

Andrea Ercolani, Manuela Giordano (Eds.)
Submerged Literature in Ancient Greek Culture
The Comparative Perspective

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The Comparative Perspective

Edited by Andrea Ercolani
and Manuela Giordano

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Andrea Taddei

Literacy and Orality in the Attic Orators

The topic of relationships between literacy and orality is not new, even when considered in the specific field of the Attic orators and Athenian law. On the contrary, it has been studied on many occasions during last century¹ and in more recent years, under different perspectives² and to varying degrees of technicality. The Athenian law courts are an excellent vantage point from which to observe this kind of problem: the trial is an agonistic context (ἀγών is the word that defines it) in which the accuser (ὁ διώκων) and the defendant (ὁ φεύγων) fight against each other, ‘wrestling’ and using words as weapons. Within this same context, the more the Athenian law courts functioned as a system that depended on a defined set of written law and procedures, the more persuasion and argumentation increased in importance. The aim of the struggle is in each case – to quote L. Gernet’s words – *accabler l’adversaire*,³ to strike down the opponent, using laws and various kind of witnesses as instruments in order to win the case.

When discussing the relationship between literacy and orality, it is then worth narrowing the problem and stressing from the start that the presence and use of writing in the law courts of Athens is a matter of fact and does not need to be discussed any further.⁴ The procedure for bringing an accusation exhibits a gradual but continuous shift from the use of opposed oaths (ἀντωμοσία) towards the drawing up (by the γραμματεύς) of an accusation in writing, which is supposed to be sealed in *echinoi* and transmitted to the law court for the trial. Even though this happened within a system that continued to use oaths⁵ on a large scale, the ἀντωμοσία gradually became an ἀντιγραφή.

1 See, for instance, Calhoun 1919 discussed in Gernet 2001, 65–86 (with further bibliography). See Thomas 2005.

2 For Athenian law, see, for instance, Faraguna 2007, Faraguna 2009, Faraguna 2013, 107–171 (articles by C. Pébarthe, S. Epstein, E. Harris, M. Faraguna), Canevaro 2013. A recent and important discussion of the topic is Thomas 2011.

3 See. *Archives Louis Gernet* III 17, 61 (available online on the website of *Laboratorio di Antropologia del Mondo Antico*: <http://lama.fileli.unipi.it>). This file included an unpublished book by Gernet (see Di Donato 1990, 112; see also 87 ff.) that has been edited in Italian translation with the title *Diritto e civiltà in Grecia antica* (Gernet 2000). See also Faraguna 2007, 90.

4 See Gagarin 2008, 177–181.

5 The prefixes *anti-* and *hypo-* modify the meaning of *homosia* and identify different procedures connected with oath-taking in Athenian law. See Todd 1993; Gernet 2000, 122–127, 167–177.

Nevertheless, the topic of literacy and orality in the Attic orators is wider than this and can be viewed in a different perspective. As R. Thomas has written,

The issue is not whether or not Athens was an ‘oral society’ in the 5th or 4th century, something which is demonstrably untrue whatever it means (it also implies a uniform citizen body), but the combination and interrelation of the democratic performances of assembly and jury courts and written documents or inscriptions.⁶

The relationship between written texts and oral procedures in the Attic orators should be seen, therefore, within the larger frame of the different relationships among different social practices (related to different skills and argumentative abilities) or, even better, around the complementary ideas of *droit* and *prédroit*, the latter being a notion much more dynamic than interpreters have usually allowed since its first formulation or in the many subsequent discussions of it.⁷

In the first part of this paper I will try to (re)construct a specific context (the judicial sphere of classical Athens) in which the polarity orality/aurality, on one hand, and writing/literacy,⁸ on the other, can be observed, and I will try to trace some paths by which it is possible to study the theme of ‘submerged’ literature with reference to the Attic orators. In the second part, I shall discuss some particular case studies in which some form of coexistence of orality and literacy in Athenian law can be observed, and I shall consider the possibility of reconstructing the specific part played by rituals and pre-judicial elements, which became progressively more and more submerged (but not erased) by the creation of a complex, articulated, writing-based system of law at Athens.

⁶ Thomas 2011, 169–170.

⁷ The article *Droit et prédroit en Grèce ancienne* was published in the 1948–1949 volume of the *Année Sociologique*, printed in Paris in 1951 (on this, see Di Donato 2013, 121). For a reconstruction of the debate about the idea of *prédroit*, see Gernet 2000, 150–152. The idea of *prédroit* was used by Gernet from the period he spent at the Fondation Thiers, where he conceived his project of *Philologie et droit* (see Di Donato 1990, 15). See, for instance, his comments in his research project: ‘ce droit attique est suffisamment original pour qu’on puisse aboutir à des résultats vraiment intéressants et généraux ... quel profit peut-on tirer de l’étude du vocabulaire, pour la connaissance de la psychologie juridique des Athéniens du VI au IV siècle? et par exemple des notions “préjuridiques” contemporaines de la vengeance privée et de la famille souveraine’, quoted by G. Davy, in Louis Gernet. *L’homme et le sociologue, Hommage à Louis Gernet, rendu le samedi 16 février 1966* (but: 1963, see Di Donato 1990, 39), Paris 1966. On this topic, see my ‘De la sociologie à l’anthropologie juridique. Les études de Louis Gernet sur le droit grec ancien’, forthcoming in *Mètis*.

⁸ On the pair orality/aurality see Gentili 1988 (Engl. transl.), 4–5 and Palmisciano 2014, 19 n. 1. See also Di Donato 1999.

1 Write, rewrite but speak just once

In order to set out the context in which our discussion should be framed, I would like to start with an episode concerning the logographos Lysias or, to be more precise, the Lysias reconstructed by Plutarch, many centuries after the so called ‘age of the orators’. In his treatise *Concerning Talkativeness*, he wrote:

Λυσίας τινὶ δίκην ἔχοντι λόγον συγγράψας ἔδωκεν ὁ δὲ πολλάκις ἀναγνοὺς ἦκε πρὸς τὸν Λυσίαν ἀθυμῶν καὶ λέγων τὸ μὲν πρῶτον αὐτῷ διεξιόντι θαυμαστὸν φανῆναι τὸν λόγον, αὐθις δὲ καὶ τρίτον ἀναλαμβάνοντι παντελῶς ἀμβλὺν καὶ ἄπρακτον· ὁ δὲ Λυσίας γελάσας ‘τί οὖν;’ εἶπεν ‘οὐχ ἅπαξ μέλλεις λέγειν αὐτὸν ἐπὶ τῶν δικαστῶν;’ (Plut. *Mor.* 504c 5–11)

Lysias once composed a speech for a litigant and gave it to him. The man read it through a number of times and came to Lysias in despair and said that the first time he read it the speech seemed to him wonderfully good, but on taking it up a second and third time it appeared completely dull and ineffectual. ‘Well,’ said Lysias laughing, ‘isn’t it only once that you are going to speak it before the jurors?’ (Transl. W. C. Helmbold)

The relationship between Lysias and his client is well sketched. After being written (συγγράψας), the speech is delivered to the client, who submits it to a thorough process of evaluation. After a positive first impression, the client comes back to the logographos and starts complaining: the more he reads and re-reads the text, the less he likes it. What is most important for us is the reply of the speechwriter, who starts laughing at the hypercritical attitude of his client, stressing at the same time the limits – in terms of space and time – of the performance in which the speech must be delivered: *isn’t it only once that you are going to speak it before the jurors?*

There is a long chronological and cultural gap between Lysias and Plutarch. However, in Plutarch’s words, the speechwriter seems to be fully aware of the context of the future performance.

The speech had to be performed – not read out – just once, and that was the only occasion⁹ on which it was supposed to achieve its purpose. Despite its anecdotal nature, the conclusion reached by Plutarch’s Lysias is nevertheless important to put in perspective each of the notions mentioned in the title of this paper.

⁹ On the relationship between the text and the ‘context of publication’ see Colesanti and Giordano 2014 (‘Introductory Notes’) and Ercolani 2014.

2 In and out of the canon

When dealing with the Attic orators, the theme of submerged literature can be seen in different perspectives. First, one must consider the selection that led to the set of texts which, many centuries later, has been identified as a ‘canon’,¹⁰ a selection most probably made in the Hellenistic period, and already well known during the imperial age, when Herodes Atticus was praised by his public as ‘one of the ten’.¹¹ This selection evidently involved also the speeches attributed to each single author.¹²

However, it is not only the eleventh, twelfth (and so on) orator, whose characteristics and prosopography we can sometime and somehow reconstruct, who has been left out of the canon. We must consider another important element of selection, connected with the previous point: for each case debated in the tribunal, we have just one version (the accuser’s or the defendant’s) of what happened.

It is true that we have records of some disputes between two or more orators (Lysias and Andocides, but also Lycurgus and Demades¹³); we know some names of other Attic logographers (in the case of Apollodorus we can even read some of his speeches, conserved in the Demosthenic corpus). Nonetheless – to give just one, very famous example – we cannot read anything of the speech delivered by Eratosthenes’ relatives against Euphiletus, after the latter had killed the former, who was allegedly his wife’s lover (so far as we can trust Euphiletus’ words).¹⁴

The lack of an opponent’s speech (what did he say? what were his arguments? how did he use the juridical and ‘pre-judicial’ tools to try to win his case?) is not the only element to be taken into account when assessing what we have and what we do not among the speeches delivered in Athens during the age of the orators. Considering the texts of orations that we read (as many times

10 D. Ruhnken, *Historia Critica Oratorum Graecorum*, Leiden 1768. On this topic see Nicolai 2007 and Nicolai 2014. On the canon of Attic orators, see also Worthington 1994, 244–264; Pernot 2006, 47–48.

11 Philostratus, *Life of the Sophists* 564–565.

12 To give just one example: among the 425 speeches attributed to Lysias at the end of the Hellenistic period (Caecilius of Calacte, however, considered only around a half of them to be authentic), we have just thirty-four speeches, together with a hundred more or less extensive fragments (see Todd 2009, 26 and Carey 2007, v–xiii)

13 Cf Lycurgus, *fr.* 23–26 Conomis, Lysias, *Against Andocides*, Andocides, *On Mysteries*.

14 See Todd 2009, 43–60.

as we like, or need, in order to appreciate or understand a passage), but were intended to be performed just once, in the law courts or at the assembly, we must also take into consideration the extent to which what was actually said during the trial in one of the Athenian *dikasteria*¹⁵ conformed to what was committed to writing and so began to circulate in book markets which authors did not control.¹⁶

How did Plutarch's Lysias eventually behave when he heard his client's spoken remarks? The degree of re-elaboration of each of the speeches is disputed among interpreters. In some cases rewriting is evident because different orations dealing with the same historical facts show some incoherence.¹⁷ On the other hand, the anticipation of the opponent's arguments should be seen within the framework of a judicial sphere and activity less stringent than is sometimes assumed.¹⁸ The elements that did not find a place in the text at the moment of (re)writing it include all references to interactions with those who were present at the trial (οἱ περιεσθηκότες), interrupting speakers with different kind of noises, laughing, stamping their feet, and clapping their hands.

Not everything has been lost, however: in Demosthenes *Against Meidias* we are informed about this noise,¹⁹ and lexicographers add some information about interruptions from bystanders;²⁰ in Lycurgus' *Against Leocrates* we hear the speaker hoping to have the jurors' wives and children present in court at the moment of voting (§141); moreover, some passages show that orators aimed to persuade not only the jurors, but also those who were present at the trial.²¹

In his reconstruction of the activity of the law courts, A. Boegehold has described in detail (based both on archaeology and literary sources) the jurors' arrival in court, protected by benches (the *dryphaktoi*),²² surrounded by people

15 A useful reconstruction can be read in Boegehold 1995, 21–43.

16 See Dover 1968, 25–26 and, more recently, Carey 2007. See also Boegehold 1999, 78–93.

17 Cf, for instance, Lysias, *In Defense of Mantisheus* 8 and *On the Scrutiny of Evandros* 10 (see, on this issue, Lavency 1964, 7).

18 On the circulation of information and on anticipation of arguments see Dorjahn 1935, Carawan 1998, 183 ff.

19 Demosthenes, *Against Meidias* 226.

20 Cf Harpocration, *Lexicon of the Ten Orators* s.v. κλόζετε, Pollux, *Onomasticon* 4. 122. On περιεσθηκότες see Lanni 1997. More generally on this issue see Hall 2006, 337, Serafim 2016 (forthcoming)

21 On the presence of children, cf also Lysias, *For Polystratus* 34. On the importance of persuading bystanders cf Aeschines, *On the False Embassy* 15 and the discussion of this and other passages in Lanni 1997, 187–188.

22 Cf, for instance, Aristophanes, *Wasps* 532 and 830. See Boegehold 1995, 195–201 (with further bibliography).

who ask, suggest, recommend, beseech. A passage of *Against Leocrates* (§20) is very noteworthy on this point: the speaker has been informed that the defence witnesses are not going to give evidence, and therefore summons them to use the ‘modern’ procedure of *kleteusis*. It is interesting to hear from the voice of the speaker about these kinds of pressures from bystanders.

πρὸ δὲ τοῦ ἀναβαίνειν τοὺς μάρτυρας βραχέα βούλομαι διαλεχθῆναι ὑμῖν. οὐ γὰρ ἀγνοεῖτε ὡς ἄνδρες οὔτε τὰς παρασκευὰς τῶν κρινομένων οὔτε τὰς δεήσεις τῶν ἐξαιτουμένων, ἀλλ’ ἀκριβῶς ἐπίστασθε, ὅτι χρημάτων ἕνεκα καὶ χάριτος πολλοὶ ἐπέισθησαν τῶν μαρτύρων ἢ ἀμνημονεῖν ἢ μὴ ἔλθεῖν ἢ ἑτέραν πρόφασιν εὐρεῖν ... ἀξιοῦτε οὖν τοὺς μάρτυρας ἀναβαίνειν καὶ μὴ ὀκνεῖν, μηδὲ ... μμεῖσθαι Λεωκράτην, ἢ λαβόντας τὰ ἱερά κατὰ τὸν νόμον ἐξομόσασθαι.

But before the witnesses come up I want to say a few words to you. You are well acquainted, gentlemen, with the tricks of defendants and with the requests made by others asking pardon for them. You know too well that desire for bribes and favours induces many witnesses to forget what they know, to fail to appear, or to contrive some other excuse. Ask the witnesses therefore to come up without hesitation and not to put offered favours before your interests and the state....and not to follow the example of Leocrates by failing in this duty. Otherwise let them swear the oath of disclaimer with their hands on the sacrifice. (Transl. J. O. Burt)

The presence and influence of bystanders at different moments of the trial is important for our argument for at least three reasons: first, because it enables us to take into consideration the ‘aural’ context in which speeches were delivered; second, because these sort of ‘interruptions by the public’ are sometimes used by orators in order to stress a specific point of their argumentation;²³ third, because these interactions between orators and the public find their roots in a sort of shared competence (about law, about rituals, about rituals in the law). Interruptions and comments are, moreover, very frequent and – so to speak – usual within the societies that have been studied by anthropologists of law.²⁴

²³ See Hall 2006, 377. On *thorybos* in the Attic orators, see Bers 1985 (more recently Hall 2006, 376–379, with further bibliography).

²⁴ See for instance Bohannon 1957, 18 and 28 ff. (see also Gluckmann 1955, 16); Verdier 2011. Drawing such a comparison does not provide an answer nor help to fill the gaps in our knowledge of Greek judicial experience. Nevertheless, it can stimulate us to ask different questions, under different perspectives and presuppositions, about Greek society and, therefore, also about Greek law.

3 From mouth to hand: use and abuse of the Attic orators

As S. Todd showed well in an important article more than twenty years ago,²⁵ it has been a long time since W. Wyse, in his commentary on Isaeus, expressed scepticism about the orator's reliability for the purpose of historical reconstruction. During the last century there has been a continuous, if irregular, oscillation between a total lack of confidence and moments of real enthusiasm about the trustworthiness of evidence given by the Attic orators for the study of Athenian history and civilization.

It is, in fact, a quite complicated theme with many elements.

Orators' reliability is not the point at issue for us: when an epigraphic text containing a law or an oath (the ephebic oath, for instance)²⁶ has been found and collated with the words quoted by speakers *from* a law or *from* an oath, the degree of accuracy of what we read in some (not all) manuscripts has been to some extent tested.²⁷ The point is the interaction, rather than the opposition, between the utilization of writing and oral competences and performances, with specific emphasis on the use of oral procedures in a field where the use of written documents is well attested.

To sum up in few words, we can state – as we have already observed – that in the age of the orators, writing was widely adopted in many fields of Attic judicial experience. We must, nevertheless, add that the transition *from the mouth to the hand*,²⁸ was very gradual in ancient Greece, in particular in the judicial sphere, where significant delays can be noted in specific domains such as homicide cases,²⁹ where the role played by the idea of contamination lasted for a long time.³⁰ Even *katadesmoi* make a very specific use of writing, and the turning point of modern interpretation has been when interpreters began to say that these particular kinds of texts were used *before* and not *after* the *agon*,³¹ with all the consequences for the perceived force of (a particular use of) writing

25 Todd 1990.

26 Cf Lycurgus, *Against Leocrates* 76–77. See Rhodes and Osborne 2003, n. 88, 440–448.

27 As is well known, the reconstruction of law, witnesses, and oaths in modern editions is provided by editors to match the indications ΝΟΜΟΣ, ΜΑΡΤΥΡΙΑ, ΟΡΚΟΣ that we read in the manuscripts. For a recent discussion, see Canevaro 2013.

28 Goody 1986, 175–176.

29 See the discussion in Gernet 2001, 65–86.

30 A recent discussion on *miasma*: Giordano 2014.

31 See the recent discussion in Carastro 2010.

against the power of oral words and rhetoric. Moreover, *katadesmoi* are able to show a different role for women in the realm of Attic law because, though we know that they were not entitled to appear in a trial and had to be represented by a *kyrios*, and therefore seldom appeared in the law court, women are nonetheless mentioned in many *katadesmoi*.³²

A first step, before the shift from hand to mouth, was the gradual transition from *how to swear* to *how to write* (and, in some cases, falsify) *an accusation*. A passage of Demosthenes *Against Pantaenetus* (§39–41) is very instructive on this point, because it allows us to observe a concurrent use of old and new procedures.

The defendant summons the prosecutor with a *proklesis* (a *pro-vocation* in the proper sense of the word) in order to have his slaves tortured³³ to give evidence. This particular procedure of summons was oral, and a *πρόκλησις* had to be publicly pronounced on the street, near the summoned person's home and in the presence of other persons.³⁴

οὐδὲν τοίνυν δίκαιον ἔχων οὐδὲ καθ' ἑν λέγειν ὑπὲρ ὧν ἐγκαλεῖ, ἀλλὰ καὶ ψευδῆ γεγραφώς εἰς τὸ ἔγκλημα καὶ περὶ ὧν ἀφῆκε δικάζόμενος, τοῦ ἐξελεθόντος μηνός, ὧ ἄνδρες Ἀθηναῖοι, ἐπειδὴ ἔμελλον εἰσιέναι τὴν δίκην, ἥδη τῶν δικαστηρίων ἐπικεκληρωμένων, προσελθὼν καὶ περιστήσας τοὺς μεθ' ἑαυτοῦ, τὸ ἐργαστήριον τῶν συνεστώτων, πράγμα ποιεῖ πάνδεινον: [40] ἀναγιγνώσκει μοι πρόκλησιν μακράν, ἀξιῶν, ὃν φησιν οἰκέτην ταῦτα συνειδέναί, βασανίζεσθαι ...

Having not a single just argument for any of his charges, and having made false statements in his written charge, and prosecuting for matters for which he had granted release, last month, men of Athens, when I was about to go into the trial, after the courts had already been allocated, he stepped forward, surrounding himself with his friends, his gang of supporters, and did an outrageous thing. He read me a long challenge, calling for the questioning of the slave who, he said, had knowledge of these matters ... (Transl. D. MacDowell)

³² See the texts quoted in Eidinow 2007, 184–187.

³³ Among *atechnoi pisteis* (cf Aristotle, *Rhetoric* 1. 15), torture (*basanos*) was somehow considered the most democratic. For those interested in historical anthropology it is one of the most stimulating topics of Greek law, at least for its continuities with ordeal. On torture as evidence, see Gernet 2000. On the debate on the effective use of *basanos* and *proklesis eis basanon* see Mirhady 2000, Thür 2005.

³⁴ On the procedure of *proklesis*, see Todd 1993, 125–126 and Gernet 2000, 68 (with further bibliography).

The summoned person eventually accepted, even while expressing serious doubts about the real efficacy of this kind of evidence,³⁵ and finally sealed the πρόκλησις in an *echinos*. When the trial starts, it is possible to observe a true interaction between the use of writing and modes of orality,³⁶ because in a very noisy moment (διὰ γὰρ τὸν θόρυβον τότε) there had been a sort of oral confirmation of what had previously been written and read aloud (ἀναγιγνώσκει μοι πρόκλησιν μακράν).³⁷

ἐπειδὴ δ' ἤκομεν πρὸς τὸν βασανιστὴν, ἀντὶ τοῦ τὴν πρόκλησιν ἀνοίξας δεῖξαι τὰ γεγραμμένα καὶ κατὰ ταῦτα πράττειν ὅ τι δόξαι (διὰ γὰρ τὸν θόρυβον τότε καὶ τὸ μέλλειν καλεῖσθαι τὴν δίκην τοιοῦτον· ἦν-προκαλοῦμαι σε ταυτί· δέχομαι φέρε δὴ τὸν δακτύλιον· λαβέ· τίς δ' ἐγγυητής; οὐτοσί οὐδὲν οὔτ' ἀντίγραφον οὔτ' ἄλλ' οὐδὲν ἐποισάμην τοιοῦτον) ἀντὶ δὲ τοῦ ταῦθ' οὕτως ὥσπερ λέγω πράττειν ἐτέραν ἦκεν ἔχων πρόκλησιν, ἀξιῶν αὐτὸς βασανίζειν τὸν ἄνθρωπον, καὶ ἐπιλαβόμενος εἴλκεν, καὶ ἐνέλειπεν οὐδὲν ἀσελγείας.

When we went to the questioner, instead of opening up the challenge, displaying the written terms, and proceeding to do in accordance with them whatever seemed right – because of the hubbub at the time and the imminent calling of the case, it went like this: ‘I issue this challenge to you’ ‘I accept it’ ‘Let’s have your ring’ ‘Take it’ ‘Who is the guarantor?’ ‘This man’. I didn’t make any copy or anything of that sort – instead of proceeding in the way I have mentioned, he came with another challenge, demanding to question the man himself, manhandled him, and subjected him to all kinds of bullying. (Transl. D. MacDowell)

As we can see, the new competence in writing an oral procedure goes together with skills and abilities in falsifying texts, as well as with an oral procedure used – so to speak – so that what has been written may operate properly. New competences must be seen within the frame of a complex and quite complicated relationship among judges, opponents, witnesses, bystanders, and speechwriter. It seems to be necessary, therefore, to get away from the duality that exists between Plutarch’s Lysias and his client. These kinds of documents focus our attention instead on the coexistence of ancient procedures, and the progressive shifting towards an emancipation of law, an emancipation that found in writing a very important support and motivation.

³⁵ Cf §41: ποῦ γὰρ ἐστὶ δίκαιον, ἐν οἰκέτου σώματι καὶ ψυχῇ. See also Thür 2005, 149–150.

³⁶ This is not the only example of allusion to written documents. Cf Demosthenes, *Against Stephanus I* 46; *Against Aphobos III* 31; *For Phormio* 20. These documents could be sealed in *echinoi* and transmitted to the trial at the lawcourt. In one case at least, as M. Faraguna has shown (Faraguna 2007, 97), there was also a *katadesmos* together with the other written texts.

³⁷ On the uses of *anagignosko* and *paragignosko* see Battezzato 2003, 8–12.

3.1 Old and new competences

The *exordia* of speeches are often a repository of concepts that rhetorical tradition has afterwards called *topoi*, for instance the declaration of having no previous private reason of enmity with the adversary or, above all, the declaration that one is totally inexpert in law. Logographers are not *advocati*,³⁸ and one of the most important differences between Greek and Roman law is the absence, at Athens, of *iusprudentes* along with the total lack of a written *iusprudentia*.³⁹

This point is beyond doubt and does not need to be examined or discussed any further.

There is, nevertheless, the matter of competence. The absence of a written jurisprudence does not mean the absence of a competence diffused among *politai*.⁴⁰ Each citizen had the opportunity to be present at trials (the *periestekotes* mentioned above) and was thus able to acquire his own competence, possibly developing knowledge, skills, and capacities in this specific field. Isaeus could affirm, for example, that an agreement had been made ἐναντίον μὲν τῶν δικαστῶν, πεντακοσίων ὄντων, ἐναντίον δὲ τῶν περιστηκῶτων (Isaeus, *On the Estate of Dicaeogenes* 20) and Lysias fiercely criticized his opponent because, allegedly, this latter had never in his life gone to the Areopagus and therefore did not know anything about the performance of a *diomosia*, the oath used to open a homicide case (Lysias, *Against Theomnestus I* 11).⁴¹

That is why the relationship with bystanders must be considered not unilateral but mutual, since there was an influence from the world of trials (with its procedures, arguments, and rituals) on those who were present (or were in charge as judges), as well as an influence from outside the tribunal in the form of solicitations, interruptions, and acclamations. There was a reciprocal process of legitimation, as the words of Isaeus cited above show very well.

Moreover, one must take into consideration the competences of groups such as some *gene* that are mentioned in the oratorical corpus and in some philosophical dialogues (such as Plato's *Euthyphro*).⁴² These groups are not directly involved in or strictly relevant to the ordinary development of the trial; at the same time, however, they can sometimes be pivotal in finding a solution to the case (or some aspects of the quarrel) between litigants.

³⁸ On this topic, see the discussion in Lavency 1964, 36–45, 96–113.

³⁹ Todd 1993, 49–54.

⁴⁰ On continuities of context between drama and law courts, see Mirhady 2004; Hall 2006.

⁴¹ For the possibility of a 'political background' to this allegation, see Todd 2007, 636.

⁴² See Hammond 1952.

A famous example can be found in Ps. Demosthenes' *Against Evergus and Mnesibulus*, where the *Exegetai* (the expounders of law)⁴³ give to the accuser, a trierarch whose former slave had been killed in his home, some extra-legal (I would say: pre-judicial) advice.

The trierarch turned to the *Exegetai* asking for practical – not theoretical – advice (ἵνα εἰδείην ὅ τι με χρῆ ποιεῖν περὶ τούτων), because he was not entitled to prosecute.⁴⁴ In a sort of 'technical' dialogue emerging from the orator's narration, the expounders ask what kind of advice the trierarch is seeking, i.e. whether religious or practical (ἤρροντό με πότερον ἐξηγήσονται μοι μόνον ἢ καὶ συμβουλεύσωσιν). The narration of this dialogue continues with the reply of the prosecutor, who says he wants to explore both sides of the question (ἀποκριναμένου δέ μου αὐτοῖς ἀμφοτέρα), and with the counter-reply of the *Exegetai* who distinguish between 'ritual' instruction and advice about what to do (ἡμεῖς τοίνυν σοι τὰ μὲν νόμιμα ἐξηγησόμεθα, τὰ δὲ σύμφορα παραίνεσομεν).

The instructions concerning the ritual (ἐπενεγκεῖν δόρυ ἐπὶ τῇ ἐκφορᾷ, καὶ προαγορεύειν ἐπὶ τῷ μνήματι)⁴⁵ are distinguished (πρῶτον μὲν ... δὲ, § 69) from the advice about how to operate in the field of law: since the woman killed was neither his wife nor his slave (she had been manumitted), if the accuser swears the *diomosia*, he is going to commit perjury, facing the risk of being considered an oath-breaker by his fellow-citizens (καὶ ἐὰν μὲν ἀποφύγη σε, ἐπιωρκηκέναι, ἐὰν δὲ ἔλῃς, φθονήσει).

The prosecutor must, therefore, perform rituals of purification (ὕπερ σεαυτοῦ καὶ τῆς οἰκίας ἀφοσιωσάμενος ὡς ῥᾶστα) and try to take revenge *in some other way* (ἄλλη δὲ εἴ πη βούλει, τιμωροῦ). It is worth stressing that this is not the core of the speech, and after the narration of this dialogue the orator proceeds with the rest of his argumentation. The orator, however, seems to be fully aware of the distinction between the kind of advice given by the *Exegetai* and what was transmitted by written laws. In fact, he distinguishes the instructions given by the *Exegetai* from the words he had read in the law of Draco.

⁴³ On the *Exegetai* see Valdés Guía 2001; Parker 2005, 99 ff.; Berti 2009, 107–111.

⁴⁴ For other aspects of this case, see Taddei 1997.

⁴⁵ The ritual is made up of acts and words which are prefigured in myth, cf Harpocration, *Lexicon of the Ten Orators* s.v. ἐπενεγκεῖν δόρυ.

3.2 Rituals and the trial

This kind of competence, orally transmitted within the *genos* and eventually written in the form of *exegetika* whose titles we can sometimes reconstruct,⁴⁶ were not confined to the *Exegetai*, and left traces also in the text of the orators. One may mention, for instance, the competences of the *kerykes* not only in proclaiming the time of the start, interruptions, and end of the trial, but also in pronouncing the prayers that preceded the trial, as a passage of Aeschines shows (ἐπειδὴν ὁ κῆρυξ τὰς πατρίους εὐχὰς εὔξηται).⁴⁷ The same passage is important also for a different ritual practice, made by another, still different, group, perhaps called the *Peristiarchoi*, who took a sacrificed pig around the place where assembly was going to be held.⁴⁸

The importance of rituals is, therefore, manifold and can be considered both from the perspective of the reception of rituals in the argumentation of orators,⁴⁹ and by considering the role played by rituals *during* the trial, as happens with oaths.

This is a much studied and debated topic, both for the role and efficacy of this kind of *atechnos pistis* (as it is defined, together with torture, by Aristotle in

46 *Exegetika* are attributed to some Attidographers (for instance Autocliides, Clidemus, Philochorus: see Jacoby 1949, 8–24, 54, 75–76; Dillery 2005).

47 Aeschines, *Against Timarchus* 23.

48 ἐπειδὴν τὸ καθάρσιον περιενεχθῆ και ὁ κῆρυξ τὰς πατρίους εὐχὰς εὔξηται, προχειροτονεῖν κελεύει τοὺς προέδρους περὶ ἱερῶν τῶν πατρίων και κῆρυξι και πρεσβείαις και ὀσίων, και μετὰ ταῦτα ἐπερωτᾷ ὁ κῆρυξ· ‘τίς ἀγορεύειν βούλεται τῶν ὑπὲρ πεντήκοντα ἔτη γεγονότων;’ ἐπειδὴν δὲ οὗτοι πάντες εἴπωσι, τότε ἤδη κελεύει λέγειν τῶν ἄλλων Ἀθηναίων τὸν βουλόμενον, οἷς ἔξεστιν. See the commentary of Fisher 2001 *ad loc.* Cf also Harpocration, *Lexicon of the Ten Orators* s.v. καθάρσιον.

49 An instance is the use of participation in a festival, rite, or sacrifice as an argument to attest that something is true or false. This is a very fruitful issue. The fact of having participated (or not) in a ritual is sometimes used by the orators to strengthen the argumentation. See, for instance, what happens in Isaeus, *On the Estate of Ciron* 15: the daughters and the grandson of Ciron, in order to get their share of the disputed inheritance, need to demonstrate that they are legitimate heirs of the deceased. Beside ordinary arguments (having lived in the same house, having received a dowry from her father), Ciron’s daughter uses arguments based on the participation in the same rituals shared by the grandfather with his daughter and grandsons (οἷα γὰρ εἰκὸς παίδων [ὑέων] <δντων> ἐξ ἑαυτοῦ θυγατρός, οὐδεπώποτε θυσίαν ἄνευ ἡμῶν οὐδεμίαν ἐποίησεν, ἀλλ’ εἴτε μικρὰ εἴτε μεγάλα θύοι, πανταχοῦ παρήμεν ἡμεῖς και συνεθύομεν. και οὐ μόνον εἰς τὰ τοιαῦτα παρεκαλούμεθα, ἀλλὰ και εἰς Διονύσια εἰς ἀγρὸν ἦγεν ἀεὶ ἡμᾶς, και μετ’ ἐκείνου τε ἔθεωροῦμεν ἐνθήμενοι παρ’ αὐτὸν και τὰς ἐορτὰς ἡγομεν παρ’ ἐκείνου πάσας· τῷ Δί τε θύων τῷ Κτησίῳ, περὶ ἣν μάλιστα ἐκείνος θυσίαν ἐσπούδαζε).

the *Rhetoric*)⁵⁰ and for the significance that can be detected behind each component of the ritual. Formalism is strongly respected, even if an oath contradicts another one previously sworn: it seems to be important not what is sworn, but how it is sworn, that is, whether procedure has been respected.

It can happen that an orator swears to the truthfulness of something he had previously denied through another oath, for instance the legitimacy of a possible heir, as is attested in Andocides' *On Mysteries* (§§ 126–127). In this oration, Callias had previously sworn that he was not the father of a child but, some years later, for reasons that are explained but are not relevant for us here, changed his mind and swore an opposite oath in front of his fellow phratry members:

‘Ο δ’ ἡρώτα τίνας εἶη τὸ παιδίον ἔλεγον ‘Καλλίου τοῦ Ἴππονίκου’. ‘Εγώ εἰμι οὗτος.’ ‘Καὶ ἔστι γε σὸν τὸ παιδίον.’ Λαβόμενος τοῦ βωμοῦ ὤμοσεν ἢ μὴν μὴ εἶναι <οἱ> υἱὸν ἄλλον μηδὲ γενέσθαι πώποτε, εἰ μὴ Ἴππονίκον ἐκ τῆς Γλαύκωνος θυγατρὸς ἢ ἐξώλη εἶναι καὶ αὐτὸν καὶ τὴν οἰκίαν, ὥσπερ ἔσται.

He asked whose child it was. ‘The child of Callias, son of Hipponicus’, they replied. ‘But I am he’. ‘Yes, and the child is yours’. Callias took hold of the altar and swore that the only son he had or had ever had was Hipponicus, and the mother was Glaucon’s daughter. If that was not the truth, he prayed that he and his house might perish from the earth – as they surely will. (Trans. by K. J. Maidment)

The procedure is guided by an official (‘Ο δ’ ἡρώτα τίνας εἶη τὸ παιδίον) and no contradiction is felt by anyone about the paradox of two contradictory oaths, the previous being the opposite of the latter. On the contrary, the officer asks his question and draws the practical, procedural, conclusion from what has been sworn at the moment (ἔλεγον ‘Καλλίου τοῦ Ἴππονίκου’. ‘Εγώ εἰμι οὗτος.’ ‘Καὶ ἔστι γε σὸν τὸ παιδίον’). The procedure followed is consistent with the performance of oaths in classical Athens: the swearer touches a sanctifying object (here the altar: Λαβόμενος τοῦ βωμοῦ),⁵¹ calls down a curse upon himself and his family (ἢ ἐξώλη εἶναι καὶ αὐτὸν καὶ τὴν οἰκίαν), and swears with effects that, sometimes, can be immediate on the matter at issue: in this case, for instance, Callias’ son is immediately admitted to the phratry (ἔστι γε σὸν τὸ παιδίον) and

⁵⁰ Aristotle, *Rhetoric* I 15 (1375a 24).

⁵¹ For the importance of the stone in oath taking, see Demosthenes, *Against Conon* 26, Aristoteles, *Constitution of the Athenians* 55.

any consequence that may arise in the event that the statement proves false is postponed into the future (ὥσπερ ἔσται, note the indicative).⁵²

There is a much quoted and discussed⁵³ passage of Demosthenes' *Against Aristocrates* in which ritual actions to be performed during a *diomosia* at the Areopagus are described in detail. This oath seems to be different from any other performed in the lawcourts, (οὐδὲ τὸν τυχόντα τιν' ὄρκον ... ἀλλ' ὃν οὐδεὶς ὄμνυσ' ὑπὲρ οὐδενὸς ἄλλου) not only for its importance,⁵⁴ but also because of the gestures enacted by the swearer, demonstrating that words can be distinguished by ritual actions.⁵⁵

Specific animals are chosen (κάπρου καὶ κριοῦ καὶ ταύρου) and only certain persons are entitled to sacrifice them (καὶ τούτων ἐσφαγμένων ὑφ' ὧν δεῖ). Moreover, this exceptional oath and oath-ritual must be performed on specific days (καὶ ἐν αἷς ἡμέραις καθήκει), with a specific timing, and assuming a specific posture. It is necessary to establish contact (στάς ἐπὶ τῶν τομιῶν) with the parts slaughtered in the same way as happens, for instance (though not only), in the passage of *Against Leocrates* quoted at the beginning of this paper, in which witnesses are forced to swear λαβόντας τὰ ἱερά (§20).⁵⁶

3.3 Selection, omission, inclusion

When speaking of the Attic orators, the most important 'submerged' elements are, certainly, all those speeches that we are not able to read, the responses to those speeches that we can read and analyse, and all the judicial performances that did not enter the canon of the Attic orators.

However, this is not the only aspect of submersion involved when dealing with the Attic orators. We can also go further and consider all the procedures that imply the competence of jurors, speakers, and bystanders, which at a certain moment also began to be written (and sometimes manipulated). There seems to be a wide sphere of competences, functions, and ritual actions that were not included in the final version of the speech delivered in the law court and which was sometimes rewritten afterwards. This sphere is crucial for the

⁵² On the lack of the possibility of appeal against an oath in Athenian procedure, see Gernet 2000, 122 ff.

⁵³ Carastro 2012.

⁵⁴ For further cases of hierarchy between oaths, cf Andocides, *On the Mysteries* 31, Lysias *Against Diogeiton* 13, Aeschines, *Against Timarchus* 111.

⁵⁵ On gestures as added rituals, see Faraone 2012.

⁵⁶ For oriental parallels to this practice see Faraone 1993; Giorgieri 2001; Faraone 2012.

understanding of the civilization of classical Athens, as seen through the lens of the judicial experience.

Interactions between these different kinds of competences contributed to the shaping of what was performed by accuser or defendant during the trial, and contributed also to the sedimentation within the lines of the text we read (in the form of selection, omission, or inclusion) of these speech acts, ritual actions, oaths, and citation of parts of laws. Besides rituals, and the way rituals are used or referred to in orations, we may also add the competences that were orally transmitted within specific *gene* and provided to citizens who sought advice on specific points.

There are many different elements submerged beneath the words of a speech delivered in the law court, but there are also many different ways of being submerged, and many corresponding strategies by the interpreter may allow them to emerge.

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