

LAW AND TORTURE

Contemporary understandings of torture are ruled by a medico-legal duopoly: the language of law (regulating definition and prohibition) and that of medicine (controlling understandings of the body in pain). This duopoly has left little space for contextual conceptualisation – of ideological, emotional and imaginal impulses which function in readily recognising some forms of violence and dismissing others. This book challenges the rigour of this prevailing duopoly. In its place, it develops a new approach to critique the central scripts of ‘law and torture’ scholarship (around progress, violence, evidence and senses). Drawing on socio-legal and critical-theoretical scholarship, it aims to ‘widen the apertures’ of the dominant dogmas to their interconnected social, political, temporal and emotional dimensions. These dimensions, the book advances, hold the key to more fully understanding not only the production of torture’s definition and prohibition but also its normative contestation – to better grasp whose pain gets recognised and redressed and why.

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LAW AND TORTURE

*Widening the Apertures from the Doctrinal
to the Critical*

Ergün Cakal

University of Copenhagen

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To Ayşe, Aynur, Charlie, Josie and Sonia

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Preface

Writing this book emerged out of an indoctrination and its disillusioning fallout. It was a long time in gestation. Seed to fruit, it took eight years. Seeds were sown as a legal advisor at the Danish Institute Against Torture (DIGNITY), where I learned anti-torture doctrine as well as its practice and critique. Experiences as a practitioner led me to pose (rather risky) questions around law's utility and rigidity, which were not dignified in the established 'law and torture' canon. Responses, where offered, were to hold steadfast to faith and to ignore blind spots, biases, habitus and failings. These were neither sensitive to my needs nor satisfactory, to say the least. The idea for the book, as with my fledgling research, was born out of needing to make sense of these questions and failings. Following an age-old recipe, this was an exercise in turning personal troubles into public issues. Some of the ideas presented here would be familiar to those who have meandered through my less doctrinal work. This book represents an attempt to piece together the core ideas in that work, strewn over several articles. It represents them, I hope, in all their connections, with added consideration and exemplification, more coherently and panoramically.

I made clear to whoever listened to my (then) growing profound loss of faith in the law's potency to deliver on its promises – of due recognition and redress towards eradication. There were many at DIGNITY, Lund and Copenhagen universities, within the bounds of my home, hood and beyond, who helped make sense of what was a professional (and personal) crisis – who helped me wield and channel my angst towards the pages before you (and before these). Others' lack of reflexivity and receptivity equally helped fuel my drive. I am glad to have survived and

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learned to live with the ‘compromised circumstances’ (I borrow this doublet from dearest Andrew Jefferson, who remains an inspiration). I feel both stronger and frailer for it. The pages to follow might reveal to the reader that my feelings of loss and alienation persist. In their stead, however, a newfound hope in critical thought, the humanities and inter-disciplinarity has emerged.

My rupture followed being introduced to and influenced by several strands of scholarship: socio-legal scholarship on state violence, interdisciplinary scholarship on pain, anthropology of violence, feminist phenomenological scholarship on violence and state crime scholarship. These bred a healthy sense of scepticism to think through and against the received doctrinal ‘wisdom’. I remember distinct moments when colleagues swivelled on their office chairs to pick out a particular book from their shelves that they thought could offer me solace. Although Tomas Max Martin, Andrew M. Jefferson, Vicky Canning or Toby Kelly might not remember these moments, their imprint is visible on the pages to follow. I thank them for their encouragement and solidarity. I also extend my thanks to the following people: Steffen Jensen, Henrik Rønsbo, Elna Søndergaard, Therese Rytter, Marie Brasholt, Giorgio Caracciolo, Natasa Mavronicola, Annika Lindberg, Darius Rejali, Carmi Lecker, Pau Pérez-Sales, Lutz Oette, Nimisha Patel, Michelle Farrell, Joseph Bernasol, Frederik Rom Taxhjelm, Ylva Lennartsson Hartmann, Jenny Orlando, Silvia Steininger, Ellen Aagaard Marquard and Ezgi Yildiz. There were, then, the countless colleagues working under the threat of torture itself, whom I have chosen not to name. I met you in Armenia, Bangladesh, Egypt, Jordan, Myanmar, Palestine, Sierra Leone, Tanzania, Turkey, Uganda and Ukraine. You generously added to my thinking, perhaps without realising. There were others who took the time to comment directly on an advanced draft of this book; in this regard, I am indebted to Mattia Pinto, Grant Shubin and Vicky Canning. I also thank my editors at Cambridge University Press, and the external reviewers, for their trust and wise guidance throughout this process. Much of this book was shaped during my doctoral research under Mikael Rask Madsen, whose ‘macro-management’ afforded me the autonomy to engage in side projects such as this book.

I have aimed to capture the ideas and airs of these people in this book. These and other colleagues, past and present, also extended me

PREFACE

something of themselves, be it thoughts, walks, warmth, songs, dances, coffees and the occasional puff, to keep me going. This process was also one of finding ‘my people’ – and I am happy to have found a few. This is not to say that we are all like-minded. Despite the many hands that have helped in penning these pages, what has made it before you represents my own views and vulnerabilities. I am well aware that some of those named might not agree with all of my critiques and conclusions. This book, which I have written in my own time during my doctoral studies, does not represent the position of DIGNITY, to which I returned following an extended absence to pursue a doctorate. I cannot, at the same time, renounce the influence that impressive place has had on me personally and professionally. I have chosen not to please or appease (for the most part). I have not always listened to my colleagues, for better or worse, so they bear no responsibility for the words before you.

It took time, solitude and space to string these ideas together with any semblance of sense. This was all afforded to me by my dears at home. In this regard, I think of Josie, Charlie, Sonia, Tina and Per. Each shouldered and eased my burdens to allow me to stare into space and screen. Josie, I thank you above all for picking me up when I flailed and fell – intellectually, politically, emotionally. The academic space I inhabit, the fights I pick and my obsession with others’ suffering have been alienating – no more so than when my mind turns to my mother Ayşe, a peasant from the mountains of the Black Sea turned migrant, oblivious to what I do for a wage. That this work will remain distant to her, written oceans away, means both more and less about the academic ascent it might mark. You are all more important than these ideas, though it might not always have been experienced so by you. So I feel blessed that you indulged my distractions. I am lucky to have and love you.

Usage

Readers should note that I use the terms ‘torture’s prohibition’ and ‘torturous suffering’ to refer in short to the entire spectrum of state violence prohibited, namely, ‘torture’, ‘inhuman’ and ‘degrading’ treatment (cf. Victoria Canning’s ‘torturous violence’, who focuses on torturous suffering not directly inflicted by the state). As not all legal frameworks refer to ‘cruelty’, I take it to be covered under the categories of inhuman and degrading treatment. I take the following couplets as effectively synonymous: ‘pain’ and ‘suffering’; ‘treatment’ and ‘punishment’; and ‘mental’ and ‘psychological’. I use ‘research’ interchangeably with ‘scholarship’. I use ‘advocates’ to refer to legally trained practitioners representing victim-survivors, except where I refer to ‘state advocates’ and ‘adjudicators’ to refer to any decision-maker, whether a judge, a committee or a tribunal member. I prefer the term ‘victim-survivor’, mindful of the different connotations both ‘victim’ and ‘survivor’ have in the anti-torture field. Citations accord with OSCOLA with some adjustments for readability, with years and paragraph numbers in caselaw appearing in square brackets and with page numbers indicated with a ‘p.’.

Abbreviations

CAT	UN Committee against Torture
CIDT	cruel, inhuman and degrading treatment
CoE	Council of Europe
CPT	European Committee for the Prevention of Torture
CUP	Cambridge University Press
ECHR	<i>European Convention on Human Rights</i>
ECmHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
GC	Grand Chamber
IACPPT	<i>Inter-American Convention to Prevent and Punish Torture</i>
IACtHR	Inter-American Court of Human Rights
ICJ	International Court of Justice
Istanbul Protocol (IP)	<i>Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</i>
OUP	Oxford University Press
para	paragraph
UN	United Nations

LIST OF ABBREVIATIONS

UNCAT	<i>UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</i>
UN HRC	UN Human Rights Committee
UN SRT	UN Special Rapporteur on Torture
USSC	United States Supreme Court