

WHY IS FREEDOM FROM TORTURE AN ABSOLUTE RIGHT? – A MULTI-DISCIPLINARY ANALYSIS

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Legal discussions of human rights do not usually address fundamental questions such as why they exist and, in a very few remote cases where they are absolute, why they are so. For example, it is often taken for granted that the prohibition of torture under national, regional and international human rights laws is absolute and admits of no exception. This article will assess the justification for the claim that freedom from torture is an absolute right.

We all read and study about human rights. We have a multitude of conventions protecting human rights, an MA in Human Rights and Democratization, a Mediterranean Journal of Human Rights, and so on and so forth. Human rights and discussion about such rights are with us, wherever we go, whatever we do. What we fail to do, however, is to analyse why they exist, and in a very few remote cases where they are absolute, why they are so. For example, we just take it for granted that the prohibition of torture under national, regional and international human rights laws is absolute and admits of no exception. This article will assess why torture may not be resorted to in any circumstance whatsoever, or rather, why is freedom from torture an absolute right.

In this article I will argue that the torture of individuals by a state may never be justified, whatever the surrounding circumstances. After disclosing its systematic nature, I will show that 'valid considerations', such as those based on utility and public interest which enhance, *prima facie*, its effectiveness, do not suffice to impinge upon and defeat the ethical and moral philosophy basis prohibiting such act. Therefore the usefulness/effectiveness and appropriateness of torture in any given situation is excluded *ab initio*

by the mere existence of a hierarchically supreme body of norms generally termed 'natural law'.

I will also show that this superior body of laws, which is intricately linked to mortality itself, may be construed as emanating from the actual nature of all human beings, that is, human existence, although it must be pointed out that a sound religious conviction leads to the same conclusion in a simpler way, or in a more direct fashion. Moreover, torture is also considered legally unjustifiable not only by naturalists, but also by positivists, because its prohibition is categorically prohibited under contemporary international law, since it has attained the status of a *jus cogens* norm.

Nowadays many people are either misinformed or find it hard to believe that torture is indeed a common practice, even in certain states which are considered 'civilized' and 'developed'. In this field, non-governmental organizations (NGO's), such as Amnesty International and Human Rights Watch, should be singled out for praise. Their reliable findings are further substantiated by other recognized bodies, including, *inter alia*, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, "a multinational group of persons – independent of government control", which has been granted "formal authority to penetrate the *sancta sanctorum* of each state (police stations, prisons, psychiatric hospitals), in other words those very places where national sovereignty is given its overpowering yet most recondite expression."¹ Although condemned as a blatant violation of fundamental human rights by the General Assembly of the United Nations (UNGA), "torture persists, daily and across the globe."² Fully documented and detailed reports by NGO's supported by publicists strengthen this thesis.³

¹ Cassese A., (1996), Inhuman States: Imprisonment, Detention and Torture in Europe Today, Cambridge & Oxford, Polity Press, p 1

² Amnesty International (AI), (1984), Torture in the Eighties, Oxford & London, Amnesty International & Martin Robertson

³ DeBrito A.B., (1997), Human Rights and Democratization in Latin America: Uruguay and Chile, Oxford & New York, Oxford University Press, p 19; Crahan M., (1982), Human Rights and Basic Needs in the Americas, Washington D.C., Georgetown University Press, pp 100-119; Quiroga C.M., (1988), The Battle of Human Rights: Gross, Systematic Violations and the Inter-American System, Dordrecht, Boston & London, Martinus Nijhoff, p 268; Guest I., (1990), Behind the Disappearances: Argentina's Dirty War Against Human Rights and the United Nations, Philadelphia, University of Pennsylvania Press, pp 34-48

Now, after having introduced the subject in order to elicit awareness in the reader who, *prima facie*, may not categorically condemn an international problem such as the practice of torture, I will pursue my objective, which consists in persuading the reader to arrive at the only plausible conclusion leading to the absolute proposition prohibiting torture in every given situation. I will now consider the moral basis which leaves no room to justify this morally reprehensible conduct. It is pertinent to stress that I do not believe that torture ought to be condemned merely because it is widespread. On the contrary, it is unjustifiable wherever and whenever it is committed, by whosoever it is perpetrated, and for whichever reason it exists in any particular situation. Its frequency is immaterial, because its nature is too horrible and runs counter to the dictates of human reason and essence, so that even the torture of one individual is always necessarily morally unjustifiable.

I believe it would be safe to argue that it is universally accepted that torture for the purposes of extracting confessions or inflicting pain to satisfy sadistic tendencies may never be justified. Contrarily, questions are usually posed where torture is deliberately employed by state agents/officials as a means, for example, of obtaining information to prevent other grave human rights violations, especially nowadays in the context of on-going terrorist activities.⁴ This dilemma leads to various controversial and conflicting views which I will next take into consideration.

One such view is the utilitarianist school of thought, which directs all to produce the 'greatest happiness'.⁵ Most contemporary utilitarians, unlike traditional utilitarians such as Bentham and Mill⁶, speak instead of "the satisfaction and frustration of desires or preferences." We must maximise preference satisfaction", they say, "if we are to act rightly." "Thus, what people want is the ultimate

⁴ "Its apologists argue that there are" cases when torture may be justified, that is, "whereby its use protects an innocent population from terrorist attack." – see AI (British Section), (1990), The Amnesty International Handbook, London, Maxwell, Macmillan & Pergamon, p 23

⁵ Bentham J., (1948), Fragment on Government and Introduction to the Principles of Morals and Legislation, Oxford, Blackwell, p 12

⁶ Mill argues that the principle of utility is the first or fundamental principle of morality. – see Mill J.S., (1987), Utilitarianism and Other Essays, Harmondsworth, Penguin, pp 295-297

measure of right or wrong.”⁷ In its most modern reformulation, it is therefore “the moral theory that judges the goodness of outcomes – and therefore the rightness of actions in so far as they affect outcomes – by the degree to which they secure the greatest benefit to all concerned.”⁸ Foot qualifies the term by the word ‘welfare’ in order to distinguish between utilitarianism and consequentialism. She notes that what is most radically wrong with utilitarianism is its consequentialism, but paradoxically its consequentialist feature “is one of the main reasons why utilitarianism seems so compelling.”⁹ The principle of utility, or “the greatest good for the greatest number”¹⁰ has been erroneously given a moral and ethical dimension although its own nature divests it of such attributes. In fact, Smart and Williams, who distinguish between positive and negative utilitarianism, between hedonistic and non-hedonistic utilitarianism, have defined act-utilitarianism, in order to distinguish it from rule-utilitarianism, as the type of utilitarianism whereby “the rightness or wrongness of an action depends only on the total goodness or badness of its consequences, that is, on the effect of the action on the welfare of all human beings.”¹¹ This gives rise to the logical pre-supposition that all people, including utilitarians, distinguish between good and bad, and between right and wrong. Additionally, it also leads to the pre-supposition that considerations in this discussion must necessarily include issues of morality. This point will be considered later and will support the writer’s argument by defeating the *ratio*, or better, the lack of any *ratio*, behind utilitarianism.

Benthamine philosophy suggests that the lesser evil must give way to the larger good. Bentham holds that torture may be justified on the following ground:

⁷ Maclean A., (1993), The Elimination of Morality: Reflections on Utilitarianism and Bioethics, London & New York, Routledge, p 10

⁸ Goodin R.E., (1995), Utilitarianism as a Public Philosophy, Cambridge & Melbourne, Cambridge University Press, p 3

⁹ Foot P., (1995), ‘Utilitarianism and its Virtues’, Mind, Oxford University Press, vol. 94, p 198

¹⁰ Rescher N., (1966), Distributive Justice: A Constructive Critique of the Utilitarian Theory of Distribution, Indianapolis, New York & Kansas City, Bobbs-Merill, p 8

¹¹ Smart J.J.C. & Williams B., (1963), Utilitarianism: For and Against, Cambridge and New York, Cambridge University Press, p 4

"It ought not to be employed, save where the safety of the whole state may be endangered for want of that intelligence which it is the object to procure."¹² Therefore, to Bentham's mind, it is sufficient that the victim of torture has, under coercion, yielded useful information. This fact, a sua sponte, is sufficient justification of the method employed.

Naturalists strongly disapprove of this. Baker points out that "the fundamental grounds for rejecting torture as a means of eliciting information from the unwilling is not that it is inefficient, but that it denies to the other the respect which is his due as a human being."¹³ Natural law theorists advocate that an application of morality is indispensable to solve the dilemma relating to the justification or otherwise of torture. This is because individuals possess the human faculty of practical reasonableness,¹⁴ which is a value *per se*, and if humans are divested of this element of rationality, they are automatically, and in every sense, equated to all other living creatures and consequently lose all that makes them truly and uniquely human.

It has been held that "conscience develops from feelings and desires with which all normal human beings are naturally endowed, modified by reaction to the attitudes of their fellows in social intercourse."¹⁵ I agree that both morality itself and natural rights are universal concepts¹⁶ also partially because, for example, it is derivative of common sense and reason that what is good should be pursued and what is bad ought to be repressed. If this conclusion is not spontaneously reached, human individuals would have initiated

¹² Twining P.E., (1973), 'Bentham on Torture', Northern Ireland Legal Quarterly, vol.24, no.3, p 15

¹³ Baker E., (1980), 'Discussion of the Putative Grounds' (1975) in Public Policy and the Use of Torture, London, Quaker Pearce & Service with Amnesty International, p 25

¹⁴ Finnis J., (1980), Natural Law and Natural Rights, Oxford & New York, Oxford University Press, pp 126-127

¹⁵ Raphael D.D, (1994), Moral Philosophy, 2nd Edn., Oxford & New York, Oxford University Press, p 117

¹⁶ "Human rights are rights which all persons equally have simply insofar as they are human."

see Gerwith A., (1984), 'The Epistemology of Human Rights', in Human Rights by Miller F.D., Paul J & Paul E.F., Oxford, Basil Blackwell, p 1

a process of self-destruction whilst discarding self-preservation and self-fulfillment. Darwin, in his 'Origin of the Species' and 'The Descent of Man', points out that every single creature possesses a natural instinct for survival. Therefore, if persons fail to preserve their own human species, by performing wrong acts instead of right ones, their own reprehensible behaviour would lead to their self-destruction, a state of affairs which no living mechanism imposes upon itself, as Darwin correctly infers.¹⁷ Thus, if human beings proclaim and actually perform what is bad, they would be rendering themselves mere living creatures which stand on a hierarchical level at par, or, to a certain extent, below animals.¹⁸

What is good and/or wrong is dictated by human reason and feelings. Thus the premise that morality is at the very heart of the issue under analysis, is an essential *point de depart*. The absence or negation of morality would mark the transition from human reason to human instinct, and by analogy, from Natural Law to the 'law of the jungle', transforming the human being into a living creature which appertains to a different, *sui generis*, and most of all, completely irrational kind of species. Therefore the misconception of morality or the application of immorality/unsound morality, would lead to the undesirable situation whereby the well-being of individuals is not fostered but severely curtailed. This should be avoided by humankind.

Gibbard defines utilitarianism as a doctrine which maintains that the ultimate moral standard is the promotion of the general good. He then asks "how can concern with the general good dictate that respect for rights takes precedence over considerations of the general

¹⁷ "An individual with strong social instincts would be less likely to survive than a selfish individual intent on saving his own skin, and therefore would be less likely to leave offspring inheriting his instincts. But because this type of behaviour is more conducive to the welfare of the group, he would, as Hume had said, be praised by his fellows, and the praise of his qualities would cause others to emulate it and to counsel emulation in the teaching of their own young. To this Darwin added that an increase of such qualities in a group by the force of example would give that group a greater survival-value than would be possessed by a group whose members acted only for their individual welfare." see Raphael, *op.cit.*, pp 117-118

¹⁸ "The initial social impulses which form the basis of conscience are to be found in animals also."

see Raphael, *op.cit.*, p 117

good?”.¹⁹ He further states that “principles like freedom from arbitrary arrest, have a direct rationale in the dignity and security of each person protected. To qualify the principle with exceptions would be to undermine that rationale.”²⁰ Great importance is attached to the concept of the dignity of the human person by international and regional human rights instruments and particularly by Natural Law itself. Hart introduces his famous pre-suppositional argument by stating that “if there are any moral rights at all, it follows that there is at least one natural right, the equal right of all men to be free.”²¹ Similarly, French philosopher Jacques Maritain, whose name is associated with the *rinascimento del giurisnaturalismo* wrote:

*“The expression ‘the dignity of the human person’ means nothing if it does not signify that by virtue of natural law, the human person has the right to be respected, is the subject of rights, possesses rights.”*²²

Maritain developed a human rights theory based on natural law in an innovative way in that his philosophy does not start with a reflection on ‘being’²³, but has, as its *point de depart*, the human persons who possess a ‘mystery’. This mystery lies in their whole existence, not merely their physical existence, for they have a richer and nobler existence, that is, a spiritual super-existence through knowledge and love, two human values which are classified as basic also by philosophy of law expert John Finnis.²⁴

Having explained the mystery of human existence, by which Maritain recognises an Absolute and the existence of a soul which transcends our transient spatio-temporal existence, Maritain holds that a person cannot be fully a person alone, but has to enter a series of relationships with others. This proposition complements

¹⁹ Gibbard A., (1984), “Utilitarianism and Human Rights”, in *Issues in Contemporary Society: Human Rights in the Modern World* by Paul E.F., Paul J. & Miller F.D., Blackwell, p 93

²⁰ *ibid.*, p 100

²¹ Hart H.A., (1995), “Are there any natural rights?”, in *Philosophical Review* 64, p 189-191

²² Maritain.J, (1994), *Man and the State*, in *MDA Freeman’s Lloyd’s Introduction to Jurisprudence*, London, Sweet & Maxwell, p 87

²³ Systematic reflection on ‘being’ is known in philosophy as ontology

²⁴ Finnis J, *op.cit.*, Part II, Chapter IV, ‘The Other Basic Values’, pp 81-97

the maxim, used by many legal anthropologists, *ubi societas ibi ius*. Maritain adds that the aim of society is the common good of human persons, and stresses that it is inadequate to say that the aim of society is the good of each individual or the mere aggregate of the individual good of each of the persons which that given society contains. In order to defeat utilitarianist doctrine, he points out clearly that there can never be the common good if there is no concomitant tendency towards what is intrinsically moral. Thus, the common good goes well beyond what is convenient, because justice and moral righteousness are essential to it. This is why it requires the development of the virtues in the masses of citizens, and this is why every unjust and immoral political act, such as torture by the state, is in itself harmful to the common good, and politically bad even when it is exclusively directed towards the best of all causes. Therefore, it is incorrect to say that natural law does not take the consequences of an action into account.²⁵

However some actions are so wrongful and atrocious *per se*, that no matter what their consequences are, they are always prohibited and remain unjustifiable. Thus, their outcome should not even be considered. The *raison d'être* behind this is that torture divests a human being of his/her dignity, that is, it impinges on his/her fundamental human rights attained at birth {actually, *strictu sensu*, at the moment of conception}, but most of all, it degrades and humiliates. Humiliation and degradation are the antithesis of respect. A respect-based analysis, which supplements a valid Kantian rights-based argument, is reflected in Aristotelian philosophy. The

²⁵ Maritain writes that Natural Law is based upon the following propositions:

1. there is a human nature and it is the same in all human beings
2. human beings are gifted with intelligence and act with an understanding of what they are doing
3. human beings have the power to choose the ends they pursue
4. because human beings have a common nature and constitution, they all possess ends in line with their natural constitution, ends that are the same for all since human beings are endowed with intelligence and determine their own natural ends, and therefore it is up to them to put themselves in tune with the ends necessarily demanded by their nature

see Maritain J., (1986), *Christianity and Democracy – The Rights of Man and Natural Law*, San Francisco, Ignatius Press, pp 140-141; Maritain J., (1994), *op.cit.*, p 145

amalgamation of Aristotelian and Kantian ethics²⁶ necessarily leads to the conclusion that torture may never be justified, because even animals and all living creatures are to be granted rights and are to be respected, let alone us humans.

This is the main reason why so far biological and chemical weapons were internationally banned and deemed violative of international law and morality, whilst the International Court of Justice (ICJ), to my disapproval, has not yet expressly held the same with regard to the threat or use of nuclear weapons.²⁷ The same may be said about the requirement of Articles 6 and 7 of the International Covenant on Civil and Political Rights of 1966 which allow the death penalty, provided the execution is performed in a humane way.²⁸ This shows that slow, temporarily uninterrupted and prolonged suffering is always necessarily unjustifiable.

Maritain contends that knowledge of natural law is not acquired through logical, rational thinking, but by listening to the inclinations of nature. In fact, he held that "the human person possesses rights because of the very fact that (s)he is a person, a whole, a master of himself/herself and of his/her acts, and who consequently is not a means to an end, but an end, an end who must be treated as such. There are things which are owed to the human being because of the very fact that he is a human being."²⁹ Similar arguments are expounded by Sergio Cotta, Italian major exponent of *filosofia del diritto*, who gives human rights an anthropological foundation.³⁰

Finnis speaks of acts "*which, per se and in themselves, independently of circumstances, are always seriously wrong by reason of their*

²⁶ See Paton H.J., (1964), *The Moral Law: Kant's Groundwork of the Metaphysics of Morals*, London, Hutchinson, p 61 *et seq*

²⁷ In the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons [ICJ Reports, (1996), no. 96/23, para.78], the ICJ reiterated that it is "prohibited to cause unnecessary suffering to combatants and that it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering."

²⁸ In *NG v Canada*, (1993), no.469/1991, the United Nations Human Rights Committee held that execution by gas asphyxiation, should the capital punishment be imposed on the convict, would not meet the test of "least possible physical and mental suffering", and therefore constituted cruel, inhuman and degrading treatment.

²⁹ Maritain J., (1994), *op.cit.*, pp 144-145

³⁰ Cotta S., (1997), *Soggetto Umano - Soggetto Giuridico*, Milano, Giuffrè Editori, pp 51-108

object”, and that “correspondingly, there are moral norms that have a precise content which is immutable and unconditioned.....for example, the norm.....which forbids the direct killing of an innocent person.”³¹ Therefore, there exist certain actions which are intrinsically wrong, or rather, which are absolutes, that is, as Finnis defines them, “exceptioneal moral norms”.³² These norms are truly exceptioneal, because exceptions to them are morally excluded *ab initio*, that is, whenever we are making a choice, we should not only never choose to torture, but we should indeed never deliberate about whether or not to torture.³³

It is very pertinent to highlight that even Thomas Nagel, who is an ardent consequentialist, never justifies torture, whatever the circumstance. In fact he states:

*“It is not even possible to undertake a commitment to serve the interests of one’s children in complete disregard of the interests of everyone else. Obligations to the state also have limits which derive from their moral context.”*³⁴

Nagel adds that

*“just because the power to kill thousands of people is yours only because you are the secretary of defence of a certain country, it does not follow that you should be under no restrictions on the use of that power which do not derive superficially from your obligations to serve that country.”*³⁵

Moreover, he states, that “not everything is permitted. Restrictions on the treatment of individuals continue to operate from a public point of view, and they cannot be implemented entirely by the courts. One of the hardest lines to draw in public

³¹ Finnis J., (1991), Moral Absolutes: Tradition, Revision and Truth, Washington D.C., Catholic University of America Press, p 2

³² *Ibid.*, p 3

³³ This is reflected in the striking Socratic *dictum*:

“It is better to suffer wrong than to do it.” – see Gulley N., (1968), The Philosophy of Socrates, New York, St.Martin’s Press, p 29

³⁴ Nagel T., (1978), ‘Ruthlessness in Public Life’, in Mortal Questions, New York, Cambridge University Press, p 81

³⁵ *Ibid.*

policy is the one that defines where the end stops justifying the means. If results were the only basis for public morality, then it would be possible to justify anything, including torture and massacre, in the service of sufficiently large interests. Whether the limits are drawn by specific constitutional protections or not, the strongest constraints of individual morality will continue to limit what can be publicly justified even by extremely powerful consequentialist reasons.”³⁶ Therefore the consequentialist also concludes that public morality generates “limits to what a public official may do in the conduct of his office, even if he is serving institutional interests.”³⁷

From a purely legal perspective, the norms prohibiting torture have attained the status of *jus cogens* under contemporary international law.³⁸ In other words, their peremptory, non-derogable nature and their superior legal status reflects their natural law origins. The leading multi-lateral instrument prohibiting torture³⁹ explicitly states, in Article 2(2), that

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

³⁶ *Ibid.*, p 89

³⁷ *ibid*

³⁸ For a better understanding of the concept of *jus cogens*, see Article 53 of the 1969 Vienna Law of Treaties, Rodley N., (1987), The Treatment of Prisoners Under International Law, Oxford, Oxford University Press, p 30; Maslen S., (1997), REDRESS: Seeking Reparation for Torture Survivors – What Role for a Permanent International Court, London, Bill Browning Trustee, pp 8-11; Randall K.C., (1988), ‘Universal Jurisdiction Under International Law’, Texas Law Review, vol.66, p 803; Meron T., (1995), ‘International Criminalisation of Internal Atrocities’, American Journal of International Law, vol.89, p 571; Forrest Martin et., (1997), International Human Rights Law and Practice: Cases, Treaties and Materials, The Hague, London & Boston, Kluwer Law International, pp 341-342; Bassiouni MC., (1986), International Criminal Law, Vol. 1, Crimes, Dobbs Ferry & New York, Transnational Publishers, p 383

³⁹ This is the 1984 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

International jurisprudence also conforms with the above legal provision.⁴⁰ At present, apart from being a grave human right violation which is redressed before domestic state courts and regional human rights courts, such as the European Convention on Human Rights and the Inter-American Court of Human Rights, torture is considered, for all intents and purposes of existing international criminal law, a crime under international law and will be prosecutable as such when the International Criminal Court starts to function.

On the basis of the above, I have shown why, unlike other rights, freedom from torture is an absolute right. Both under moral philosophy and ethics, torture is unjustifiable on the strength of the existence of Natural Law, a body of norms which, although predominantly philosophical, today, finds its legal counterpart in the important juridical concept of *jus cogens*. This is why the torturer is, even when he/she tortures for the very best of all causes, *hostis humani generis*.

⁴⁰ See *Regina v Bartle and the Commissioner of Police for the Metropolis and Others (Appellants) ex parte Senator Augusto Pinochet (Respondent)* (House of Lords)[1999], *The Barcelona Traction Case between Belgium and Spain*, (International Court of Justice) Report 3 [1970], *The Advisory Opinion in the South-West Africa Case, Second Phase, (Legal Consequences for States of the Continued Presence of South Africa in Namibia)*(International Court of Justice) Report 16 [1971], *The Tehran Hostages Case (Case Concerning United States Diplomatic and Consular Staff in Tehran)*(International Court of Justice) Report 3 [1980], *Filartiga v Pena-Irala*, 630 F 2d 876 2nd Circuit [1980], where the United States Federal Court of Appeal held that the torturer has become *hostis humani generis* (an enemy of humankind).