

THE PROHIBITION OF TORTURE FROM A HUMAN RIGHTS PERSPECTIVE: FICTION OR REALITY IN THE CURRENT RULE OF LAW

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Abstract: This article discusses the problem of torture in Mexico and its impact on the legitimacy of the State and the protection of human rights. Despite the normative advances in the configuration of the notion of torture, there are problems of effectiveness in the mechanisms with which the State operates to comply with its obligation of due diligence in the prevention, investigation, registration and prosecution of torture cases. The author emphasizes that torture is a symptom of the weakness of the rule of law, which produces a social delegitimation due to the disappointment of society's expectations in legal institutions and in the procedural guarantees of criminal justice systems. Furthermore, torture is related to a culture of impunity, discrimination and inequality, which demands effective and fair policies to address this problem. Therefore, it is necessary to advance in the justiciability, prevention, investigation, eradication, protection, reparation and punishment of acts of torture.

Keywords: Torture, cruel, inhuman and degrading treatment, Rule of Law, Human Rights, Legitimation, effectiveness.

SUMMARY: 1. INTRODUCTION. 2. CONTENT AND SCOPE OF THE CONCEPT OF TORTURE. 2.1. The scope of the principle of equal appreciation of differences in the concept of torture. 3. THE PROHIBITION OF TORTURE AS A HUMAN RIGHT: ASPECTS OF EFFECTIVENESS AND SOCIAL LEGITIMACY. 4. CURRENT THEORIES ON THE ETHICAL-RATIONAL JUSTIFICATION OF TORTURE: MAIN POSITIONS FOR AND AGAINST. 5. CONCLUSION.

1. INTRODUCTION

Torture constitutes one of the most serious forms of human rights violations, it is an inhumane practice, it is a serious crime punishable under any modern legal system; it is an act of violence, coercion, and abuse of power that violates the Rule of Law and transgresses personal integrity, understood as the human right not to be a victim of any physical pain or suffering (O'Donnell, 2004). In its Article 22 the Mexican Constitution establishes that the personal integrity of every human being must be respected; consequently, both torture and the application of punishments that cause physical harm or psychological anguish to persons are prohibited (Const., 2022, art.22). In this sense, the right to personal integrity has three elements: the prohibition to receive bodily injury, psychological damage and moral

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damage.² However, the practice of torture not only violates dignity and personal integrity, but is “the very negation of the current rule of law and democracy” (Ribotta, 2012, p.158), at least if we recognize that the fundamental principles of a constitutional and democratic rule of law are not only the rule of law, legality, separation of powers, but are also the respect and guarantee of human rights.³ (Gozaíni, 1995), as well as in the principles of any criminal justice system such as proportionality, the presumption of innocence, reparation of damages, the right to a fair trial; therefore, the fight against torture is an ethical and legal imperative, and an inescapable commitment of democratic societies and their legal institutions. However, in spite of its prohibition as a universal human right⁴ recognized by various international treaties, it continues to be used today by state agents, police forces, the military, and armed groups around the world⁵ (Ferrajoli, 2013). In Mexico, since that year, there has been an upturn and a significant expansion in the application of torture throughout the national territory. This trend has reached a point where it can be qualified as a “generalized”⁶ practice, according to different reports and analyses. It is crucial to recognize the seriousness of this situation, as well as the urgent need to address this serious problem from legal, humanitarian and ethical perspectives. (Guevara, 2021, 104).

² The Inter-American Convention on Human Rights (IACHR) has identified certain acts that affect violations of personal integrity, which are demonstrated indirectly, by assuming such conduct as: locking someone in the trunk of a car, (Case of Castillo Paez v. Peru, 1997, Series C, No. 34, para. 66); that a person remains naked covered only with a sheet in front of heavily armed guards, Case of Miguel Castro Castro Prison vs. Peru (2006, Series C, No. 160, para. 306M); telling the victim that he was kidnapped to be killed, Case of the “Street Children”, (Villagrán Morales et al.), vs. Guatemala (1999, Series C, No. 63, para. 163,), (Ramírez and Pallares, 2011). In the “Report on Terrorism and Human Rights”, the IACHR (2002), has established as cruel, inhuman and degrading treatment: “The imposition of restricted food causing malnutrition, the application of electric shocks to a person, submerging a person’s head in water to the point of suffocation, standing on or walking on people, beatings, cutting with pieces of glass, placing a hood over a person’s head and burning it with lit cigarettes, rape, mock burials and executions, beatings and deprivation of food and water, threats of behavior that would constitute inhuman treatment, threats of removal of body parts, exposure of other victims to torture or threats of death” (IACHR, 2002, para. 161).

³ Gozaíni (1995) maintains that “today, the guarantee of human rights has become a kind of supreme legitimizing instance of the exercise of power, to the point that it is practically impossible to find any system of government that, in one way or another, is not concerned with offering a public image of full compliance with human rights” (p. 24).

⁴ The Universal Declaration of Human Rights in its Article 5 states: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment” (UN General Assembly, 1948, art. 5).

⁵ The practice of torture and violations of liberty and personal integrity has been evident to the whole world. Think of the prisoners suspected of terrorism in the cages of Guantanamo, the inhuman, cruel and degrading treatment in Abu Ghraib prison during the occupation of Iraq by the United States, and other detention centers such as Bagram in Afghanistan (Ferrajoli, 2013). Mexico does not escape this reality, the torture documented by various international organizations that point out that torture and ill-treatment have a generalized nature, which is used mainly for criminal investigation purposes, as a means of intimidation and punishment within the justice system, detention and reintegration centers, in arbitrary detentions, as sexual violence such as that which occurred in Atenco against women protesters, among others.

⁶ Report on the mission to Mexico (April 21 to May 2, 2014) of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez or cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, (A/HRC/28/68/Add.3), paragraph 76.

Certainly, torture is one of the criminal acts of greatest concern worldwide, and constitutes one of the most serious forms of violation of human rights that is not justified under any circumstances, it is a practice that destroys the most precious possession of a person. - its human integrity-(Alonso-Niño, 2014); it affects the essential core of the person; torture is a process that tends to annul the personality, identity, and deepest intimacy of the human being, it is an act that fractures, that breaks all affective and trusting relationship with the outside world (Pino, 2017), a consummated form of “total annihilation of the existence” (Améry, 2001, p. 91). Therefore, anyone who practices it commits a crime against humanity (Alegre, 2014).

The prohibition of torture is certain and absolute in international law and domestic law (La Torre, 2020), it cannot be given under any factual assumption the rational necessity of acts of torture and its proportional adequacy to the fact, i.e., acts of torture and cruel, inhuman or degrading treatment cannot be legitimized as the use of force by the authorities in detention or subjugation is validated. In fact, the prohibition of torture is equated with the prohibition against slavery or genocide, and therefore has a *prima facie* absolute⁷ meaning, so relevant that, even those States that are not party to international treaties that explicitly prohibit torture, are prohibited from applying it under factual assumptions such as: national security, state of emergency, war, public emergency or threats of terrorism against the population (APT, 2008), “internal commotion or conflict, suspension of constitutional guarantees, internal political instability or other emergencies or public calamities; neither the dangerousness of the detainee or prisoner, nor the insecurity of the prison or penitentiary establishment can justify torture” (IACHR, 1985, art. 5). Article 2.2 of the UN Convention against Torture (1985) expressly states that no exceptional circumstances whatsoever, such as a state of war or threat of war, internal political instability or any other public emergency, may be invoked as a justification for torture or any other act that violates the dignity and integrity of the person. In this context, the second paragraph of the 29th article of the Mexican Constitution, regarding the restriction or suspension of human rights and their guarantees, establishes that under no circumstances may “the prohibition of slavery and servitude; the prohibition of forced disappearance and torture, nor the judicial guarantees indispensable for the protection of such rights” be suspended (Const., 2022, art. 29).

However, the prohibition of torture and ill-treatment is not only an absolute norm, but constitutes a notable example of a norm of international law that has attained an imperative character of *jus cogens* (Drnas de Clément, 2002); a peremptory norm of international law that is accepted and recognized as a norm from which no State may derogate or withdraw by means of an agreement or reservation, at the time of being bound by a human rights treaty or convention (Nash, 2009). The Inter-American Court of Human Rights (hereinafter IACHR), has stated that:

The absolute prohibition of torture, both physical and psychological, belongs today to the domain of international *jus cogens*. This prohibition

⁷ We speak of *prima facie*, from a human rights context, to refer to the idea of the importance, strength, of the strong moral requirement that accompanies the absolute prohibition of torture, and that makes it a superior principle that governs the actions of States, and that consequently cannot be displaced by any factual assumption, circumstance or moral, legal or political consideration.

subsists even in the most difficult circumstances, such as war, threat of war, fight against terrorism and any other crimes, state of siege or emergency, internal commotion or conflict, suspension of constitutional guarantees, internal political instability or other emergencies or public calamities (Case of *Bueno Alves v. Argentina*, 2007, para. 76).

Therefore, they have a binding force supreme to any other rule of international law and are intended to protect fundamental values for humanity, which are “imposed over the consent of the States that in international law conditions the validity of the rules” (Cebada, 2002, p. 4).

2. CONTENT AND SCOPE OF THE CONCEPT OF TORTURE

The concept of torture has been evolving, because unlike the traditional concept, in which the constituent elements and decisive factual assumptions of torture focused mainly on causing serious physical or mental harm inflicted intentionally, and with the sole purpose of obtaining information or a confession, punishing or intimidating (SCJN, 2015); the concept of torture in the current Rule of Law, more specifically in the General Law to Prevent, Investigate and Punish Torture, and other Cruel, Inhuman or Degrading Treatment or Punishment (2017) (hereinafter LGPIST), we can see that in Article 24 the concept emphasizes the normative development of the Inter-American Convention to Prevent and Punish Torture, and the jurisprudence of the IACHR⁸, by incorporating into the purpose or aim of torture personal punishment, as a means of coercion, as a preventive measure, or for reasons based on discrimination or any method tending to diminish or annul the personality of the victim or his physical or psychological capacity, even if it does not cause him pain or suffering⁹, as a form of intimidation, and as a means of official social control¹⁰.

⁸ Cases: Case of *Bueno Alves v. Argentina* (2007, p. 79). Case of *Inés Fernández Ortega et al. v. Mexico* (2010, p. 93). Case of *Valentina Rosendo Cantú et al. v. Mexico* (2010, p. 83). Case of *Women victims of sexual torture in Atenco v. Mexico* (2018, pp. 58-80).

⁹ These new methods tend to cause, even temporarily, the disintegration of the victim’s personality, the destruction of his mental equilibrium and the subjugation of the free determination of his will. Inter-American jurisprudence has indicated that certain acts amount to cruel, inhuman or degrading treatment. These conducts are particularly practiced in the context of detention, where those deprived of their liberty are subjected to prolonged interrogations under the effects of sodium pentothal, known as “truth serum” (IACHR, 2002, paragraph 161). The use of this drug in interrogations must be provided under strict control, as it produces serious side effects and even death in the case of overdose (Case *Herzog et al. v. Brazil*, 2018).

¹⁰ Torture, cruel, inhuman and degrading treatment are used as a weapon of control of public or social order, when such acts transcend the personal sphere of the victim to impact society through these violations with the objective of not only harming the victim directly, but also sending a message of power, intimidation and repression about the scope, character and strategies of official social control (Nagan and Atkins, 2001). The IACHR in the case of *Atenco vs. Mexico* (2018), pointed out that sexual violence is used as a tactic or strategy of control, domination or imposition of power, since sexual violence was applied in public, in the presence of several witnesses, with the purpose or intention to intimidate, to give a message of domination, forcing the other detainees to listen or even see what was done to the women’s bodies; thus using them as tools to transmit a message of repression, and in this way disapprove the means of protest used by the demonstrators.

Likewise, torture shall be understood to mean other methods of affecting personal integrity, medical or scientific procedures¹¹ on a person without his consent or without the consent of the person who could legally grant it. In Article 25 of the LGPIST (2017), individuals who with any degree of authorship or participation and with the authorization, support or acquiescence of a public servant commit any act of torture are indicated as active subjects. It is important to note in this regard that the prohibition of cruel, inhuman or degrading ill-treatment not only requires public servants a negative obligation not to intervene in such actions, but state agents also have a positive obligation to protect persons “under their custody or control” (UN, 1999, art.7)¹² against the acts of a private individual (UN, 2004). On the other hand, it establishes the imprescriptibility of the act of torture and reaffirms the inadmissibility or nullity of any evidence obtained directly through acts of torture, prohibits the granting of pardons or amnesties and the recognition of immunities to persons prosecuted or convicted for acts of torture (UN, 2019b). It also standardizes criminal offenses related to torture, such as cruel, inhuman or degrading treatment, which are acts that cause physical pain and severe mental anguish, not necessarily intended to obtain information or confessions, but that are regularly carried out with the purpose of punishing, annulling or degrading people, causing them severe physical and psychological suffering or damage that constitute a violation against personal integrity and human dignity.

2.1. The scope of the principle of equal appreciation of differences in the concept of torture

In the LGPIST (2017), is particularly relevant the increase of penalties by up to one half when the victim is a child or adolescent; a pregnant woman¹³; a person with a disability; an elderly person; a person subjected to any form of sexual violence; thus paying attention to respect for cultural and social diversity, differences, discrimination and plurality of

¹¹ An example of a medical procedure or scientific method that is considered to affect personal integrity is chemical castration, used as a punitive measure for the prevention of crimes of a sexual nature. From a human rights perspective it is considered a cruel, inhuman and degrading punishment. This medical procedure consists of the administration of drugs that reduce libido-Diethylstilbestrol (DES), medroxyprogesterone acetate or hormone-releasing hormone (LHRH)-and is applied with the aim of preventing rapists, pedophiles and other sexual offenders from reoffending. The countries where this practice is permitted for sexual crimes against minors are: Indonesia, United States of America (California, Florida, Georgia, Iowa, Louisiana, Montaba, Oregon, Texas and Wisconsin), Poland, Russia, India, Moldova, Estonia, South Korea, other countries that have approved forced chemical castration of pedophiles are Ukraine, Canada, Denmark, Germany, Israel, Kazakhstan, Norway and Sweden. On a voluntary basis, it has been provided for in the United Kingdom, Australia, Spain, France, and Argentina, as the only country in Latin America (BBC, 2016).

¹² Article 7 of the Rome Statute states that: “Torture means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; however, torture shall not include pain or suffering arising only from lawful sanctions or being the normal or incidental consequence thereof” (UN, 1999).

¹³ The Supreme Court of Justice of the Nation, in the Protocol of action for those who impart justice in matters involving acts constituting torture and ill-treatment, considered obstetric violence as a conduct that occurs in health institutions, which can become a form of ill-treatment (SCJN 2014a).

perspectives such as gender, and the vulnerability, disadvantage and defenselessness of certain groups. This corresponds to a “differential and specialized approach”¹⁴ that we are just beginning to see to take on relevance in the public exercise, since for a long time the differences remained legally standardized in the actions of the State, concealing the inequality and discrimination that these differences entail; it is important to point out that this differential approach is based on the principle of equal legal valuation of differences proposed by Ferrajoli, which has its *raison d’être* in the principle of equality based on the identical ownership and effectiveness of the guarantees of human rights, “independently by the fact, and on the contrary, precisely by the fact that their holders are different among themselves“ (Ferrajoli, 2010, p. 8).

In practice, this principle is fundamental in the fight against torture and other cruel, inhuman or degrading treatment, as it obliges the authorities to observe and assess the differences of population groups with specific differences and the degree of defenselessness, disadvantage or vulnerability in which they find themselves for reasons of age, gender, sexual preference or orientation, ethnicity, disability, among others; therefore, the authorities that apply the LGPIST (2017), must guarantee access to the same rights and opportunities for all persons, regardless of their differences, establish appropriate measures and special guarantees of protection to these groups, which are exposed to a greater danger of violation of their human rights. In the context of torture, this principle is relevant, since all victims of torture must have access to justice, to a prompt and effective investigation, to punishment, to reparation of damages, regardless of their ethnic origin, social or economic status, sex, age, color, disability, sexual preference or any other ground or category suspected of discrimination.

Without doubt, acts of torture, cruel, inhuman and degrading treatment especially affect groups in a situation of disadvantage or vulnerability, and therefore, more likely to suffer harm, such as: women, children and adolescents, the elderly, people with disabilities, migrants, indigenous people, etc., so that the risk and disadvantage is exacerbated and results in their vulnerability to be victims of violations of their human rights, cruel, inhuman and degrading treatment, therefore, the risk and disadvantage is aggravated and brings as a consequence that in a situation of vulnerability they are victims of violations to their human rights, cruel, inhuman and degrading treatment; which are visible, to mention some, to women, indigenous people and migrants.

In the case of women; the complaints of sexual torture of which they are victims in detention, since “one in ten claims to have been a victim of rape during the detention process“ (UN, 2019a), which include forced nudity, insults and verbal humiliation,

¹⁴ Article 6 frac. III. LGPIST (2017). “Differential and specialized approach: when applying the Law, the authorities must take into account the existence of population groups with particular characteristics or with a greater situation of vulnerability due to their ethnic or national origin, language or dialect, religion, age, gender, sexual preference or orientation, gender identity, disability status, social, economic, historical and cultural status, as well as other differentiating circumstances and that require specialized attention for the same.”

groping of the breasts and genitals, introduction of objects into the genitals, repeated sexual assault and rape by several people, which in most of these cases have not been investigated or punished. In recent research, it has been observed that women are more likely to be victims of sexual violence by military forces and security corporations. This form of aggression is considered especially appropriate for women, due to a conception of femininity that supports it. (Sánchez 2020). The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, in his report on his mission to Mexico, points out that “most of these cases have not been investigated or punished, or have been classified as less serious conduct” (UN, 2014, p. 8). On December 21, 2018, the IACHR condemned the Mexican State for the case of Women victims of sexual torture in *Atenco v. Mexico* (2018), for physical and psychological violence and sexual torture exercised against 11 women during their detention and subsequent transfer to a Social Readaptation Center on May 3 and 4, 2006. In this ruling, the Mexican State recognized its international wrongfulness for the violations of the human rights of health protection, judicial guarantees, equality before the law, as well as for its failure to comply with its obligation to investigate acts of torture and violence against women. The IACHR Court determined in this case that, in general terms, rape, like torture, has the purpose of degrading, threatening, humiliating, discriminating, punishing, and controlling or annulling the personality of the victim. In addition, it establishes standards to qualify a rape as torture, by considering as basilar elements: the intentionality, the severity of the suffering, as well as the purpose of the act of torture, taking into consideration the context and the specific circumstances of each case (*Case of Women Victims of Sexual Torture in Atenco v. Mexico*, 2018).

In this context of torture, another group that deserves special attention are indigenous people. The Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people has pointed out that in many countries they are victims of acts of violence and ill-treatment; the most vulnerable are indigenous women and children (IACHR, 2004). In its report, it has pointed out that, in many countries, indigenous persons have disproportionate access to criminal justice, as they are denied due process rights and freedoms, and are generally victims of violence and mistreatment (IACHR, 2004). Some reports indicate that, in Mexico, indigenous women are victims of mistreatment and harassment when incarcerated (IACHR, 2004). The Mexican National Human Rights Commission (CNDH) has documented several cases of torture against indigenous persons in different parts of the country. In its special report on torture in Mexico, published in 2018, the CNDH noted that indigenous persons are one of the populations most affected by this practice (CNDH, 2018).

The migration corridor between the United States of America and Mexico is the one with the highest flow of migrants worldwide (IACHR, 2015). The Office of the Special Rapporteur on Torture has indicated that Mexico is one of the main countries of origin, destination, transit and return of migrants (UN, 2014). Therefore, there is a potential risk of violence and human rights violations suffered by migrants at all stages of the migration process. For example, the Rapporteurship on the Rights of Migrants of the International Commission on Human Rights (hereinafter IACHR) to Mexico (IACHR 2015), has evidenced the situation of extreme vulnerability of which migrants and other persons in

the context of human mobility are victims; it has pointed out that the socioeconomic, political, environmental and citizen security situation in the region are the main factors of expulsion and attraction that lead to the situation of extreme vulnerability in which migrants in irregular situations in Mexico find themselves. The CNDH, has pointed out that the vulnerability of migrants is considered structural in nature, and how this has currently worsened due to the hardening of migration policies in the United States by seeing this phenomenon more as a national security situation than as a human rights situation of migrants (CNDH, 2017). In one of its recent recommendations on the personal integrity of migrants, it has stated that a fundamental factor in the vulnerability of migrants is the lack of migratory documents or authorization from the State to transit or reside in its territory. Consequently, this forces them to move through clandestine means and networks (CNDH, 2022). The Office of the Special Rapporteur on Torture has expressed its concern about the violence, cruel, inhuman and degrading treatment with which State agents detain migrants (UN, 2014).

From this perspective, the most current and advanced normative concept of torture is configured, considering that the current criminal offense complies with the standards and commitments that the Mexican State has assumed in the international treaties for the protection of human rights recognized in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, in the Inter-American Convention to Prevent and Punish Torture, Observations and Recommendations of monitoring or oversight bodies such as the Committee Against Torture of the United Nations, as well as the rules of the Inter-American Convention against Torture, Inhuman or Degrading Treatment or Punishment, the Inter-American Convention to Prevent and Punish Torture, Observations and Recommendations of monitoring or oversight bodies such as the United Nations Committee Against Torture, as well as relevant rules of humanitarian law, refugee law and international criminal law; and also reflects the dynamics of power and social relations underlying the practice of torture by highlighting the importance of analyzing social and cultural structures influenced by factors such as: gender, conditions of vulnerability, reasons of discrimination, impunity, corruption, which allow and encourage acts of torture, as well as the legal and political responses to this problem in a society¹⁵.

3. THE PROHIBITION OF TORTURE AS A HUMAN RIGHT: ASPECTS OF EFFICACY AND SOCIAL LEGITIMACY

Despite these normative advances in terms of the configuration of the notion of torture, it is evident that in Mexico there are two presumptions in this matter: problems

¹⁵ In the case of *Montiel Flores and Cabrera García vs. Mexico* (2010), the IACHR determined that violations of the right to physical and psychological integrity of persons is a type of violation that has various connotations of degree, ranging from torture to other types of abuse or cruel, inhuman or degrading treatment whose physical and psychological consequences vary in intensity according to endogenous and exogenous factors (duration of treatment, age, sex, health, context, vulnerability, among others) that must be demonstrated in each specific situation.

of effectiveness¹⁶ of human rights due to the minimal possibilities of practical realization of the mechanisms with which the State operates to comply with its absolute and non-derogable obligation of due diligence¹⁷ in the prevention, investigation, registration, and prosecution of cases of torture in all its forms and in all circumstances, as well as of its ineffectiveness in the protection and respect for the personal integrity of the victims who have suffered it (UN, 2021). Thus, the problem of the effectiveness of human rights and the right not to suffer torture produces a lack of social legitimacy, because of the way in which this practice affects social cohesion by undermining the trust and expectations of citizens in the institutions of the State and in the systems of administration and administration of justice due to the obstacles of the possibilities of realization, which consists of the effective political will to guarantee human rights and eradicate the practice of torture, having the resources to do so. For Ferrajoli, a State that tortures a person not only loses any legitimacy, but also contradicts its *raison d'être*, placing itself on the same level as the perpetrators (Ferrajoli, 1995).

Currently -Ferrajoli argues- there is a growing tendency to remove torture more and more from the public eye and from interest as an object of study and reflection of legal dogmatics (Ferrajoli, 2008b). As a consequence, the State is not developing necessary, effective and fair state policies to address the problem of acts of torture, therefore, the State faces great dangers such as the emergence of positions that seek to relativize its absolute prohibition, as well as challenges that demand the ability to react on a large scale to address what Arnaud calls the paradox of paradoxes, which has to do with the regulatory inability of law and the State to address the complexity of this social-legal phenomenon (Arnaud, 1994). This leads us to the fact that the situation of torture is a problem that places the State in a position far from balance, between norms recognizing human rights and their real legal effectiveness in power relations and social dynamics in a context in which torture, cruel and inhuman ill-treatment are a widespread and systematic practice that is influenced by cultural factors, inequality, discrimination, impunity, lack of effective investigations, therefore, the legal-political responses with respect to this problem have been insufficient to develop solutions that address the structural causes, consequences and effects that impact on both of its aspects, as a violation of human rights and as a crime (SCJN, 2014b), and in this sense can advance in the justiciability, prevention, investigation, eradication, protection, reparation, and punishment of acts of torture.

¹⁶ Effectiveness in general will refer to the effects of the rules, i.e., with a view to the practical realization of the content expressed in them. In this sense, the law will be effective if and only if it succeeds in directing human behavior. The term effectiveness, on the other hand, translates into what is called real efficacy. Effectiveness refers to the analysis of the consequences of the application of the norm in order to contrast them with the legislator's intention, in this sense, the criticism of the effectiveness of the law is the object of legal science and the theory of law, while effectiveness would be the task of sociologists of law (Gonzalez, 2003).

¹⁷ Article 6 frac. II LGPIST (2017). "Due diligence: which means that all prevention, investigation, criminal proceedings and reparation initiated for the crimes or violations of fundamental rights provided for in this Law, must guarantee their development in an autonomous, independent, immediate, impartial, effective manner; and must be carried out with timeliness, thoroughness, respect for human rights and the highest level of professionalism".

In this sense, torture and ill-treatment are a practice that originates in systems that are overstressed; consequently the State changes direction in the way it must comply with its commitments and obligations, thus originating instability, to the critical point that the order breaks down and bifurcates¹⁸; as a result, the legal-political system falls into crisis and conflict; and it is in this scenario that the practice of torture arises, in this context, the Rule of Law is threatened and legal institutions are no longer able to guarantee security and justice. From this point of view, torture becomes a symptom of weakness of the Rule of Law, which produces a social delegitimization due to the defrauding of society's expectations in legal institutions and in the procedural guarantees of criminal justice systems. Consequently, a progressive effect of the displacement of the State to spaces of illegality, impunity and legitimacy is created within the legal and moral framework of the absolute prohibition of the practice of torture, cruel, inhuman or degrading treatment (García, 2001). Thus, from this perspective, torture is not an isolated or exceptional phenomenon, but is related to a culture of illegality, impunity and violence that affects society as a whole.

The central problem in relation to the real effectiveness of human rights and the right not to be tortured, lies in the fact that we already find ourselves, as Ferrajoli argues, before a realist fallacy that consists in the reduction of the right by the reality of the facts, and the determinist fallacy by the identification of what happens with what cannot fail to happen (Ferrajoli, 2016), because despite its absolute prohibition without exception, cases of torture, cruel, inhuman and degrading treatment continue to occur. In Mexico, torture is widespread; the crux of this element is the act carried out on a large scale, and the number of victims who are subjected to it. National and international organizations have pointed out that, in Mexico, torture and cruel, inhuman and degrading mistreatment are present in several areas of action of state agents. In general, these cases occur in the criminal justice system, that is, as a result of acts derived from effective investigation and documentation, clarifying the facts, recognizing the responsibility of the actors, as well as establishing the necessary measures to prevent the repetition of these acts during detentions related to the criminal process. Torture is frequently applied in the period between the time of arrest - generally arbitrary - and the time when the victims are brought before the Public Prosecutor's Office. Victims are deprived of their liberty in illegal detention centers (IACHR, 2015).

This is reinforced by the National Survey of Population Deprived of Liberty (INEGI, 2021) conducted on more than 64 thousand people incarcerated in 338 penitentiary centers,

¹⁸ Becoming familiar with the new meaning of the word bifurcation is one of the fundamental insights of our time: [...] the basic meaning of bifurcation is a sudden change of direction in the way systems unfold... Bifurcations are triggered when complex systems are overstressed, beyond their threshold of stability. Up to that point the behavior of the systems is relatively orderly, there is periodic oscillation, i.e. movement around or towards a certain state, or stability in one state or another. But beyond the critical point, order breaks down and the system falls into chaos. Its behavior is no longer predictable, although it is not entirely random either. In most kinds of complex systems, chaos finally gives way to a new variety of order... We ourselves and the ecological, social, economic and political structures in which we live constitute complex systems. These structures unfold and sooner or later their evolutionary paths bifurcate. Our world is subject to sudden and surprising phase shifts.... (Grün, 1997, p. 19).

in which it resulted that, two out of three, that is 64% reported some type of physical violence at the time of detention, such as electric shocks, strangulation and asphyxiation (CNDH, 2019; INEGI, 2021). The UN Special Rapporteur noted that there are several documented cases exposing that torture is used on a regular basis throughout the country by municipal, state and federal police officers, state and federal ministerial agents, and the armed forces. In the National Census of State Justice Procurement (2017), INEGI mentioned that, nationwide, a total of 3,569 victims of torture and other cruel, inhuman or degrading treatment or punishment were reported, identified in preliminary inquiries initiated and open investigation files. Despite the fact that evidence obtained through acts of torture is prohibited in criminal proceedings, most defendants face obstacles and delays in proving that they were tortured, which restricts the effectiveness of the prohibition, which should be strict, complete, unconditional and imperative (2017)¹⁹.

This situation is aggravated by the lack of a national registry²⁰ that prevents knowing the actual cases of torture, in this sense, the LGPIST (2017) requires the Attorney General of the Republic in its Article 35 frac. III “Perform the registration of the fact in the National Registry”, to follow up on the complaints of torture, however, it wasn’t until December 2022 that the Attorney General’s Office of the Republic created the online registry publishing barely some preliminary data. On the other hand, there is a tendency for authorities not to investigate complaints of torture and to qualify acts of torture and cruel and inhuman ill-treatment as less serious crimes (UN, 2014), such as: excessive use of force, injuries resulting from resistance in the subjugation of the detainee, abuse of authority, self-defense, state of necessity.

In the most recent inquiry to inmates in prison in July of 2021, half of the incarcerated people expressed that, after being detained by police authorities and by the elements of the armed forces, they had used excessive use of force to subdue them (INEGI, 2021). Among the inmates who had confessed to committing a crime, 38% indicated doing it after being beaten and threatened. Our preliminary conclusive consideration is that in the subject of torture, there is a multiplicity of problems, as well as a series of structural challenges that the law enforcement agencies and the prosecutors have to confront and that have not managed to overcome despite having control mechanisms and monitoring for the prevention, documentation, investigation, and punishment of torture and with a specialized national and international legislation that represents a significant challenge for the expected change in structures and methodologies for its action and investigation.

¹⁹ Article 6 of the LGPIST (2017), frac. VII dictates: “Absolute prohibition: torture and cruel, inhuman or degrading treatment or punishment are strictly, completely, unconditionally and imperatively prohibited”.

²⁰ Article 83 of the LGPIST (2017), dictates: “The National Register is the research and statistical information tool that includes data on all cases in which cases of torture and other cruel, inhuman or degrading treatment or punishment are reported and investigated; including the number of victims of the same, which will be integrated by the databases of the Institutions of Procurement of Justice, the National Commission, the Human Rights Protection Organizations, the Executive Commission and the Commissions of Attention to Victims; as well as the cases that are processed before international organizations for the protection of human rights”.

**4. CURRENT THEORIES ON THE ETHICAL-RATIONAL JUSTIFICATION OF TORTURE:
MAIN POSITIONS IN FAVOR AND AGAINST IT**

Despite the absolute prohibition of torture, achieved in the legal systems of the States, torture is still in force, the novelty lies in the fact that in recent years in the accidental democracies is open debate about the constituent elements that make up the concept of torture contained in declarations, covenants, conventions and international treaties on human rights, with questions that have been invoked in certain areas on the legitimacy and legality of its use, trying to relativize the scope of its prohibition for the investigation and prosecution of certain crimes, and in extreme or exceptional circumstances that threaten peace and national security such as terrorism, organized crime, as well as to obtain information necessary to protect innocent people who are facing a clear, direct and high risk to life and personal integrity; and that can be caused by an identifiable and unique active subject that can materially avoid the real damage (Bea, 2007).

The main argument on which the new paradigm of the ethical-rational justification of torture is based on the following question: Can torture be used in police interrogation procedures as a mechanism to save the lives of innocent people (Cano, 2014)? Can the use of torture by the State as a mechanism to obtain the truth in the face of terrorist threats be validated? The justification of this type of torture based on these approaches is called rescue torture, and is based on Brugger's theory of necessity, which consists of the defenseless becoming the aggressor and extreme aggression becoming a last but possible defense (La Torre, 2020).

This argument is reinforced by the reasoning of Wolfgang Lenzen, who, according to him, one thing is "genuine torture" that has as its object and purpose the degradation and suffering of a human being, and another thing is what he calls "torture in quotation marks", which is on the contrary a conduct that has as its objective the saving of human lives (Lenzen, 2006). Professor La Torre makes an interesting argument regarding the distinction between the deliberate infliction of suffering for the purpose of humiliation and degradation, and the infliction of suffering for the purpose of obtaining information crucial to preserving human lives. According to him, this distinction seems more appropriate to a philosophical reflection than to the legal argumentation of a trial lawyer. This notion is perceived essentially as a clever device, a technicality. For La Torre, this approach is simply untenable. A close analysis of what is commonly referred to as "torture" - with or without quotation marks - recognizes that in order for it to fulfill its function and be effective, it must first meet the quality of being "real torture". This is achieved through the application of specific acts and practices aimed at inflicting suffering, humiliation and degradation on those who are subjected to them. The information that is sometimes obtained through this coercion is acquired because it has undergone a process of extremely intense degradation, to such a degree that it becomes unbearable for the individual who has suffered it. However, it is essential to emphasize that this level of suffering and degradation was previously conceived as such by the person who applies it (La Torre/Lalatta, 2018).

This approach sheds light on the question of whether "torture" itself can be justified on the basis of obtaining vital information. It involves recognizing that torture, to be

effective in this sense, must be inherently inhumane and brutal, highlighting the inherent contradiction between the supposedly “noble” objectives and the means employed. In this way, La Torre’s analysis raises valuable questions about the ethics and legality surrounding the use of extreme practices, raising the importance of carefully weighing the implications of such actions in a broader context of human rights and justice.

Consequently, the focus quickly shifts from the actual context of the act of torture, in which there is a tortured victim and an aggressor who performs the act of torture, to a possible and prior circumstance in which the relationship between victim and aggressor is configured in such a way that the victim becomes the torturer and no longer the victim. Therefore, torture then becomes a way of restoring and readjusting the right between the victim and the torturer, making it clear that the suffering of the victim takes second place and it is notably the tortured person. From this perspective, self-defense and state of necessity reach a prominent meaning to justify the legitimate use of torture or any cruel or inhuman treatment. At this point, what is unjust is that the alleged offender has kidnapped an innocent person and does not want to reveal where he is being held, so that the social expectation is also focused on the injustice that the State produces by not being able to protect the kidnapped person before, continues without protecting him, does not find him, and does not release him. Consequently, the abuse of the act of kidnapping is transferred to the norm that prevents the police forces from acting by prohibiting acts of torture, ill-treatment, inhuman and cruel treatment of the kidnapper (La Torre, 2020). Thus, what is called the theory of necessity is configured, which argues that torture is necessary in extreme situations, such as in cases of kidnapping, terrorism, to obtain information that can save the lives of innocent people.

In fact, under these arguments it is intended to find a rational justification to apply in these cases the state of necessity that allows to preserve the unlawfulness of the act (act of torture) but that eliminates the responsibility that can be attributed to the active subject that in order to protect the life of the victims deprives the human rights of the other person (the kidnapper). In this case, the detained kidnapper who continues to hold the kidnapped person in captivity and denies him his freedom, the kidnapper is not defenseless and is also a criminal who has the obligation to stop his criminal plan and cooperate with the authorities. In this situation, the dignity of the aggressor conflicts with the dignity of the victim, who continues to be violated by the aggressor even after his arrest. In these cases, torture can be considered as a way to restore the victim’s dignity through the use of force to obtain information necessary to free the abductee (La Torre, 2020).

Authors such as Luhmann have proposed that, in the face of terrorist threats against the lives of innocent people by a time bomb, the principles and unrenounceable norms must be rejected, since, in a case like this, respect for fundamental rights and human dignity cannot be invoked, therefore, torture must be used as a mechanism to obtain information about the location of the device. According to Luhmann, if a terrorist is captured before the bomb explodes, one could consider lifting the “unwaivable standard” of human dignity in this case to obtain information about the location of the bomb and how to defuse it. Luhmann proposed the application of torture under the supervision of international judges and with televised observation of the scene from Geneva or

Luxembourg, and remote management through the use of telecommunication devices (Quintero, 2016).

It is imperative to consider that the justification for torture is intrinsically linked to the risks inherent in its application to an individual. In the context of the Ticking Bomb Scenario (TBS) Security-Based Torture debate, the question arises that, if there is strong evidence that a person possesses relevant information about the location of a bomb, how to deal with the possibility that this person is innocent or lacks sufficient information to indicate an imminent threat? In such circumstances, there is concern about torturing an individual under these conditions. This scenario also poses a conflict between two protected legal values: on the one hand, the physical and moral integrity of the individual subjected to torture; on the other hand, the lives of the people who could be affected by an explosion. The choice between these two fundamental legal goods becomes a moral and legal dilemma of utmost importance. Which option should prevail in cases such as this?

Similarly, the theory of the lesser evil is addressed, which postulates that in situations where two evils are confronted, one should opt for the one that causes less harm, with the intention of achieving a general benefit. In this line of thought, the aim is to mitigate the harmful effects by choosing the option that causes the least harm in a critical situation. (Arias, 2019, 406).

Ultimately, the discussion surrounding the justification of torture, the ethical dilemmas it poses, and the balancing of fundamental values illustrate the complexity of decision making in extreme situations. These debates highlight the importance of a comprehensive approach, based on legal, ethical and humanitarian principles, to address these sensitive issues and reach solutions that seek to safeguard the dignity and rights of all involved.

A paradigmatic case regarding the justification of torture in borderline circumstances arose from a “Jakob von Metzler” case in Germany that generated a great deal of debate and a number of scientific articles. This case brought to the table essentially controversial issues such as the justification of the practice of physical or psychological torture by the state in situations of “state of necessity” to safeguard the life of an eleven-year-old boy who had been abducted on September 27th, 2002. This measure was positively accepted by the public as a means of justifying the protection of a lesser good in order to protect a higher good according to German legal dogmatics. This case in question posed a dilemma for the judges, as they had to make a decision between two important legal values: on the one hand, the protection of the physical integrity of a child and, on the other hand, the preservation of the psychological integrity of the alleged abductor who was suspected of having committed a crime. Taking into account that the intention behind the physical coercion was not to clarify a crime, that the purpose of the act of torture was not to obtain any personal or psychological benefit, but rather to protect the life of the child, the judges, despite assessing the prohibition of torture, cruel, inhuman or degrading treatment by an agent of the State, imposed penalties considered as one of the lightest penalties provided for in German law. Moreover, these penalties were imposed conditionally, which means that both should pay the fines only in case they commit such acts again (Cano, 2014).

To understand this case it is necessary to mention that there are positions that advocate restricting the practice of torture and limiting it only to physical aggression, i.e., any act that causes physical pain, but not psychological distress. In this sense, it is important to bear in mind that both Germany and Italy do not criminalize torture, and although they have ratified the United Nations Convention against Torture, which considers in its 2nd article that no exceptional situation may allow a State to justify torture, doctrine adds that it is not possible to argue that the threat, coercion or intimidation to obtain information or a confession cannot be considered torture²¹.

In response to advocates standing up for the relativization of the prohibition of torture, criticism emerged from various sectors of politics and academia. These criticisms were seen as a setback to the country's human rights culture. The European Court of Human Rights followed up on the case and took note of it. In particular, the support of state officials and organizations related to the judicial system was criticized for their ignorance of the constitutional mandates regulating the issue. Furthermore, it was emphasized that such a discussion could not allow room for the differentiation between "superior" and "inferior legal goods", which is what Daschner's defenders were basically promulgating. Finally, it was recalled that the Federal Republic of Germany is a party to several international human rights instruments prohibiting torture, including the European Convention on Human Rights, the European Convention for the Elimination of Torture and Inhuman or Degrading Treatment, and the International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (Góngora, 2005).

Finally, the "Jakob von Metzler" case reached the European Court of Human Rights in Strasbourg, and on June 1st, 2010, it convicted Germany for psychological torture of Magnus Gäfgen on charges of kidnapping and murdering an 11-year-old boy, in violation of the 3rd Article of the European Convention on Human Rights, which prohibits torture and inhuman or degrading treatment. The court found that the threats of torture against Gäfgen were incompatible with the fundamental values of a democratic society and that the coerced confession was inadmissible as evidence in criminal proceedings. The ruling established that torture is an inhumane and unacceptable method in all circumstances, including in cases of public safety and emergencies. However, judges in Germany defended their actions, arguing that torture can never be justified, but that police often have to use pressure tactics to obtain critical information in kidnapping or terrorism situations.

On the other hand, in a recent work, Dworkin (2006), in a position against the relativization of the absolute prohibition of torture, wondered about the moral justification of torture. The case of a government that resorts to this practice to confront a terrorist threat is presented. After a conceptual clarification of what we should understand by human rights and a discussion of when a violation of human rights occurs, Dworkin rejects torture as a means of securing political objectives, collective interests and the rights of others. For

²¹ For a broader perspective on the implications of the state of necessity and torture in criminal justice today, see Muñoz's (2017) keynote lecture.

Dworkin, human rights find their foundation in two principles of human dignity; that of the intrinsic value of life and that of personal responsibility in the realization of that value in one's own life. These two principles are concretized in a fundamental human right: the right to be treated according to a certain attitude. That is, an attitude that expresses the understanding that each person is a human being whose dignity matters. Accepting such principles implies, for Dworkin, limits to the actions of a government, group or person. The justification of such actions depends directly on respect for these principles (Dworkin, 2006).

La Torre (2007a) adds to Dworkin's reflection with another very suggestive work on torture. In his study, the Italian professor exposes, quite clearly, the different strategies justifying torture since the events of September 11th, 2001:

- The first strategy is that of the superiority of the Executive, to allow certain cases of torture, with respect to state and international legality. The situation of the fight against terrorism is assimilated to war and, in these cases, it is said that the President is subject only to his own judgment.
- The second strategy is to consider that torture is a fact that occurs in any case in the face of terrorist attacks or serious emergencies against the security of the State.
- The third strategy, the most powerful and immediate, consists of justifying torture to extract information about an attack that will occur immediately and, for whose solution, only those who have the information can be tortured. It is the so-called rescue torture.
- The fourth strategy is the one that appeals to the responsibility of taking the decision to torture, placing us in the previous cases, exclusively to politicians, as if they enjoyed a different ethics from the rest that, in these cases, would be put to the test.

There is no doubt that all these strategies, post 9/11, are contrary to the idea of the rule of law and its minimum guarantees²². And one does not have to go that far in the strategies of justification of torture to reject its use, in any case. As La Torre (2007a) writes:

Thus, our conclusion can only be the following. Torture has no place in the rule of law. In the first place, because it breaks the process of civilization of the juridical experience set in motion by the Enlightenment and modernity, which aims at lowering the level of force and the rate of violence in social relations and, especially, in the juridical sphere. Torture has no place in the

²² According to Portilla (2008): "Specifically, September 11, 2001, has reoriented the philosophy of global security, creating a defense project in which the principle of procedural legality disappears" (Portilla, 2008, p. 51).

rule of law, however, for another, perhaps more important reason. It is a structural reason. The principle of legality, the rule of law, is the criterion according to which the determination of a conduct, and even more so of a violent conduct by a public body, must make the conduct in question foreseeable and proportional (La Torre, 2007a, pp. 85-86).

Ferrajoli (2013), for his part, has established two simple types of guarantees aimed at preventing the continuation of this type of acts of torture, which are of great importance for the case of Mexico, as we shall see.

The first is a more rigid limitation of police powers of detention and the reintroduction of the obligation of assistance and the presence of defense counsel in any case of deprivation of personal liberty by the police. It is evident, considers Ferrajoli (2013), that the restriction of personal liberty without guarantee of defense or jurisdictional controls, provides the privileged place and time for torture or, at least, for acts of violence by agents of the State, against unarmed citizens who have fallen into their hands. We know that the cases of torture and abuses by the authorities are high in Mexico, that the police use it as a means of investigation in their cases, also the cause of omission to denounce on the part of the victims, because they run the risk of being threatened or persecuted for their statements. Against this type of practices, the first guarantee, says Ferrajoli (2013): “is the reduction to what is strictly necessary and, at the same time, the maximum transparency of any contact between the citizen and the police” (Ferrajoli, 2013, p. 117).

The second guarantee, for the safeguarding of personal integrity, is a clear and unequivocal stigmatization of the crime of torture, appropriately punished, as any form of pain or suffering unduly inflicted by public officials against any person deprived of his or her liberty. In no other matter as in this one, the penal norms of the State have an educational value or, as Ferrajoli rightly points out, so to speak, performative of the moral sense, civic spirit and professional deontology of the police forces (Ferrajoli, 2013). In Yucatan this elementary negative guarantee is missing, since torture is ignored as a specific crime committed by public officials in our criminal law. In cases of torture, rather less serious crimes are applied, such as the generic abuse of authority, foreseen in article 251 of the state penal code, and the common injuries, contemplated in article 363 of the same norm. Calling torture by its name and punishing it appropriately, rather than as simple injuries, does not mean merely subjecting it to the generic preventive purposes of criminal law. Above all, it means recognizing its existence and calling for its eradication and rejection as an outrageous act for a civilized society. More than ever, in this case, in the Yucatan penal system, the importance of language is manifest. That is to say, calling these abject and harmful violations of the person torture, instead of abuse or injury, is the first moral redress owed to the victims of torture and is the first civil, social and cultural guarantee against the repeated and normalized use of torture (Ferrajoli, 2008a).

In the United States, the debate over the legitimacy of torture in cases of terrorism is being discussed. For example, in the National Defense Strategy document drafted in March 2005 by the U.S. Department of Defense, by the Pentagon, there is a paragraph that is revealing. There, where a list of the country’s vulnerabilities is made, we read the

following: “Our strength as a nation state will continue to be challenged by those who employ a strategy of the weak, using international fora, judicial proceedings and terrorism”. According to the above paragraph, international institutions and legal proceedings are put on the same level as terrorism. Moreover, there is a strong Nietzschean accent in such a frightening paragraph; international law and judicial action are seen as weapons of the weak (strategy of the weak), to counteract, it is supposed, the success, the triumph and the vitality of the strong. Regarding this pentagon text, La Torre (2007b) has said:

Words are facts, and the consequences are not long in coming. Thus, what has been the nightmare of every legal order since the Enlightenment seems to be looming once again: the legalization of torture. Torture, as an anticipated and therefore inevitably disproportionate use of force, reproduces to some extent the phenomenological structure of the preventive war of George W. Bush’s new national security doctrine (p. 345).

La Torre (2007b), in addition, offering valuable data on this thorny issue, points out that the same John Yoo, whom he calls the Kronjurist who theorizes the legality of preventive war, was the one who, on August 2nd, 2002, in his capacity as Deputy Assistant Attorney General, drafted a memorandum for the United States Department of Justice, in which he states the following. *First*, that the United States is subject to the 1987 international convention on torture, within the limits made explicit by a reservation expressed by the Bush (Sr.) Presidency, which appears to restrict the semantic scope of the notion of torture. *Second*, John Yoo and his colleague Jay Bybee, Assistant Attorney General, propose a redefinition of torture, according to which torture is only inflicted at the threshold of imminent threat of death and prolonged mental harm. In addition, John Yoo introduced the doctrine of double effect, so that torture would only occur where infliction of severe suffering is the immediate and direct purpose of the conduct. Where suffering is presented as collateral damage, torture does not occur. As a consequence, by rigorously applying the doctrine of double effect, all torture aimed at obtaining information from the tortured cannot be qualified as such, i.e. as torture (La Torre, 2007b).

5. CONCLUSIONS

In this time of crisis and social, political and cultural transformations, it is necessary to build a shared vision of human rights: to move from theory to practice, from ideal ethical values or demands to real concreteness. It may not be possible to establish a community of work linked by what we might call a “normal science of human rights²³”, but it should at least inspire new awareness of how human rights are to be understood, justified and defended, in order to achieve their realization and practical application. Clearly we are in a complex world, in which diverse cultures, political and economic systems coexist, as well as different social realities, and constantly changing, in which technological advances and globalization have transformed the ways in which we relate and communicate. However, law, and in particular

²³ The suggestion of a possible “normal science of Human Rights”, supposes a social reading of the classic work of Thomas Kuhn (2013), on scientific paradigms.

human rights, have not escaped this continuous transformation that has affected the rules of the game. Today, the parameter of validity of a norm is no longer another norm. Law is conceived as a complex, accessible, open and ductile system. Law is a social reality; human rights are increasingly conditioned by extra-legal factors of a cultural, social and economic nature. Now the influence of law has an impact on social reality or, on the contrary, social reality on law. We can no longer have a concept of human rights that disregards its own social reality, its level of acceptance, demand or its compliance, respect and guarantee.

This creates a tension between the value posed by the abstract legal norm (values, principles), with the increasingly complex social reality, in which we see or perceive new dangers to human rights, from the most visible (such as insecurity, impunity, abuse of power, discrimination, violence), to the most intimate (such as acts of torture or domestic violence). Although there have been important advances, we still have to face this paradox, which consists in the incapacity of the State and the justice system to confront such important challenges to human rights, such as poverty, inequality, gender violence, discrimination, acts of torture, among others. The current legal system seems to be in a state far from balance, between a controlled government and an effective government; between a norm that recognizes rights and its real legal effectiveness in human relations.

It is important that the operationalization of human rights be carried out progressively, but also effectively; although important constitutional reforms have been carried out in the areas of amparo, criminal justice and human rights, it is essential to create and maintain the proper checks and balances in the midst of this complexity to guarantee the human rights of all people. Therefore, torture, cruel, inhuman and degrading mistreatment must be completely eradicated in any society that seeks to be just and respectful of human rights; its use is incompatible with any modern and democratic justice system. Other mechanisms must be found to obtain information and resolve difficult or essentially controversial cases; that we truly understand that there is no excuse for torture and that it can never be considered a victory.

Torture always violates human rights and goes against the principles of any rule of law and democracy. Therefore, it is important to understand that, in the fight against torture, prevention will always be more effective than punishment (Ribotta, 2012). Ultimately, we must aspire to an effective justice system that emphasizes the importance of education and training of responsible and ethical public officials who acquire a new awareness of how to understand and protect human rights and dignity in all spheres of society. We need to aim to this in order to meet the current challenges in the fight against torture.

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