Detention in Europe and the European Committee for the Prevention of Torture

1. TORTURE AND THE HISTORICAL DEVELOPMENT OF CRIMINAL JUSTICE

It is a well-established fact that torture can look back upon a long tradition although its objectives have differed widely. It has accompanied mankind since approximately the beginning of the hierarchical organization of society. Already in the ancient city of Athens torture was known as a means to extort confessions from slaves. In the Roman Empire the range of torture (quaestio) was extended to include freemen for the purpose of obtaining or having evidence confirmed. Originally used to coerce statements from slaves, torture was soon also employed by government authorities against detained persons. It is true that torture differs conceptually from the cruel methods commonly used well into modern times to punish prisoners, but hardly in the degree of pain inflicted upon the persons concerned. In Europe the use of torture as a means of directly extorting evidence has been a matter of historic fact at least since the 14th century. It is closely connected with the alterations rules of evidence underwent at that time. Although early legal records are fully aware of the dangers inherent in torture, its application was even intensified in the so-called trials by inquisition. The developmental significance of these trials hence ought not to obscure the fact that the torture system was characterized by far more serious crimes committed in the name of the battle against crime than the crimes which were actually or supposedly being atoned for. Only sporadical attempts were made to dam up these excesses. The witch trials, finally, erased all memories of the legal forms and limits of torture. In view of this the execution of punishment and penal detention in a period of mutilating corporal punishment and various kinds of death penalties, though in no way less cruel than torture, recedes into the background.

2. CHANGES SINCE THE PERIOD OF ENLIGHTENMENT BY INNOVATIONS OF THE LAW OF EVIDENCE, THE PRISON REFORM MOVEMENT AND BY NEW NEEDS AGAINST 'CRIMES OF THE POWERFUL'

The Age of Enlightenment, renewed alterations in the system of evidence and the reform of the prison system finally brought about a change. The conviction that prisoners shall some
day be granted protection by the rights of man dates back about 200 years - almost to the first declarations of human rights and the outset of the reform of the modern prison sentence.\(^3\) The use of torture as an investigative and interrogative method has logically been disapproved of and criminalized in Europe since the Age of Enlightenment. Thanks to the 'pioneers of the prison system' such as John Howard and Heinrich Balthasar Wagnitz the interest of the scientific world and of society in the issues of detention was roused. The beginning of the Age of Enlightenment initiated the modification or even complete abolition of torture and inhumane treatment. This was no doubt, not only due to the realization that such a line of action is inhumane, but also to the fact that the trials by inquisition prevailing at that time were increasingly susceptible to criticism; as a consequence, the main goal of torture, \(i.e.,\) to extort a confession at any price, even at the cost of torture, lost importance\(^4\).

In the 19th century, however, various codes of criminal procedure still 'stipulated that an accused refusing to disclose information or denying facts is either to be caned or to be imprisoned, put in chains and kept on low commons'.\(^5\)

The renaissance of torture and inhumane treatment of criminals under the National Socialist regime particularly during the Second World War shocked the entire international community and intensified efforts towards recognition and protection of human rights.

The long time-span, however, in particular the 'dictatorship of misanthropy'\(^6\) and the realization that this is still an urgent and important issue today illustrates the difficulties in realizing the protection of human rights in penal detention. Although the prohibition of torture has been effective as imperative international customary law since about the end of World War II, and despite the fact that Article 5 of the Declaration of Human Rights of 10 December 1948 explicitly postulates this prohibition, infractions of human rights of detainees are still a rather common and, in some parts of the world, even an everyday occurrence. Acts of torture are executed under the application of modern technology ('high-tech-torture') and even under medical observation, not to mention the controversial practice of 'isolation torture'. Ill-treatment is therefore rather difficult to ascertain and verify as it rarely leaves externally visible physical marks. There still exists an unchanged need for focusing on human rights wherever citizens are confronted with a complete development of governmental power, and wherever the protection of human rights seems to be endangered most, \(i.e.,\) in places where persons are deprived of their liberty by a public authority.\(^7\)


\(^5\) R. Hauser, loc. cit., p. 590.


\(^7\) This is the reason why torture and ill-treatment by state agencies are more and more often discussed under the criminological concept of 'crime of the powerful'; on this topic, see D. Spirakos, Folter als Problem des Strafrechts (Frankfort/M. 1990) pp. 237ff.; J. Reemtsma, ed., 'Folter'. Zur Analyse eines Herrschaftsmodells (Hamburg 1991).