4. Torture and Democracy

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Torture and law were always already closely connected in the Western legal tradition. In the 13th Century, torture was put on a legal basis in the context of the inquisition trials. This juridification is a late part of a large-scale law reforms of the 12th and 13th Century, from which the church (according to Harold Berman´s groundbreaking studies on the Papal Revolution)[1] emerged as the first modern state that was ruled by law. `Inner´ actions, attitudes, schemes, desires and intentions were no longer liable to prosecution – with the exception of the two strictly defined, if spectacular, offenses of *treason* and *heresy*.

Ordeals and torture during the hearing of evidence and adjudication were first prohibited within canon law and replaced with formal requirements of evidence so strict that a condemnation in criminal cases was often difficult, and in hard cases or cases of covert crime, nearly impossible.[2] Although the formal presumption of innocence did not exist yet, the burden of proof was put on the prosecution from then onwards. A professional lawyer was admitted to trials. Fact finding and sentencing became separate processes, and at least two independent eyewitnesses were required for a complete hearing of evidence. The confession became the silver bullet of criminal proceedings. Later, towards the end of the 13th Century, torture was reintroduced but subject to norms in accordance with the rule of law. Torture was approved in certain hard cases of capital crime, and especially in those that were related to criminal states of consciousness, such as heresy and treason.

Yet, the application of torture was strictly standardized and, thus, limited. It was to be applied only if at least one eyewitness and strong evidence indicated the defendant's guilt. Moreover, a confession extorted from someone under torture was only valid if it was repeated voluntarily in court.[3] If the defendant revoked it, he or

1 H. Berman, *Law and Revolution. The Formation of the Western Legal Tradition*, (Cambridge, Harvard University Press, 1983).

2 J. H. Langbein, *Torture and the Law of Proof. Europe and England in the Ancien Regime*, (Chicago, University of Chicago Press, 1977). One must add that there were not only moral and legal reasons for the abolishment and condemnation of ordeal and torture but also simple class interests of the noble and the higher clergy, and in particular of the new and highly increased powers of the mighty kings of Sicily, France and England, and the Pope who strived for the monopolization and centralization of all power in their own hands and to get control over the local communities. Therefore it was no longer in the interest of the new ruling class that ordeal and great parts of the jurisdiction laid in the hands of decentred local communities, and they now were persecuted as heresy and pagan praxis, see: R. I. Moore, *The First European Revolution, c. 970-1215* (Oxford, Blackwell, 2000).

3 Berman, *Law and Revolution II. The Impact of the Protestant Reformations on the Western Legal Tradition* (Cambridge, Harvard University Press, 2003), p. 133.

she was exposed to torture again, and if he/she repeated the confession, the 'voluntary' confession was obligatory for verification in the second 'round' as well. Why was torture reintroduced in canon law? The problem partly was a self-produced trap because the burden of proof in the 12th and 13th Century was simply too high. Therefore the new criminal law was too weak to fulfil the stabilizing function of law as an 'immunity system' of the society (Luhmann). But the *legal* revolution was not only oriented to the *stabilizing function* of law but law was also, and for the first time in history, designed as a *means of changing the world*, and to realize parts of the *civitas dei* within the *civitas terrana*.[4] Since that time modern law has the double function of stabilizing expectations (Luhmann) *and* emancipating us from informal power.[5] The jurists and legal philosophers of the 11th and 12th Centuries were aware of the repressive use of law and its stabilizing function but they also wanted to improve and correct the individual's behaviour, and they wanted a criminal law that worked not only as punishment but also as an expression of divine grace and as an embodiment of parts of the realm of God on earth. In strengthening the stabilizing function of law since the late 12th Century, torture (and in particular the persecution of heresy) became a means for those in power to reduce the tension between the two fundamental purposes of law and to get its emancipatory use (and with it the poor who were the subjects of their rule) under control, and this was due to the new economic and political class structure that was established after the revolution.[6]

This is the famous Habermasian Janus face of law: '*rechterfüllte Kriege*' – 'lawfull wars' (Carl Schmitt) and '*rechterfüllte*' or 'lawful' torture – in the name of God, and both at the same time fitting very well the 'material interests' (Weber) of the ruling classes. A case study in the dialectic of enlightenment: The end of ordeal and result enlightened Christian legal reforms during the so called Renaissance of the 12th Century empowered the individual human with the full responsibility for his or her deeds, and in particularly made the judges individually responsible for their judgments. The legal reforms indicated an emancipation of subjectivity and an increase of autonomy[7]. Therefore they increased the burdens of proof in cases of capital crime, and this *progress* then became the *reason* for the re-invention of torture in great measures, because this re-invention in the course of time (and in particular in times of crisis) became a useful instrument for the increased oppression and expropriation of peasants and the destruction of self organized rural communities.[8]

A book written by a German legal historian in 1940 (when he was serving as a soldier in the *Wehrmachtsgerichtsdienst* [Army legal service] in Berlin in a time of terribly increased use of torture) shows very well how this dialectic of enlightenment worked during the late 14th and 15th Century. At that time the interest of the emerg-

4 Ibid.; see also H. Brunkhorst, *Solidarity. From Civic Friendship to a Global Legal Community* (Cambridge, MIT Press, 2005), pp. 23-54.

5 C. Möllers, *Die drei Gewalten. Legitimation der Gewaltengliederung in Verfassungsstaat, Europäischer Integration und Internationalisierung* (Weilerswist, Velbrück 2008), p. 226.

6 Moore, *The First European Revolution*.

7 Langbein, *Torture and the Law of Proof.*

8 Moore, *The First European Revolution.*

ing territorial state in the social order of things increased. Torture then was used systematically to produce reliable knowledge about criminality, security of citizens, and better means of stabilization of power.[9] More and more facts became criminal facts, and new and extraordinary crimes were invented to justify the use of torture for the 'protection' of indigenous and economically well established good citizens against the poor people, homeless knights and (as usual since the 12th Century) the Jews. These groups became then the preferred subjects of torture, and if they had done their part to increase knowledge and discursive power of the state or the city, '*nit vil umbstand*' was made with them if they had come through the torture alive.[10] This anticipates already a distinction which emerged during the debate about the new security and anti-terror legislation in Germany. This distinction is that between two kinds of penalty law: *Bürger*- v.. *Feindstrafrecht*, or in English: 'penal law for citizens' v.. 'penal law for enemies' which denies enemies or illegal fighters the status of legal persons who belong to the race of beings that are born equal.[11]

Yet, in the late 13th Century there was also an *intrinsic* motivation to reintroduce torture then, and this was more ideological and religious. Even if it was related completely to the stabilizing function of law it corresponded even more to the 'ideal interests' (Weber) of the ruling (clerical and noble) elites than to their material interests, and I guess one should take this *ideal interest* as seriously as material interests. Torture, re-introduced simultaneously with enhanced prosecution and the death penalty for heresy, was designed as a means to make the world safe not (as in present day America) for democracy but for the true believers in the holy and only church of Rome, and to save the indestructible soul and eternal life of all Christians. For that spiritual purpose the fundamentalist opposition, the Antichrist and the inner and outer Axis of Evil should be excluded and exterminated. In Christianity the inner self mattered, and in particular this was so since the new discovery or construction of the *individual subject of consciousness* in legal theory, scholastic philosophy, theology and poetry during the Renaissance of the 12th Century.[12] The intrinsic purpose of torture now reveals another chapter of the negative dialectic of enlightenment, subjectivity and progress. Torture was supposed also to offer the defendant a chance to salvage his or her immortal soul from eternal condemnation by means of revocation and acknowledgment of Christianity's objective truth, and – as a true believer – accepting the physical penalty authentically.[13] Torture in the inquisition trials of the 13th and 14th Century was '*Rettungsfolter*', i.e. *salvation-oriented torture*, torture exerted as a legal instrument to save the eternal life of men. It was a regime

9 E. Schmidt, *Inquisitionsprozess und Rezeption* (Berlin, 1940), p. 24.

10 Ibid., pp. 17, 54, 84.

11 G. Jacobs, 'Bürgerstrafrecht und Feindstrafrecht', *HRRS* 3 (2004): 88-95, pp. 89ff, in particular p. 93. [Available at: <http://www.hrr-strafrecht.de/hrr/archiv/04-03/hrrs-3-04.pdf>]

12 R. M. Kiesow, 'Das Experiment mit der Wahrheit. Folter im Vorzimmer des Rechts', *Rechtsgeschichte* 3 (2003): 98-110. For the broader context of the development of individualization see: N. F. Cantor, *Medieval History. The Life and Death of a Civilization* (London, Macmillan, 1969).

13 Berman, *Law and Revolution*; Berman, *Law and Revolution II*.

of truth, the intertwinement of reason, belief and torture, a power discourse that once was opened by Jesus' word 'I am the truth' – a truth belonging to nobody, being completely egalitarian but had to be introduced by *torture* as well as by *grace* and *insight*.

II.

The German term '*Rettungsfolter*' or *salvation-oriented torture* originally was not invented by the old canonists but by a German legal scholar, Wilfried Brugger, who was the first German lawyer after World War II who suggested an argument for the legalization of torture in certain cares of terror suspects, hijackers etc.[14] Yet, Brugger's idea of juridified and lawfull ('*rechtserfüllte*') *Rettungsfolter* – law no longer expected to save eternal but mortal life of victims of crime and terror – fits nicely with the canon law of the late 13th Century, and so does the whole social and legal context. In the same way as 700 years ago, torture again is accompanied by enhanced prosecution, much extended punishment, death and life sentence for terrorism, heavy and notorious criminals etc.; by new forms of discoursive power, biopower etc.; by new disciplinary instruments to control and construct the inner self; by a strong preference for the stabilizing and repressive function of law and a growing suspicion against its emancipatory component;[15] by the ideal and – not to forget – the material interests of an emerging and again transnational but now global ruling class.[16]

Those who argue today in favour of legalized torture clearly argue from *within* the Western legal tradition. As we have seen, within the legal principles of this tradition *Rettungsfolter*, the salvation-oriented torture is completely compatible with *rule of law* or the *state of law* (*Rechtsstaat*). Yet, here the question arises if *Rettungsfolter* is also compatible with a *Rechtsstaat* that is *democratic*?

14 W. Brugger, 'Würde gegen Würde', *Verwaltungsblätter Baden-Württemberg* (1995): 414ff; Brugger, 'Darf der Staat ausnahmsweise foltern?', *Der Staat* (1996): 67 ff; Brugger, 'Vom unbedingten Verbot der Folter zum bedingten Recht auf Folter?', *Juristenzeitung* 55 (2000): 165-73.

15 N. Berman, 'Privileging Combat? Contemporary Conflict and the Legal Construction of War', *Columbia Journal of Transnational Law* 43 (2004): 1-72; O. Lepsius, 'Freiheit, Sicherheit und Terror: Die Rechtslage in Deutschland', *Leviathan* 1 (2004): 64-88; *Ehrhard Denninger*, 'Freiheit durch Sicherheit? Anmerkungen zum Terrorismusbekämpfungsgesetz', *StV* (2002): 96 ff.; T. Groß, 'Terrorbekämpfung und Grundrechte', *KJ* (2002): 1 ff.; S. Buckel and J. Kannankulam, 'Zur Kritik der Anti-Terror-Gesetze nach dem 11. September', *Das Argument* 44 (2002): 34 ff; G. Frankenberg, 'Kritik des Bekämpfungsrechts', G. Beestermöller and H. Brunkhorst (eds.), *Folter: Sicherheit zum Preis der Freiheit* (Munich, Beck, 2006).

16 On the emergence of this class: Brunkhorst, 'There Will Be Blood. Konstitutionalisierung ohne Demokratie?', in: Brunkhorst (ed.) *Demokratie in der Weltgesellschaft*, Special Issue of *Soziale Welt* (Baden-Baden, Nomos, 2008); Brunkhorst, 'Cosmopolitanism and Democratic Freedom,' in C. Thornhill and S. Ashenden, (eds.), *Normative and Sociological Approaches to Legality and Legitimacy* (forthcoming, 2008)

I think not. From the point of view of German law, European law and International Law torture is forbidden unconditionally: '*notstandsfestes*' *ius cogens* with *erga omnes* binding power.[17] As Mathias Hong rightly says: 'A new constitution is needed by those' German lawyers who want to alter the German laws against torture, and one should add: a new European and Intentional Law as well.

Yet, the more philosophical or theoretical debate of this question – so I argue – depends deeply on our understanding of *law*, *constitution* and *constitutionalism*. From its very beginning the Western legal tradition has been characterized, as I already mentioned, by the tension or even dialectical opposition between a *repressive* and an *emancipatory* understanding of law. Since Hobbes and from Austin, through Laband and Jellineck, to Carl Schmitt, including even Hans Kelsen and Niklas Luhmann, a onesided understanding of law as *peace-keeping repression* (the legal system as the *expectations stabilizing immunity system*) has prevailed on the one hand; but on the other hand a lot of philosophers of law have interpreted the very concept of law, not as repressive and peacekeeping, but *basically* and *primarily* as *emancipatory*. Law, in this reading that is inspired by the French Revolution, is deeply connected with the idea of realizing and implementing *equal freedom of all*, and not only of all *citizens*, but of all *people*. From Kant´s definition of law as *compartibilization of reciprocal spheres of freedom* that relies completely on the one and only human right to *equal freedom*, this track of argumentation runs via Savigny and Hegel's famous definition of law as the *existence of freedom* ('Dasein der Freiheit') to Rawls, Habermas or Ingeborg Maus today.

Since the German and English Protestant Revolutions of the 16th and 17th Centuries, and since the American and French Constitutional Revolutions of the 18th Century, both competing understandings of law have been reflected by different comprehensive ideas of a *constitution*, and during the 19th and 20th Centuries both ideas were implemented and tried out in different constitutional regimes. The first one historically stems from the German and English revolutions, and the early inventions of constitutional Monarchy are its paradigmatic cases. This kind of constitution, following Christoph Möllers, can be called a *power-limiting* constitution.[18] That means that the constitution is invented to limit the *already prevailing power* of a certain *non-democratic regime*. Granting its citizens a constitution, this regime binds itself

17 M. Hong, 'Das grundgesetzliche Folterverbot und der Menschenwürdegehalt der Grundrechte – eine verfassungsjuristische Betrachtung', in G. Beestermöller and H. Brunkhorst (eds.), *Rückkehr der Folter* (München, Beck, 2006), pp. 24-35; see further: A. Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures', *Leiden Journal of International Law*, 19 (2006): 519-610, S. Oeter, '*Jus cogens* und der Schutz der Menschenrechte', in S. Breitenmoser, B. Ehrenzeller, M. Sassòli, W. Stoffel and B. W. Pfeiffer (eds.), *Menschenrechte, Demokratie und Rechtsstaat*, (Baden-Baden, Nomos, 2007), pp. 499-521; A. Emmerich-Fritsche, *Vom Weltrecht zum Völkerrecht* (Berlin, Duncker & Humblot, 2007), pp. 493ff, 706f.

18 On the distinction between *power limiting* and *power founding* constitutions: C. Möllers, 'Verfassungsgebende Gewalt—Verfassung—Konstitutionalisierung', in A. von Bogdandy (ed.), *Europäisches Verfassungsrecht* (Berlin, Springer, 2003), pp. 1ff. The distinction is prominently used by H. Arendt, *On Revolution* (Harmondsworth, Penguin 1973).

to the rule of law (Jellinek). Though it only grants (like a merciful and good prince: like the prince of the mythical tale of a 'Glorious Revolution') individual rights and legal remedies to its *subjects*. These *subjects* or in French or German: *sujets/Untertanen* are citizens only as long as the regime is pleased to treat them as citizens. The *consitutionalized asymmetry* between the ruler and his subjects never vanishes except in the case that the regime transforms itself into a full fledged democracy (as it was the case with English history during the late 19th and early 20th Century). The point here is that power limiting constitutionalism must not but can be reduced to a mere *repressive understanding of law*. The repressive understanding in any case has priority over the emancipatory or freedom-enabling understanding of law (which form the very beginning was much more alive in the English than in the German constitutional monarchies).

The philosophical background of power-limiting constitutionalism is clearly Hobbesian. *Freedom has to be relative with security*, and in case of emergency or exception the self preservation of the constituent power, of the monarchy or the 'state' (Jellinek) becomes an absolute and unconditioned norm even at the price of individual rights, legal remedies and democratic participation. Torture, in this case of a self-tamed, self-bound Leviathan can or even *must* become a legal and constitutional measure in the struggle against public enemies who oppose the constitutional regime fundamentally. Following Lord Tony Giddens: *Human rights could not be applied to enemies of the basic human rights*.[19]

The latter is an implication of a power-limiting understanding of constitutionalism for which the work of Georg Jellinek is paradigmatic. Power-limiting constitutionalism presupposes a 'law-free' state which is of the ready beyond law as an 'emergency resource of argument' ('*argumentative Notstandsreserve*') in order to 'withdraw the legal standards it originally granted.'[20] Or in the affirmative words of Ernst Forsthoff (from the 1970s): 'Only where government and administration appear as an executive that is no longer bound to law, they are the 'state' and nothing else.'[21] One of the present advocates of legalized torture, who suggest the introduction of a specific criminal law for enemies ('*Feindschaftsrecht*'), the highly recommended legal scholar from Bonns Law School, Günther Jacobs brings that to the striking formulation: 'Those who win the war define the law.'[22] (This is nothing else than a reformulation of Carl Schmitt's infamous definition of sovereignty: *The one who determines the state of emergency is the sovereign*.)

19 Speech in the debate on the Terrorism Bill, H. L. Debs, 1 March 2005, cols. 148-51. [Lord Giddens did not use the phrase in the text, but it could be seen as implicit in his argument that we cannot 'sustain our traditional procedures' in the face of 'new style terrorism' – eds.]

20 C. Möllers, 'Skizzen zur Aktualität Georg Jellineks', in S. L. Paulsen and M Schulte (eds.), *Georg Jellinek – Beiträge zu Leben und Werk* (Tübingen, Mohr, 2000), pp. 164-5.

21 E. Forsthoff, *Der Staat der Industriegesellschaft – dargestellt am Beispiel der Bundesrepublik Deutschland* (München, Beck, 1971), pp. 46-7, 105.

22 Jacobs, 'Feindstrafrecht', p, 95.

III.

The other kind of constitutional regime, the power-binding kind, introduces a completely different perspective. The paradigm cases of power-*founding* constitutions stem from the French and American Revolutions. Not how to *limit* power was – according to Arendt – the problem of the American Revolution but how to *establish power*, and how to preserve, enlarge and improve the constituent power of the people?[23] The revolution (with Thomas Jefferson) should be transformed into a *permanent* revolution, and a German jurist and revolutionary from the year 1848 Justus Fröbel followed the Jeffersonian track and defined democracy as a 'permanent legal revolution'.[24] Contrary to power-limiting constitutions power-founding constitutions are from the very beginning democratic. Power founding constitutionalism is *democratic constitutionalism* because it is relying on the legal principal of *democratic inclusion*.[25]

A power founding constitution constitutes a *citizenship of free and equal citizens* who control the state and its branches of power. In this case of a power-founding constitution it is not an already existing power that grants rights to its subject but the *citizens themselves ascribe rights to each other reciprocally*.[26] Therefore, in a modern democracy exists no *legitimacy* ('*Legitimität*') of rulership or a ruler (like the *legitimate king*) but only procedures of the egalitarian *legitimation* ('*Legitimation*') of binding decisions (legal norms). Power-founding constitutionalism *necessarily* is committed to an *understanding of law that is emancipatory* because there are no longer any legal norms *allowed* which are not legitimated by the free and equal discourse and free and equal decisions of all legal subjects affected by the specific norm. Democratic legitimation does transfer the right to equal freedom into positive law that interprets and implements this right that does not exist before the self-corrective procedure of its legitimization.

Now, the basic idea of a democratic constitution is first that there exists no longer any sovereign subject that keeps outside or rules over the law because a free and equal citizenry is constituted by the always already legal procedure of implementing and concretizing this very constitutional procedure. Democracy allows 'only as much state as its constitution creates.'[27] There is no state outside the legal procedure of constitutional and normal legislation and concretization of law, hence there is no difference left between state and law (as in Kelsen's theory of law).[28] Yet, also the

23 Arendt, *On Revolution*.

24 Quoted from J. Habermas, 'Ist der Herzschlag der Revolution zum Stillstand gekommen?', in Habermas (ed.) *Die Ideen von 1789* (Frankfurt, Suhrkamp, 1989).

25 See: S. Marks, *The Riddle of all Constitutions*, (Oxford, Oxford University Press, 2000).

26 I. Maus, *Zur Aufklärung der Demokratietheorie* (Frankfurt, Suhrkamp, 1992); J.Habermas *Faktizität und Geltung* (Frankfurt, Suhrkamp, 1992; trans. W. Rehg as *Between Facts and Norms,* Cambridge, Polity, 1996).

27 A. Arndt, 'Umwelt und Recht', *Neue Juristische Wochenschrift* 25 (1963): 848 ff.

28 On Kelsen see now: H. Brunkhorst and R. Voigt, *Rechts-Staat. Staat, internationale Gemeinschaft und Völkerrecht bei hans Kelsen* (Baden-Baden, Nomos, 2008).

people are no longer a substantial *sovereign* before and over the law. The *pouvoir constituant* is (and must be if democracy is possible at all) always already mediated by the *pouvoir constitué* in a (hopefully) virtuous circular process. The difference between the two is not a fundamental *dualism*, as in Sieyes (natural v.. positive law) or in Carl Schmitt (state of exception v.. legal state) but a gradual difference within a *continuum*, and with the idea of transforming dualism into a continuum I try to combine John Dewey´s pragmatism with in Hans Kelsen's legal theory.[29] Only then we can keep Kelsen's anti-sovereign inside but to get rid of Kelsen's Non-Kantian, yet already formal, Apriorism.

Second, modern democracy is *not* simply rulership of the majority over the minority (constrained by law or not) but 'rulership of the ruled' or self-rule, self-legislation. Democracy therefore formally and procedurally presupposes the *identity of rulers and ruled*. Self-rule or self-legislation is possible only, if *everybody* who *is affected* by *collectively binding decisions* has a say, has a voice and a vote, has equal access to the whole process of political discussion, creation and concretization of legal norms on all levels of Kelsen´s 'Stufen des Rechts' (hierarchy of legal actions) which is on all levels at once is legislation *and* application/ implementation of norms and standards (against we have here a *continuum* of creation and implementation of legal actions). As individual human being everybody who is affected by a legally binding decision has to have sufficient and equal access to the discussion, creation and implementation of legal norms, on all levels of the legal hierarchy, in parliaments as well as in referenda, in international organization as well as in courts, in governments as well as in local administrations. Hence, *universal human rights* are the indispensable and necessary condition for any democratic will formation that is *self-legislative rulership by the ruled* ('*Herrschaft Beherrschter*').[30] Without these *rights* no *equal* access would be possible, and without *universal* rights no access for *all* affected would be possible. This is mirrored by constitutional history: All democratic power-founding constitution textbooks are based on the dialectical tension between universal human rights which *do not allow to exclude anybody* on the one hand, and concrete rights of citizenship, constitutional norms of check and balances etc. on the other hand, which never can avoid to *exclude* or silence *some* people or groups, minorities or even majorities etc.[31] Therefore we can argue with Susan

29 For more see: H. Brunkhorst, 'Kritik am Dualismus des internationalen Recht – Hans Kelsen und die Völkerrechtsrevolution des 20. Jahrhunderts', in R. Kreide and A. Niederberger (eds.) *Internationale Verrechtlichung. Nationale Demokratien im Zeitalter globaler Politik*, (Frankfurt am Main and New York, Campus, 2008); further the last section of Brunkhorst, 'Cosmopolitanism and Democratic Freedom'.

30 For this definition see C. Möllers, 'Der parlamentarische Bundesstaat – Das vergessene Spannungsverhältnis von Parlament, Demokratie und Bundesstaat', in *Föderalismus – Auflösung oder Zukunft der Staatlichkeit?* (München, Boorberg 1997), p. 97; Brunkhorst, *Solidarity*, 70ff.

31 This is Derrida´s point: see J. Derrida, 'Force of Law: The "Mystical Foundation of Authority"' in D. Cornell, M. Rosenfeld and D. G. Carlson (eds.) *Deconstruction and the Possibility of Justice* (London, Routledge, 1992).

Marks, that the function of the legal principle of democratic inclusion in national and international law is to keep the *meaning of democracy open* for ever new voices, new definitions of citizenship, democratic participation beyond representative government, and new institutions of democratic legitimation beyond prevailing national borders etc.

IV.

Coming back to torture, there can be no doubt that the principle of democratic inclusion and the idea of *self-legislative rulership of all ruled individual human beings* (of all human being affected by collectively binding decisions) categorically *excludes torture*. A democratic constitution stipulates the *relativization of security with freedom* and prohibits in reverse the relativization of freedom with security. Security however fundamental for the exercise of rights, is limited by the basic right that is to protect. A democratic legal system that does not allow a loophole for 'salvation' torture, 'does not miss the opportunity to a state of emergency, it only refuses to offer the revocation of itself in that case', Gertrude Lübbe-Wolf wrote already in the 1980s, now judge at the Federal Constitutional Court of Germany.[32] This is so because legalized torture would destroy the possibility of individual self-determination of the one exposed to torture, hence, torture would destroy the possibility to say freely *yes* or *no*. Moreover, torture in particular would destroy the democratic self-determination because legalized, and *only legalized torture* oppresses the opportunity of subjects to the law of torture, to intervene *every time* into the public issue on this law once it is applied to her or him. Thus, the most elementary method of the individual affected by law to participate democratically in its making – namely to be able to interfere with an argument about its validity at every time, as the chain of democratic legitimacy demands it – would cease to exist. A law to which *both*, the torturer and the tortured could accept or reject, no longer would be possible. As opposed to legal torture, not even the otherwise barbarian death penalty destroys that option. The condemned individual can agree or disagree with it until the very last second in order to continue the egalitarian argument about its validity even beyond his own death.

V.

A brief additional remark on the ticking bomb: Legal and moral discourse are different matters. Besides other advances, the differentiation of legal and moral norms increases our individual freedom. The difference enables us to behave immorally

32 Quoted from Heribert Prantl, 'Rettungsfoltern', S*üddeutsche Zeitung* 19 November 2004, p. 13.

without fear of legal sanctions. The increase here is an increase of liberal freedom, the freedom of Kant's '*Volk von Teufeln*' – 'people of devils', or Hobbes' negative or legal freedom that allows the citizens to do everything they want to do unless it is not explicitly forbidden by law. Yet there is also an increase of moral (or practical-rational) freedom because acting in accordance with the moral law now depends *only* on the individual conscience, deliberation and decision of the actor; hence the difference of law and morality increases the (Kantian) personal autonomy of the individual human being who is no longer bound to the imperative of the concrete moral life or *Sittlichkeit* of the societal community, and its traditional overlap of morality and law.

The separation of morals and law therefore puts the full responsibility for decisions on the conscience on the individual. Someone who thinks for moral reasons that it is in a case of emergency necessary to torture and to violate the constitution fundamentally as a bearer of public authority, has to set the record straight with his or her own conscience, and with the public moral discourse which cannot *bind* him or her *externally*, and can not excuse him or her legally. For the sake of legal and moral freedom, law cannot resolve this tragic conflict. There may be cases where arguments both for and against torture can present morally sound arguments. Once the bomb has started ticking, the respective officials (and only they) may see it fit to violate the constitution, because they believe to have good moral reasons for torture.

As opposed to law, morality doesn't know any limits and does not allow for dogmatics. That in itself excludes an overlap of moral and legal discourses. Contradictions between morals and law can, contrary to Kant´s beliefs, never be excluded. Therefore, it is true that an, in current law, irreparable *collision between morals and law* can occur in any single case, although positive law has to remain morally acceptable as a whole. This is the price to be paid for what is gained from differentiation. From the perspective of law, there is nothing 'outside the law code': 'Torture is either right or wrong – tertium non datur. Legal prohibitions of torture do not prohibit the political and moral discussion. But they do assign the competence to decide.'[33] The law would have to be executed on the German chancellor Merkel, or any other official who takes his or her competence to order torture to prevent Berlin from falling victim to a nuclear bomb, as Kant´s in this case justified rigorism demands. Kant would have had her executed because of high treason. In the people's collective memory, however, that same chancellor would probably be worshiped as a moral hero – even if both the legal and the moral prize for this rescue would remain visible (like in classical tragedy).

33 Hong, *Folterverbot* 25.