

8. Torture, between Law and Politics: A Retrospective View

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A. Introduction

This chapter contributes to the discussion of torture at the present time from a historical point of view. My contention has always been that the history of modern political thought can offer us a critical understanding of the question of the justifiability of torture, a question that is today again scandalously being raised.

Torture is not only a practice of the past. People continue torturing today, even in democratic countries, and we can see many attempts to justify it today in democratic countries.

In this chapter I will not be directly concentrating on the revived contemporary debate on torture. Rather, my purpose is to focus on the role which torture had in the past and on the presumed change which has occurred in the last decades. For instance, it has recently been argued, for example by Antonio Cassese, that ‘today torture is *merely* an instrument of repressing political and ideological dissent. *Through time it has become* the most brutal form of war on political enemies, against those who do not agree with the ideology of the dominant power’.¹ From this angle I will try to throw light on the recent *Rehabilitierung* of torture.

My question is the following: is it true that such a radical change has occurred? Is it true that torture is essentially a political instrument and no longer a judicial instrument? Again, is it true that in the past torture was always something different from today, ignoring of course the changing of the more or less sophisticated, more or less cruel and underhand instruments to perform it in the most effective way? My point is that the argument that the meaning of torture has changed from a judicial to a political one, *pace* the good intentions of its supporters, favours the position of torture’s defenders. The reason is that, if we say that today torture has a new face, a political face, people could argue that today we are in an exceptional and dangerous situation indeed, and that for *this* reason torture and in particular the ‘new’ form of torture is a necessary and adequate reaction to the attack by the ‘forces of evil’, or something like that. On the contrary, I think that we may reject torture with more force and arguments if we recognize that what we have in front of us really is a *reaction* without precedent, but that does not mean that it is justified by extraordinary international and political circumstances; on the contrary, it presents a regression in terms of liberty and rights, a regression insofar as the democratic process is concerned.

Torture is an old instrument. It was used in the past to defend power through judicial practice, but all of this happened in an age when people were not expected to

1 A. Cassese, *I Diritti Umani Oggi* (Laterza, Rom-Bari, 2005), p. 76, italics added.

define themselves as upholders of democracy and human rights. My interpretation tries to show, with, I hope, more evidence than the ‘change argument’, that torture is unacceptable and incompatible with democracy and human rights, and I think that in the process it may afford a realistic insight into the nature of the *status quo*. Today people are trying to square the circle, so to speak; they support torture and at the same time call themselves democratic. This does not work. Even the arguments which were elaborated during the Enlightenment, for example by Christian Thomasius, Pietro Verri, or Cesare Beccaria, are today misunderstood or simply ignored.² Today we are going back to pre-modern forms of law and power.

Two points support this view. The first one goes back to Niccolò Machiavelli, because in his works we can find an idea of torture not only as a legal instrument, but also as a political instrument *stricto sensu*.³ In Machiavelli’s age and thought, torture was already political, just like today, and not only an instrument for judicial inquiry.

The second point deals with Enlightenment thought. If we read books by authors like those mentioned above, we will find some arguments against torture which are used today. Not so much has changed in this respect, and this means that today we are facing a regression (a ‘three century regression’), a deeply antidemocratic movement. To a great extent, today we are repeating that old debate, the claim to justice of the Enlightenment has not yet been realized and, in any case, probably never will be realized once and for all. Those thinkers have shown how useless and inhuman torture is, but that is not enough in face of the new ideologies and policies promoted by efficient modern instruments of hegemony designed to shape and shed public consent. As I will try to demonstrate, in Machiavelli’s *Discourses* and in Thomasius’ essay on torture we can already find clear awareness of the existence of a political sense of torture. Arguments that using torture is pointless are strong arguments only if we are talking about judicial torture, and this is crucial for my analysis. Indeed, if torture is also a political instrument, it can be ‘useful’, and for that reason – as was already clear to Thomasius – good arguments against torture have to show its injustice, not only its uselessness. Torture cannot be a mere question of utility. This holds today as in the past.

B. *From judicial torture to political torture: the Machiavellian view*

I prefer for the moment to proceed slowly and talk about a part of the history of torture. In Greek and Roman antiquity torture was an instrument which had a place within a general concept of law and politics. It was a judicial instrument for extort-

2 C. Thomasius, *Über die Folter*, ed. by R. Liebewirth (Weimar, Hermann Böhlau, Nachfolger, 1960); P. Verri, *Osservazioni sulla Tortura*, ed. by C. Gallone (Milan, 1997).

3 N. Machiavelli, *Lettere*, ed. by Giorgio Inglese (Milan, Rizzoli, 1996); N. Machiavelli, ‘Discorsi sopra la prima deca di Tito Livio’, in Id., *Opere*, (Rome, Istituto dell’Enciclopedia italiana fondata da Giovanni Treccani, 2006).

ing by violence a confession or piece of information to be used in a trial against the accused, who refused to confess, or a presumed witness, who was reticent about the facts.⁴ It was considered an instrument of proof, which was only suited to the lower classes, however, in particular to slaves (with the exception of crimes directly or indirectly against political authority like magic, *falsa moneta* and *majestatis causa*, to punish which cases the Romans also used to torture free people). It was considered an instrument of proof regardless of the principle of the presumption of innocence (as a sort of preventive detention, so-called *mala mansio*, demonstrates) or individual responsibility for having committed the crime in question (it involved witnesses too). Moreover, torture differed from ordeal, which had nothing to do with forcing the will of someone, and was related to the irrational and superstitious conviction that a particular reaction by the accused to a cruel practice, such as bad water,⁵ would be a sign of truth. By contrast, torture had a ‘rational’ (if wrong) connection with truth.

Under certain conditions torture in the pre-modern age was clearly considered legal and right. So it was in theory and in law, so in Antiquity and in the Middle Ages. In practice torture was used not only for judicial reasons, but also for more general purposes. It was applied in order to destroy the enemy, including the ideological or religious enemy, i.e. related to political aims. We may think of the Inquisition or the torture of Christians in Ancient Rome because they were Christian.⁶

If this is true, and if my interpretation of Machiavelli is correct, as early as the 16th century, for instance in Machiavelli’s *Discourses*, we can find a political justification of extreme punishments including torture. Machiavelli was not a precursor, but a good interpreter of his age. In this sense Machiavelli is important for my purpose; to reflect on his theory and later on some Enlightenment thinkers seems to me interesting for the present.

Focusing on Machiavelli’s thought is particularly interesting for two different reasons. For one thing, after he was accused of conspiracy and arrested, he was himself tortured. And then again, he explicitly revealed the true nature of torture, its double face: the political and the judicial.

So, a word about Machiavelli. On 18 February 1512, Niccolò Machiavelli was accused as a presumed partner of Pier Paolo Boscoli and Agostino Capponi in their conspiracy against the De Medici cardinal who would later become Pope Leone X. After his arrest he was tortured, as he told Francesco Vettori in a letter dated 13 March 1513, when he left prison. This was the traditional use of torture. Judges tried to obtain his confession. He was innocent and did not confess anything. But that is not the most interesting thing as such. What I find more relevant is the reaction and the opinion Machiavelli seems to have on torture *in general*, because – as we can see in the correspondence with Vettori – he did not condemn the event in itself, he did not reject torture, but the way in which in *that* (his) particular situation it was used.

4 P. Fiorelli, *La tortura giudiziaria nel diritto comune* (Milan, Giuffrè, 1954) Vol. I.

5 See *Numbers* 5:4-31

6 Fiorelli, *La tortura giudiziaria nel diritto comune*, p. 45.

In Machiavelli's opinion, torture can be unfairly suffered, that is, it can be *fairly* suffered. When is torture unjust? When it is used against people that are only suspected and not only against people who are seriously suspected or considered guilty.⁷ The point at issue and the reason for his bitterness are not connected with the injustice of that institution; on the contrary, they depend on the fact that a non-liberal and suspicious political and social context make application of it unfair. But the reason for this justification of torture is not the traditional one: the reason grounded on the need to expiate someone's extreme guilt or to receive confession and information about a crime. Moreover, Machiavelli seems to know that in particular this way of obtaining a confession is dangerous and problematic in itself (as his biography shows).

The 23rd chapter of his *Discourses* is of capital importance in this context. The title is 'How much did the Romans avoid using moderation in judging their subjects'. Machiavelli's thesis is that Romans used no moderation and they were right in so doing. In fact extreme punishments are the necessary instrument not for justice (justice is not the end of adjudication), but for 'control over subjects which cannot and must not be offensive any more'.⁸ 'That is possible – Machiavelli continues – in two ways, either by eliminating every possibility of being harmful, or giving them everything they desire'.⁹ With Livy, Machiavelli concludes: 'you have to annihilate them, making them totally dependent on your power, either by punishment, or by inducements'.¹⁰

First of all, here extreme punishments are not a judicial instrument, but punishments. They are not the outcome of applying the criterion of proportionality between crime and punishment. They are related to *political reasons*, which can justify the absence of penal proportionality as the criterion of fairness. Machiavelli thinks that the independence of punishment from a proportional relationship with crimes and even from application of the criterion of retribution has to be rightly understood. It is here fundamental to look at the relationship between punishment and the political circumstances. Punishment has to satisfy the political needs and requirements of the ruler. In 1502 Florentine people made exactly this mistake: They looked at proportionality and respected moderation in their judgements after the rebellions of Arezzo and Val di Chiana. By contrast, the right criterion is for Machiavelli the criterion of political efficacy. 'They used,' he tells us, 'the criterion of moderation which is very dangerous in judging people'.¹¹

Here we see the primacy of politics over law, the priority of efficacy of political decision over moral and legal correctness. For these reasons Machiavelli defends extreme punishments like torture, and supports rulers and judges in using them for political ends, in particular to stabilize power.

7 Machiavelli, *Lettere*, p. 99.

8 Machiavelli, *Discorsi sopra la prima deca di Tito Livio*, p. 280.

9 Ibid.

10 Ibid.

11 Ibid., p. 283.

In paragraph 16 of the rightly famous *Dei delitti e delle pene* (1764) by Cesare Beccaria the argument on torture presupposes an idea of torture as judicial torture, which was considered a useful instrument for obtaining a confession or good information, or for discovering the truth before a trial, or an extreme punishment suited to very serious crimes, purifying the accused from the infamy deriving from heavy guilt.¹²

In order to condemn torture and demonstrate its incompatibility with legal order, Beccaria produces four interrelated arguments.

The first argument corresponds to the principle of the presumption of innocence. 'A person cannot be considered guilty and the state cannot refuse him its public protection until it is demonstrated by trial that he has violated the social contract. What sort of law can authorize a judge to punish a citizen before the sentence? Only a law such as force'.¹³ The second argument concerns the usefulness of torture. It is not only true that torture is unjust in itself, but it is also useless and a source of mistakes:

The offence is certain or uncertain. If it is certain, the punishment that law prescribes in each case is enough, and torture is useless, because judges do not need a confession. If it is uncertain, it is wrong to torture an innocent person, because they are innocent until proven guilty. And I add that it goes against all reasons to expect that a person be at the same time the accused and the accuser, and that pain should be the test of truth, as if truth resided in the muscles and fibres of a wretch under torture. That is an instrument for acquitting criminals and condemning feeble innocents.¹⁴

The third argument is related to the intrinsic irrationality of torture as a judicial instrument. Torture presupposes a factual levelling between the criminal and the innocent, and this is contrary to every conception of justice and to the principle of individual responsibility. For this reason it is also incompatible with legality, because it is irrational and unacceptable that the same consequences should derive from being guilty or innocent. Furthermore, Beccaria underlines that a very strange consequence comes from applying torture, because the innocent is put in a worse condition than the criminal. Indeed, either the former confesses and is accused, or he is recognized innocent and has suffered unfair torments. By contrast, the criminal in any case has an advantage. If he confesses, he is condemned for his guilt, but he has a chance of avoiding this. If he resists torture with determination, he has to be acquitted. He has exchanged a bad punishment for a better one. In the end, an innocent person can only lose, the criminal can only win.

When Beccaria refers to torture as the punishment for an infamous act, he presents his fourth argument, based on a principle of justice, because in this case the problem consists in the abuse of power that torture implies. In torturing, the political

12 C. Beccaria, *Dei delitti e delle pene*, ed. by A. Burgio (Milano, Feltrinelli, 2007).

13 Ibid. p. 60.

14 Ibid.

authority exceeds its constitutive limits. And that is nonsense again, because ‘infamy would be eliminated through infamy’!

Let me now briefly turn to another Italian philosopher, Pietro Verri. When he writes on torture and its intrinsic injustice Verri is thinking about judicial torture, which is usually justified by the argument of public security and the common good. As is well-known, this sort of justification will be very clearly elaborated by Utilitarianism. In this regard a passage from the Manuscripts by Jeremy Bentham is paradigmatic. Here the utilitarian philosopher points out two cases in which torture may be applied:

There seem to be two Cases in which Torture may with propriety be applied. 1. The first is where the thing which a Man is required to do being a thing which the public has an interest in his doing, is a thing which for a certainty is in his power to do; and which therefore so long as he continues to suffer for not doing he is sure not to be innocent. 2. The second is where a man is required what probably though not certainly it is in his power to do; and for the not doing of which it is possible that he may suffer, although he be innocent; but which the public has so great an interest in his doing that the danger of what may ensue from his not doing it is a greater danger than even that of an innocent person’s suffering the greatest degree of pain that can be suffered by Torture, of the kind and in the quantity permitted to be employed¹⁵

In order to favour general interests – that is the argument – it would be justified to sacrifice the interest of a single individual.

Against this common opinion, Verri’s arguments are partially Beccaria’s arguments (... we know how bitter Verri’s feelings were against Beccaria, who was accused of having plagiarized arguments by other authors, in particular by Verri himself). In any case, polemics apart, it is worth concentrating on Verri’s arguments against torture, because some of them are very interesting, original, and in my opinion, strong.

The first of Verri’s arguments is the well-known argument of the usefulness of torture as an instrument of truth. The other four arguments are specifications of the general argument of injustice. They are answers to the question: Why is torture unjust as such? Here Verri’s considerations are very fertile.

First of all, torture exhibits an excessive nature. It is essentially excessive and for this reason it is impossible to limit and moderate it through laws or judicial practices. Torture is excessive or it is not torture. Torture is efficacious and extreme or it is not torture at all. Torture is structurally unjust: it is a form of injustice. Pretending to avoid this excessive character is like pretending to avoid the excessive character in something that is *by nature excessive*. It would become something radically different.

A second argument concerns the injustice peculiar to every act which is superabundant in doing evil. Torture, in other words, has some psychological implications, because it reveals the obscure sadistic face of human nature. Verri stresses that after

15 J. Bentham, Manuscripts, University College, London 46/63-70, in W. L. and P. E. Twining, ‘Bentham on Torture’ *Northern Ireland Legal Quarterly* 24 (1973): 307-356, pp. 312-313.

the initial disgust, torturers take pleasure from torturing; compassion and humanitarian feelings fade away. The third argument is the one already mentioned: the presumption of innocence. The fourth one consists in recognition of the contra-naturam character of torture. Forcing a confession, forcing one's own confession, forcing the principle of self-conservation to be violated, that is, the fundamental right to life prescribed by natural law, is an action against nature itself. This argument of the contra-naturam character together with the argument of the excessive nature of torture is peculiar and fundamental, because it insists on an evident violation of the basic individual right to life.

At this point, the German philosopher of law Christian Thomasius is very helpful for my chapter, and may bring us to a conclusion.

Thomasius writes on torture in his essay *Dissertatio de Tortura* (1705, more than three centuries ago). It is an essay in two parts. In the first part the author presents some historical-reconstructive reflections. In the second part he presents his normative and critical theories. His first argument is the last one we described in talking about Verri: the argument of the contra-naturam character of torture. The second one is the usually recognized argument of the presumption of innocence. The third one is the frequently maintained argument of the usefulness of torture and of its paradoxical character so well described by Beccaria, as we have just seen: judges lose rather than gain certainty in finding judicial truth.¹⁶ The fourth argument is new and relevant in this context. It deals with conventions and tradition. For Thomasius it is not a good argument to justify torture on the grounds of its antiquity. History is not a principle of justification at all. In this regard we may remember the poor eels of Benjamin Constant's French cook and his connected argument against slavery: for injustice there is no justification through time.¹⁷

But another argument by Thomasius is decisive for us. He dedicates an entire paragraph (number 4 of the second part) to the *political nature* of torture. Here he writes: 'Punishments give an opportunity to all tyrants to act cruelly towards their subjects, misrepresenting justice. Torture gives the more powerful an instrument by which to harm innocent and hated people'.¹⁸ It is a very clear passage. Torture is a judicial instrument but also a *political* one, because this is an instrument for fighting efficaciously against ideological and political enemies – a very significant aspect of the current application of torture.

D: Concluding remarks

Such was Thomasius' criticism three centuries ago. Old arguments supporting torture such as the Benthamite argument, and old practices such as torture in its different applications are unfortunately recurring.

16 Part B, §§ 2 and 3

17 Thomasius, *De l'Esprit de conquête et de l'usurpation*, chap. XIII, fn. 2

18 Thomasius, *Über die Folter*, p. 164

The 'old' counter-arguments are therefore still valid and have not lost their argumentative force.

Torture has a dual nature: it is judicial and political.

Torture is useless in terms of public interest and produces paradoxical outcomes for any trial.

Torture is unjust for at least four main reasons: (i) *it violates* the principle of the *presumption of innocence*; (ii) it implies depreciation of fundamental rights, in particular and first of all *the right to life*; (iii) it is essentially excessive and *cannot be moderated* by legal norms; (iv) finally it *cannot be justified by tradition*.

All this was already clear and evident to Enlightenment thinkers. But these ideas no longer seem so evident today; they are again under debate. They have a worrying topicality, because torture is a cogent reality as a political instrument, as a judicial instrument, and, last but not least, as a practice prejudicial to prisoners, immigrants, and refugees. My impression is that these circumstances show the regressive character of the present, in which subjective rights seem to 'have a price': the price of so-called public security: people expect to legitimize something that is a contradiction in itself, since in a democracy law and torture cannot go together. Torture supporters expect to transform subjective rights into relative rights, which can be sacrificed in the name of public utility and the common interest; relative rights which cannot be defined – borrowing Ronald Dworkin's metaphor – as 'trumps' anymore, but simply as good cards, whose importance depends on contingent conditions; they are always held in reserve.

We may hope that the democratic crisis is only temporary, that the modern democratic process forms part of a general dialectical dynamic. We may hope that the present time is a moment in a progressive process. But for that very reason we have to reflect on the Enlightenment theses and take them seriously. We must not ignore the real meaning of Verri's words with regard to the present situation: they sound, to my mind, like a warning against indifference, against the current risk of underestimating the immorality of torture and what is at stake in terms of constitutional rights.

'It seems impossible to me,' Verri wrote in 1770, 'that torturing could have persisted for so long': never has a prediction erred more than this on the side of optimism.