Lene Rubinstein

Litigation and Cooperation

Supporting Speakers in the Courts of Classical Athens

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To Paul and Dorothy
and their families

Seht ihr den Mond dort stehen? –
Er ist nur halb zu sehen,
Und ist doch rund und schön!
So sind wohl manche Sachen,
Die wir getrost belachen,
Weil unsre Augen sie nicht sehn.
Matthias Claudius 1740–1815

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Preface

This book began life in Copenhagen on a grey afternoon in March 1994, as I was working on the ambiguous Athenian attitudes to litigation in general and on the Athenians' love-hate relationship with their volunteer public prosecutors (*hoi boulomenoi*) in particular. On that day I had just finished my survey of the twenty-eight surviving forensic speeches delivered by prosecutors in public actions, when I realized that a good number of attested *hoi boulomenoi* were not what they seemed to be, or at least not what I had thought they were. *Boulomenoi* (volunteers) they certainly were; but more than half (at least fifteen) of the prosecutors who delivered the speeches in our corpus were volunteering as speakers in public actions initiated by other citizens. These prosecutors were *synêgoroi*, literally 'with-speakers', and most of their speeches were written as supplementary contributions to the cases presented by the main prosecutors (*hoi grapsamenoi*) and sometimes also by yet more *synêgoroi* who spoke on their side.

This observation initially called for a reinterpretation of all the prosecution speeches in our corpus of forensic oratory, including the speeches delivered by *hoi grapsamenoi*, because of the possibility that any given speech may not have presented the entire case of the prosecution, but only part of it. It soon became clear that the use of supporting speakers was neither rare nor largely restricted to public actions: once I began to look systematically for *synêgoroi* they turned up nearly everywhere, although their appearance seemed to have been less frequent in private actions than in public ones.

Eventually I decided to let my original project rest for a while in order to concentrate on the practice of *synêgoria*, which has received only scant attention in modern works on Athenian law, in spite of the fact that the use of *synêgoroi* has been widely recognized by modern scholars. As work progressed I became convinced that this lack of attention was entirely undeserved, and that the contributions by supporting speakers in private as well as public actions were crucial for our general understanding of Athenian court practice and the broader social and political context of litigation in the fourth century.

Many of the ideological tensions surrounding litigation that I had observed during work on my original project could be at least partially explained if Athenian public actions were interpreted as team-based contests. Chapter 5 of the present work will discuss the implications of team-based litigation for our reconstruction of how the Athenian courts worked in practice and for our interpretation of the ideological tensions that were generated by litigation. It is my hope that the reader will agree at least with my assessment of the importance of these *synêgoroi*, and that this monograph devoted to them may also fill a gap hitherto left open in modern scholarship on Athenian legal history.

The manuscript in its present form was completed during the summer of 1999, and I regret not having been able to take more recent scholarship into account, especially S. Johnstone's new book *Disputes and Democracy: The Consequences of Litigation in Ancient Athens* (Austin: University of Texas Press, 1999). Some of his conclusions are very similar to mine; but we arrive at them by very different routes. David Whitehead kindly let me read the penultimate draft of his forthcoming commentary on the speeches of Hypereides, and I have benefitted enormously from his work and from our discussions of the texts.

Over the past six years my debts to friends and colleagues have accumulated, and the number of creditors has risen steadily. First, I should like to thank my colleagues at the Department of Classics at Royal Holloway. Their support and team spirit have created a working environment that has an atmosphere second to none. I am particularly grateful to Susanna Morton Braund, Chris Carey, and Rosalind Thomas, all of whom have read and commented on individual chapters. I also owe a considerable debt to my BA and MA students who have attended the course *Greek Law and Lawcourts* in 1996/7, 1997/8 and 1999/2000. Their intelligent questions and lively tutorial discussions have frequently made me see problems in a new light.

Next, the following scholars have all read the manuscript in its entirety and provided me with invaluable comments and criticism: M. Chambers, J.A. Crook, P. Flensted-Jensen, M. Golden, M.H. Hansen, E.M. Harris, T. Heine Nielsen, A. Johnston, D. Konstan, D.M. MacDowell, P.C. Millett, P.J. Rhodes, S. Usher, and D. Whitehead. A.C. Scafuro and G. Thür have both read parts of the work and made suggestions for which I am deeply grateful. I thank them all. They have drawn my attention to numerous mistakes and inadequacies, which I have attempted to correct to the best of my abilities. Any errors that remain are of course entirely my own responsibility.

My mother, Ulla Rubinstein, has patiently endured endless interrogation on Danish court practice and administration of justice. She has generously let me draw on her nearly forty years of experience as a judge in the Danish courts, and she has always been ready to provide me with relevant literature. She has also done her best to prevent me from making outrageously ill-informed claims about modern administration of justice. If she has not always succeeded in protecting me from my own ignorance, I alone am to blame. I also thank my father and my brother for putting up with us and our shared obsession with law, which has often threatened to dominate the conversation whenever the four of us have been together.

I am very grateful to the Carlsberg Foundation for their generous financial support of the first stages of this project, and to the editors of *Historia Einzelschriften* for their decision to publish my manuscript.

My greatest debt of all is to my teacher and friend Paul Cartledge. Over the past ten years he has been a constant source of inspiration and constructive criticism. No one could wish for a more acute reader or more eloquent devil's advocate. This piece of work has been deeply influenced by him; and although there are many points over which we disagree, such disagreement has always been fun and intellectually stimulating. I very much hope that he feels the same way.

When I first arrived in Britain nearly ten years ago, Paul Cartledge and Dorothy Thompson, along with their families, generously opened their homes to me; and their friendship and warmth have sustained me over this long period. I owe them more than I can possibly express in words. I hope that they will accept the dedication of this book as a small token of my feelings.

Staines
March 2000

Chapter 1: Introduction

It has long been recognized that Athens knew no profession comparable to that of the modern lawyer. A modern lawyer will undertake to act and speak on behalf of other people in court, solely on the grounds that he can offer his clients the service of legal expertise that they themselves do not possess. The relationship between the modern lawyer and his clients is normally a purely commercial one: the lawyer offers his clients the benefit of his formal legal training and his experience as a legal practitioner in return for pay. That type of commercial relationship was not only frowned upon by the Athenians, it was also illegal when it took place in the context of the democratic courts.[1]

Yet the ban on paid support in the courtroom did not mean that Athenian litigants had to fight their legal battles in isolation, nor that they had to plead their legal cases alone. A litigant could obtain support at all stages of the legal procedure in which he was involved, including the final stage when his case was presented to the panel of judges in the *dikastêrion*.

That Athenians cooperated before and during litigation, and that many trials were in reality launched as joint ventures are not new observations. Over the last three decades much important scholarship has been undertaken that throws light on the way in which Athenian litigants drew on the support of friends and kin as participants during pre-trial procedures such as the *anakrisis* and arbitration, and later as witnesses during the actual hearing in court.[2] But while it is readily accepted that the Athenians collaborated out of court in the preparatory stages leading up to the actual courtroom battle, and that the litigant's supporters would confirm their willingness to back him through their appearance as witnesses on his *bêma* during the proceedings, it is commonly assumed that the main *rhetorical* confrontation in court, the 'battle of speeches', would normally be fought out by only two opposing litigants who were clearly defined as protagonists in the legal drama. However, the corpus of forensic oratory that has survived from classical Athens suggests otherwise. As will be argued in Chapter 2 of the present work, about a third of these speeches were in fact written to be delivered by people who were not the main parties in the legal actions in which they were involved, at least not in formal terms.

These speeches, along with the persons who delivered them, will be the main theme running through this book. My proposition is that the complexity of Athenian litigation cannot be fully appreciated unless the importance of these supporting speakers, *synêgoroi*, is taken into account. Only if it is acknowledged that they were significant figures in the Athenian legal process will it be possible to arrive at a satisfactory reconstruction of Athenian court strategies.

1 [Dem.] 46.26. On this law, see the discussion in Chapter 2: 2.

2 *e.g.* Humphreys (1985) and (1986), Todd (1990a), Hall (1995).

Although it is generally recognized that Athenian litigants sometimes received assistance from supporting speakers in court, the *synêgoros* has occupied a marginal position in modern scholarship on Athenian law and litigation. One reason for the general neglect of the *synêgoros* as a participant in Athenian legal proceedings is undoubtedly that the phenomenon of *synêgoria* has been discussed first and foremost in the context of a debate concerning the types of expert assistance on which an Athenian litigant could draw when he was fighting his battles in court.

Although a few scholars, most notably Bonner (1927), regarded the *synêgoros* as a precursor of the modern professional advocate, that idea was soon abandoned in modern scholarship, and rightly so. If our main concern is to search for an Athenian parallel to the modern professional practitioner who makes a living from his legal expertise, the Athenian logographer, who wrote speeches to be delivered by the litigants themselves, is a far better candidate.

This was one of the main points made by Lavency in his book *Aspects de la logographie judiciaire attique*, which appeared in 1964, and which contains the most comprehensive discussion of *synêgoroi* to date. Lavency observed that a large number of speeches in our corpus of forensic oratory were delivered not by main litigants but by their supporters; and that even such supporters would sometimes draw on the expertise of logographers. Not surprisingly, this led Lavency to consider the question why the persons who had written the speeches, *i.e.* the logographers, as a rule did not deliver the speeches themselves.[3] The persons who engaged in logography clearly were in possession of both the legal and rhetorical skills required for successful court-room performance, and yet they wrote most of their speeches to be performed by others. Lavency's answer to that question was that the Athenians insisted that a litigant pleaded his own case, at least in principle (1964: 69–76).[4] According to Lavency (1964: 79–89), a litigant was allowed to receive support from other speakers; in fact, such support was very frequently given and it was readily accepted by the Athenians, but with one important proviso. Such speakers would be tolerated only if they appeared literally as his '*with*-speakers', the basic meaning of the word *synêgoros*, rather than as his legal *representatives*.

According to Lavency, the persons who spoke *with* a litigant would be required to voice their support of him as an individual, and, unlike modern lawyers, they could not limit their contribution to arguments concerning only the merits of his case. And here Lavency represents a general trend in modern scholarship: in so far as the existence of *synêgoroi* has been recognized, it has often been held that, under normal circumstances, their rôle was comparable to that of a modern character wit-

3 Lavency (1964: 26–31) identified eight speeches that were purportedly written and delivered by the logographer himself as a *synêgoros*: Dem. 18, 20, 25, [26], 29; Hyp. 1 *Dem.* (Hyp. 5 in the Budé edition), Hyp. 3 *Eux.*, and Hyp. 4 *Phil.* (Hyp. 1 in the Budé edition). Of these, however, he dismissed Dem. 25 and 29 as forgeries. These speeches will be discussed in Chapter 2: 1.

4 It was, however, noted both by Lipsius (1905–15: 905) and Lavency (1964: 114–117) that the evidence for an Athenian legal requirement that a litigant presented his own case in court is very slender indeed. The assumption rests entirely on Quintilian *Institutio Oratoria* 2.15.30. Cf. Harrison (1971: 156) who leaves the question open in his main text, but sides with Lipsius and Lavency on pp. 156–157 n.7.

ness.[5] Their main function was to act as the partisans of the main litigant and to take a stand on his platform (*bêma*) as an overt demonstration of their solidarity with him. Lavency regarded the requirement that such 'with-speakers' always declare their deep personal engagement in the main litigant and his case as a significant impediment to the development of advocacy as a profession comparable to that of a modern lawyer (1964: 89–95).

A point of view similar to that of Lavency was stated forcefully by Wolff (1964: 10), who followed up this proposition in his booklet *Demosthenes als Advokat* (1968). Wolff, too, saw the Athenian insistence that a litigant would have to plead his own case as an insurmountable obstacle to the development of real legal advocacy (1968: 11). In so far as the Athenians knew a craft or trade (Wolff deliberately avoided the word 'profession') comparable to that of the modern lawyer, logography rather than advocacy provides the best parallel.[6]

In one respect, however, Wolff went even further than Lavency: the *synêgoros* as a 'with-speaker' was allowed no place in his own right in Wolff's discussion. Wolff noted (1968: 11–12) that the Athenians sometimes permitted another citizen to speak on a litigant's behalf as a 'Fürsprecher', that is as a true legal representative, a Vicarious Voice to borrow a term from Crook (1995: 13–17). According to Wolff, such permission was given occasionally, but only as a concession to a fundamental principle that the Athenian litigant had to plead his case by himself: 'for the Athenian legal system ruled out not only *formal* legal representation, as do many archaic procedural arrangements; in addition it insisted on the principle that every litigant had to conduct his own case personally, also as a speaker' (my translation, Wolff's italics).[7]

That *synêgoroi* as 'with-speakers' of the type discussed by Lavency did not figure in Wolff's discussion is understandable: after all, Wolff's main concern was with logography as the real parallel to modern advocacy; and the fact that the Athenians seem to have preferred the Vicarious Pen to the Vicarious Voice was of course

5 Dorjahn (1937: 343), Lavency (1964: 85), Latte (1968: 282). For the suggestion that *synêgoroi* would sometimes replace witnesses in public actions see Todd (1990a: 31). Harrison (1971: 158) compared the *synêgoros* to a 'witness of good character'. Humphreys (1985) treats *synêgoroi* and witnesses together as serving more or less the same purpose. She claims that 'normally *synêgoroi* only appeared briefly to praise the litigant's character.' (1985: 318).

6 Wolff stated his reasons for not applying the word 'profession' ('Berufsstand') to the logographer's trade ('Gewerbe') as follows: 'we cannot speak of a real profession, and especially not a higher profession in the modern sense of the word. The activity in question was open to all and did not require any qualifications, exams or certification. It was the livelihood of many a man; others practised it occasionally, as has already been noted, and not for the sake of cool cash' (1968: 10). The terms 'profession' and 'professional' are in any case highly problematic when applied to the ancient world. See *e.g.* the discussion in Crook (1995: 41–46). The term 'professional' in the combined sense of 'making a living from' and 'expert' was used freely by Bonner (1927) and Lofberg (1917), who both worked on the teleological assumption that the Athenian practice of litigation must have developed towards the practices prevailing in America in the early 20th century.

7 'Das attische Recht schloß nämlich nicht nur, wie viele archaische Ordnungen, die *formale* Prozeßvertretung aus, sondern verlangte darüber hinaus grundsätzlich, daß jeder Litigant seine Sache auch rednerisch in eigener Person verfocht.'

of central importance to this type of investigation. True legal representation in the sense that the *synêgoros* would take over the entire pleading, while the main litigant played only a purely perfunctory rhetorical part in the proceedings, does indeed seem to have been rare, although it was far from as rare as Wolff's statement might lead us to believe.

The fact that the *synêgoros* has been regarded (and later rejected) as a potential candidate in the modern search for the Athenian 'advocate' is undoubtedly the reason why only those speeches that were delivered by *synêgoroi* in their capacity as genuine Vicarious Voices have received full attention in modern scholarship. A celebrated example of the *synêgoros* as a Vicarious Voice is the speech that Demosthenes wrote for Phormion to be delivered in his *paragraphê* against Apollodoros. The speech was delivered not by Phormion himself but by one (or perhaps several) of his friends (Dem. 36).[8] Another equally famous example is Dem. 18, a speech written and delivered by Demosthenes personally in defence of Ktesiphon in an action for illegal decree proposal (*graphê paranomôn*) brought by Aischines. [Dem.] 59 is a further speech that has regularly been recognized and discussed as a *synêgoria* delivered by a *synêgoros* who acted as a Vicarious Voice.

It is hardly surprising that these speeches in particular should have contributed to the impression that the *synêgoros* was, under normal circumstances, a marginal figure in Athenian litigation, except in so far as he may be regarded as a type of 'super-witness', who, unlike the conventional fourth-century witness, would address the court in words of his own. For as far as these speeches are concerned, the intervention by the *synêgoroi* as Vicarious Voices may be explained with reference to the apparently exceptional circumstances in which the main litigants found themselves.

Phormion was an ex-slave who, like his former master Pasion, had been given his freedom, and who was later made an Athenian citizen because of his exceptionally lavish contributions to the coffers of the Athenian *polis*.[9] Because of Phormion's unusually humble background, and because he was not a native speaker of Greek, the *dikastai* may have allowed his friends to plead on his behalf as an exceptional measure.

As for Dem. 18, Ktesiphon was prosecuted because of a decree that he had proposed in honour of Demosthenes to reward the latter for his conduct in Athenian public life. The context of the action, and indeed the contents of both Aischines' and Demosthenes' speeches, suggest that Aischines' prosecution would have been widely regarded as an attack on Demosthenes, and that Ktesiphon himself was little more than a pawn in their game. So when Demosthenes rose to deliver his speech, which was nominally in defence of Ktesiphon, it may have been recognized by everybody present in court that Demosthenes was the 'true' defendant, and that he should therefore be allowed to speak in his own defence.

If we turn to [Dem.] 59, the reasons for synegorial intervention do not present themselves as readily, but they can still be found. Apollodoros, who was a son of the

8 For the possibility that more than one speaker delivered the text that survives, see Chapter 2: 1.

9 See Davies (1971: 431–432) and, for a more detailed discussion, Trevett (1992).

ex-slave Pasion mentioned above, was engaged in a public action (a *graphê xenias*) in which he attacked a non-Athenian woman, Neaira, for cohabiting with an Athenian citizen as his wife. The prosecution was based on the allegation that Neaira and her citizen 'husband' Stephanos were passing off their children as Athenian citizens.

That Apollodoros, who himself was not a born Athenian, may have preferred to launch the action in the name of his brother-in-law Theomnestos, whose citizen pedigree was unassailable, is not all that surprising. Yet the whole case as represented in [Dem.] 59 has its origins in a hostile relationship between Apollodoros and Stephanos. The judges may for that reason have accepted that Apollodoros, as a *de facto* party to the case, fought the action on behalf of his brother-in-law, who was the main litigant only in name. Scholars have proposed other reasons for Apollodoros' appearance as Theomnestos' Vicarious Voice; and the problem will be discussed in more detail in Chapters 3 and 4. Here it must suffice to say that the case can be regarded as exceptional with some justification.

So the *synêgoros* as represented in modern scholarship could assume one of two functions, each of which would be at opposite ends of a scale, as it were. He could be either a 'super-witness' whose rôle in the legal proceedings amounted to a display of his solidarity with the main litigant. The very appearance of the *synêgoros* on the main litigant's *bêma* in this capacity would, as a rule, be perceived as more important than the actual verbal arguments that he might contribute. Or, at the other extreme, he could act as the Vicarious Voice of the main litigant; but only if it was universally agreed that the main litigant could not be expected to plead his case adequately because of exceptional circumstances. What the conventional discussions of *synêgoroi* have not normally taken into account is the possibility that the rhetorical performance in court could be genuinely shared between several individuals. Each of these speakers would have contributed less than the entire case, but considerably more than just a token couple of words as a demonstration of their support for the main litigant.

Hyp. 3 *On Behalf of Euxenippos* is an example of this. Hypereides, for his part, emphasizes the plight of the defendant Euxenippos, allegedly an old man without political experience who had inadvertently become a target in a heavyweight public action. It cannot be ruled out that the judges may have been prepared to accept Hypereides' intervention as a *synêgoros* because of the exceptional circumstances of the case. What is often overlooked, however, is that Hypereides was in fact not acting as a true Vicarious Voice in this action. His speech, which has been preserved in its entirety, was but one contribution out of several delivered in Euxenippos' defence. In 3.15 he refers to a previous *synêgoros* who has already addressed the court, and it is clear that Hypereides' own contribution was intended as a supplement to other *synêgoriai* and perhaps also to a defence speech delivered by Euxenippos himself. Many of the preserved *synêgoriai* that were delivered in public actions resemble Hyp. 3: they were contributions to a team effort. The speaker who delivered a *synêgoria* of this type did not define himself as the exclusive mouthpiece through which the main litigant's case was voiced, but nor did he confine his contribution to a mere display of his willingness to back the main litigant as an individual.

This leaves room for yet another type of *synêgoros*: a 'with-speaker' who could join in the proceedings because he had a personal or political interest in the case, and whose rôle in the trial would not necessarily be perceived as a token of his personal solidarity with the main litigant. Rather, such a speaker might represent himself as involved in the dispute in his own right, but without necessarily having to represent the legal dispute as 'his' action in the way that Demosthenes redefined the *graphê paranomôn* from being an action against Ktesiphon into an action brought by Aischines against himself. A *synêgoros* of this third type could be as much a 'with-party' as a 'with-speaker', and the demonstration that such rhetorical cooperation was a common and widespread phenomenon in the Athenian courts will be an important concern of the present work. The existence of truly joint litigation at Athens may force us to reconsider what we actually mean when stating that 'an Athenian litigant was expected to plead his own case'.

The assumption that an Athenian litigant was expected not only to plead his own case but also to plead it alone, at least in principle, has been fundamental to most recent scholarship on Athenian legal proceedings. It is widely assumed that it was a characteristic of the ideal democratic citizen that he was capable of pleading his own case in court, be it as a prosecutor or as a defendant. The connection between personal appearance in court and the rights and duties of Athenian citizenship was made by Egger as early as the middle of the nineteenth century (1862b: 364–365).

Lavency (1964: 77–78) went even further in regarding the pleading of one's own case as a citizen's privilege. He based his view on the assumption that metics had to be represented in court by their *prostatai*, an assumption that has since been widely questioned.[10] But other scholars, for example Todd, who have accepted that the Athenian metic had direct access to the courts in at least some types of legal action, have still agreed with their predecessors in linking personal appearance and pleading in court with Athenian civic identity: 'this was an intrinsic part of the democratic theory of citizenship: to admit that you were not capable of defending your own interests in the law courts was to admit that you did not fully possess the capacity of a citizen' (Todd [1993: 94]).

The claim that a citizen was expected and required to fight his own legal battles is central to the current reconstruction of the Athenian legal *agônes* as 'open trials of strength' between two (usually élite) protagonists, not unlike a wrestling match where the role of the audience, the judges, was to choose the winner. D. Cohen (1992:106) suggests that 'if the process is seen as an *agôn*, a competition for honour in Bourdieu's sense, then what one *is* as a man and a citizen is precisely what is at stake.'

Cohen's interpretation of Athenian trials forms part of a general trend in modern scholarship, which focuses overwhelmingly on the courts as a space in which individual members of the Athenian élite competed for honour and prestige. The

10 *e.g.* Whitehead (1977: 91–96), MacDowell (1978: 78), Hansen (1991: 118), Todd (1993: 198). Rhodes (1993: 655) takes a compromise stand when assuming that normally metics could not prosecute in *graphai* (but see, *e.g.*, Dem. 21.175 and [59].66–67).

contest between prosecutor and defendant would have been monitored by the *dêmos* which also decided the outcome of each encounter.[11] Another characteristic of this recent trend is the tendency to play down the differences between private and public actions. The fact that Athens had no institution comparable to a modern impersonal prosecution agency, and that the initiative and risks connected with ordinary public actions rested with individual citizens has occasioned the claim that public actions did not differ fundamentally from private suits as far as the court hearing was concerned: both types were fought as intensely personal *agônes* between individual members of the élite.

On this reconstruction, the main difference between public and private actions is that a public action may represent a more advanced stage in an escalating feud between two litigants, since in public actions the stakes would be higher both for the prosecutor and for the defendant. A citizen who volunteered as a public prosecutor faced a personal risk of being fined a thousand drachmai in addition to partial *atimia* if he failed to gain 20% of the votes cast by the judges. When a citizen decided to take on that risk, that was in itself a display of strength.[12] For the defendant the stakes would be raised even higher: where defeat in a private action would mean only that he would be liable to pay compensation to his opponent, or, at the very worst, face *atimia* as a state debtor, defeat in a public action could mean execution, confiscation of property, denial of burial in Attica, perpetual and hereditary *atimia* or fines so high that he might have no realistic hope of ever paying off his debt to the state.

According to the current modern reconstruction, Athenian legal actions, public as well as private, can be characterized as 'zero-sum games' in which the prize for which the two opponents competed was recognition of status or honour (*timê*): in this game the successful litigant could add to his own prestige the prestige lost by his unsuccessful opponent, and the more the loser stood to lose, the more there was to be gained by the victor.

If this model is to work, it is obviously essential that the person who initiated a legal action would always be perceived as a main party to the case, no matter whether the procedure was, in formal terms, a private suit (*dikê*) or a public action (*graphê*). And many modern scholars do indeed maintain that this was so. Although it would be possible for a prosecutor in a public action to claim that he was acting not only in order to further his own personal aims but also to further the interests of the community as a whole, the action would remain *his* action because of the personal risk that he stood to incur if he failed to gain the required share of the votes. Thus it might still be argued that the fundamental principle that a litigant was expected to plead 'his case' on his own applied as much in *graphai* as it did in *dikai* (see most recently Christ [1998: 26–27]).

11 See *e.g.* Garner (1987), Ober (1989) and (1994), Cartledge (1990), Wilson (1991), Christ (1998: 35–37). Public trials were recognized by Calhoun (1913: 104) as 'tests of strength'. The justification of interpreting the Athenian administration of justice on the basis of a simple *agôn* model has been questioned by Carey (1994a: 182–183).

12 As argued already by Paoli (1930: 252).

The *agôn*-model is also at the heart of Ober's *Mass and Elite*. It was precisely the *agôn* that was one of the mechanisms by which the *dêmos* maintained control and shaped the collective ideology of Athens, and it was through the *agôn* that élite members of the community would demonstrate their allegiance to democratic community values. The line of comparison drawn by Ober between the courts and the *ekklêsia* is obvious: in both fora the *dêmos* responded by *thorybos* and vote to the performance of individual élite members of the community; the *dêmos* chose the winner of each contest who, in turn, had to demonstrate his willingness to conform to the values and expectations of his democratic audience.[13]

Ober's work is part of a trend that represents a radical departure from previous reconstructions of fourth-century political life as centred on political parties or 'clubs'. Many modern scholars have strongly opposed the idea that political parties or 'clubs' (*hetaireiai*) dominated political and legal activities in fourth-century Athens, an idea of which Calhoun (1913) was one of the most significant early proponents. In general, later scholars may be prepared to accept the validity of Calhoun's model for fifth-century Athens, at least up to a point; but it is now widely maintained that, in fourth-century Athenian political life, individuals rather than organized parties were what mattered.[14] While it is of course accepted that ties between politically active citizens were forged, it is now maintained that such political alliances were ephemeral. Allegiance could (at least theoretically) be shifted from one day to the next. Ober (1989: 121) notes that '[a] politician commonly called upon friendly rhêtores as *synêgoroi* when he was involved in a public trial' as one way in which members of the Athenian élite could and did cooperate, but he urges that 'we must resist the tendency to make too much of these relationships'. He later asserts that '[w]hen he addressed the Assembly or court, the orator stood alone, before the people' (1989: 123).

As long as it was assumed that clearly defined and organized political groups or 'parties' played a crucial part in public life, collaboration by speakers in the Athenian *dikastêria*, especially in legal actions with a significant political dimension, was accepted as an essential feature of Athenian litigation. However, the current reconstruction of Athenian politics in general as primarily centred on individuals leaves little room for the *synêgoros* except in his capacity as a 'super-witness' or, in exceptional circumstances, in his capacity as a Vicarious Voice.

The participation by *synêgoroi* in their capacity as 'super-witnesses' is not in itself incompatible with Ober's statement. A *synêgoros* of this type who uttered only a few words, but who would demonstrate to the audience that the litigant enjoyed the support of an important section of the community, would add to the latter's display of personal prestige. Such *synêgoroi* would not have prevented the litigant from retaining his position as protagonist.[15]

Likewise, in his capacity as a Vicarious Voice the *synêgoros* can also be accommodated in the current agonistic model, provided that he can be shown always to

13 For objections to Ober's model, see *e.g.* Kallet-Marx (1994: 324–329).

14 Dover (1968: 50–51), Sinclair (1988), Ober (1990: 84–86, 121–125), Hansen (1991: 281–287), followed by Harding (1994: 16–17), Rhodes (*CAH* VI^2 577–578).

15 Humphreys (1985: 336–7).

have pleaded as a true legal *representative* of the main litigant. It will have to be assumed that such a *synêgoros* would have to concentrate exclusively on the main litigant's case while effectively suppressing his own personal voice and individual profile.

Furthermore, the type of *synêgoros* who defined himself as the *de facto* main party to the case is also compatible with the current reconstruction of Athenian trials as *agônes* fought between two opposing individuals. To illustrate this with a classic example: when Demosthenes acted as *synêgoros* in defence of Timarchos and Ktesiphon in the public actions brought by Aischines it may have been recognized by all that Demosthenes was the real defendant in both trials. Indeed, the arguments presented in Dem. 18 may be taken to suggest that if the defendants were acquitted the winner would be Demosthenes, rather than the litigants on whose behalf he was pleading.[16] Thus, these particular trials are not held to cause problems for the *agôn* model. It is still possible to regard the trials as one-to-one competitions for honour between two *de facto* protagonists, Aischines and Demosthenes. Allegedly, the two defendants were but pawns in a larger political game, and Demosthenes' role as *synêgoros* for the two defendants is seen as crucial.

On the other hand, the modern interpretation of Athenian trials as zero-sum games between individual members of the élite cannot be maintained if it can be shown that teams of pleaders could engage in litigation together on an equal footing, also in rhetorical terms, without necessarily defining one member of the team as *the* legal protagonist. This kind of teamwork is commonly supposed to have operated in one particular type of Athenian public prosecution, the *apophasis*. The *apophasis* was probably introduced in the middle of the fourth century. The Areiopagos could be commissioned by the Assembly to investigate suspected crimes, and the council was also authorized to carry out such investigations on its own initiative. In either case, its report would subsequently be submitted to the Assembly. If the Assembly decided to follow up the case by a court hearing, then a team of prosecutors would be elected to plead the case in a *dikastêrion*. In that type of procedure, the Areiopagos council could in a sense be regarded as the initiator of the legal action, and the citizens who were elected by the Assembly to plead as prosecutors in such *apophaseis* thus were not perceived as the supporters of any particular individual, but rather as the voices of the community as a whole or, alternatively, as the voices of the council (Dein. 1.48).

However, *apophaseis* are normally regarded as exceptional, precisely because, unlike regular public actions (*graphai*), they were not launched in the name of a single individual citizen. As mentioned above, a fundamental characteristic of ordinary Athenian public actions was the fact that they had to be initiated by individual citizens who as such took personal legal responsibility for the actions; the *apophasis*, by contrast, was the responsibility of the Areiopagos and the Assembly collectively, and the same probably applied, *mutatis mutandis*, to *eisangeliai* to the *boulê*.

An important objective of this book is to call for a modification of the view of the *apophasis* and similar procedures as exceptional, and to argue that it was not at

16 Lipsius (1905–15: 907), Blass (1910: 7–11), Calhoun (1913: 103–104), Wankel (1976: 9–10 and 37–38), MacDowell (1978: 251), Ober (1989:121), Carlier (1990: 249), Usher (1993: 16).

all unusual that teams of prosecutors would undertake to plead together in ordinary *graphai*, at least such *graphai* as concerned crimes where the community as a whole was perceived as a victim. While supporting prosecutors were in a formal sense the *synêgoroi* of the citizen who had initiated the action, such speakers seem to have preferred to represent themselves as real *katêgoroi* in their own right rather than as partisans of the initiator (*ho grapsamenos*), and in that respect there seems to have been little difference between their rôle in the trial and the rôle of those citizens who had been elected to plead in public actions initiated before the Assembly or the *boulê*.

The observation that team-based public prosecution of the ordinary *graphê* type was a widespread phenomenon was made already by Meier and Schömann (1824: 710) and repeated *e.g.* by Lipsius (1905–15: 909–910) and Harrison (1971: 160), but it has largely been ignored in more recent scholarship on Athenian litigation in public actions. I shall take that observation further and argue that the teams who pleaded in such public actions constituted informal parallels to the collegiate nature of most of the attested Athenian boards of officials (*archai*).

The suggestion that a principle of collegiality operated in Athenian public actions of the *graphê* type as well as in extraordinary procedures such as *apophaseis* will serve to narrow the gap between ordinary and extraordinary public actions, while at the same time drawing attention to the fact that there seem to have been important differences between public and private actions in regard to the way in which the pleading was conducted in the court room.

In the following chapters, then, the Athenian *synêgoros* will be the focus of attention. The claim that participation by *synêgoroi* was a widespread phenomenon will be substantiated in Chapter 2, which will also emphasize the difference in the frequency of attested synegorial activity between public and private actions. In this chapter I have attempted to produce a comprehensive survey of the evidence for the practice in the *dikastêria* in the fourth century, for three reasons. First, any attempt to argue that a practice hitherto considered exceptional was in fact the norm in certain types of legal action must necessarily take into account all the surviving forensic speeches, both those delivered by main parties and those delivered by *synêgoroi*. Second, the claim that practice varied between public and private actions rests on an admittedly very limited number of cases of either category, and it would be ill-advised to limit the statistical basis even further. And third, it is my hope that such a survey may prove useful also to those scholars who will not agree with my interpretation of the practice or with my assessment of its significance for our general understanding of Athenian litigation.

Chapter 3 will address the question whether legal actions could be initiated jointly by several individuals. Here, too, a distinction will be made between private and public actions, and it will be shown that the Athenian legal system was sufficiently flexible to accommodate disputes to which several individuals on both sides defined themselves as main parties, at least on a rhetorical level. As far as public actions are concerned, it will be concluded that, although it was probably a requirement that only one individual assumed legal responsibility for a public action of the ordinary *graphê* type, that person would not necessarily be identical with the key person or

persons in the rhetorical strategy adopted by the prosecution team as a whole. Moreover, the chapter will also discuss the use of elected prosecutors in public actions initiated through the *boulê* or the Assembly, first and foremost in relation to *apophaseis* and *eisangeliai*.

Chapter 4 will consider to what extent *synêgoroi* defined their task differently according to the nature of the procedure in which they were involved. It will be concluded that the requirement that supporting speakers defined themselves as partisans of the main litigant applied first and foremost in private actions. In public actions, however, supporting prosecutors would, as a rule, define themselves as *katêgoroi* in their own right. Such prosecutors seem to have preferred to maintain a rhetorical distance from the main prosecutor who had initiated the action. The composition of defence teams in public actions will also be discussed, and it will be argued that the rôle of *synêgoroi* who participated in such teams would differ considerably, depending on the nature of their relationship with the defendant. It will be shown that defence *synêgoroi* did not necessarily have to claim that they were friends or relatives of the defendant who was receiving their support: it was possible also for people who defined themselves rhetorically as outsiders to contribute to the defendant's case.

Finally, Chapter 5 will discuss the implications of team-based pleading for our reconstruction of Athenian public actions. It will be suggested that the practice offered scope for non-élite citizens to participate actively as speakers in the type of public actions that were perceived as affecting the community as a whole. Although we cannot gauge how often the average citizen availed himself of the opportunity to participate, the option of risk-free participation on a team may have lent some substance to the democratic claim that any citizen who wished to contribute actively to the political life of his *polis* also had an opportunity to do so, regardless of his personal wealth and social standing.

This will lead on to a discussion of the darker side of team-based prosecution, and it will be argued that the phenomenon of the sykophant, normally perceived as a rhetorical inversion of the ideal *boulomenos*, can be fully understood only in the context of multiple prosecution. Such prosecution teams provided opportunities for subversive litigious behaviour of a kind that has not been properly appreciated in previous scholarship, and in that respect the practice was clearly a double-edged sword. A similar conclusion will be drawn in regard to the use of defence *synêgoroi* in public actions: while intervention by *synêgoroi* on the side of a defendant could be represented as a way of creating a level playing field between prosecution and defence, the practice was also perceived as a way in which wealthy and well-connected citizens might be at an advantage when compared to the vast majority of their fellow citizens. The Athenian attitude to supporting speakers was clearly ambiguous, and the practice of team-based public actions seems to have created at least as many social tensions as it resolved.

Chapter 2: *Synêgoroi* in the *Dikastêria*: the Evidence

The Athenian practice of enlisting support from *synêgoroi* has been noted in most standard works on Athenian law but never properly quantified; and there is considerable disagreement between modern scholars as to whether *synêgoroi* were employed as a rule or only exceptionally. As mentioned in the introduction, Wolff (1968: 11) believed that *synêgoroi* were allowed only occasionally (ab und zu) on grounds of 'fairness' (Billigkeit). Other scholars, such as Bauman (1990: 7) and Christ (1998: 37), have agreed with Wolff in regarding the use of *synêgoroi* as a circumvention of the rule that every litigant was supposed to plead his own case.

On the other hand, Latte (1968: 281–282) noted that the phenomenon was widespread in fourth-century Athens and argued that the practice was a survival from the archaic age when friends and relatives had a moral duty to support each other in court.[1] Hansen (1991: 194) has claimed that 'in political trials it was almost regular for both accusation and defence to be divided between several speakers from the same group', but without adducing evidence to support his (implicit) assumption that in such trials *synêgoria* was the rule rather than the exception.[2]

Lavency's *Aspects de la logographie judiciaire attique* (Louvain 1964) contains the most detailed study of *synêgoroi* available, but Lavency did not attempt to set out in full the evidence for how the Athenian use of supporting speakers operated within the wider context of the Athenian democratic administration of justice. His main concern in his chapter on *synêgoria* was to show the relationship between *synêgoroi* and *logographoi*, and he did not try to assess how widespread the practice of *synêgoria* was.

An important part of the empirical basis for Lavency's study of *synêgoroi* was his classification of the surviving forensic speeches as either *synêgoriai* or as speeches delivered by litigants who were main parties to the cases that they were pleading. Blass, too, paid attention to the issue in his discussions of individual speeches in our corpus of forensic oratory (1887, 1892, 1893, 1898), but he did not enter into a general discussion of the phenomenon. More recently a list of extant *synêgoriai* has been presented by Todd (1993: 95 n. 19) as part of a wider discussion of the types of assistance available to Athenian litigants.

The speeches delivered by *synêgoroi* form a crucial part of our evidence for the practice; but there has been considerable disagreement as to which speeches actually belong in that category. A reevaluation of this body of evidence is a *sine qua non* for the present study, and thus the first section of the present chapter will contain

1 He compares the Athenian *synêgoroi* with the Homeric ἀρωγοί mentioned in *Il.* 18.502: λαοὶ δ' ἀμφοτέροισιν ἐπήπυον, ἀμφὶς ἀρωγοί.

2 For other scholars of the same opinion, see Meier and Schömann (1824): 709–10, Keil (1902: 248), Bonner (1905: 82), Lipsius (1905–15): 909, Calhoun (1913: 86), Busolt and Swoboda (1920–26: 1160), Bonner and Smith (1938: 8–19), Harrison (1971:158 n.3), Usher (1993: 16).

discussions of each of the speeches that were delivered by supporting speakers rather than by main litigants.

Section 2 will discuss the legislation that may have regulated the use of *synêgoroi* in court; and the informal means by which the Athenians may have controlled the practice will also be considered here. Section 3 will attempt to assess how frequent the practice was. This discussion will be based not only on the extant *synêgoriai*, but also on the references to *synêgoroi* made in speeches delivered by main litigants. This evidence has not yet been the object of systematic investigation, and together with other types of evidence, especially the Athenian *defixiones* (lead 'curse tablets') relating to litigation, the material points to the conclusion that the use of *synêgoroi* in court was a widespread phenomenon. However, it will be argued that there seems to have been a considerable difference between private and public actions, and that *synêgoroi* were not used as frequently in the former as in the latter type of procedure. Section 4 will provide an explanation for the difference in synegorial activity between different types of legal action. Finally, in Section 5 I shall touch briefly on some of the differences between witnesses and *synêgoroi* in relation to Athenian court strategy. It will be argued that the gap between these two types of supporter widened in the fourth century, and that it is essential that we keep these differences in mind.

1. The *synêgoriai*

In his monumental *Die Attische Beredsamkeit*, Blass classified twenty-seven of our surviving lawcourt speeches as contributions delivered by supporting speakers. However, because of the nature of the investigation carried out by Blass, he was less interested in assessing the formal position of the speakers as either main litigants or *synêgoroi* than in determining whether their contributions served as main speeches (Hauptreden) or supplementary speeches (called *epilogoi* or *deuterologiai* by later rhetorical theorists whose terminology was adopted by Blass). It was, however, perfectly possible for a *synêgoros* to deliver what was in effect a main speech, while the main litigant receiving his support delivered only a token contribution. While Blass was fully aware of this important factor (as for example in his discussions of Lys. 13 [1887: 555], Dem. 18 [1893: 420] and [Dem.] 59 [1893: 536]), his emphasis on the speeches rather than the speakers is probably the reason why he overlooked two obvious *synêgoriai* (Isaios 12 and [Dem.] 43), and why he did not discuss in more detail the position of the speakers of Dein. 2 and Dein. 3 who spoke as members of prosecution teams elected by the Athenian Assembly.[3]

Blass made no attempt to produce a systematic discussion of all extant *synêgoriai* in their own right. But Lavency (1964: 26–31), who was concerned primarily

3 In his discussion of Dein. 2 Blass (1898: 314) focussed on the question whether the speech was delivered as a main speech or as a supplementary speech. He concluded tentatively that the speech was indeed a main speech, since it contains no references to a preceding speaker. He was more inclined to accept Dein. 3 as a *deuterologia* (1898: 317) on the grounds that it does not contain a proper discussion of the actual charge brought against Philokles.

with the question of what legal assistance was available to Athenian litigants, be it in the form of a script purchased from a logographer or in the form of a *synêgoria*, produced a very useful table in which the extant forensic speeches are arranged according to the following categories: a) speeches delivered by the main litigant himself (or his or her *kyrios*), b) speeches delivered by *synêgoroi*, c) speeches delivered by the logographer himself *qua* main litigant, and d) speeches delivered by the logographer *qua synêgoros*. Lavency's table distinguishes further between speeches delivered by prosecutors and those delivered by defendants. Lavency identified 28 *synêgoriai* among the forensic speeches. His figure is far higher than that arrived at by Todd (1993: 94–95 with note 19), who claims that, because of the Athenian refusal to accept overtly professional advocacy, 'only thirteen of our one hundred or so surviving forensic speeches were delivered by *sunêgoroi*'. Only ten speeches have been classified as *synêgoriai* by both Lavency and Todd: Lys. 5, [20] and 32, Isaios 4 and 6, Dem. 18, 36, [43], [44], and Hyp. 3 *For Euxenippos*.

There is no obvious reason for this discrepancy between Todd's and Lavency's figures, apart from the fact that Lavency, unlike Todd, does not distinguish between speeches delivered by publicly elected prosecutors (Dem. 25, [26], Dein. 1, 2, 3, Hyp. 1) and those delivered by ordinary *synêgoroi*. The speeches delivered by elected prosecutors are all absent from Todd's list. They will later be treated as belonging in a separate category, and in Table 1 I have marked them with an (*). Moreover, both Todd and Lavency include speeches that were not delivered by *synêgoroi*, while omitting others that undoubtedly were.

In what follows the speeches that were demonstrably delivered by *synêgoroi* will be listed and discussed individually. This will be followed by a discussion of speeches that have previously been classified as *synêgoriai* by either Lavency or Todd, but which were delivered either by speakers whose position in the legal proceedings cannot be ascertained, or by speakers who were probably main litigants. The order in which the speeches are presented here follows the traditional ordering in our corpus of forensic oratory in the hope that this may facilitate the use of this collection of *synêgoriai* for reference. The non-specialist (or impatient) reader is advised to go straight to the concluding part of this section and use the main part of it only for consultation in connection with problems relating to specific speeches.

Speeches delivered by supporting speakers

Lys. 5 was delivered in a public action by a *synêgoros* in defence of the metic Kallias, who was on trial for his life (5.1). The speaker was clearly part of a larger team of defence *synêgoroi*, some of whom had already addressed the court before him.[4]

[Lys.] 6 was delivered in an *endeixis* by a *synêgoros* in support of the main prosecutor Kephisios ([6].42), and our speaker was but one out of several supporting prosecutors (And. 1.92–101, 133–136). The speech has been regarded by numerous scholars as a late forgery and it will be discussed in more detail in Chap-

4 εἰ μὲν περὶ ἄλλου τινὸς ἢ τοῦ σώματος, ὦ ἄνδρες δικασταί, Καλλίας ἠγωνίζετο, ἐξήρκει ἄν μοι καὶ τὰ παρὰ τῶν ἄλλων εἰρημένα.

ter 4 below. Other scholars, for example Blass (1887: 568–569) and especially Lämmli (1938: 17–57), have been prepared to accept the speech as a genuine fourth-century oration, although most modern scholars reject the possibility of Lysianic authorship. Here I shall only anticipate my conclusion that there is no compelling reason why we should classify the speech as a pamphlet rather than a genuine piece of forensic oratory.

Lys. 13 was delivered in an *apagôgê* brought by Dionysios (13. 41, 86, 90).[5] Blass (1887: 555) characterized the speech as a main speech; but he was fully aware that the speaker himself had not taken legal responsibility for the *apagôgê*. In formal terms Dionysios' brother-in-law, the speaker of Lys. 13, probably appeared as *synêgoros* in support of the main prosecutor (see Chapter 3: 2b for further discussion).

Lys. 14 and 15 were probably delivered in a *graphê astrateias*.[6] It is clear from the remarks made in Lys. 14.3 and 15.12 that the speakers addressed the court after the main prosecutor Archestratides, and that the latter had conducted the main part of the prosecution.[7] The speaker of Lys. 15 ends his speech with a brief reference to his personal reasons for having addressed the court (15.12): 'Now, I, being the supporter of my friend Archestratides as well as avenging myself on my enemy Alkibiades, ask you to vote for a just decision.' (ἐγὼ μὲν οὖν καὶ φίλῳ ὄντι Ἀρχεστρατίδῃ βοηθῶν, καὶ Ἀλκιβιάδην ἐχθρὸν ὄντα τιμωρούμενος, δέομαι τὰ δίκαια ψηφίσασθαι.) Both speeches were classified as *synêgoriai* by Blass (1887: 486 and 489).

[Lys.] 20 is a defence *synêgoria* written for delivery in a public action on behalf of Polystratos, whose son delivered at least part of the surviving speech ([20].11–36). For the possibility that the first ten sections of the speech were delivered by another *synêgoros*, see the discussion in Chapter 4: 3.

Lys. 27, which has been classified as a *synêgoria* by Lavency, was delivered in support of a prosecutor in a public action heard by a *dikastêrion* (27.6), probably a *euthyna*.[8] However, Blass (1887: 454–455) and Lipsius (1905–15: 907 n. 24) regarded the text as the end of a mutilated speech, not as a *synêgoria*. Blass (1887: 372, 454–5) drew attention to a lexicographical reference to the word καταδιώξαι in Lys. *κατὰ Ἐπικράτους* (fr. XLV [Thalheim]). He regarded this as an indication that Lys. 27 has not survived in its entirety, since the word does not occur in the extant text. This led him to draw the conclusion that the extant part of the speech was but an *epilogos* delivered by the main prosecutor. But it is very likely that more

5 See also Hansen (1976: 131) cat. no. 12.

6 Hansen (1973: 17) concludes on the basis of Lys. 15.1 and 4 that the two speeches were genuine and suggests that they may have been delivered in a *graphê astrateias*. He argues, *pace* Dover (1968: 166–167), that there is no reason for treating Lys. 15 as spurious: the title of Lys. 14, *κατὰ Ἀλκιβιάδου λιποταξίου* is unreliable evidence for the type of action employed, and it is impossible to decide on the basis of Lys. 14.5–8 whether the action brought was a *graphê astrateias, deilias* or *lipotaxiou*. Carey (1989: 148) also accepts Lys. 15 as genuine.

7 Lys. 14.3: περὶ μὲν οὖν τῶν ἄλλων Ἀρχεστρατίδης ἱκανῶς κατηγόρησε· καὶ γὰρ τοὺς νόμους ἐπέδειξε καὶ μάρτυρας πάντων παρέσχετο·

8 Hansen (1975: 66 n.6), see Harrison (1971: 208 n.2) who sums up the pre-1971 debate. Todd (1993: 302) classifies, tentatively, the procedure as a *euthyna*.