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INTO THE ABYSS OF EVIL:
Some Reflections On Torture And Human Rights

NO ABISMO DO MAL:
Algumas Reflexões Sobre Tortura E Direitos Humanos

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ABSTRACT

The essay tackles the issues raised by the undeniable atrocity of torture and therefore on elaborating the necessity of a value judgment, totally compatible with the concept of law as a claim to justice. In the first part, I focus on historical evolution of torture. Then, theoretical strategies in support of the legitimization of torture will be addressed and critized. Finally, some remarks to intend to reject the use of torture as a manifestation of force and violence in any case will be made.
Keywords: Judicial Torture. Political Torture. Rule of Law. Torture.

RESUMO

O ensaio aborda as questões levantadas pela inegável atrocidade da tortura e, portanto, elabora a necessidade de um juízo de valor, totalmente compatível com o conceito de direito como pretensão de justiça. Na primeira parte, concentro-me na evolução histórica da tortura. Em seguida, serão abordadas e criticadas estratégias teóricas de apoio à legitimação da tortura. Finalmente, serão feitas algumas observações no sentido de rejeitar o uso da tortura como manifestação de força e violência em qualquer caso.
Palavras-chave: Estado de Direito. Tortura. Tortura Judicial. Tortura Política.

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1. INITIAL CONSIDERATIONS[2]

In the current theoretical, philosophical, political, and legal debate, the issue of the use of force seems to emerge with increasing intensity. (Not only) recent terrorist events and attacks[3], along with ongoing wars around the world, appear to have had a crucial impact on the continual and alarming decline of democratic principles and constitutionalism that characterized previous legal, political, and social reflections[4].

Therefore, discussions have begun to recall the hypothetical and at least questionable merits of a preventive war, with the inevitable consequence of reformulating the concept of law itself. Before the 9/11 terrorist attacks, the law seemed capable of rejecting its coercive, cruel, and, violent aspects, in contrast to the current situation. Consequently, and at least in some cases, law currently seems to be dominated by its factual aspects to the detriment of the normative dimension, which can be defined as discursive and/or argumentative, emphasizing the importance of rules, principles, and values. In other words, especially in international relations but also in the conception of national law, it seems that what we are witnessing is the transformation of the concept of law only into merely a synonymous for force. Behind this alteration we can identify the theoretical and philosophical positions rooted in political decisiveness, such as the Schmittian concept of the State of Exception.[5] These approaches are based on the assertion of the executive power's

[2] Some parts of this paper, with the title "The EU as a Global Actor in Europe and the Use of Force" were presented to the Venice Academy of Human Rights, "The obligations of the State", EIUC European Inter - University Centre for Human Rights and Democratization, July 8 - 19 2013 and also in Portuguese with the title "Torture", at the "III Seminário do ciclo 'Vulnerabilidades e Direitos Humanos'" organized by "Defensoria Pública do Estado do Paraná", Curitiba, Brazil, June 2, 2017. The present version was completely modified, updated and revised and also with additional and new parts. I am very grateful to Matteo Frau, Jairo Néia Lima, Marcos Maliska, Bruno Meneses Lorenzetto and anonymous reviewers for their helpful comments to a previous version of this paper and to Jairo Néia Lima for his suggestions in English style.

[3] For example, considering the 9/11 attacks in the United States or the 2004 terrorist attacks in Madrid and the 2005 attacks in London or 2015 in Paris, but not only these.

[4] The current crisis seems to deeply penetrate the "soul of democracy" to such an extent that some studies even suggest how it dies. See, for example: LEVITSKY, Steven; ZIBLATT, Daniel. **How Democracies die**. New York: Crown Publishing, 2018. Here, it is important to highlight that the book is not free from criticism, sometimes even controversial. Furthermore, the authors include problematic and quite questionable passages.

[5] For more details on the concept of Schmittian State of Exception see: Carl Schmitt, Political Theory, composed in 1922 and The Concept of the Political elaborated in 1932. Now see: SCHMITT, Carl. **Political Theory: Four Chapters on the Concept of Sovereignty.** Edited and translated by George Schwab. Chicago: University of Chicago Press, 2006; SCHMITT, Carl. **The Concept of the Political**. Edited and translated by George Schwab. Chicago: University of Chicago Press, 2007. For a different approach to the definition of the State of Exception see: AGAMBEN, Giorgio. **State of Exception**. Translated by Kevin Attell. Chicago and London: University of Chicago Press, 2005.

supremacy over judiciary and legislative powers[6], recalling the thesis that legitimizes the use of force to achieve a state of peace. One of the aims of this research is to highlight some of the risks associated with these theories. Special attention is given to arguments against the use of force, formulated after examining and criticizing the various theoretical approaches that support the legitimization of torture[7]. The results obtained from the research will then be specifically applied to prevent the adoption of practices such as torture, which are categorically contrary to human dignity.

This paper is divided into two parts: the first part focuses on the historical evolution of torture until its abolition, while the second part analyzes the changing relation between torture and law. To address this point, when analyzing the relation between torture and law, it becomes evident that human rights, particularly human dignity, are crucial considerations.[8]

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[6] See FRAU, Matteo. L'equilibrio originario dei poteri di guerra nella Costituzione americana. **Giornale di Storia Costituzionale**, n. 33, 2017, pp. 235-252; FRAU, Matteo. La War Powers "Revolution" del Regno Unito. **Federalismi.it**, 2/2015. The author particularly emphasizes that, in the classical view of the separation of powers, the management of war and the deployment of armed forces abroad fall within the scope of the executive power (or, more specifically, within the realm of federative power in Locke's conception). It is now important to highlight that, in general, the role attributed to parliaments in this matter has gradually atrophied over the past century, while the role exercised by executives has experienced an opposite trend, namely the progressive concentration of military power. In many other cases, especially within the framework of *majoritarian democracies* (as alluded to in Arend Lijphart's majoritarian model of democracy, LIJPHART Arend. **Patterns of Democracy**. Government Forms and Performance in Thirty-Six Countries. Second edition. New Haven-London: Yale University Press, 2012), the progressive increase in the decision-making supremacy of executives in this delicate area has been almost unstoppable.

[7] In my analysis, I take torture as an example of the manifestation of the use of force.

[8] It is important to stress that the concept of human dignity is complex, and discussing it is not an easy task, especially considering the numerous (re)definitions that sometimes conflict with each other. Thus, the debate often presents opposing possible views. In this respect, see for example, D'AVACK, Lorenzo. Il paradigma dignità: usi etici e giuridici. **Rivista di filosofia del diritto**, 1, 2019, pp. 11-22, esp. p. 13. Some scholars argue that human dignity could be thought of as a useless concept (see MACKLIN, Ruth. Dignity is a Useless Concept (It Means No More than Respect for Persons or Their Autonomy). **British Medical Journal,** 327, 2003, pp. 1419-1420), or a vacuous concept (see BARGARIC, Mirko; ALLEN, James. The Vacuous Concept of Dignity. **Journal of Human Rights**, vol, 5, n. 2, 2006, pp. 257-270), a mere rhetorical expression (see REICHLIN, Massimo. La discussione sulla dignità nella bioetica contemporanea. **Bio Law Journal**, vol. 4, n. 2, 2017, pp. 93-101) used when there is no rationale behind it. Human dignity is considered as a thick concept because it seems to be characterized by an invariable semantic content. In this way, it could be possible to define human dignity in relations to other specific fundamental rights or principles. For example, "it means no more than respect for persons and their autonomy" (MACKLIN, Ruth. Dignity is a Useless Concept (It Means No More than Respect for Persons or Their Autonomy). **British Medical Journal**, 327, 2003, pp. 1419-1420); or also that equality and no discrimination are the foundation of human dignity (see FERRAJOLI, Luigi. **Manifesto per l'uguaglianza.** Roma-Bari: Laterza, 2018 and FERRAJOLI, Luigi. Dignità e libertà. **Rivista di filosofia del diritto**, 1, 2019, pp. 23-32); or more generally the human dignity makes sense to apply the prohibition of torture (WEBSTER, Elaine. Interpretation of the Prohibition of Torture: Making Sense of 'Dignity Talk'. **Human Rights Review**, vol. 17, n. 3, 2016, pp. 371-390; STAMILE, Natalina. La tortura, Ieri, Oggi, Domani (?), pp. 153-176. In: Santano, A. C.; Meneses Lorenzetto, B.; Gabardo E. (eds). **Direitos fundamentais na Nova ordem Mundial**., Curitiba: Ithala, 2018). Therefore, the semantic content of the expression of human dignity is varied because of its dual dimension as a normative concept and as a legal concept (see SCHACHTER, Oscar. Human Dignity as a Normative Concept. **The American Journal of**

Some scholars characterize this relation as a "dangerous liaison" emphasizing that law must be supported by ethics, by the virtues of lawyers, and especially by orientation through an ideal sense of justice.[9] Currently, the theoretical and legal philosophical debate is increasingly focused on the analysis and assessment of opportunities to use force and to practice torture in a hypothetically legitimate manner. This is one of the consequences, because the most destructive terrorist attacks have shaped and influenced reflections, as well as legal, social, and political developments of the past. Therefore, the legal scholars and even the lawyers, increasingly work within a complex and multiform reality, highlighting the need to elaborate and/or revise legal and political theories within the legal field, which is developed around key concepts such as sovereignty, citizenship, the concept of law and the rule of law, democracy, tolerance, equality, and freedom. In this context, greater and more numerous responsibilities must be assumed.

This primarily involves the effort of introspection: examining how we act, think, and reason. Torture should be banned, not only for the reasons expressed here but also, and especially, for its evident immorality[10]. Hence, arguing about torture and the various theories

International Law, vol. 77, n. 4, 1983, pp. 848-854 and, FERRAJOLI, Luigi. Dignità e libertà. **Rivista di filosofia del diritto**, 1, 2019, pp. 23-32). Thus, it could be characterized as an essentially contested concept (RODRIGUEZ, Philippe-Aandré. Human Dignity as an Essentially Contested Concept. **Cambridge Review of international Affairs,** vol. 28, n. 4, 2015, pp. 743-756). Beyond this debate, we have to consider that after the Second World War and especially after the horrors committed by Nazism, the dignity of the person assumed a central role in constitutionalism. See, for example, Conventions, decisions of national and international Courts, the Basic Law for the Federal Republic of Germany (*Grundgesetz für die Bundesrepublik Deutschland*) of 1949, the Italian Constitution of 1948 and the Constitution of the French Republic of 1946. They share the claim to the person's absolutely priority value and the firm reaction toward totalitarianism. In this context, the marked emphasis on the centrality of fundamental rights in the overall constitutional framework is placed above all: fundamental rights referring not to the abstract individual, considered as a mere center of imputation of active and passive legal situations. In this way, the Constitution clearly expresses the nexus between person, dignity, and fundamental rights. The dignity of person is recognized for all persons as such and is realized because all fundamental rights are attributed and guaranteed. The concept is perceived to be absolute and inviolable, not comparable with other principles or values (see FERRAJOLI, Luigi. Dignità e libertà. **Rivista di filosofia del diritto**, 1, 2019, pp. 23-32) or also as "ideal synthesis of the fundamental values of the constitutional system" (see SILVESTRI, Gaetano **Dal potere ai principi**. Libertà ed eguaglianza nel costituzionalismo contemporaneo. Roma-Bari: Laterza, 2009, esp. p. 85).

[9] See LA TORRE, Massimo. Amistades peligrosas. Tortura y Derecho. **Derechos y Libertades***,* n. 28, 2013, pp. 25 - 38.

[10] Furthermore, the reflections elaborated by Gerald A. Cohen (Casting the first stone: who can and who can't condemn the terrorists?). **Royal Institute of Philosophy**, Supplements, n. 81, Cambridge University Press, 2006, pp. 113-136) are particularly interesting, even though they do not expressly refer to torture but rather to the analysis of the Palestine-Israel conflict. The author claims that it is not incoherent to think it impossible to justify terrorism and also find certain condemnations of terrorism repugnant. The reason is that there is a difference between an expression of moral opinion and a condemnation. So, it might be true both that terrorism is to be condemned, and that some particular person is not in a position to condemn it. Cohen distinguishes two ways of impugning someone's right to condemn, which he names "*Look who's talking*!" (or *Tu quoque*) and "*You're involved in it yourself*".

aimed at justifying its use is not akin to debating other topics. While the discussion torture may be undesirable, if compelled to address it due to a violent reality, we must do so without losing sight of the grim reality of torture and the suffering it inflicts on human beings[11].

2. HISTORICAL EVOLUTION OF TORTURE

In the first part of this study, I will focus on the historical evolution of the institution of torture until its abolition. Over the centuries, torture has assumed several and various meanings, which becomes clear when analyzing some of the different and important positions by figures such as Niccolò Machiavelli, Friedrich von Spee, Jean Bodin, and Jeremy Bentham, who is one of the most important utilitarians[12]. According to Gerald Postema, "Bentham was not just a utilitarian and a positivist; he was a utilitarian positivist".[13] This means that Bentham's upholding of the principle of utility is not incompatible with his (normative and anti-authoritarian, i.e., "Anti-Hobbesian" and "anti-Austinian") positivist views.[14] In general terms, this theory is based on the sacrifice of one individual justified in the name of public security and collective interest, balancing not only goods and principles but also human lives. Utilitarian theory would be opposed, centuries later, by the devastating and effective critiques elaborated by John Rawls[15], based on the inability and unacceptability for utilitarianism to take the uniqueness of individuals seriously. The law as a domain of reasoning and discourse cannot admit the use of force and violence, regardless of which (re)definition of torture is adopted. It is related to morality and politics, and its nature cannot

[11] It is important to highlight that the European Court of Human Rights condemned Italy for torture due to the behavior of the police during the operation at Diaz School, which took place on the night of July 21-22, 2001, during the G8 summit in Genoa. The case is known as "Il Caso Diaz". This would demonstrate that torture has never completely disappeared in practice. Unfortunately this case is not the only one. See for more details: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22003-5056783-6219425%22]}; https://www.giustizia.it/giustizia/it/mg_1_20_1.page?facetNode_1=0_8_1_85&facetNode_2=1_2(2015)&contentId=SDU1158721&previsiousPage=mg_1_20

[12] For more details see: MILL, John Stuart. Bentham. In: COWLING, M. (ed.). **Selected writings of John Stuart Mill**. New York: American Library, 1968; MILL, John Stuart. Utilitarianism. In: ROBSON, J. M. (ed.). **Collected Works of John Stuart Mill**, vol. X. Indianapolis: Liberty Fund, 2006; POSTEMA, Gerald J. **Bentham and the Common Law Tradition**. Oxford: Oxford University Press, 2019a; POSTEMA, Gerald J. **Utility, Publicity, and Law:** Essays on Bentham's Moral and Legal Philosophy. Oxford: Oxford University Press, 2019b; ANDRESANI, Gianluca; STAMILE, Natalina. Bentham: our contemporary?. **Revista da Faculdade de Direito UFPR**, Curitiba, v. 65, n. 3, p. 173-189, 2020.

[13] See POSTEMA, Gerald J. **Bentham and the Common Law Tradition**. Oxford: Oxford University Press, 2019a, p. 462.

[14] See SILIQUINI-CINELLI, Luca. Bentham and the Common Law Tradition. **Edinburgh Law Review**, vol. 24, n. 2, 2020, esp. p. 318.

[15] For more details see: RAWLS, John. **A Theory of Justice**. Cambridge: Harvard University Press, 1971 and 1999.

merely be an affirmation of power. Beginning with the Enlightenment and due to the reform of criminal procedures, the doctrine of torture seemed as if it might be banished from practice forever. Though failing as a topic of the higher legal philosophical debate, it has unexpectedly made its appearance in our time, challenging the notion that law is not, and could not be, an instrument in the hands of the strongest to achieve any purpose, and that it could not have any sort of content or quibble that could beguile as desired[16]. Torture has indeed had a constant presence in criminal procedural law for a long time. Thus, it is possible to note that torture has been an integral part of “our” system of positive law and “our” legal culture for many centuries[17]. Nevertheless, since the beginning of its legal reception, there have been many doubts, puzzlements, and criticisms.[18] It is important to stress that there has been no shortage of research, studies, teachings, and lessons on techniques to inflict torture and understand how and when to resort to it. The most impressive example is represented by Bartolus de Saxoferrato[19], who is considered by legal historians to be one

[16] It is interesting to see Plato, **The Republic**, Book 1, where Thrasymachus, a Sophist, describes his definition of justice as presenting the city and its laws, and thus is, in a sense, opposed to Socrates and to philosophy in general. In fact, Thrasymachus said, 'Listen—I say that justice is nothing other than the advantage of the stronger’.

[17] Here, the expression “our” emblematically refers to the West.

[18] See LA TORRE, Massimo. La giustizia della tortura. Varianti sul tema. **Materiali per una storia della cultura giuridica**, n. 1, 2014, pp. 3-30.2014, esp. p. 3. The author reminds the present of these doubts yet in the Retorica by Aristotele, in some works by Cicerone, Seneca, Valerio Massimo, and Quintiliano and in the whole productions within Christianity.

[19] For more details see CORTESE, Ennio. **Le grandi linee della storia giuridica medioevale.** Roma: Il Cigno, 2001, esp. p. 387, where the author states that his doctrine gave him extraordinary celebrity throughout his life. In the 15th century, his fame continued to grow, giving him the epithet of *lucerna juris,* which had been given centuries earlier to Irnerius. He was also called “the mirror of law” and the “oracle of Apollo”. He was compared to Homer, Virgil, and Cicero. Finally, he entered triumphantly into history when Giovanni Battista Caccialupi exalted him in his *Vitae Doctorum*, which could be considered the first history of medieval jurisprudence. For more details see also: KÖPCKE TINTURÉ, Maris. “From a World States Bartolus, or the Juristic Foundations of a Key Transition in Western Politicial Thought” paper presented at the seminar at the Pompeu Fabra University. Barcelona: Spain, 2019; KÖPCKE TINTURÉ, Maris. **Legal Validity. The Fabric of Justice.** Oxford: Hart Publishing, 2019; KÖPCKE TINTURÉ, Maris. **A Short History of Legal Validity and Invalidity**. Foundations of Private and Public Law. Cambridge: Intersentia, 2019.

of, if not the most important, members of the Law school of "Glossatori"[20]. He neither denigrated nor rejected the use of torture on either the accused or the witnesses.[21]

Furthermore, it is possible to discern two aspects within the historical dimension of torture: torture as a legal instrument and torture as an instrument of political domination. If we consider the historical circumstances where there was an undeniable need to extort confessions and to impose exemplary punishments, the profound relation between torture and policy emerges clearly, especially between torture and the face of tyrannical and cynical power. The first aspect is related to the fear of which torture is based, ingrained in daily life. The second aspect is related to the seemingly common utility that torture appears to favor, although it is to the disadvantage of individual interests in their singularity.[22] Therefore, the phenomenon of torture can be analyzed through four characteristics to reconstruct the general framework in which, for centuries, torture has played a fatal, dramatic, and legal role. The first two are generally inherent to the judicial sphere: judicial torture for confessions and judicial torture for punishments. The other two pertain to the political sphere: political torture for terror and political torture for common utility. It is possible to analyze judicial torture for confession within the relation between law and justice, especially with reference to the Roman and Greek ages.[23] In this scenario, the objective is to extract a confession by distorting the opposing intentions of the accused and of those who were required to testify, with the aim of obtaining evidence upon which to base a judgment. Thus, torture categorically denies the presumption of innocence as an expression of the truth. It was only during the barbarian invasions in the Middle Ages that the use of torture seemed to weaken. However, it reigned force in the late Middle Ages with the renewal of legal and political order

[20] "Scuola dei Glossatori" in English is known also as the *Four Doctors of Bologna.* This name derived from Latin: *Quatuor Doctores*. It was composed by Italian jurists and glossators of the 12th century, based in the University of Bologna. For more details see: CORTESE, Ennio. **Le grandi linee della storia giuridica medioevale.** Roma: Il Cigno, 2001; LIOTTA, Filippo (ed.). **Studi di storia del diritto medioevale e moderno**. Bologna: Monduzzi editore, 1999; ERRERA, Andrea. ***Arbor actionum****. Genere letterario e forma di classificazione delle azioni nella dottrina dei glossatori*. Bologna: Monduzzi editore, 1995; ERRERA, Andrea. La quaestio medievale e i glossatori bolognesi. **Studi senesi,** CVIII (III Serie, XLV) 1996, Fasc.3, pp. 490-530; ERRERA, Andrea. Ricerche sulle *actiones mixta e* nel sistema dalla Glossa accursiana. **Studi senesi,** CIV (III Serie, XLI) 1992, Fasc.1, pp. 143-188; ERRERA, Andrea. The Role of Logic in the Legal Science of the Glossators and The Jurist's Philosophy of Law from Rome to the Seventeenth Century. In: Padovani, Andrea; Stein, Peter G. (eds). **The Jurist's Philosophy of Law from Rome to the Seventeenth Century. A Treatise of Legal Philosophy and General Jurisprudence**, vol. 7, Dordrecht: Springer, 2007, pp. 79-156.

[21] See Verri, Pietro. **Osservazioni sulla tortura.** Roma: Tascabili Economici Newton, 1994.

[22] See LA TORRE, Massimo; LALATTA COSTERBOSA, Marina. **Legalizzare la tortura?** Ascesa e declino dello Stato di Diritto. Bologna: Il Mulino, 2013, p. 26.

[23] See Fiorelli, Piero. **La tortura giudiziaria nel diritto comune**. Milano: Giuffrè, 1954.

from a hierarchical perspective. It was an era during which some lawyers dedicated their efforts to justifying torture and finding ways to confer authority upon judges who employed such methods. In some works of this period, the term torture is euphemistically designated by the Latin term "*quaestio"*[24]*,* invoking the authority of sources of law: the Digest by Justinian, which, together with *Institutiones Justiniani, Codex Justinianus*, and the *Novellae Constitutiones, forms* the *Corpus iuris civilis.*[25]

These considerations paved the way for the progressive growth and development of the idea of the positivity of punishment, reaching its pinnacle during the Renaissance. In this period, it is interesting to note how torture is considered necessary, and in some cases, even essential, in the interrogation of women suspected of practicing witchcraft. This consideration is relevant to understanding some anthropological preconditions or premises of the "witch hunt", during which the crime of so-called witchcraft was coined, and its history became intertwined with that of torture.[26] According to some scholars, it is possible to distinguish between the analysis of witchcraft, on one hand, as a phenomenon, and on the other hand, the witch hunt, which specifically denotes the repression of witches during a particular historical period: from the 14th throughout the entire 16th century[27]. In his principal book, "*Cautio Criminalis"*, Friedrich von Spee, a German Jesuit and confessor during sessions of torture and executions, presented a passionate plea on behalf of those accused of witchcraft.[28] It is based on his own experiences in a time and place that witnessed some

[24] The reference is to the School of Bologna that, after Irnerius, includes among its major commentators Accursius, Bartolus de Saxoferrato, Baldus de Ubaldis.

[25] See for example Augustine of Hippo, **De civitate dei** (XIX, 6). He is hostile to the *quaestio*, and the whole of Christianity, whose symbol is the cross, an atrocious instrument of torture, which transmits a feeling of horror against the cruelty of this inhuman practice.

[26] See for example BETETA MARTÍN, Yolanda. La sexualidad de las brujas. La deconstrucción y subversión de las representaciones artísticas de la brujería, la perversidad y la castración femenina en el arte feminista del siglo XX. **Dossiers Feministes**, n 18, 2014, pp. 293-307; STAMILE, Natalina. Direito e Gênero: desafios contemporâneos. **Revista Brasileira de Direito**, Passo Fundo, v. 18, n. 3, p. e4750, out. 2022; STAMILE, Natalina. Mucho para ganar y mucho para perder. Comentario al artículo de Torres Sánchez, Ximena. Justicia de género en el plano judicial. Análisis comparado sobre el derecho fundamental de la mujer a tomar decisiones sobre su propio cuerpo en contextos de violencia. *Revista Derecho del Estado, Universidad Externado de Colombia*, n. 47, 2020, pp. 177-213, https://revistaderechoestado.uexternado.edu.co/2020/12/11/mucho-para-ganar-y-mucho-para-perder/?fbclid=IwAR1Ojvb6l6K7J9pojUAbryzlNlp3rOiYZA2Mu-htTBBvIilxzzbuq4cPfUA#_ftn1, 11 dicembre 2020.

[27] More especially see PILO, Gianni; FUSCO, Sebastiano. Profumo di strega. In: PILO, Gianni; FUSCO, Sebastiano (eds). WIRE, Henry; ALBRIGHT, Robert C.; WRIGHT, Stanley F.; MCCLUSKY, Thorp. **Storie di streghe.** Roma: Newton, 1994.

[28] VON SPEE, Friedrich. **Cautio criminalis sive Liber de processu contra** *sagas* (1631). Translated in English by Marcus Hellyer. Charlottesville: University of Virginia Press, 2003. Spee argued strongly against the use of torture, and particularly highlighting its cruelty and unreliability. He stated "Torture has the power to create witches where none exist.", p. 419.

of the most intense and fatal witch hunts. Furthermore, Friedrich von Spee was one of the first of his time to speak strongly and with articulated arguments against torture in general. He supported the idea that torture is not a valid means of extracting *truth* from someone undergoing *painful* questioning. He also attempted to define the nature of the crime of witchcraft as horrible, enormous, very serious, and terrible. He reasoned that it could be considered tantamount to other heinous crimes, such as apostasy, heresy, sacrilege, blasphemy, murder, even patricide, unnatural coitus with demonic entities, and/or hatred against God. These crimes are considered worse than any other.[29] Friedrich von Spee described witchcraft as particularly dangerous for the State and included it in this group of exceptional crimes; hence, for this reason, it seemed appropriate to intervene with exceptional measures.[30] Nevertheless, Friedrich von Spee believed that witches exist, but he raised doubts about the use of torture and its merits, invoking the famous parable of the wheat and the tares.[31] Witchcraft ceased to be considered a crime by the end of the 18th century, but it remained an oppressive anthropological model: women were not only considered inferior but also inherently evil and prone to sin[32]. The witch trials represented a phenomenon that characterized the whole of Europe for several centuries and were marked

[29] VON SPEE, Friedrich. **Cautio criminalis sive Liber de processu contra** *sagas* (1631). Translated in English by Marcus Hellyer. Charlottesville: University of Virginia Press, 2003.
[30] VON SPEE, Friedrich. **Cautio criminalis sive Liber de processu contra** *sagas* (1631). Translated in English by Marcus Hellyer. Charlottesville: University of Virginia Press, 2003.
[31] See VON SPEE, Friedrich. **Cautio criminalis sive Liber de processu contra** *sagas* (1631). Translated in English by Marcus Hellyer. Charlottesville: University of Virginia Press, 2003. For more details about the parable of the wheat and the tares see MATTHEW 13:24-30 and MARK 4:26-29.
[32] Witchcraft is connected to the patriarchal view of society and consequently to a particular concept of Law. For more details see: STAMILE, Natalina. Mucho para ganar y mucho para perder. Comentario al artículo de Torres Sánchez, Ximena. Justicia de género en el plano judicial. Análisis comparado sobre el derecho fundamental de la mujer a tomar decisiones sobre su propio cuerpo en contextos de violencia. **Revista Derecho del Estado***,* Universidad Externado de Colombia, n. 47, 2020, pp. 177-213, https://revistaderechoestado.uexternado.edu.co/2020/12/11/mucho-para-ganar-y-mucho-para-perder/?fbclid=IwAR1Ojvb6l6K7J9pojUAbryzlNlp3rOiYZA2Mu-htTBBvIilxzzbuq4cPfUA#_ftn1, 11 dicembre 2020. Furthermore, the legal feminist theories do have the merit of having shown that the Law is a mere masculine instrument in a more incisive and clearer way, and that for this reason the Law itself is totally unable to offer an adequate "protection" to women. The Law is based on predominantly male models, categories and values. According to Carol Smart, it is possible to identify three phases in the development of the idea that Law is not neutrality but is gendered. The first phase is summarized in the sentence "Law is sexist", the second by "Law is male" and finally by "Law is gendered". These three phases constitute three levels of arguments "may be found to be deployed simultaneously in some feminist work on Law, however, it is useful to differentiate between them in order to see what analytical promise each approach has", see SMART, Carol. The Woman of Legal Discourse. **Social and Legal Studies**, 1, 1992, pp. 29-44, esp. p. 30. See also, STAMILE, Natalina. Direito e Gênero: desafios contemporâneos. **Revista Brasileira de Direito**, Passo Fundo, v. 18, n. 3, p. e4750, out. 2022; STAMILE, Natalina. Para uma discussão crítica do Direito: o jusfeminismo. In: AGUILAR VIANA, Ana Cristina; MENDONÇA BERTOTTI, Bárbara; SOUZA GITIRANA; Julia Heliodoro; CAMARGO KREUZ, Letícia Regina; COSTA, Tailaine Cristina. (eds). **Pesquisa, Gênero&Diversidade**. Vol. II. , Curitiba: Íthala,, 2020 pp. 39-52; STAMILE, Natalina. On the false myth of the legal neutrality: some remarks. *forthcoming.*

by distinct phases of varying intensities and scopes in different countries. Some scholars describe this phenomenon as being closely related to the context and process of criminal proceedings, particularly the preliminary investigation.[33] At this point, it is important to shed light on the transition from a progressively accusatory system, focuses on judicial discretion, to an inquisitorial system. In a nutshell, the confession process has allowed torture to assume a privileged and undisputed role in researching and ascertaining the truth by means of confession. Therefore, torture becomes a successful instrument, and the spread of witchcraft is a lie that could only take root and develop within the internal dynamics of torture usage, gaining increasing evidence in society. Torture is indeed the most effective means to invent the desired reality. This position is shared by some scholars, such as Brian P. Levack, who clearly affirms that torture is responsible for the creation of witchcraft.[34]

These considerations are obviously connected to the second aspect of torture related to the judicial system: torture as punishment. In this case, torture serves as a form of commensurate retribution for serious crimes. While not a new concept—it was already known in Roman times—Cesare Beccaria argued that the use of torture for the purgation of infamy, where the testimony of an infamous person was confirmed through physical dislocation, was an abuse that should not be tolerated in the eighteenth century.[35] Without even mentioning the 21st century!

In contrast, scholars such as Jean Bodin consider witchcraft to be one of the worst crimes to be punished with the utmost severity. In fact, witchcraft is considered a crime against God and therefore the court is granted utmost discretion to impose penalties to remedy evil and protect society, even in the absence of a trial. On the other hand, from a political point of view, the relation between torture and tyranny is emphasized. For example, Montesquieu argues that it is impossible to justify torture except by understanding the political significance inherent in inflicting torments, even if only by referencing fear as a means of preserving despotic power.[36] Thus, he is against the use of torture because it goes against the very nature of human beings. Similarly, Joseph von Sonnenfels, from 1761 to

[33] See for example: SKOLL, Geoffrey R. Torture and the Fifth Amendment. Torture, the Global War on Terror, and Constitutional Values. **Criminal Justice Review***,* vol. 33, n.1, 2008, pp. 29 -47.
[34] LEVACK, Brian P. **The Witch-Hunt in Early Modern Europe**. London: Longman, 2006. See also MILLER, Arthur. **The Crucible**. London: Penguin, 1952.
[35] BECCARIA, Cesare. **Dei delitti e delle pene.** A. Burgio (ed.), Milano: Feltrinelli, 2007, p. 61.
[36] MONTESQUIEU, Charles-Louis de Secondat de. **De l'esprit des lois** [1748]. CARRITHERS, David Wallace; NUGENT, Thomas (eds). **The Spirit of Laws a Compendium of the First English Edition**. Berkeley: University of California Press, 1977.

1763, served as the secretary of the Austrian "*Arcierengarde*" (Hapsburg Crown counsel), which denounced the practice of torture as a tool of tyrant to consolidate power and dominate through fear (1735). Therefore, there is no legitimate power to justify torture; instead, there is only tyranny, based on violence and fear, which creates the illusion of increasing stability. The alternative to torture should be associated and identified with complete and transparent trust in the law and in the commitment "to reconstruct the truth in the process only by a reasonable, rational or reasoning way".[37] Despite these isolated cases, the torture was considered legal, just, and politically acceptable during the medieval period. In general, torture became a tool in the struggle against political enemies. For example, the Inquisition Court consistently used torture to combat heresy, and even "heresy of heresies"[38]—witches. This practice had a dire consequence: information extracted through extreme penalties and torture could only be considered and qualified as evidence in the criminal process. However, the role of torture itself was just as terrible and brutal as the crime it aimed to punish, often becoming a political tool in the hands of the judge or politicians.

To conclude this first part of the present article, it is necessary to briefly mention the utilitarian theory of Jeremy Bentham as previously referenced. Bentham does not consider the notion of the fundamental right; consequently, the only sources of a political system become force and habit.[39] Therefore, a conflict arises between Bentham's views and Enlightenment ideas, ultimately leading to the abolition of torture as a form of punishment and as a method of obtaining evidence in the legal process[40]. This also explains how torture subsequently served not only procedural purposes but also to obtain information deemed essential for "national security," representing a "functional" evolution of torture. This aspect will be discussed further in paragraph three, with reference to the state of emergency/necessity.

[37] LA TORRE, Massimo; LALATTA COSTERBOSA, Marina. **Legalizzare la tortura?** Ascesa e declino dello Stato di Diritto. Bologna: Il Mulino, 2013, p. 38.
[38] The witchcraft is also called "heresy of heresies".
[39] For more details see *ut supra* note 11. See also especially TWINING, William L.; TWINING, Peter E. Bentham on Torture. **Northern Ireland Legal Quarterly,** 24, 1973, pp. 305-356; PAREKH, Bhikhu C. (ed.). **Jeremy Bentham:** Critical Assessments. New York: Routledge, 1993; DAVIES, Jeremy. The Fire-Raisers: Bentham and Torture. **Interdisciplinary Studies in Long Nineteenth Century**, 19, 15, 2012.
[40] In discussing the evolution of torture, at the conclusion of this paragraph 2, it may be noted that the abuse of pre-trial detention has become a sort of "soft revival of torture" aimed at extorting confessions or evidence, even in contemporary Western democracies.

3. TORTURE AND LAW

Now, in this second part, I will try to shed light on the existence of a relation, not always obvious yet undeniable, between torture and law. I turn to the question of how torture can be interpreted from a legal theory perspective. In fact, as mentioned in the introduction, in the current theoretical, philosophical, political, and legal debate, the issue of the use of force seems to emerge with increasing intensity because of terrorist events and attacks and/or the current wars. As we will see in the continuation of this reflection, they have all had a crucial and negative impact on constitutional and democratic institutions.[41] Therefore, this research contrasts with "imperativist" theories and aims to question and reject "the merits" of a preventive war. In the current crisis, both international relations and national law, seem to emphasize the factual dimension of law, characterizing it as merely synonymous with force or violence. For that, at the basis of the ideological justifications, as mentioned, there are precise theoretical and philosophical traditions, first of all, Schmittian political decisionism or the State of exception. These are based on the affirmation of supremacy of executive over both the judiciary and legislative power, along with the related thesis of the legitimate use of force to achieve peace, stability, and security.

In this regard, some scholars talk about the reversal of the normative paradigm, specifying that before 9/11 terrorist attacks, the philosophical, political, and legal debate focused on cosmopolitan scenarios and the possible extension of constitutionalism in the context of international relations.[42] This could allow us to hypothesize the institutionalization of the Kantian project of perpetual peace. Today, however, we talk of the merits of preventive war, the end of the Westphalian tradition of international law, "the benevolent hegemony", and even "empire" and imperialism.[43] In summary, quoting Jürgen Habermas, validity mainly trumped facticity, and norms, reconceptualized to emphasize rights, principles, arguments, trumped facts, leading to an orientation toward justice[44] and what some scholars call "*Diritto*

[41] See for example: BARBERIS, Mauro. **Non c'è sicurezza senza libertà**. Il fallimento delle politiche antiterrorismo. Bologna: Il Mulino, 2017. For the tension between constitutionalism and democracy see: Conde Pires, Matheus. **Todo poder emana do povo**. A participação popular das emendas constitucionais no Brasil a partir da tensão entre constitucionalismo e democracia. Londrina: Hoth editora, 2023.
[42] LA TORRE, Massimo; LALATTA COSTERBOSA, Marina. **Legalizzare la tortura?** Ascesa e declino dello Stato di Diritto. Bologna: Il Mulino, 2013, p. 95.
[43] *Ibidem*.
[44] See for example HABERMAS, Jürgen. **Between Facts and Norms**: contributions to a discourse theory of law and democracy. Cambridge: Polity Press, 1996.

mite"[45]. Currently, as a consequence of this shift, might, violence, and their relative coerciveness are considered, as they were in the past, essential elements of law.

The structure of the this session is as follows. Special attention is given to the arguments against the use of torture, formulated after stating and criticizing the various theoretical strategies supporting of the legitimization of torture. The results obtained from the analysis will then be applied to banning torture on both a moral and legal levels. The analysis aims to reject the use of torture as a manifestation of force and violence under any circumstances. In the other words, it focuses on emphasizing the undeniable atrocity of torture and elaborating the necessity of a value judgment that is fully compatible with the concept of law as a claim to justice or correctness. Thus, in the conclusion, it reinforces the rejection of torture as a manifestation of force and violence in any form.

Such a claim refers to reasonableness[46] and moral reflection and is thus open to justification and discussion. However, reasoning about torture and the theories that intend to justify it in certain circumstances, asserting that torture may be morally permissible or even necessary, is not the same as reasoning about other matters. We should not discuss torture, but if compelled by a violent present to engage in the argument, we should do so without forgetting the reality of torture: inflicting pain on someone to dehumanize them.

The first theoretical strategy aimed at justifying torture is based on the concept of a State of Emergency. The most important supporters are John Yoo and Jay Bybee, former consultants of the United States Department of Justice[47]. They assert that, in the context of a State of Emergency, the Constitution would recognize exceptional executive powers that would not be subjected to any legislative restrictions to protect national security[48].

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[45] See for example ZAGREBELSKY, Gustavo**. Il diritto mite**. Legge diritti giustizia. Torino: Einaudi, 1992.

[46] For the concept of reasonableness see STAMILE, Natalina. Razonabilidad vs Igualdad ¿Un conflicto entre principios? **Ética y Discurso.** Revista científica de la Red Internacional de Ética del Discurso, 7, 2022, pp. 1-19.

[47] John Yoo was Deputy Assistant Attorney General of the United States. He signed in August 2002 by Assistant Attorney General while Jay S. Bybee was head of the Office of Legal Counsel of the United States Department of Justice.

[48] See FRAU, Matteo. L'equilibrio originario dei poteri di guerra nella Costituzione americana. **Giornale di Storia Costituzionale**, n. 33 del 2017, pp. 235-252. In particularly, the author analyzes that there are multiple reasons, both of a legal-hermeneutic and political nature, that have gradually led to the expansion of the role of the *Commander in Chief*, resulting in an actual system of war powers that is very far from the balanced design originally outlined by the American constituents. In the United States Constitution, where there is an effective system of checks and balances intended to produce, according to Richard Neustadt's famous definition, as mentioned by Frau, "separated institutions sharing powers", even the so-called war powers are distributed between the legislative branch and the executive branch based on a complex scheme of checks and balances that, at least in theory, appears certainly balanced. See, also: PFIFFNER, James P. The

They also elaborate a "new" definition of torture, stating that "cruel, inhuman, or degrading treatment is not torture according to that statute"[49], and they also examine some "possible defenses that would negate any claim that certain interrogation methods violate the statute"[50]. They conclude that torture, according to the Convention Against Torture, is limited to extreme acts[51]; that severe pain (a requisite for this definition of torture) is defined as "serious physical injury, such as organ failure, impairment of bodily function, or even death"[52]; that prolonged mental harm must last for "months or even years"[53]; that "prosecution […] may be barred because enforcement of the statute would represent an unconstitutional infringement of the President's authority to conduct war"[54]; and that "under the current circumstances, necessity or self-defense may justify interrogation methods that might violate Section 2340A"[55]. Therefore, they advised the Central Intelligence Agency, the

Contemporary Presidency Constraining Executive Power: George W. Bush and the Constitution. **Presidential Studies Quarterly,** vol. 38, Issue 1, 2008, pp. 123-143; PFIFFNER, James P. The Constitutional Legacy of George W. Bush. **Presidential Studies Quarterly**, vol. 45, issue 4, 2015, pp. 727-741. Furthermore see BYBEE, Jay. (2005). Memorandum for Alberto R. Gonzales counsel to the president: Standards of conduct for interrogation under 18 U.S.C. §§ 2340–2340A. In K. J. Greenberg & J. L. Dratel (eds.). **The torture papers**: The road to Abu Ghraib (pp. 172–214). New York: Cambridge University Press; YOO, John, & Delabunty, R. J. (2005). Memorandum for William J. Haynes II, General Counsel, Department of Defense. In K. J. Greenberg & J. L. Dratel (eds.). **The torture papers**: The road to Abu Ghraib. New York: Cambridge University Press. As Yoo put it, "This makes clear that the source of authority for the application of the customary laws of war to the armed forces arises directly from the President's Commander-in-Chief power" (p. 78)

[49] For more details see: BYBEE, Jay. (2005). Memorandum for Alberto R. Gonzales counsel to the president: Standards of conduct for interrogation under 18 U.S.C. §§ 2340–2340A. In K. J. Greenberg & J. L. Dratel (eds.). **The torture papers**: The road to Abu Ghraib (pp. 172–214). New York: Cambridge University Press; YOO, John, & Delabunty, R. J. (2005). Memorandum for William J. Haynes II, General Counsel, Department of Defense. In K. J. Greenberg & J. L. Dratel (eds.). **The torture papers**: The road to Abu Ghraib. New York: Cambridge University Press.

[50] *Ibidem*.

[51] For more details on the American legal framework, through its constitutional amendments and historical legal precedents, that has consistently aimed to prevent the use of torture and coercion, it is useful to see: SKOLL, Geoffrey R. Torture and the Fifth Amendment Torture, the Global War on Terror, and Constitutional Values. **Criminal Justice Review**, Vol., 33, n. 1, 2008, pp. 29-47.

[52] See: BYBEE, Jay. (2005). Memorandum for Alberto R. Gonzales counsel to the president: Standards of conduct for interrogation under 18 U.S.C. §§ 2340–2340A. In K. J. Greenberg & J. L. Dratel (eds.). **The torture papers:** The road to Abu Ghraib (pp. 172–214). New York: Cambridge University Press; YOO, John; Delabunty, R. J. (2005). Memorandum for William J. Haynes II, General Counsel, Department of Defense. In K. J. Greenberg & J. L. Dratel (Eds.). The torture papers: The road to Abu Ghraib. New York: Cambridge University Press. See also, SKOLL, Geoffrey R. Torture and the Fifth Amendment Torture, the Global War on Terror, and Constitutional Values. **Criminal Justice Review**, Vol., 33, n. 1, 2008, pp. 29-47. The author particularly emphasizes, with reference to the Memorandum by Bybee (2005), that "the salient part of the Bybee memo limits the meaning of torture. Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury such as organ failure, impairment of bodily function, or even death. For purely mental pain or suffering to amount to torture under Section 2340, it must result in significant psychological harm of significant duration, for example, lasting for months or even years" (p. 38).

[53] *Ibidem.*

[54] *Ibidem.*

[55] *Ibidem.*

United States Department of Defense, and the President on the use of enhanced interrogation techniques, including mental and physical torment, pain, and coercion, such as prolonged sleep deprivation, binding in stress positions, and waterboarding. They argued that such acts, widely regarded as torture, might be legally permissible under an expansive interpretation of presidential authority[56].

The memorandum elaborated by John Yoo and Jay Bybee has been widely criticized. Some scholars point out that anything falling below the threshold described in the memorandum—such as repeated rape—would not be considered torture according to John Yoo and Jay Bybee.[57]. Indeed, the two lawyers seem to rediscover the theory of the "double effect"; which suggests that morality depends on the specific intent to torture, and true torture only occurs if the purpose "to torture" is the ultimate aim of the torturer[58]. Furthermore, the idea of unlimited and uncontrolled power must be considered extraneous to the fundamental principles at the base of the rule of law, where fundamental rights and human dignity cannot become mere items for political commodities.

The second theoretical strategy seeks support from a more descriptive understanding of the practice of torture. It is based on the conceptualization of the torture as a mere fact. This way of conceptualizing bifurcates between the Scylla of the exercise of torture "in obscure recesses of executive power" and the Charybdis of its (re)legitimation in society as a lesser evil but legalized and subjected to legal limits and controls. Alan Dershowitz, who in some ways anticipates Niklas Luhmann, is one of the most important supporters of this argumentative strategy.[59] From this perspective, the absolute and

[56] *Ibidem.*

[57] For example see SKOLL, Geoffrey R. Torture and the Fifth Amendment Torture, the Global War on Terror, and Constitutional Values. **Criminal Justice Review**, Vol., 33, n. 1, 2008, pp. 29-47.

[58] For more details about the theory of the double effect see Cohen, Gerald A. Casting the first stone: who can and who can't condemn the terrorists?. **Royal Institute of Philosophy**, Supplements, n. 81, Cambridge University Press, 2006, pp. 113-136.

[59] It is important to highlight that Alan Dershowitz argues also about the reasons to introduce the "torture warrants", see especially DERSHOWITZ, Alan. **Why Terrorism Works**. Understanding the Threat, Responding to the Challenge. New Haven & London: Yale University Press, 2002; and also see DERSHOWITZ, Alan. The Torture Warrant. **New York School Review**, 48, 2004; and DERSHOWITZ, Alan. A Should the Ticking Bomb Terrorist Be Tortures? A Case Study in How a Democracy Should Make Tragic Choices. In: J. Feinberg and Jules Coleman (eds). **Philosophy of Law**. United States: Thomson Higher Education Publishing, 2008, pp. 497-508. See also for more details GROSS, Oren. Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience. **Minnesota Law Review**, 88, 2004, pp. 1481-1555; BUFFACCHI, Vittorio; ARRIGO, Jean Maria. Torture, Terrorism and the State: A Refutation of the Ticking Bomb Argument. **Journal of Applied Philosophy,** 23, 2006, pp. 355- 373; COHAN, John Alan. Torture and the Necessity Doctrine. **Valparaíso University Law Review**, 41, 2007, pp. 1587-1632; Brecher, Bob. **Torture and the Ticking Bomb.** Oxford: Blackwell, 2007; Card, Claudia. Ticking Bomb And Interrogations. **Criminal**

principled indictment against torture would be rejected. The discourse would be limited to a mere matter of degree without questioning the acceptability of torture itself.

In this hypothesis, torture would be practiced "*de facto*" and would not be considered morally repugnant. Indeed, the option of its legalization could not be ruled out. This, of course, implies a positive view of inflicting pain and torture, which is quite difficult and, actually, unacceptable.

The third strategy, in support of torture relies on a utilitarian justification. The classic example is known as the *ticking bomb scenario*, where the terrorist is someone who planted the bomb and is the only one who knows where it is hidden. The terrorist does not want to voluntarily disclose the location of bomb, and the authorities have already exhausted all their resources in an attempt to discover where it has been placed, to no avail. According to Winfried Brugger, who proposed a utilitarian argumentative strategy, it would be necessary to reverse the moral intuition regarding the prohibition of torture. The outcome leads to the conclusion that abstaining from torturing a terrorist would amount to a greater evil.[60]

Therefore, as a response to the moral absolutist perspective, the prohibition of torture would be considered as a relativist moral stance compatible with the rule of law of a particular state. Otherwise, the absolute prohibition would create an "internal contradiction" since the State maintains a monopoly on the use of force.

Although the ticking bomb scenario example undeniably carries emotional weight, it is possible to express some objections, and they are neither few nor weak. For instance, torture should never be carried out under the guise of legally sanctioned force.

The premise of the monopoly of the State on violence does not mean or imply that the state is allowed any type of violence. Torture aims to break the will of the victim, forcing

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Law and Philosophy, 2, 2008, pp. 1-15; Bellamy, Alex J. Torture, Terrorism, and the Moral Prohibition on Killing Non-Combatants. In: Werner G. K. Stritzke, Stephan Lewandowsky, David Denemark, Joseph Clare, Frank Morgan (eds). **Terrorism and Torture:** An Interdisciplinary Perspective. Cambridge: Cambridge University Press, 2009; WALDRON, Jeremy. **Torture, Terror, and Trade-Offs**: Philosophy for the White House. Oxford: Oxford University Press, 2010; MORGAN, Rod. The Utilitarian Justification of Torture: Denial, Desert, and Disinformation. **Punishment and Society**, 2, 2000, pp. 181-196; ALLHOFF, Fritz. **Terrorism, Ticking Time-Bombs, and Torture**. Chicago: University of Chicago Press, 2012. Furthermore, see also LUHMANN, Niklas. **Gibt es in unserer Gesellschaft noch unverzichtbare Normen?.** Heidelberg: C.F. Müller, 1993.

[60] BRUGGER, Winfried. Darf der Staat ausnamsweise foltern?. **Der Staat**, 35, 1996; BRUGGER, Winfried. **Freiheit und Sicherheit.** Eine staatstheoretische Skizze mit praktischen Beispielen. Baden-Baden: Nomos, 2004; BRUGGER, Winfried. **Rettungsfolter im modernen Rechtsstaat?** Eine Verortung. Bochum: Kamp, 2005; BRUGGER, Winfried. Vom unbedingten Verbot der Folter zum bedingten Recht auf Folter?. **Juristen Zeitung,** vol. 55, no. 4, 2000, pp. 165–173; BRUGGER, Winfried. Würde gegen Würde. **Verwaltungsblätter Baden-Württemberg**, 16, 1995, S. 414 f., 446-455.

their body to betray their mind, compelling them to say and do things they truly do not want to say or do. This is why torture is accompanied by feelings of shame and humiliation: stemming from the intimate violation it inflicts.[61]

In addition, utilitarians deliberately ignore the distinction between intent and motive of conduct; that is, the motive does not change the root of the conduct and its description, except in case where the possible intention might be by the agent under certain conditions.[62] Torture remains torture, regardless of whether the aim is to save a significant number of lives. We are always faced with the choice between two evils, and even if opt for the lesser one, it remains inherently wrong. One of the most important consequences is that if we allow and accept torture in any instance, there will be no inviolable limits to its use in other cases. This represents the essence of "slippery slope" argument[63].

The fourth argumentative strategy is that of self-defense, which considers torture as an effective tool against an individual who represents an immediate threat and intends to attack another person. This argument is traced back to the writings of Brugger and Bybee. The argumentative strategy discussing self-defense in relation to torture is indeed specious because, by definition, the tortured are defenseless. The asymmetry between the prisoner and the executioner is evident. Furthermore, there is no guarantee for the reliability of the confession or information obtained, nor of proportionality.[64]

Finally, the last argumentative strategy in favor of torture concerns ethical responsibility[65]. The statesman, when relying on the reason of state argument, may well

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[61] See LA TORRE, Massimo; LALATTA COSTERBOSA, Marina. **Legalizzare la tortura?** Ascesa e declino dello Stato di Diritto. Bologna: Il Mulino, 2013, p. 126.

[62] TRAPP, Rainer. Wirklich "Folter" oder nicht vielmehr selbstverschuldete Rettungsbefragung? In: W. Lenzen, (ed.). **Ist Folter erlaubt?** Juristische und philosophische Aspekte. Paderborn: Mentis, 2007. For more details see also STAMILE, Natalina. La tortura, Ieri, Oggi, Domani (?). In: A. C. Santano, B. Meneses Lorenzetto, E. Gabardo (eds). **Direitos fundamentais na Nova ordem Mundial**. Curitiba: Ithala, 2018, pp. 153-176.

[63] For more details on the concept of "slippery slope" see: Devlin, Lord. **The Enforcement of Morals**. Oxford: Oxford University Press, 1959.

[64] See STAMILE, Natalina. La tortura, Ieri, Oggi, Domani (?). In: A. C. Santano, B. Meneses Lorenzetto, E. Gabardo (eds). **Direitos fundamentais na Nova ordem Mundial**. Curitiba: Ithala, 2018, pp. 153-176.

[65] This argumentative strategy is inspired by Weber's distinction between the ethics of conviction (*Gesinnungsethik*) and the ethics of responsibility (*Verantwortungsethik*). For more details, see: WEBER, Max. Politics as a Vocation. In: W. G. Runciman (ed.), E. Matthews (trans.). **Max Weber:** Selections in Translation. Cambridge: Cambridge University Press, 1978, pp. 212–225. See also: STARR, Bradley E. The Structure of Max Weber's Ethic of Responsibility. **The Journal of Religious Ethics**, vol. 27, n. 3, 1999, pp. 407-434, especially the author highlights: "The ethic of conviction recognizes a given hierarchy of values as the context for moral endeavor. The ethic of responsibility acknowledges value obligations, but assumes the absence of any given hierarchy of values and the inevitability of value conflict as the context for moral endeavor. When interpreted in the context of his multilayered understanding of value conflict, Weber's ethic of responsibility emerges as a coherent ethical perspective".

enter into conflict with a broader moral outlook. According to this perspective, the politician could be imagined as a person of exceptional virtues capable of better managing the "public good", almost like a "hero". Therefore, such person would not feel bound by common morality. To rule and exercise their powers effectively, they would have no hesitation about acting ruthlessly. This approach, however, is incompatible with a Constitutional State and with Democracy whose essence is that of the *constitution* and fundamental rights. In fact, in a constitutional order, *rectius* in the Rule of Law, the State is never merely an argument. As Michael Ignatieff argues, "For torture, when committed by a state, expresses the state's ultimate view that human beings are expendable. This view is antithetical to the spirit of any constitutional society whose raison d'être is the control of violence and coercion in the name of human dignity and freedom"[66].

At this point, to unravel the issue regarding the relation between torture and law, we must acknowledge that it inevitably leads to lawlessness and/or illegality. For instance, Christian Thomasius argues that the victim of torture is immediately perceived as a victim of abuse[67]. This captures a compelling argument. Torture defies any attempt at material universalizability: no one can accept being tortured in return.[68] It constitutes extreme violence and intolerable pain, clearly defined as excessive and abuse. Therefore, torture directly contradicts the fundamental moral principle: "*do not do unto others what you would not want done unto you".*

This rule, known as the Golden Rule, of course, may not necessarily apply to torture. If it is objected that no one would willingly choose to be imprisoned or sentenced to death, the response is as follows: in torture, there is no voluntary submission, and there is no limit to the pain inflicted; it is an unthinkable and unworkable situation for the subject. Some scholars, consequently, redefine the Golden Rule as "what is unthinkable and impractical for me to do to myself"[69]. Therefore, torture is the situation that most dramatically and with

[66] See IGNATIEFF, Michael. **The Lesser Evil: Political Ethics in an Age of Terror**. Princeton: Princeton University Press, 2004, p. 143. Generally see also: CLUCAS, Bev; JOHNSTONE, Gerry; WARD, Tony (eds.). **Torture:** Moral Absolutes and Ambiguities. Baden-Baden: Nomos Verlagsgesellschaft, 2009.
[67] See THOMASIUS, Christian. **Dissertatio Inauguralis Juridica De Tortura Ex Foris Christianorum Proscribenda**, first publication in 1705.
[68] See LA TORRE, Massimo; LALATTA COSTERBOSA, Marina. **Legalizzare la tortura?** Ascesa e declino dello Stato di Diritto. Bologna: Il Mulino, 2013, p. 167.
[69] See LA TORRE, Massimo; LALATTA COSTERBOSA, Marina. **Legalizzare la tortura?** Ascesa e declino dello Stato di Diritto. Bologna: Il Mulino, 2013, p. 168.

greater impact contrasts with the Golden Rule. In the words of John Finnis, we can assert, "Torture is the situation that [is] paradigmatically opposed to the moral point of view".[70]

What torture inflicts on another person is not only morally reprehensible but also incompatible with the rule of law. To justify this assertion, we can identify several reasons: the first is related to the inherent cruelty of torture, which places it in irreconcilable conflict with the role of law as "the principle and technique of pacification of social and interpersonal relations".[71] The second reason is inherent to a structural nature: "the rule of law is the criterion by which the determination of conduct, especially violent conduct, committed by a public body must be predictable and proportional"[72]. However, torture is neither predictable nor proportional; on the contrary, by its very nature, it is meant to deny the dignity and judgment of every human being subjected to it. Therefore, the relation between human rights and fundamental rights becomes evident. The basis of any rule of law is the notion of human dignity, around which all of modern society is build; it is a kind of "absolute" right, or "right of rights", making it unthinkable to obscure it. The thesis that torture can be a reaffirmation of violated human dignity or that one person should die rather than the whole people perish[73] is false and fallacious. It is intolerable to fall into the abyss of evil, which is bottomless, and the descent towards of this abyss can continue indefinitely. Thus, torture is irreconcilable with any form of the rule of law—it encompasses not only human dignity but also the supremacy of law over the arbitrariness of political power and despotism, as evident from the present reflections—or legality.

The undeniable impact is the point of view of Michael Moore.[74] He asserts that under certain conditions, even the "torture of the innocent" could be justified, but he does not consider "the torture of guilty".[75] Therefore, he focuses particularly on the scenario of using torture on the innocent individuals, such as children or the mothers of the potential terrorist.[76]

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[70] See FINNIS, John. **Moral Absolutes**. Tradition, Revision and Truth. Washington DC: The Catholic University of America Press, 1991, esp. pp. 81-82.
[71] See LA TORRE, Massimo; LALATTA COSTERBOSA, Marina. **Legalizzare la tortura?** Ascesa e declino dello Stato di Diritto. Bologna: Il Mulino, 2013, p. 174.
[72] *Ibidem.*
[73] For more details see JOHN 18, 14. For more details about human dignity see *ut supra* note 7.
[74] See especially MOORE, Michael S. Torture and the Balance of Evils. **Israel Law Review**, n. 23, 1989, pp. 280-344; also see MOORE, Michael S. Patrolling the Borders of the Consequentialist Justifications. The Scope of Agent-Relative restrictions. **Law and Philosophy**, 27, n.1, 2008, pp. 35-96.
[75] *Ibidem.*
[76] See especially KRAMER, Matthew H. Michael Moore on Torture, Morality and Law. **Ratio Juris**, vol. 25, n. 4, 2012, pp. 472-495; and ALEXANDER, Larry. Deontology at the Threshold. **San Diego Law Review**, n. 37, 2000, pp. 893-1201.

It is possible that a terrorist could be compelled to confess out of compassion perhaps witnessing the torture of friends, relatives or innocents could be so intolerable as to induce a confession. However, this argument leads to an unacceptable consequence of rendering a moral choice that is entirely arbitrary and uncertain. The argumentative strategy proposed by the thesis of the "torture of the innocent" is objectively unacceptable and fundamentally contradicts the basic legal principles underlying the rule of law, where criminal liability can only be personal.

Torture is ontologically excessive and deeply harms human nature. It breaks the autonomy and consciousness of the subject, reducing a human being to mere animalistic instincts. It exploits, "torches", and turns the body against the mind, directs emotions against reason, and uses suffering to overpower and silence any opposing arguments. Thus, torture is essentially a conflict of human nature against itself[77].

The tortured are forced to lend their own body to an atrocious struggle against their nature. Both body and soul are twisted, akin to the "tort" from which the tortured person screams in pain. In the word "torture", the root is "tort", meaning "twisting"; and the result is a "tort". It stands outside the "law". Torture represents the greatest tyranny an individual can endure; it destroys the very subjectivity of the human beings and, for this reason alone, is incompatible with the law.[78]

However, it is undeniable that the world has inevitably changed after the 9/11 terrorist attacks, and the consciences of everyone, for more than two decades of dramatic events, remain in a state of upheaval. The impact of the tragedy that followed—and that we are still experiencing—across the world, has always remained vivid and relevant.

Therefore, it is certainly no surprise that the consequences of the extreme acts that have occurred in real-time, under the astonished eyes of all humanity, continue to exert an unquenchable influence everywhere—on life, thinking, emotions, behavior, and within the law, both practical and theoretical dimensions.

[77] See LA TORRE, Massimo. La giustizia della tortura. Varianti sul tema. **Materiali per una storia della cultura giuridica**, n. 1, 2014, p. 5, and see VON SONNENFELS, Joseph. **Ueber die Abschaffung der Folter**, in Sonnenfels gesammelte Schriften, vol. 7, Wien, Mit von Baumeisterischen Schriften, 1785, pp. 51-52.
[78] See LA TORRE, Massimo. La giustizia della tortura. Varianti sul tema**. Materiali per una storia della cultura giuridica**, n. 1, 2014, p. 4.

For example, Rainer Trapp elaborates on the theory of the “torture of salvation”, where the only purpose is to obtain information.[79] The example by Trapp is as follows: a woman is immobilized by two men, while a third violently hits her and holds a knife to her neck. The woman dies, and in light of this situation, our reaction is indignation. However, according to Trapp’s argument, if we were informed that she had swallowed something and was choking, and that the person holding the knife was a doctor attempting to save her life, our perception would change dramatically, along with our moral judgment of the man’s behavior, regardless of the final outcome.

At this point, Trapp applies this situation by analogy to torture: if the person subjected to torture is the kidnapper of a child who refuses to reveal the child’s whereabouts, our moral judgment would change because the interrogator has the sole purpose of finding and saving that child.

According to Trapp, our understanding of the motive behind an action helps us to classify the action legally and alters our perception of its morality. However, there is a strong objection to Trapp’s argument: the motive of an action overlaps with the intention behind the same action, leading to an unacceptable conclusion. This conclusion suggests that modifying the description of an action also changes or modifies the action itself. The intention behind an act is not the same as the motive or reason for it; therefore, torture always remains torture, and the redefining the act based on the motive is not justified.

Regrettably, considering the pain and dismay of the people who are victims of terrorism attacks and/or ongoing wars around the world, one could argue that today we are witnessing the breakdown of a substantial portion of those ethical, social and above all, legal achievements and victories made after the countless tragedies of the twentieth century. These achievements had seemed, at least in the West, to be consolidated forever.

4. FINAL CONSIDERATIONS

In conclusion, the complex phenomena of globalization and the inexorable transformation of society from pluricultural to multicultural and multiethnic call, at the very

[79] TRAPP, Rainer. Wirklich “Folter” oder nicht vielmehr selbstverschuldete Rettungsbefragung?. In: W. Lenzen, (ed.). **Ist Folter erlaubt?** Juristische und philosophische Aspekte. Paderborn: Mentis, 2007, p. 95.

least, for the consideration of a "*new*" legal order.[80] The scholar, whether a legal philosopher or a lawyer, increasingly finds themselves working within a complex and multiform reality. This highlights the need to (re)elaborate and revisit legal and political theory. The legal discourse, developed around key concepts such as sovereignty, citizenship, the very essence of the law, the rule of law, democracy, tolerance, equality and freedom, needs to be (re)thought in light of the changed historical circumstances. In this new framework, it is necessary to attempt an analysis of the possible forms of political and social participation that could, to some extent, connect with fundamental rights and the ways in which we conceive them. We also need to analyze the extent to which these fundamental rights can be applied and the guarantees put in place for their protection.[81]

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[80] See for example FERLITO, Sergio. **Le religioni, il giurista e l'antropologo**. Soveria Mannelli: Rubbettino, 2005. The author analyzes the relation between globalization and multiculturalism and Law. See also for more details about the multiculturalism: COHEN-ALMAGOR, Raphael. **Just, Reasonable Multiculturalism**. New York and Cambridge: Cambridge University Press, 2021; COHEN-ALMAGOR, Raphael. Can Group Rights Justify the Denial of Education to Adolescents? The Amish in the United States as a Case Study. **Revista Direitos Sociais e Políticas Públicas (UNIFAFIBE),** 9 (2), 2021, pp. 940–981.

[81] For example, see STAMILE, Natalina. On the false myth of the legal neutrality: some remarks. **Forthcoming.** The author analyzes how sovereignty is connected to the patriarchal view of society and especially to a particular concept of Law. For this reason, the reflection starts from the premise that the traditional discourse on Law is a discourse of power, even camouflaged at times as cognitive discourse. Then, it analyzes how the legal feminist theory could contribute to overrule the patriarchal structure of society and to redefine the traditional legal concepts. In addition, it is important to stress the legislation of the European Union about the torture: see the European Parliament Resolution of 14 December 2011, on the anti-terrorism strategy, with which the European Union proves to have understood that to face the terrorism threat a more prudent approach is necessary. While through the framework decision 2002/475/JHA, the European Union defined terrorist crimes, later, through the resolution of 2011, it made an important breakthrough: the European Union understands that international cooperation is an essential step to deprive terrorism of its financial, logistical and operational bases, and it especially affirms that counter-terrorist policies should aim not only to prevent terrorist acts but also to protect and strengthen the fabric of democratic societies by strengthening civil liberties. From this perspective, what the European legislator specifies is emblematic: «The approach to counterterrorism that is most likely to succeed is that which focuses on the prevention of violent extremism and escalation»; therefore, it is evident that European Union responds to the preventive war against terrorism with a strategy of contrasting not only the consequences of terrorism but also its causes. See also for example, European Parliament resolution of 11 February 2015 on anti-terrorism measures in https://www.europarl.europa.eu/doceo/document/TA-8-2015-0032_EN.html; Parliamentary questions on 2 March 2016 about the subject: Follow-up to the resolution of Parliament of 11 February 2015 on the US Senate report on the use of torture by the CIA (2014/2997(RSP)) in https://www.europarl.europa.eu/doceo/document/O-8-2016-000039_EN.html; https://www.europarl.europa.eu/doceo/document/O-8-2016-000039_EN.html in https://www.europarl.europa.eu/doceo/document/B-7-2013-0379_EN.html; See also, Directorate-General for Internal Policies of the Union (European Parliament), A quest for accountability? EU and Member State inquiries into the CIA rendition and secret detention programme, 2015, available in https://op.europa.eu/en/publication-detail/-/publication/812037f3-1213-4aa9-a978-2b9a33511f82/language-en/format-PDF/source-212977491; CEPS, Directorate-General for Internal Policies of the Union (European Parliament), The results of inquiries into the CIA's programme of extraordinary rendition and secret prisons in European states in light of the new legal framework following the Lisbon treaty, University of Maastricht, 2015, available in https://op.europa.eu/en/publication-detail/-/publication/0e07596a-9e90-11e5-8781-01aa75ed71a1/language-en/format-PDF/source-212977491; See also for example, the case of Maher Arar;

To conclude, this paper, in contrast with "imperativist" theories, aims to support the (re)affirmation of law to underscore their important role in protecting and guaranteeing fundamental and human rights by condemning practices such as torture. This stance is supported by Jeremy Waldron's cogent arguments on the shame and outrage brought upon by any use of torture, for whatever reason;[82] by Bernard William's conception of the "moral unthinkable";[83] and by Robert Alexy's definition of torture as something that is "discursively impossible", all of which categorically oppose practices contrary to human dignity.

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the case of Abu Omar; the case of Al Zeri e Ahmed Agiza and the case of Khaled el Masri; see also the report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners (2006/2200(INI)), Temporary Committee on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners Rapporteur: Giovanni Claudio Fava, available in https://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A6-2007-0020+0+DOC+XML+V0//EN; and; https://www.europarl.europa.eu/meetdocs/2004_2009/documents/dt/617/617721/617721en.pdf.
Finally, it is also important to stress that Article 4 of the EU Charter of Fundamental Rights states: "Article 4 - Prohibition of torture and inhuman or degrading treatment or punishment. No one shall be subjected to torture or to inhuman or degrading treatment or punishment." Available in https://fra.europa.eu/en/eu-charter/title/title-i-dignity

[82] WALDRON, Jeremy. Torture and Positive Law. Jurisprudence for the White House. **Columbia Law Review**, 105, 6, 2005, pp. 1681-1750. See also MAYERFIELD, Jamie In Defense of the Absolute Prohibition of Torture. **Public Affairs Quarterly**, 22, 2, 2008, pp. 109-128; HOWES, Dustin Ells. Torture Is Not a Game: On the Limitations and Dangers of Rational Choice Methods. **Political Research Quarterly,** 65, 1, 2012, pp. 20-27.

[83] WILLIAMS, Bernard. A Critique of Utilitarianism. In: J.J. C. Smart; Bernard Williams. **Utilitarianism For and Against**. Cambridge: Cambridge University Press, 1973, esp. p. 92.

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