. THÜR and J. VELISSAROPOULOS-KARAKOSTAS (ed.), *Symposion 1995. Vorträge zur griechischen und hellenistischen Rechtsgeschichte (Korfou, 1.-5. September 1995)* (Köln-Weimar-Wien, 1997), p. 125-134 ; D. MIRHADY, *The Oath-Challenge in Athens*, *CQ* 41 (1991), p. 78-83.

challenge was a readily available (although not necessarily always the first choice) forensic strategy in settling disputes³⁷.

However, some problems remain. An aspect that has baffled commentators of the *Hymn to Hermes* is the apparent mendacity of Hermes' oaths³⁸. As a result, scholars who have commented on the relevant passages of the hymn have dissected the wording of the oaths that Hermes volunteers to swear in order to devise some feasible explanations. Such explanations, however, only scarcely take into consideration the wider legal context. For example, Callaway³⁹ and Thür⁴⁰ correctly point out that the oaths Hermes proposes were in fact never sworn⁴¹. In the first instance, Apollo ignores Hermes' oath offer and instead he snatches baby Hermes and goes in search of his cattle. During the arbitration proceedings in front of the gods, Hermes' oath-challenge is also ignored, presumably because Zeus already knows that the new-born god is the guilty party. Furthermore, scholars are eager to point out that even if it had been sworn, the oath-challenge that Hermes imposed upon himself in front of Zeus, would not have constituted perjury since Hermes did not hid the cattle in his house but in a cave near the river Alpheius⁴². But this is not the most obvious way to read these passages. First, regarding the oath of innocence that Hermes offers to Apollo in 273-77. Hermes makes three statements that he purports to confirm by swearing an oath: first, that he is not guilty of the theft with which Apollo accuses him (275 μή μὲν ἐγὼ... αἴτιος εἶναι); secondly, that he has not seen anyone else stealing the

³⁷ GAGARIN, *op. cit.*, previous note.

³⁸ Besides the issue of the oaths' mendacity, scholars have in general been perplexed by other aspects of the oaths in the Homeric *Hymn to Hermes*. See e.g. Radermacher's comments on Hermes' second oath, *op. cit.*, n.35, 141, where it is pointed out that "Der Schwur, den H. an die Beteuerung seiner Unschuld anhängt (383), wird schlauerweise überhaupt nicht formuliert und hat keinen Inhalt (384)".

³⁹ C. CALLAWAY, *Perjury and the Unsworn Oath*, TAPA 123 (1993), p. 22-4.

⁴⁰ THÜR, *Oaths and Dispute Settlement*, *op. cit.*, n.20, 60.

⁴¹ Contrary to what E.L. WHEELER, *Sophistic Interpretations and Greek Treaties*, GRBS 25 (1984), p. 260-1 and GAGARIN, *op. cit.*, n.3, p. 40 claimed. However, in a later article GAGARIN (*op. cit.*, n.36, p. 133, n.32) correctly points out that even if not sworn, the effect of a volunteered oath is essentially the same: 'the offer of an oath becomes equivalent to the swearing of the oath'.

⁴² THÜR, *Oaths and Dispute Settlement*, *op. cit.*, n.20, 69; see also CLAY, *op. cit.*, n.3, 134, where the emphasis is not on the hiding place of the stolen cattle but rather on the fact that Hermes has never crossed the threshold of his home in their company (l. 379).

cows (276, μήτε τιν' ἄλλον ὄπωπα βοῶν κλοπὸν ὑμετεράων); and thirdly, that he does not even know what cows are (277 αἴ τινες αἰ βόες εἰσί· τὸ δὲ κλέος οἶον ἀκούω). Technically, the second statement could be construed as accurate: Hermes has not seen anyone else stealing the cows because he is the guilty party himself. But statements one and three are clearly lies and if Apollo had accepted Hermes' oath and the latter had sworn it in the exact same words, then he would have undoubtedly committed perjury.

A comparable situation occurs with regard to the oath that Hermes offers to swear at the tribunal of Zeus (378-86). Once again, Hermes makes three assertions: that he did not drive the cattle to his house (379 οὐκ οἴκαδ' ἔλασσα βόας); that he did not cross the threshold in their company (380 οὐδ' ὑπὲρ οὐδὸν ἔβην); and finally that he is not guilty of the crime with which he stands accused (383 οὐκ αἴτιός εἰμι). There is no doubt that the first two statements are factually accurate, even though misleading. In conjunction with Hermes' assertion in l. 276 discussed above, in which he denies any direct knowledge of the theft by a third party, ll. 379-80 must be recognized as an attempt to swear what Greeks of later periods called a "sophistic oath", *i.e.* an oath that "involved neither perjury, *i.e.* swearing something false, nor breaking an oath, but rather an overly literal interpretation of the wording of the oath or agreement, or playing on some ambiguity of meaning to produce an interpretation contrary to that intended and obvious, whereby the sophistic interpreter can, in any event still claim fidelity to what was actually sworn"⁴³. But similar to the oath offered to Apollo, the not-guilty plea in verse 383 is certainly mendacious. In other words, if sworn this oath (ll. 378-86)

⁴³ See WHEELER, *op. cit.*, n.41, p. 254. Wheeler collects evidence, primarily post-archaic, which show attempts to swear such sophistic oaths or contain oath anti-deceit clauses (*e.g.* in interstate treaties). An example of a sophistic interpretation of an oath is given in Hdt. 4.154. Etearchos, king of Axos in Crete, had been persuaded by his second wife to devise ill against his daughter from his first marriage. After befriending a merchant called Themison, Etearchos made him swear that he would perform any service that he (*i.e.* Etearchos) desired. As soon as the oath was sworn, Etearchos delivered to Themison his daughter and asked him to take her away and throw her into the sea. Themison was upset for being deceived in the matter of the oath (τῆ ἀπάτη τοῦ ὄρκου); he took the girl and sailed away, and when they were in the open sea, in order to absolve himself of the oath he had sworn to Etearchos, he bound her with ropes, let her into the sea and then drew her up again.

as well, similar to the one volunteered in ll. 273-77, would have constituted perjury.

Modern commentators' perplexity in recognizing the two oath-challenges of Hermes for what they really are, *i.e.* attempts to acquit himself through perjury, derives from an embedded incredulity that an oath could have been willingly falsely sworn. After all, how could Hermes be so foolish as to unscrupulously and blatantly commit perjury? I suggest that Hermes' willingness to extricate himself from crime by swearing false oaths is not so incredible if viewed in the context of other archaic evidence regarding oath-taking and the breach of oaths in legal contexts. Archaic sources suggest that litigants often resorted to perjury and other unorthodox methods (e.g. curses) to achieve success in court⁴⁴. We have already encountered Hesiod's admonitions against the dangers of committing perjury in court (*Op.* 282-4)⁴⁵. A little later in date is a lyric fragment, attributed by scholars either to Archilochus (79aD) or Hipponax (115W), consisting of a prayer against an enemy who broke his oath (ὄς μ' ἠδίκησε, λάξ δ' ἐφ' ὀρκίοις ἔβη, τὸ πρὶν ἐταίρος ἐών)⁴⁶. In the sixth century Theognis castigated the manipulation and ultimately control of the judicial system of his community by the *kakoi* through, among others, the use of false oaths (ὄρκῳ πὰρ τὸ δίκαιον 200 ; ὀλεσθήνορας ὄρκους 399 ; ὄρκοι δ' οὐκέτι... δίκαιοι 1139 ; cf. also 745, ὄρκον ἀλιτρόν)⁴⁷.

Epigraphic evidence confirms the impression that abuse of oaths was a major preoccupation for lawmaking and judicial authorities in

⁴⁴ For oaths and perjury in ancient Greece in general see R.J. BONNER and G. SMITH, *The Administration of Justice from Homer to Aristotle*, vol. II, Chicago, 1938, p. 145-191 ; J. PLESCIA, *The Oath and Perjury in Ancient Greece*, Tallahassee, 1970.

⁴⁵ See also more generally *Theog.* 231-2 : ὄρκον θ', ὃς δὴ πλείστον ἐπιχθονίου ἀνθρώπου πημαίνει, ὅτε κέν τις ἐκὼν ἐπίορκον ὀμόσση. ('Oath, who brings most grief to men on earth, when anyone knowingly swears falsely') and *Op.* 189-94 where, in the process of bemoaning the conditions of life during the present age of iron, Hesiod predicts that in the future 'there will be no appreciation for a man who keeps his oath (εὐόρκου) nor of a just man nor of a good man, but they will rather praise the evildoer and violence. Justice will be by force and there will be no reverence and the wicked will hurt the better man by speaking with crooked words, and he will swear a false oath (μύθοισιν σκολοῖς ἐνέπων, ἐπὶ δ' ὄρκον ὀμεῖται)'.

⁴⁶ The use of the verb ἠδίκησε suggests that the perjury in question might have occurred in a legal context.

⁴⁷ For law and justice in the poetry of Theognis see now Z. PAPAKONSTANTINOU, *Justice of the kakoi : Law and Social Crisis in Theognis, Dike 7* (2004), p. 5-17.

many communities across archaic and early classical Greece⁴⁸. For instance, a law from Gortyn (*IC IV*, 81 = *Nomima II*, 47 = *IGT* 155, mid-fifth century ; almost verbatim replicated in *IC IV*, 75A), which deals with various facets of mortgaged property ownership and/or seizure suggests that, in connection with judicial oaths sworn by witnesses often a majority principle was in operation, *i.e.* that the side that ensured the biggest number of oaths by supporting witnesses won the trial (15-6 : νικῆν δ' ὄτερὰ κ' οἱ π[λίεζ ὀ]μύσαντι). According to a recent interpretation by van Effenterre and Ruzé, *Nomima II*, p. 172, this regulation essentially amounts to an attempt on the part of the judicial authorities of Gortyn to combat perjury by avoiding having contradictory oaths sworn : requesting all witnesses to affirm or deny by oath the same aspect of the case would have essentially amounted to a tacit admission by the judicial authorities that some witnesses were committing perjury. Instead, when the appropriate stage of the procedure was reached, court officials counted the witnesses who were willing to swear in support of each litigant. The majority were

⁴⁸ In addition to *IC IV*, 81/ *IC IV*, 75A discussed below, one should note that the designation of a litigant or witness in laws from Gortyn as ὀρκιότερον - “prevalent by oath” (*e.g.* *IC IV*, 41, II, 12-4 = *Nomima II*, 65 = *IGT* 127, early fifth century ; *IC IV*, 45, B, 3-4 = *Nomima II*, 69 = *IGT* 135, c. early fifth century ; *IC IV*, 72, II, 15-6 = *Nomima II*, 81 = *IGT* 164, mid-fifth century ; *IC IV*, 72, III, 49-52 = *Nomima II*, 34 ; *IC IV*, 72, IV, 6-8 = *Nomima II*, 35), *i.e.* able to decide the case on his/their oath (and not based on the oath of an opposing litigant or a witness of the opposition) also seems to depend, at least in part, on the assessment by the authorities of which of the litigants and his witnesses were less likely to commit perjury. Moreover, clauses in written laws that describe in detail oath-taking procedures as well as stipulate severe punishments or impose curses against those who violate their oaths (*e.g.* *IC IV*, 28 (= *Nomima II*, 12), Gortyn early sixth century ; *IC IV*, 51 (= *Nomima II*, 13 = *IGT* 139), Gortyn, late sixth-early fifth century ; *IC IV*, 47, 23-4 (= *Nomima II*, 26 = *IGT* 138, Gortyn early fifth century ; possibly *IvO* 16 = *Nomima I*, 56 = *IGT* 44, Elis, early/mid fifth-century), are clearly motivated, at least partially, by the concern that many litigants or witnesses could potentially abuse their oaths. Finally, provisions against the breach or other abuse of oaths also appear in treaties between two independent *poleis*. Such treaties were legally binding and had implications for the legal status of the citizens of the communities involved. See *IvO* 10 (= *Nomima I*, 51) from Elis, found in Olympia and dating from the early fifth century, which is a peace and friendship agreement between the Anaitians and Metapians (possibly the inhabitants of small communities in the area around Olympia). The treaty in question includes a final clause stipulating that if one of the contracting parties violates the terms of the treaty sealed by oath, then the *hiaromaioi* (priests in Olympia) shall judge the matter : αἱ τὸ[ν] ὄρκον παραβάνοιαν, γνόμων τὸρ ἰ[α]ρῶμαορ τ' Ὀλυμπία.

summoned to swear the oath and that automatically settled the case, while on this occasion the minority did not have to take an oath.

Finally, the problem of perjury in court appears to have attracted the attention of at least two of the archaic lawgivers. According to a gloss in a late lexicographer, (Bekker A.G. I, 242.19 (*Lex. Rhet.*) δοξασταί (Antiph. 5.94 = Ruschenbusch 1966, F 42), Solon, and by extension the judicial authorities in early sixth century Athens, recognized the threat of perjury and attempted to combat it. According to this late source δοξασταί: κριταί εἰσι οἱ διαγιγνώσκοντες, πότερος εὐορκεῖ τῶν κρινομένων· κελεύει γὰρ Σόλων τὸν ἐγκαλούμενον, ἐπειδὴν μήτε συμβόλαια ἔχη μήτε μάρτυρας, ὁμνῦναι καὶ τὸν εὐθύναντα δὲ ὁμοίως ('*doxastai*: they are judges who determine which of the litigants swears correctly. For Solon asked the accused to swear an oath when he did not have contracts or witnesses, and similarly the accuser'). Besides an almost certainly anachronistic reference to contracts, the substance of this procedural rule is largely accepted as genuinely Solonian by many scholars⁴⁹. There are several issues of interpretation associated with this passage (e.g. during what stage of the proceedings were the oaths sworn) but these lie largely outside the scope of the present discussion. For our purposes, it will suffice to emphasize the reference to εὐορκία which strongly suggests that, if the gloss really reflects Solonian conditions, the procedure supervised by the *doxastai* aimed at eradicating the practice of perjury by litigants.

The second archaic lawgiver who appears to have legislated against perjury is Charondas of Catana (very possibly active during the sixth century). According to Ar. *Pol.* 1274b 5-7, Charondas was purportedly the author of a law against false testimony (αἱ δίκαι τῶν ψευδομαρτυριῶν (πρῶτος γὰρ ἐποίησε τὴν ἐπίσκηψιν); but since, as some of the evidence discussed above suggests⁵⁰, providing testimony

⁴⁹ E.g. E. RUSCHENBUSCH, ΣΟΛΩΝΟΣ ΝΟΜΟΙ. *Die Fragmente des Solonischen Gesetzeswerkes mit einer Text- und Überlieferungsgeschichte*, Historia Einzelschriften 9, Wiesbaden, 1966, p. 85; A.R.W. HARRISON, *The Law of Athens II, Procedure*, Oxford, 1971, p. 99, n.2; M. GAGARIN, *op. cit.* n.36, 127-8 and IDEM, *Legal Procedure in Solonian Laws*, in J. BLOK and A. LARDINOIS (ed.), *Solon of Athens: New Historical and Philological Approaches*, Leiden 2006, p. 268-9.

⁵⁰ Further evidence regarding the use of oaths to seal witnesses' testimonies, as well as to decide cases in the courts of justice of some archaic and early communities can

under oath appears to have been a widespread practice in the courts of justice of many communities of archaic Greece from which evidence survives, it can be reasonably argued, in agreement with other scholars⁵¹, that the law of Charondas also partially aimed at curbing perjury and the abuse of oaths.

It would be of course absurd to claim, on the basis of the evidence surveyed above, uniformity across archaic Greece regarding the use and abuse of oaths or any other aspect of the legal system. Nevertheless, the evidence at the very least suggests that despite the religious reservations as well as the threat of punishments and other deterrents imposed by civic authorities, some litigants and witnesses did abuse their oaths in court and that perjury was a reality in the courts and public life of many communities of archaic and early classical Greece. In consequence, there is no good reason, at least on evidentiary grounds, to doubt that through the oaths he volunteers in ll. 273-77 and 378-86, Hermes attempts to exculpate himself by committing perjury⁵². He does so not because he has taken leave of his senses or because he is unaware of the implications of his actions. Rather, it seems more likely that the poet of the *Hymn to Hermes* describes in ll. 273-77 and 378-86 what was quite possibly a common occurrence, *i.e.* the attempt by a litigant to abuse and manipulate oath-taking in order to gain an advantage in court. To be sure, in real contexts of adjudication the particular conditions of each case undoubtedly dictated, to a certain extent at least, the forensic strategies adopted by the litigants⁵³. Yet to the extent that some of the litigants contemplated and/or committed perjury, the Homeric *Hymn to Hermes* provides glimpses of potentially how such manipulation of oaths could have been carried out during litigation proceedings and in

be adduced. I discuss all this material in a forthcoming monograph entitled *Lawmaking and Adjudication in Archaic Greece*, chapter V.

⁵¹ See J.M. HALL, *A History of the Archaic Greek World, ca. 1200-479 BCE*, Malden, MA 2006, p. 131 who translates the Aristotelian passage in question as “suits against those who perjure themselves”.

⁵² Trickery and perjury were after all characteristic attributes of Hermes. See Hom. *Od.* 19.395-7, n.15 above.

⁵³ This was mostly due to the fact that, as far as we know, there was no system of legal representation in any of the archaic Greek communities for which evidence survives. As a result, litigants were in all probability almost entirely responsible for formulating their legal strategies, including initiating proceedings, mobilizing their witnesses and support networks, and presenting their case in court.

that sense, complements the scarce literary and epigraphical evidence regarding such practices.

Conclusion

Despite its overtly religious tone, the Homeric *Hymn to Hermes* provides valuable clues for various aspects of judicial procedures. Arbitration was one of many avenues that the litigants could pursue in their attempt to settle their dispute. This assertion is corroborated by other archaic sources (primarily Homer and Hesiod) but the *Hymn to Hermes* reveals a great deal about the dynamics of the negotiations, which often involved unequal relations of power, that were carried out until the dispute reached a stage of adjudication by an arbiter. Furthermore, the *Hymn to Hermes* elucidates other crucial aspects of legal procedure such as the perception and role of witnesses and legal oaths. Literary and epigraphic evidence (the latter mainly from Gortyn) suggests that at times witnesses were expected to do more than just testify to the facts of a case. In many instances, witnesses were promoting the plea of one litigant and their presence or absence in court, as the *Hymn to Hermes* suggests, could have been duly exploited by the opponent as part of a forensic strategy that aimed at achieving a most favourable verdict. In a similar fashion, the *Hymn to Hermes* suggests – and again, other literary and epigraphic evidence does not seem to contradict that picture – that oaths and oath-challenges could be freely volunteered and sworn as it suited the personal interests of the litigants, often without much concern about the prospect of committing perjury. Such an interpretation of the legal oaths in the *Hymn to Hermes* within their proper judicial context also helps explain a conundrum regarding the language of the relevant passages (ll. 273-77 ; 378-86) that has puzzled literary critics for many years.