Aquinas on Torture

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Thomas Aquinas was twenty-seven years old when Pope Innocent IV published the bull *Ad extirpanda* (May 15, 1252), a code for the conduct of the Inquisition in Lombardy, Romagna and the Marches. The document is most famous, today, for the "Law 25" (§ 26), which reads as follows:

> The *Podestà* or Rector has the authority to oblige all heretics that he may have in his power, without breaking limbs or endangering their lives, to confess their errors and to accuse other heretics whom they may know, as true assassins of souls and thieves of the Sacraments of God and of the Christian faith, and their worldly goods, and believers in their doctrines, those who receive them and defend them, just as robbers and thieves of temporal goods are obliged to accuse their accomplices and confess the evil that they have done.[1]

It is obvious from the text that what Pope Innocent is doing here is to allow the Inquisition in Northern Italy to adopt the practices that had, by 1252, become accepted practice in secular tribunals, and were to remain, in most of Europe, for centuries. Perhaps the *ne plus ultra* of such practice can be found in Passerinus, an Italian jurist who published in 1677:

> In the event that witnesses who are clerics are to be tortured, they must not be tortured under the supervision of a lay judge, but under that of an ecclesiastical judge.[2]

We are dealing here with judicial torture, which came into practice after the rediscovery of Roman law in the 11th and 12th centuries. It should be noted that this involved not only accused persons, but *witnesses*, and in particular witnesses whose social status was such

[1] Teneatur praeterea Potestas, seu Rector omnes haereticos, quos captos habuerit, cogere citra membri diminutionem & mortis periculum, tamquam vere latrones, & homicidas animarum, & fures Sacramentorum Dei, & Fidei Christianae, errores suos expresse fateri, & accusare alios haereticos, quos sciunt, & bona eorum, & credentes, & receptores, & defensores eorum, sicut coguntur fures, & latrones rerum temporalium, accusare suos complices, et fateri maleficia, quae fecerunt. Bull *Ad extirpanda, §26*, in *Bullarium Privilegiorum ac Diplomatum Romanorum Pontificum amplissima collectio* (Romae, 1740), vol. III, p. 326.

[2] *Regulare Tribunal seu Praxis formandi processus nedum in foro Regularium sed etiam saecularium* (Romae, 1677), qu. 15, n. 138.

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that their testimony would not be accepted unless confirmed under torture: slaves, gladiators, actors and others of like status. This appears extremely bizarre to the modern readers, and it is bizarre. One should recall that the rules of evidence at the time were extremely restrictive. Passerinus, writing as late as the seventeenth century, provides an example: "An *indicium* is an act that represents a preamble, or something subsequent to the criminal act, or something extremely close to such an act; for example, to find a naked man in the same bed with a naked woman is a proximate *indicium* of fornication."[3] This is obviously, as circumstantial evidence, much more serious than the "mere suspicion of terrorist links" that seems in our own time to suffice. A conviction could not be obtained on the basis of an *indicium*, but it was sufficient to subject the suspect to torture to obtain a confession.

Sadly, confession was regarded as the best of evidence, even when it was obtained through torture, although in theory, a voluntary confession was preferred. One could not be convicted solely on what today would be called circumstantial evidence. Not perhaps that it mattered, since as Aristotle noted, people will say anything under torture.

Unlike today, the institution of torture was officially established and, as such, subject to regulation.[4] Records were kept. And there were rules. Procedures were carefully defined. Foucault notes that torture under the *Ancien Régime*

> . . . was not a way to obtain the truth at any price; this is not the unchained torture of contemporary interrogations; it is indeed cruel, but not savage. It was a question of a practice subject to rules, to a well-defined procedure; moments, duration, the number of trials, the interventions of the magistrate who conducts the interrogation, all this is, according to different customs, strictly codified."[5]

For example, even under torture, the witness of a declared enemy of the suspect could not be accepted as proof of guilt.[6] And it was common practice that an accused person could provide the court

[3] "Indicium ergo proximum est actus ille, qui inter praeambulas, vel subsequentes actus delicti est illi proximior, vel valde proximus; ut esse simul in eodem lecto virum nudum cum foemina nuda est proximum indicium fornicationis." (*Op. Cit.*, qu. 16, n. 5). Such an *indicium* would not be sufficient to find one guilty, but it would suffice to submit the suspect to torture to determine whether or not he or she would confess.

[4] Cfr. Michel Foucault, *Surveiller et punir*, Paris, Gallimard, 1975, pp. 44 ss.

[5] ". . . the question n'est pas une manière d'arracher la vérité à tout prix; ce n'est point la torture déchaînée des interrogatoires modernes; elle est curelle certes, mais non sauvage. Il s'agit d'une pratique réglée, qui obéit à une procedure bien définie; moments, duré, instruments utilisés, longueur des cordes, pesanteur de poids, nombre des coins, interventions du magistrat qui interroge, tout cela est, selon les différentes coutumes, soigneusement codifié (*ibid.*).

[6] Passerinus, *cit.*, qu. 15, n. 144.

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with a list of his enemies, and it appears that an accused person had a right to present such a list. Obviously, one cannot, and should not defend the institution of judicial torture, but it should not be forgotten that as a legal institution, records were kept. Since most contemporary torture is illegal, it is also hidden, and most frequently denied. It is hard to say which is more chilling, lawful torture – for the most part, the rack, which was also employed in Elizabethan England – or the lawlessness of torture inflicted at the whims of those in charge of prisoners, for which there are no limits, and no rules, since officially it does not exist.

That Pope Innocent IV should have admitted this practice for ecclesiastical trials is abominable, but perhaps no less so than that the church accepted contemporary secular practice without protest. Pope Nicholas I, in his *Response to the questions of the Bulgars* (866), written nearly four hundred years before the Bull of Innocent IV, had been extremely clear:

> If a thief or robber is apprehended and denies that he is involved, you say that in your country the judge would beat his head with lashes and prick his sides with iron goads until he came up with the truth. Neither divine nor human law allows this practice in any way, since a confession should be spontaneous, not compelled, and should not be elicited with violence but rather proffered voluntarily. But it just so happens that you find nothing at all which casts the crime upon the one who has suffered, aren't you ashamed and don't you realize how impiously you judge? Likewise, if the accused man, after suffering, says that he committed what he did not commit because he is unable to bear such [torture], upon whom, I ask you, will the magnitude of so great an impiety fall if not upon the person who compelled this man to confess these things falsely? Indeed, the person who utters from his mouth what he does not hold in his heart is known not to confess but to speak [cf. Mt. 12:34]. Therefore leave such practices behind and heartily curse the things which you have hitherto done foolishly. Indeed, what fruit shall you have in those practices, of which you are now ashamed. Finally, when a free man is caught in a crime, unless he is first found guilty of some wicked deed, he either falls victim to the punishment after being convicted by three witnesses or, if he cannot be convicted, he is absolved after swearing on the holy Gospel that he did not commit [the crime] which is laid against him, and from that moment on the matter is at an end, just as the oft-mentioned Apostle, the teacher of the nations, attests, when he says: *an oath for confirmation is an end of all their strife* [Heb. 6:16).[7]

We have no way of knowing whether or not Nicholas I was familiar with Aristotle's remarks in *Rhetoric*:

[7] Chapter LXXXVI. Translated by W.L. North from the edition of Ernest Perels, in MGH Epistolae VI, Berlin 1925, pp. 568–600. In Fordham University, Medieval Sourcebook: the Responses of Pope Nicholas I to the Questions of the Bulgars, p. 33. (http://www.fordham.edu/halsall/basis/866nicholas-bulgar.html).

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> We must say that evidence under torture is not trustworthy, the fact being that many men whether thick-witted, tough-skinned, or stout of heart endure their ordeal nobly, while cowards and timid men are full of boldness till they see the ordeal of these others: so that no trust can be placed in evidence under torture.[8]

The whole argument of the Bull in this matter is that heretics are to be treated as criminals are treated in secular trials, where torture is an established practice. This practice was not an innovation of the Inquisition. It may in fact be too much to expect that the Church should have resisted the adoption of this standard practice in her own procedures; we have the advantage of living in a time when such practices are largely unacceptable, at least in theory, although there are myriad examples of the use of torture in our own time, most commonly by regular armies engaged against guerrilla uprisings, such as Nazi Germany, the French in Algeria, the United States in Vietnam, and the United States in Afghanistan, Iraq and Guantánamo, to say nothing of police interrogations in places too numerous to count.

Torture as State Terrorism

There is another dimension that bears discussing: the use of torture is often not simply a matter of extorting information. It is, as we have seen in Brazil in the late 1960s, in Argentina, Uruguay, Chile after 1973, and again in Afghanistan, Iraq and Guantánamo, a systematic effort to destroy the human will to resist tyranny. How much of this was involved in the judicial torture that became the practice in Europe from the eleventh century onwards is hard to say. Officially it was employed either to confirm testimony of those deemed unable to speak the truth except under torture, or to extort a confession from accused persons against whom there was serious circumstantial evidence. Popular polemic against the Inquisition suggests that this may well have been part of the medieval picture, but it is hardly explicit. There are a number of contemporary states where such practice was and is routine: Uzbekistan, Syria, Egypt, states to which the United States employs the "rendition" of suspected political enemies with the understanding that they will be subject to torture. In a recent comment, Naomi Klein suggests that the current use of torture goes beyond any attempt to gain information:

> This is torture's true purpose: to terrorize–not only the people in Guantánamo's cages and Syria's isolation cells but also, and more important, the broader community that hears about these abuses. Torture is a

[8] Aristotle, *Rhetoric*, Bk. I, ch. 15 (1377a). *The Basic Works of Aristotle*, edited by Richard McKeon, New York/Toronto, Modern Library, 2001, 1377–1378.

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> machine designed to break the will to resist–the individual prisoner's will and the collective will.[9]

As Klein notes, torture as now debated in the United States is not "merely a morally questionable way to extract information . . . [but] an instrument of state terror."[10] Citing the US NGO *Physicians for Human Rights*, the question is quite explicit:

> . . .perpetrators often attempt to justify their acts of torture and ill treatment by the need to gather information. Such conceptualizations obscure the purpose of torture. . . . The aim of torture is to dehumanize the victim, break his/her will, and at the same time, set horrific examples for those who come in contact with the victim. In this way, torture can break or damage the will and coherence of entire communities.[11]

It is hard to say whether or not the medieval institution of judicial torture was intended in this way. As part of the judicial system, its primary purpose, at least as stated, was to secure proof of crime.

No doubt there was another element that is also present in contemporary torture, or at least cannot always be excluded. There exist human beings who enjoy inflicting pain on others, and when torture, judicial or contemporary, is justified, it may well be impossible to exclude such persons from its practice. This, to be sure, is "outside" of the stated purpose of medieval or Roman judicial torture, and perhaps equally "outside" of the stated purpose of contemporary torture. But once torture is admitted, under whatever justification, as governmental policy, it may well be impossible to exclude the sadistic practice of it.

Aquinas and the Question of Torture

Here we are faced with something that, for this writer at least, is something of an enigma. It does not appear that Aquinas approved of this practice. Nowhere does he defend it, although he explicitly defends putting heretics to death.[12] While he must have known the Bull *Ad extirpandam*, at least by the time that he wrote the *Summa Theologiae*, he does not cite it, nor does he employ the language of the Bull, "..tamquam vere latrones & homicidas animarum, & fures Sacramentorum Dei . . .". His argument is fundamentally the same as he uses to defend the death penalty for murder and other crimes: that these people are criminals and a serious danger to the

[9] Naomi Klein, "Torture's Dirty Secret: It Works" in *The Nation* (New York), May 30, 2005, p. 10.
[10] *ibid.*
[11] Cited by Klein, *ibid.*
[12] *Summa Theologiae*, 2a2ae, qu. 11, 3.

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community.[13] But he neither defends or condemns the judicial institution of torture. The omission is curious, to say the least. We do not know whether he was familiar with the letter of Nicholas I to the Bulgars. He does cite Aristotle's *Rhetoric* in an article where he discusses whether it is licit for parents to punish their children physically, or masters their slaves.[14] What are we to conclude? One is tempted to say that Aquinas "copped out," that he ducked the question, perhaps because the temper of the times would not have tolerated an honest answer.

The torture of *witnesses*, as mandated in Roman law, involves inflicting pain on persons who are, at law, *innocent* of any crime. In his discussion of homicide, he absolutely rejects the killing of innocent persons.[15] In the following question, concerned with "other injuries committed against persons" he does not raise the question of mutilating, beating or incarcerating *the innocent*. One likes to think that for him, the question could not arise: the context is clearly that of justice. Here, as with Aristotle, there is no question of "justifying" actions otherwise reprehensible on the basis of some greater good. Punishing the innocent is quite simply *unjust*. Hence there can be no justification for it.[16]

Yet he was faced with an institution which was not only practiced, but *legislated*, both by the Church at the highest level, and by all contemporary civil societies. Was there any point in arguing against it? He would not, as some might today, defend it on the basis of some greater good, as for example, uncovering a terrorist plot. Perhaps, in the best of all possible worlds, he should have taken a clear stand on the question that was, for him, indefensible, at least with respect to inflicting pain on *witnesses* who were not even accused of any crime. As for the extortion of confession through torture, this again runs contrary to a basic element in his ethics, and those of Aristotle: *only the guilty can be subject to punishment*. But even where there exists strong circumstantial evidence (*indicia*), *this is not proof of guilt*. It is true that there was no "presumption" of innocence. But guilt would have had to be proven on the basis of evidence that was admitted in the courts. If the officials in question were convinced of guilt on the basis of what today we should call circumstantial evidence, then the suspect could be tortured to produce a confession that would confirm his guilt. But the question was very nearly beyond the possibility of

[13] *ibid*., 2a2ae, qu. 64, a. 2.
[14] *ibid*., 2a2ae, qu. 65, a. 2 ad 2um.
[15] Cfr. 2a2ae, qu. 64, a. 6.
[16] Cfr. G.E.M. Anscombe, "Modern moral philosophy" in *Philosophy*, 1958: "To arrange to get a man juridically punished for something which it can be clearly seen he has not done is intrinsically unjust." For Anscombe, as for Aristotle and Aquinas, this is the end of the matter; one cannot argue that something that is *unjust* could somehow be "licit", or "permissible", or "morally acceptable.

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rational discussion. Aquinas does raise the question of the dilemma faced by a judge who has private knowledge of the innocence of an accused person, but who is bound to judge according to the evidence,[17] and here, while suggesting that the judge should do all in his power to bring out the truth, in the end he is bound to make his judgement on the basis of the evidence admitted in court.

The context of the *Summa theologiae*

In addition, one must recall that the *Summa theologiae* was written for the "erudition of beginners."[18] According to the late Leonard Boyle, O.P., the writing of the *Summa* came out of Aquinas's experience as a *Lector* in the Dominican priory of Orvieto. As Fr. Boyle notes:

> In theory at least, St. Thomas was not unaware of the demands on Lectors and of the limitations of these priory schools. In June 1259, some six months before he left Paris for Naples and, eventually, Orvieto, he had been, with Albert the Great and Peter of Tarantaise, a member of a committee of five that presented a *Ratio studiorum* for the whole order to the General Chapter at Valenciennes, north of Paris. In their report, Thomas and his fellow Masters had suggested, among other things, that each conventual lecture should have a tutor to assist him, that no one, not even the Prior of the community, was to be absent from lectures. . .[19]

The priory at Orvieto was not a *studium*, a house devoted to special formation of students in theology, but a working priory. At this time each priory would receive novices, and the professed would study in the context of a working priory, and the studies would take place under the direction of a *Lector*, a teacher assigned to the priory. Fr. Boyle maintained that the *Summa* was in fact written not for the intellectuals of the universities, but for the ordinary working friars such as those in the priory at Orvieto.[20] Working friars assigned to the priory would also assist at the lectures of the house *Lector*, and take part in the discussions. The accent was on *practical* theology, on problems that the friars would encounter in their work. The task of the *Lector* was "to lecture to the whole Dominican community on a book of Sacred Scripture, any book."[21] While Pope Urban IV was in residence in Orvieto at the time, Aquinas was not in any formal sense,

[17] 2a2ae, qu. 67, a. 2; 2a2ae, qu. 64, a. 6 ad 3m.
[18] *Summa theologiae*, I, prologus: "quod congruit ad eruditionem incipientium."
[19] Leonard Boyle, O.P., "The Setting of the *Summa Theologiae* of Saint Thomas Aquinas" (Etienne Gilson Series, 5, Pontifical Institute of Medieval Studies, Toronto, 1982), p. 5
[20] *ibid.*, especially p. 7 ss.
[21] James A Weisheipl, O.P., *Friar Thomas d'Aquino. His life, thought and works*, Garden City, N.Y. Doubleday, 1974, p. 153.

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a "papal theologian", but simply the *Lector* of Saint Dominic's Priory in Orvieto. This writer at least does not know whether any of the friars from the Orvieto priory were inquisitors. Probably not–Orvieto was hardly a hotbed of heresy at that time. In the prologue to the *Summa Theologiae*, which was begun after Aquinas had established a *studium* in the convent of Santa Sabina, in Rome, he complains that the study of sacred doctrine presents serious difficulties for beginning students, in part because of the "multiplication of useless questions, articles and arguments."[22] One might assume that, especially for working friars in Italy at that time, the question of torture would have been an important one. But to raise it with respect to the practice of the Inquisition could hardly be done unless it was also raised with respect to secular tribunals, where the practice was well established. To raise the question would have involved questioning a practice that was universally accepted. Would it have been a "useless question?" Would it have caused serious problems for the work of the ordinary working friars for whom the *Summa* was intended? Was this one of the "useless questions" complained about in the preface to the *Prima pars?* It is quite possible that to question this institution would have been regarded as a form of madness both in civil society and in the Church. Yet given Aquinas's teaching on justice, it would not have been possible to defend the institution.

Hard questions

One can imagine parallels in our own times. We also have questions that are taboo. It would be very nearly useless for someone to discuss, for example, whether Canada, or even Great Britain, really has any rational use for the maintenance of armed forces as they now exist. The mythology of the nation state is too strong. Every state has armed forces. It is simply assumed that we cannot get along without them, although Costa Rica, which might well have more need for armed forces than does (say) Canada, has abolished them with excellent results.[23] As late as the eighteenth century, it was nearly

[22] "Consideravimus namque huius doctrinae novitios, in his quae a diversis conscripta sunt, plurimum impediri: partim quidem propter multiplicationem inutilium quaestionum, articulorum et argumentorum. . ." (*ibid.*.)

[23] The argument for Canada is at least as strong as for Costa Rica. The only polity in a position to threaten Canada's territorial integrity is the United States. Canada has no interest in using military force to subdue any other country, or to defend her economic interests (diplomacy works better), and Canada has no interest in the oppression of her own people. Q.E.D. To abolish the armed forces *as we know them* would leave room for armed forces tailored to the real needs of the country, to the exclusion of such expensive and useless artifacts as bomber aircraft, frigates, submarines, tanks and the like. But as was the case with Aquinas and the question of torture, to ask the question is very nearly unthinkable.

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impossible to discuss the abolition of judicial torture. It was assumed that countries would soon be overrun with criminals. In some places, a similar attitude is observed with respect to the death penalty, if indeed it is allowed to be discussed at all. Was this a "copout" on Aquinas's part? Or was it simply the sad recognition of the impossibility of applying his ethics to this question? One could of course say *qui tacet, consentire videtur* – silence indicates consent. And today we find well-educated people who, on utilitarian grounds, defend the use of torture as a means to extract information vital to the common good, although it is interesting to note that some professional interrogators remain highly skeptical, on grounds that Aristotle had already set out.

The basic question remains one of justice, and here both Aristotle and Aquinas provide an ethical infrastructure that is quite clear. Even in jurisdictions where there is no presumption of innocence, the guilt of an accused person must be proven in court. Evidence obtained under duress can be repudiated. But we must live with the fact that torture, in Foucault's words, "The unchained torture of contemporary interrogations", is still very much a fact of life.

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