

reading some orations (Isaeus, Andocides, etc.) where we read clearly that, for attic law, generally only slaves could be put to torture, thanks to Scamandrius' decree, through a proceeding which was like a 'challenge' (*proklesis eis basanon*). Something similar, probably, happened also in roman law, where we find expressions like *postulare* or *offerre servum* for the torture (*quaestio* or *tormentum*).

If we take a look at roman legal experience, in Cicero's rhetorical works we find considerations similar to Aristotle's ones, regarding torture, which was to apply to slaves (although, often, Cicero doesn't remarks it clearly). But in his orations, things change: we find also information about the increasing use of torture in case of crime of *maiestas*. The idea that roman citizens could be tortured if necessary in order to protect emperors' well-being slowly arose in roman law, grew and went very far: historians, like Cassius Dio, understood it long before jurists.

ANNALISA TRIGGIANO

Post Doctoral Fellow in Roman Law

Faculty of Law-University of Salerno-Italy

E-mail: atriggiano@unisa.it

## EVIDENCE GIVEN UNDER TORTURE IN ARISTOTLE AND CICERO\*

Summary: 1. 'Basanos' in Aristotle and Anaximenes 2. Torture in Cicero's Works 3. Torture in Quintilian's 'Institutio Oratoria' 3.1. Short remarks on the early roman empire: torture of free men in case of 'maiestas' 3.2. New rules for 'quaestio in caput domini' in roman empire? 4. Final considerations

### 1. 'Basanos' in Aristotle and Anaximenes

The purpose of this paper is to trace, shortly, the development and the characteristics of judicial torture between attic law and roman oratory. So, first of all, it is important to understand what orators and philosophers meant by 'torture' and if it really occurred, in practice. The general term among Athenians for the application of the torture was *basanos*. Probably was a kind of evidence: for Aristotle it seemed to be a means of eliciting evidence from a witness<sup>1</sup>; for Anaximenes, it

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was a kind of ‘confession’, given against the will of the person to be tortured<sup>2</sup>. ‘By nature’, to be tortured should only be a slave<sup>3</sup>.

As far as the procedure was concerned, we know that any person might offer his own slave to be examined by torture or demand that of his adversary, and the offer or demand for a slave to be tortured was equally called *proklesis eis basanon*. If the opponent refused to give up his slave to be thus examined, such a refusal was looked upon a strong presumption against him. The *proklesis*, a kind of ‘challenge to torture’, appears to have been generally made in writing<sup>4</sup>, and it was delivered to the opponent in the presence of witnesses in the most frequented part of the *Agora*<sup>5</sup>. Though there were several modes of torture, the particular one to be employed was usually specified<sup>6</sup>. Sometimes, when a person offered (or decided to offer) his slave for torture, he gave his opponent the choice of adopting any

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(Winnipeg-Canada) il 6 e 7 Marzo 2009. I ragguagli bibliografici sono, volutamente, essenziali.

<sup>1</sup> Arist. *Rhet.* 1376b

<sup>2</sup> *Rhet. ad Alex.* XVI 1423b.

<sup>3</sup> Lycurg. *In Leocrat.* 10. 32.

<sup>4</sup> Demosth. *In Pantaen.* 978.

<sup>5</sup> Demosth. *In Aphob.* 848.

<sup>6</sup> Demosth. *In Steph.* 1120.

never base their statement on results of such evidence<sup>73</sup>.

#### 4. Final considerations

To synthesize everything we said until now, let’s try to make some short final remarks. *Tormenta*, said Cicero (*pro Sull.* 28.4), in words which it is almost impossible to translate satisfactorily, *gubernat dolor, regit quaesitor, flectit libido, corrumpit spes, infirmit metus, ut in tot rerum angustiis nihil veritati loci relinquatur*. St. Augustine (*de civ. Dei* 19.4) recognizes the fallacy of torture. If, says he, the accused may be innocent, he will undergo for an uncertain crime a certain punishment, and that not for having committed a crime, but because it is unknown whether he committed it.

Aristotle was the first one to understand, and underline, the fallacy of torture, which he called, like his contemporaries, *basanos*. In Aristotle and Anaximenes, who wrote rhetorical handbooks, we don’t find many considerations about the daily legal practice: such informations we can find only

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<sup>73</sup> Ulp. 8 *de off. proc.* D.48.18.1.16 : ...*cum quaestio de servis contra dominos neque haberi debeat, neque, si facta sit, dicturi sententiam consilium instruat.*

ters, but freemen and citizens as well»<sup>70</sup>. The position of the historian seems, to me, very clear.

Taking a short look at legal sources, surprisingly, we find a different point of view: emperors Severus and Antoninus Pius, for example, in their *rescriptum* ordered that slaves could not be put to torture against their masters, except in case of *adulterium*<sup>71</sup>. In *Pauli Sententiae* it is expressed, in two texts, the same principle, even if we find there used the term *interrogari* and not, as we shall expect, *torqueri*: I think that such words were meant to be as synonymous, in this case, although sometimes jurists trace a difference between *interrogatio* and *quaestio servorum*.<sup>72</sup> Also Ulpian remarks that torture of a slave against his master was forbidden and, if ever occurred, judges should

<sup>70</sup> Cass. Dio 57.19.

<sup>71</sup> C.9.41.1: *Quaestionem de servis contra dominos haberi non oportet, exceptis adulteriis criminibus.*

<sup>72</sup> *Paul. Sent.* 1.12.3: *In caput domini patronive nec servus nec libertus interrogari potest*; *Ivi*, 5.16.5: *Servi in caput domini neque a praeside, neque a procuratore, neque in pecuniariis neque in capitalibus causis interrogari possunt.* See, clearly, also *Marc. 2 de iud. publ.* D.48.18.9.1: *Ex quibus causis quaestio de servis adversus dominos haberi non debet, ex his causis ne quidem interrogationem valere rell.*

mode of torture which the latter pleased<sup>7</sup>. The parties interested either superintended the procedure themselves, or chose certain persons for this purpose, hence called *basanistai*, who took the evidence of the slaves.

In some cases, however, we find a public slave attached to the court, who administered torture<sup>8</sup>; but this appears only to have taken place when the torture should be administered in the court, in presence of the judges<sup>9</sup>. This public mode of administering torture was, probably, contrary to the usual practice<sup>10</sup>. The general practice was to read at the trial the depositions of the slaves, which were called *basanoi*,<sup>11</sup> and to confirm them by the testimony of those who were present at the administration of the torture. So, slaves «answered for all offences with their bodies»<sup>12</sup>. But what did the law of Athens have to say about the body of the citizens? Citizens were immune from torture. Under a decree

<sup>7</sup> Antiph. *De Chorent.* 777.

<sup>8</sup> Aesch. *De Leg.* 284.

<sup>9</sup> Aesch. *De Leg.* 284; Demosth. *In Energ.* 1144.

<sup>10</sup> Demosth. *In Steph.* 1106.

<sup>11</sup> Demosth. *In Nicostrat.* 1254.

<sup>12</sup> V. HUNTER, *Constructing the Body of the Citizen: Corporal Punishment in Classical Athens*, in *Echos du Monde Classique/Classical Views*, XXXVI, 1992, 278.

passed under the archonship of Scamandrius, it was forbidden to submit citizens to judicial torture<sup>13</sup>. We don't know exactly when this decree came in force, but we know that in some exceptional circumstances there had been proposals for rescinding the decree itself. Pisandrus, a greek politician, in 399 B.C. had been one of the members of the Commission inquiring about the desecration of Hermes. He asked for the assembly the rescinding of the decree of Scamandrius. So Apsepiones and Mantiteus, two athenian citizens indicated by Diocles as the main liable of the desecration, should get on the wheel of torture<sup>14</sup>. After the *Boule* approved such a determination, Apsepiones and Mantiteus laid down on their knees begging not to be tortured; then they left Athens.

Both Aristotle and Anaximenes believed that, although torture was a means of proof usually trustworthy<sup>15</sup>, sometimes it was necessary to have serious doubts about what slaves may say under torture, because some

<sup>13</sup> See, overall, Andoc. *De Myst.* 43.

<sup>14</sup> Andoc. *De Myst.* 43.

<sup>15</sup> *Rhet. ad Alex.* 1432 a15, but see also Antiph. *Tetral. II* 3.4.; Demosth. *In Onetor.* 37; Isae. *De Cyron. heredit.* 12-13.

the case of a master offering a slave to be tortured because simply suspected of committing *furtum*.

### 3.2 New rules for '*quaestio in caput domini*' in roman empire?

According to Cassius Dio, in year 8 A.D. – in trials for high treason – it would have been broken, for the first time, by confiscation, the ancient Republican traditon<sup>68</sup>, prohibiting the torture of a slave against his master. It was necessary that slaves became *servi publici*: «as it was not permitted that a slave should be tortured for evidence against his master, he (*scil.* Augustus) ordered that, as often as the necessity for such a course should arise, the slave should be sold either to the state or to him, in order that, being no longer the property of the defendant, he might be examined»<sup>69</sup>. And Tiberius followed the same footsteps, for Cassius Dio: in case of *maiestas*, «not only slaves were tortured to make them testify against their own mas-

<sup>68</sup>L. SOLIDORO MARUOTTI, *La disciplina*, cit., 46.

<sup>69</sup> See Cass. Dio 55.5, hereabove translated.

woman charged of poisoning, after suspicions against her were proved by the prior torture of slaves not her own (C. 9.41.3)<sup>65</sup>.

Nevertheless, we must underline that slave, who usually were put to torture in criminal trials, during the first centuries of Empire were put to torture also in civil trials. It is remarkable, in this direction, a statute of Diocletian (a. 294 A.D.), who said that, doubtless, slaves *could* be tortured not only in criminal trials: note that the verb he used was *interrogari*, but we know what it truly meant!<sup>66</sup> Furthermore, slaves could be tortured even in *furtum*, according to Papinian<sup>67</sup>, who described

<sup>65</sup> C 9.41.3: *Ant. A. cum cognitionaliter audisset, dixit: primum servi alieni interrogabuntur. Si praestita fuerint ex tanto scelere argumenta, ut videantur accedere ad verisimilia causae crimina, ipsa quoque mulier torquebitur: neque enim aegre feret si torqueatur, quae venenis viscera hominis extinxit.* Transl. «Emperor Antoninus said, while holding a *cognitio*: first the slaves of others are to be tortured. If sufficient evidence is furnished for such horrible crime that it seems to have been committed, also the woman herself is to be put to torture: for she who took a man's life by her poisons will not without justice undergo the hardship if tortured».

<sup>66</sup> C. 9.41.15: *Interrogari servos de facto suo non solum in criminali causa, sed etiam in pecuniaria [...] posse non ambigitur* rell.

<sup>67</sup> D. 19.5.8.

were weak and could not bear torture<sup>16</sup>, some were strong, had skin like a stone (*lithodermoi*), so it was easy for them to lie<sup>17</sup>. Such Aristotle's consideration about torture was really successful, because we find something similar even in Justinian's *Digesta*<sup>18</sup>.

Aristotle and Anaximenes followed different positions in evaluating torture, but also modern scholars have different opinions about the purpose of torture. Some say tor-

<sup>16</sup> Arist. *Rhet.* 1377a; similarly, *Rhet. ad Alex.* XVI 1432 a20; Ivi, 1432 a24; Antiph. *De caed. Herod.* 31-32; Antiph. *Tetral. I* 2.7.

<sup>17</sup> Arist. *Rhet.* 1377a.

<sup>18</sup> Ulp. 8 *de off. proc.* D. 48.18.1.23: *Quaestioni fidem non semper nec tamen numquam habendam constitutionibus declaratur: etenim res est fragilis et periculosa et quae veritatem fallat. Nam plerique patientia sive duritia tormentorum ita tormenta contemnunt, ut exprimi eis veritas nullo modo possit: alii tanta sunt impatientia, ut quodvis mentiri quam pati tormenta velint: ita fit, ut etiam vario modo fateantur, ut non tantum se, verum etiam alios crimentur.* Transl.: «The torture is not to be regarded as wholly deserving or wholly undeserving of confidence; indeed, it is untrustworthy, perilous and deceptive. For most men, by patience or the severity of the torture, come so to despise the torture that the truth cannot be elicited from them; others are so impatient that they will lie in any direction rather than suffer the torture; so it happens that they depose to contradictions and accuse not only themselves but others».

ture was a «moyen d'arracher un aveau ou d'obtenir un temoignage»<sup>19</sup>; others say it was meant to be a kind of 'ordeal'<sup>20</sup>. Recently, beyond the traditional studies<sup>21</sup>, most scholars are trying to focus on the meaning of the word *basanos*, in order to verify if, in practice, torture really occurred<sup>22</sup>.

<sup>19</sup> So, A. SOUBIE, *Les preuves dans les plaidoyers des orateurs attiques*, in *RIDA*, XX, 1973, 226.

<sup>20</sup> Following the suggestion of J. HEADLAM, *On the Proklesis eis basanon in Attic Law*, in *CR*, VII, 1893, 7: «if we knew more about the early history of attic law, we should find that the effectiveness of the *basanos* depended very little on whether or not the man who was submitted to it knew anything at all about the matter on which he was questioned, and that is really a vicarious ordeal, altered and wrestled until it has become more distinguishable from ordinary evidence».

<sup>21</sup> Cfr. P. DORJAHN, *Evidence by torture in ancient Athenian courts*, in *Studi Arangio Ruiz*, IV, Napoli, 1953, 77 ff.; ID., *On slave evidence in the Athenian Courts*, in *CB*, XLVII, 1971, 45 ff.

<sup>22</sup> M. GAGARIN, *The torture of slaves in Athenian law*, in *CPh*, XCI, 1996, 2, torture was, primarily, «any test to determine the genuineness of someone or something», then it became «evidentiary torture» (ivi, 7). This idea is shared by D.C. MIRHADY, *Torture and Rhetoric in Athens*, in *JHS*, CXVI, 1996, 119 ff., who thinks that «the *basanos*-challenge would then not be an alternative means of setting a dispute, but only a means for securing a piece of non binding evidence» (ivi, 122); G. THÜR, *Beweisführung vor der Schwurgericht-*

tus' *Annales*<sup>62</sup>. And Claudius, after Caligula, indulged in torturing citizens: let's read the words of Cassius Dio: «...These masters and other of the highest birth, foreigners and citizens alike, and not only plebeians, but some of the senators as well, were put to torture, in spite of the fact that Claudius at the very beginning of his reign had sworn not to torture any free men»<sup>63</sup>. This tendency arose before the end of the 3<sup>rd</sup> century A.D., when – according to the jurist Arcadius Charisius – in case of *maiestas*, protecting Emperor's wellbeing, if needed, anyone anyway could be tortured<sup>64</sup>.

Beyond historians' testimonies, and beyond the trials of high treason, the earliest lawful inquisition of a free suspect according to this new, increasing tendency, is in the record from Caracalla's reign. In 216 A.D., the emperor authorised the torture of a free

<sup>62</sup> Tac. *ann.* 11.22: *...Interea Romae, nullis palam neque cognitis mox causis, Cn. Nonius eques Romanus ferro accinctus reperitur in coetu salutantum principem. Nam postquam tormentis dilaniabatur, de se non infitatus conscios non edidit, incertum an occultans.*

<sup>63</sup> Cass. Dio. 60.15.

<sup>64</sup> Arch. Char. *sing. de test.* D. 48.18.10.1: *Sed omnes omnino in maiestatis crimine, quod ad personas principum atinet, si ad testimonium provocentur, cum res exigat, torquentur.*

Emperor». On the other hand, according, probably, to *Lex Iulia maiestatis* (27 B.C.), Augustus himself seemed to allow an unlimited use of torture in trials for *maiestas*<sup>59</sup>.

After Augustus, also Tiberius, according to Cassius Dio<sup>60</sup>, was really strict in punishing (maybe also citizen committing) crime of high treason: «he pushed to the bitter end the trials for *maiestas*, in cases where the complaint was made against anyone for committing any improper act, or uttering any improper speech, not only against Augustus but also against Tiberius himself and against his mother. And towards those who were suspected of plotting against him was inexorable». By reading Seneca's *De ira*<sup>61</sup> we realize that Caligula was really cruel in torturing free roman citizen not to discover the truth, but only for his own pleasure, and we find something similar, about Caligula, also in Tacit-

<sup>59</sup> See, particularly, *Paul. Sent.* 5.29.2: ...*In rerum maiestatis... nulla dignitas a tormentis excipitur.*

<sup>60</sup> See Cass.Dio 57.19.

<sup>61</sup> Sen. *de ira* 3.18.3: ...*Quid antiqua perscrutor? Modo C. Caesar Sex. Papinium, cui pater erat consularis, Betilenium Bassum quaestorem suum procuratoris sui filium, aliosque et senatores et equites Romanos uno die flagellis cecidit, torsit non questionis sed animi causa.*

It's now time for taking a look at some medieval and renaissance latin commentaries, in order to verify what some ancient aristotelian translators meant by 'torture'.

In anonymous *Translatio*, a commentary going back to 10<sup>th</sup> century A.D., we find a simple translation of greek terms: *testes* and *tormenta*<sup>23</sup>. The paraphrasis belonging to Italian humanist M. A. Majoragius seems to be more careful and trustworthy, in spite of *Translatio Vetus*, as far as the five proofs *artis expertes* is concerned. The text written below shows clearly how Majoragius deeply respected roman rhetorical theory:

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*sbölfen Athens. Die Proklesis zur Basanos*, Wien, 1977, 285; M. GAGARIN, *The torture*, cit., 5. The scholars underlines, furthermore, that «the absence of evidentiary *basanos* in the orators is good evidence that such cases must have been rare, and most scholars have rightly accepted the conclusion that evidentiary *basanos* rarely, if ever, occurred in practice» (ivi, 7). By rading some orations, we have the impression that torture could take place, in practice, but most of the times, asking for or offering a slave for torture had a symbolic value: Antiph. *De caed. Herod.* 29; ivi, 49; ivi, 52; Antiph., *De choreut.* 23; Andoc. *De myster.* 64.

<sup>23</sup>1375a20 ff.: *de fide vero dicta inartificiali consequens est predictorum pertransire, proprie enim hec iudicialium sunt quinque numero: leges, testes, compositiones, iuramentum, tormenta.*

Maiorag. *Explanat.* I 173 20a (=Arist. *Rhet.* 1375a): Deinceps ea percurrenda sunt, quae ad probationis artis expertes, pertinere uideantur: nam haec iudicialium controuersiarum propriae sunt, sunt autem numero quinque: leges, testimonia, tabulae, quaestiones, iusiurandum.

It is interesting, in our perspective, also the commentary belonging to another famous Italian humanist, P. Vettori, from Florence, whose translation, regarding Arist. *Rhet.* 1376a, shows as follows, as far as torture is concerned:

Vettor. *Explanat.* 264: Quaestiones Cicero has, Quintilianus tormenta, ut nos quoque vulgo facimus, appellauit; basan...zein quaestionem habere de aliqua re significat, quo uerbo Aristophanes in Ranis suis usus est, ubi multa quaestionum genera commemorauit [...]. Testimonium autem quoddam esse quaestionem dicit: quod scilicet ab inuito aliquo, et dolore coacto exprimitur. Urgente enim illo, cogitur testari, et aperire, quod scit.

P. Vettori remarks that Cicero and Quintilian used different words in order to un-

On one hand, citizens seemed to be still protected by Augustus, like in republican age: a statute probably regarding use of torture in the early Empire was a clause of *Lex Iulia de vi publica* (maybe going back between 19 and 16 B.C.<sup>57</sup>) by which Augustus punished, as a crime of *vis publica*, the behaviour of a magistrate putting to torture a Roman citizen in spite of his right to *provocatio* or, later, to *appellatio*<sup>58</sup>: «under the Julian law on public violence is condemned anyone who, when invested with any office, puts or orders to be put to death, tortures, flogs, condemns, or orders to be led to prison a Roman citizen who appeals, earlier to people, but now to the

<sup>57</sup> Many doubts about this topic, and further bibliography, in B. SANTALUCIA, *Diritto e processo nell'antica Roma*, Roma, 1998, 198, nt. 37.

<sup>58</sup> See *Paul. Sent.* 5.26.1: ...*Lege Iulia de vi publica damnatur, qui aliqua potestate praeditus civem romanum antea ad populum, nunc imperatorem appellentem necaverit necarive iusserit, torserit verberaverit condemnaverit inve publica vincula duci iusserit. Cuius rei poena in humiliores capitibus in honestiores insulae deportatione coercetur*, Ulp. 18 *de off. proc.* D. 48.6.7: *Lege Iulia de vi publica tenetur, qui, cum imperium potestatemve haberet, civem romanum adversus provocationem necaverit* *rell.* Transl.: «Liable under the Julian law on public violence is anyone who, while holding *imperium* or office, puts to death or flogs a Roman citizen contrary to his appeal *rell.*».



The torture (also of free men, as we'll see) was based on the need, more and more strongly felt by emperors, to punish as quick as possible the ones who were also simply suspected of committing crime of majesty, which was to consider, according to Tacitus, *omnium accusationum complementum*<sup>54</sup>. It is important, in this direction, to read Svetonius' words<sup>55</sup>, reminding that Augustus – although seemed to forbid the torture (if we trust in Ulpian's words expressed in D.48.18.1pr. Ulp. 8 *de off. proc.*)<sup>56</sup> – was the first one to use torture in punishing crime of *maiestas*. Torture is to be applied, according to Augustus first, and Hadrian then, in criminal investigations, yet one should not begin at once by torments, but evidence must be considered first. Anyway, in this text it's not clear if the person to be tortured was a slave. If we take a look to legal sources, we can find something more about evidentiary torture of citizen under Augustus.

<sup>54</sup> Tac. *ann.* 3.38.

<sup>55</sup> Suet. *Aug.* 27.8.9.

<sup>56</sup> *In criminibus eruendis quaestio adhiberi solet. Sed quando vel quatenus id faciendum sit, videamus. Et non esse a tormentis incipiendum et divus Augustus constituit, neque adeo fidem quaestioni adhibendam, sed et epistula divi Hadriani ad Senium Sabinum continetur.*

derstand the meaning of aristotelian word *basanos*: Cicero translates *basanos* as *quaestio*, Quintilian as *tormenta*. And P. Vettorius – who probably made his stand by reading Greek comedies, like Aristophane's *Frogs*, here recalled – thinks is more exact meaning *basanizein* by *quaestio*, which was an inquiry aiming to give a testimony, which took place with violence, against the will of the tortured slave, forced to *testari, et aperire, quod scit*.

In this short recognition on latin Aristotle's translations, the commentary of italian philosopher A. Niphus<sup>24</sup> is distinguishing itself, in my opinion, by its importance, for the attention paid to torture. Niphus accepted, in his translation, similar to original aristotelian text, the comparison between torture and testimony, proposed by Aristotle<sup>25</sup>, but he tried to explain, also, the possible further purposes of torture:

<sup>24</sup> *Expositio atque interpretatio lucida in libros artis Rhetorice Aristotelis*, Venetiis, 1537. For further information about life and works of A. Niphus see V. DE BELLIS, *Bibliografia di Agostino Nifo*, Firenze, 2005.

<sup>25</sup> A. NIPHUS, *Expositio*, cit., 69: *Quaestiones autem testimonia quaedam sunt, videntur habere fidem, quoniam necessitas quaedam adest.*

Niph. *Exposit.* 69: Quoniam saepe quaestiones dantur alicui ut confiteatur propria delicta, aliquando, ut confiteatur complices et fautores suorum delictorum, aliquando et dantur ut testimonia perhibeat de aliorum delictis.

Ordinary purpose of *quaestio* – according to this text – was, most of the times, to gain a confession of committed crimes given by the person who was under torture. Seldom, the torture allowed to identify, through a confession, also *complices* and *fautores*. Only if the person under torture was alien to crimes for which there was inquiring, the value of the evidence given under torture would have been just a testimony (*testimonium*).

Furthermore, the right word – based on legal practice – to translate in latin the greek *basanos* was, for Niphus, *quaestio*, even if such term could be replaced by others, like *tormenta*, *torturae* and *corporis dolores*. To be tortured, anyway, were always the so called *facinorosi* (not always, or not only, slaves):

wanted the slave to be tortured. After this inquiry, it was needed the will of the master to give the slave (*offerre*)<sup>52</sup>.

### 3.1 Short remarks on the early roman empire: torture of free men in case of ‘*maiestas*’

Until now, we only considered, in our perspective of research, the ideas of rhetoricians about torture. But what about the statutes, or the jurists about torture, especially in early roman Empire?

For the age of Empire<sup>53</sup>, roman historians, not surprisingly, say a lot about politically charged *maiestas* trials. From a general point of view, expansion of torture depended on the political interests of imperial regime inaugurated by Augustus, that took increasingly inquisitive measures against those convicted, or even suspected, of threatening the well-being of the emperors and the Empire. Let’s go, now, shortly on the details.

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<sup>52</sup> Quint. *inst. orat.* 5.4.2: *Nam sive de habenda quaestione agetur, plurimum intererit quis et quem postulat aut offerat et in quem et ex qua causa rell.*

<sup>53</sup> Y. THOMAS, *Les procédures de la majesté. La torture et l’enquête depuis les Julio-Claudiens*, in *Mélanges A. Magdelain*, Paris, 1998, 477 ff.

Quint. *inst. orat.* 5.4.1: Sicut in tormentis quoque, qui est locus frequentissimus, cum pars altera quaestionem vera fatendi necessitatem vocet, altera saepe etiam causam falsa dicendi, quod aliis patientia facile mendacium faciat, aliis infirmitas necessarium.

Some believe – remarks Quintilian – that evidence given under torture is a necessary means for gaining the truth in a trial by confession; other think the people under torture could only lie, given that who bears pain easily lies, and so does who cannot bear suffering. As we know, such considerations are not original and remind us of the *loci* exposed in Aristotle’s *Ars Rhetorica*. Neither by reading Quintilian’s words it is possible, for us, to understand which person could be put to torture. As far as the language is concerned, Quintilian seems to trace very well the difference between *tormenta* and *quaestio*.

*Tormenta*, as we know, where the pain inflicted to whom was put to torture, although they had, probably, a further purpose (punishment). So, it seems to be confirmed the idea that, also in roman legal experience, torture took place, necessarily, through a formal inquiry (*postulatio*) by the party who

Niph. *Exposit.* 65: Dicuntur autem quaestiones graece basanoi, latine tormenta, vel torturae, corporisque dolores, qui dantur alicui facinoroso ad eruendam veritatem. Sicuti in iudiciis, et etiam a latinis quaestiones appellantur.

In the text above it is remarkable the use of the term *corporisque dolores, qui dantur [...] ad eruendam veritatem*. Niphus’ words remind us immediately of famous Ulpian’s definition of torture, collected in Justinian’s *Digesta*:

Ulp. 70 *ad ed.* D.47.10.15.41 : ‘Quaestionem’ intellegere debemus et corporis dolorem ad eruendam veritatem. Nuda ergo interrogatio vel levis territio non pertinet ad hoc edictum [...]. Cum igitur per vim et tormenta habita quaestio est, tunc quaestio intellegitur.

Main purpose of *quaestio* – which, at least in severian age, was useful to distinguish it from *nuda interrogatio*<sup>26</sup> – was the use of violence, for example consisting in bodily or mental pains, much more incisive, to gain the

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<sup>26</sup> This is the thought of L. SOLIDORO MARUOTTI, *La disciplina della ‘lesa maestà’ tra tardo antico e medioevo*, in EAD., *Profili storici del delitto politico*, Napoli, 2002, 47.

truth, than intimidation (*levis territio*). The likeness between these two texts could be a simple coincidence, but I'd rather think that Niphus' words are suggested by his good knowledge of roman law texts.

## 2. The torture in Cicero's Works

Modern scholarly tradition has established that two fundamental rules regulated the use of torture in ancient Rome: torture should not be applied to roman citizens or to slaves against their owners.

Judicial torture was regularized in Rome relatively early, and was certainly in use already in case of crimes like *perduellio*, as we can argue by Quintilian's words<sup>27</sup>. This tradition, probably, continued, as we'll see, also in the repression of *crimen maiestatis*<sup>28</sup>. Aiming to verify such considerations, we shall examine

<sup>27</sup> Quint. *decl. min.* 307.3: *lex quae [proditorem] torqueri iubet donec conscios indicet*. According to Quintilian, a *lex* ordered that a traitor was to be tortured until he revealed accomplices. For further details about this mysterious law, see Dion. Hal. 3.73.4; App. *bell. civ.* 4.4.28.

<sup>28</sup> See Quint. *inst. orat.* 9.2.81.6-7: *Tyrannidis adfectatae damnatus torqueatur ut conscios indicet*: «A person having aspired the throne is tortured to reveal accomplices». See also Liv. 24.5.9-14; Val. Max. 3.3.3.1-4.

Cic. *top.* 20.75: *Facit etiam necessitas fidem, quae tum a corporibus tum ab animis nascitur. Nam et verberibus tormentis igni fatigati quae dicunt ea videntur veritas ipsa dicere, et quae perturbationibus animi, dolore cupiditate iracundia metu, quia necessitas vim habent, auferunt auctoritatem et fidem.*

Cicero doesn't remark strategies aiming to devalue or exalt persuasive strenght of torture, either about the field of voidness of such kind of evidence. He stressed, only, the capability of *vis* and *necessitas* to give, most of the times, *auctoritatem e fidem*. In this work, at the end, it's not possible find useful information in order to reconstruct torture's legal regime.

## 3. Torture in Quintilian's '*Institutio Oratoria*'

Also in some rhetorical treaties going back to age of roman empire, for example famous Quintilian's *Institutio Oratoria*, we can find interesting considerations about trustworthness of torture, inspired by Aristotle and Cicero. Quintilian underlines the unsureness about torture's possible definition, as we argue by reading

Pap. 15 resp. D. 48.5.40.8: De servis quaestionem in dominos incesti postulatos ita demum habendum respondi, si per adulterium incestum esse contractum dicatur.<sup>50</sup>

So, reconsidering everything we said until now, we cannot agree with Mr. Levy, a famous french scholar, who strongly believed that roman orators, talking about torture, did not make any stand about its evidentiary value<sup>51</sup>: we found traces – really relevant – of legal practice of republican age, somehow recalled also in Justinian's *Corpus Iuris*.

Let's make, at the end, some very short remarks on torture in Cicero's *Topica*. Here, Cicero doesn't use the term *quaestio*: we find the concept of *necessitas*, probably coming from aristotelian *ananke*, which had the same evidentiary purpose of *testimonium*.

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<sup>50</sup> See, for further details, W. FORMIGONI CANDINI, *In margine al divieto di torturare gli schiavi* 'in caput domini', in *AUFE*, V.2, 1988, 61 ff.; U. VINCENTI, 'Duo genera', cit., 88 ff.; S. PULIATTI, *D.48.5.39 (26 quaest.) e la problematica dell'incesto nell'elaborazione dottrinale di Papiniano*, in *Studi Parmensi*, LIII, 1997, 153 ff.; G. RIZZELLI, 'Lex Iulia de adulteriis'. *Studi sulla disciplina di 'adulterium', 'lenocinium' e 'stuprum'*, Lecce, 1997, *passim*.

<sup>51</sup> J. PH. LEVY, *La torture*, cit., 247: «ne prennent (scil. les orateurs) aucun parti sur le valeur probatoire del la torture».

some Cicero's works, in order to find there some rhetoric principles inspired by reading Aristotle's Rhetoric but, also, relevant news in legal field.

Furthermore, the works of Cicero will demonstrate that the principle against the torture of citizens, or that of slaves against their masters, was strongly felt during the last century of Republic. Let's start from *Partitiones Oratoriae*: we find, about torture, many useful informations regarding its trustworthiness and its field of voidness. First text to examine is the following:

Cic. *part. orat.* 14.50-51: Saepe etiam quaestionibus resistendum est, quod et dolorem fugientes multi in tormentis ementiti persaepe sunt morique maluerint falsum fatendo quam verum infitiando dolere; multi etiam suam vitam neglexerint, ut eos qui eis cariores quam ipsi sibi essent liberarent; alii autem aut natura corporis aut consuetudine dolendi aut metu supplicii ac mortis vim tormentorum pertulerint, alii ementiti sunt in eos quos oderant.<sup>29</sup>

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<sup>29</sup> Similar considerations also in Cic. *pro Sull.* 27.78: ... *illa tormenta gubernat dolor, moderatur natura cuiusque tum animi, tum corporis, regit quaesitor, flectit libido, corrumpit spes, infirmat metus, ut in tot rerum angustiis nihil veritati loci relinquatur.*

Cicero's text shows many reasons why, for rhetoricians, it was easy dispising evidence given under torture: the capability to bear pain, or the fear to face it, added to feelings of hate towards some people, were good reasons, for Cicero, to distrust *quaestio*. Such considerations about torture, anyway, did not seem to be original: even in Aristotle's *Rhetorica*, as we saw before, it was important to find strategies aiming to create doubts about trustworthiness of torture. During roman empire, in severian age, we find similar ideas in Ulpian<sup>30</sup>. Ulpian, in his text, talked about torture as a means of investigation in criminal trials and this is confirmed by the reference to discovering *veritas*, which was the main purpose of every kind of trial. The jurist is, doubtless, expressing his own point of view – as we can argue by reading the *incipit*, (not

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<sup>30</sup>Ulp. 8 *de off. proc* D.48.18.1.23: *Quaestioni fidem non semper nec tamen numquam habendam constitutionibus declaratur: etenim res est fragilis et periculosa et quae veritatem fallat. Nam plerique patientia sive duritia tormentorum ita tormenta contemnunt, ut exprimi eis veritas nullo modo possit: alii tanta sunt impatientia, ut quodvis mentiri quam pati tormenta velint: ita fit, ut etiam vario modo fateantur, ut non tantum se, verum etiam alios crimentur*

We cannot know, exactly, how trustworthy Ammianus' words may be: anyway, supposing the existence, in *lex Cornelia*, of a clause regarding *quaestio in caput domini*, the purpose of such rule would have been the same that would have allowed, since augustan age, an almost unlimited use of evidentiary torture: protection of supreme emperor's majesty.

Then, the topic regarding the use of torture *in caput domini* in case of *incestum*, underlined by Cicero, cannot be focused here carefully: we can only underline that by an ambiguous text of Papinian, in Digest, is arising a point of view dramatically different from Cicero's one, expressed, as we saw, in *Partitiones*: Papinian, in fact, suggests that *quaestio* did not take place in case of *incestum*. Torture took, instead, place, when such crime was committed at the same time (for example, as a means of execution) with crime of adultery:

self, in *De inventione*, meant *minuere maiestatem* by *de dignitate aut amplitudine aut potestate populi aut deorum quibus populus potestatem dedit, aliquid derogare*<sup>47</sup>, it wouldn't be wrong thinking that *coniuratio* was similar to above mentioned idea. So, according to a famous Italian scholar, Mr. Rotondi<sup>48</sup>, it is possible to argue existence of a statute, the so called *lex Cornelia de maiestate* (going back, probably, to Sulla, 80 B.C.), which would have disciplined, in criminal law, the cases admissibility of *quaestio in caput domini*<sup>49</sup>. This theory relies on, mainly, Ammianus Marcellinus' words:

Amm. Marc. 19.12.17: Et inquisitum in haec negotia fortius, nemo qui quidem recte sapiat reprehendet. Nec enim abnuimus salutem legitimi principis, propugnatoris bonorum et defensoris, inde salus quaeritur aliis, consociato studio muniri debere cunctorum; cuius retinendae causa validius, ubi maiestas pulsata defenditur, a quaestionibus vel cruciatis, nullam Corneliae legis exemere fortunam.

<sup>47</sup> Cic. *de inv.* 2.53.

<sup>48</sup> G. ROTONDI, *Leges publicae populi romani*, Milano, 1912, repr. Hildesheim, 1962, 360.

<sup>49</sup> C. RUSSO RUGGERI, *Quaestiones*, cit., 115 ff.

perfect, as far as the writing style is concerned) – and he is not sure about the *fides* of the torture (...*quaestioni fidem ... non semper nec ... numquam habendam*). He probably knows of the increasing use, at his times, of torture in criminal *cognitiones* and he suggests to judges to use it carefully, for it was an ambiguous means, not always able to help in discovering the truth. Of course, we must remember that the words of Ulpian were to refer to a well different historical period in spite of Cicero. Ulpian talks doubtless to judges, who should carefully choose if using, or not, torture.

Going back to *Partitiones*, we must underline the well clear difference between *quaestio*, in its meaning – already seen before, and accepted by Ulpian in *Digesta*<sup>31</sup>, and, much later, similarly, by R.J.Pothier<sup>32</sup> and J. Voet<sup>33</sup> – of examination which took place by torture,

<sup>31</sup> Beyond D. 47.10.15.41 Ulp. 77 *ad ed.*, we remark also Ulp. 55 *ad ed.* D.29.5.1.25: *Quaestionem aut sic accipimus non tormenta tantum, sed omnem inquisitionem et defensionem mortis.*

<sup>32</sup> R. J. POTHIER, *Pandectae Justinianae*, IV, Parisiis, 1818, 475: «*Quaestio, ut definit Cuiacius, est interrogatio quae fit per tormenta, vel de reis, vel de testibus, qui facto intervenisse dicuntur.*»

<sup>33</sup> J. VOET, *Commentarium ad Pandectas*, VI, Bassani, 1828, 292: «*Quaestio hoc loco est inquisitio veritatis per tormenta.*»

and *tormenta*, which were meant to be pain suffered by the tortured person<sup>34</sup>. Nothing is said about the ones who could be put to *quaestio*. We can find an answer to such question, anyway, by reading another text of *Partitiones Oratoriae*:

Cic. *part. orat.* 34.117-118: Sin quaestiones habitae aut postulatio ut habeantur causam adiuuabunt, confirmandum genus primum quaestionum erit, dicendum de vi doloris, de opinione maiorum, qui eam rem totam nisi probassent certe repudiassent, de institutis Atheniensium, Rhodiorum, doctissimorum hominum, apud quos etiam (id quod acerbissimum est) liberi civesque torquentur; de nostrorum etiam prudentissimorum hominum institutis, qui cum de servis in dominos quaeri nolissent, de incestu tamen, et coniuratione quae facta me consule est, quaerendum putaverunt.<sup>35</sup>

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<sup>34</sup> That surely had, in *cognitiones*, also the different meaning of corporal punishments, as underlines P. CERAMI, ‘*Tormenta pro poena adhibita*’, in *AUPA*, XLI, 1991, especially 41 ff.

<sup>35</sup> Cic. *pro Rosc. Amer.* 28.77: ‘*Vobis advocatis, vobis agentibus aliquotiens duos servos paternos in quaestionem ab adversariis Sextus Roscius postulavit, pro Cluent.* 63.176: *Post mortem eius Sassa moliri statim [...] quaestionem habere de*

Cic. *pro Mil.* 22.59: Sed tamen maiores nostri in dominum quaeri noluerunt, non quia non posset verum inveniri, sed quia videbatur indignum et domini morte ipsa tristius.<sup>44</sup>

In Tacitus’ *Annales*, instead, such prohibition should go back to an ancient, not well known, *senatusconsultum*<sup>45</sup>. We should reflect more carefully on this topic, but probably Mr. Vincenti, an Italian scholar, is right when saying that in Roman Republic no law was in force, about the ways of acquisition of testimony given under torture of slaves in *quaestiones perpetuae*<sup>46</sup>.

We should focus, anyway, on another very important topic: in *Partitiones*, Cicero talks about the only cases, regarding to criminal trials, in which it was possible to put to torture slaves against their masters: *incestum*, and, overall, *coniuratio*. As far as *coniuratio* is concerned, and considering that Cicero him-

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<sup>44</sup> See also Cic. *pro reg. Deiot.* 1.3: *Nam cum more maiorum de servo in dominum ne tormentis quidem quaeri liceat.*

<sup>45</sup> Tac. *ann.* 2.30: *Et quia vetere senatus consulto quaestio in caput domini prohibebatur.*

<sup>46</sup> U. VINCENTI, ‘*Duo genera sunt testium*’. *Contributo allo studio della prova testimoniale nel processo romano*, Padova, 1989, 84.



prohibition was really in force at Cicero's times (although with exceptions hereabove mentioned).

Mommsen believed that in Rome took place a very important principle («verbindlichen Norm»<sup>42</sup>) regarding the prohibition to put to torture slaves against their own masters. Such principle often was put aside, in punishing political crimes.

We know nothing about the time when such rule, which was considered «a very ancient rule»<sup>43</sup>, was in force. By reading Cicero's *oratio pro Milone*, for example, we argue that the principle was in force thanks to his *maiores*, and not because they believed that declarations given under torture by a slave forced to charge his master was untrustworthy, but because such practice was more sad than the death itself of the master:

<sup>42</sup> T. MOMMSEN, *Römische Strafrecht. Systematisches Handbuch der deutschen Rechtswissenschaft*, I.4, Leipzig 1889, an. repr. Aalen 1990, 414.

<sup>43</sup> W. BUCKLAND, *The Roman law of slavery. The condition of the slave in private law from August to Justinian*, Cambridge, 1908, repr. 1970, 88.

Once again, Cicero's words sound as an advice to use carefully torture and to evaluate carefully evidence given under torture. Cicero admired his *maiores*<sup>36</sup>, who, of course, would have abolished torture, if useless for evidence. It seemed shameful to him that, for Greeks and Rhodians, free citizen were to put to torture. Cicero praised the guarantees given by roman legal institutions, adverse to torture of the slaves against their masters, unless in case of crime of *coniuratio*. Such considerations are to focus on carefully.

First of all, we need to know something more about the principle of immunity from torture of free roman citizens in republican age, whose trace we can read both in Quintilian's *Declamationes*<sup>37</sup> and in *Acta apostolorum*<sup>38</sup>.

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*viri morte constituit. [...] Praeterea servum illum Nicostratum, quem nimium loquacem fuisse ac nimium domino fidelem arbitrabatur, ab hoc adolescente Oppianico in quaestionem postulavit rell.; pro Sull. 28.78: Quaestiones nobis servorum accuator et tormenta minitatur*

<sup>36</sup> Not only in this occasion: we can take, for example, Cic. *pro Rab.* 3.10: *Sed ista laus primum est maiorum nostrorum Quirites, qui expulsis regibus nullum in libero populo vestigium crudelitatis regiae retinuerunt, deinde multorum virorum fortium qui vestram libertatem non acerbitate suppliciorum infestam sed lenitate legum munitam esse voluerunt.*

<sup>37</sup> Quint. *decl. mai.* VII: *Liberum hominem ne torqueatur.*

A torture of an innocent roman citizen, regardless of his status, was, so, against the roman custom and, anyway, strongly disapproved. Many scholars trusted in Cicero's words, as far as the forbidding of torture of roman citizens was concerned<sup>39</sup>.

But such opinion, although widely accepted, did not convince an italian scholar, Mrs. Russo Ruggeri, who has a different point of view, based on a more careful reading and

<sup>38</sup> See *Act. Apost.* 22-29.

<sup>39</sup> G. PUGLIESE, *La prova nel processo classico*, in *Jus*, XI, 1960, 411; D. DALLA, *Il Manzoni e D.48.18.1.23: riflessioni sulla tortura*, in *Atti dell'Accademia delle Scienze dell'Istituto di Bologna. Classe di Scienze Morali. Rendiconti*, LXIV, Bologna, 1976, 178; P.A. BRUNT, *Evidence given under torture in the Principate*, in *ZSS*, XCVII, 1980, 259: «In the Republic Roman citizens were legally immune from torture»; D. DALLA, 'Senatusconsultum Silanianum', Milano, 1980, 17; ROBINSON, *Slaves and the criminal law*, in *ZSS*, XCVIII, 1981, 223 ff.; J. PH. LEVY, *La torture dans le droit romain de la preuve*, in 'Collatio Iuris Romani'. *Etudes dédiées à H. Ankum*, I, Amsterdam, 1995, 242, who refers to «des gentes à qui des prerogatives politiques conféraient une dignité particulière les faisant échapper à la torture les hommes libres, tout au moins les citoyens, dans les régimes démocratique d'Athènes et de la Rome républicaine»; J. PÖLÖNEN, *Plebeians and repression of crime in the Roman Empire: from torture of convicts to torture of suspects*, in *RIDA*, LI, 2004, 225.

analysis of some ciceronian texts. According to Mrs. Russo Ruggeri's opinion, the torture of free men, at Cicero's time, often took place. The scholar bases her opinion on some texts taken by *orationes in Verrem* and by the so called *Philippicae*, which would show how, especially in roman provinces, the use of torture consisted in «using powers of *coercitio* and of *libera animadversio* of judges»<sup>40</sup>.

So, Cicero's words, hereabove examined, were nothing but a «sforzio oratorio»<sup>41</sup>, aiming to protect roman traditional love for freedom. Anyway, even accepting the idea that, in roman republic, citizens were free from torture, such 'rhetoric' principle, as we'll see, during Principate had been set aside, especially in case of crime of *maiestas*.

Cicero reminds us of another rule set up by some ancient *prudentissimi homines*, who believed that, except for cases of *incestum* and, overall, *coniuratio* (which took place also during Cicero's consulship), slaves could not be put to torture against their masters. We could wonder wether these words were meant to be as a 'declaration of principle', or maybe this

<sup>40</sup> C. RUSSO RUGGERI, 'Quaestiones ex libero homine'. *La tortura degli uomini liberi nella repressione romana dell'età repubblicana e del I secolo dell'impero*, Milano, 2002, 95.

<sup>41</sup> C. RUSSO RUGGERI, 'Quaestiones', cit., 20.