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ARTICLE

Torture and progress, past and promised: problematising torture's evolving interpretation

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Abstract

That international law progressively recognises and prohibits emergent forms of torture and related ill-treatment has become widely accepted in the anti-torture discourse. The premise that torture's techniques and contexts change is taken to shape juridical recognition, representation and response. Authoritative international treaties, such as the UN *Convention Against Torture*, the *European Convention on Human Rights* and the *Inter-American Convention to Prevent and Punish Torture*, are therefore deemed 'living instruments' – influenced by social and scientific change as channelled through the doctrine of dynamic interpretation. This article argues, however, that these premises are not sufficiently empirically grounded and, far from faithfully reflecting social and scientific changes, invoke critiques around the ideological and epistemological registers of advocates and adjudicators. Taking scholarship on dynamic interpretation and forms of state violence which do not leave overt physical marks as paradigmatic entry points, this article problematises torture's juridical conceptualisation and contextualisation through a critical theoretical lens.

Keywords: psychological torture; dynamic interpretation; solitary confinement; history of torture; sociality of torture; sociology of punishment

I. Introduction

> The making visible of what was previously unseen can sometimes be the effect of using a magnifying instrument . . . But to make visible the unseen can also mean a change of level, addressing oneself to a layer of material which had hitherto had no pertinence for history and which had not been recognized as having any moral, aesthetic or historical value. Foucault 1980, pp. 50–51

A twinned claim operates at the core of contemporary anti-torture jurisprudence (scholarship and practice): (i) that torture practices evolve and travel, persist and mutate across time and space, including towards being less physically overt (i.e. away from leaving visible marks); and (ii) that social and scientific change intimately inform juridical recognition and response to state violence. As such, scholars and practitioners have engaged in configuring and contesting the inclusion of certain forms of state violence under the rubric of torture and related ill-treatment. Previously unrecognised forms can readily be identified as now successfully recognised (at least gaining traction and entering the anti-torture 'conversation') such as: solitary confinement, reproductive rights, rape, sleep deprivation, threats, lengthy prisoner transportation, enforced disappearances, human trafficking, and conversion therapy, and contexts such as street-level policing, domestic and health-care settings spring to mind.

The doctrine of 'dynamic' (or 'evolutive') interpretation, through which juridical recognition of emergent torturous practices is promised, is presented with a progressive potential – instilling faith

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in the system as capable of update and fuller realisation. This perspective, alluding to a historical contingency and progressive impulse, gives rise to profound implications in how practitioners work in the anti-torture field (see Cakal, 2021, p. 14). The incremental progress in legal interpretation and institutional response has come to drive this field – through 'sensitising' and capacitating juridical actors, namely advocates and adjudicators, to *recognise* and *respond* in order to *deter* and *redress* torturous acts brought before them. Albeit in good faith, the self-affirmatory and congratulatory language of progress has been too hastily and prematurely exalted by the field. I will contend that the corroboration is not as self-evident as presumed and the promise does not square well with reality. There is, therefore, something missing in this received story which stands to be problematised – which this article sets out to canvass.

With a historical, doctrinal and critical eye, I examine what is compressed into purportedly progressive notions of torture's interpretation through two doctrinal paradigms: (i) the dynamic interpretation of torture (with a particular view to the European Court of Human Rights (ECtHR)); and, (ii) the international recognition of non-physical forms of torture (variably referred to as 'psychological torture', 'mental suffering', 'clean torture') through this dynamism. I'll first expand on these doctrinally before turning to critically examine the structural (ideological and epistemological) dynamics to which they are subject – towards rendering more visible the discursive conditionalities, imaginaries and scripts for recognition of the 'previously unseen'.

This article starts with a historical overview wherein torture meets progress in the history of abolition as grounded in social and scientific change, which are held to also have resulted in progressively inclusive legal recognition of psychological forms of suffering ('2. Progress past'). This is then followed by a turn to the principles upon which progressive recognition is promised ('3. Progress promised'). In the subsequent part ('4. Progress problematised'), the article will then critique the problems arising out of the preceding discussions through notions of *necessity*, *civility* and *corpo-reality*. Accepting the contention that the premise of torture's evolving interpretation is flawed, the critically oriented reader may want to skip directly over the doctrinal to part 4.

2. Progress past: received (and repeated) histories

Before turning to how the promise of progress features in contemporary international interpretations of torture, it would serve the discussion to first situate past progress in the early modern abolition and modern prohibition of torture. Historical scholarship on torture adopting the *longue durée* advances two points of progress: (i) that torture was abolished in pre- or early modern Europe; and (ii) that its juridical construction has over time been expanded to cover the *psychological*, *punitive* and *extra-custodial* (from that which exclusively focused on the *physical* and *interrogational*) (duBois 1991/2018; Peters 1996; Silverman 2001; Langbein 2006). These provide a crucial pre-history to the contemporary definition and prohibition of torture, as well as describe how the legal and cultural meanings associated with the regime of 'judicial torture', specifically the utility of pain producing legal proof during adjudicatory processes, were dismantled – effectively leading to torture's abolition in Europe. Despite the differences in their emphases, these histories take torture's corporeality (its physical, material, visible or bodily nature) to have been core to juridical and socio-cultural understandings. These accounts, without exception, define torture as 'judicial torture', meaning the interrogational practice of physically coercing confessions from accused, as distinct from the post-conviction torturous punishment currently included in prevailing understandings – marking out a singularly significant point of expanded recognition when compared.

Of equal importance for the discussion at hand are Silverman and duBois' claims that these changes in legal practice were grounded in shifts in socio-cultural sensitivities (conversely, for Peters and Langbein, decreasing evidentiary utility of judicial torture preceded the socio-cultural). Sociologists of punishment have, too, highlighted the importance of socio-cultural values in conditioning what comes to be considered 'sensible' (and therefore legitimate) punishment and what is rendered torturous (and illegitimate) (Garland 1993; Spierenburg 1984). Formation, moderation and

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recognition of suffering, whether torturous or otherwise, here and elsewhere in the literature are thus taken to necessarily involve moral, societal and civilizational imaginaries and consciousness. These accounts have a lot more to say and will be returned to in part 4.

One continues to find the centrality of historical and civilizational logics in the contemporary international prohibition of torture. The *travaux preparatoires* of the *European Convention on Human Rights* (ECHR), albeit incomplete, are revealing as to discussions amongst the drafters in late 1949 (see European Commission of Human Rights (ECommHR) 1956) relating to the historicity of torture, with overt tones of civilisation and morality through the use of phrases including: 'inconsistent with civilised society'; 'incompatible with civilisation'; 'offences against Heaven and Humanity'; 'relic of barbarism'; 'terrible wave of barbarism and bestialism which has broken over our world' and 'wholly evil'. The Nazi atrocities were also amply, explicitly invoked to fuel the discussion. The *Inter-American Convention to Prevent and Punish Torture* (IACPPT) *travaux*, where the Organization of American States (OAS 1984, pp. 9, 57) aimed to define torture in what became Article 2, depict a similar discussion about thresholds and imaginaries and readily repeat the symbolism that torture 'constitutes a crime that is repulsive of the conscience of all nations'.

The end result, as read in the current letter of international law, expressly recognises a plurality of forms of suffering to arise to torture or related ill-treatment beyond the overtly physical. Article 1 of the UN *Convention Against Torture* (UNCAT) is resoundingly clear in its language that mental harm is absolutely prohibited, proscribing 'severe pain or suffering, whether physical or mental'. Article 2 of the IACPPT too explicitly mentions the psychological. International criminal and humanitarian law also accept mental suffering as prohibited (see also *Geneva Conventions*, Common Article 3; *Geneva Convention III*, Article 17; *Rome Statute*, Article 7(2)). Furthermore, Article 7 of the *International Covenant on Civil and Political Rights*, despite its lack of express reference to mental harm, has also been interpreted by the UN Human Rights Committee (UN HRC 1992, §5) as relating 'not only to acts that cause physical pain but also to acts that cause mental suffering to the victim'.

Article 3 of the ECHR takes a similar form – namely, whilst not expressly recognising, doing so in its application. Psychological dimensions of torture were quickly recognised in the first case to deal with European torture since WWII in the *Greek Case* brought before the ECommHR in 1969 (§186). The ECommHR there took Article 3 'to cover the infliction of mental suffering by creating a state of anguish and stress by means other than bodily assault' – ultimately finding that a combination of physical and psychological ill-treatment (intimidation, humiliation and threats to family and friends) constituted torture. The ECommHR's reasoning is also credited with informing the UN *Declaration Against Torture* in 1975, itself the direct precursor to the UNCAT, wherein for 'the first time the concept of causing severe mental suffering was explicitly accepted as part of the international prohibition of state torture' (Amnesty International 1984, p. 14; Forowicz 2010, pp. 195–202). Most prominent legal frameworks dealing with the prohibition of torture, therefore, have expressly recognised possibility of torture in the absence of physical marks.

In all, we are presented with a predominantly linear expansion and consolidation from physical understandings of torture to one which promises to include emergent and invisible harms. Taking the pre-modern understandings (and eventual abolition) of torture as a comparator, we have clear shifts towards a rhetorical and real expansion – from the exclusively *physical* and *interrogational* to the *psychological*, *punitive* and *extra-custodial*. We also have a link between legal and socio-cultural understandings that stand to be elaborated – to which I now turn.

3. Progress promised: doctrinal grounds

Moving deeper into contemporary legal doctrine, I continue with examining how the notion of progress (social and scientific) has been interpreted and channelled in international human rights law, particularly through 'dynamic interpretation'. I also introduce critique on the doctrine with a focus on how it has served less physically overt torturous practices.

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3.1 Dynamic, evolving, living

As with its abolition, the interpretation and prohibition of torture as being subject to social and scientific change has come to be widely accepted in contemporary international legal framework on torture. The contemporary jurisprudential authority for the premise (and promise) of progressive interpretation in international human rights law and, in turn, the prohibition of torture is attributed to *Tyrer v. UK* (1978a). There, the ECtHR characterised the ECHR as 'a living document [to be] interpreted in the light of present-day conditions' (§31). Although *Tyrer* is the first appearance of the term 'living instrument' in its jurisprudence, the ECtHR had been implicitly adopting an evolutive approach in earlier cases (Bates 2010, p. 328). Whilst applicable to the ECHR as a whole, it is noteworthy that its inception is found in a case involving the prohibition of torture.[1]

The coupling of 'social change' and the ECHR as being a 'living legal instrument' can be traced further back to Max Sørensen's presentation 'Do the rights set forth in the European Convention on Human Rights in 1950 have the same significance in 1975?', delivered in November 1975 at the fourth international colloquy on the ECHR held in Rome before judges and state representatives. Sørensen (1975, p. 89), an established Danish legal academic, then a judge of the European Court of Justice and soon to be a judge of the ECtHR, argued that 'to use the method of interpretation of [ECHR's] provisions to introduce an element of dynamism and progress to keep pace with general social change is in keeping with generally accepted and recognised legal and judicial methods'. There is much prescient about Sørensen's (1975, p. 96) assumption that the 'evolution will be guided by a concern for humanity, equality and certainty as to the law' and take account of '[h]umanitarianism as a factor in change'. Here, the language is reminiscent of the *travaux*. Viewing the ECHR's Article 3 as a 'classic example of vague phraseology', Sørensen (1975, p. 89) takes it as duly open to a 'liberal' interpretation 'according to current attitudes in society', 'evolution of ideas and values generally accepted in society' and 'in such a way as to keep pace with social change'. The ensuing oral interventions by state representatives, to have been recorded, read as receptive to notions of living, evolving and dynamic, and as accepting that the prohibition of torture 'has rightly become the evolutive article par excellence', but also anticipate the difficulties in determining the limits of such an approach (Sørensen 1975, p. 116). The complexity as foretold is borne out in the discursive developments to have followed.

The ECtHR's next ostensibly significant utterance on evolutive interpretation as applied to Article 3 came in *Selmouni v. France* (1999, §101) where, recognising the 'living instrument' doctrine, it held that:

> '… certain acts which were classified in the past as "inhuman and degrading treatment" as opposed to "torture" could be classified differently in future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.'

Conceivably, this articulation allows us a closer insight into the prevailing logics here – primarily one of historical progression, as contingent on purposive, progressive and not merely pervasive values.[2]

[1]This has been followed, adapted and proven significant in a number of notable cases before the ECtHR – amongst other substantive questions – regarding legal recognition concerning mothers and their children born out of wedlock (ECtHR 1979b); legal recognition of trans-persons (ECtHR 2002a); mandatory life sentences (ECtHR 2002c); voting rights for prisoners (ECtHR 1999b) and marital rape (ECtHR 1995).

[2]This assertion of historical progression also resembles that in *Trop v. Dulles* (1958, p. 101), which concerned the denationalisation of an individual as punishment for desertion, where the US Supreme Court (USSC) held that determinations of cruel and unusual punishment must draw their meaning from 'the evolving standards of decency that mark the progress of a maturing society [and] judged not by the standards that prevailed in 1685 [or] when the Bill of Rights was adopted, but rather by those that currently prevail'.

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The Inter-American Court of Human Rights (IACtHR 1999, §114; 2004, §165) also regularly invokes the doctrine of dynamic interpretation, holding that, as *Tyrer*, 'human rights treaties are living instruments whose interpretation must consider the changes over time and present-day conditions'. More specifically with respect to torture, the *Selmouni* principle has also been cited by the IACtHR (2000, §99) and the Inter-American Commission on Human Rights (IACommHR 2015, §111). The IACtHR's approach to assessing evolution has also been left open-ended, with assessments looking to global normative frameworks and, to a lesser extent, notions of regional consensus (see generally Neuman 2008). The two courts, ECtHR and IACtHR, have thus interpreted their guiding instruments (and with it their prohibitions of torture) as being 'living instruments' – influenced by social and scientific change deduced by the doctrine of dynamic interpretation.

Whilst never having explicitly cited *Tyrer* or *Selmouni*, the UN Committee Against Torture (UN CAT) too has used similar language around evolution in needing to respond 'to evolving threats, issues, and practices' (2008, §1) and expressing that its 'understanding of and recommendations in respect of effective measures are in a process of continual evolution, as, unfortunately, are the methods of torture and ill-treatment' (see 2016 dissent, §§4–6). It has otherwise not elaborately historicised or explicitly linked torture's evolution to socio-cultural factors in a similar manner (except observing the evolution of torture into a peremptory norm: UN CAT 2019, §2.13). Turning to an adjacent authority, the UN Special Rapporteur on Torture (UN SRT) has explicitly endorsed both the ECtHR and IACtHR's assessments that torture is subject to 'present-day conditions and the changing values of democratic societies' (2013, §§14–15) and that this premise also pertains to psychological torture, with the emergence of new technologies and techniques that do not require direct physical interaction with the victim, needing to be 'duly considered in the contemporary interpretation of the prohibition of torture' (2020, §12). Despite these strong yet sparse parallels, there is a dearth of comparable scholarly focus on the IACtHR and the UN CAT with the scholarship being fixed on the ECtHR – which explains and informs what follows.

The notion of 'evolution' is peppered throughout ECtHR caselaw and often attributed to *Tyrer*. It is made manifest in a kaleidoscope of phrases gesturing at change and contemporaneity in values: 'present-day conditions and changing circumstances in society'; 'the most modern experience and thinking'; 'the standards of civilised behaviour that are the hallmark of a democratic society'; 'required in present-day democratic societies in Europe'; 'changing conditions'; 'modern-day conditions'; 'contemporary social attitudes'; 'a rapid evolution of social attitudes'; 'societal changes and evolving views'; 'social progress'; 'conscience of Europe' and '*perspective humanitaire*'. To ask the question at the heart of this article (and another, Dzehtsiarou and O'Mahony 2013, p. 309): 'how can judges identify and reflect the changing views of society when interpreting rights provisions?' and these adjacent notions as listed. The ECtHR's case-law exudes a similarly diverse approach in how it finds, determines and articulates what these are: assessing regulatory 'consensus' or 'emerging consensus' on a matter, or 'common ground' as found 'amongst modern societies' (ECtHR 1979);[3] considering 'the notions currently prevailing in democratic states' (ECtHR 1980); in 'national and international law' (ECtHR 2008); 'developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field' (ECtHR 1978a); 'in harmony with other rules of international law of which it forms a part' (ECtHR 2014); 'evolving convergence as to the standards to be achieved' and 'clear and uncontested evidence of a continuing international trend in favor not only of increased social acceptance' (ECtHR 2002a).[4] There are also clear parallels here to conventional assessments of

[3]Dothan (2018, p. 398) identifies there to be 'three common understandings of the doctrine' of emerging consensus – with the first focusing on 'laws of European countries', the second on the 'views of experts' and the third 'views of the European public'. He finds it is the first that is clearly adopted by the ECtHR, albeit to varying degrees of weight in judicial reasoning.

[4]The USSC has also not set down a clear formula or methodology in *Trop*, nor since. Two studies (Aarons, 2008; Matusiak *et al.*, 2014) surveying the USSC jurisprudence identify that it has inconsistently and variably drawn upon eight factors: history, judicial precedent, statutes, jury verdicts, penal purpose, international and comparative law, social science research and opinions of judges. In *Coker v. Georgia* (1977, p. 598), where the death penalty was argued to constitute a cruel and unusual punishment, the USSC openly ruled that 'in the end our own judgement will be brought to bear on the question'.

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customary international law as being grounded in state practice (for an examination of 'context' and 'subsequent agreements and practice' under VCLT 31(3) see Gaggioli 2019). At first glance, this heterogeneity looks solid, thought-through and duly flexible but these are essentially all top-down sociological generalisations and perspectives that themselves may fail to be empirically grounded – this is returned to and expanded upon shortly. Those familiar with the scholarship around 'dynamic interpretation' should skip to the section entitled 'Recognising the emergent and invisible'.

A few additional comments are warranted by way of framing the ECtHR's rationale here having: early on in its operations rejecting originalist and adopting purposive reasoning (and allowing for unexpressed rights to be read into the ECHR, ECtHR 1975); reasoning that 'object and purpose' of the ECHR was central to its interpretation to foreground 'democracy' (ECtHR 1998); 'equality' (ECtHR 2002a); 'human dignity and human freedom' (ECtHR 2002b) and in one instance 'purely humanitarian and civilising' aims (ECtHR 1973). Running through these considerations is the notion that interpretation of a law must be approached in 'a manner which renders its rights practical and effective, not theoretical and illusory [as that] would risk rendering it a bar to reform or improvement' (ECtHR 2002c). The requirement of 'improvement' was advanced in *Dudgeon v. UK* where the UK's criminalisation of homosexuality was found to violate the ECHR and was differentiated from treatment meeting popular approval (the ECtHR in *Tyrer* rejected similar arguments made by the UK that corporal punishment 'did not outrage public opinion in the Isle of Man'; see also similar ruling (ECtHR 1983, §29) that 'simply because the measure [corporal punishment] has been in use for a long time or even meets with general approval […]' it can still be degrading). Letsas (2013, p. 139) comes to characterise this exercise instead as 'a moral reading' – not 'what human rights domestic authorities or public opinion *think* people have [but] the best understanding of the moral values that underlie human rights', and as an assessment of 'the moral value it serves in a democratic society, rather than engaging in linguistic exercises about the meaning of words or in empirical searches about the intentions of drafters' (Letsas, 2010, p. 520).

Offering further elaboration, former ECtHR President Nicholas Bratza (2014, p. 120) argued that evolutive interpretation is required to 'avoid the petrification or stultification of key areas of fundamental rights and freedoms' and 'to adapt to the constant and often dramatic societal changes that have occurred since the instrument was first drafted'. Rhetorical aspirations and broader socio-culturally orientated framings in the ECHR preamble have also been identified as likely to support evolutive interpretation (Bratza, 2014, p. 120). During a judicial seminar organised by the ECtHR on the subject (ECtHR, 2011, p. 5), the then President Costa expressed the ECHR as needing to be 'interpreted, and applied, by adapting it to the changes that have taken place over time – to changes in society, in morals, in mentalities, in laws, but also to technological innovations and scientific progress'. Following on, Judge Tulkens too pointed to the ECHR preamble in underscoring progressive realisation, holding the principle of effectiveness to be 'the bedrock of evolutive interpretation, and the "living instrument" approach to interpretation is the temporal dimension of that principle' (ECtHR, 2011, p. 8). Evolution, these sources suggest, can only be in one direction: towards progressively broadening protection (see also Judge Tulkens in ECtHR 2011). Despite the ostensible consensus so far, there is no precise definition of what dynamic (or evolutive) interpretation means in international law. This already presumes a very particular and linear model of time and progress – seemingly impervious to breaks in form of revolutions, regime change or state backlash.

The logics of 'progress', 'improvement' and 'effectiveness' are also found in what Yildiz (2017, p. 311) calls the ECtHR's 'pedagogical role' following the Council of Europe's (CoE) eastward expansion. For Yildiz (2016b, p. 247), this necessitated 'cultivating a robust human rights culture in the new members'. A view to the skewed geographical distribution, as will be provided shortly, of specific findings of torture across CoE member states could readily be invoked here. In an interview with an ECtHR judge, Yildiz (2020, p. 80) is told that ECtHR's role is 'to uphold the values of our civilization'. Yildiz (2017, p. 313) complicates readings of dynamics here in pointing out that this is not simply an

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outcome of linearly progressive interpretative preferences, 'a moral or legal matter but one of political expediency as well' – indicating at a civilizing mission.[5]

Also indicative of a politically expedient imperative, and to further complicate the story here, the ECtHR has also cautiously refrained from invoking the notions of 'progress' or 'improvement' in controversial cases (at the time) such as: the right to die (ECtHR 2002b); the right to abortion (ECtHR 2010a); prohibition of the death penalty (ECtHR 2005) and the right to marry (ECtHR 1986). These demonstrate that progress is not readily defined and accepted and, in some cases, reify regression based on prevailing attitudes. The doctrine's progressive promises have thus been tempered in some areas and by some judges as needing to be reactive and reflective and not proactive, innovative nor anticipatory (ECtHR 2016, concurring opinion, §3; ECtHR 2013, dissenting opinion, §23). Similarly countering a progressive narrative of international human rights adjudication in broadly reflecting on evolutive interpretation, former ECtHR president Rudolf Bernhardt (2000, p. 22) admits that he felt obliged, as an international judge, to be more conservative than progressive. Despite the ostensible consensus earlier, dynamic (or evolutive) interpretation engenders a tension here between conservative and progressive considerations.

Based on the heterogeneity of stances, devices and sources normally relied on by judges to quantify societal values, dynamic interpretation has been criticised from numerous angles as imprecise, counter-majoritarian, activist and a reformist 'fig-leaf', as lacking predictability and foreseeability (Vedsted-Hansen and Koch, 2006, p. 11) and engendering legal uncertainty (ECtHR 1975, separate opinion of Judge Verdross). Put another way, it is difficult to find empirical support for how the doctrine has been precisely applied – with a 'sparseness' of justifications and evidence for the doctrine as it is applied 'with virtually no explanation of its origins, benefits and limitations' – opening the ECtHR up to critiques of 'policy-making' and 'subjective ad-hockery' without judicial elaboration and empirical grounding (Mowbray, 2005, p. 71). In responding to such claims, Bratza (2014, p. 123) has conceded that it had not been 'an exact science and it is hardly surprising that views will differ even among the judges themselves as to whether it has been sufficiently established and, if so, as to the weight to be given to it'. Judge Tulkens (ECtHR, 2011, pp. 9–10) also admits 'that to be legally sound and acceptable to States', evolutionary interpretation should be grounded in strong legal method, with the aid of comparative law analysis, and a 'dialectical approach' to balance 'legal certainty and flexibility'. Similar calls to 'objectivise' evolutionary interpretation and to 'scientifically analyse social trends and changes of mentalities' have been made here (Gaggioli, 2019, p. 114).

Andrea Bianchi's (2013) analysis of the concept of 'subsequent practice' under the VCLT reveals it to pose similar problems to that of dynamic interpretation and notions of socio-cultural values in terms of its uncritical repetition, intangibility, slipperiness and oversimplification in the literature – that its meaning is taken to be obvious, neat and tidy when nothing could be further from being the case. Quantifying the multifaceted phenomenon of practice for Bianchi (2013, p. 134) involves two distinct sets of issues presuppositions of which, he finds, are rarely unpacked: '(i) *whose* practice is relevant; and (ii) *what* kind of practice one should take into account'. This involves preferences and thus is not a neutral process – and looking solely at formal documents such as judgments is advanced as such a selection as there is a complex myriad of acts and actors that constitute any practice.

These complexities do not feature in the jurisprudence. From a sociological perspective, the social or its values cannot be treated as one-dimensional (treaty-centric), pre-existing and pre-determined entities. While there is indeed a human population that is readily visible, which part of this group do we refer to when we say 'public', 'community' or 'society'? Whilst there are passing attempts, the caselaw fails to clearly articulate the full range of relevant socio-cultural groundings and conditionings at play – which I return to elaborate on in part 4.

[5]Civilizational notions were also alive in *Tyrer,* where the ECtHR stated that 'the system established by Article 63 was primarily designed to meet the fact that, when the Convention was drafted, there were still certain colonial territories whose state of civilisation did not, it was thought, permit the full application of the Convention'.

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3.2 Recognising the emergent and invisible

To bring the related object of inquiry (psychological torture) back into focus, let's ask the pressing question: how has dynamic interpretation influenced juridical understandings of torture broadly (and psychological torture specifically)? The ECtHR (2017, §73), at least, accepts its broader interpretation of torture as having 'evolved considerably' since 1953. In her examination of the ECtHR, Yildiz too concludes that dynamic interpretation has seen Article 3 expand, now 'covering violations arising from omissions and emphasizing procedural obligations' (2017, p. 312) and that accordingly the 'threshold to define acts as torture and inhuman or degrading treatment has been lowered' (2016a, p. 6). Yildiz (2016b, p. 235) also claims that the 'developments within the Convention system mirrored what had been in progress outside of it'.

Building on early analysis by Cassese (2008), Yildiz (2016b, p. 199) argues that the range of issues covered under Article 3 has expanded, noting how with *Dougoz v. Turkey* the ECtHR (2001) accepted poor detention conditions to give rise to violations when it previously did not. She follows Cassese's critical assessment of the ECommHR's inadequate and evasive reasoning in *B v. UK* as well as the ECtHR's *Ireland* 1978 judgment, taking them as historical markers of higher thresholds, before comparing that period with *Selmouni* (ECtHR, 1999a) and *Gäfgen* (ECtHR, 2010b). Doing so, she concludes that the latter two judgments mark stronger recognition of 'roughly the same interrogation techniques' which were downgraded in the former (a similar claim is made by Rodley 2017, p. 342). She (2016b, p. 201) finds that:

> 'The long road from *Ireland* to *Gäfgen* shows how increasingly higher standards have been applied in the assessment of complaints in relation to Article 3 in general, and treatment during interrogations, in particular. All three cases concern complaints about interrogation methods, and a diachronic reading of these cases illustrates well that the threshold of severity for an act to fall under this article has been progressively lowered.'

Whilst procedural protection has indeed been expanded, the broader celebratory analysis is contestable. Omissions (as opposed to positive action or commission) were explicitly understood to equally have the propensity to produce torturous pain in the *Greek* case ('the failure of the Government of Greece to provide food, water, heating in winter, proper washing facilities, clothing, medical and dental care to prisoners constitutes an "act" of torture') – yet most findings of torture remain associated with the positive (see on this point, *Prosecutor v. Delalić et al.* ICTY 1998, §468). The treatment in *Selmouni*, for instance, was physically overt including severe beatings. *Gäfgen* essentially reiterated *Campbell and Cosans* (ECtHR 1983) in that a threat could amount to torture whilst ultimately finding a violation of inhuman treatment. Whilst much can be said so as to differentiate any two Article 3 cases, what such a discussion suggests is that evidence of progress all depends on the markers (or proxies) chosen. When we look at specific violations of *torture*, we are met with unevenness, ambiguities and anomalies. A cursory survey of the ECtHR case-law, for instance, reveals that, despite promises of progress, there was no *specific* finding of torture from *Ireland* (ECommHR, 1976) until *Aksoy v. Turkey* (ECtHR, 1996). There was also no finding of any Article 3 violation (namely, inhuman or degrading treatment) from *Tyrer* (ECtHR, 1978a) to *Tomasi v. France* (ECtHR, 1992). Again, while the grounds have expanded, in cases dated 1967 to 2006, Yildiz (2016b, pp. 187–189) finds there to be high numbers of dismissals.

At least a stagnancy can be observed bearing in mind that a specific finding of torture has only been found in 108 ECtHR cases to date across thousands of cases and all claims of torture, both physical or psychological. Notably, they have been predominantly found in eastern European states, with few exceptions: Russia [36], Turkey [22], Ukraine [17], Italy [7], Bulgaria [5], Moldova [4], Azerbaijan [3], Macedonia [3], Romania [2], Georgia [2], Poland [2], France [2], Moldova and Russia [1], Armenia [1], Albania [1], Spain [1], Greece [1].[6] These civilisational dimensions will be returned to

[6]All case-law reviews for this article were made in April 2022.

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later. Moreover, in my own review of the vast ECtHR case-law on Article 3, *Selmouni* is cited 386 times but only a handful cite its evolutionary principle. In a vast majority of cases, what is drawn upon is: its reasoning around torture's absolute prohibition; that good health before detention and bad health when released gives rise to a presumption; that it signals 'a value of civilisation' and that it requires a 'special stigma' – whilst *Selmouni's* broader progressive promise is overlooked. Michelle Farrell (2021) counts 'special stigma' to have been cited in around 100 cases turning on the distinction between torture and another form of ill-treatment.

Given its sociological significance, the concept of stigma is a central entry-point where the juridical nominally opens itself up to the societal and as raising important empirical questions – as much as the notion of 'prevailing social attitudes'. Bearing in mind that the ECtHR failed to specifically find a torture violation in a single case from 1976 to 1996, 'special stigma' is revealed as a barrier to recognition, conceivably rendering torture legally impracticable and unattainable and, in turn, facilitating the further destigmatisation of forms of state violence as falling short of torture. Taking exception to understandings of torture as needing to be of an exceptional character, Toby Kelly (2014, p. 158) finds that, as with torture, if 'a harm is unique, unrivalled, or incomparable, it can also become immeasurable' and unattainable.

As with social attitudes, we may well ask where stigma comes from, how it is crafted, who is involved in mediating it, what structures and functions are relevant? Although proving to be consequential, 'special stigma' was introduced despite 'virtually no jurisprudential development of what is meant by stigma or what exactly it is that the Court seeks to stigmatize' (Cavanaugh, 2020, p. 532). According to the social scientific literature, the notion of stigma relationally emerges from, captures and amplifies discriminatory social practices and practically and symbolically signals 'disqualification from full social acceptance' (Goffman, 1963/1990, p. 9) and, as such, has a capacity for social organisation (Hacking, 2004, p. 18). It is 'fundamentally a social phenomenon rooted in social relationships and shaped by the culture and structure of society [mediated between] the individual to the society, and processes, from the molecular to the geographic and historical [and] that constructs, labels, and translates difference into marks' (Pescosolido and Martin, 2015, p. 101). In sum, micro, meso and macro channels of power are all implicated in stigma's production – as is any meaning at any level such as what can be referred to as a social attitude. Identity and stigma are born out of relational and political sense-making and connected to simultaneously in/visibilise violence.[7]

There is a feedback loop between juridical and societal understandings here – revealing stigma as simultaneously enabling and disabling. Cecilia Medina Quiroga (2016, p. 153), a former judge at the IACtHR, notes that '[i]t is often said that a distinction between different types of conduct must be made in order particularly to highlight torture, as the term torture has a greater stigma associated with it that must be expressed' (see also IACtHR 2009, separate opinion of Judge Quiroga).

In a recent article, Michelle Farrell (2021, p. 7) helpfully unpacks the notion of 'special stigma' – connecting it to the ECtHR's drive to preserve the physical, exceptional and civilisational understandings of torture – and argues that the:

> 'special stigma and the intensity or severity distinction disguised a crude inquiry. The Court examined the men's experience; how much do we think these men have suffered, the judges essentially asked. In its examination, the Court fixed its gaze on the victims, looking for bodily evidence of ill-treatment, rather than on the acts of the state. The special stigma, whilst seeming to indicate the special abhorrence of torture, served as a means for the Court to search the victims for the marks of suffering.'

[7]To be fair, social contextualisation does still exist in jurisprudence. A notable example is found in *Bouyid v. Belgium* (ECtHR 2015, §104) where a police officer's slap on a child's face amounted to degrading treatment given the social significations associated with the face.

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Farrell (2021, pp. 2 and 7) finds this to have 'remove[d] the stigma from the specific acts in question' – acts which centred on psychological suffering and invisibility of marks, through which the ECtHR effectively (2021, p. 3):

> '… adopted early modern logic in its search for the bodily evidence of torture to verify the victims' tortured status. In so doing, by interrogating the bodies of the victims, the Court both deflected and reflected the modern state's power to stigmatise and torture, and to conceal and deny that torture.'

An earlier study to problematise dynamic interpretation in the *Greek Case*, picked up on the ECommHR's open acceptance of the possibility that 'the public may accept physical violence as being neither cruel nor excessive, varies between different societies and even between different sections of them' (Vorhaus, 2003 on ECommHR, 1969, p. 501). In an era of populism and 'tough-on-crime' politics it has become incumbent to underscore that human rights, particularly torture and ill-treatment, cannot be made 'subject to societal preference in so straightforward a manner as implied' (Vorhaus, 2003, p. 85), particularly as citizens are usually disinclined to comprehend or care about the treatment of prisoners. Whilst the obscurity of our knowing (or indifference to) what happens in prisons may well hold, one could well argue that Vorhaus' critique is perhaps misplaced as the *Greek* case pre-dates the ECtHR's current explicit requirement that social attitudes be harnessed progressively and not regressively. Public opinion on the Isle of Man in *Tyrer* was, in this fashion, unsuccessfully argued by the UK government as supportive of corporal punishment – as local attitudes were overridden by the national. The judges preferred to look afield and found that the 'great majority of the member States of the Council of Europe, judicial corporal punishment is not, it appears, used and, indeed, in some of them, has never existed in modern times' (*Tyrer* §38). Whilst readily doctrinally rejected, Vorhaus' argument that dynamic interpretation lets in regressive elements could conceivably still ring true at a more tacit level where, for instance, the ECtHR accepts 'dangerous' prisoner justifications in solitary confinement cases.

The unevenness, ambiguities and anomalies of dynamic interpretation are manifest particularly when we turn to cases predominantly pertaining to mental suffering. To be sure, state violence is much more multifaceted and complex than the *physical* v. *psychological* suggests – as torture always involves a combination, but to varying degrees. I use the psychological as a pedagogical device to point to the invisible. Despite the express recognitions as detailed above, where specific conclusions are reached by international authoritative adjudicatory bodies, all decisions examined for this article fix a considerably high threshold for torture violations involving the non-physical. In fact, a review of the caselaw reveals that there has never been a specific finding of torture where mental suffering has stood alone.

The UN SRT has also underscored that psychologically-oriented methods present a particular challenge, being relied on by states to avoid accountability (2001, §§7–8; 2010, §144) although 'equally destructive as physical torture methods […] very often aggravated by the lack of acknowledgement, due to the lack of scars, which leads to their accounts very often being brushed away as mere allegations' (2010, §55). That is to say that beyond seemingly straightforward express legal prescriptions, there remain important unsettled aspects concerning how non-physical torture is recognised. Looking at the point of codification, mental elements in torture's definition had not attracted much attention including during the drafting of UNCAT (see Boulesbaa, 1999, p. 18). The ECHR *travaux* reveal a similar discussion centred on the physicality of torture with psychological rendered secondary – afterthoughts of sorts.

The three legal determinations of *Ireland v. UK* in 1976, 1978 and 2018 provide additional complications to progressive recognition. In its 1976 ruling, the ECommHR first adjudicated on methods intended to leave no physical marks including wall-standing, hooding, subjection to noise, deprivation of sleep and deprivation of food and drink. In brief, the ECommHR (1976, §512) found that the five techniques constituted 'a modern system of torture falling into the same category as [previous]

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systems'. When it progressed to the ECtHR in 1978 however, the ECtHR disagreed and held that the facts only gave rise to a finding of inhuman and degrading treatment but not to torture because the necessary severity of harm was not established. Dissenting judges unsuccessfully insisted that 'modern techniques of oppression […] no longer presupposed physical violence' and differed 'markedly from the primitive, brutal methods employed in former times'. Remarkably, the ECtHR downgraded the ECommHR's ruling despite the latter 'having heard all the witnesses which numbered nearly 150 and the ECtHR had not' and additionally despite the UK Government having 'accepted the unanimous finding by the Commission' (Cooper, 2003, p. 3). The majority instead, in downgrading the five-techniques as falling short of torture, construed torturous acts as needing to be associated with 'a special stigma' which it failed to identify in the five techniques (ECtHR, 1978b, §167). In the recent review of the *Ireland* case in 2018 upon disclosure of new evidence, the ECtHR (2018, §122) decided not to change its 1978 conclusion primarily upon the principle of legal certainty – arguably failing to follow its *Selmouni* principle to find torture.

In this vein, Farrell (2021, pp. 9–10) holds the *Ireland* 2018 decision as 'demonstrat[ing] the normative emptiness of the special stigma in the liberal legal register', as 'conceal[ing] the state-centric approach on which the Court has rested its construction, and interpretative manoeuvring, of article 3' and as reaffirming its inclination to obscure and 'overlook the stealth of democratic torture, which is often "clean", causing "pain without marks"'. Farrell (2021, p. 8) broadens her study to juxtapose the police torture in *Selmouni*, *Jalloh* (ECtHR, 2006) and *Gäfgen* identifying that the ECtHR found torture only in *Selmouni* due to the presence of visible physical marks.

The prevalence of prolonged solitary confinement in Europe presents yet another complication – to have somehow failed to meet torture's threshold despite the incontrovertible evidence of its harms. Rule 44 of the UN *Nelson Mandela Rules* (2015) has set a universal definition of solitary confinement as entailing 'the confinement of prisoners for 22 hours or more a day without meaningful human contact'. The *Rules* also absolutely prohibit the indefinite, prolonged (15 days) and group-specific (children, pregnant women and the mentally ill) uses of solitary confinement. Notwithstanding that, these have come to be presented as an advancement in the regulation of what can be described as a psychological method of torture. Interestingly, whilst the revised Council of Europe's *European Prison Rules*, finalised in 2020, adopt the definition of solitary confinement as found at the UN level, they have intentionally avoided adopting the 15-day limitation, leaving this question to national systems. The ECtHR also fails to recognise the definition and prohibitions found in the *Mandela Rules* – not having considered a single complaint of solitary confinement to specifically amount to torture (though numerous cases were found to be inhuman and degrading treatment). This finding also applies to the UN CAT, a body closer to the *Mandela Rules*, namely the UN. A recent ruling in *Ali Aarrass v. Morocco* (UN CAT, 2020), presents a distinct case, where the Rules were explicitly discussed and applied – yet inadequately so. The case concerned a pre-trial detention detainee of over nine years – recent years being in solitary confinement. In its reasoning, the UN CAT recalled the definition and prohibitions yet held the treatment to amount not to torture under Article 1 but inhuman and degrading under Article 16 of the UN CAT (§8.5).

Taking all this together, whilst the premise that torture evolves may be widely-accepted in principle and observed across certain markers, concrete proposals for expanded recognition remain amorphous, cursory and contested – particularly when touching on prevalent and protected state practices. These move us from the distinctly epistemological (how law knows) to the ideological (what it knows and takes for granted) – a three-limbed exploration of which now follows.

4. Progress problematised: critical counterweights

With the core doctrinal objects of inquiry now canvassed, and with the aid of further critical theoretical perspectives, one could characterise torture's well-circulated genealogy as impoverished and as one that rarely moves beyond the institutional and state-centric (top-down) – relentless in its projection of law as a beneficent and progressive mediator and arbiter. Numerous questions arise here: to

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what extent can the legal register explicitly draw on contemporary socio-cultural norms? How can we even epistemologically approach the question of quantifying the social? What is the relationship between social and juridical perspectives and apprehensions of suffering? Or to put these another way: how are complex micro, meso and macro imaginings, configurations and dynamics constituted and coalesced to form understandings of suffering? The notion of progressive understandings of torture thus warrants a broader aperture and to be situated in a more complex matrix of state formation, social organisation, and criminal law and procedure. Numerous prominent scholars across traditions have theorised and philosophised about the sources and notions of punishment upon the backdrop of societal and governmental developments. I explore these through discussions around necessity, civility and corpo-reality – taken as grounds on which torture's configuration (particularly its psychological dimensions) remains contested.

4.1 Necessity, rationality, legitimacy

Modern use of state force self-identifies as rational, neutral, natural, inevitable. In this guise, the carceral apparatus tends to 'finesse its failures', 'explain[ing] them away in terms which do not call into question the foundations of the organization – such as the need for more resources, minor reforms, better staff, more co-operation from other agencies and so on [pointing] to a future programme in which these problems will be better managed and the institution will reform itself' (Garland, 1993, pp. 5–6). This technical and managerial language of rationality and professionalization also aims to neutralise and remove punishment 'from direct public participation and involvement and have been cast in a form which de-emphasizes their moral content' (Garland, 1993, p. 184–185). Whilst socio-cultural values still operate implicitly, this is with a reduced immediacy, decreased official accountability *and* distant public knowledge than previously (Garland, 1993, p. 187). This has the potential of misinforming the public, distorting the debate, and creating indifference in some areas and directing passion towards others. In this manner, punishment is no longer predominantly subject to moral and social evaluation but increasingly technical and professional – with the expert's role increasing corresponding to the public's role diminishing (Garland, 1993, p. 187).

Accepting this reading, the functionality of 'present-day attitudes' as a legal fiction becomes compromised – abetting and masking a more ideological and strategic exercise adopted to expand evaluative discretion in the service of state power. It would seem unreasonable to think that juridical actors would so readily constrain themselves through ceding their discretion to a nebulous phenomenon beyond their control such as 'present-day attitudes'. This is all to say that this puts juridical conceptions of torture beyond the societal and the scientific and into the realm of state ideology and necessity.

Numerous scholars emphasise such political instrumentality over socio-cultural sensitivity. Preferring readings of purpose (*raison d'etat* or necessity) over 'social progress' in modern penal history, Foucault attributed 'the disappearance of torture as a public spectacle' to the disappearance of its need by the state. Narratives of *raison d'etat* in state formation and social organisation and its impact on prevalence from conspicuous and physical to less visible and psychological forms of punishment (and with it torture and ill-treatment) abound in the literature (see also Spierenburg, 1984; Sarat, 2001). Foucault, (1979, pp. 7–8) argued that the emergence of a 'non-corporal penality' which was 'less immediately physical', 'more subtle, more subdued' emerged out of a more 'scientifico-legal complex'. Yet, this is to be characterised as no more than a sovereigntist adaptation or instrumentalization. In pointing out that 'it is not on account of some profound humanity that the criminal conceals within him but because of a necessary regulation of the effects of power', Foucault (1979, p. 91) rejected connecting these developments to any notion of civilization or a humanitarian awakening. The change in punishment was only incidental to any change in the nature or forms of pain-delivery – for Foucault, pain was not a requisite for punishment.

In a Foucauldian tradition, Rejali's (2007) well-circulated work similarly advances the argument that there is no necessary *in*compatibility between torture and modernity or democracy, and that torture is rather integral to and inextricable from *raison d'etat*. In his earlier work, Rejali (1991, pp. 127–128) also

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labels the civilization/enlightenment-as-eradication (that 'as societies become civilized and establish vital public spheres, barbaric practices such as torture will eventually disappear') explanation as 'the humanistic approach' (and as implausible and misleading). Rejali also critiques the scientism exuded by contemporary forms of punishment – the premise that officially-sanctioned pain is scientifically controllable.

Taking Rejali's work as a point of departure, Talal Asad (1997, pp. 293–297) too questions physical cruelty's association with the pre-modern and its elimination with the modern – and holds it plausible for one to be 'inclined to think that at least in humanizing societies more sorts of inflicted pain come to be considered morally unacceptable with the passage of time'. Asad (1997, p. 297) brings the discussion closer to legal regulation of torture in characterising these dynamics as not only moving towards progressive recognition but also as regressing and desensitising the collective conscience – claiming that certain forms of 'pain-producing behavior that was once shocking no longer shocks – or, if it does, not in the way it did in the past [such as] large numbers of people in prison for more and more kinds of offenses'. This is important as it speaks to the way that 'progress' has perhaps gone in one direction and left out other possible directions. Yet, torture is implicated in the civilising project given that (Asad, 1997, p. 295):

> 'Clearly, in the cause of moral progress, there was suffering and there was suffering. What is interesting is not merely that some forms of suffering were to be taken more seriously than others but that "inhuman" suffering as opposed to "necessary" "inevitable" suffering was regarded as being essentially gratuitous and therefore legally punishable. Pain endured in the movement toward becoming "fully human" on the other hand, was seen as necessary because social or moral reasons justified why it must be suffered […] As the idea of progress became increasingly dominant in the affairs of Europe and the world, the need for measuring suffering was felt and responded to with greater sophistication.'

According to Farrell (2021, p. 19), when understandings of torture are associated with stigma, it is transformed into a political device on a civilisational scale – as affirming 'Western powers' self-identities as civilised and superior […] transmut[ing] and encod[ing] the civilising standard […] a practice that happens "elsewhere", whilst facilitating the acceptance of actual practices of torture'. Asad's thesis accords with Farrell's 'return of stigma' argument that the contemporary persistence of torture follows similar logics of torturability. Physically overt torture produced and evidenced the torturable other, physically and figuratively.

This interplay between *progress* and *purpose* (or necessity) can also be read into the moment of torture's abolition. That is to say, whilst Enlightenment thought powerfully critiqued uses of violence, their condemnation or abolition was far from complete – with only the deliberate and gratuitous uses coming 'to be seen as barbaric and uncivilized, the controlled use of violence came to be seen as a sign of progress and civilization' (Martschukar and Niedermeier, 2013, p. 3). In this vein, it has been argued that whilst physical forms of torture were abolished (or at least prohibited) *tortura spiritualis* (and *territio*), that is 'invisible forms of coercion', remained standard official interrogational practice, and, with it, 'torturous violence continued to uphold its powerful impact by being transformed into verbal and imaginary forms of violence' (Weitin, 2013, p. 46).

Political expediency (call it necessity, purpose, *raison d'etat*) thus held (and continues to hold) the no longer useful forms of violence as physical and primitive whilst protecting the less physical replacements as permissible and beyond contest – as these forms (such as solitary confinement, coercive interrogation, life imprisonment) serve law's purposes and are thus to be bracketed off. These practices purportedly came to be ruled by 'expedience', 'reason' and 'measure' – and by 'necessity'. The modern logic exuded here is characterised by quantifiable (measured, calculated) and qualifiable (purposeful) pain. Pain for a recognised and official purpose therefore becomes invisibilised as inherent. These threads of thought (necessity, expediency, progress, civilisation) also weave their way through the notion of civility and modernity.

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4.2 Civility, sociality, modernity

A dominant thesis on how social attitudes inform juridical recognition is that the less a society was developed (or 'simpler' the society), the higher the intensity involved in its punishment – reliant on the capital and corporal. The more the society was developed, the lower the intensity of its punishment – reliant on incapacity through incarceration. This equation also squarely rejects the technical and rational ascriptions claimed by modern regimes of penality as introduced above – purporting to have divorced *passion* from *ration*. This, as Garland (1993, p. 49) puts it, is 'too much a story of smooth evolution and functional adaptation to fit the facts'. Whilst punishment can be viewed as 'administered by state functionaries […] it is necessarily grounded in wider patterns of knowing, feeling, and acting, and it depends upon these social roots and supports for its continuing legitimacy and operation' (Garland, 1993, p. 21). For Garland (1993, p. 180), penality (and, with it, configurations of the torturous) is *mediated* between passion ('morally toned desire to punish') and ration ('administrative, rationalistic, normalizing concern to manage') – clashing and contrasting but ultimately integral to the social process of punishing.

Whilst societal values may have been displaced in modern regimes, they are not taken to have altogether disappeared. Garland continues to explore 'passion' that which renders certain forms of punishment as viscerally, socially abhorrent. Again, these are not merely contained to forms found within established brackets but also that which is outside the brackets and understood as 'conscionable, tolerable, or "civilised"'. For Garland (1993, pp. 195–196), culture determines 'the contours and outer limits of penality as well as shaping the detailed distinctions, hierarchies, and categories which operate within the penal field', ruling out 'a whole range of possible punishments (tortures, maimings, stonings, public whippings, etc)' as:

> '"unthinkable" because they strike us as impossibly cruel and "barbaric" – as wholly out of keeping with the sensibilities of modern, civilized human beings. This is often experienced as a kind of visceral judgment – one which expresses emotional repugnance rather than rational objection. […] Usually this boundary line has the unspoken, barely visible character of something which everyone takes for granted. It becomes visible and obvious, only when some outrageous proposal crosses the line, or else when evidence from other times or other places shows how differently that line has been drawn elsewhere. It is therefore stating the obvious – but also reminding ourselves of something we can easily forget – to say that punishment are, in part, determined by the specific structure of our sensibilities, and that these sensibilities are themselves subject to change and development.' [1993, p. 214]

Civil, civilised, civilisation. In exploring a parallel notion behind socio-cultural sensibility, Garland (1993, p. 215) zooms out to view notions of *civilisation* as a 'powerfully evocative concept which has extensive connotations within our culture'. The term 'civilised' has come to be a measure of socio-cultural appropriateness of punishment. For duBois (2018, p. 157), as with early calls for abolition, modern torture continues to mark the boundary between the 'civilized' and 'primitive', and as a source of 'a comfort to the so-called civilized nations, persuading them of their commitment to humanitarian values, revealing to them the continued barbarism of the other world'. Garland too argues (1993, p. 235) that this is connected to a 'sanitization of penal practice and penal language' – no longer presupposing brutality and physicality, but concealed, denied and deniable. The veracity of these preconceptions was openly debated in the *Ireland v. UK* cases.

Defining 'public attitudes' proves to be difficult through any reading, generous or critical – as it draws on macro societal and cultural dynamics. Ultimately, socio-cultural sensibilities and sentiments remain 'unobservable', 'inconclusive' and 'difficult to substantiate' and only inferable from 'statements and actions' subject to misreading (Garland, 1993, p. 229). It leads us to more fundamental questions: what do human rights law or criminal law represent if not wider reflections and measure of values of what it means to be human in a certain time and space? Clearly, the law aims at capturing, preserving

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and promoting collective imaginations, homogeneity and solidarity. Social values serve and are in turn constituted by 'society-wide interpersonal communication, spontaneous social interactions, economic confidence and co-ordination, social inclusion and collective commitment, and mutual appreciation of diversity' (Cotterrell, 2011, p. 10).

Yet, there is a complexity and plurality that is being juridically reduced here. The universality of human rights whilst philosophically defended, as is progress, is not sociologically nor empirically substantiated. Deferring to the power of legal precedent, judicial fact-finding and reasoning is easily let off from fully accounting for itself. The difficulties should not be accepted as excusatory. These values are powerfully advanced as the basis which legitimates 'incarceration as a machine for the transformation of public space' (Sarat, 2014, p. 11). The old ill-attributed adage, after all, has it that 'how society punishes reveals its true character' (Sarat, 2014, p. 1). Importantly, what legal doctrine takes to be essentially unidirectional with social sentiments informing legal enactments, for Garland (1993, p. 57) is circular, interactive and reiterative – with society shaping but also being shaped by penality. Differentiating *inherent* from *illegitimate* suffering are taken here to as intimately inter-linked to common-sense and related emotions, undergirding legal protection. Moral feelings as common sense thus bring with it emotional associations and engender drives to *punish* as well as to *protect* – sense, sensibility, sensible.

4.3 Corpo-reality, in/visibility, technology

The question of evidence allows us to recentre the less than overtly physical in this exploration. How societies come to witness the prevalence of less visible or physical forms of torture, as alluded to at the outset, implicate histories on the nature and function of evidence in penal practice. These histories indicate that the focus on physical torture is linked to particular histories and assumptions about the material/visible nature of truth. That is, torture as a juridical technology for the production of evidence has historically relied on the assumption that truth could be 'read from' people's bodies and was therefore physically manifest. Foucault's (1979, p. 34) history of torture, for instance, has torture necessarily needing to have marked the victim. Farrell (2021, p. 20) criticises this for having 'inflated the case for the disappearance of torture' given that he 'overlooked the reality that torture became "part and parcel" of the disciplinary institutions, even if it had gone somewhat into hiding'.

For Rejali (2007, p. 2), outrage has depended on visibility:

> 'A democratic public may be outraged by violence it can see, but how likely is it that we will get outraged about violence like this, that may or may not leave traces, violence that we can hardly be sure took place at all? A victim with scars to show to the media will get sympathy or at least attention, but victims without scars do not have much to authorize their complaints to a skeptical public. A trial can focus on the specific damages of a beating—where did the blows allegedly fall? Were the strikes professional, necessary or neither?—but what precisely can a trial focus on with electric shocks that leave few marks? […] we are less likely to complain about violence committed by stealth. Indeed, we are less likely even to have the opportunity to complain.'

Garland (1993, p. 243) similarly finds:

> 'The wince of pain or the scream of agony announce the fact of violence and render it visible, whereas the mental anguish and gradual deterioration of an inmate is much more difficult to observe and much easier to overlook. The crucial difference between corporal punishments which are banned, and other punishments – such as imprisonment – which are routinely used, is not a matter of the intrinsic levels of pain and brutality involved. It is a matter of the form which that violence takes, and the extent to which it impinges upon public sensibilities. Modern sensibilities display a definite selectivity. They are highly attuned to perceive and recoil from certain forms of violence, but at the same time they have particular blind spots, or

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> sympathetic limitations, so that other forms are less clearly registered and experienced. Consequently, routine violence and suffering can be tolerated on condition that it is discreet, disguised, or somehow removed from view.'

With questions of in/visibility and ambiguity, technologies of investigation and documentation become equally important. Examining a dual genealogy of trauma and the rise of psychiatry, Fassin and Rechtman (2009, p. 160) argue that the 'reality of this suffering is of course not new, but the recognition of it certainly is. And does recognition not make it a little more real?'. Fassin and Rechtman's (2009) study of the concurrent recognition of trauma and the disciplinary authority of psychiatry is of immense value to the discussion at hand. The concept of psychological trauma, they claim, is currently 'rarely called into question – either as a category of intelligibility or as an object of compassion' (2009, p. ix) – the notion of the scar is recognised as both mark and as metaphor, as having 'become the central reality of violence' (2009, p. 22) with 'marks in the mind which are then seen as "scars" by analogy to those left on the body, is just as easily accepted', (2009, p. 4) 'no longer contested, testifies to an experience that excites sympathy and merits compensation' (2009, p. 5). Such was not always the case, they demonstrate, as this area was contested decades ago – when psychiatrists and psychologists were not as highly sought after as today. Here too Fassin and Rechtman (2009, p. 30) observe societal values as central, pointing to 'a moral genealogy running parallel to the scientific development [derived] from the collective process by which a society defines its values and norms, and embodies them in individual subjects'.

The recognition therefore is 'due not to more refined diagnostic tools, but rather to a narrowing of the gap between the climate of public opinion and the preoccupations of mental health professionals, between the moral economy and medical theory' (Fassin and Rechtman, 2009, pp. 21–22). Fassin and Rechtman (2009, p. 30) also attribute the change to what they call 'collective sensibilities' – and reject this was a 'single, linear path, the journey to establishing trauma as part of the regime of truth emerges as an uncertain, ambiguous process, full of contradictions that say much more about moral and political stakes than they do about clinical and diagnostic issues' (p. 223). So how does psychological torture fit in here? There is also a link between what we see and what evokes outrage.

5. Compressed conclusions

When viewed through the *longue durée*, torture's histories ostensibly stand for progress – particularly in the guise of legal shifts in the historical abolition and contemporary prohibition. When particular non-physically overt forms are viewed however, the contemporary mode of continuing and effectuating progressive recognition, through dynamic interpretation, proves to be more rhetorical than real. Rhetorically, progress is predominantly presented as top-down (technical, as manifest in legal developments taken as responsive and representative) and linear (uni-directional however incremental). Empirically, however, progress is necessarily complicated and coupled with stagnation and regress – tempered by a complex matrix of conservative logics three of which can be identified in: the well-guarded notions of 'necessity' of certain penal pains for state purposes (think solitary confinement); the purported 'civility' associated with pain delivery currently in use in self-identified 'modern' states (i.e. we're modern so naturally must be our use of force/violence); and, the 'corpo-reality' in understanding physical pain as more real (visible, identifiable, harmful, recognisable) than the psychological. These are presented as flash-points where consequential limits to recognition are both concealed and configured, backgrounded and foregrounded subject to political expediency. They each represent a part of the puzzle in understanding the in/ability of adjudicators to fully grasp the reality of the torture brought before them.

I hold these reflections as necessary to complicate (but also, counterintuitively, to clarify) legal qualifications of torture – to differentiate the operational and instrumental from the ornamental, rhetorical and aspirational – to imagine and identify socio-cultural and political contingencies at play. To be clear, I do not argue for an ahistoric or static interpretation of torture but for a move closer

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to critically and creatively understanding how social conceptions of ethics and violence differ across time and space. That is to say, I do not challenge the empirical claim that either torture techniques or their legal conceptualisations change but rather find problematic how adjudicators claim to quantify these. How legal actors determine what counts as social and scientific change is left unconvincingly open and uncritically repeated. Ambiguities abound and stand to be better acknowledged.

Dominant notions advanced by adjudicators (e.g. social change, special stigma, evolution) lack the claimed explanatory power, rather serving as reductive and capricious rationalities and as genealogical expediencies – instead of leaning more profoundly and genuinely into ideological and epistemological questions of how torture comes to be interpreted. These are not abstract academic questions; the stakes are high – not only for the victim but the anti-torture field who claims care and concern for them in its pursuit of the effective delivery (and possibility) of recognition and redress.

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