

The Testimony of Slaves in Athenian Courts

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While we currently have an idea of what the Athenian legal system looked like, there are many aspects which have proven harder to describe and place within the system. One institution that has spurred many papers and incurred much scrutiny over the last century is the issue of the testimony of slaves. Under normal circumstances slaves could not give testimony in court, that is appear as a witness like any free man. A litigant could reference a slaves testimony by challenging his opposition to a βάσανος, a procedure allowing that litigant to torture a slave belonging either the opposing litigant or to a third party. Analysis of βάσανος, however, is challenging for a number of reasons. First, the word is used to describe not only the procedure of torture, but also the evidence gathered through torture, and sometimes just the challenge to the torture. [Gag96, 1, 13] Further difficulty lies in the utter lack of evidence that a βάσανος was ever conducted, resulting in no first hand accounts of the torture and no insight into how it would be used to help argue a case. In his examination of slave testimony, Michael Gagarin comes to the conclusion that the βάσανος is not a “hypothetical procedure” which never saw the light of day, but actually a “forensic procedure,” the purpose of which was to sneak testimony of slaves into court and bolster the case of the challenger. [Gag96, 1, 13] Through scrutiny, it is possible to determine the rules governing slaves testimony, at least to an extent that allows for an understanding of how and why βάσανος is used when it is.

The form of a challenge and the procedure of torture must be established before the context and ramifications of a βάσανος can be discussed. The challenge would have been made before the dispute escalated to a dikasterion. If a litigant was of the opinion that his oppositions slave was a material witness in the matter, he could challenge his opposition to a βάσανος. Torture was considered to be necessary for garnering reliable testimony from slaves, because, otherwise, a slave could be easily coerced into providing whatever testimony his master wished. The theory was that torture was effective in producing reliable testimony, since a slave being tortured would be swayed more by the pain of the present than by the possibility of being beaten by his owner in the future. [Mac78, 245] The owner had to accept a challenge before the torture commenced, because there was a danger that the slave would be damaged beyond repair. As a slave was valuable property, the consent of its owner was legally required before subjecting it to such danger. The form of a challenge is the most important part of βάσανος, since there are dozens of surviving cases where a challenge is referenced, but absolutely none where βάσανος was actually carried out.

Should a challenge be accepted and the βάσανος carried out, there was a generally accepted format for the torture. As a constant consideration throughout the whole interrogation would have been the damage done to the slave, the slaves owner always had the right to end the βάσανος, although doing so would have had the same effect as having refused it in the first place. [Mir96, 119] The torture would have consisted of beating, whipping, or usage of the rack, all done while repeatedly asking the slave only the agreed upon question. [Gag96, 15] There was no agreed

upon limit to the duration of the torture nor the amount of pain inflicted, it would just be ended whenever the challenger became satisfied with the response of the slave. [Gag96, 15] Again, there is no evidence that a βάσανος actually ever progressed this far, but if it did there would be a slew of additional considerations. Firstly, the two parties would likely disagree over the duration of the torture; how could anyone really know when a slave has been broken? Secondly, if the challenger failed to make his case, he would be forced to compensate the owner of the slave for damages; therefore there must have been disputes over the amount of damages. [Gag96, 16] How would this be settled? Would they go back to court? Would the slave be tortured to get testimony about his injuries?! Sadly these are questions that will go unanswered, likely forever. Cases in which βάσανος is mentioned can easily be divided into two general categories: cases where the speaker refused a βάσανος and cases where the speaker issued a challenge that had been refused. Across the available body of evidence, there are only four speeches in which the speaker makes reference to a challenge that he refused. [Gag96, 9] In Demosthenes 53, against Nicostratus, reference is made to both a challenge he refused and one he offered:

They challenged me at the preliminary hearing, stating that they were ready to deliver up the slaves, that I myself might put them to the torture, their wish being that this offer should serve as a sort of evidence for their side. I answered, however, in the presence of witnesses, that I was ready to go with them to the senate, and in conjunction with the senate or the Eleven to receive the slaves for the torture, telling them that, if my suit against them had been a private one, I should have accepted the slaves for the torture, if they had offered them, but that, as it was, both the slaves and the information belonged to the state. [Dem49, 53.22-23]

Demosthenes first prevents damage to the case by pointing out how the challenge was impossible, as Apollodorus did not own the slaves in question, and therefore could not consent or oversee their torture. Demosthenes goes on to detail a counter-challenge, which would have required the slaves be interrogated by a public official. He makes that his opponent only would have consented to private torture, as it was easier to distort the results in court. He finally refutes any weakness in his case, saying, “When I made this offer, they declared that they would not deliver up the slaves to the officials, nor would they go with me to the senate.” This excerpt is similar to passages in Lysias 4 [Lys30, 4.15-16] and Demosthenes 29 [Dem39, 29.38], in which the speaker prevents damage to his case by pointing out that his opponent also refused a challenge in some way.

In the only other surviving speech where the speaker refuses a challenge, he claims that the opposition was merely stalling for time. He asserts that “they put in a challenge with a view to gaining time and preventing the boxes from being sealed, offering to deliver up certain slaves, whose names they wrote down, to be examined as to the assault.” [Dem49, 54.27] Gagarin suggests that Eratosthenes family may have issued a challenge in the case depicted in Lysias 1, requesting that Euphiletus nursemaid be tortured so that they could make a case for entrapment. This challenge would have been rejected by Euphiletus, as he had a strong enough case with many witnesses. [Gag96, 9] It may not have always been to the advantage of a speaker to explain why he did not accept a challenge, as it would only serve to highlight flaws in his own case. Furthermore, dwelling on the challenge gives credibility to the opposition by spending time on its issues rather than ones own. If there was no way to cleverly refute a refused challenge, attempting to do so would further weaken a case and waste valuable time that could be used on more constructive subjects.

The cases in which speakers point out that their opponents did not consent to βάσανος number in the forties, and provide enough information to establish a paradigm under which βάσανος can

be applied. In these speeches, the speaker introduces the refusal of βάσανος as if it held the same credibility as testimony from a slave. For the most part, the speeches where reference is made to a challenge refused by the opposition fall into two categories: speeches where the challenge is used to introduce information and speeches where the challenge is used to corroborate or disprove some other piece of evidence. [Mir96, 123-125] In Lysias 7, the speaker refers to a challenge he issued, wherein he would have given up his slaves for βάσανος, as if his opponents refusal is evidence of guilt. He argued thus,

I went with witnesses to see him, and said that I still had the servants that I owned when I took over the plot, and was ready to delivery any that he wished to the torture, thinking that this would put his statements and my acts to stronger testin truth, gentlemen, I think it is manifest to all that, had I refused to deliver the men at Nicomachus’s request, I should be considered conscious of my guilt; so, since he declined to accept them when I offered to deliver them, it is fair to form the same opinion regarding him... [Lys30, 7.34-36]

An argument of this kind is an example of the logical leap orators felt licensed to make when dealing with a refused βάσανος. A slightly different usage of the inference of testimony from the refusal of a challenge is the aforementioned bolstering of previously stated evidence. In Isaios speech on the estate of Ciron, the speaker asserts,

Wishing, therefore, in addition to the witnesses which I already had, to obtain proof of these facts by evidence given under torture—in order that the veracity of my witnesses might be tested before, and not after, they gave their evidence, and so your belief in them might be confirmed—I demanded that our opponents should surrender the male and female slaves to be put to the question on these points and any others of which they had cognizance. My adversary, however, who will presently demand that you shall believe his witnesses, refused the examination under torture. Yet, if he shall be shown to have refused my request, what remains to be thought of his witnesses except that they are giving false evidence, since he has refused so decisive a method of testing them? [Isa62, 8.10-11]

This usage is arguably more effective, as, instead of making a statement that is essentially hearsay, the speaker uses the actions of the opposing litigant to make his witnesses seem more credible, while simultaneously discrediting his opponent. In all these cases, it is important to keep in mind that the βάσανος was never carried out, just referenced after the challenge had been made and refused.

While the ethics of torture are certainly dubious at best, so too is the rationality of such methods. Contemporary thought is that torture is a relatively ineffective method of compelling criminals and their accomplices to produce information, as it is impossible to draw the line between a statement of truth and the statement of someone who is willing to say anything to make the pain stop. This concern raises the question of how accurate the Athenians considered testimony gathered through βάσανος. As the majority of speeches where βάσανος is mentioned are those where the opposing litigant refused the procedure, the majority of accounts unsurprisingly praise torture as a mechanism for extracting information. In Isocrates 17, the speaker, in recounting a refused challenge, states, “I see that in private and public causes you judge that nothing is more deserving of belief, or truer, than testimony given under torture.” [Iso80, 17.54] Similarly in Demosthenes 30, in a similar argument, the speaker says, “You on your part hold that in both private and public matters the torture is the most in of all methods of proof, and when slaves and freemen are both

available, and the truth of a matter is to be sought out, you make no use of the testimony of the freemen, but seek to ascertain the truth by torturing the slaves.” [Dem39, 30.37] Of course, when his case is weakened by refusing to acquiesce to a *βάσανος*, a litigant is far less inclined to place trust in the institution of torture, as displayed in Lysias 4: “And then, had we put his servants, who were wholly his property, to that torture, they would have been led by a foolish complaisance to him into denying the truth and falsely accusing me.” [Lys30, 4.16] Considering that orators felt comfortable arguing both that torture was always reliable and that slave would sometimes lie under torture, it is safe to conclude that the Athenian jury pool was relatively open-minded on the subject. In his Rhetoric, Aristotle also comments on the efficacy of torture, stating,

Those under compulsion [of torture] 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. [Ari26, 1.15.26]

The language Aristotle uses around this excerpt makes it clear that the unreliability of torture was not a foreign concept to the Athenians. The jurys perception of torture, therefore, must be taken into account when considering the potential testimony of tortured slaves; the rhetorical and forensic power of the challenge may have superceded the material testimony that could have been gathered.

There is also the concern that if a *βάσανος* were carried out, it would force an out of court settlement. As a litigator with perhaps a weak case but strong rhetorical ability, it would be in ones best interest to refuse a challenge, and simply argue that the challenge was in some way frivolous. There has been a great deal of academic discussion about what actually the ramifications of a completed *βάσανος* would have been. The scholar James Headlam proposed that if a *βάσανος* had been completed, the results would have automatically settled the case out of court, thus making this procedure an alternative to a trial. [TH94, 136] This theory at first seems quite convenient, as it explains the utter lack of evidence that a *βάσανος* had ever taken place; for if a case never came to court, there would have been no speeches, and probably no paperwork to stipulate to its existence. Other academics, however, rejected his argument immediately, raising a number of points. C. V. Thompson points out that the speakers in Demosthenes 30 and Lysias 7 argue that the slaves would have been brought into court as evidence, had the opposition agreed to a *βάσανος*. [TH94, 136] Michael Gagarin also raises a number of points refuting Headlams theory. Firstly, he comments on how the topics of *βάσανος* were sometimes at the periphery of a dispute, therefore not having enough material substance to deliver a verdict alone. [Gag96, 6] Secondly, he observes that even if all *βάσανοι* settled disputes without record, there should still be some anecdotal evidence that one had transpired at some point, as disputes were sometimes drawn out over several cases, increasing the likelihood that some speech would refer back to a completed *βάσανος*. [Gag96, 6-7] Further weakening Headlams argument is the aforementioned doubts concerning the efficacy of torture as a means of gathering accurate testimony. Therefore it is likely that the *βάσανος* functioned just like other forms of evidence, where it was completed before the trial and referenced by one of the litigants in his speech.

As *βάσανος* was mentioned constantly, but never chronicled, it becomes evident that the use of the challenge and the legal definition of the *βάσανος* diverged. Therefore, it is not entirely informative to consider *βάσανος* for what it is, torture and the evidence gathered therein; the context and real world application of the law is more consequential to the study of Athenian law. Just as lawyers in modern legal dramas on television often volunteer their clients to take a polygraph test, so too would Athenian litigants employ *βάσανος* not to torture slaves, but to make a gesture

of confidence and credibility. In the most extreme sense, the challenge is akin to a bluff in poker; a litigant believes he is in the right, so he issues a large bet in the form of a challenge; only if his opposition is completely confident in the outcome of a βάσανος will he put in all his chips. This metaphor comes to life in Demosthenes 37, a speech against Pantaenetus, where the speaker consented to βάσανος only to have it aborted before the torture could begin:

He read me a long challenge, demanding that a slave should be put to the torture. When he had received sureties to this agreement from me and I had sealed the challenge...after this he again summoned me in the suit, as soon as he had taken back his deposits; so clear did he make it at once that he would not abide by the conditions which he had himself laid down. [Dem39, 37.41-42]

At its most basic, however, the challenge to βάσανος can be thought of as an unofficial procedure for admitting the testimony of slaves into court. It is logical that many cases would have hinged on the testimony of slaves, as slaves were likely to be present both when domestic violence and property violations occurred. The challenge process allowed litigants to imply the assumed testimony of slaves without rewriting the law to give them some rights of citizens. Should the testimony of the slaves actually be in question, the challenged litigant could have either counter-challenge, if possible, or, in the worst case, have accepted the challenge to diffuse the situation.

While βάσανος and slave testimony is a complex issue, it is one that does make sense. Charging the Athenians with lacking ethics with regard to torturing of slaves for testimony is unfounded, as all evidence shows that a βάσανος was never carried out, either due to reluctance by litigants to potentially damage their cases, or perhaps due to an acknowledgement by the Athenians that torture was either unethical or unreliable. It is likely that over time βάσανος was regarded as less and less of a procedure that would actually have taken place, and increasingly as a rhetorical tool. In whatever case, it is clear that βάσανος was not solely about torture, it acted simply as a necessary provision for giving slaves a voice in the Athenian courtroom.

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