



GERHARD THÜR OPERA OMNIA

http://epub.oeaw.ac.at/gerhard-thuer

Nr. 282c (1 Lexikonartikel / 1 encyclopedia article, 2009)

Torture: Ancient Athens (478–482)

The Oxford International Encyclopedia of Legal History, hg. v. Stanley N. Katz, V (2009)

© Oxford University Press (Oxford) mit freundlicher Genehmigung

gerhard.thuer@oeaw.ac.at
http://www.oeaw.ac.at/antike/index.php?id=292

Dieses Dokument darf ausschließlich für wissenschaftliche Zwecke genutzt werden (Lizenz CC BY-NC-ND), gewerbliche Nutzung wird urheberrechtlich verfolgt.

This document is for scientific use only (license CC BY-NC-ND), commercial use of copyrighted material will be prosecuted.

TORTURE. [This entry contains four subentries, on torture in ancient Athens, in Chinese law, in English common law, and in Islamic law.]

Ancient Athens

The Greek word basanos, a Semitic loan-word, means "interrogation under torture." In its fundamental sense, it designated a touchstone, a hard black pebble against which gold was rubbed in order to test the metal's fineness. Besides the legally relevant meaning "interrogation under torture," the verb basanizein also (nontechnically) meant, on the one hand, the simple torment of a human being and, on the other hand, all types of scrutiny by purely moral means of coercion, such as the oath. Unlike the processes that took place under common and canon law throughout the early modern period, in Athens at the time of the orators (around 420–320 B.C.E.), the goal of the

interrogation under torture was not to extract a confession from the defendant, but rather to uncover participation in a political conspiracy or to bring forward evidence in a legal proceeding, or to conclude a conflict outside of court. With this in mind, the following first describes interrogation by government bodies and then considers interrogation by private individuals. This latter could be used only for slaves. We must again distinguish here between a master interrogating his own slaves in order to learn something from them in a private capacity and cases where an opposing party also participates in the interrogation. It was common for an opponent in a lawsuit to levy a formal challenge (proklēsis), in which the exact content of the interrogation would be set down in writing. This proklēsis for basanos offers interesting insights into the overall system of litigation strategies and into evidence before the Athenian courts.

Interrogation by Government Bodies. To the modern understanding, one would expect that government bodies would intervene in such drastic proceedings as interrogation under torture. Of the sources we have from Athens, however, far more are concerned with interrogation carried out by private individuals. Torture did not belong, then, to the ordinary political life of Athens. It was only used in cases of high treason.

The torture of free individuals. Legally, Athenian citizens were protected from interrogation under torture by a law passed in the archonship of Skamandrios (near the end of the sixth century B.C.E.). The only source for this is Andocides, who alleges that in 415 B.C.E. some sought to overturn this law for two of the suspects in the scandalous mutilation of the hermai. It was hoped that they would give up the accomplices with whom they had, in the night, mutilated these stone monuments to Hermes.

Lysias shows that citizens were still protected in 404 B.C.E. Here, the Athenian authorities were expressly forbidden to interrogate a citizen under torture, even in order to uncover a conspiracy. In the fourth century, however, a loophole was found. One could strike those who were to be interrogated from the list of citizens (Demosthenes; Deinarchus), or move, when a defendant had been sentenced to death, to submit him to interrogation under torture before his execution (Demosthenes; Plutarch, *Phokion*); with the death sentence, the right to citizenship had been forfeited.

Free noncitizens were tortured primarily in political proceedings concerning treason, in order to unmask their accomplices and the masterminds behind them. The interrogation would be carried out either during the preliminary investigation or before the execution of the party found guilty. In all cases, this would be decided by the assembly alone, or jointly with the council, by a decree authorizing the authorities to act against the accused. A state official, however, was never allowed to decide on his own to submit a person to torture. For this reason, it is unlikely that, even in a trial for murder, a free person would be interrogated under torture. Murder was prosecuted by the nearest relatives of the victim through a private suit (dikē). Only where there was a political element and it was in the public interest did the authorities intervene, maybe after having been empowered to use torture.

Little may be gathered from the sources concerning the procedure by which governmental bodies carried out the interrogation under torture. An investigative commissioner appointed by the council led the interrogation in front of the assembled council, while a public slave carried out the torture itself. The subject would not, however, be examined, but was instead presented with a list of the names of suspects, whom he had then either to exonerate or to condemn. His answer could be only "yes" or "no." It is questionable whether such testimony had much worth in court; jurors were certainly not bound by it. Rather, this was about gaining evidence for the authorities, with which to proceed against other conspirators or spies, and to prepare the resulting prosecutions. For aesthetic reasons, the forensic speeches almost never offered precise pictures of the torture itself. Sometimes, the wheel that was used to contort limbs would be mentioned, and once the rack was (Thür, Beweisführung). The whip was the usual instrument of torture for slaves.

The torture of slaves. Just as with noncitizens, officials also took hold of slaves in cases of treason, in order to discover accomplices. In practice, there was no real difference between the two groups of informants. Of course, a slave could not be interrogated under torture without the agreement of his owner. But in exceptional cases his delivery to justice could be mandated by the assembly (Andocides). Any private citizen who was interested in the investigation also could buy the slave from his master in order to interrogate him.

Interrogation of Slaves by Their Owners. Of greater legal interest is the interrogation of slaves by private individuals. Under his rights as a master, an owner was allowed to extract information from his slaves through the application of pain. Such "one-sided" testimony, collected only by the master, was without value in legal proceedings. Nonetheless, the master could—like the magistrate, as noted earlier-use the information gleaned through torture to justify further legal proceedings. Above all, slaves responsible for the management of property were threatened by this kind of interrogation, as may be seen in Demosthenes' speech against Olympiodorus. The beating of slaves by their masters was a popular motif in Attic New Comedy; very frequently, this had to do with the withholding of information (Thür, "Recht").

Challenges to Slaves Using Proklesis. A unique feature of Athenian legal procedure was the use of testimony gathered from slaves under torture. Since slaves-except perhaps in commercial cases—did not have the right to appear before the court as witnesses, testimony collected under torture was the only way to use their knowledge in a case. Testimony (one-sided) collected from the slave by the owner himself was irrelevant. Only an objective process counted. For such a process, however, neither the court nor the authorities were responsible, but rather the two parties to the proceedings, in a "two-sided" collaboration. Anyone who wanted to call on the knowledge of a slave in a lawsuit had to deliver to his opponent a formal challenge (proklēsis) in which he requested that a slave (or several, men or women) be subjected to interrogation under torture (basanos) in a private process, separate from the legal proceedings. In twenty-three forensic speeches, forty-two such challenges appear (Thür, Beweisführung). Oddly enough, as a general rule, the opponent declined this challenge. In any case, testimony taken from a slave through torture in a two-sided process is not used in fact is not even mentioned-in any of the surviving speeches. This has led to two opposed explanations of the process. Either the proklesis was not really intended to result in carrying out the basanos-rather, was calculated to provoke the opposing party to decline the challenge and then appear in court with unsatisfactory explanations (Thür); or, testimony gathered through torture was never intended to serve as evidence in legal proceedings, but was rather—like a trial by ordeal—intended to settle the entire suit out of court (Mirhady, with older literature sharing this view). With all this in mind, the following will treat of the proklēsis itself, the basanos process, its principles and purpose, and the arguments resulting from a declined challenge.

The proklēsis. The Greeks used proklēsis (cognate with the verb prokaleisthai, to call forth) to denote any kind of request or invitation. Between two parties to a suit, such challenges took well-defined forms and occurred on specific kinds of occasions. The proklēsis would be delivered orally, before witnesses, directly to the opposing party, and would usually be read aloud from a prepared script. If the suit went to court, that script (which would itself also be called a proklēsis) would be used as a court document; the witnesses who had been present at its delivery would testify before the court that this challenge had been delivered to the opponent and would describe that party's reaction: this was most often a refusal. Since trials in Athens were restricted to a single, short session, the proklesis served to elicit from the opponent an unambiguous reaction or position prior to the hearing itself. The interrogation of slaves under torture also generally took place outside the period of the trial. If a litigant wished to refer to a slave's testimony, he was thus obliged to ask the opponent to join in carrying out the interrogation outside of court.

The *proklēsis* requesting a *basanos* followed a standard format, in which one party declared its readiness either to

deliver or to accept slaves who would be suitable informants. The most important point in the formula was the precise wording of the question that was to be posed to the slave while he was being tortured. Typically, this included "knowledge" that the slave—in the opinion of the requester—was presumed to have. So, the speaker in Antiphon's first speech reports, "I was ready to subject to basanos those slaves who knew that this woman . . . had already before made an attempt on my father's life with poison." Sometimes it would also be explicitly stated that the outcome of basanos should decide the entire suit.

By agreeing to a proklesis, a litigant accepted the conditions for the interrogation formulated by his opponentabove all, the wording of the question. Remarkably, as far as we know from the forensic speeches, only one proklesis to basanos was accepted (Demosthenes), and even this did not produce actual testimony from a slave, because the parties clashed on the procedure for the torture itself. But the document recording the declined challenge would be read aloud in court during the trial, and affirmed by witnesses. And one may indeed describe this document as an atechnos pistis or "nonartistic proof" (a court document) in the terminology of rhetorical handbooks such as Aristotle's Rhetoric, but not as legally valid evidence for the matter proposed as the theme for the interrogation (as Mirhady wrongly argues). The witnesses affirmed only the fact that a proklesis with the wording described was issued, but not that its content was true.

The basanos procedure. Although nowhere in the sources are they expressly enumerated, the principles of a proper legal challenge may be precisely deduced from the many different situations described. Already in the formula for a proklēsis two elements are evident: First, regardless of who issued the challenge, the slave had to be "released" by his master to the other party. As a rule, whichever party did not own the slave was personally responsible for administering pain (whippings); the public executioner was seldom called in by private individuals. Second, the party (the basanistes) doling out the lashes was not allowed to examine the slave, but was instead tied tightly to the issue formulated in the proklesis, which the slave "clearly knew" to be true or false. During the torture, the slave could only affirm or refute this one sentence in its entirety.

In combining these two elements there was a certain "security mechanism," which inhered in this private, out-of-court proceeding. The master could influence his slaves both before and after the torture through promises, threats, or beatings. Because of this, one may assume that slaves typically answered the question posed them as their masters desired. The master's opponent had, then, the opportunity to break the slave of this tendency through the application of pain—a point also acknowledged in the rhetorical handbooks (Anaximenes). Typically, therefore,

both parties had the same chance of producing testimony favorable to them. From the perspective of the Athenians. the democratic principle of equal opportunity was the best guarantee of truth. Viewed realistically, this principle can only be effective when both parties trust in it. This, however-according to our sources-never actually happened.

The purpose of basanos. This last conclusion leads straight to the question of for what purpose the litigants did agree (through the proklesis) to the torture of slaves. Mirhady picks up J. W. Headlam's old theory, that every interrogation under torture automatically settled the lawsuit out of court. For this reason, one need not wonder at the fact that the testimony of slaves is never introduced as evidence in the forensic speeches; since such testimony would have ended the suit, it would no longer come to trial. Against this explanation stands the fact that not every case in which a proklesis to basanos occurs could be settled by a private accord. Often, for the accused, the stakes were exile or death; a court's acquittal or conviction could not be replaced by the outcome of a private process. Furthermore, this theory can only explain why no slave testimony used in a trial has been preserved, not the fact that we have no report of a lawsuit being settled in this manner. Thus, the production of evidence must after all be seen as the purpose of the proklesis; further consequences of a basanos would have to have been expressly agreed upon.

But even when we discern an evidentiary purpose for basanos, we need an explanation of why this process never actually resulted in torture. Gagarin sees the reason for this in a flawed concept of the entire process: because the master could at any time withdraw his slave from the torture, he argues, this never resulted in testimony that was useful for the trial. As long as the slave answered the question according to his master's wishes, the opponent continued to torture him; if the slave threatened to change sides, the master would withdraw him. There is only a single case (reported by Demosthenes) that may be interpreted in this manner without danger: there, however, the slave was never actually turned over, and thus never taken back. Certainly, the sort of withdrawal for which Gagarin argues was possible at any point. But by so doing, the master made himself even more vulnerable to the argument that he had thereby admitted the truth of the assertion that was being tested than had he simply declined the proklēsis. However unsatisfying the interrogation under torture may be from a contemporary standpoint, the process of basanos that was recognized in Athens cannot be characterized as a "flawed concept."

It was surely also (as far as we know) not humanitarian concerns that prevented the Athenians from delivering their slaves up to a private basanos. What did the physical integrity of a slave matter when set against the death sentence that sometimes threatened the master? The reason a basanos process never actually took place lies in all probability in the fact that despite the theoretically equal chance it offered, an element of risk always remained, in the face of which both parties would avoid resorting to this primitive method of determining truth, never criticised by the Athenians; ultimately, neither party could foresee with absolute certainty the outcome of the interrogation. Both parties knew, however, that the result of a mutually agreed upon process would be difficult to attack through argument. In contrast, a declined proklēsis offered a nearly ideal, risk-free basis for argument. This should explain the considerable discrepancy between the frequency with which a challenge was proposed and the total absence from existing records of the use of slave testimony as evidence.

The declined proklësis. The Attic orators developed into a fine art the legal tactic of on the one hand avoiding the risk that slaves would actually be interrogated, and on the other hand successfully arguing that the opponent had deliberately avoided this objective process. They readily used a series of commonplaces, whereby the opponent, by declining the basanos proposed, "admitted" the point to be tested in the interrogation, and thus "condemned himself." Careful study of the arguments and proceedings in the pertinent speeches strengthens the suspicion that the aim of the many proklēseis was less to subject slaves to torture than to have the opponent decline and thereby expose himself to the charge of admitting the point. There were certain forms of proklesis that-naturally, only after a second look—were unacceptable for the opponent. For instance, one could cunningly fashion the theme to include both truth and falsehood, so that the slave being tortured could not in good conscience say either "yes" or "no." One could place unacceptable conditions on the execution of basanos, or choose a time and date that would be inconvenient for the opponent; one could also propose the torture of physically weak slaves, or of those particularly close to one's opponent. It is not easy always to give compelling proof of such forms of unacceptable challenge, but one can nonetheless not dismiss even the search for such simply as "ideological bias." In any case, the absence of slave testimony in the forensic speeches requires an explanation; about this, and about whether and to what degree private basanos still existed in the legal life of Athens at the time of the orators, the sources tell us nothing. Even the allusions in New Comedy are not compelling evidence that torture frequently took place in private suits (Thür, "Recht"). The signs pointing to interrogations by owners and by governmental bodies are however, another story.

[See also Procedure, subentry on Athens: An Overview.]

BIBLIOGRAPHY

Finley, Moses I. Ancient Slavery and Modern Ideology. New York: Viking, 1980.

482 TORTURE: Ancient Athens

- Gagarin, Michael. "The Torture of Slaves in Athenian Law." Classical Philology 91 (1996): 1-18.
- Harrison, A. R. W. *The Law of Athens*. Vol. 2, *Procedure*. Oxford, U.K.: Clarendon Press, 1971.
- Kassel, Rudolf, and Colin Austin, eds. Poetae Comici Graeci. Vol. 8, Adespota. Berlin: Walter de Gruyter, 1995.
- Mirhady, David C. "Torture and Rhetoric in Athens." Journal of Hellenic Studies 116 (1996): 119-131.
- Thür, Gerhard. Beweisführung vor den Schwurgerichtshöfen Athens: Die Proklesis zur Basanos. Vienna: Akademie der Wissenschaften, 1977
- Thür, Gerhard. "Recht im hellenistischen Athen." In Symposion 1997, edited by Eva Cantarella and Gerhard Thür, pp. 141–164. Cologne, Germany: Böhlau, 2001.
- Thür, Gerhard. "Reply to D. C. Mirhady, 'Torture and Rhetoric in Athens'." Journal of Hellenic Studies 116 (1996): 132-134.

 $\label{eq:Gerhard Thur} Gerhard\ Thur$ Translated from the German by Ira Allen