

TERRORISM v. HUMAN RIGHTS
WHERE DO YOU DRAW THE LINE?

I intended to write this essay as a blackly humorous spoof missive from al-Qaeda headquarters, urging British sympathisers to stand up for their human rights, in case changes to the law made the undertaking of “martyrdom operations” difficult. Then I realised; that was sick and twisted. Instead, I argue in favour of torture.

The Human Rights Act 1998 enshrined into UK law the provisions of the European Convention on Human Rights. Article 3 of the ECHR (prohibition of torture) states: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment”. There are no exceptions. Compare, for example, article 2 (right to life): “Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary *in defence of any person from unlawful violence*” (emphasis added). Many articles of the ECHR provide for similar balancing acts between individual rights and other imperatives. Not article 3.

Note that the ECHR does not provide the only legal prohibition of torture. Various international agreements have been ratified by the UK, including the 1949 Geneva Conventions, the International Covenant on Civil and Political Rights, and the Convention against Torture. Essentially, all say the same thing: no torture, no exceptions. I shall confine myself to discussion of the ECHR.

Article 3 has posed problems for the British government since the 1996 European Court of Human Rights ruling in Chahal v. UK. The court held that Mr Chahal, (a Sikh militant who had entered the UK illegally) could not be deported to his country of origin, due to the real risk of him receiving inhuman treatment in that country. Where substantial grounds could be shown for believing that the risk was real, article 3 was engaged. Consequently, the conduct of the proposed deportee, with reference to national security, could not be a consideration.

This decision prevents the Home Secretary from deporting suspected terrorists to countries where they might face persecution. Bilateral no-torture agreements have been sought, with states such as Jordan, in an attempt to make deportation to these countries possible, but cosy understandings seem unlikely to survive legal scrutiny. Inevitably, the UK has sought (and been given) the permission of the European Court of Human Rights to intervene in the upcoming case of Ramzy v. The Netherlands. The UK will argue that the minority ruling in the Chahal case was correct – that the interests of national security should be balanced against the deportee’s risk of torture – and that Chahal was wrongly decided.

There is potential inconsistency if the Ramzy judges rule that we absolutely cannot torture within Europe’s borders, but can acquiesce to abuse abroad. Criminal lawyers might draw a parallel with the difference between acts and omissions – both can, however, engender liability. The unpalatable truth is not that we must admit unwanted guests for the sake of our principles. Article 3 is flawed, whatever the outcome of Ramzy. Could torture be, if not justified...excused?

At this point, ex-torture victims like American senator John McCain, and Amnesty members may despair at my depravity. Ominously, I am not alone in dysfunction, as I discovered from a recent Sunday Times article concerning, appropriately, the End of civilisation. Harvard law professor Alan Dershowitz argues that torture should be given legal status.

He cites the “ticking bomb” dilemma, a scenario that delights Hollywood hacks. Unfortunately, modern terrorists go to the movies (or download pirate copies). Spectacular atrocities are not a fantasy; we have seen them become a terrorist ideal. A nuclear bomb-making manual posted in an online al-Qaeda forum received 57,000 hits in one month.

A dirty bomb on a timer has been secreted somewhere in legal London. The individual responsible is in custody, but isn’t talking. When other methods of interrogation have been exhausted, some form of torture will be applied. If you think not, you delude yourself, and if you argue against, your compassion is inconsistent – unless you care more for moral acts than moral outcomes. Incidentally, if it is spiritual

welfare that you value more highly than human life, you are no better than the bomber. What if it were a full-blown nuke-in-a-box, threatening everything held dear (including this essay) with atomisation? The human right not to be tortured might weigh in the balance after all.

If torture can be excused in certain circumstances, the law ought not to abdicate responsibility. It should define circumstances and corresponding limits of mistreatment. At present, it does not. Consequently, we witness hypocrisy. “Water-boarding is not torture, because detainees are not physically harmed”. “Extraordinary rendition does not enable torture by proxy”. “Illegal combatants are not prisoners of war”. “Black sites (possibly in the EU) do not exist”.

The arguments against legal status for torture do not convince. There is no moral equivalence with the terrorist. Judicially sanctioned torture would be open to scrutiny, and never arbitrary. With strict controls, the thin end of the wedge would remain thin – in contrast to today’s unregulated non-system. There may be a “coarsening” effect upon authorised torturers, but the demand on their conscience is no greater than that on soldiers ordered to kill.

It may be said that torture does not work. If so, there would be no need to ban it. Say rather that torture works unreliably, e.g. by obtaining false confessions. A well-formulated national law would prohibit torture solely directed toward securing conviction. Due to the unreliability of information obtained under torture, authorisation would only be granted where the consequences of obtaining no information whatsoever were of the utmost seriousness. A further requirement would be an overwhelming likelihood of the detainee being in possession of the requisite information. With medical supervision mandatory, torture causing lasting physical harm would be forbidden (methods allowed might include the insertion of a sterilised needle beneath the fingernail).

Where do I draw the line? I draw the line at absolute moral certainties. They belong in Paradise, with the 72 virgins; they do not belong in the law.