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THE OATH-CHALLENGE IN ATHENS

In the 23rd book of the *Iliad*, Menelaus loses second place in the chariot race because of a manoeuvre by Antilochus. So, after Antilochus claims the second prize as his and dares others to fight him for it with their fists, Menelaus rises before the assembled heroes, sceptre in hand, to initiate a formal proceeding against him (571ff.). First he makes the charge: Antilochus has insulted his *aretē* and endangered his horses. He then calls upon the leaders of the Argives to judge fairly between them. But at this point he states that he will judge the case himself – in both instances the verb for 'to judge' is δικάζειν. He then calls on Antilochus to follow an involved procedure and finally to swear an oath that in running the race he did not purposefully use a trick.[1] But despite the fact that Menelaus said during the race that Antilochus would not take the prize without swearing an oath (23.411), we do not know later what the result might be if Antilochus were to accept Menelaus' challenge and to swear the oath. Homer has him sidestep the challenge and concede the prize.

Although this dispute only concerns an athletic prize, the procedure and language involved have long been recognized as courtroom-like. The oath-challenge made by Menelaus is clearly representative of some form of legal procedure from the Homeric age in general and thus from the earliest period of Greek society for which any substantial evidence is available to us. The continuing breadth of the employment of such oath-challenges in the Greek world is attested by Aristotle's quotation of a saying by the already apparently sceptical sixth-century Ionian philosopher Xenophanes, who points out that an oath-challenge by an impious man to a pious man is uneven, rather like a big man challenging a small man to take the first punch in a fight (*Rhet.* 1.15 1377a19–21). Herodotus emphasizes the Panhellenic character of the procedure when he has the Spartan Glaucus say to the sons of the Milesian that he will settle their dispute by using 'the laws of the Greeks' (νόμοισι τοῖσι Ἑλλήνων) towards them, by which he means, as the subsequent text indicates, that he will simply swear an oath confirming his claim (6.86). Also in the *Eumenides*, Aeschylus gives us a trace of an oath-challenge: the Furies complain to Athena that Orestes has been unwilling to swear or to receive oaths in his case (429–32). Athena's response is that injustice should not prevail through oaths.[2] These passages are to be distinguished from the procedures used in homicide cases, where both parties swear as a matter of course,[3] as well as from those described in the Gortynian Code and that attributed to Solon (*Lex. Seguer.* 242.19–21) whereby oaths are prescribed without the provocation of a challenge. It is presumably against these oaths especially that Plato objects (*Laws* 12 948b–c).

But given the early and Panhellenic character of the oath-challenge, it remains to ask what exactly the role of the procedure is. There are several instances of it reported in speeches of the fourth-century Athenian orators, so that it can be considered a significant part of the judicial process in disputes between private individuals

[1] G. Thür, 'Zum δικάζειν bei Homer', *ZSStRom* 87 (1970), 426–44 and 'Zum δικάζειν im Urteil aus Mantineia', *Symposion 1985* (1989), 55–69, argues convincingly that Menelaus is taking on the role of a judge and, by calling upon Antilochus to swear the oath, is proposing a means of settling the dispute.

[2] See also Theognis 1.199–203 and 1139–43, Sophocles, *Ant.* 264 and Antiphon the Sophist, DK[6] F44 col. 5.8–13.

[3] See D. M. MacDowell, *Athenian Homicide Law in the Age of the Orators* (Manchester, 1963), pp. 90–100.

(exclusive of homicide cases). We know at least that it takes place at the arbitration stage of litigation, or in some cases earlier (see e.g. the informal challenge mentioned at [Dem.] 50.31). The prevailing scholarly view appears to be that the challenge serves essentially only a rhetorical function. An accepted and fulfilled oath-challenge would, according to Lipsius and Harrison, add great persuasive weight to the statement that is sworn, but it would not, in itself, either end the dispute or bind the *dikastērion* to decide the case in its favour.[4] However, another view of the oath-challenge recommends itself, one which puts the procedure in a somewhat different light in terms of our understanding of Athenian legal procedure and its antecedents. It appears to me that the oath-challenge is to be seen as an *alternative* to a contest before the *dikastērion*. It is not the case that an accepted and fulfilled oath-challenge has heightened rhetorical weight with judges, since the matter about which such a challenge is made, accepted and fulfilled does not then come before judges; an accepted oath-challenge is meant to effect an 'out-of-court' means of settlement at the arbitration stage of litigation, the settlement itself awaiting the fulfilment of the oath. While the evidence would not support the claim that an accepted oath-challenge necessarily precludes subsequent court action or involves any formal prohibition of such action, it does, in my view, support the claim that the oath-challenge was considered by the Athenians, whether formally or not, to be a method of ending a dispute alternative to a contest before the *dikastērion*.

One of the strongest pieces of evidence about the challenge is found in Pollux, a late grammarian. He says that a challenge is 'a resolution of the case (λύσις τῆς δίκης) on the basis of a defined oath, a piece of testimony, a *basanos* or some other such thing' (8.62). Pollux has been largely discounted as too late and prone to error, but his testimony conforms with the interpretation to be argued in this paper, that the oath-challenge effects an alternative method of ending litigation. A complicating factor, however, is the parallel institution of the challenge to *basanos*, the process of torture whereby testimony was adduced from slaves. Conclusions about the oath-challenge would appear to have to be valid also for the *basanos*-challenge. Indeed, it seems hard to believe that a case of litigation could be made to depend exclusively on the testimony of a slave under torture. Nevertheless, just such a view, although not well received, was put forward almost a century ago by J. W. Headlam.[5] G. Thür has more recently explored aspects of the *basanos*-challenge in great detail, including Headlam's thesis, which he also rejects.[6] The suggestion of this paper will be, of course, that Headlam may after all have been on the right track. His mistake, I believe, was that he concentrated too heavily on the actual torture, likening it to a primitive ordeal, rather than on the challenge and its acceptance.

Obviously a single occurrence of an accepted and fulfilled oath-challenge being brought before a *dikastērion* concerning the litigation for which it was initiated would defeat this interpretation. But we find none. What we do find in the speeches of the Athenian orators are, for the most part, reports of challenges that were not accepted.

[4] J. Lipsius, *Das attische Recht und Rechtsverfahren* (Leipzig, 1905–15), pp. 895–900, and A. R. W. Harrison, *The Law in Athens*, ii (Oxford, 1972), pp. 150–3. Cp. R. J. Bonner, *Evidence in Athenian Courts* (Chicago, 1905), pp. 67–9 and 74–9, who anticipates some of the views expressed in this paper. The discussion of G. Glotz is helpful in Dar.-Saglio, s.v. *proklésis*. Cp. also now M. Gagarin, 'The Nature of Proofs in Antiphon', *CP* 85 (1990), 22–32.

[5] J. W. Headlam, 'On the πρόκλησις εἰς βάσανον', *CR* 7 (1893), 1–5 and 8 (1894), 136–7. C. V. Thompson, 'Slave Torture in Athens', *CR* 8 (1894), 136 and Bonner, op. cit., p. 72, reject Headlam's thesis.

[6] G. Thür, *Beweisführung vor den Schwurgerichtshöfen Athens. Die proklesis zur basanos* (Vienna, 1977), pp. 205–7.

The exact consequences, were the oath-challenges to have been accepted and fulfilled, are never clearly spelled out. But there is one report, repeated in the 39th and 40th speeches of Demosthenes (39.3–4, 40.10–11), of a man who had had a paternity suit brought against him by a man claiming to be his son. Out of fear of the uncertainties inherent in confrontations before a *dikastērion*, the man made an informal agreement with his former mistress, the supposed mother, according to which she would, in exchange for a cash payment, refuse his challenge to her to swear that he was the father. Her refusal would have completely dashed the plausibility of the litigating son's claim and virtually guaranteed the man's victory both before the arbitrator and, if there had been need, before a *dikastērion*. But contrary to his expectation and the informal agreement made between them, the mistress accepted the challenge made before the arbitrator and swore the oath. In this instance the litigant was compelled to give up his case and to fulfil his obligations as father.

But given our ignorance of what would have happened in the other cases if the oath-challenges had been accepted and fulfilled, another line of demonstration is needed – we cannot simply discuss the matter 'as if' the challenges had been accepted. What it is possible to show is that in the extant texts the oath-challenge is portrayed, as in the speech of Menelaus, as a means of settlement alternative to a proceeding before a *dikastērion* or other third party. The longest piece of evidence for this view is found in Aristotle's *Rhetoric* 1.15 1377a8–b11, a passage which, paradoxically, is passed over almost completely in published discussions of the oath in the Athenian courtroom.[7] Several of the arguments recommended in Aristotle suggest quite clearly that the oath-challenge is to be an alternative to a jury trial: e.g. the litigant who wants to swear an oath thinks the danger before the judges is greater (1377a14); the oath(-challenge) is advanced in place of a real case (*ἀντὶ χρημάτων* a15–16); the man who swears will have the case (a17–18); the man who has the opportunity to administer an oath can judge the case (a24–5); through an oath the matter is referred to the gods (a26); and, finally, with an oath there is no need for other judges (a27). If it can be assumed that Aristotle was aware of current procedure when formulating these suggested arguments, then it is hard to avoid the conclusion that the oath was meant to end litigation, to be an alternative to the contest before the *dikastērion*. The possibility that the terms of an accepted challenge might allow for the continuance of the dispute in court is nowhere suggested by Aristotle. Indeed, such a possibility seems irreconcilable with the evidence given by Aristotle.

The discussion in Aristotle makes clear, however, that, among other things, the rhetorical strategy surrounding the oath-challenge does involve some clever sleight of hand. Thus at 1377a12 (*τοὺς δὲ μὴ ὀμόσαντος οἴεται καταδικάσειν* 'the opponent thinks the judges convict the man who has not sworn') the reader is left wondering whether there might actually be sworn oaths coming before the judges. But similar circumstances are described by Demosthenes. In one case a litigant proposes to talk about the challenges he and his opponent made at the arbitration. He says that he himself put not the challenge, which would be a more accurate description, but 'an oath' into the evidence box, although it is clear that his challenge was not accepted (49.65). In fact he put only the inscribed wording of a proposed oath into the *echinos*, so that, even if it were rejected, he could argue before the *dikastērion* on the basis of that wording. Likewise his opponent is described as believing that by having sworn he will be free of the case, but his oath challenge was not accepted either. In another

[7] But see J. Plescia, *The Oath and Perjury in Classical Greece* (Talahassee, 1970), pp. 43–7 and now D. Mirhady, 'Non-technical *pisteis* in Aristotle and Anaximenes', *AJP* 112 (1991), 5–28, where the passage is discussed in more detail.

speech, the litigant says that he and his witnesses swore beforehand (προομνύναι), although it is clear that the oath was not accepted by the opponent (29.52–7). Thus what Aristotle is referring to is the rhetorical advantage that might be won with the *dikastērion* or the arbitrator by someone who, by means of a challenge, shows himself willing to swear to his claim.

An interesting and important echo of the Homeric passage mentioned earlier is found in several passages of the orators that relate to oath-challenges. The echo further suggests that the oath-challenge was thought of as an alternative to a jury trial and that the fourth-century Athenian attitude toward the challenge reflects a deep-seated Greek view about the role of this procedure. In Homer, Menelaus declares that he will 'judge' (δικάσω) the case himself before demanding that Antilochus swear an oath. As Thür has argued, δικάζειν in this case means 'to propose a means of settling a dispute'.[8] Similarly in [Dem.] 29.53, after relating a complicated challenge involving oath-swearing by both litigants as well as a possible interrogation of a slave – a challenge the opponent refused – the litigant says that his opponent 'fled judging (δικάζειν) the case for himself'. In another speech the speaker describes a scenario from a previous litigation wherein his father, if he had refused an oath-challenge, would have refused 'to become judge of his own case' (52.15).[9] Of course Aristotle also suggests the idea of giving the opponent the decision through the challenge (1377a26–7). In fact it is again through a close reading of Aristotle that an important distinction becomes clear. At 1377a24–5 Aristotle says, 'it (would be) terrible not to be willing (to judge) things oneself about which one demands that they [the judges] judge on oath'. There is an equivocation here between the activity of the litigant when judging and that of the judges. The litigant when judging only agrees to a means of settlement, in the Homeric sense, whereby the settlement actually lies in the hands of his opponent, since he (the opponent) has the option either to perform the oath or not; if the case were left to them, however, the judges would settle the case, in the regular Attic sense, by deciding for the one party or the other. At 1377a27–8, on the other hand, the litigant who wishes to administer an oath to his opponent gives him not the ability 'to judge' the case, but the decision itself (κρίσιν), since the opponent can then both agree to the means of settlement and actually settle the case by accepting the challenge and subsequently swearing the proposed oath.

The point to be made is that in the Athenian cases, as in Homer, the use of the challenge avoids a decision by an outside party. Through the challenge (πρόκλησις), the one party invites the other to join with him in setting out the means of settling the case (δικάζειν) for themselves. (Uses of the verbs προκαλέομαι and προκαλίζομαι in Homer, esp. *Iliad* books 3 and 7, reflect an analogous desire on the part of the challenger to let the other warriors rest and to fight an opponent one-on-one.) The dispute is not actually 'decided' until the oath-swearing has been completed. But according to this archaic procedure the parties are said 'to judge' by agreeing on the means of settlement, the formula to be followed in the oath-swearing.

In Demosthenes 33.13–14 a situation is described in which an oath is challenged and accepted, but then not actually sworn. Notice has been taken in the past of a deposit that was given and presumably forfeited because of failure to carry through

[8] Thür, op. cit., see note 1.

[9] Elsewhere in Demosthenes, although the challenge referred to is for the interrogation of a slave, the phrase is the same: Demosthenes says 'I called on him to be judge of his own case' (30.2, 30, 36f.). See also Antiphon 1.12 and G. Thür, op. cit., note 5, pp. 265–6. Interestingly, Demosthenes also employs the *topos* suggested by Aristotle (1377a14), according to which the danger (κίνδυνος) before the judges is greater (30.2).

with the oath.[10] Also interesting, however, is the fact that the oath was to be sworn about only some of the charges (*περί τινων ἐγκλημάτων*), the suggestion being that some other charges may have been left outstanding. This might imply that challenges could be used to resolve certain aspects of a case, the remainder being allowed to go on to be decided by a *dikastērion*, or simply by the arbitrator. But in this case there were several countervailing charges made, any one of which could have provoked litigation. An agreement to cease litigation of several of them by means of an oath in no way suggests that the litigation about any one charge could be continued after an oath-challenge concerning it had been fulfilled.

In Demosthenes 54.40–2, the speaker relates oath-challenges that he and his opponent made to one another. He contrasts the two and cites as a matter of trustworthiness the fact that he himself was willing to swear simply according to the traditional formula (*ὡς νόμιμον*). His opponent's challenge was much more dramatic and departed somewhat from the formula. The implication of the passage, as recognized by Cary and Reid, is that the formulas of the oaths sworn in such circumstances were highly regulated by custom.[11] The litigant swore against his own destruction, that of his family and household. Even the insertion of 'children' for 'family' (*γένος*) could evoke a ridiculing accusation of insincerity from one's opponent. Of course in speech 54 neither challenge was accepted, but the speaker goes on actually to swear informally before the court what he would have sworn otherwise. Such an oath, however, outside the bounds of a challenge, has only some rhetorical effect. But it is interesting to note that here, and in all of the cases, the text of the oath is worked out at the time of the challenge and its acceptance. Thür has demonstrated in the case of the *basanos* that the interrogation of the slave involves simply the denial or affirmation of a preformulated text.[12] In a similar way, after the acceptance of the oath-challenge, settlement depends solely on whether the oath, or oaths, are duly sworn or not. Therein lies the decision (*κρίσις*).

Most of the time we find litigants or their witnesses declaring themselves ready or willing[13] to swear or 'willing to add a confirmation', a *πίστις*, by which they mean an oath (see e.g. [Dem.] 29.26, 49.42 and 55.35). It is with these cases that we often come upon one of the most difficult and interesting aspects of the oath-challenge. For just as it appears that in Athens the testimony of slaves is only admitted in the context of a forceful interrogation, so it also appears that the direct testimony of women is only admitted within the context of an oath-challenge.[14] Their *κύριοι* can and do testify on their behalf, but it seems that the direct giving of evidence to a *dikastērion* is a privilege restricted to free males of age. In [Dem.] 55.27 the speaker relates that he challenged his opponent to allow oaths to be sworn by their mothers, and from his description it seems that the mothers would really have been able to resolve the dispute, since they knew the decisive details. But we do not actually hear of either of them swearing. Similarly in Isaeus 12.9 we hear of a woman being willing to swear. In fact, she appears to express her willingness openly before the arbitrator. In these cases, therefore, as in Demosthenes 39 and 40, mentioned earlier, the fulfilment of the challenge depends both on its acceptance by the opponent and on the willingness of the witness, whether man or woman, to swear the oath.

[10] Harrison, op. cit., p. 152.

[11] C. Cary and R. A. Reid, *Demosthenes. Select Private Speeches* (Cambridge, 1985), p. 102.

[12] Thür, op. cit., note 5, pp. 74–82.

[13] Thür, ibid., pp. 61–2, points out that within the context of the *basanos*-challenge expressions of 'willingness' or 'readiness' are significative of a challenge.

[14] E. Leisi, *Der Zeuge im Attischen Recht* (Frauenfeld, 1907), pp. 12–20. See also now R. Just, *Women in Athenian Law and Life* (London, 1990), pp. 33–9.

One last aspect of the oath-challenge should be noted, namely the way in which it was employed by a litigant to ridicule his opponent. In 31.9 Demosthenes ponders aloud what his opponent might have sworn at the arbitration if he had been offered the chance to swear. His ostensible point is that his opponent's position has shifted somewhat in the meantime, but interesting for us is that the entire idea of the oath-challenge is a product of Demosthenes' imagination. In fact, no challenge took place at all. Similarly Isaeus ridicules a witness of his opponent, speculating that he would be glad to swear an oath if someone were to offer him one (9.24). This Isaean passage has been used to support the view that oath-challenges could take place not only before an arbitrator but also before the *dikastērion*,[15] but it seems much more likely that ridicule is Isaeus' only aim. Several passages from Aristotle's discussion of oath are also aimed at ridicule, as e.g. when he says that it would be odd (ἄτοπον) for the opponent not to be willing to swear to something about which he demands that others judge on oath (1377a28–9). The passage mentioned earlier in which the speaker ridicules his opponent's use of a non-traditional and somewhat histrionic oath formula (Dem. 54.40), is another example of this employment of the challenge.

It is true that the evidence for all kinds of challenges, including the oath-challenge – despite its appearance in so many different forms of literature – is rather slight. The inference drawn from this lack of evidence has been that oaths were rarely used, that the challenges were simply rhetorical ploys. But it appears they were meant to lead to settlements of cases out of court, perhaps on the basis of some compromise (entailed in a promissory oath). So it is understandable that we do not have many speeches referring to them, since the speeches we have were spoken before *dikastēria* in cases where all such compromise had failed. In this paper a previously unused, and yet significant passage from Aristotle has been noted in which the oath and a contest before a *dikastērion* are presented as alternatives. Moreover, echoes of Homeric language have been seen in Athenian litigants' suggestions that through acceptance of a challenge, the opponent has the opportunity 'to judge' the case for himself by agreeing to the means of settlement. It was noted also that the oath-challenge provided the only means by which Athenian women, by agreeing to swear to challenged oaths, could give direct forensic testimony. The role of rhetoric for the oath-challenge, finally, should not be overlooked. Proper appreciation of that role depends not only on a correct understanding of the legal thinking involved, which has been sketched here, but also on a consideration of the teachings of the rhetorical handbooks.[16] And clearly these two perspectives do not give the entire picture either. More light can certainly be shed from the standpoints of e.g. religion and social history, and the relationship of the oath-challenge to the *basanos*-challenge needs to be studied in more detail.[17]

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[15] Harrison, op. cit., p. 150.

[16] See my article, note 7 above.

[17] Previous versions of this paper have been read by J. Cargill, M. Ostwald and E. Carawan and to the Classical Association of Canada in May, 1990, all of whom I wish to thank, while taking responsibility myself for any remaining errors. Likewise, I thank the anonymous referee for *CQ* for his critical comments and suggestions.