

Terrorism is no excuse for torture

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THE PUBLIC outcry over Professor Mirko Bagaric's condoning of torture has been visceral and instinctive. This "alarmist and reflexive" response is derided by Bagaric as "emotive", and compared unfavourably to the rational debate being undertaken in the US. Yet it is the very intuitive nature of our response that we should celebrate. That so many find the arguments to be abhorrent to a fundamental moral code reflects well on the state of our society and, indirectly, on the strength of the prohibition against torture as a binding and universal norm.

For commentators who propose lifting the absolute prohibition, torture can be justified in certain circumstances in order to save innocent lives. The argument poses hypothetical scenarios in which it can be envisaged that the State, perhaps after receiving the stamp of authority of a judge, can be certain that torturing a particular person will prevent a terrorist attack. It is basic utilitarianism: one's actions can be justified, and individual rights can be limited, in the name of a greater public good.

According to these theories, terrorism is a unique historical circumstance, a new context within which their reasoning operates with even greater force. The rules of international law can and must be re-written in its shadow, from the laws of war to international human rights protections. Australian politicians and their administrators have similarly used the rhetoric of terror to justify derogating from previously accepted norms. As Robert Cornall, Secretary of the Federal Attorney-General's Department, asserted recently, individual rights will need to give way to community rights now that we live in a more dangerous world.

This utilitarian argument - the balancing of the public good against the individual's right to security of person - is the stuff of Ethics 101. Most people who have taken such a course will be familiar with the ways in which the calculation breaks down. To put it crudely, the teacher might ask students how many children they would be willing to rape in order to achieve the saving of a certain number of lives. Invariably the response is none.

Unlike the "ticking bomb" hypothetical which the proponents of State-sanctioned torture propose, the rape of children in such circumstances is far from theoretical. Anyone who has worked with refugees will have come across men, women and children who have been raped, mutilated and otherwise abused in the name of preventing terrorism. Once we step down the path of rationalisation of torture for the greater good, such acts are not just logically justifiable but inevitable, either because of the inability of the State to control persons responsible for torture, or because the State itself gives its implicit imprimatur. Those commentators who believe they can introduce ways to stop this "slippery slope" from operating need to read more human rights reports and meet more victims of torture.

What is incredulous is that so many American, and now at least some Australian, academics and policy-makers should present their rationalisation of torture (and other relaxations of human rights protections) as novel, born out of necessity in the Age of Terror. Nothing could be further from the truth: the arguments are inherently medieval in origin; terror merely gives them a new guise. To argue, as Robert Cornall has, that our rights were created in the absence of threats to our community is to misunderstand history. Human rights law is a product of bitter and tragic experiences, not least of which were the atrocities committed during last century's world wars. And as many commentators and judges have pointed out, the most fundamental of these laws were created exactly for times such as these.

The absolute prohibition against torture arose, in many respects, as a result of a lengthy, brutal and failed scientific worldwide experiment in which State-sanctioned and controlled torture was considered necessary to pre-empt what were considered great threats to society. That the historical experiment failed is reflected in the fact that the prohibition against torture is so universally accepted as a norm of international law, binding on all States regardless of whether they are signatories to relevant international treaties. This prohibition is based on at least three lessons of history.

Firstly, at the purely practical level, torture frequently failed in its objective of obtaining reliable evidence. This is even more relevant today. Terrorist organisations know all about torture, and prepare for it by ensuring that no single operative knows all the facts about an operation or organisation. Furthermore, a torture victim will say almost anything - usually what their torturers want them to say. Given the abysmal record of our intelligence agencies in being able to determine the worth and credibility of the information at their disposal, torture-derived evidence hardly promises to be the panacea to information failures of the recent past.

Secondly, the modern polity is founded on the principle of limiting the power of the State. Again, this core principle of liberal thought arose not just in the social philosopher's chair but in the living history of abuses of power. To grant to the State the ultimate power to destroy the body of the citizen through torture invites the greatest abuse of all. The American revolutionaries knew this, and therefore entrenched the prohibition into their fledgling Constitution. In Australia, we rely primarily upon a fragile common law, and the workings of responsible government to protect us against the removal of our basic rights. And while the High Court at one time indicated that the separation of powers doctrine might act as a human rights guarantor, the current bench is much more deferential to the principle of parliamentary sovereignty, as the recent cases approving indefinite detention of aliens starkly demonstrated.

In the absence of a constitutional protection against torture, we must ultimately rely on the third, most potent reason why torture is universally and absolutely prohibited: the fact that our society abhors the violation of our common humanity that torture entails. Torture destroys the moral fabric of our polity: the abused body of the victim is reflected in the devastation of the body politic. That many of us had an almost physical revulsion to Professor Bagaric's argument is a reflection of the way certain legal prohibitions, such as that against torture, slavery or genocide, can become ingrained into a society's collective unconscious and operate hand-in-glove with social morality.

Our gut reaction to the proposition that torture should be legalised should therefore not be considered as mere ill-informed populism. It reflects deeply seated values and legal rules, an emotional intelligence that is born of historical experience and now ingrained into our culture and legal system. As legal philosopher Jeremy Waldron has said, the prohibition of torture now operates as an "archetype" in our legal system, shared by all participants, and reflecting the spirit of the law.

At the end of the day, anything can be rationalised. And without an entrenched Bill of Rights, almost anything can be legislated away, even the most basic human rights. Let us look to our instincts and hope that they prevail.

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