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Reply to D.C. Mirhady: Torture and Rhetoric in Athens

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REPLY TO D. C. MIRHADY: TORTURE AND RHETORIC IN ATHENS

THE strong point of D. Mirhady's work (hereafter 'M.') lies in his interpretation of the rhetorical handbooks (*technai*). I agree in general with Part III, though admitting my lack of specialist knowledge in this field. To a large extent Part III confirms my observations on procedural law published in 1977 (*Beweisführung*, quoted supra n. 4). I approve of the opinion that, despite the use of written rather than oral testimony, the formulas, by which the evidence was used, did not change (M. after n. 62, see my recent article in: *Die athenische Demokratie*, ed. W. Eder [Stuttgart 1995], p. 329 f.). M. states an appealing hypothesis, that the introduction of written testimony did not so much change the procedure as provide the cause for a new handbook on rhetoric to be written, which he suggests was the common precursor to Aristotle and Anaximenes. The analysis of arguments brought forward for the rejection of the *basanos*-challenge proves to be important for the discussion of this special topic. To examine the lines of argumentation from Antiphon, Isocrates, Isaios and the early Demosthenes until [Dem.] xlviii 8 (which has to be taken ironically, n. 75) cannot be the task of a jurist; here we rely on interdisciplinary cooperation. Moreover, I have to acknowledge M.'s criticism in n. 64: without good reason I tried to exclude *proklesis* from the *atechnoi pisteis*. In 1977 I equated the *atechnoi pisteis* with judicial evidence in the modern sense (*Bew.* 147 f.; despite reservations p. 10 n. 4 and p. 316). Now I am convinced that the *atechnoi pisteis* must be considered from the rhetorical rather than the judicial point of view and have to be interpreted merely as written documents, for the reading of which the clepsydra in court was stopped. Of course, I too added challenges to those '*Prozeßurkunden*' (p. 148). Nevertheless my considerations p. 132-48 are still to be understood as follows (which will prove important in this discussion): the *proklesis*-document itself had no probative force whatsoever and the orators knew this well: ἅπαντα γὰρ ὅσα παρέχονται εἰς τὸ δικαστήριον προκαλούμενοι ἀλλήλους οἱ ἀντίδικοι διὰ μαρτυρίας παρέχονται. '*For all pieces of evidence which the parties to a suit bring before court when they tender challenges to one another, they bring in by means of depositions.*' ([Dem.] *Steph.* 2, xlvi 4). Those witnesses only testify that one of the litigant parties wanted to have a certain statement proved and the other rejected this challenge. The argument of a rejected *proklesis* is one of the classical tools of forensic oratory and its practical use should not be underestimated. It is this practical use that M. stresses, comparing Aristotle's *Ath.Pol.* 53,2-3 to *Rhet.* 1375a24. The enumeration 'laws, challenges and testimonies (of witnesses)' in *Ath.Pol.* points to the practical application of evidential documents, whereas the categorization 'laws, witnesses, *basanoi* and oaths' in the *Rhet.* has to be seen from the argumentative point of view, (I believe the contracts cited in *Rhet.* 1375a24 to be part of the testimonies in *Ath.Pol.*). Undoubtedly the *proklesis*, especially to *basanos*, forms the basis of artistically elaborate forensic argumentation. Undoubtedly the orators do call this challenge and not only the *basanos 'elenchos'* (M. refers to Dem. *Aph.* 3 xxix 11 and *On.* 1 xxx 27). Still—in the strictly judicial sense—the piece of evidence is only the *basanos* correctly taken and confirmed to the court by witnesses.

Now we reach the main question that has been discussed for more than a century: is the testimony of a tortured slave, the *basanos*—which is often praised by the orators but apparently never used—to be considered a piece of evidence in Athenian procedural law or a means of settlement out of court, a trial by ordeal?

For what follows it might prove useful to repeat the principles of the *basanos*-procedure that are out of dispute. I refer to my resumé (*Bew.* p. 312-15) that has been summarized by M. Gagarin in his recent article (*CP* 91 [1996] 1-18). The procedure of the challenge to *basanos* was controlled by rules that apparently remained constant throughout the century of our evidence (*c.* 420-320). If a litigant wanted to use the testimony of servants, he first issued a challenge offering his own or requesting his opponent's slaves for interrogation; rarely slaves belonging to a third party were proposed (Ant. vi 23). The challenge would often give specific details about when and where the interrogation would occur and exactly what questions would be asked. The slave's testimony was limited to giving yes-or-no answers to the questions

formulated in the challenge which was regularly written down and observed by witnesses. The other party could accept or reject the challenge, or accept it with modifications, or make a counter-challenge involving different slaves or different conditions. When the two parties had reached agreement, the slave was normally interrogated in the owner's presence by the litigant who was not his owner; occasionally a third party, referred to as βασανιστής, was chosen to conduct the interrogation (I am grateful to Prof. Gagarin for letting me use his manuscript). Herein we find a primitive mechanism of control: in the expectation that the slave will testify in favour of his master, the opponent is granted the right to conduct the torture and decide on its duration. Poor slave: if he sticks with his master, the physical pain will increase; if he switches sides, his master might take revenge later on. This dilemma was well known to the ancient orators (combine Anaxim. *Rhet. Alex.* 16,1 and 2; *Bew.* p. 195 f., p. 288 f.). Gagarin recently criticized this mechanism of control (*CP* 91 [1996] at n. 51-52): according to Dem. *Pant.* xxxvii 40-42 and Isoc. *Trap.* xvii 15-17 the owner could interrupt the interrogation at any time and withdraw his slave. Since the slave's answer never could satisfy both parties, the whole procedure thus proved worthless. Nevertheless, Gagarin fails to notice that in the texts he cites, the *basanos*-procedure has not yet started. When the owner had handed over his slave for torture (*para-* or *ekdidonai*, *Bew.* p. 166), he was not allowed to withdraw him arbitrarily (*Bew.* p. 190): it is out of the question that the legal conception of a procedure unanimously esteemed the highest form of proof in court should be undermined by such a defect. Therefore I cannot agree with Gagarin's explanation that the *basanos* formed a legitimate piece of evidence that was never used because of the room for disagreement on the procedure out of court. We have no evidence for a *basanos*-procedure having begun correctly that was sabotaged by one of the parties.

Do we now have to return to Headlam's thesis of the *basanos* being a trial by ordeal out of court rather than a piece of evidence? This thesis seemed to explain why there is no testimony delivered by a slave in the forensic speeches—and M. stresses exactly that point. In *Bew.* p. 205-14 (§13) I gathered all the texts opposing Headlam's theory that suggest that *basanos* was considered a piece of evidence. In Part II M. tries to disprove the conclusions I draw from these 'direct statements made by the orators' passing over the result of §14 (*Bew.* p. 214-32). Herein I discuss six texts, in which we find an expressively drawn up *basanos*-challenge regulating the way by which the slave's testimony could terminate litigation. This was never done by the act of interrogation or by arbitration but in an indirect way. A *basanos* comprising the intention of settling a dispute enacted a discharge (*aphesis*) or an agreement (*homologia*), whereas a simple *basanos* was used as a piece of evidence in court. (Todd [n. 4] p. 35 stated recently that a *basanos*, correctly completed, had 'compelling force' but in my opinion the Athenian *dikasterion*, which took its votes secretely, could not be bound by any evidence, see *Bew.* p. 151.) A party which had lost such a decisive *basanos*, would rate its chances poor in the future lawsuit—and would try to avoid it. The litigating parties would have a similar view of their chances regarding a *basanos* without the special clause (*Bew.* p. 232). This—hypothetically assumed—conduct of the litigants has to be clearly distinguished from the procedural consequences of the *basanos*.

Let us now consider M.'s arguments against my conclusions in *Bew.* §13. In a first group of nine texts the speakers want to persuade the dicasts of the fact that—by refusing the *basanos* - the opponent tries to suppress definite knowledge. Whether—in this connection—only the *basanos* or rather already the challenge are called *elenchos* does not matter from their point of view. The speakers—mentioning that the *basanos* could have released (ἀπηλλάχθαι) the opponent—describe the actual situation and not the legal consequences (for [Dem.] *Eu.* xlvii 5,7 and 9 see *Bew.* p. 222 f., p. 252-55). In Lys. *Tr.* iv 11 I would like to stress my conviction that τούτοις refers to the Areopagites. After the subjects bound to be confirmed by *basanos* were enumerated, the defendant addresses his opponents directly—consequently the judges are referred to in the third person. In the same way in Ant. *Her.* v 47 τουτουσί relates to the dicasts.

The second group of texts calling the *basanos*—or the challenge—*elenchos* for witnesses does not lead any further. Regarding their situation the speakers have to attach the same importance to

a refused challenge as to a successful *basanos*. The texts M. has cited up to now often use 'good knowledge' (εὖ εἰδέναι) as an argument, e.g. Ant. *Stepmother* i 7. There we find 'the good knowledge' quoted from the oath of *diomosia* sworn by the defendant and her son. The same 'εἰδέναι' is used in the wording of testimony and for the regulation of the subject in the *basanos* (*Bew.* p. 130 f.). The defending step-brother's good knowledge in Ant. *Stepmother* i 7 relates to the act of *apologein* in a lawsuit that was—after an unsuccesssful *basanos*—*de lege* still possible for the plaintiff, although *de facto* there was no chance for him to win (ἀπήλλακτο, *Bew.* p. 222, 304.).

I do admit that it is often possible to explain the speaker's arguments based on the rejection of a challenge, as though it would have been possible to settle the dispute by the—now refused—*basanos*, without going to court. This exaggeration is due to the special situation. Dem. *Conon* liv 27-29, the last text of the third group (n. 54), is the best proof for the fact that according to the laws of procedure the *basanos* should be presented to the *dikasterion* together with all the other written documents. It was not a challenge to be worked out in an long-lasting process that might have delayed the sealing of the evidence jars. The *proklesis* was already drawn up (liv 29-31), and the names of the slaves had been written down (γράψαντες). Only the result of the torture, the *basanos*, was not yet in the *echinos*. As an exception to the rule, in this speech a speaker fought against an expected argument based on a challenge rejected by himself (liv 27, *Bew.* p. 252, 262). Although he did not dare to doubt the general probative force of the *basanos*, he constructed his arguments using the formalism of Athenian procedural law: the *basanos* does belong in the *echinos*!

Part I of M.'s article starts with a quotation from Pollux viii 62 (n. 7) that is of doubtful value. Lexicographers tend to generalize; of course challenges to an oath and to *basanos* with the intention of settling a dispute out of court existed—but also to simple *basanos*. I do not see how Pollux (or M.) imagines out of court termination of a dispute by means of *marturia* (testimony in court). Does he think of challenge to an oath sworn by the witness? This source is worthless because of its vagueness.

The great importance of the challenge—justly pointed out by M.—can be understood easily by correctly classifiying the *basanos* within procedural law, rather than by using Headlam's simplifying theory. Having reached agreement, both litigant parties co-operated in the *basanos*-procedure, so that the result—the testimony delivered by a slave—was theoretically of very high reputation. The *crux* is the agreement. Only a litigant confident in his advantage will enter into a *basanos* and in this case the opponent will try to avoid it. Without further exposition, I would like to presume that the *basanos* could only work in a system where the judicial magistrates had the possibility to force one litigant to enter into an action proposed by the opponent. If these conditions are assumed, *basanos* as well as a terminating oath can be called an ordeal (supposed in *Bew.* p. 307). In this sense, and restricted to the archaic period, but not 'to undergo fire' (n. 26) I take Headlam's observations for an important contribution. Considering democratic Athens there cannot have been coercion to the *basanos*. The testimony of a slave is a piece of evidence like many others. Left to the litigants, the elaborate bipartite procedure formed the legal basis for the risky game with the 'unacceptable challenge'. Still this 'game' often enough meant a fight for life.

I believe that the esteem for the *basanos* comes from an earlier period. The procedure is simple enough to appeal to every Athenian even without seeing it performed. Rejecting a challenge with unfavourable preconditions was natural. But why do we never read that a challenge that was accepted as fair by both litigants led to a *basanos*-procedure? The answer might be easy: masters and servants lived in different worlds. It was unworthy for an Athenian citizen to rely on the answer of a slave in an important matter. The epilogue to Lys. *Tr.* iv shows this mentality, although the passage does not refer directly to the *basanos* mentioned before (iv 19): ἀγανακτῶ δ', ὦ βουλή, εἰ διὰ πόρνην καὶ δούλην ἄνθρωπον περὶ τῶν μεγίστων εἰς κίνδυνον καθέστηκα, ... '*I am vexed, gentlemen, at finding myself in danger of losing what I value most on account of a harlot and a slave*'.

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