

Torture, Democracy and Human Rights

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1. Torture, Democracy and Human Rights

Georg Simmel, *The Phenomenon of Outvoting*, in *The Sociology of Georg Simmel* (1908), trans. by Kurt Wolff, London, Macmillan, 1950

The voting serves the purpose of avoiding the immediate contest of forces and of finding out its potential result by counting votes, so that the minority may convince itself that its actual resistance would be of no avail [...] Voting has the same methodological function here as have, between parties, diplomatic or other negotiations designed to avoid the ultima ratio of fight.

Universal Declaration of Human Rights (1948).

Art. 5: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

European Convention of Human Rights (1950)

Art. 3: No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)

The States Parties to this Convention,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that those rights derive from the inherent dignity of the human person,

Considering the obligation of States under the Charter, in particular Article 55, to promote universal respect for, and observance of, human rights and fundamental freedoms,

Having regard to article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant on Civil and Political Rights, both of which provide that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,

Having regard also to the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly on 9 December 1975, Desiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world,

Have agreed as follows:

PART I

Article 1

1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

Article 2

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

Torture coming back? The "ticking bomb argument" and the "torture warrant"

Alan Dershowitz, «Is There a Torturous Road to Justice?» *Los Angeles Times*, November 08, 2001

If a suspect is given "use immunity" - a judicial decree announcing in advance that nothing the defendant says (or its fruits) can be used against him in a criminal case - he can be compelled to answer all proper questions. The issue then becomes what sorts of pressures can constitutionally be used to implement that compulsion.

We know that he can be imprisoned until he talks. But what if imprisonment is insufficient to compel him to do what he has a legal obligation to do? Can other techniques of compulsion be attempted?

[...]

What if the truth serum doesn't work? Could the judge issue a "torture warrant," authorizing the FBI to employ specified forms of non-lethal physical pressure to compel the immunized suspect to talk?

Here we run into another provision of the Constitution - the due process clause, which may include a general "shock the conscience" test. And torture in general certainly shocks the conscience of most civilized nations.

But what if it were limited to the rare "ticking bomb" case - the situation in which a captured terrorist who knows of an imminent large-scale threat refuses to disclose it?

Would torturing one guilty terrorist to prevent the deaths of a thousand innocent civilians shock the conscience of all decent people?

To prove that it would not, consider a situation in which a kidnapped child had been buried in a box with two hours of oxygen. The kidnapper refuses to disclose its location. Should we not consider torture in that situation?

All of that said, the argument for allowing torture as an approved technique, even in a narrowly specified range of cases, is very troubling.

We know from experience that law enforcement personnel who are given limited authority to torture will expand its use. The cases that have generated the current debate over torture illustrate this problem. And, concerning the arrests made following the Sept. 11 attacks, there is no reason to believe that the detainees know about specific future terrorist targets. Yet there have been calls to torture these detainees.

I have no doubt that if an actual ticking bomb situation were to arise, our law enforcement authorities would torture. The real debate is whether such torture should take place outside of our legal system or within it. The answer to this seems clear: If we are to have torture, it should be authorized by the law.

Judges should have to issue a "torture warrant" in each case. Thus we would not be winking an eye of quiet approval at torture while publicly condemning it.

Democracy requires accountability and transparency, especially when extraordinary steps are taken. Most important, it requires compliance with the rule of law. And such compliance is impossible when an extraordinary technique, such as torture, operates outside of the law.

Arguments against torture

Cesare Beccaria, *Of Crimes and Punishments* (1764), chap. XVI, *Of Torture*, London, 1801

The torture of a criminal during the course of his trial is a cruelty consecrated by custom in most nations. It is used with an intent either to make him confess his crime, or to explain some contradictions into which he had been led during his examination, or discover his accomplices, or for some kind of metaphysical and incomprehensible purgation of infamy, or, finally, in order to discover other crimes of which he is not accused, but of which he may be guilty.

No man can be judged a criminal until he be found guilty; nor can society take from him the public protection until it have been proved that he has violated the conditions on which it was granted. What right, then, but that of power, can authorise the punishment of a citizen so long as there remains any doubt of his guilt? This dilemma is frequent. Either he is guilty, or not guilty. If guilty, he should only suffer the punishment ordained by the laws, and torture becomes useless, as his confession is unnecessary, if he be not guilty, you torture the innocent; for, in the eye of the law, every man is innocent whose crime has not been proved. Besides, it is confounding all relations to expect that a man should be both the accuser and accused; and that pain should be the test of truth, as if truth resided in the muscles and fibres of a wretch in torture. By this method the robust will escape, and the feeble be condemned. These are the inconveniences of this pretended test of truth, worthy only of a cannibal, and which the Romans, in many respects barbarous, and whose savage virtue has been too much admired, reserved for the slaves alone.

[...] What is the political intention of punishments? To terrify and be an example to others. Is this intention answered by thus privately torturing the guilty and the innocent? It is doubtless of importance that no crime should remain unpunished; but it is useless to make a public example of the author of a crime hid in darkness. A crime already committed, and for which there can be no remedy, can only be punished by a political society with an intention that no hopes of impunity should induce others to commit the same. If it be true, that the number of those who from fear or virtue respect the laws is greater than of those by whom they are violated, the risk of torturing an innocent person is greater, as there is a greater probability that, *cæteris paribus*, an individual hath observed, than that he hath infringed the laws.

[...] The impression of pain, then, may increase to such a degree, that, occupying the mind entirely, it will compel the sufferer to use the shortest method of freeing himself from torment. His answer, therefore, will be an effect as necessary as that of fire or boiling water, and he will accuse himself of crimes of which he is innocent: so that the very means employed to distinguish the innocent from the guilty will most effectually destroy all difference between them.

[...] The examination of the accused is intended to find out the truth; but if this be discovered with so much difficulty in the air, gesture, and countenance of a man at ease, how can it appear in a countenance distorted by the convulsions of torture? Every violent action destroys those small alterations in the features which sometimes disclose the sentiments of the heart.

[...] A very strange but necessary consequence of the use of torture is, that the case of the innocent is worse than that of the guilty. With regard to the first, either he confesses the crime which he has not committed, and is condemned, or he is acquitted, and has suffered a punishment he did not deserve. On the contrary, the person who is really guilty has the most favourable side of the question; for, if he supports the torture with firmness and resolution, he is acquitted, and has gained, having exchanged a greater punishment for a less.

Jean Améry, *Torture*, in *At the Mind's Limits. Contemplations by a survivor on Auschwitz and its realities* (1966), Indiana University Press, 1980

In most Western countries torture was eliminated as an institution and method at the end of the eighteenth century. And yet, today, two hundred years later, there are still men and women - no one knows how many - who can tell of the torture they underwent. As I am preparing this article, I come across a newspaper page with photos that show members of the South Vietnamese army torturing captured Vietcong rebels.

[...]

It does not have to be something as extreme as torture. Arrest is enough and, if need be, the first blow one receives. "If you talk," the men with the plain, ordinary faces said to me, "then you will be put in the military police prison. If you don't confess, then it's off to Breendonk, and you know what that means". I knew, and I didn't know. In any case, I acted roughly like the man who buys a newspaper, and spoke as planned. I would be most pleased to avoid Breendonk, with which I was quite familiar, and give the evidence desired of me. Except that I unfortunately knew nothing, or almost nothing. Accomplices? I could name only their aliases. Hiding places? But one was led to them only at night, and the exact addresses were never entrusted to us. For these men, however, that was far too familiar twaddle, and it didn't pay them to go into it. They laughed contemptuously. And suddenly I felt the first blow.

In an interrogation, blows have only scant criminological significance. They are tacitly practiced and accepted, a normal measure employed against recalcitrant prisoners who are unwilling to confess.

[...]

Mostly, the public does not prove to be finicky when such occurrences in police stations are revealed now and then in the press. At best, there may be an interpellation in Parliament by some leftist-oriented deputy. But then the stories fizzle out; I have never yet heard of a police official who had beaten a prisoner and was not energetically covered by his superior officers. Simple blows, which really are entirely incommensurable with actual torture, may almost never create a far-reaching echo among the public, but for the person who suffers them they are still experiences that leave deep marks-if one wishes not to use up the high-sounding words already and clearly say: enormities. The first blow brings home to the prisoner that he is helpless, and thus it already contains in the bud everything that is to come. One may have known about torture and death in the cell, without such knowledge having possessed the hue of life; but upon the first blow they are anticipated as real possibilities, yes, as certainties. They are permitted to punch me in the face, the victim feels in numb surprise and concludes in just as numb certainty: they will do with me what they want. Whoever would rush to the prisoner's aid-a wife, a mother, a brother, or friend-he won't get this far.

Not much is said when someone who has never been beaten makes the ethical and pathetic statement that upon the first blow the prisoner loses his human dignity. I must confess that I don't know exactly what that is: human dignity. One person thinks he loses it when he finds himself in circumstances that make it impossible for him to take a daily bath. Another believes he loses it when he must speak to an official in something other than his native language. In one instance human dignity is bound to a certain physical convenience, in the other to the right of free speech, in still another perhaps to the availability of erotic partners of the same sex. I don't know if the person who is beaten by the police loses human dignity. Yet I am certain that with the very first blow that descends on him he loses something we will perhaps temporarily call "trust in the world." Trust in the world includes all sorts of things: the irrational and logically unjustifiable belief in absolute causality perhaps, or the likewise blind belief in the validity of the inductive inference. But more important as an element of trust in the world, and in our context what is solely relevant, is the certainty that by reason of written or unwritten social contracts the other person will spare me-more precisely stated, that he will respect my physical, and with it also my metaphysical, being. The boundaries of my body are also the boundaries of my self. My skin surface shields me against the external world. If I am to have trust, I must feel on it only what I want to feel.

At the first blow, however, this trust in the world breaks down. The other person, opposite whom I exist physically in the world and with whom I can exist only as long as he does not touch my skin surface as border, forces his own corporeality on me with the first blow. He is on me and thereby destroys me. It is like a rape, a sexual act without the consent of one of the two partners. Certainly, if there is even a minimal prospect of successful resistance, a mechanism is set in motion that enables me to rectify the border violation by the other person. For my part, I can expand in urgent self-defense, objectify my own corporeality, restore the trust in my continued existence. The social contract then has another text and other clauses: an eye for an eye and a tooth for a tooth. You can also regulate your life according to that. You cannot do it when it is the other one who knocks out the tooth, sinks the eye into a swollen mass, and you yourself suffer on your body the counter-man that your fellow man became. If no help can be expected, this physical overwhelming by the other then becomes an existential consummation of destruction altogether. The expectation of help, the certainty of help, is indeed one of the fundamental experiences of human beings, and probably also of animals.

[...]

In almost all situations in life where there is bodily injury there is also the expectation of help; the former is compensated by the latter. But with the first blow from a policeman's fist, against which there can be no defense and which no helping hand will ward off, a part of our life ends and it can never again be revived.

[...]

During these few minutes, when you are already expending your utmost strength, when sweat has already appeared on your forehead and lips, and you are breathing in gasps, you will not answer any questions. Accomplices? Addresses? Meeting places? You hardly hear it.

All your life is gathered in a single, limited area of the body, the shoulder joints, and it does not react; for it exhausts itself completely in the expenditure of energy. But this cannot last long, even with people who have a strong physical constitution. As for me, I had to give up rather quickly. And now there was a crackling and splintering in my shoulders that my body has not forgotten until this hour. The balls sprang from their sockets. My own body weight caused luxation; I fell into a void and now hung by my dislocated arms, which had been torn high from behind and were now twisted over my head. Torture, from Latin *torquere*, to twist.

[...]

In this way, torture becomes the total inversion of the social world, in which we can live only if we grant our fellow man life, ease his suffering, bridle the desire of our ego to expand. But in the world of torture man exists only by ruining the other person who stands before him. A slight pressure by the tool-wielding hand is enough to turn the other – along his head, in which are perhaps stored Kant and Hegel, and all nine symphonies, and the World as Will and Representation – into a shrilly squilly piglet at slaughter. When it has happened and the torturer has expanded into the body of his fellow man and extinguished what was his spirit, he himself can then smoke a cigarette or sit down to breakfast or, if he has the desire, have a look in at the World as Will and Representation.

[...]

Whoever has succumbed to torture can no longer feel at home in the world. The shame of destruction cannot be erased. Trust in the world, which already collapsed in part at the first blow, but in the end, under torture, fully, will not be regained. That one's fellow man was experienced as the antiman remains in the tortured person as accumulated horror. It

blocks the view into a world in which the principle of hope rules. One who was martyred is a defenseless prisoner of fear. It is fear that henceforth reigns over him. Fear-and also what is called resentments. They remain, and have scarcely a chance to concentrate into a seething, puny thirst for revenge.