Academic Journal of Legal Studies and Research
Vol.7, Issue 5; September - October 2022;
1252 Columbia Rd NW, Washington DC, United States
https://topjournals.org/index.php/AJLSR; mail: topacademicjournals@gmail.com

HUMAN RIGHTS VIOLATIONS: TORTURE AND DEPRIVATION OF LIBERTY EXAMINED

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Abstract: Torture, a practice that has endured throughout history against individuals deemed guilty or presumed as such, including prisoners of war and those subjected to coercion for political or religious reasons, constitutes a static aspect of human history. Its dynamics are inherently tied to shifts in societal moral values and the thresholds of pain within various civilizations, coupled with advancements in available technological means.
While generally prohibited and subject to severe ethical condemnation, torture has persisted in both official state bodies and private settings, often escaping the regulatory scrutiny associated with legitimacy. This paper primarily focuses on judicial torture, a complex array of physical and moral means of personal coercion used during trials. It is accompanied by parallel police activities, which may be officially lawful, semi-legitimate, or illicit, depending on the temporal and geographic context. The objectives of judicial torture encompass establishing the guilt of the accused, eliciting confessions, and validating the credibility of witness testimonies.
In the legal systems of ancient Greece and Rome, where torture was codified, it was regarded as an action conducted pro reo (for the accused). The underlying principle was that the accused's fortitude in enduring suffering to unveil the truth served as a test, especially in the absence of clear evidence. In certain historical periods, torture could only be applied to non-free individuals due to its not only painful but also humiliating nature. Nevertheless, Roman imperial legislation witnessed fluctuations in this regard.
Keywords: Torture, judicial torture, ethics, historical perspective, legal systems.

1. Torture as a judicial act

Torture, which for centuries has been exercised against guilty or presumed guilty persons, prisoners of war or subjects subjected to coercion for political or religious reasons, belongs to a sort of immobile *histoire* of humanity and knows a dynamic certainly linked to the modification of the widespread moral sense and of the 'thresholds of pain' in different civilizations. It is also connected to the changing technological means available to man at all times.
Generally forbidden or subject to harsh ethical censure, it has been and is nevertheless practiced both within the 'special' or 'parallel' bodies of modern states and in the context of private situations. However, the main subject of history is not this type of torture, which is not subject to civil consent and is therefore subtracted from the regulation that accompanies legitimation, but that of judicial torture, understood as the complex of means of personal coercion, both physical and moral, used during the trial, accompanied and complicated by parallel police activity (officially lawful, semi-lecitimate or illicit, depending on the time and place) that precedes or accompanies it. These means are used to ascertain the guilt of the accused or to provoke their confession, or to validate the reliability of the testimony of witnesses[3].

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In Greek and Roman law that have codified torture, it was interpreted as an act also practiced *pro reo*: it started from the principle that, in the absence of clear evidence, the strength of mind shown by the accused in supporting the suffering in order to triumph the truth was, itself, a test. Given its character not only painful but also humiliating, torture in certain periods could not be applied except in cases of subjects not free: the Roman imperial legislation, however, knows, in this regard, different phases[1].

The etymology of the term torture derives from the Latin verb "*torqueo*", which indicates the act of twisting, torturing[2]. In order to analyze a model of torture used in judicial proceedings, one must refer to Roman law, in which the practice of torture was indicated by the term "*quaestiotormentorum*", which designated the procedure of interrogation under torture, as distinct from the terms "*tormenta and cruciatus*" which referred to bodily afflictions understood in their material aspect.

It was this instrument of torture "*ad eruendamveritatem*" to be used even after the fall of the Western Roman Empire and the crisis of the feudal system. In this context, famous European jurists committed themselves to give new contributions to the use of the practice of torture, think about Bartolo da Sassoferrato and the controversial phenomenon of the Holy Inquisition, through which the Catholic Church, applying the Roman law, often persecuted and tortured those who were considered heretics, "different", enemies of God and the Church.

2. *The Age of Enlightenment against torture*

From a historical point of view, the Age of Enlightenment was a period of fervent political and cultural commitment, in which a critical reflection against torture was structured by well-known thinkers and philosophers of that time: PietroVerri and CesareBeccaria, for example, spread a culture of tolerance and a first acute sensitivity to human rights of the condemned. The first reflection of the Enlightenment that can be recalled, concerns the thesis of the uselessness of torture, in fact, both for Beccaria and Verri, but also for Thomasius, it was an inappropriate means that destabilized the social order, useful only to test the tenacity of the accused rather than demonstrate the veracity of the answers obtained. In fact, even the weak and innocent were punished and persecuted, and forced to make false statements in order to stop the act of "torturing".

The second argument against the practice of torture concerned the problem of its illegality, in fact, according to the philosophical-legal arguments of the Enlightenment, it represented an unacceptable preventive punishment that violated what can be defined as two normative bulwarks in defense of the trial subject: the presumption of innocence and the principle of *nemotenetur se detegere*, by virtue of which no one can be forced to self-accuse of having committed a certain fact.

The ethical and social commitment demonstrated by these thinkers during the century of reason was not able to achieve the absolute abolition of torture. On the contrary, it began to evolve and update itself in the modern era, often raging against ethnic minorities. Consider, as a striking example, the violence suffered in the Nazi concentration camps, where the instrument of torture became a demonstration of the omnipotence of state sovereignty. Its practice, however, was not free from strong mortgages, from heavy and painful perplexities.

3. *The democratic* ethos *and the erasure of inhumane practices from the world*

A change of course in Europe and internationally, aimed at introducing a ban on torture, occurred with the end of the Second World War. The 1984 United Nations Convention, in fact, introduces in its first article the meaning of the term torture, i.e. any act by which severe pain and suffering is inflicted on a person, in order to punish, intimidate and extort information from him.

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[1] *Ibidem.*

[2] In Old French it was called "gheine" or "Jehine" from the French verb meaning to confess.

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In the European context, the ECHR, in its third article, introduces a real and absolute prohibition of torture, a rule consolidated by the Jurisprudence of the European Court of Strasbourg, which states: "article three of the ECHR consecrates one of the fundamental values of democratic societies. Even in the most dramatic and difficult circumstances, such as the fight against terrorism and organized crime, the Convention prohibits in the most absolute terms torture and inhuman and degrading punishment, admitting no restrictions."

Despite the immense efforts of European and international organizations, however, torture is still present and used, in different forms, even in the twenty-first century, and this highlights the contradiction of the belief that in the democratic *ethos* there would be an erasure of inhumane practices from the world.

4. *Torture in the modern utilitarian conception*

If the practice of torture seems to recall an archaic conception of the world and of the person, not considered as bearer of rights and worthy of respect in every situation, it is also present in modernity, having a different face, which can be called utilitarian. Utilitarianism is a philosophical-political current, based on hedonism, which indicates the affirmation of general happiness through the most favorable choice and consequentialism, which leads to the fulfillment of all those actions that generate positive consequences.

Torture is among these actions, revealing itself as an effective preventive means for social defense: in this way it is carried out in places far from the law and in the shadow of the State, hidden behind terms such as coercive interrogation or pressure, so much so that it is considered justified and salvific for the health of the State itself. According to this perspective must be analyzed the serious episode occurred as the torture suffered by the researcher GiulioRegeni in Egypt, a diabolical instrument that has left on Regeni's body its *character indelebilis*; in fact the autopsy carried out in Italy has revealed fractures, swellings and burnings hidden by the previous Egyptian autopsy.

In this way, we find a type of evil that not only punishes external enemies, but generates a constant stalemate of the citizens' liberties, inaugurating an eternal state of emergency, in which even a liberal and democratic power can use an anti-democratic, anti-guarantee and anti-constitutional means that causes, through the sacrifice of certain individuals, the preservation of public order. As a demonstration of this thesis it is necessary to cite certain phenomena occurred in modernity, think of the Patriot Act, introduced and led by the President of the United States George W. Bush, with which extraordinary powers were given to the police and intelligence, with the aim of using every possible means to terrorize terrorists, as revenge to the attack of the Twin Towers on September 11, 2001. Through illegal methods such as torture, therefore, an attempt was made to ensure the security of the United States and peace in Iraq.

In this way, political power reveals its tanato-political *facies*, that is, a policy that controls life and can go so far as to torture and kill in the name of so-called "public health". It is an insidious and disturbing practice that recalls the practices of totalitarian regimes. As a degrading example can be recalled the techniques used during the G8 in Genoa in 2001, during which boys and girls demonstrators were tortured and raped first in the Diaz school and then in the Bolzaneto barracks by police officers. Amnesty International defined this event as the most serious transgression of human rights occurred in a Western country since the Second World War. The dramatic picture outlined so far is hostile to the subject of law, who seems to spend his life in the State theorized by Thomas Hobbes, namely "the State of the great Leviathan", that absolutist reality in which citizens give up all rights, as long as they are guaranteed the "supreme good" of life, and receive protection from the Sovereign, who can use every possible means to ensure social order.

5. *The liberal democratic State vs. the Great Leviathan State*

The utilitarian and bio-tanatical-political drift that promotes the use of preventive torture, even in the twenty-first century, can be countered by the dictates of the philosophy of natural law, more precisely by analyzing the ideals

of modern natural law and in particular the theorization of the liberal-democratic state implemented by John Locke, who introduces an idea of state that does not violate human rights, but is conservative and defender by means of guarantees and democratic. The citizen for Locke does not have to give up all rights, but rather retains, during the transition in the political state, all universal and inalienable rights, the right to life, liberty, equality, psychophysical integrity, health, losing only one: the right to take justice for themselves. In this way, vengeance is replaced by legal power, that is, by the application of procedural and substantive rules that, first of all, serve to resolve disputes between subjects, and secondly, to eliminate any overpowering of the individual by the State and any discretion over the fate of a man's life.

6. *The importance of garantism*

The philosophy of law can be useful to reflect on problems and dramas such as "the act of twisting", that is torture, and to integrate the legal system, reinforcing all those principles that must be considered normative bulwarks to be used daily in the legal and social field. One thinks of the importance of garantism, a term of reference for legal practitioners and a protection technique for the fundamental rights of individuals. The importance of this juridical model can be found above all in the field of criminal law, with the aim of protecting the weakest subjects who find themselves on the margins of society: a suspect or defendant who loses his procedural and penal guarantees, a prisoner who suffers violence and blackmail in detention facilities, a demonstrator who opposes a power he considers illegitimate. By defending people who are in a condition of weakness, on the one hand, the idea of a classist criminal justice, based on inequality, is removed, and on the other, the formation of a community based on principles, those fundamental norms contained in the sources of law, is recalled.

The expression criminal process is used in the Italian legal system as a synonym for criminal proceedings, both in the writings of doctrine and in the terminology of the law. The fact that the criminal process is conceived and defined as a series of acts necessarily implies that all acts, although preordained towards the same end, have different functions and value.

In fact, if we think of the various phases in which the criminal proceedings are articulated, we identify different fundamental moments: with the criminal proceedings it is ascertained whether a crime has been committed, if the subject identified as the accused is really the author and, if so, what penalty should be applied to him. All these phases are subject to the regulation of the criminal procedural law.

The criminal trial, regulated by criminal procedure, can be understood as a path of investigation, carried out according to precise rules, which serves to establish whether a given punitive claim is taken for granted or not, to identify the possible culprit and to apply the sanction. Everything must obviously take place in compliance with the laws that regulate the criminal process and in compliance with what is also established in the Constitution, which provides for guarantees for the fundamental rights of the individual.

In this regard, it is possible to cite article 27 of the Italian Constitution which sanctions the presumption of innocence of the accused within the trial; this implies two consequences: the burden of proof on the prosecution and the respect of the right of action and defense of the weaker party, that is, the suspect or the accused who has these rights, according to article 24, at every stage and degree of the proceedings. Furthermore, it is necessary to refer to article 111 of the Italian Constitution which sanctions the principle of the contradictory, which consists in the alternation of the reasons of the opposing parties and in being placed on an equal footing in front of the third and impartial judging body, equidistant from the parties in dispute and extraneous to the object of the judgement, a neutral body which applies the dictates prescribed by the legislator, guaranteeing a culture of legality and applying the first paragraph of article 111 of the Constitution.

6.1. *The link between the criminal process and punishment*

By its nature, the term process, already in use also in Roman law in the sense of progress or succession, still recalls the idea of proceeding towards a point or an objective. In fact, what all the authors agree on is that the criminal process, although regulated by multiple laws and composed of various phases, as a whole is directed to the implementation of criminal law in the concrete case. In this regard, to give further confirmation of the close link between the criminal process and the penalty, we can recall the opinion of Carnelutti who says that the criminal process consists of the complex of acts, in which the punishment of the offender is resolved.

In fact, even if we want to proceed with the analysis of the very concept of punishment, understood as the theory of criminal sanction, it refers precisely to the aspects of criminal procedural law. The definition of punishment covers two distinct areas: that of substantive criminal law and that of procedural criminal law. The penalty, with reference to substantive criminal law, includes everything relating to its classification and discipline at the time of the threat and then the substantial repercussions of its execution, in the sense that a fact considered as a crime is punished with a sanction established in precise ways.

With reference to procedural criminal law, the concept of punishment includes both everything that concerns the means and forms for the imposition of the sentence, therefore all the principles that regulate the phases of the criminal process, and everything that concerns the proper phase of the execution of the sentence imposed. Therefore, the definition of punishment also includes in itself the elements proper to the criminal process; this is an element that further strengthens the link between criminal trial and punishment that also takes on a social value with implications for the rights of associates.

6.2. *The question of the iuspuniendi of the State*

The main problem is always to decide whether the State has the right to impose a penalty on an individual, depriving him of his freedom; in this regard, the reflection expressed on this point by the contemporary philosopher Mario Cattaneo in his book Giusnaturalismo e dignitàumana is very eloquent: "at the base of criminal law – because of the perhaps inevitable presence within it of the principle of 'rendering evil for evil' – there is a paradoxical ambivalence: on the one hand it is necessary for the protection of a healthy civil coexistence, on the other it threatens to carry out – and in history and in the present world it has often committed – serious damages to human rights and dignity".

The reflection just mentioned raises the problem that, although the existence of the criminal process and the right of the State to punish seems legally justifiable, the deprivation of liberty of the person and his torture, from the point of view of the protection of human rights, is not justifiable because the guilty man does not lose his fundamental rights.

Philosophical analysis, even before the functioning of the process, respect for human dignity and human rights in the exercise of criminal justice, deals in its reflection with the very foundation of the penal power of the State. Opinions are divided on this point because there are those who speak out in favour of giving the state a right to punish and those who believe that the state should not have the right to impose penalties on its citizens.

Among those who express a favorable opinion about the attribution to the State of the right to punish we can cite for example Arturo Rocco who in a very rigorous and scientific way in his writing On the concept of the subjective right to punish expresses the concept according to which in the head of the State, precisely because of the power it has over citizens, there is also the right to punish. In fact he says: "Subjective right to punish (iuspuniendi) is the faculty of the State to act in accordance with the rules of law (criminal law, in the objective sense) that guarantee the achievement of its punitive purpose and to demand from others (offenders) what it is obliged to by virtue of the rules themselves ... the right to punish appears as a public subjective right, of the State, and precisely as a particular right of supremacy, deriving from the general status subiectionis, from the general relationship of subjection and political obedience".

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Among those who believe that the State has by its very nature the right to punish those who commit a crime we can also mention Karl Binding, for whom criminal law is the law of the State and as such can well provide for civil sanctions and penalties to protect the legal assets of the system, to the detriment of individual citizens who know they are committing violations of the law. This very strict vision of respect for criminal law expressed by Binding is explained by the fact that he believes that subjecting the offender to the power and sovereignty of the law, through the penalty that aims to preserve the force of law, is a sort of satisfaction for the other associates and therefore a stimulus to respect the law.

Francesco Carrara in his paper Criminal Law and Criminal Procedure highlights how the power of the State to punish assumes the connotations of a real duty that it has towards its associates to maintain peaceful and civil social coexistence. Among those who believe that the State, instead, should not have the right to punish, it is possible to cite NiccolòTommaseo who expressed his opinion in his writing Of the Death Penalty. While admitting that society must correct criminal behavior, he draws attention to how it can be improper and rash to discuss the existence of a right to punish. He writes: "the right to punish is an improper and dangerous phrase: but in that voice by placing obligation, that is, moral necessity to punish, with this very fact one would come to melt away with many anguished doubts, and to promote others of those healthy doubts, which are beneficial voices of conscience ... Society has the right and the duty to correct evil, and to use this, among other means, punishment. But to think absolutely of the right to punish as an essentially moral and absolutely scientific principle, is like making treatises on the right to beat or to chain in the abstract".

Another negative opinion about the power to punish by the state is expressed by Kurt Tucholsky, who has always expressed his strongly critical thinking against the orientations of the judiciary in the Weimar Republic. In his 1927 deutsche richter, Kurt Tucholsky openly denies the existence of a state right to impose penalties and indeed considers any moral theory of punishment inconceivable. He believes that there is no right of the state to punish but only the right of society to guarantee and protect order from those who threaten it; everything else is for Tucholsky sadism and class struggle.

The philosopher Montesquieu also expressed his thoughts on the right to punish. In his Esprit des Lois he questions the basis of the punitive power of the State and what is the actual role of the penalty and when it can be validly used by the State. He does indeed recognize in favour of the State system the possibility of providing for criminal legislation that intervenes with the penalty, but such intervention must be absolutely necessary and the penalty must be presented as the only solution. In fact, Montesquieu says that any punishment that does not derive from necessity is tyrannical, the law is not configured as an act of power, the things that are indifferent to it are not within its competence. Montesquieu's reflection might seem decisive, but in reality for philosophical analysis it opens up new questions. In fact this is the essence of philosophy, as the famous philosopher Karl Jaspers said: “Philosophieheisst: auf demWegesein. IhreFragensindwichtigeralsihreAntworten, und jedeAntwortwirdzurneuenFrage”.

6.3. *The retributive theory and the preventive theory of punishment*

From the examination of the various theories elaborated by scholars about the foundation, purpose and function of punishment it is possible to trace two general orientations: one that collects all the doctrines which, looking at the past, consider punishment a just imposition for an evil that has been committed; another that, looking to the future, considers the penalty as a tool to inhibit the commission of new crimes.

In the thought of the German authors the distinction between the absolute theory and the relative theory is outlined. The first one conceives the penalty as an element for its own sake, which disregards any purpose to be pursued or any justification must be given of the penalty within the social order. The second one, on the other hand, include all those theories that provide a justification of the penalty on the basis of the individual purposes

that from time to time can be attributed to it. In the thought of the authors of Anglo-Saxon matrix, on the other hand, the distinction between the retributive theory and the utilitarian theories is outlined.

The theory of retributive considers punishment as a just punishment or counterstep for an evil committed; utilitarian theories are instead all those theories that, for various reasons, attribute to punishment a function of instrument of protection of society and therefore consider it as a social utility. This variety of opinions is also found in the thought of Italian authors, who saw in the second half of the nineteenth century the evolution of two schools of thought that then contributed with the theories of their exponents to the formation of the penal code of 1930: the Classical school and the Positive school.

The exponents of the classical school, as far as the theory of punishment is concerned, agreed in supporting the retributive nature of the penalty, some for strictly ethical reasons, some for utilitarian reasons. They also considered that imputability was based on free will, that is, on the faculty of self-determination according to a free and total choice of one's own will, and therefore the penalty, as a punishment for the evil committed, was rightly attributed only if the offender had voluntarily and consciously chosen the violation of the norm, while having, instead, the possibility of choosing its observance.

The exponents of the positive school contested the very existence of free will and conceived the crime not as a conceptual and juridical entity, but as a natural and social phenomenon. Therefore, for the members of the Positive School the penal system should not have aimed at the punishment of crimes through the application of a penalty, but the neutralization of the social danger of offenders through the so-called security measures, having the purpose of preventing the commission of crimes.

7. *The identification of the guilty person and the presumption of innocence*

Criminal science, in its first part, contemplates the generality of the crime and punishment, and starts from the assumption of having before it a guilty person, that is, the author of an external fact that has violated and attacked the right of the citizens. "In its second part, penal science contemplates the procedural rite and starts from a contrary presupposition; that is, it presupposes the innocence of that citizen against whom justice directs its suspicions and its weapons." The first part of criminal science, therefore, serves to identify the guilty, while its second part serves to protect innocence. Criminal science protects every man until his guilt is proven, and this guilt must be proven in the ways and forms prescribed by law. Respect for human dignity in the field of criminal procedure, which is based on the presumption of innocence, requires that all those measures of safeguard and protection of the person under investigation that go by the name of garantism be applied. Negative elements are to be abolished, such as, the superior attitude of the judge, the treatment with contempt of the defender, the role of 'prima donna' of the accuser, the fact that the arrested person awaiting trial is abandoned to the worst arbitrariness of police officers and investigating judges, who often consider it a personal offense if the accused, as is his right, lies in order to defend himself.

8. *The principles of guarantee in the criminal process*

An essential theme, in fact, concerns the principles of guarantee in the criminal process with particular attention to the treatment of the accused during the trial. One can dwell on the issue of pre-trial detention, preventive detention, citing in particular Carrara, who believed it was necessary to begin immediately and seriously the work of reform of judicial prisons.

There are two essential ways of reform:

1) thinning out as much as possible and shortening preventive imprisonments;
2) reduced to the limits of strict necessity, preventive detentions must structured in such a way that they are not an apprenticeship for moral perversion.

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According to the Scottish scholar Antony Duff, as Cattaneo argues, preventive imprisonment unjustly treats not only, of course, an innocent person, but also a guilty person. In essence, even the guilty person very often is detained before his guilt is recognized under proper procedure; thus the presumption of innocence is ignored. Beccaria writes that "a man cannot call himself guilty before the judge's sentence, nor can society take away his public protection, except when it is decided that he has violated the pacts with which it was granted. What then is that right, if not that of force, which gives the power to a judge to give a penalty to a citizen, while it is doubted whether he is guilty or innocent?" Beccaria also writes: "This dilemma is not new: either the right is certain, or it is uncertain; if it is certain, it suits him no other punishment, than that established by the laws, and useless are the torments, because useless is the confession of the guilty; if it is uncertain, one must not torment an innocent, because such is according to the laws a man, whose crimes are not proven".

8.1. *The parallelism between torture and preventive detention*

This passage implicitly contains a parallel with preventive detention. Certainly torture is an absolute cruelty, an unbearable suffering, and in this the preventive detention is not directly comparable, but in it there is certainly no lack of psychological suffering, such as worry, despair, anguish.

Torture translates into an unjust institution of criminal law, that is, into an undue punishment inflicted on a person who must still be presumed innocent. But the same can be said of preventive detention, which the Italian code of 1988 calls "measure of pre-trial detention". It is legally an institute of procedural law aimed at avoiding dangers to the acquisition of evidence, the risk that the accused will flee, or commit new crimes. But even in this case it is an undue custodial punishment that is inflicted on a person who has yet to be presumed innocent. Therefore, from a legal point of view, the parallelism between torture and preventive detention has its own subsistence. In both cases we are dealing with institutions of procedural law that are transformed into undue, unjust, illegitimate punishment.

Humanity is the value that must inspire criminal law and garantism is the modality that must be at the basis of its procedures. If the principles of guarantees are not applied, there is a risk that the process of justice will be transformed into a series of serious injustices, and that human dignity will not be respected in the criminal process.

9. *Rules of legal civilization:* dignitasnumquamperit

As other examples of guarantees it is necessary to refer to articles 64 and 65 of the c.p.p., which introduce rules that safeguard the freedom and defense of the interrogated person. Article 64, introduces a series of obligations during the interrogation for the prosecuting bodies, such as the obligation to warn the person interrogated that his statements may be used against him, that if he will expose statements concerning the responsibility of other subjects he may take the role of witness, up to the non-usability of the statements made in case of failure to warn according to the previous rules. All this, represents a perfect protection of the moral freedom of the person interrogated but, above all, outlines the protection of the self-determination capacity of the subject, who must be able, at any time of the interrogation, to evaluate and remember certain facts. Article 65 sanctions the *litiscontestatio*, i.e. the contestation of the charge, which must be carried out in a clear and precise manner, communicating the elements and sources of evidence to the accused person, in order to guarantee him/her the construction, within a reasonable time, of his/her procedural defense. These rules of juridical civilization are small examples that must be remembered and recalled in the daily social and juridical life in order to form a model of trial and a model of social relations accusatory-garantist, that is, protector of the rights and interests of all the subjects of a trial, guaranteeing a criminal law that compensates the victims of a crime but is also able to protect the rights of the convicted person. In this way, the protection of the prerogative that belongs to every man in every system can be consistently achieved: human dignity. *Dignitasnumquamperit*, dignity never dies, is the motto that

celebrates the art of logos, the art of speech and thought that can break the silence complicit in torture, of that evil unfortunately still present in the twenty-first century.

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