Torture, Inhumanity and Degradation under Article 3 of the ECHR. Absolute Rights and Absolute Wrongs

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Carey Young is a contemporary visual artist who often draws inspiration from legal and political issues in her work. One of her well-known installations, created in 2005, is titled “Declared Void”. In a corner of the exhibition hall, certain black lines trace a square that serves as an imaginary gateway to a bleak *non-legal/a-legal area*, a “zone of lawlessness”. A nearby sign, featuring large-letter text, conveys its message, with a forceful tone: “By entering the zone created by this drawing, and for the period you remain there, you declare and agree that the US Constitution will not apply to you.”[1]

The visitors can, perhaps even *are invited to*, cross the lines; taking the –exceedingly delicate step– that will (dis)qualify them as radically deprived individuals, as *right-less subjects*. Implied here, as a sort of “fourth dimension” of the entire installation, is an *all-encompassing and almighty Power*: A Power, capable of imposing *what is and should be legally inconceivable,* as we aim to show below, as a *de facto situation*. Indeed, we must stress it out in the most unequivocal manner: Within the institutional and moral framework of modern legal systems, no legitimate authority can enforce “such lines”; and no individual is capable, even with their own consent, of “crossing them”. “*Such lines” aren’t even –normatively– conceivable.*

To be expressed in terms of Kantian philosophy: human persons cannot be conceived to exist in a state, or enter into relations, that do not presuppose them as free and equal beings (violating, thus, the “principle of humanity in their own person”). In the same line, and more importantly: no ruling authority can alienate individuals under its control from this foundational principle. It cannot deprive, in other words, any individual or group of the “right to have rights [to freedom]” (recalling

[1] See the installation photo available on the artist’s website: http://www.careyyoung.com/declared-void, accessed: 30 October 2023.

here, in conjunction with Kantian thought, Hannah Arendt's emblematic phrase[2]). In this case, we would not only be dealing with a grave case of injustice or institutional violence, but with the actual *void of law itself*, an instance of raw violence masked by the façade (and false identity) of "legal institutions."

Fundamental rights equate to *basic aspects, specifications, or guarantees* of the *equal freedom and inherent worth* of all human persons. With this as the foundational premise, the following positions can be normatively derived (as *equally* valid and mutually complementary): a. rights can only be restricted if, and only if, this is demanded by the very *balance-system of equal legal freedom* (see, for instance, proportional restrictions on freedom of expression in order to protect other rights, such as those related to privacy, personality, etc.). At the same time, b. certain fundamental rights *can never and should never be restricted for any reason whatsoever* (these are exactly what legal theorists call "absolute rights"). Because, simply put, b1. there can be no justification drawn from a system of equal legal freedom that allows such restriction. On the contrary, b2. absolute rights violation would not just pose a challenge*, but a complete upheaval to the system of equal legal freedom itself.*

It becomes, then, clear why the *prohibitions of i. slavery, ii. torture, and iii. inhuman and degrading treatment* are considered as absolute rights. Freedom from slavery is an absolute right, because merely questioning it results in a radical separation of the individual from their inherent right to freedom and self-ownership. The same holds true as well for ii. and iii.: No authority can wield or permit such *nullifying violence* (see *torture*) that pushes human persons into the grim state of existence of a "human res", or of a "living dead". Nor can it reduce them to a level of functioning that equals legal annihilation and nullification *qua persons* (see *inhuman and degrading treatment*). We will return to all of these points, in detail, below.

We live in a world where rights are everywhere invoked, and everywhere challenged.[3] Increasingly today, rights are accepted as a *secondary variable* – constantly

[2] For an insightful study that co-examines Kant's philosophy with that of Arendt, specifically in relation to the topic of political regimes that represent a structured "absence of law and freedom", perpetrating in that way what we could describe as "organized barbaric violence" against individuals, see Helga Varden, "Kant and Arendt on Barbaric and Totalitarian Evil" 121 (2) Proceedings of the Aristotelian Society 221-248.

[3] See Justine Lacroix – Jean-Yves Pranchère, *Les droits de l'homme rendent-ils idiot?* (Éditions du Seuil et La République des Idées, 2019). The book expertly discusses the current, contentious arena or rights, in both discourse and practice. As stated among others, rights today are not only threatened by their usual sources of danger (e.g. states and powerful private entities), but also, and perhaps more worryingly, by a *zeitgeist increasingly less willing and able to practically uphold and guarantee them.*

adaptable to other "values" and overarching objectives (see "national security", the somewhat elusive "public interest", even "fiscal stability," and so on). Certainly, there is a robust theoretical discussion advocating for rights. Paradoxically though, these advocacies often turn into arguments for the human rights adversaries: Rights may be "theoretically valid or attractive," as they claim, but in practice,[4] rights are either *vacuous or dangerous*, lying far from, or even standing in opposition, to real problems and required institutional designs and actions. Even absolute rights may then be circumvented, as they further claim, under exceptional circumstances.[5]

We need to set the tone for the appropriate response from this point forward: torture and inhuman-degrading treatment are *not only, under any circumstances, legally intolerable*. They should, to be more precise, be considered legally *inconceivable*.[6] Their very practice equals a bleak ideogram that represents nothing less than the exact opposite of *rightful interpersonal* relations and *legitimate political institutions*. Torture and inhuman-degrading treatment should never be permissible, under any circumstances. As if they were, then: *nothing would be in fact legally impermissible*.

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In her book presented here, N. Mavronicola encourages (and significantly aids us) to "take absolute rights seriously". The latter phrase stands in obvious dialogue with the prominent American legal philosopher Ronald Dworkin[7] – who also constitutes a fundamental theoretical source and reference for the author, as demonstrated

[4] Kant critically engaged with this line of argument in his time; essentially asserting that if something is well-founded "in theory" (i.e., it is valid as a demand of practical Reason) but it is contested "in practice" (i.e., in terms of human social experience), then this should not be set forth as a negation of the former but rather as an argument for the realignment of the latter, see in his essay "On the Common Saying: 'This May Be True in Theory, but It Does not apply in Practice'", in *Political Writings* ([2nd ed.] ed. by Hans Reiss, Cambridge University Press, 1989) 61-92.

[5] In a 2018 interview, the Belgian Vice-Minister Theo Francken suggested the necessity to find ways to bypass the Article 3 of the ECHR (see *prohibition of torture/inhuman-degrading treatment*), in order to address the challenges posed by mass immigration in Europe (although he later clarified, in response to criticisms, that he did not actually mean it as a challenge to art. 3). See the on-line article "Theo Francken veut 'contourner l'article 3' pour renvoyer les bateaux des migrants: l'opposition réclame sa démission" (Radio Télèvision Belge Francophone on line, 6.6.2018, https://www.rtbf.be/article/theo-francken-veut-contourner-l-article-3-pour-renvoyer-les-bateaux-de-migrants-l-opposition-reclame-sa-demission-9937090), accessed: 30 October 2023.

[6] As for Greek-speaking legal scholarship, let us also reference the in-depth philosophical examination of this subject in the work by Philippos Vassiloyannis, *Autonomy and Bioethical Coercion: A Critical Casuistry* (Crete University Press, 2020) 85-90 [in Greek].

[7] See Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977).

throughout the text. The book's chief strength lies in its ability to bridge theories of rights and legal interpretation with an in-depth knowledge and analysis of actual judicial practices and case-law. The author effectively engages with both the *puzzles of theory* and the *intricacies of jurisprudence*. Her research aim, expressly stated, is to offer tools that encompass both a. conceptual clarity and b. legal interpretation guidance, capable of ensuring legal protection of absolute rights.

Mavronicola aligns with and builds upon the widely accepted legal theory approaches (see for instance the views of A. Gewirth), according to which *an absolute right is one that cannot, under any circumstances and with valid justification, be restricted*. Within this context, particularly regarding the European Convention of Human Rights, rights considered absolute are those whose textual wording does not include any restriction clauses. To be more specific, these rights refer to articles 2-4, which address the right to life, the prohibition of torture, inhuman and degrading treatment, and slavery or forced labor. On the other hand, the rights detailed in the articles 8 and beyond, such as the right to private life or freedom of expression, allow for their conditional and justified limitations.

In this case, the critical question persists: How does the absolute nature of protection of certain rights shape their interpretation and application in particular contexts? The core thesis put forth by the author in the case is as follows: Despite prevalent misconceptions (or concerns in this context), the obvious need to specify the regulatory meaning of absolute rights (in varied, and unforeseeable circumstances) harmonizes perfectly with the inherent absoluteness of their protection. Within this scope, Mavronicola's book ambitiously seeks to develop a theoretical framework, precisely *for the correct interpretation and legitimate specification of absolute rights* (particularly, Articles 2-3 of the Convention).

Informed by rich academic scholarship, the author aligns with what we regard as *sound and crucial* legal theory and methodology *theses and key-points*. In summary, and if we were to undertake a certain reconstruction, these are the following:

1. The (clear) requirement for specialized rights protection in specific contexts should not be misconstrued as a potential basis for deviations from – or alterations of – the absolute right's normative content. In essence, specialization *arises from and concretizes the article's regulatory content*, rather than justifying departures from it.[8] (It is worth emphasizing that this applies to all legal rules subject to interpreta-

[8] For a Greek-speaking legal methodology contribution that serves both as a theoretical model for the "factual concretization" of legal interpretation, and at the same time as a theory of *sound legal reasoning,*

tion, not solely within the realm of human rights law). The author aptly underscores that it is *this adherence to the law*, and not its very antithesis – i.e. *extraneous to law reasoning* and *policy-based considerations* –, that delivers the required legal certainty.

2. In order to ascertain the scope of the respective rights, one must engage in robust normative reasoning, aimed at grasping their precise juridical meaning and, notably, the *legal wrong* with which their violation is associated. By employing this approach, ultimately, we end up tailoring the right at stake *according to its inherent meaning and value*; rather than molding it to conform to extra-legal policies and assessments. Mavronicola's key-thesis, here, is that *contesting absolute rights is tantamount to challenging the equal elevated ethical status of all persons* (see also in this instance our references, stated above, to Kantian human dignity and the inherent right to freedom). It could be contended that Mavronicola in fact formulates a *Dworkinian theory of (the interpretation of) absolute rights*, all while drawing from a *Kantian philosophical foundation* (the latter is tacitly acknowledged in her work, without in-depth exploration; we need to note, of course, that the present observation is not at all a criticism – her work is not a treatise, after all, in legal or moral philosophy).

3. The accurate delineation and application of the ECHR provisions regarding absolute rights should not rely on a necessarily "strict" or historically fixed ("originalist", as we call it) interpretation (i.e. what constituted torture during the Convention's drafting or according to a closed and time-bound list). Nevertheless, the requirement for a "dynamic" interpretation does not negate the existence of *accurate* — or, at the very least, *more accurate* compared to others—legal interpretations and judicial opinions.[9] The author emphasizes that the Court (in *the present case*, as *in all cases* – as it is crucial to add) is obligated to render well-founded judgements, involving *substantial interpretative argumentation*, so as to precisely uncover and accurately define the meaning of the ECHR articles in the particularly given context.

4. Last but not least (something evident from the above but still worth under-

see the book of Constantin Stamatis, *Justification of legal Judgements* ([8thed.], Sakkoulas, 2009) [in Greek].

[9] Let us be allowed to refer at this point to a study of ours; where, among others, the so called "dynamic interpretation of the ECHR" is being re-assessed as a variant of purposive-systematic interpretation, and notably, as an argumentative pillar for substantial correctness in interpreting the ECHR articles, Stergios Mitas "'European Consensus' and the justification of the Strasbourg Court judgements. Reflections for a methodological reappraisal", in Konstantinos Tsinas (ed.), Court judgement *justification in Greece and Cyprus* (Nomiki Vivliothiki, 2023) 35-52 [in Greek].

scoring): The correctness of an interpretation is *unrelated* to its potential popularity or convenience for present state policies or public opinion views. As Mavronicola astutely observes, popularity may arise *precisely because* the solution was juridically flawed: restricting for instance or distorting the protective scope of a right. Furthermore, endorsing the standpoint on the existence of correct legal answers does not imply that a certain court-reasoning provided at a particular point in time is necessarily *the correct one*, nor does it negate the possibility for critical re-assessment of it, of differing legal opinions etc. Conversely, the latter (re-orientation through criticism and rational disagreement) becomes precisely impossible if one favors the opposing position: that of the *inability to discern a correct legal answer* to a specific legal question (see, as we can label it, the "no-right answer thesis").

The author delves into the conceptual and normative analysis of *what constitutes an absolute right* and the actual *nature of the legal wrong* associated with its violation in the early chapters of the book (Chapters 2 and 3). Subsequently, she proceeds to examine the regulatory aspects of the subject, primarily through an analysis of positive law and case-law (Chapters 4 to 7). Chapter 4 focuses on torture, Chapter 5 deals with the human-degrading treatment, Chapter 6 touches upon positive obligations stemming from absolute rights for the states, and Chapter 7 raises the issue of the connections between absolute rights protection under the ECHR and the non-refoulment principle of refugee law.

The analysis in Chapter 4 regarding torture and the relevant case law of the European Court truly stands out. Indeed, we frequently allude to the "profound evil" embodied by torture, indicating that the ascribed "fundamental wrongdoing" in this context is characterized more by its *qualitative nature* than by its *quantitative aspects*. The author underscores and significantly elucidates this point.[10] The actual *normative wrong* inherent in torture does not primarily lie in the pain or trauma it inflicts *per se*. By exercising control and inflicting suffering and pain (as a demonstration of the *absolute power* of the torturer), torture instills terror and dehumanizes the individual to such an extent that *it erases their status as a person*. In particular,

[10] With regard to the conceptualization of torture, the author draws creatively from the works of David Luban, Jay Bernstein, Jeremy Waldron, and others. It is important to pay tribute, in this regard, and emphasize the significance of the soul-wrenching (and philosophically powerful) testimony of Jean Améry (to which Mavronicola also refers), see "At the Mind's Limits: Contemplations by a Survivor on Auschwitz and its Realities" (trans. by Sidney Rosenfeld and Stella P. Rosenfeld, Indiana University Press, 2009). The idea that torture actually represents a *radical power asymmetry* and a *moral annihilation of the individual* is a concept we largely owe to the work of Amery.

torture renders the victim profoundly and infinitely susceptible to the arbitrary will of others.

Should we grasp that freedom is fundamentally a *relational* concept (as noted by Kant: one is free if they can set and pursue goals in independence from the authority or influence of another person), it becomes evident why torture represents a radical violation of our *shared humanity*. Torture, as a result therefore, is structurally *akin to slavery*; not merely something in deviation from a rightful legal condition, but *in direct opposition to it*. The individual subjected to torture forfeits the right to determine their own body, resembling the state of a slave.

What is more, when it comes to the ethical aspects and the (negative) attributes of torture in particular, it is important to take into account the following aspect: The body of the victim, which to reiterate in Kantian terms is the foremost "means of external freedom," inseparable actually from our own person, undergoes – in the torture case – a (truly *abhorrent*) transformation: It doesn't merely turn to something foreign and contrary to the person's own will; rather, it becomes the very *instrument of complete subjugation* and *moral annihilation* of the person.

What do all of these considerations, then, imply for the legal assessment of torture and the accurate interpretation of the Convention article at hand? The author correctly highlights that the interpretive approach to determining whether a practice constitutes torture should prioritize the practice's inherent (*qualitative* and *relational*) features rather than its outcomes. Often, the Court's decisions err precisely when they tend to classify a practice as torture based on external or quantitively measurable aspects of harm to the victim, such as severe physical injuries.

Here, the author makes the following (counter)observations: First of all, this approach neglects to recognize that contemporary torture techniques frequently do not leave physical traces (at least not on the victim's body). Additionally, it fails to consider that a specific practice may qualify as torture in one case but not in another, depending on the context and the traits of the persons involved. Moreover, it dismisses the fact that the mere threat of torture can be tantamount to torture itself, as it may lead the recipient to believe that the impending violence and suffering they are about to endure will be boundless (and, actually, "nullifying", in the sense explained above).

As we can discern from the above, in line with the author's fundamental stance: The legal interpretation to be undertaken should be a. *dynamic*, *purposive*, and *fact-oriented*; and at the same time b. ultimately *resistant to* relativist presuppositions or extraneous to law considerations. The reasoning that the Court should un-

dertake needs to be centered around the (*qualitatively*) *heightened harm* the torture actually conveys. Key determinants in this regard encompass the degree of power asymmetry (within persons involved), and the imposition held upon the victim, potentially resulting in the person's actual "nullification" (see in terms of self-determination and self-worth).

Now, the practice of inhuman and degrading treatment shares some of the regulatory characteristics and negative "qualities" of torture. What is called into question in both cases is the *equal inherent dignity of persons*. Over the years, the European Court of Human Rights has introduced in its case law the concept of a "minimum level of severity." That is, that an act or a state of affairs must meet or exceed this essential minimum to be classified as inhuman and degrading treatment. Despite standard uses by the Court, the severity criterion still remains unclear and uncertain. The unclarity in this context tends, in practice, to serve as a restraining factor: This threshold poses, both, as *demanding* and *uncertain* – leading in that way to its very *infrequent* assertion. The practice of resorting, then, to extraneous to law criteria, supposedly in order to address this uncertainty, only exacerbates legal uncertainty; and does not in fact align with the absolute nature of protection (as stipulated in the Article 3 of the Convention).

The assessment of passing the threshold must naturally consider various factors, including specific circumstances, duration, effects, and individual characteristics. However, as the author consistently emphasizes, the concept of severity in these cases is *qualitative*, not quantitative; it is concerned with the nature of the treatment rather than the extent of harm or suffering. For instance, forcing a religious person to burn a sacred book or compelling a woman to stand naked in front of individuals of the opposite sex may be deemed inhuman or degrading treatment depending on the circumstances. In such critical situations, the "severity" evaluation needs to assess the *qualitative and relational aspects* of the behavior or condition in question, all within the context of upholding one's fundamental dignity. The book offers a comprehensive commentary on these cases and detailed jurisprudence.

In chapters 6 and 7, there is however a modest decrease, in our view, in the depth of theoretical insights, even though they remain as rich, coherent and rigid as the rest of the book. Those chapters take their cue, as well, from the core belief of the book, namely a. that particular case-circumstances play in the case a highly influential role (e.g. when assessing the reasonable and effective measures the states might adopt for absolute rights-protection; or in determining whether the expulsion or a deportation

of foreigner could result in exposure to inhuman and degrading treatment). Specific conditions however b., as the author rightly insists, are properly considered and assessed through the lens of the regulatory content of the ECHR articles; the latter being *properly specified and further elaborated upon the specifics of the case*, rather than *sidestepped because of them and by their invocation* (as is often the unfortunate case). Within these chapters, there remain some points and themes that still have unexplored potential. In our view, those themes could be more thoroughly and fruitfully explored, especially by drawing upon additional theoretical references and literature (akin, for instance, to the approach taken in the chapter on torture). This could very well provide the basis for the author's future research, e.g. delving into topics such as refugee law, socio-economic rights, basic human needs, the *principles and legal rationales underpinning* all the above etc.

Let us revisit the issue: legal scholarship and thought should be capable of offering a sound response to the critical question at stake: Can torture or inhuman-degrading treatment, even under exceptional circumstances, be justified and supported? If the answer is no, then a. legal theory must be capable of elucidating the specific *legally binding rationales* (as opposed to abstract *ethical ones*) that establish the prohibition as absolute and unconditional. And b. legal theory should be competent in employing the relevant interpretive standards (based on legal rules and principles, not extraneous considerations and policies) that permit a solid and legally secure assessment of specific case-details; taking of course into account the specificities, yet *within the binding normative light* of the ECHR rights. The author points out shrewdly the interconnection of a. and b., offering valuable theoretical guidance on how to successfully address both.

Stergios Mitas