

СТАТЬИ / ARTICLES

THE THEORY AND PRACTICE OF TORTURE
IN ANCIENT ATHENIAN COURTS

VASILEIOS ADAMIDIS

Nottingham Trent University, UK

Vasileios.adamidis@ntu.ac.uk

ABSTRACT. There has been much debate in scholarship over the actual existence of torture (*basanos*) of innocent slaves for evidentiary purposes in the courts of classical Athens in the age of the orators. In the absence of direct evidence in the forensic speeches, scholars have pointed to a putative inconsistency between theory and practice regarding this institution. On the one hand, belief in the reliability of torture is evident in the works of the Attic orators, as well as challenges to evidentiary torture. Furthermore, rhetorical theory (in Aristotle's *Rhetoric* and Anaximenes' *Rhetorica ad Alexandrum*) supposedly provides guidance to orators as if recourse to *basanos* was a real possibility and classifies torture under the category of artless or supplementary proofs. On the other hand, not even one of such challenges has evidently been accepted and actually carried out and the sources are silent as to the actuality of evidentiary torture. This study closely examines the evidence of the primary sources and seeks to provide a solution to the aforementioned putative inconsistency. It demonstrates that it is far from certain that Aristotle and Anaximenes referred to the particular type of evidentiary *basanos*, since closer analysis shows that the shape of this institution is complex and much nuanced. Moreover, the presence in the courts of testimonies elicited by other than evidentiary types of torture, points to the root of the Athenian belief in the reliability of torture. Consequently, it is plausible to suggest that by the time of the Attic orators, evidentiary *basanos* had become obsolete and its remnant was primarily of rhetorical value.

KEYWORDS: _____.

Introduction

The institution of torture is inherently controversial; its morality is extremely dubious and its expediency is, at least, questionable. A particular form of torture that seems completely indefensible from a modern perspective is the torture of

innocent slaves for evidentiary purposes in Athenian law. This has been characterised as ‘wanton and purposeless barbarity’,¹ yet has been explained as a way classical Athenians citizens reinforced their dominant political status and ‘confirm[ed] their own social hierarchy and cohesion’.² The barbarity and putative irrationality of evidentiary *basanos*, in addition to the lack of evidence proving the actuality of this practice, make its existence, at least in the period of the Attic orators, doubtful.

The paper accepts the scholarly consensus³ that challenges to evidentiary torture were primarily ploys that were expected (and perhaps even designed) to be rejected.⁴ Yet, some issues remain debatable, such as the actuality of the practice of evidentiary torture in the age of the Attic orators, the reason for its persistence as a rhetorical tactic, and its (supposed) classification in Aristotle’s day among the artless or supplementary proofs in the rhetorical handbooks. The aim of this paper is to address these questions and to offer an outline of (challenges to) *basanos* in theory and practice in the age of the Attic orators.

Definition of *basanos*

The word *basanos* was originally used to signify the touchstone in metallurgy, the means for testing the genuineness of gold. Metaphorically, the word meant the forceful interrogation of persons, the means for testing and confirming the truth of a fact or a statement. LSJ identifies two particularly relevant meanings to our enquiry: ‘examine closely, cross-question’ and ‘question by applying torture, be put to the torture, rack’. The word could have the meaning of ‘put to the test, prove; investigate scientifically’. Additionally, the term could be used as a synonym for ‘proof’. Thus, when Xenophon says that ‘τοῦ δὲ πιστοὶ εἶναι ἐν τῇ φθορᾷ τῶν δεσποτῶν μάλιστα βάσανον ἐδίδοσαν’⁵ or Hyperides maintains that ‘ὅς γε τοῦ τρόπου δις ἤδη ἐν ὑμῖν βάσανον δέδωκεν’⁶ they both use the word as ‘proof’.

In Athenian courts, *basanos* mainly referred to the forceful interrogation of persons or to confessions and statements under torture. *Basanos* can be classified under the following types: evidentiary (which is the main focus of this enquiry), judicial and penal or punitive torture.⁷ Depending on the type, persons of differ-

¹ MacDowell 1978, 246. More similar remarks can be found in Gagarin 1996, 1 with n. 3.

² Mirhady 2000, 71.

³ See Gagarin 1996, 7 n. 34.

⁴ See Thür 1977, 233-61; cf. Gagarin 1996, 10-12.

⁵ *Cyropaedia* 7.5.64: ‘of their fidelity they gave the best proof upon the fall of their masters’.

⁶ Hyp. 2 (*Against Philipides*) 11: ‘he has twice already given proof of his character to you’.

⁷ Gagarin 1996, 2-3.

ent status could be subject to torture – even free men in, for example, investigations for treason. *Basanos* as ‘evidentiary torture’ was aiming at finding the truth in advance of a trial. It refers to the torture of an innocent slave following a formal challenge (*proklesis*), whose statement could not otherwise have been introduced in court and whose testimony was putatively illuminating of a more or less fundamental disputed issue. This type may be distinguished from penal torture whose aim was to punish a perpetrator after his condemnation. Evidentiary torture can also be distinguished from judicial torture, a one-sided procedure, whereby suspects or material witnesses are tortured by the victim or a *basanistes*, usually in criminal investigations, in order to confess.

The actuality of evidentiary *basanos*

The actual practice of evidentiary *basanos* in the age of the orators is problematic. In particular, there is putative inconsistency between theory and practice. In ancient rhetorical theory *basanos* is treated as a real possibility and is classified among the *atechnoi* (artless) or *epithetoi* (supplementary) *pisteis* – but do the rhetorical handbooks refer specifically to evidentiary *basanos* following a formal challenge? If yes, such treatment would square with the belief (suggested in the forensic speeches) in the reliability of torture as a way of extracting truthful evidence.⁸ As a result, both its reference in the handbooks and the putative belief in its reliability as expressed in the rhetoric of litigants would advocate the actual existence of *basanos* during this period – though, again, was it the actuality of evidentiary *basanos* which gave rise to this belief? In practice, it is unclear whether the Athenians ever witnessed instances of forensic evidentiary torture. Sources are silent on this matter. Direct evidence proving that statements of tortured innocent slaves entered the courtroom is entirely absent. Probably then, either evidentiary *basanos* was non-existent in the age of the orators or it was a means for automatically settling a private case (*dike*) out of court.

In addition to *basanos* per se, the challenge (*proklesis*) to evidentiary torture in the forensic speeches, unlike in the rhetorical manuals, is also mentioned as a form of proof (*pistis*).⁹ In principle, a litigant in a private suit (*dike*), in order to support

⁸ Mirhady 2000 discussed the rationale for torture in ancient Athens and offers a convincing argument as to why the Athenians, in certain cases, accepted the reliability and expediency of *basanos*.

⁹ Lys. 4.18: ‘ὑπολόγω ταύτας τὰς προκλήσεις ποιείσθαι. καὶ μὴ ζητεῖτε τούτων ἔτι μείζους πίστεις’. This could be seen as corroborating the account of the *Athenaion Politeia* 53.2-3 which refers to the challenges as evidence to be enclosed in the a sealed box, *echinos* (ἐμβαλόντες τὰς μαρτυρίας καὶ τὰς προκλήσεις καὶ τοὺς νόμους εἰς ἐχίνους) in advance of private trials.

his narrative and prove a disputed point, could issue a challenge to the other party offering his own (or a third party's) slaves or requesting his opponent's for interrogation. This challenge had to take place during the arbitration stage and, if rejected, it was possibly deposited in a sealed box, the *echinos*, to be introduced as evidence in the trial.¹⁰ In non-arbitrational cases, it is unclear whether there was a time-limit for the tendering of such a challenge or whether these were allowed even during the hearing.¹¹ The aforementioned is circumstantial evidence supposedly indicating the actuality of evidentiary torture in Athenian courts. However, closer examination of the sources might suggest otherwise.

The shape of evidentiary *basanos*

In the court speeches, the recurrent reference to challenges to torture supports the view that recourse to evidentiary *basanos* was a real possibility.¹² This has been the main question for scholars who try to explain the absence of concrete evidence in the forensic speeches. Back in 1893, Headlam suggested that an actual *basanos* would act as a kind of ordeal and automatically settle the case out of court in advance of the trial.¹³ The outcome of a *basanos* was not introduced in court as a piece of evidence, this being the main reason for the lack of relevant references in the forensic speeches. This view, which had received little support in the past, was revived by Mirhady in recent years,¹⁴ somewhat advanced and reshaped in order to concentrate more on the challenge itself and its procedural implications.

Since evidentiary torture refers to private, arbitrational disputes, where the matter was left to the discretion and the willingness of litigants, I would consider more probable that the parties were allowed the flexibility to decide the conse-

¹⁰ *Ath. Pol.* 53; Harrison 1971, 149 and 153.

¹¹ Aeschin. 2.126; cf. Dem. 47.17 (*dike aikeias*); Dem. 45.16 (*dike pseudomarturion*). I do not find completely implausible what Aeschines requests, taking into account that he particularly refers to the practicality of this option in terms of time-management and feasibility. It is interesting to imagine how this could work in practice by reference to Achilles Tatius' *Leucippe and Clitophon* Books 7 and 8 where challenges and counter-challenges to *basanos* take place during the trial.

¹² Mirhady 2000 discussed the rationale for torture in ancient Athens and offers a convincing argument as to why the Athenians, in certain cases, accepted the reliability and expediency of *basanos*.

¹³ Gagarin 2007, 219-23 proves that such trials by ordeal are not a characteristic of early Greek law.

¹⁴ Mirhady 1996.

quence of *basanos* to their case.¹⁵ In the absence of conclusive evidence suggesting that the outcome was automatic or predetermined by law, litigants (the challenger or the counter-challenger) remained free either to propose a termination of the proceedings or, in the light of this new evidence, to leave the case open for the arbitrator and the court to decide.¹⁶ Certainly, this approach could overcome the implausibility of the automatic settlement in cases where the challenge referred to immaterial or peripheral questions and to facts which were not (or should not be) decisive of the legal case.

Headlam's thesis is discounted by other scholars. Thür, in the most seminal study on *basanos*,¹⁷ maintains that litigants viewed this institution as primarily of rhetorical value and, in order to make the most of it, designed the challenge in a way to be rejected by the opponent. In the absence of coercion by judicial magistrates who could force a hesitant litigant to accept the challenge,¹⁸ the main purpose of a *proklesis eis basanon* is the 'contrived rejection' which would offer the challenger the rhetorical advantage over the rejecter to be exploited in court. Thür suggests that even if an evidentiary torture was carried out, this would not settle the case automatically.¹⁹ Gagarin, generally being in agreement with this thesis, discusses other possible functions of this institution in the context of the rhetorically-oriented Athenian system of justice. As he says, "if *basanos* was designed as a procedure to elicit true evidence from slaves by torture, it was a failure, for it rarely (if ever) achieved this goal...by the period of the orators the institution of *basanos* had become a legal fiction, whose function and purpose were

¹⁵ Cf. Thür 1977, 213-14.

¹⁶ It is tempting to suggest that the position would be very close to the one described in Achilles Tatius' *Leucippe and Clitophon* Book 8.12-13. There, Thersander, the prosecutor, requested two maidservants to be tortured and rested his case on their testimonies saying that if they don't prove his assertion, then *he himself* acquits his opponents whereas if his points are verified he suggests that his opponents should be punished in accordance with the law. Δεύτερος δέ ἐστί μοι πρὸς Μελίτην μοιχείας ἄγων, πρὸς ἣν οὐδὲν δέομαι λόγων: ἐν γὰρ τῇ τῶν θεραπεινῶν βασάνῳ τὴν ἐξέτασιν γενέσθαι δέδοκται. Ταύτας οὖν αἰτῶ, αἱ ἂν βασανιζόμεναι φήσωσιν οὐκ εἰδέναι τοῦτον τὸν κατάδικον χρόνῳ πολλῷ συνόντα αὐτῇ καὶ ἐν ἀνδρὸς χώρῃ ἐν τῇ οἰκίᾳ τῇ ἐμῇ, οὐκ ἐν μοιχοῦ μόνον καθεστηκότα, πάσης αἰτίας αὐτὴν ἀφίημι. Ἄν τοίνυν τοῦναντίον, τὴν μὲν κατὰ τὸν νόμον ἀφείσθαι τῆς προικὸς φημί δεῖν ἐμοί, τὸν δὲ ὑποσχεῖν τὴν ὀφειλομένην τοῖς μοιχοῖς τιμωρίαν: θάνατος δέ ἐστιν αὕτη.

¹⁷ Thür 1977.

¹⁸ Compare this absence of coercion regarding *basanos* with the possible pressure placed on unwilling witnesses in the form of a *kleteusis*, *dike lipomarturiou* or even *dike blabes*.

¹⁹ Thür 1977, 207-211; cf. Gagarin 1996, 5-7.

not (and may never have been) the eliciting of truth from slaves".²⁰ For him, *basanos* in the time of the orators was a legal fiction, a forensic procedure for introducing evidence from slaves in court.²¹

I am in general agreement with the position that the silence of the speakers in cases tried in dicastic courts suggests that evidentiary *basanos* of innocent slaves was rarely, if ever, applied in practice in the age of the orators. The main manifestation of this institution was in the form of challenges. However, *basanos*, even at a late date, was seen as a reliable, fair and democratic (!) way of extracting evidence (Lycurgus 1.29). This needs to be explained. This last description as 'democratic' possibly suggests that in the third quarter of the fourth century BC, the preeminent type of torture employed in the Athenian administration of justice was the judicial (rather than the evidentiary), mainly used during investigations for 'political crimes' such as treason or subversion of the constitution. In cases of such offences, this procedure was employed without distinction against slaves and free men, although after the enactment of the decree of Scamandrius (whose date is uncertain but possibly 508/7 B.C.) Athenian citizens were not subject to this cruel institution for evidentiary purposes. Yet, in cases of turmoil or of suspension of the democratic constitution (and, presumably, of the decree of Scamandrius), Athenians were possible candidates too.²² Therefore the root of the belief in the reliability of *basanos* should be sought for in other than evidentiary forms of torture (or in informal forceful interrogations taking place within the household).

Among the reasons put forward for the unwillingness of parties to accept *proklesis*, is that the procedure was too uncertain, making litigants reluctant to risk their case in such a 'high-stakes' game,²³ that the challengers most of the times offered a deceitful challenge focusing on peripheral or irrelevant issues

²⁰ Gagarin 1996, 16. Cf. at p. 14: "the interrogation of slaves was neither the main purpose nor the normal manifestation of evidentiary *basanos*". Carey 1994, 291 seems to agree with this by saying that the real aim of these challenges "is to give the challenger a moral advantage in court, since the challenge is always issued in the confident expectation that the opponent will refuse it".

²¹ Gagarin 1996, 16.

²² Possible examples could include Andocides under the oligarchic regime of the Four Hundred in 411 (Andoc. 2.15; Lys. 6.27) and Aristophanes of Cholleis under the Thirty (Lys. 13.59-60). Another Athenian citizen, Antiphon, was already disfranchised when tortured and executed for treason as an agent of Philip in 344/343 B.C. (Dem. 18.132-3; Din. 1.63).

²³ Thür 1977, 285; cf. Gagarin 1996, 7.

aiming at what Thür calls a ‘contrived rejection’²⁴ or that the opponent built his case on different issues²⁵ and did not want to play the game on the challenger’s pitch. The fact that there was no procedure against a slave who lied during the interrogation²⁶ must be taken into account; a losing party could not have reopened the case as he could for example by a *dike pseudomarturion*. More pragmatic reasons for rejecting an opponent’s challenge could include the possibility of ‘damage’ to a valuable slave who had developed a degree of expertise in his occupation as in Isocrates 17, to a putative personal intimacy that the owner had developed with the slave as in Lysias 3, to the expectation that the slave might run away in order to escape from the torture²⁷ or to a promise not to be tortured being made to the slave if he / she cooperated with the master (Lysias 1). Finally, could there have been any humanitarian reasons for viewing *basanos* as inappropriate? Possibly yes but these could not be admitted in court: if they were, they would certainly have been used against the rejecter of a challenge as prioritising his personal interest, affection or sympathy for the slave over truth and justice but also as undermining citizen status by indirectly arguing for the extension of the applicability of the decree of Scamandrius to slaves. To be sure, *basanos* could have been a very effective way of inflicting material and / or rhetorical harm to the opponent.

Basanos in the rhetorical handbooks

The rhetorical handbooks of Aristotle and Anaximenes have been said to be classifying torture among the artless or supplementary proofs. This, if true, has to be explained since it could offer support to the view that *basanos* was a real possibility in Athenian courts. However, it is debatable whether both thinkers refer to the

²⁴ Thür 1977, 233-261. Carey 2007, 231 referring to challenges in general, describes the challengers’ aim as being to get a moral advantage in court, since the challenge is issued in the confident expectation that the opponent will refuse it. The challenge ‘must be so worded as to satisfy the jurors of the litigant’s good faith... [but] it must never be so attractive that the opponent is tempted to accept it’.

²⁵ Gagarin 1996, 12.

²⁶ The reasons for this omission of Athenian law could touch upon the status of the slave but also to either a firm belief in the reliability of this institution or to the fact that this was very rarely, if ever, took place in practice. However, an argument could be developed about the need to have a legal procedure against the slave since if one side thought that the slave was lying, he could keep the torture going (with possible limitations such as the already agreed terms of the torture and the *dike blabes* that could be triggered in the event of a serious injury of the slave).

²⁷ Cf. Isoc. 17; Achilles Tatius’ *Leucippe and Clitophon* Book 2.

type of evidentiary *basanos* and why they classify torture as a proof which is beyond the manipulative powers of the orator.

Aristotle in the *Rhetoric* (1.2) does not discuss challenges (*proklesis*) to torture. He refers to torture (*basanos*) per se and defines it (1.15) as testimony (μαρτυρία) under compulsion.²⁸ It is placed in the category of artless proofs (Aristotle, *Rhetoric* 1.2) because it pre-existed (προϋπήρχεν), therefore it belongs to all these things that are not invented / furnished by the orator (ὅσα μὴ δι' ἡμῶν πεπόρισται). Hence it seems that artless proofs for Aristotle (laws, witnesses, contracts, torture, oaths) have both a temporal and a practical aspect (Aristotle refers to the things already placed in the *ἐχίνος* as neither invented by the orator nor being within his art).²⁹ For Aristotle, *basanos* has many types (*Rhet.* 1.15.26: καθ' ὅλου τοῦ γένους τῶν βασάνων), yet these are not defined. So when Aristotle in the *Rhetoric* treats *basanos* as a *pistis* to be discussed in court, he could refer to any of the aforementioned types of torture (judicial, punitive or evidentiary) but not to challenges.

Gagarin³⁰ refers to Aristotle's treatment of torture as a proof to be discussed in court as evidence against the thesis that an accepted challenge would automatically settle the case. However, the rhetorical advice provided by Aristotle in the *Rhetoric*, need not refer solely to the *evidentiary* torture of innocent *slaves* following a *proklesis eis basanon* in private disputes. Indeed, the absence of evidence proving the actual introduction of such testimonies in Athenian courtrooms makes this suggestion even more plausible.³¹ The only evidence from *basanoi* re-

²⁸ The orators distinguish *basanoi* from *marturiai*. See *Lys.* 7.37; *Dem.* 30.36 with Harrison 1971, 147.

²⁹ Gagarin 2008, 188-90 maintains that owing to a reform of procedural law in Athens, from ca. 375 B.C. onwards all documents of direct evidence (to which Aristotle refers as 'artless proofs') had to be presented at a preliminary hearing in written form and then be placed and sealed in a jar (the *echinos*) to be read out during the trial by the clerk.

³⁰ Gagarin 1996, 6 [*pace* Headlam 1893, 1894; Mirhady 1996].

³¹ Another argument supporting the thesis that Aristotle in this passage does not solely or mainly refer to the *evidentiary* torture of *slaves* (excluding all other types of *basanos*) arises from his view of slavery in general and his disbelief in the majority of slaves' ability of rational calculation (see *Arist. Politics*, 1254b; Millett 2007). One of the arguments he uses in the *Rhetoric* against the value of *basanos* testimonies is based on a supposition that the subject of torture reacts according to logical reasoning and rational calculation: "for those under compulsion are as likely to give false evidence as true, some being ready to endure everything rather than tell the truth, while others are equally ready to make false charges against others, in the hope of being sooner released from torture" (*Rhet.* 1.15.26). Therefore, if the above passage referred to slave torture, it would be inconsistent with his view of slaves' capacity of practical reasoning.

ported from Athenian courts falls under the other categories of *basanos* (see the next section below). Moreover, Aristotle's *Rhetoric* is neither a handbook which exclusively refers to Athenian orators, institutions and audiences nor a manual useful only for the period that it was written. Laws and procedures could change yet the arguments provided for and against the value of a *pistis* should be generally applicable.

Anaximenes of Lampsacus in the *Rhetorica ad Alexandrum* (1428a 7.2), refers to *basanos* as a supplementary (ἐπιθετος) proof to what people say and do and defines it (1432a 16.2) as a 'confession of complicity by someone involved / knowing under compulsion' ('Βάσανος δέ εστι μεν ομολογία παρά συνειδότητος ἀκοντος δέ'). As becomes evident subsequently, when Anaximenes refers to 'cases where slaves make false statements against their masters' (1432a 16.2), his use of *basanos* does not refer exclusively to judicial torture and confessions of complicity but could cover instances of evidentiary torture of innocent slaves. He also refers to *basanos* as the 'most reliable evidence on which both private individuals and cities rely upon in matters of importance' (*Rhetorica ad Alexandrum* 1432a 16.1) thus denoting different types of *basanos*. Anaximenes, in contrast to Aristotle, concentrating on practical advice for winning a case, discusses the introduction of slave testimonies in the courtroom as a real possibility and / or (hypothetically) offers a justification for a rejected challenge.³² Again, however, there is no reason why this handbook should be seen as exclusively referring to Athens or to the Athenian legal system.

Aristotle and Anaximenes refer to any kind of testimony or confession under compulsion, that is to the document / copy of the statement placed in the *echinos*³³ and ultimately to the *pistis* ('artless' or 'supplementary'³⁴) which lies beyond

³² This is particularly evident in the following passage: 'you must point out that even free men before now have often under torture made false statements against themselves, in their desire to escape from the agony of the moment, so that it is much more probable that slaves should wish to escape being punished themselves by telling lies against their masters, than that when enduring great agony of body and mind they should not be willing to tell a lie themselves in order to save others from suffering.' *Rhet. ad Alex.* 1432a 16.3.

³³ Cf. Harpocration, Valerius, *Lexicon in decem oratores Atticos*, s.v. ΒΑΣΑΝΟΣ: "Υπερείδης δ' ἐν τῷ κατ' Ἀντίου τὰ ἐν ταῖς βασάνοις εἰρημένα ὑπὸ τῶν βασανιζομένων καὶ ἀναγραφέντα βασάνους ὠνόμασε".

³⁴ The temporal aspect of *epithetoi pisteis* (supplementary proofs) as pre-existing is more difficult to prove beyond any doubt, since Anaximenes includes the ambiguous proof *doksa tou legontos* in them. I consider Kraus' interpretation (Kraus 2011) as the most plausible (pace Mirhady 2011), especially when taking into account Benoit 1990. Key to our understanding is Isocrates' (pace Aristotle's) discussion of the ethos of the speaker: Aristotle says that this is created *during* the speech (Arist. *Rhet.* 1356a8-10) whereas Isoc-

the manipulative powers of the orator.³⁵ In discussing *basanos*, they mainly refer to the actual written testimony rather than to the challenges frequently found in the orators. As far as Aristotle is concerned, if he intended to discuss the challenges, he would have probably followed the same methodology as in his discussion of oaths in which he refers in a much nuanced way to all the different possibilities of tendering, accepting or rejecting a challenge.³⁶ Also, arguments resembling the ones found in the orators supporting or criticising the reason for the rejection (for example that the challenge was not fair, the slave was free etc.) are absent from the *Rhetoric*.³⁷ As far as Anaximenes is concerned, by referring to *basanos* as the ‘most reliable evidence on which both private individuals and cities rely upon in matters of importance’ (*Rhetorica ad Alexandrum* 1432a 16.1), denotes the statement under torture rather than the challenge.³⁸ Since they neither exclusively refer to the Athenian legal system of their period nor solely refer to the evidentiary torture of innocent slaves, their rhetorical treatises do not provide concrete evidence for the actual practice of evidentiary torture of innocent slaves in the Athenian courts of the fourth century.

Basanos evidence entering the courtroom

The rhetoricians in their handbooks provide advice for supporting or questioning the credibility of *basanos*. Yet, if the slaves’ statements did not enter the courtroom due to the fact that evidentiary *basanos* following a challenge was rarely, if ever, carried out, then what was the practical usefulness of such advice? In that respect, the *Rhetoric* and the *Rhetorica ad Alexandrum*, could have a – however limited – applicability in the courts of classical Athens (or to the arbitration

rates (15 *Antidosis* 278) maintains that this *pre-exists* (as Anaximenes’ *doksa tou legontos*). Therefore, since Anaximenes puts ‘*doksa tou legontos*’ under the supplementary proofs whereas Aristotle retains it (in the form of *ethos*) under the *entechnoi pisteis*, it seems that Anaximenes’ distinction of *pisteis* indeed has a temporal aspect.

³⁵ On the classification of artless *pisteis* in Aristotle and Anaximenes, see Mirhady 1991; Mirhady 1996; Carey 1994.

³⁶ Arist. *Rhet.* 1.15.27: “As to oaths four divisions may be made; for either we tender an oath and accept it, or we do neither, or one without the other, and in the last case we either tender but do not accept, or accept but do not tender”.

³⁷ This triggers the question of why Aristotle discussed *basanos* per se and omitted the challenge to *basanos*, especially since the challenge and its rhetorical impact is so evident in the court speeches. Such a question is addressed by Carey 1994 and certainly, this is not the only omission of rhetorical handbooks. Mirhady 1996, 129 suggests that this omission have “resulted perhaps from the economy of not having to deal with the challenge twice, first in terms of the *basanos* and then of the oath”.

³⁸ Cf. Sternberg 2006, 157.

stage) in the sense that (formally or informally) deliberation was taking place regarding *basanos* testimonies in cases *not* involving a formal challenge (*proklesis*).

In the Hyperides fragments, in the ‘*Defence of Chaerephilus on the salt fish*’, we find the most direct evidence regarding a *basanos* testimony been discussed in court. There, following an *apophasis* or an *eisangelia*, the Areopagus carried out the investigation by practising *basanos* on slaves. Their statements were presented to the people in the assembly and were used as the basis of a further action against the accused. Such evidence from torture (not triggered by a challenge but by an independent investigation of the Areopagus) could be discussed by litigants in court:

“As to what the Council (of the Areopagus) reported to the people from its investigation, nowhere did it demonstrate to the people wrongdoing on the part of Chaerephilus, and though, it says, the secretary read out the names disclosed from the interrogations of slaves (*basanoi*), not one of those tortured accused him of any wrongdoing. As a result, at least from the charges written in the decree, he is not even liable for trial. Why, then, has this case arisen?” (Hyp. Fr. 187a. Transl. Craig R. Cooper)

In other instances, slave testimonies were discussed in the courtroom, albeit in an informal way, being incorporated in litigants’ speeches. In Antiphon 5.29-52, reference is made to the testimony of a slave (later executed by the speaker’s opponents) which provided evidence for the trial at hand. The speaker attempts to discredit it by pointing to the injustice of the procedure that had been followed and to general considerations about the fallibility of *basanos*. In Antiphon 1.20, reference is made to the judicial or punitive torture of the accomplice concubine who administered the alleged fatal poison / love potion to the speaker’s father. Throughout Demosthenes 48, the torture and confession of a slave are discussed as providing circumstantial evidence for the case at hand. Finally, as suggested in Antiphon 5.49, confessions of slaves under torture for a crime they had committed should be followed by a trial, this being another way in which *basanos* testimonies entered the courtroom.

Apart from slaves, in limited circumstances, confessions of free men could be educed under torture and introduced in court.³⁹ In most cases, free men who were tortured were involved in matters of treason or crimes against the state. This could also be the case with the free Mytilenean (?) tortured in Antiphon 5 who, although (probably) not being seen as an accomplice or suspect to the mur-

³⁹ A list of instances of torture of free persons is found in Bushala 1968, n. 10.

der of Herodes, he was perhaps tortured because this murder was received as directed against the Athenian state.

A controversial case is mentioned in Lysias 3, a case of *trauma ek pronoias*, due to the debatable status of Theodotus. Carey (*pace* Bushala 1968) argues that the torture of free aliens was not allowed in cases of *trauma* from the contention in Lysias 4 that if the slave girl was free, she could not have been subject to torture. He maintains that: “Either Athenian law allowed the torture of free aliens in cases of *phonos* but not in cases of *trauma*, or the ‘torturable class’ was restricted to slaves in both cases as in other types of action. The other procedural similarities between trials for *phonos* and trials for *trauma* strongly suggest the latter”.⁴⁰ However, this should not be regarded as conclusive. In the first place, Lysias 3 can be distinguished from Lysias 4 (in an admittedly speculative way) if the former was a *dike traumatos* whereas the latter a *graphe*.⁴¹ So, even if the procedural similarities between a *dike phonou* and a *dike traumatos* support Carey’s conclusion, we cannot be sure whether these rules would be identical in a *graphe traumatos*. Also, unlike the woman in Lysias 4, Theodotus could have been seen as a suspect or an accomplice in the *trauma ek pronoias* against Simon. Therefore it might be suggested that for crimes against the state the law allowed for the torture of free aliens, but in cases of *phonos* or even of *trauma ek pronoias*, it only allowed for the forceful interrogation of suspects or accomplices. The fact that the speaker of Lysias 3 uses the word *μηνύω* when referring to the testimony of Theodotus (*μηνύσαι δὲ ἱκανὸν ἦν βασανιζόμενον*), possibly denotes that the statement educed by Theodotus under *basanos* could have formed the basis of an indictment against the speaker and, thus, could have entered the courtroom.

Conclusion

Torture in the Athenian legal system was received as a reliable form of gathering truthful evidence, yet the actuality of evidentiary *basanos* remains doubtful. The general consensus in the reliability of this institution might have its roots in the distant past or in the exercise of other types of torture such as penal and judicial. The absence of testimonies elicited from the torture of innocent slaves following a formal challenge is striking, especially when compared to the presence of testimonies educed from other types. After all, the discussion of *basanos* in the rhetorical handbooks refers mainly to these other types, whose presence in the courtrooms was certainly more frequent. Consequently, it is plausible to suggest that the actual existence of the form of torture most indefensible, that is the eviden-

⁴⁰ Carey 1988, 245.

⁴¹ cf. Hansen 1983.

tiary torture of innocent slaves, is not supported by either the forensic speeches or the rhetorical handbooks. By the age of Aristotle, this way of eliciting evidence had probably become obsolete.

REFERENCES

- Benoit, W. (1990) "Isocrates and Aristotle on Rhetoric," *Rhetoric Society Quarterly* 20.3, 251-9.
- Bushala, E.W. (1968) "Torture of Non-citizens in Homicide Investigations," *Greek, Roman and Byzantine Studies* 9.1, 61-68.
- Carey, C. (1988) "A Note on Torture in Athenian Homicide Cases," *Historia: Zeitschrift für Alte Geschichte* 37.2, 241-5.
- Carey, C. (1994) "Artless Proofs in Aristotle and the Orators," *Bulletin of the Institute of Classical Studies* 39, 95-106.
- Cooper, Craig R., tr. (2001) *Dinarchus, Hyperides, and Lycurgus*. University of Texas Press.
- Gagarin, M. (1996) "The Torture of Slaves in Athenian Law," *Classical Philology* 91.1, 1-18.
- Gagarin, M. (2007) "The Nature of Proofs in Antiphon," in Carawan, E., *The Attic Orators*. New York, OUP.
- Gagarin, M. (2008) *Writing Greek Law*. Cambridge University Press.
- Hansen, M.H. (1983), "Graphe" or "Dike Traumatosa"? *Greek, Roman and Byzantine Studies* 24.4, 307-20.
- Harrison, A.R.W. (1971) *The Law of Athens*. Vol. 2. Oxford: Clarendon Press.
- Headlam, J. (1893) "On the *proklesis eis basanon* in Attic Law," *Classical Review* 7, 1-5.
- Headlam, J. (1894) "Slave Torture in Athens," *Classical Review* 8, 136-7.
- Kraus, M. (2011) "How to Classify Means of Persuasion: The Rhetoric to Alexander and Aristotle on *Pisteis*," *Rhetorica* 29.3, 263-79.
- MacDowell, D.M. (1978) *The Law in Classical Athens*. Cornell University Press.
- Millett, P. (2007) "Aristotle and Slavery in Athens," *Greece & Rome* 54.2, 178-209.
- Mirhady, D. (1991) "Non-Technical *Pisteis* in Aristotle and Anaximenes," *American Journal of Philology* 112, 5-28.
- Mirhady, D. (1996) "Torture and Rhetoric in Athens," *Journal of Historical Studies* 116, 119-31.
- Mirhady, D. (2000) "The Athenian Rationale for Torture," J. Edmondson and V. Hunter, eds. *Law and Social Status in Classical Athens*. Oxford, 53-74.
- Mirhady, D. (2011) "Aristotle and Anaximenes on Arrangement," *Rhetorica* 29.3, 293-304.
- Sternberg, R.H. (2006) *Tragedy Offstage*. Austin: University of Texas Press.
- Thür, G. (1977) *Beweisführung vor den Schwurgerichtshofen Athens: die Proklesis zur Basanos*. Wien.