

## From the *Odyssey* Onwards: Law's Long and Winding Road

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### Abstract

This article seeks to introduce the *Odyssey* into the law and literature canon by delineating a continuum leading toward the generative legal narrative presented in the *Oresteia*, along the course of which the *Odyssey* is a significant milestone. As will be elaborated, the *Odyssey* presents a potent contemplation of reckoning, retribution, justice and public order. In the *Oresteia*, due to the convergence of poetic, performative, and sociopolitical factors, this contemplation evolves into a generative legal narrative. Both of these great works are meaningful stations on law's long and winding road.

The *Odyssey* is the story of motion, purposeful and purposeless, successful and futile. What else is the history of law? (Bernard Schlink, *The Reader*<sup>1</sup>)

Tragedy is born when myth starts to be considered from a point of view of a citizen. (Jean-Pierre Vernant, *Myth and Tragedy*<sup>2</sup>)

### Introduction

The *Odyssey*<sup>3</sup> is a celebrated epic poem attributed to Homer, written circa 750–700 BC.<sup>4</sup> It recounts the adventures of Odysseus, King of Ithaca, on his way back from Troy to his homeland, where he had to wrest back his kingship.

The *Oresteia*, which some see as the greatest achievement of Greek drama,<sup>5</sup> is a trilogy written and staged by Aeschylus in 458 BC consisting of the plays *Agamemnon*, *The Libation Bearers*, and *The Eumenides*.<sup>6</sup> It tells the events that initiated the establishing of the first court in the ancient world, a court that acquitted Orestes, who killed his mother.

Even today, thousands of years after it was written, the *Oresteia* retains its seminal standing as a generative legal narrative. Generative narratives are such that appear in the background to the law, describing the transition from a lawless existence towards the rule of law.<sup>7</sup> The *Odyssey*, on the other hand, is not usually perceived as having much to do with the establishment of law, and is markedly understated within the law and literature discourse.

This article seeks to introduce the *Odyssey* into the law and literature canon by delineating a continuum that led toward the generative legal narrative presented in the *Oresteia*, along the course of which the *Odyssey* is a significant milestone.

As Ostwald describes, among the few testimonies providing hints as to the nature of the many links in the complex chain of continuity that shapes the law, alongside the archaeological and epigraphic sources, the literary sources hold a central value.<sup>8</sup> Indeed, alongside the legal channel flows the literary stream, each enriching the other, influencing and being influenced. According to the reading proposed here, the *Odyssey* represents a significant station on the road towards the rule of law.

The paper proceeds as follows. In Part One I will briefly outline the conjectured timeline relevant to the *Odyssey* and the *Oresteia* and the events featured in them. I will then deal in greater detail with what I refer to as the crisis of revenge at the heart of both works. In the next two parts I will highlight notions of revenge, accountability, and trial present already in early myth, and then, against the background of Mikhail Bakhtin's perception of great time, I will propose a reading the *Odyssey* and the *Oresteia* as a continuum leading towards a generative legal narrative, and delineate the presence of the concept of social life regulated by binding rules in the *Odyssey*. Next, I will focus on elements that cumulatively enabled the full emergence of a generative legal narrative in the *Oresteia*. Lastly, before concluding, I will cast light on Athena, who plays an essential role in both works – judicial, quasi-judicial and mediatory – and whose image epitomizes the complexity of law, as a vital yet flawed mechanism.

## **1. Revenge, Accountability and Judgment in the Myth**

The *Oresteia* and the *Odyssey* relate myths of the Mycenaean period, an era of Greek history circa 1600 BC to 1200 BC.<sup>9</sup> One of the major events during the Mycenaean period, as also in Greek mythology generally, was the Trojan War.

The *Iliad* and the *Odyssey* that are attributed to the blind bard Homer were created several centuries later, apparently circa 750 BC. Homer recounts events that took place, so his audience apparently believed, 400 years before their time.<sup>10</sup>

The *Oresteia* was written by Aeschylus in 458 BC.<sup>11</sup> A few years earlier, apparently in 462 BC, the Athenian leader Ephialtes instituted a reform concerning the authority of the Areopagite Council, which served as the judicial body of the Athenian polis. Due to concerns regarding the Council's forceful standing, its powers were curtailed, among other things its judicial authority being restricted only to cases of premeditated homicide.<sup>12</sup>

Nonetheless, a practice of judicial character was represented in Greek epic relating the myth of the Trojan War, hundreds of years before Epheialtes' reform and the staging of the *Oresteia*. In the *Iliad*, Book xviii, the sea nymph Thetis asks Hephaestus to create a shield for her son Achilles. Hephaestus forges the shield. As Homer tells us, the entirety of human life is engraved on it. One scene features a judicial procedure: a judge delivering a verdict in a dispute between two people that have quarreled in the matter of someone having been murdered.<sup>13</sup>

This description of the scene plays no direct role in advancing the narrative of the *Iliad*. Its purpose is to glorify the wonders of the shield, but what emerges from it is that already in the Heroic Age some kind of judicial procedure existed. It is described in the *Iliad* as arousing public interest and drawing a large audience, and as being conducted in accordance with a distinctive formal poetics.<sup>14</sup>

The resolution of a murder case by combined means of payoff and some kind of a judicial proceeding is thus represented in the myth and depicted in the *Iliad*. Against this background, the question arises why there is no mention of the possibility of judicial resolution in the *Odyssey*, and it appears only many generations later in the *Oresteia*, as a revolutionary innovation instituted by Athena. This question sharpens in light of the similarities between the conflicts at the heart of each of the two stories. Both the *Odyssey* and the *Oresteia* describe a situation that can be termed a crisis of revenge.

Let's begin with the *Odyssey*. After killing all the suitors and maidservants, Odysseus visits his father Laertes and updates him on the recent events. Laertes, who is all too familiar with the dynamics of a blood feud, tells his son:

But now I am terribly afraid in my heart that speedily the men of Ithaca may come against us here, and send out messages everywhere to the Kephallenian cities.<sup>15</sup>

Laertes' foreboding materializes. The families of the slain suitors gather around Odysseus' palace with the intention of avenging the deaths of their loved ones. Eupheithes, whose son Antinous was the first to fall at Odysseus' sword, cites the duty of revenge:

... all this shall be a disgrace, even for the men hereafter to hear of, if we do not take revenge on the murderers of our brothers.<sup>16</sup>

The crowd ignores the voices warning of the destructive consequences of revenge, and prepares to attack. The crisis of revenge reaches its peak.

Just as in the *Odyssey* the relatives of the murdered suitors are compelled to take revenge, in the *Oresteia* it is the Erinyes – the Furies – that are committed to take revenge on Orestes who murdered his mother. When they are deprived of the ability to do so, they threaten to escalate the conflict:

... in requital for my grief from my heart I shall discharge a distillation for the land intolerable; and after that a canker, blasting leaves and children.<sup>17</sup>

In both works the crisis of revenge poses a threat to the entire public. Both Homer and Aeschylus describe Athena as the one who will provide an answer, but each chooses a different mode of action for her.<sup>18</sup>

In both cases the crisis of revenge is resolved. The *Odyssey* ends as follows: "So spoke Athena ... And pledges for the days to come, sworn to by both sides."<sup>19</sup> The last lines of the *Oresteia* are: "Raise a glad cry, echoing our song! There shall be peace forever ... for the citizens of Pallas."<sup>20</sup> The similarity between the crises of revenge, both of which end in peaceful and conciliatory accords, underscores the way in which each was resolved. In the *Oresteia* the hero murders his mother and her lover and stands trial for his actions. In the *Odyssey* the hero murders his wife's suitors and the maidservants, is reunited with his family, and does not stand trial for his actions.

Hundreds of years after law won a certain place and presence in Greek society and even artistic representation in the *Iliad*, in the *Odyssey* Homer chooses a lawless conclusion to the crisis of revenge. And hundreds of years after that, in the *Oresteia* Aeschylus tells about events that happened historically prior to those described in the *Odyssey*, and chooses to present a generative legal narrative at the climax of the story as a resolution to the crisis of revenge.

## 2. Reflections of Law in the *Odyssey*

Mikhail Bakhtin describes a continuous temporal flow that places alongside the past and the future of a literary work:

A work of literature ... is revealed primarily in the differentiated unity of culture of the epoch in which it is created, but it cannot be closed off in this epoch: its fullness is revealed only in great time.<sup>21</sup>

Following Bakhtin's notion of the great time, I will delineate a continuum between the *Odyssey* and the *Oresteia*, associating them both to the idea of law and the rule of law.

Homeric society, of course, precluded the era of the polis. Within it, however, a system of conflict resolution did already exist. The *Odyssey* and the *Iliad*, both of them products of a tradition that orally related mythos, describe the social life and moral values of early Greek society as containing social rules and norms. Among other things, this system regulated the urge to take revenge. Any infraction of those rules was referred to a Council of Elders, which functioned as a sort of jury.<sup>22</sup>

As the myth reveals, the wish to avoid social disgrace serves as a central instrument in guiding social behavior. Anyone whose honor has been tainted has the duty to take revenge in order to avoid social disgrace.<sup>23</sup> Nonetheless, already at the mythic time the norm of revenge becomes institutionalized; the avengers act under the aegis of social authorization.<sup>24</sup> This implied social regulation included also the option of a “blood price” – an agreed arrangement between the injurer and the injured party, according to which the injurer pays fiscal compensation to the injured party in return for the latter’s renunciation of his right to revenge. In such a case, no social disgrace or loss of face were attributed to the failure to take revenge.<sup>25</sup>

The judicial-like scene engraved upon the Shield of Achilles is of central importance in this context. As mentioned, it has evoked wide-ranging polemics. There are various, sometimes contradictory interpretations of almost each and every one of its lines.<sup>26</sup> One of the approaches sees the shield’s scene as representing the juridification of revenge. According to this view, the scene is a depiction of the “blood price” arrangement gone awry, requiring a public resolution of the disputants’ claims.<sup>27</sup> However, even if the exact details of the dispute remain vague, the fact that Homer chose to describe the scene serves to mark it as a representation of “a crucial moment in legal history: the moment of transition when a system of revenge gives way to a system of criminal law.”<sup>28</sup>

Despite the interpretative differences of opinion surrounding it, some issues seem evident: the disputants submit their conflict to external resolution; they voice their claims in a public forum, in accordance with a known, formal and public procedure.<sup>29</sup> Gagarin, who has extensively analyzed quasi-judicial situations in the Greek literature prior to the *Oresteia*, notes that the later judicial scene that appears in the *Oresteia* also begins, similarly to the scene described upon the Shield of Achilles, with two sides that bring the conflict before an authoritative body (the goddess Athena), who then decides to establish a court. The formalistic characteristics of the trial that is subsequently conducted are given greater emphasis than in earlier judicial scenes, but in essence the innovation that is presented by means of the judicial procedure in the *Oresteia* is not that revolutionary.<sup>30</sup>

Returning to the *Odyssey*, it is interesting to note how replete it is with references to the duty of the injured party to take revenge on the injurer in order to preserve honor. The climax of the crisis of revenge in the *Odyssey* is the decision by the slain suitors’ relatives to avenge their deaths in order to avoid disgrace. We see, then, that a norm regulating revenge, not as an uncontrollable personal impulse but as part of an existing social order known to all – which, in light of what we know from the scene upon the shield in the *Iliad*, makes it possible to contain revenge with no further bloodshed and if necessary with the exercise of judicial authority – is represented in the *Odyssey*.

This is the point of Luban's view, which holds that whereas the *Oresteia* is the birth-site of judicial instrumentalism, Homer's work (alongside that of Hesiod) marks, for the first time in Western civilization, a preoccupation with the role of legal justice in establishing the social order.<sup>31</sup> Finley, too, emphasizes the uniqueness of the *Odyssey* in this context. Whereas in the *Iliad* personal motivations reign supreme, in the *Odyssey* the personal element is complemented by "the demands of justice ... even if only partially and crudely."<sup>32</sup>

Indeed, the *Odyssey* resonates various levels of sympathy for the notion of social life regulated by binding rules. Such resonance appears already in its opening lines:

Tell me, Muse, of the man of many ways, who was driven far journeys, after he had sacked Troy's sacred citadel. Many were they whose cities he saw, whose minds he learned of, many the pains he suffered in his spirit on the wide sea, struggling for his own life and the homecoming of his companions. Even so he could not save his companions, hard though he strove to; they were destroyed by their own wild recklessness, fools, who devoured the oxen of Helios, the Sun God, and he took away the day of their homecoming.<sup>33</sup>

The story of the oxen appears in Book xii, *Sirens, Scylla & Helios*. Odysseus and his men arrive at the island where the oxen of Helios, the sun god, are grazing. Odysseus informs his men of the norm prohibiting any harm to the oxen, and demands that they pledge an oath not to violate it, but in his absence, their hunger drives them to slaughter some of the oxen. Helios demands vengeance of Zeus, and gets it. All of those who violated the norm are drowned. Only Odysseus, who abided by the norm, escapes alive.

The choice to set this relatively marginal episode at the very beginning points at its centrality. The episode highlights a leitmotif of just retribution, which extends throughout the work.

Immediately after the opening lines that manifest the idea of recompense, in Book i, *Athena & Telemachos*, appears a framing that is, in general terms, quasi-legal. The scene, which describes a gathering at Olympus to discuss the matter of Odysseus, is organized in a way that brings to mind a judicial proceeding. Athena takes on a task similar to representing a client. Being aware of the adversarial nature of the deliberations, she uses the absence from the divine jury-like of Poseidon, who is hostile to her "client," to advocate his cause, requesting a decision that will facilitate his return home.

In the debate that follows, the scales indeed rise in favor of Odysseus, mainly due to the sympathetic position of Zeus, who serves as a kind of head of court and acts in accordance with the idea of justice, retribution, and due recompense for faithfulness. "How could I forget Odysseus the godlike, he ... who beyond others has given sacrifice to the gods, who hold heaven?" asks

Zeus, rhetorically, so it seems.<sup>34</sup> However, he also presents the counter-argument: Poseidon's understandable anger at Odysseus for having blinded his son. In the same breath, though, he dismisses Poseidon's position as a kind of minority opinion, which the majority opinion overrides:

But come, let all of us who are here work out his homecoming and see to it that he returns. Poseidon shall put away his anger; for all alone and against the will of the other immortal gods united he can accomplish nothing.<sup>35</sup>

Homer frames this Olympian council as quasi-judicial which leads to an operative ruling. The debate ends with Athena's self-recruitment to the mission of arranging Odysseus' return to Ithaca.

The "right of return" is granted to Odysseus by means of the Olympian council's decision. This decision is given confirmation in Book v, which describes another divine gathering, still without Poseidon. Again the council convenes, and Athena continues to represent Odysseus' interests resolutely and efficiently. Having succeeded at the earlier meeting in obtaining a favorable decision, she turns to advancing its practical implementation. She mentions the danger to Telemachus, whom the suitors are threatening to kill, and the urgency requiring that Odysseus, who is stranded on the nymph Calypso's island, be sent on his way. Zeus instructs her to put the plan of return into effect, and Hermes informs Calypso of the decision: "Now Zeus tells you to send him on his way with speed."<sup>36</sup> Calypso explains her position, which is opposed to that of Athena. She argues that for saving Odysseus from drowning and taking care of him, she has the *right* to hold him. Calypso's position is rejected. Hermes warns her not to protest too forcefully, and she indeed acknowledges her subordination to the authority of the Olympian ruling and sends Odysseus on his way. Angry Poseidon complicates Odysseus' journey, but he too, like Calypso, accepts the verdict of the Olympian court. The *Odyssey* is actually a detailed description of the way in which the quasi-judicial decision, which is presented as being in accord with the principle of justice and was taken by the gods in council, was put into effect.

Further insinuations to law and to the glorification of social life subject to the rule of law and condemnation of those whose existence is lawless are brought in through the depiction of three different societies at which Odysseus arrives in the course of his long journey home: the island of the Cyclopes, the land of the Phaeacians, and Ithaca. Each of them reflects a different social order.

In Book ix, Odysseus tells his Phaeacian hosts the tale of his confrontation with the Cyclopes. The first thing he asked himself upon arriving at their shores, he says, was whether he would meet law-abiding folks or their opposite:

... go and find out about these people, and learn what they are, whether they are savage and violent, and without justice, or hospitable to strangers and with minds that are godly.<sup>37</sup>

The answer comes soon. He and his companions enter the cave of the Cyclopes Polyphemus, in order to exchange gifts as guests, as demanded by a customary norm of the Greek world.<sup>38</sup> The Cyclopes doesn't respect the norm and respond by devouring Odysseus' men. Only by trick does Odysseus succeed in escaping with some of his group, while blinding the Cyclopes with a wooden stake. The absence of law is a central theme in this story.

Polyphemus is referred to several times as being a wild thing, "with no true knowledge of laws or any good customs."<sup>39</sup> Odysseus repeatedly emphasizes that the Cyclopes as a group are characterized by the total absence of rule of law.

These people have no institutions, no meetings for counsels... and each one is the law for his own wives and children, and cares nothing about the others.<sup>40</sup>

The lawlessness of the Cyclopes is further underlined against the background of the highly civilized Phaeacians, in whose land Odysseus finds himself in Book ix, following his misadventures with the Cyclopes. Their social existence is described as Utopian in nature.

An assembly of the people listens to Odysseus' plea for help. In the course of the event one of the Phaeacians, Euryalus, is offensive towards Odysseus and disrespects him. The king rules that the offender owes Odysseus an apology and a gift. Euryalus accepts the verdict gracefully and obeys fully. Indeed, it seems that the Phaeacian society peacefully resolves disputes and conflicts. The king presents himself as someone who never gets angry and believes that "Always moderation is better."<sup>41</sup> Everyone respects the queen, "For there is no good intelligence that she herself lacks."<sup>42</sup> After hearing the detailed stories of Odysseus' travels, and after hosting him generously and plying him with gifts, the Phaeacians urge their king to send the guest back home, "for what he said was fair and orderly."<sup>43</sup>

According to one approach, Phaeacian society is depicted as being over-civilized; preoccupied with games, pleasures, and niceties of manners, to the neglect of customary governmental duties. As a result, it's hard to distinguish the king from his subjects. For example, the king recounts how his authority was dismantled in favor of collective decision-making.<sup>44</sup> However, the Homeric narrator doesn't appear to be critical of the social and governmental order in the land of the Phaeacians, and describes their land in striking contrast to that of the Cyclopes, inasmuch as it concerns the subjection of the individual to the social order. As Zanghellini describes, both populations – the Phaeacian and the Cyclopesian – present a "formula, repeated throughout the epic, [that] consolidates the association between, on the one hand, lawlessness and

savagery and, on the other hand, between legality and the qualities of being friendly to strangers and god-fearing.”<sup>45</sup>

A third model of social existence is presented by Ithaca, Odysseus’ homeland. In principle there is a social order in Ithaca. As described in Book ii, Odysseus’ son Telemachus seeks to invoke the existing customs, in order to fix the wrongful state of affairs caused by the suitors. However, when he convenes an assembly, a procedural argument is put forward, contending that only certain matters, such as an enemy at the gate or a weighty public issue, justify such convening. Telemachus admits to personal distress. This distress – “my need,” as Telemachus says – stems from the actions of the suitors, the uninvited guests who are wasting his property. Telemachus thus appeals to the assembly:

I supplicate you, by Zeus the Olympian and by Themis who breaks up the assemblies of men and calls them in session: Let be, my friends.<sup>46</sup>

Telemachus’ words refer to major customs in Homeric society which the suitors disrespect. <sup>47</sup> Indeed, part of what has gone wrong in Ithaca of the time is a blatant disregard of the customs and fundamental concepts on which Telemachus relies. Antinous, one of the suitors, openly rejects Telemachus’ right to address the assembly, issuing a threatening demand: “we will not go back to our own estates, nor will go elsewhere until she marries whichever Achaian man she fancies.”<sup>48</sup> Despite the support of Mentor, Telemachus fails to win the assembly over to his side, and the suitors continue their depredations. All Telemachus can do is warn them that punishment will be meted out to those who transgress the norms, in words that precisely foretell the future:

I will cry out to the gods everlasting in the hope that Zeus might somehow grant a reversal of fortunes. Then you may perish in this house with no payment given.<sup>49</sup>

This protest manifests the principle of accountability, known to the poet and his audience – whoever kills is accountable and must pay a price. The poet chooses to raise the subject of accountability for the suitor’s impending deaths already at the beginning of the story, and already there he anticipates the exemption from responsibility for these deaths, with which the story will end. The main point here is that the accountability for causing death is made manifest, the very existence of which demands careful planning and divine support in order to structure the exemption.

There is no clear delineation of the constitutional state of affairs in Ithaca as regards monarchical succession.<sup>50</sup> However, even in light of this reservation, Ithaca in the *Odyssey* appears to be a society in which practices that are in general affinity with what is regarded now, in a broad sense, public law, are existent. Thus, in principle social institutions such as a people’s assembly

function. The suitors, despite their long and upsetting stay in Ithaca, don't try to employ force but concentrate their efforts on getting the queen to choose one of them. The recognition of property rights and the custom of gifts bring to mind practices that today would be generally grasped as echoing private law. Practices that are commonly identified with criminal law, such as acknowledgment of the principles of accountability, guilt, and punishment also exist in Ithaca. Yet, Odysseus' prolonged absence and the suitors' behavior have led to its severe disruption. Odysseus' reaction and the slaughter of the suitors lead towards the crisis of revenge. At the height of the crisis, the aged Halitherses reminds the suitors' relatives, who are about to attack Odysseus, of the fundamental principles of the social order and the responsibility of the suitors for its having been disrupted:

Hear me now, you men of Ithaca; hear what I tell you. It is by your weakness, dear friends, that these things have happened. You would not listen to me, nor to Mentor, shepherd of the people, when we told you to make your sons give over their senseless mood; for they, in their evil recklessness, did a great wrong in showing no respect to the wife, despoiling the possessions, of a lordly man.<sup>51</sup>

His words fall on deaf ears, and it is only the return of Odysseus and his violent actions that finally repair the disruption and restore the social order. After the situation has been rectified, all those involved in the crisis of revenge revert to the pattern of ordinary social existence.

The *Odyssey*, then, doesn't describe an experience or space devoid of law. The phenomenon of law comes to expression in a variety of contexts. Although the closure of the crisis of revenge which ends the *Odyssey* is devoid of a judicial procedure, it doesn't lack a legal dimension. A social agreement – the signing of an “alliance for the days to come” – ultimately seals the dispute, and that is the bottom line, even if preceded by the *Deus ex Machina* – the intervention of Athena.

The crisis of revenge is dissipated and ends in a return to the social order, not only as a result of Athena's intervention and the divine amnesia she casts upon those seeking revenge, but due to an intricate process of resolving a power struggle in Ithaca. The king's “missing in action” status, his son's youth and lack of experience, and the queen's decision to withstand the pressures placed upon her could not but have ignited a struggle over the political control and leadership of Ithaca. The crisis of revenge in the *Odyssey* is only part of this struggle and in fact its last gasp. Upon the return of Odysseus and his clear-cut victory, having recaptured the reins of power and rule in Ithaca, the sides are able, with the guidance of Athena, to reach a closure of the crisis through agreement and mutual acceptance of what preceded it.

Contrarily, in the *Oresteia* the crisis of revenge is of another kind. The exceptional circumstances of the *Oresteia* require in Argos a kind of resolution

which is different from the one needed in Ithaca. That requirement is satisfied by the judicial procedure instituted by Athena, a procedure whose absence is narratively possible in the *Odyssey*.

### 3. Myth, Epic, Tragedy and Generative Legal Narrative

The way law is represented in the *Odyssey* and the *Oresteia* can be ascribed to various factors, such as the development of the idea of justice in the centuries between the writing of the two works, and the personal poetic choices of their respective authors. Aeschylus' inclination produced a detailed account concerning the establishment of a court in the *Oresteia*, while Homer chose to focus on other elements.<sup>52</sup> Personal imagination alongside the era in which the work was written is of central importance. Notwithstanding, I will delineate three factors that may illuminate why a generative legal narrative appears in Aeschylus' work: poetic, performative, and sociopolitical.<sup>53</sup>

#### A. The Poetics of Epic, Tragedy and Law

Poetics is an array of principles referring to the nature and essence of literary expression and the ways in which it creates meaning.<sup>54</sup> The earliest theory of poetics is found in Aristotle's *Poetics*, written circa mid-fourth century BC. The theory seeks to systematically describe the tools by means of which a literary text elicits (or fails to elicit) responses among its audience. Aristotle, who regarded poetics as the art of mimicry and representation (*mimesis*), dealt mainly with tragedy, although he did refer to other genres, including epic and comedy. To Aristotle, "epic" meant Homeric epic – the *Iliad* and the *Odyssey*.<sup>55</sup>

The poetics of epic, according to Aristotle, differs from the poetics of tragedy in several respects: epic paints upon a broader canvas various episodes woven into the web of its narrative, and it may include counter-logical elements.<sup>56</sup> Epic poetry is denser than tragedy: "any Epic poem will furnish subjects for several tragedies."<sup>57</sup> However, the breadth of the canvas on which epic poetry paints makes no concession as regards a distinctive narrative core:

Thus the story of the *Odyssey* can be stated briefly. A certain man is absent from home for many years; he is jealously watched by Poseidon, and left desolate. Meanwhile his home is in a wretched plight – suitors are wasting his substance and plotting against his son. At length, tempest-tossed, he himself arrives; he makes certain persons acquainted with him; he attacks the suitors with his own hand, and is himself preserved while he destroys them. This is the essence of the plot; the rest is episode.<sup>58</sup>

Homer, Aristotle tells, is as an outstanding craftsman who carefully considers the flow of the narrative. Accordingly, "Homer did not include all the

adventures of Odysseus ... but he made the *Odyssey*... to center around an action that in our sense of the word is one.”<sup>59</sup> Into this “one action,” focused purely on Odysseus’ successful return home, an integration of a contending substantial story about the establishment of legal justice – a story that takes center-stage in the *Oresteia* – is hardly feasible. The establishment of legal justice has consequences for all of society, and as arises from *The Eumenides*, time and again it moves the spotlight from the individual (Orestes) to the polis and its future. The story of the *Odyssey* remains focused on Odysseus’ late but successful return, and is conveyed via a dense and precise epic tapestry that leaves little room for a narrative thread extensively describing a judicial procedure.

The epic pulse reaches its peak in the *Odyssey*’s concluding Book xxiv, *Peace Imposed/Reconciliation*.<sup>60</sup> The dead suitors “gibbering, they went their way”<sup>61</sup> to the Halls of Death, where they encounter the shades of Achilles and Agamemnon. Agamemnon recounts the glorious send-off of Achilles, who died on the battlefield, as opposed to his own ignominious demise. Amphimedon, one of the slain suitors, recounts the events that led to his death, voicing his suspicion that Odysseus enjoyed divine assistance: “it could be seen then that some one of the gods was helping him.”<sup>62</sup>

At the same time, Odysseus is visiting his father, Laertes. Laertes believes that the killing of the suitors, “who violated every custom,” was justified – “the suitors have had to pay for their reckless violence”; however, he is “terribly afraid”<sup>63</sup> of the vengeance of the suitors’ families.

Meanwhile, word of the suitors’ deaths has spread through the city, and an angry crowd has gathered around the palace. Eupheithes, whose son was the first to fall, tells the crowd that Odysseus has brought down disaster on the entire public: he led many to Troy, lost men and ships, and upon his return killed the finest of the land. Revenge is necessary, concludes Eupheithes, “or else we shall then be shamed forever.”<sup>64</sup> Medon, whose life had been spared by Odysseus not long before, brings up the following argument: Odysseus could not have succeeded without assistance from the gods, and therefore attacking him would lead to devastation. He is supported by Halitherses, who reminds everyone that the suitors “in their evil recklessness, did a great wrong,”<sup>65</sup> due to the weakness of the people of Ithaca who did nothing to stop them.

The crowd remains unconvinced and prepares to attack Odysseus. At this moment Athena accosts her father Zeus and asks for his intervention:

Will you first inflict evil fighting upon them, and terrible strife, or will you establish friendship between the two factions?<sup>66</sup>

Zeus replies:

... and let us make them forget the death of their brothers and sons, and let them be friends with each other, as in the time past, and let them have prosperity and peace in abundance.<sup>67</sup>

Before the amnesia can take effect, Odysseus hurries to the scene of the impending battle and there, with Athena's help, he slays Eupheites, the leading clamorer for revenge. Odysseus and his son prepare to take on their remaining foes, but at this juncture Athena appears in awesome glory, ordering the disputants to desist from hostilities. They obey her, but Odysseus nonetheless has second thoughts and attempts to attack again. Zeus casts a smoke-shrouded bolt of lightning, and Athena again orders Odysseus to call a halt, warning him of Zeus' wrath if he doesn't lay down his arms. Odysseus at last complies, happily. Assuming the appearance and voice of Mentor, Athena strikes an alliance between the two sides for the time to come.

This narrative density, which includes events occurring in several spaces and contexts at the same time, creates a hectic conclusion to the crisis of revenge that ends the *Odyssey*. The accelerated pace, which brings to mind the picaresque novel,<sup>68</sup> is unlikely to give rise to detailed and exacting preoccupation with the careful establishment of the court and a judicial procedure. The *Odyssey* presents the world of myth, which is "chaotic, full of contradictions, impossible versions, adaptations and fabrications."<sup>69</sup> Odysseus' confrontation with the suitors is the last station along the turbulent route that includes, among other things, charged encounters with monsters, goddesses, Sirens and Cyclopes. The focus throughout remains on the way in which, although impeded and delayed, Odysseus returns home. This direction is unlikely to align with a competing detailed story about the establishment of judicial procedure that turns into the heart of the narrative, as in the story crafted by Aeschylus in the *Oresteia*.

Contrarily, *The Eumenides* leads gradually but consistently from the commencement of the crisis of revenge towards its closure by means of the establishment of legal justice. Throughout the course of the narrative the protagonists conduct discussions of an adversarial nature, some before the establishment of the court, some afterwards. Such discussions, featuring mainly the exchange of arguments and counter-arguments, occur between the Erinyes and Apollo, Orestes and Athena, Athena and the Erinyes, and Apollo and the Erinyes; they focus on the question of what justice Orestes is deserving of, using rhetoric that is saturated with references to law, justice and judging. Already at the beginning of the play Apollo, who agrees to take Orestes under his wing, directs him "to the city of Pallas"<sup>70</sup> and the legal track:

And there shall we have judges of your cause, and words to charm them, and shall discover means to release you forever from this distress.<sup>71</sup>

Orestes internalizes the judicial rhetoric employed by Apollo and immediately upon arriving at Athena's temple he does not ask for mercy, but demands to be put on trial:

I come to your house; your image, goddess. Will I guard here as I await the issue of the trial?<sup>72</sup>

As soon as Athena becomes involved, she too employs judicial rhetoric. After the Erinyes tell her their demands, she asks whether they are willing to accept her judicial verdict: "Would you commit to the settlement of the charge?"<sup>73</sup> and is answered: "Surely, we reverence you as worthy and of worthy parentage."<sup>74</sup> After some further exchange of remarks with Orestes, he again demands her verdict: "Whether I acted justly or unjustly, you decide the case! For however I may fare, I shall rest content with your decision."<sup>75</sup> The foundation thus having been laid, after mulling some more over the issue of authority, Athena proclaims the establishment of a human court as the only way out of the dilemma:

The matter is harder than any mortal thinks to judge of; it is not right even for me to decide a trial for murder that brings down fierce wrath; ... But since this matter has devolved on me ... judges ... of murder, respecting the covenant of their oaths, which I shall establish for all time ... I will select the best among my citizens, and will return, to decide this issue in all sincerity.<sup>76</sup>

*The Eumenides* features a widening track studded with references to judging, which at its climax leads naturally to Athena's festive proclamation of the establishment of a court and the civilian duty to maintain and protect it. The background to the materialization of the formal judicial procedure and its taking center-stage – both artistically and publically – is built up gradually from the beginning of the play. In other words, the poetic choices in the *Oresteia* pave the road towards the establishment of legal justice.

## **B. Tragedy and the Legal Proceeding as Spectacles**

The generative legal narrative molded by Aeschylus is based on a powerful presentation of a legal proceeding as a spectacle. *The Eumenides* is a detailed account of the transfer of divine authority to a human responsibility, and an exemplar of how the judicial spectacle should be conducted.

The nature of the stage created by Aeschylus makes it not only possible but also natural to epitomize the judicial procedure in detail. As Aristotle told us, Aeschylus introduced significant innovations to the staging of tragedy: "Aeschylus first introduced a second actor; he diminished the importance of the Chorus, and assigned the leading part to the dialogue."<sup>77</sup> These innovations, marking the transition from monologue to dialogue, gave rise to drama as we know it today. Hundreds of years later, the Roman poet Horace mentioned Aeschylus in his *Ars Poetica*, a work dedicated to artistic

expression. Among other things, Horace reviews the history of the tragic form. He first mentions Thespis, “said to have invented a new kind of tragedy,” accompanied by novel visual effects – “and to have carried his pieces about in carts, which [certain strollers], who had their faces besmeared with lees of wine, sang and acted.”<sup>78</sup> He then turns to Aeschylus’ performative innovations:

After him Aeschylus, the inventor of the vizard mask and decent robe, laid the stage over with boards of a tolerable size, and taught to speak in lofty tone, and strut in the buskin.<sup>79</sup>

Using linguistic and visual formats, texts and images, law aspires to signal that the decision reached in court is due and apposite. The poetic tool is necessary to achieve this aim. It is put into action in two arenas – the visual and the verbal – by means of practices that I have proposed calling *formal* and *informal poetics*.<sup>80</sup> These practices shape the form and content of judicial procedures, as well as the spaces in which they transpire.

The most important representation of doing justice is the adversarial procedure – two sides argue before the bench, according to known rules, in an event that is unrepeatable, although it echoes familiar formats.

For the judicial procedure to constitute an efficient representation of doing justice, it must convince its addressees that its methods are fair. To that end, the element of visibility is harnessed. The festive entry of the judges into the courtroom, which serves as a stage, and the audience’s rising to receive them are markers of the place and time in which justice is done. The judicial procedure is thus simultaneously both a mechanism of doing justice and a representation of doing justice.

Similarly, Aeschylus harnesses the dramatic stage in order to shape the first act of judicial justice in history. Visibility is the central element inherent to the judicial procedure, and Aeschylus was active at a time when the performative tradition made it possible *to show* a procedure. The establishment of the first court and emplacement of the rule of law require a visual representation of certain complexity. The spectacle of the court in the *Oresteia* illustrates and manifests the basic principle regarding the public nature of the procedure, which ensures its fairness and correctness and at the same time expresses the vital link between seeing and doing justice. In parallel, the text composed by Aeschylus, which refers to the contents of the judicial procedure conducted by Athena, brings to mind the verbal poetics, both formal and informal, according to which an adversarial judicial procedure is conducted.

Upon summoning the judges, who are expected to commit to “respecting the covenant of their oaths, which I shall establish for all time,”<sup>81</sup> Athena goes into the details, proclaiming not only the obligatory existence of the judicial procedure from now onwards, but also how it will be conducted. In effect, she establishes a poetics of procedure that will serve society forever:

Do you summon witnesses and proofs, sworn evidence to assist justice.<sup>82</sup>

She goes on to specify the procedure's public attributes:

Make proclamation, herald and bid the people to their places! And let the shrill Tyrrhenian trumpet filled with human breath show to the people its high-pitched note! For this court is filled, it is proper that silence be kept ...<sup>83</sup>

Afterwards, Athena conducts the debate in an adversarial manner, giving the disputants as well as the defendant an opportunity to have their say. After a public count of the judges' votes, and a declaration, also public, of her decision in favor of the defendant, the procedure reaches its climax with the head of the court's announcement: "This man stands acquitted on the charge of murder."<sup>84</sup>

To recap, Aeschylus creates a new kind of representation of the judicial spectacle. Even if judicial activities of various kinds existed already in the myth, reflected in the epos and practiced in Greek and Athenian society as well, Aeschylus, by means of the poetics that he innovated and sophisticated, presents a drama which crystallizes these factors into "the rule of law" and connects the rule of law to the judicial performance.<sup>85</sup>

The poetics of the tragedy works in tandem with the legal orientation of the polis. As Vernant puts it, "Tragedy is not only an art form; it is also a social institution that the city ... set up alongside its political and legal institutions."<sup>86</sup> Tragedy then brings to the stage not only "an ancient heroic legend,"<sup>87</sup> but also contemporary rising institution – court of law. It is the form of the tragedy that enables the construction of a new bridge between the mythical traditions embodied in the epos and the new forms of legal practices.

The aesthetic principles of performative expression allow Aeschylus to create a representation of the transition to a procedural era. The grandeur of the stage fashioned by Aeschylus, with its revolutionary number of actors and their prominent costumes, brings to mind the power of the judicial spectacle and the formal and informal poetics employed in it.<sup>88</sup> The development of the poetics of dramatic performance then converges with the honing of the poetics of the judicial spectacle.<sup>89</sup>

### **C. A Political Moment, the Tragic Transition and a Generative Legal Narrative**

Both the *Odyssey* and the *Oresteia* relate events of the Heroic Era. Both Homer and Aeschylus focus their gaze on the Achaean period, distant from their own times. Nonetheless, each of them operates in a different "story time." The developments and changes that Athenian society underwent over the centuries that elapsed between the two works are directly related to our topic.

The Homeric world features a stratified class society, mainly its highborn aristocracy, who see themselves as resembling the gods, the differences (except for the latter's immortality) being "matters of degree, prestige and power."<sup>90</sup> The will of the gods serves as the law, which always prevails: "Their will is just because it is their will."<sup>91</sup> Similarly, in the Homeric epic the will of the high-class serves as the law: "He does not perform his actions because they are just, to the contrary: since he is an aristocrat and owes no account to anyone, his actions are just because he performs them."<sup>92</sup>

The *Oresteia* tells a new story, in which humans give up their autonomy and the power and liberty to freely conduct their affairs. As Goldhill explains, this is first and foremost a political story.<sup>93</sup> The fifth century BC was marked by a social and political change, from oligarchical or tyrannical regimes towards democracy. In 507 BC Cleisthenes' reforms established a democratic system.<sup>94</sup> The political upheavals in Athens during those years yielded a vigorous public debate, which earned the name "the Fifth Century Enlightenment." The *Oresteia*'s appearance when it did was an inseparable part of this process of enlightenment. The *Oresteia* manifests the convergence of the political moment with what Vernant and Vidal-Naquet call "the tragic transition."<sup>95</sup> The tragic transition represents and simultaneously is a symptom of the unresolved tension between two systems of values and ideas when it reaches a peak: it happens when a space develops at the core of social existence, one broad enough to accommodate the opposition between political and legal thinking on one hand, and mythical and heroic tradition on the other.<sup>96</sup>

Vernant explains the profound difference between myth and tragedy. Whereas myth, in its original form, provides answers without explicitly formulating the questions, tragedy takes the mythical story and uses it to formulate complex questions that remain unanswered.<sup>97</sup> Mythical heroes have a fabulous existence. The Homeric epic uses the mythical experience and cleverly "organizes" it.<sup>98</sup> The tragic hero originally comes from the same mythical sphere, but the drama involves him in the reality of the fifth century BC polis, riven by political struggles.<sup>99</sup> In effect, the tragic transition makes use of the mythical narrative in order to tell a new story, which is suited to the reality of the polis and its audience.

This complicated step is exemplified by the figure of Orestes. The references to Orestes in the *Odyssey* express an unequivocal moral directive presented as a model of worthy behavior, its content something like "Orestes who murdered his mother who murdered his father, acted rightfully." The dilemma that his action provokes is given no expression. Contrarily, in the *Oresteia* Orestes is depicted as tormented by doubts: "Pylades, what am I to do? Shall I respect my mother, and not kill her?"<sup>100</sup> And the discussion of this question, with its various ramifications, is carried on and developed, in several discursive arenas, including the judicial, throughout *The Libation Bearers* and *The Eumenides*. The presentation of this discourse is only

possible against the background of an extant ethos centering on the rule of law and respect for the law. This was indeed the background in Aeschylus' time, which didn't exist in the Homeric age.

The convergence of the political moment with the tragic transition in Aeschylus' time also provided an audience capable of fully receiving a generative legal narrative and charging it with meaning.

The *Odyssey* and the *Oresteia* are performative works; their creators addressed them to audiences who furnished these artistic expressions with meaning by identifying themselves and their values in what is told. The representation of legal justice in the *Oresteia* isn't just Greek drama's reflection of the changes in the Athenian judicial system, but also a story told to an audience living in a very different sociopolitical reality from the Homeric. Consequently, the poetic expression changes and makes it possible to accommodate the narrative about the establishment of legal justice, and the removal of revenge from the realm of the individual to the polis, which represents the public.

To summarize, the convergence of three paths – poetic, performative, and sociopolitical – created a juncture potent enough to produce a powerful representation of the moment when the rule of law emerges.

#### **4. Athena as a Mediating Judge**

Twice in the *Odyssey*, once at the beginning of the story and another time towards its end, Zeus remarks that Odysseus' return is consequent from Athena's wishes and plan.<sup>101</sup> The entire epic is in effect a particularizing of the determined manner in which Athena accomplishes her plan. In *The Eumenides*, Athena declares that she will take action to end the dispute "since this matter has devolved on me."<sup>102</sup> However, more than the matter devolves on her; it seems that Athena voluntarily takes it upon herself, and resolves it in accordance with her inclinations and will.

In both cases Athena stands at the center of the conflict, and in both it is she who brings it to an end by means of active intervention, motivated by her wish to help her two protégés, Odysseus and Orestes. Her intervention, which in both cases combines elements of coercion and intimidation with elements of rhetoric, conciliation, and persuasion, does indeed resolve the two conflicts.

There is, however, a significant divergence between her modes of action in the two cases. She assists Odysseus in preplanning his return and his revenge on the suitors. "I will indeed be at your side, you will not be forgotten at the time when we two go to this work,"<sup>103</sup> she promises him, and is true to her word. On Orestes' behalf she operates *ex post*, only after he himself has performed the act of revenge, murdered his mother, and fled to her temple.

In Aeschylus' play Athena establishes a new institution – a court – which is harnessed to solve Orestes' predicament. In the Homeric epos her intervention on behalf of Odysseus is direct and much more intensive. The difference in the way the two authors chose to describe Athena's modes of action is usually attributed to the social and political changes in Greece during the centuries that separate the works.

The way in which Aeschylus describes Athena's modes of intervention, corresponds with the historic changes that diminished the authority of the patriarchal family and subordinated it to the authority of the polis. Aeschylus' drama reflects a transformation in the course of which the judicial roles and procedures, already present on the Areopagus, shifted from the preservation of patriarchal rituals into pursuing civil justice in the name of the polis.<sup>104</sup> Interestingly, however, Athena's character in *The Eumenides* retains prominent themes that pertain also the Homeric Athena. First, in both narratives Athena appears to know that brute power alone doesn't yield a sustainable solution in a social environment, whether that power is a judicial act, or an act of violence. In both narratives, Athena employs other tools besides power, heading for advancing an agreement. This is how the conflict ends in the *Odyssey*:

Then the gray-eyed goddess Athena said to Odysseus: "Son of Laertes and seed of Zeus, resourceful Odysseus, hold hard, stop this quarrel in closing combat, for fear Zeus of the wide brows, son of Kronos, may be angry with you." So spoke Athena, and with happy heart he obeyed her. And pledges for the days to come, sworn to by both sides, were settled by Pallas Athena.<sup>105</sup>

As mentioned, ultimately, the crisis of revenge is resolved not by means of Odysseus' victories but by means of Athena's cajoling. In the course of the *Odyssey*, Athena has devised stratagems and plans, with and without Odysseus, assumed terrible appearance to intimidate the disputants, and with Zeus' help erased the slaying of the suitors from their families' memories. Yet eventually the conflict was resolved only after Athena uses conciliatory arguments. She turns to the power of persuasion in order to make sure that the peace achieved is maintainable. Despite being able to impose a coercive settlement on the sides, she chooses to strive towards an agreed resolution, instituting a peaceful covenant for the right conduct of society in the days to come.

In the *Oresteia*, Athena establishes a court in order to resolve the dispute between Orestes and the Erinyes and break the chain of revenge. After Orestes' acquittal, the enraged Erinyes intend to send a plague upon Athens – which means that the judicial solution may not accord with the best interest of the Athenian public. The response that Aeschylus attributes to Athena's is therefore directed towards both the Athenians and the Erinyes. She reminds the Erinyes of the menacing power of lightning, and the advantages to be gained if they yield to the verdict:

You are not dishonored; do not with excessive wrath blight the land of mortals, goddesses that you are! I, for my part, have trust in Zeus, and – why need I speak of it? – I alone among the gods know the keys of the house wherein is sealed the lightning. But there is no need of it; let me persuade you, and do not discharge upon this land the words of an idle tongue so as to cause all things that bear fruit no more to prosper. Lull to repose the bitter force of your black wave of anger, since you shall be honored and revered and dwell with me!<sup>106</sup>

Turning to the Athenians, Athena tries to convince them of the advantages of the new way to resolve disputes that she intends to institute from now onwards:

Such is the object of awe that you must justly dread, and so you shall have a bulwark of the land and a protector of the city such as none of human kind possesses, neither among the Scythians nor in the domains of Pelops.<sup>107</sup>

It's actually Athena's mediatory effort and not the verdict that ultimately leads to a resolution of the conflict.<sup>108</sup> Interestingly, that part of the play devoted to the dialogue between Athena and the Erinyes after the trial is about twice as long as the part devoted to describing the actual trial. Athena as judge doesn't succeed in enforcing the verdict. A full resolution of the matter is possible only by means of mediation towards a compromise that recognizes the powers behind each of those involved in it.<sup>109</sup> The ultimate the closure of the *Oresteia* then, isn't legal; only the goddess's rhetoric succeeds in resolving the deep-seated tensions.<sup>110</sup>

The duality of the figure of Athena – which perhaps resonates with the profound duality, pointed out by Nietzsche, at the heart of Aeschylus' drama in general<sup>111</sup> – is revealed in yet another context: the conspicuous flaws in the judicial procedure she establishes. "The triumph of law" in the *Oresteia* is blemished, as various critical readings – Marxist, feminist, and others – suggest.<sup>112</sup> Even a basic legal reading raises a number of problems that characterize the judicial procedure described in the *Oresteia*, most of them relating to Athena's multiple roles.

Although Athena, in her role as the founder of the court, proclaims her commitment to the Athenians' best interest and the prosperity of their city, donning her judicial gown she adamantly declares her support for the defendant due to his gender, regardless of the specific matter at hand: "I vouch myself the champion of the man, not of the woman, yea, with all my soul."<sup>113</sup> She repudiates a previous declaration of hers, according to which she is precluded from deciding in this matter and will entrust it to the judges from among the Athenians, and reveals her personal interest and intention of pursuing it:

... and I belong altogether to my father. Therefore I shall not give greater weight to the death of a woman, one who slew her husband, the watcher of the house; Orestes is the winner, even should the votes be equal.<sup>114</sup>

Likewise, it is personal motives that guide Athena's acts in the *Odyssey*. Athena is often driven by emotion – sometimes rage,<sup>115</sup> sometimes compassion, affection and sympathy, the latter frequently being expressed towards Odysseus and his family. In *The Eumenides* her sympathy clearly and openly lies with Orestes. The way the legal procedure is conducted reinforces the sense of favoritism. Aeschylus describes the course of the trial with brevity. Athena allows Apollo – who by his own account serves as a witness, as an attorney, and as the one who counseled Orestes to kill his mother – to present his arguments in Orestes' favor.<sup>116</sup> After Apollo does so at some length, the Erinyes make no response and there is no discussion of the questions that arise. The trial ends in no decision. It is then that Athena casts her deciding vote. Against this background, the Erinyes' frustration and rage is not unexpected, although they may be incapable to label the failings of the proceeding with tags that developed in later stages of the rule of law such as "bias," "prejudice," or "conflict of interests." When Athena realizes that the judicial outcome won't suffice, she takes upon herself the task of conciliating the Erinyes, which is successfully accomplished.

The way Athena functions in the *Oresteia* makes it challenging to reconcile her actions with any conception of procedural justice associated with the rule of law: Orestes is her favorite, and she acts in a blatantly biased manner. Her derogatory remarks about women color the ancient story in blatantly patriarchal shades and charge it with gender prejudice. The act of judging conducted under her patronage seems a manifestation of inequitableness.

As elaborated, the *Odyssey*, in which aggressiveness also plays a central role, is not devoid of quasi-judicial moments. As described above, the divine pantheon serves as judicial-like panel before which Athena pleads for Odysseus. Like the procedure in the *Oresteia*, the quasi-procedure in the *Odyssey* is also flawed, and in the *Odyssey* too it is Athena who is mainly responsible for the flaws. Athena functions as counsel for the defendant, Odysseus, and at the same time she is one of his Olympian judges. The timing of dealing with the case was chosen by her, as noted above, due to the absence of Poseidon, known to be hostile towards Odysseus. After the Olympian "verdict" that allows Odysseus to return to his home, Athena becomes the executor of the decision.

The figure of Athena in the two works constantly shifts between complementary and sometimes contradictory roles. In the *Odyssey*, at one moment she expresses the cold logic of recompense, referring to the justice of Aegisthus' fate: "though he knew it was sheer destruction, for we ourselves had told him ... nor court his lady for marriage."<sup>117</sup> At another instant she is driven by emotion, talking about the urgent need to help Odysseus: "But the

heart in me is torn for the sake of wise Odysseus, unhappy man, who still, far from his friends, is suffering griefs.”<sup>118</sup> In the *Oresteia*, at one instant she is a quasi-adversarial judge, conducting the courtroom according to formal rules in order to reach a decision regarding Orestes’ guilt for the murder of his mother: “Do you summon witnesses and proofs, sworn evidence to assist justice.”<sup>119</sup> At another instant, it seems that her judgment is based on a personal whim: “I approve the male in all things.”<sup>120</sup> At one stage she threateningly refers to her access to Zeus’ dreadful thunderbolts, and at another she seeks to rely on her powers of persuasion and calls on the Erinyes to acknowledge “the power to charm and soothe that sits upon my tongue.”<sup>121</sup>

In both cases, the initial action taken by Athena – rendering “belligerent assistance” to Odysseus in the Homeric epic and establishing the court in the *Oresteia* – doesn’t suffice to resolve the crisis of revenge. Consequently, in both works complementing reconciling action is required.

In both works, Athena is described as a mediator and conciliator who conducts a multiparty discourse that is lively, dynamic, and sensitive to the needs of all sides to the dispute, in order to arrive at a long-term solution beneficial to society as a whole. In the context of the *Odyssey*, Athena’s act of mediation and conciliation seems to acknowledge the limitations of power and its inability to provide sustainable solutions to intricate conflicts. In the context of the *Oresteia*, Athena’s mediation and conciliation seems to highpoint the limitations of formal institutional judging. In contemporary terms, in her formal judging Athena also integrates elements of alternative dispute resolution. Thus, in retrospect, inside these classical narratives lie the seeds of the possible complexity of the judicial role; and both stories, despite the centuries and immense social transformations that separate their authors, place at the center of the narrative the figure of a goddess whose acts, as told in both the Homeric epic and the Aeschylean tragedy, represent landmarks along the road to the rule of law.

## Conclusion

In a study of Athens’ transition in the fifth century BC to the sovereignty of law, Martin Ostwald notes some of the stations along the way:

Ephialtes’ work is unthinkable without the work of Cleisthenes ...; Cleisthenes’ achievement, in its turn, was made possible only by the consequences of Solon’s activity at the beginning of the sixth century; and Solon’s reforms based on developments, inscrutable to us, that had followed the unification of Attica attributed by legend to Theseus ... All were responses to historical situations that, as by-product, led to ... the point at which the sovereignty of the people ... could then become an ideology.<sup>122</sup>

The rule of law, in the spirit of these remarks, could only spring at a certain moment when certain conceptions mature and the rule of law becomes feasible; likewise, a powerful story about the establishment of law could only emerge at a certain moment, against the background of preceding history. Yet, though the generative legal narrative could only sprout at a certain moment, it could only sprout against the background of the narratives preceding it that paved its path.

The constitutive moment of the judicial procedure described in *The Eumenides* is central to the process of establishing the conception of the rule of law, and rightfully deserves the title “generative legal narrative.” However, against the background of Bakhtin’s “Great Time,” it appears to be one more significant landmark along the endless journey towards an improved legal justice, a journey that is far from its end even today.

In the course of that journey, the *Odyssey*, an articulation that presents a potent, quasi-legal contemplation of reckoning, retribution, justice, and public order, constitutes a major milestone. In the *Oresteia* this contemplation evolves into a generative legal narrative.

The space between these two great works can be likened to a slow relay race. The smoldering ember of law, its glimmer already apparent in the *Odyssey*, turns into a flaming torch when the *Oresteia* – a suitable platform in terms of timing and poetics, sets the story of the establishment of the rule of law at its center.

The man whose fate would set alight the torch of law would not be the opportunistic, cunning Odysseus, who unblinkingly killed dozens of suitors and handmaidens to ensure his successful return, but rather the tormented, anguished Orestes, who lost his sister and his father and murdered his mother and her lover. Each of them is led towards a different end by Athena, the goddess of war and wisdom and the great patron of civil political life. Athena, who in the *Odyssey* dealt with the public interest by leading the rivals towards signing “pledges for the days to come, sworn to by both sides,<sup>123</sup> sees it as her duty also in the *Oresteia* to act “in good will toward my citizens.”<sup>124</sup>

The generative legal narrative fully emerges in the *Oresteia*. It presents a model of action that fits primarily the interests of the privileged patriarchal elite. As much as the *Odyssey* relates the exploits of elite that will pay a lower price for its actions and choices, according to the *Oresteia*, in a formal rule of law, not much will change. Orestes, who is part of this group, is ultimately extricated from legal payment for the murder he committed. The elite will continue to enjoy privileges. And yet, the constitutive moment described in *The Eumenides* is of immense importance. Once it was presented, even if the judicial model presented by Athena is imperfect, women and men could no longer do without it.

Both of these great works, the *Odyssey* and the *Oresteia*, reflect the meaning of the *paradigm of literature alongside law*, a paradigm that exposes the structural failure in law, together with the ever-existing aspiration to improve it.<sup>125</sup> Both are meaningful stations on law's long and winding road.

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## Notes

1 Bernard Schlink, *The Reader* (Vintage, 2001), 182.

2 Jean-Pierre Vernant and Pierre Vidal-Naquet, *Tragedy and Myth in Ancient Greece* (Harvester Press, 1981), 37 (hereinafter Vernant & Vidal, *Tragedy*).

3 Homer, *The Odyssey of Homer* (Harper & Row Pub., Richmond Lattimore trans. 1968) (1965) (hereinafter *Odyssey of Homer*); the story of the Greek victory in the Trojan War, from which Odysseus returns, is told in Homer, *The Iliad of Homer* (Richmond Lattimore trans., Chicago Univ. Press 1984) (1951) (hereinafter *The Iliad*).

4 Moses I. Finley, *The World of Odysseus* 18 (1954) (hereinafter Finley, *World*).

5 Simon Goldhill, *Aeschylus: The Oresteia* (2nd ed. 2004) (hereinafter Goldhill, *Aeschylus*) VII.

6 *Agamemnon* tells the story of King Agamemnon's murder upon his return to Argos from the Trojan War, at the hands of his wife Clytemnestra and her lover Aegisthus; Aeschylus, *Agamemnon* (Hugh Lloyd-Jones trans., Prentice-Hall 1970). *The Libation Bearers* recounts how Orestes, Agamemnon's and Clytemnestra's son, murdered his mother and her lover to avenge his father's death, after which the Erinyes arrive and Orestes flees; Aeschylus, *The Libation Bearers* (Hugh Lloyd-Jones trans., Prentice-Hall 1970) (hereinafter *The Libation Bearers*). *The Eumenides* tells how Orestes stands before a court established by Athena. Aeschylus, *The Eumenides* (Hugh Lloyd-Jones trans., Prentice-Hall 1970) (hereinafter *The Eumenides*).

7 Generative narratives are part of a "narrative map," which traces the scope of the narrative's influence in the field of law and the way in which law and narrative are interwoven. See Shulamit Almog, "From Sterne and Borges to Lost Storytellers: Cyberspace, Narrative and Law," *Fordham Intellectual*

*Property, Media & Entertainment Law Journal*, 13(1), 2002 (hereinafter Almog, “Cyberspace, Narrative and Law”).

8 Martin Ostwald, *From Popular Sovereignty to the Sovereignty of Law: Law, Society, and Politics in Fifth-Century Athens* (University of California Press, 1986) at xx (hereinafter Ostwald, *From Popular Sovereignty*).

9 See Irad Malkin, *The Returns of Odysseus: Colonization and Ethnicity* (University of California Press, 1998) (hereinafter Malkin, *Odysseus*). The Mycenaean Period corresponds to what is known in Greek mythology as the Heroic Age. This is one of the five stages of humanity’s existence, moving gradually from a starting point of quasi-divine existence to human existence that entails evil and pain. The Heroic Age comes after the Bronze Age and prior to the Iron Age, according to Hesiod: Hesiod, *Works and Days* (Richmond Lattimore trans., Michigan Univ. Press 1959), 15–117 (1728).

10 Finley, *World*, *supra* note 2, at 47.

11 Goldhill, *Aeschylus*, *supra* note 3, at vii–viii.

12 See Goldhill, *Aeschylus*, *supra* note 3, at 8.

13 *The Iliad*, *supra* note 1, at 338, book xviii, lines 497–508.

14 For the definition of formal and non-formal legal poetics, see Almog, “Cyberspace, Narrative and Law,” *supra* note 5, at 42–54.

15 *Odyssey of Homer*, *supra* note 1, at 354, book xxiv, lines 353–55.

16 *Ibid.* at 356, book xxiv, lines 433–35.

17 *The Eumenides*, *supra* note 4, at 61, lines 783–85.

18 For elaboration see Part 4.

19 *Odyssey of Homer*, *supra* note 1, at 359, book xxiv, lines 545–46.

20 *The Eumenides*, *supra* note 4, at 73, lines 1043–45.

21 Mikhail Bakhtin, *Speech Genres and Other Late Essays* (2nd ed., 1986), 5.

22 Eva Cantarella, Private Revenge and Public Justice: The Settlement of Disputes in Homer’s *Iliad*, *Punishment & Society*, 3, 473, 478–479 (2001) (hereinafter Cantarella, “Private Revenge”).

23 Cantarella, “Private Revenge,” at 475.

24 Ibid., at 479.

25 Ibid., at 477.

26 See Raymond Westbrook, “The Trial Scene in the Iliad,” *Harvard Studies in Classical Philology*, 94, 53, 76 (1992).

27 Cantarella, “Private Revenge,” *supra* note 20, Ibid.

28 Ibid., at 480.

29 Michael Gagarin, *Early Greek Law* (University of California Press, 1986), 19 (hereinafter Gagarin, *Early Greek Law*), also at 27.

30 Ibid., at 41.

31 David Luban, *Legal Modernism* (University of Michigan Press, 1997), 298.

32 Finley, *World*, *supra* note 2, at 37. See in this context also Zanghellini’s approach: “in the *Odyssey* rule of law concerns coagulate with particular insistence around the management of guest–host relationships: specifically, ignorance and/or violation of the duties and rites of hospitality toward strangers”. Aleardo Zanghellini, “The Foundations of the Rule of Law,” *Yale Journal of Law & the Humanities*, 28, 213, 228 (2016).

33 *Odyssey of Homer*, *supra* note 1, at 27, book i, lines 1–9.

34 Ibid., *supra* note 1, at 29, book i, lines 65–67.

35 Ibid. at 29, book i, lines 76–79.

36 Ibid. at 91, book v, line 112.

37 Ibid., *supra* note 1, at 141, book ix, lines 174–76.

38 Finley, *World*, *supra* note 2, at 83–85.

39 *Odyssey of Homer*, *supra* note 1, at 142, book ix, line 215.

40 Ibid. at 140, book ix, lines 112–15.

41 Ibid. at 119, book vi, line 310.

42 Ibid. at 113, book vi, line 73.

43 Ibid. at 199, book xiii, line 48.

44 Jasper Griffin, *Homer: The Odyssey* (Cambridge University Press, 1987), 85 (hereinafter: Griffin, *Homer*).

- 45 Zanghellini, *supra* note 30 at 231.
- 46 *Odyssey of Homer*, *supra* note 1, at 41, book ii, lines 67–70.
- 47 *Ibid.*
- 48 *Ibid.*, *supra* note 1, at 42, book ii, lines 127–28.
- 49 *Ibid.* at 43, book ii, lines 143–45.
- 50 Griffin, *Homer*, *supra* note 42, at 85.
- 51 *Odyssey of Homer*, *supra* note 1, at 357, book xxiv, lines 454–460.
- 52 For example, complex narrative twists, and numerous poetic digressions that produce various sub-plots and give space to many side characters.
- 53 For a general discussion of Greek drama’s social, aesthetic, and psychological dimensions, see Vernant & Vidal, *Tragedy*, viii-ix.
- 54 See C. Hugh Holman & William Harmon, *A Handbook to Literature* (6th ed., Macmillan Pub. 1992), 364.
- 55 *Ibid.* at 114.
- 56 For details of these differences, see *ibid.* at 115.
- 57 *The Poetics of Aristotle* (S. H. Butcher trans., 1902) hereinafter Aristotle, *Poetics* (Eng.), at 111, available at <https://www.stmarys-ca.edu/sites/default/files/attachments/files/Poetics.pdf>
- 58 *Ibid.* at 65.
- 59 *Ibid.* at 33–35.
- 60 *Odyssey of Homer*, *supra* note 1, at 345, book xxiv.
- 61 *Ibid.* at 345, book xxiv, line 9.
- 62 *Ibid.* at 350, book xxiv, line 182.
- 63 *Ibid.* at 354, book xxiv, lines 352–53.
- 64 *Ibid.* at 356, book xxiv, line 432.
- 65 *Ibid.* at 356, book xxiv, line 458.
- 66 *Ibid.* at 357, book xxiv, lines 475–76.
- 67 *Ibid.* at 357, book xxiv, lines 484–86.

68 As per the suggestion of Adorno and Horkheimer in Theodor W. Adorno & Max Horkheimer, *Dialectics of Enlightenment* (John Cumming trans., Verso, 1997), 46 (hereinafter Adorno & Horkheimer, *Dialectics*).

69 Malkin, *Odysseus*, *supra* note 7, at 29.

70 *The Eumenides*, *supra* note 4, at 16, line 79.

71 *Ibid.* at 16, lines 81–83.

72 *Ibid.* at 25, lines 242–43.

73 *Ibid.* at 38, line 434.

74 *Id.* at 38, line 435.

75 *Ibid.* at 39, lines 468–69.

76 *Ibid.* at 40, lines 470–88.

77 Aristotle, *Poetics* (Eng.), *supra* note 55, at 19. Some speculate that Aeschylus himself may have participated in the *Oresteia* as an actor: C. W. Marshall, “Casting the *Oresteia*,” *The Classical Journal*, 98, 257, 258 (2003) (hereinafter Marshall, “Casting”).

78 Horace, *Ars Poetica* (trans. C. Smart & E. H. Blakeney), available at <https://www.poetryfoundation.org/articles/69381/ars-poetica> (hereinafter Horace, *Ars Poetica*).

79 *Ibid.*

80 As I have noted in another context, “the rules of legal procedure are in a sense formal instructions for creating meaningful representations. Beside this system of formal rules another system operates which is not anchored in positive directives and can be described as an informal poetic system. The combined operation of both systems determines how the law appears, is heard and grasped.” Almog, “Cyberspace, Narrative and Law,” *supra* note 5.

81 *The Eumenides*, *supra* note 4, at 40, lines 483–84.

82 *Ibid.* at 40, lines 485–86.

83 *Ibid.* at 45, lines 566–71.

84 *Ibid.* at 59, line 751.

85 In this context, see Richard Kuhns’ description of the way in which Aeschylus, by means of the performance, heightened the status of Athenian jurisprudence, which already existed: Richard Kuhns, *The House, The City*,

and *The Judge: the Growth of Moral Awareness in the Oresteia* (Bobs Merrill Co., 1962), 66–67 (hereinafter: Kuhns, *The House*).

86 Vernant & Vidal, *Tragedy*, *supra* note. 51, 36

87 *Ibid.*

88 Almog, “Cyberspace, Narrative and Law,” *supra* note 5.

89 In this context, Maria Aristodemou writes about the power of new signifiers to create a reality, including judicial reality: “[a]rtists can use their power to create new signs, and thereby new selves and new laws.” Maria Aristodemou, “The Seduction of Mimesis: Theater as Woman and the Play of Difference and Excess in Aeschylus’s *Oresteia*,” *Cardozo Studies in Law & Literature* 11(1), 1, 26 (1999) (hereinafter: Aristodemou, “The Seduction”).

90 William K. C. Guthrie, *The Greeks and their Gods* (Beacon Press 1955), 121 (1950).

91 *Ibid.* at 123.

92 *Ibid.* at 122.

93 Goldhill, *Aeschylus*, *supra* note 3, at 47.

94 *Ibid.* at 2. In 507 BC, after years of struggle, Cleisthenes’ reforms established a democratic system for the first time; *ibid.*

95 Vernant & Vidal, *Tragedy*, *supra* note 51, at 34.

96 *Ibid.*

97 *Ibid.* at 34.

98 Adorno & Max Horkheimer, *Dialectics*, *supra* note 66, at 43. On the complex relation between epic and myth in the Homeric oeuvre, see *ibid.* at 46–47.

99 Vernant & Vidal, *Tragedy*, *supra* note 51, at 34.

100 *The Libation Bearers*, *supra* note 4, at 60, line 899.

101 In the fifth book he tells her: “For is not this your own intention, as you have counseled it, how Odysseus shall make his way back, and punish those others?”; *Odyssey of Homer*, *supra* note 1 at 88–89, book v, lines 23–24. In the last book he says: “For was not this your own intention, as you have counseled it, how Odysseus should make his way back, and punish those others?”; *ibid.* at 357, book xxiv, lines 479–80.

102 *The Eumenides*, *supra* note 4, at 40, lines 482.

- 103 *Odyssey of Homer*, *supra* note 1, at 208, book xiii, lines 393–94.
- 104 Kuhns, *The House*, *supra* note 83, at 66.
- 105 *Odyssey of Homer*, *supra* note 1, at 359, book xxiv, lines 541–47.
- 106 *The Eumenides*, *supra* note 4, at 62–63, lines 824–33.
- 107 *Ibid.* at 55–56, lines 700–03.
- 108 On Athena as mediator, see Gagarin, *Early Greek Law*, *supra* note 27, at 42.
- 109 *Ibid.* at 66.
- 110 Goldhill, *Aeschylus*, *supra* note 3, at 31.
- 111 Friedrich W. Nietzsche, *The Birth of Tragedy* (Douglas Smith trans., Oxford University Press 2000), 67 (1872).
- 112 For details, see Goldhill, *Aeschylus*, *supra* note 3, at 30–33.
- 113 *The Eumenides*, *supra* note 4, at 58, lines 737–38.
- 114 *Ibid.* at 58, lines 738–741.
- 115 For details on how Athena’s anger and its appeasement drive the plots of the *Iliad* and the *Odyssey*, see Jenny Strauss-Clay, *The Wrath of Athena: Gods and Men in the Odyssey* (Rowman & Littlefield pub. 1983), 213–39.
- 116 *The Eumenides*, *supra* note 4, at 46, lines 574–80.
- 117 *Odyssey of Homer*, *supra* note 1, at 28, book i, lines 37–39.
- 118 *Ibid.* at 28, book i, lines 48–50.
- 119 *The Eumenides*, *supra* note 4, at 40, lines 485–86.
- 120 *Ibid.* at 58, line 737.
- 121 *Ibid.* at 65, line 886.
- 122 Ostwald, *From Popular Sovereignty*, *supra* note 6, at xx.
- 123 *Odyssey of Homer*, *supra* note 1, at 359, book xxiv, lines 541–47.
- 124 *The Eumenides*, *supra* note 4, at 68, line 927.
- 125 For elaboration on the paradigm of literature alongside law, see: Shulamit Almog, “Windows and ‘Windows’: Reflections on Law and Literature in the Digital Age,” *University of Toronto Law Journal*, 57, 755, 756–761 (2007).

