HOW IT ALL BEGAN – EXPLORING THE THEORETICAL CONCEPTUALISATIONS OF ABSOLUTE RIGHTS

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Abstract: The concept of absolute rights occupies a contentious space in both academic literature and legal practice. The aim of the paper is to shed light on the philosophical explanations of the term, by contrasting philosophical paradigms - deontological ethics, which uphold the intrinsic wrongness of certain actions irrespective of outcomes, and consequentialist ethics, which prioritize the outcomes and may justify overriding rights for some greater good. Starting from the caveat regarding the intricate relationship between moral and legal human rights and differing viewpoints on their interconnectedness, it offers a comprehensive examination of theoretical interpretations of absolute rights, with the special emphasis on the effects that 9/11 attacks may have had on the theoretical positions. Ultimately, the objective of the analysis is to contribute to the broader discourse on human rights by offering a recapitulation of an important academic debate that has yet to be concluded.

Keywords: Absolute rights; human rights; deontology; consequentialism; prohibition of torture.

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> Imagine that you are creating a fabric of human destiny with the object of making men happy in the end, giving them peace and rest at last, but that it was essential and inevitable to torture to death only one tiny creature—that baby beating its breast with its fist, for instance—and to found that edifice on its unavenged tears, would you consent to be the architect on those conditions?
>
> Ivan Karamazov (Fyodor Dostoevsky, *The Brothers Karamazov*)

I. Introduction

In the realm of human rights discourse, the term absolute rights can sporadically be found not only in the academic literature, but also in international and national case-law, including the practice of the human rights monitory mechanisms of various international treaties (international courts and quasi-judicial bodies)[1]. However, there is no universally agreed-upon definition of the concept, since different authors proposed various interpretations of the notion.

This paper embarks on an exploration of the theoretical conceptualizations of absolute rights, tracing their evolution and examining key philosophical arguments. It delves into historical and contemporary perspectives, analysing the works of scholars who have directly or indirectly touched upon the concept. The debate pivots on the philosophical foundations underpinning these rights, primarily deontological *versus* consequentialist ethics. Deontological perspectives assert the intrinsic wrongness of certain actions, irrespective of outcomes, thereby offering solid framework for accepting absolute categories. In contrast, consequentialist views prioritize the outcomes of actions, allowing for the possibility that rights may be overridden in pursuit of greater overall welfare.

By engaging with these foundational theories and their practical implications, the analysis seeks to contribute to a deeper understanding of

[1] For the analysis of means for achieving coherent protection of human rights before European supranational courts see Ćorić, Knežević Bojović, 2020.

absolute rights. It addresses the challenges of upholding these rights in an increasingly complex and interconnected world, where ethical dilemmas often arise at the intersection of individual freedoms and collective security.

II. Setting the Stage

Given that paper will focus on philosophical views on absolute (human) rights, a caveat regarding the link between legal and moral human rights seems inevitable. Namely, most of the scholars that dealt with the topic of absoluteness from a philosophical point of view, which will be analysed in the following pages contemplated moral human rights. That said, it is pertinent to note that there is no generally agreed explanation of the relationship between human rights as moral rights and human rights as legal rights[2]. This is evident from the recent contribution of Başak Çalı, who recognized four different approaches towards the relationship (Çalı, 2020, pp. 13-25).

To begin with, some argued that these are distinct and separate categories, which is the view that can be traced back to the more general positivist position on law and morality being two separate domains of inquiry, regardless of the possible overlaps in the objects that they study (Çalı, 2020, p. 17). This «no relationship view», as Çalı labelled it, insists that the focal point of moral human rights is the domain of morality, which is completely independent from the legal practice of human rights (Çalı, 2020, p. 17). Therefore, it is said that, from the perspective of positivist lawyers, legal human rights find their basis in law and do not need any other grounds or justifications apart from their conventional foundations (Çalı, 2020, p. 17)[3].

On the other hand, within «morality-dominant relationship view» it is considered that legal human rights must refer somehow to the moral human rights (Çalı, 2020, p. 17). Even though there are various perspectives on the exact nature of this reference, one of them is especially worth mentioning. According to the so-called «mirroring view», which was widely criticized

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[2] Neither is there a common agreement on this differentiation itself in the literature. For instance, Siegfried van Duffel distinguished human rights, as those that are inherent and derive simply from the fact of being human, from legal and conventional rights, that depend on conventions and institutional agreements and moral rights, that arise due to special relationships, like the right to fulfilment of a promise (van Duffel, 2013, pp. 33-34).

[3] See also Invernizzi-Accetti, 2018, pp. 215-228.

by Allen Buchanan, every legal human right must directly correspond to a pre-existing moral right, otherwise it may not be viewed as real (Çalı, 2020, p. 18)[4].

Another group of ideas regarding the matter, which is marked as «law-regarding relationship view», can be boiled down to the stance that moral human rights are practice-dependent, hence the practice of international human rights must be taken into account in order to understand moral human rights (Çalı, 2020, p. 19)[5].

Finally, the idea that the relationship in question is a dynamic one and that human rights law can even be conceived as a generator of moral human rights is the main point of «law's internal morality view» (Çalı, 2020, p. 20). Supporting this one was Samantha Besson when she explained that a moral human right need not pre-exist the legal human right, as well as that our moral and legal reasons may arise at the same time in given circumstances, and the law may create a moral human right through a legal human right (Besson, 2018, chapter 1).

Taking everything said under consideration, it becomes evident that scholarship has yet to come up with the final explanation on what moral human rights are to legal human rights and *vice versa*. However, as Çalı indicates, the proposal to treat them as completely distinct categories is rather disturbing, especially since it undermines the very objective of international human rights law, which was to institutionally address moral wrongs witnessed through human history (Çalı, 2020, p. 24).

As far as this treatise is concerned, once again, the distinction between the two categories is perhaps most noticeable in the first chapter, since it covers scholars who have primarily analysed moral rights (as they understood them), while the rest focuses on legal rights, *i.e.*, rights that are based on and defined in within international conventions and national legal documents.

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[4] Buchanan acknowledged that although some legal human rights are a specification of their moral counterpart, others may not be, such as the right to a fair trial before an independent and impartial tribunal. Nonetheless, the latter may still be justified as «instrumentally valuable» for the realization of a pre-existing moral right (Buchanan, 2013, pp. 50-84).

[5] Scholars that are cited by Çalı as those in favor of this view are: Rawls, 1999; Raz, 2010; Beitz, 2011.

III. Absolute Human Rights Prior to the Global War on Terrorism

Legend has it that during a hunt for a terrorist group who once kidnapped the Prime Minister of Italy and threatened to kill him, an investigator from the Italian security service suggested to the general of the state police to torture a prisoner who appeared to have intel regarding the case. The general dismissed the proposal, stating that «Italy is a democratic country that could allow itself the luxury of losing Aldo Moro, but not of the introduction of torture» (Fox, 1985, p. 38 as cited in Dershowitz, 2002, p. 247)[6]. However, this view is not universally shared. The prohibition of torture has traditionally been regarded as a paradigmatical example of an absolute human right and still, there has always been those opposing such a viewpoint.

In general terms, virtually all views that will be presented hereinafter gravitate towards one of the opposed ethical theories. Namely, authors that advocate for the existence of absolute human rights obviously accept absolutism, a categorical (or deontological) theory that considers certain acts as intrinsically wrong (McNaughton, 1999, p. 202), irrespective of their effects and consequences, which have no ethical relevance, and hence, those acts must be avoided at all costs (Nagel, 1988, p. 60)[7]. In contrast, opponents of absolute human rights mostly derive their positions from consequentialist (or teleological) theory, which evaluates the morality of an action by reference to its consequences (Dembour, 2006, p. 78)[8]. Absolutism, thus, forbids

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[6] See also Drake, 2006, pp. 114-125.

[7] Most of the criticism of deontology is based on its inflexibility, which led to the conceptualization of a third approach, the so-called «threshold deontology». It argues that rules should always be obeyed unless there is an emergency situation, in which one should revert to consequentialism. Two variations of this theory can be detected. According to the simpler one, there is some fixed threshold of awfulness beyond which morality's categorical norms no longer have their overriding force and such a threshold does not vary with the stringency of the categorical duty being violated. Alternatively, threshold can also be understood as a sliding scale, if it varies in proportion to the degree of wrong being done. See Alexander, Moore, 2020, https://plato.stanford.edu/entries/ethics-deontological/ (accessed 12.12.2023).

[8] The most familiar version of consequentialism is utilitarianism, which commonly believe to maintain that the best state of affairs among any possible set is the one that possesses the greatest net balance of aggregate human pleasure, happiness or satisfaction. Samuel Scheffler summarized objections against it, the first being that of Rawls, who claimed that it does not take into account

doing certain things to people, rather than bringing about certain results (Nagel, 1988, p. 58)[9]. As Thomas Nagel remarked, absolutism sets limits to consequential reasoning (Nagel, 1979, p. 58). Expectedly, from absolutist point of view, certain rights are exceptionless, whereas consequentialists are willing to trade-off any right for welfare.

Among pioneers in distinguishing absolute from relative rights was Sir William Blackstone. Back in 1795, in *Commentaries on the Laws of England in Four Books*, he recognized that absolute rights belong to particular individuals, merely as single persons, whereas relative are those that are owned by them as members of the society and stand in various relations to each other (Blackstone, Chapter I: Of the Absolute Rights of Individuals, p. 123). Absolute rights were believed to be «those which are so in their primary and strictest sense; such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it» (Blackstone, Chapter I: Of the Absolute Rights of Individuals, p. 123). Blackstone noted that the rights of personal security, liberty, and private property amount to absolute rights of individuals (Bedau, 1968, p. 564). The right of personal security was said to include person's legal and uninterrupted enjoyment of life, limbs, body, health, and reputation (Bedau, 1968, p. 564).

Later, Sir William David Ross differentiated between *prima facie* and absolute right, where the former is the one that may be violated if the appropriate conditions hold, while the letter, if there is such, would «hold come what may» and could never be overridden for any reason (Ross, 1930, pp. 19-20).

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justice or fairness in the distribution of goods and does not consider how satisfaction is distributed among individuals (thus, utilitarianism will favour that wealthy acquire more wealth, whereas others languish in poverty, if the overall satisfaction will be maximized that way). Basically, it ignores intrinsic moral significance of its considerations. Then, it seems to indicate not only that one may but also must do something immoral, such as torture a child of a terrorist in order to save many people, which is for many people unacceptable reasoning. Finally, utilitarianism is quite demanding in a way that it is indifferent towards one's own pursuits and requires that one may not devote time and energy to itself unless there is no other way in which one could produce more overall good. See Scheffler, 1988, p. 3.

[9] Samuel Scheffler is among authors who noticed the presence of another group, namely the more restrictive non-absolutist who would argue for violation of imposed restrictions with an aim to prevent catastrophe, but not in other, less stringent situations. See Scheffler, 2003, p. 86.

But the one who was remarkably invested in the topic was Alan Gewirth. He began his essay on absolute rights with the initial assertion that «it is widely held opinion that there are no absolute rights». To test that claim, he firstly had to clarify a few points, so that the possible definition of absolute rights could be proposed[10].

According to Gewirth, a right is *fulfilled* when the correlative duty is carried out; a right is *infringed* when the correlative duty is not carried out; a right is *violated* when it is unjustifiably infringed; a right is *overridden* when it is justifiably infringed, so that there is sufficient justification for not carrying out the correlative duty, thus the required action is justifiably not performed or the prohibited action is justifiably performed (Gewirth, 1981, p. 2). Finally, a right is *absolute* when it cannot be overridden in any circumstances, meaning that it can never be justifiably infringed and it must always be fulfilled without any exceptions (Gewirth, 1981, p. 2). Put differently, infringement of an absolute right automatically amounts to its violation.

In addition, Gewirth differentiated between three levels at which a right may be qualified as absolute (Gewirth, 1981, p. 3). At the top is «Principle Absolutism», where absolute can only be some universal moral principle that lays down a general formula for all the diverse duties of all respondents or agents toward all subjects or recipients (Gewirth, 1981, pp. 3-4). The issue with this kind of principles is obviously their incapability of specifying precise entitlements and obligations or solving particular moral dilemmas (Mavronicola, 2021, p. 18). Examples of such principles could be the ones stating that human rights protection is a concern of the whole international community or that human rights are an essential part of democracy (Addo and Grief, 1998, p. 515). For their apparent incapability of differentiating between various types of rights, these principles remain just a general formula for deriving other forms of absolutism (Addo and Grief, 1998, p. 515).

On the other end of the spectrum, Gewirth placed «Individual Absolutism», that accounts for the highest degree of specification, hence it can be said that a person has an absolute right to some particular object at a

[10] Gewirth accepted the Hohfeldian model of rights, hence the rights in question are claim-rights in that they are justified claims or entitlements to the carrying out of correlative (positive or negative) duties, and such an approach will as well be followed in this text (Gewirth, 1981, p. 2).

particular time and place when all considerations for overriding the right in the particular case have been eliminated (Gewirth, 1981, p. 4). Arguably, this level can be reduced to a post-displacement residue, or even post-consequentialist residue, but the point is that if absolute quality is brought down only to the most concretised rights, it will certainly lose its power to guide general behaviour and can no longer be considered as a general standard applicable to all (Mavronicola, 2021, pp. 18–19). What is more, with enough specification, any right could eventually be considered absolute (Shafer-Landau, 1995, p. 209)[11].

Finally, in the middle is «Rule Absolutism», according to which potential absolute rights are characterized in terms of specific objects with possible specification also in regard to subjects and respondents, hence it may vary in degree of generality, but its content regarding the entitlements and correlative duties is assertable (Gewirth, 1981, p. 4). It is said that «Rule Absolutism» reflects an agreement reached within a particular society to qualify certain rights as absolute, such as the prohibition of torture or other forms of ill-treatment embodied in the Article 3 of ECHR (Addo and Grief, 1998, p. 515). Even though Gewirth continued to explain that the question of absolute rights arises most directly at this particular level (Gewirth, 1981, p. 4), the potential issue also emerges. Namely, if a right must be valid without exceptions in order to be absolute and yet may still vary in its generality, then it is possible for its specifications regarding objects, subjects or respondents to be considered as exceptions to the more general rights (Gewirth, 1981, p. 4).[12] Hence, either there are no absolute rights, since all of them require some kind of specification or all rights are equally absolute, because once their specifications are established, they are entirely valid without any further exceptions (Gewirth, 1981, p. 5).

The solution for this dilemma may be in Gewirth's proposal of three criteria for permissible specifications:

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[11] He claimed that the case of potential conflict between rights and other moral considerations, including also rights, may be resolved by reducing the scope of the right through its specification, *i.e.*, by adding exceptive clauses, while retaining maximal stringency (Shafer-Landau, 1995, p. 225).

[12] As an example, he suggested the following statement «all persons have a right not to be killed except when the persons are not innocent, or except when such killing is directly required in order to prevent them from killing somebody else» (Gewirth, 1981, p. 5).

a. permissible specifications can only be such as result in a concept that is recognizable to ordinary practical thinking, which eliminates rights that are overloaded with exceptions;

b. permissible specifications must be justifiable through a valid moral principle (by way of explanation, there is no good moral justification for incorporating racial or religious restrictions on the subjects of the right);

c. permissible specifications cannot contain any reference to the possibly disastrous consequences of fulfilling the right (as when some argue that there are no absolute rights, they usually claim that any right may be overridden if this is required to avoid certain disasters – for instance, that infringing the absolute prohibition of torture will enable the authorities to find out where a terrorist has hidden a bomb) (Gewirth, 1981, pp. 5-6).

Natasa Mavronicola, who recently monographed the topic of Article 3 of the ECHR, commented extensively on Gewirth's viewpoints in an effort to present her own understanding of absolute rights (Mavronicola, 2021, pp. 9-26). In that regard, she differentiated between the applicability parameter of absoluteness, which offers basis for understanding absolute rights as non-displaceable entitlements and the specification parameter, which is of paramount importance, since it delineates the substantive scope of the right and therefore, determines what is unlawful (Gewirth, 1981, p. 21). However, she expressed awareness that specification is linked to potential risks, such as the one of uncertainty, if it narrows the scope in a manner that the right loses its capacity to guide behaviour *ex ante* or if it overburdens the right with certain qualifiers (Gewirth, 1981, p. 22). Additional risk may be found in the possibility that specification can have an effect of (disguised) displacement, if it brings extraneous considerations into framing the content of the absolute rights (Gewirth, 1981, p. 22).

As a result, she adjusted Gewirth's requirements and, apart from the implied requirement of good faith, proposed the following features of legitimate specification of an absolute right, that should serve as the absoluteness starting point:

a) it must have the capacity to guide (thus, over-generality and over-specificity are excluded, and adjudicative bodies have a particular duty to provide with meaningful, clear and generalizable specification of the substance of the right);

b) it must be premised on reasoning which relates to the wrongs that the right proscribes (in other words, the right should be interpreted in a way that it remains loyal to its safeguarding objects instead of being distorted by irrelevant considerations);

c) it must not amount to displacement of the right (for instance, possible desirable consequences of infringement of an absolute right must not be part of specification, because they will amount to the displacement of the right through a back door) (Gewirth, 1981, pp. 23-25).

This adjustment of Gewirth's initial criteria for specification is particularly appropriate for absolute (legal) rights, *i.e.*, those located in legal instruments, thus Mavronicola validly remarked that Gewirth's moral reasoning seems like it took place in a legal and textual vacuum (Gewirth, 1981, p. 24).

Second part of Gewirth's essay addressed main arguments of consequentialists, who argue against absolute rights, since one can always imagine the consequences of fulfilling certain right being so disastrous that the right may need to be overridden (Gewirth, 1981, p. 7). That is usually called a «ticking bomb» scenario. Gewirth framed it as a situation in which a group of terrorists with an arsenal of nuclear weapons require that an individual named Abrams torture his mother to death or, otherwise, they will use the weapon against some designated city (Gewirth, 1981, p. 8). To put it another way, the question is whether Abrams should infringe the absolute prohibition of torture with regard to his mother in order to prevent nuclear catastrophe and consequently save incomparably more lives? Therefore, many construct the puzzle of absolute human rights as an issue of conflict of rights by constructing such examples where those considerations that are not supposed to displace an absolute right, are actually also rights. In fact, the question arises – how can it be that everyone can have equal moral rights, if there are certain rights that may never be overridden by any considerations, even if they have catastrophic consequences for the equal rights of others (Gewirth, 1981, p. 6)?

Gewirth's answer was multifaceted. His non-legal argument boiled down to the fact that terrorists who make such demands cannot be trusted to keep their promise not to drop the bombs if the mother is tortured to death and even if they do, there is no guarantee that the situation will not escalate in the future (Gewirth, 1981, p. 10). Also, he recalled that Philippa

Foot had sagely commented on cases of this sort in a manner that if it is the son's duty to kill his mother in order to save the lives of others, then «anyone who wants us to do something wrong has only to threaten that otherwise something worse will be done» (Foot, 1967, p. 10). Nevertheless, main point was that in this Gewirth's scenario there is no conflict of rights, because by deciding to respect his mother's absolute right and refusing to torture her to death, Abrams is not violating (possibly also absolute) rights of other residents who may die as a result (Gewirth, 1981, p. 11)[13]. Other residents do not have a right that the mother's right not to be tortured to death is violated for their sakes and again, in protecting his mother's right, Abrams does not violate the rights of the others (Gewirth, 1981, p. 14). For this reason, absolutists can claim that even if others die, that does not affect the absolute nature of theirs or anyone else's right. To wit, given that their death is a consequence of terrorists' unjustified action, their right to life will remain absolute even if they are killed as a result of the son's refusal, and it is not he who violates their rights, but the terrorist who killed them (Gewirth, 1981, p. 13).

Considering that the suggested solution so far seems to be letting nuclear catastrophe to occur, even though unimaginable consequences may arise, Gewirth instructed us to differentiate between abstract and concrete absolutism. The former pays no regard to consequences or empirical (or causal) connections that may affect the ensuing outcomes of the alternatives that are being appraised, but only considers those alternatives as being both mutually exclusive and exhaustive (Gewirth, 1981, p. 14). On the other hand, the latter takes account of consequences and empirical connections, but each time within the limits of the right that is believed to be absolute (Gewirth, 1981, p. 14). Consequentialism of concrete absolutist is hence limited, but there is still a broader range of possible alternatives that are being considered compared to the rather simple dualism which is inherent to abstract absolutist (Gewirth, 1981, p. 14). Applied to the case of Abrams, the distinction may lead to different outcomes.

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[13] Part of this explanation, Gewirth based on the «principle of the intervening action», according to which the terrorists are morally and causally responsible for the deaths of others that may follow the refusal of the son to torture his mother to death. But the son cannot be responsible for that side-effect of his refusal because of the terrorists' intervening action. For more, see (Gewirth, 1981, pp. 12-13).

If he were an abstract absolutist, he would consider only two possibilities, that are mutually exclusive – either he tortures his mother to death, or the terrorists kill thousands of others by dropping a nuclear bomb (Gewirth, 1981, p. 14). However, were he a concrete absolutist, he would take into account additional considerations, such as that his torturing will not necessarily prevent the death of others, which may occur even if he obeys the appointed requirement (Gewirth, 1981, p. 14). He may also recognize that his obedience may be followed by further threats of nuclear catastrophe unless some other evil is done, since terrorists cannot be trusted to keep their word, or that his refusing to torture his mother may not lead to the death of others because authorities may become involved and prevent it and so forth (Gewirth, 1981, pp. 14-15).

Therefore, this distinction allows understanding that by choosing to respect mother's absolute right, Abrams did not necessarily opt for nuclear catastrophe, since many factors had to be counted in, which is why concrete absolutism appears to be more compatible with the real-life settings. Compared to the rather black-and-white reasoning of the abstract absolutist, the wider deliberation of the concrete absolutist allows for possible alternatives and various consequences, hence offers the greatest probability of averting the threatened catastrophe (Gewirth, 1981, p. 15). For that reason, Gewirth proclaimed it to be the preferred kind of ethical reasoning (Gewirth, 1981, p. 15).

Soon after Gewirth's essay on absolute rights was published, he was strongly criticized by Jerrold Levinson, who challenged the theory mostly because of its heavy reliance on the principle of intervening action (Levinson, 1982, p. 73). Due to this principle, Abrams does not violate the rights of the others, since the immediate cause of their death is the free actions of other agents – the terrorists (Levinson, 1982, p. 73). Hence, Levinson insisted that it is in fact the principle at hand that serves to protect the absoluteness of the mother's right (Levinson, 1982, p. 73). He offered a counterexample in an effort to exclude any such intervening actions.

So, his Abrams is now a biological scientist Adams, whose experiment with highly virulent variety of cholera went downhill once he discovered that it had mutated and became resistant to any conventional cures and cannot be destroyed by any physical methods of neutralization (Levinson, 1982, p. 74). As luck would have it, Adams quickly realized the possible solution, which would require the production of antibodies in the bloodstream of a person with a particular blood type who is subjected to extreme pain and

fright before expiring, or in other words, who is tortured to death (Levinson, 1982, p. 74). However, his reaction has to be immediate since there is only half an hour before the bacteria escapes and the only known person near him with the compatible blood type is his mother (Levinson, 1982, p. 74). And there is the dilemma – either his mother's absolute right is infringed by torturing her to death or half of the mankind will lose their lives.

Owing to the fact that the principle of intervening action cannot be applied in this case, Levinson was determined that Adams would be morally responsible for the deaths of others (Levinson, 1982, p. 75). He underlined that these are the cases of conflicts of (two) stringent rights, where one would have to override the other, thus that Gewirth failed to prove conclusively that there are any absolute rights (Levinson, 1982, p. 75).

Gewirth was swift to respond. His first line of rebuttal was based on the unconvincing terms of the counterexample, as well as Levinson's ignorance towards his distinction between abstract and concrete absolutism (Gewirth, 1982, p. 349). Namely, if Adams were a concrete absolutist, he would ascertain other options, instead of being short-sighted by only two extreme alternatives (Gewirth, 1982, p. 349). Although Gewirth admitted that the principle of intervening action is not applicable in Levinson's case, he introduced another one, namely, the principle of the wrong prior action (Gewirth, 1982, p. 350). Given that Adams as a professional scientist was in a position to anticipate that his experiment may lead to an extreme danger, his actions were wrong and unjustified, thus every further outcome is caused by his prior wrongdoing (Gewirth, 1982, p. 350). That being so, no possible infringement of the rights would be justified, therefore rights would not be overridden, but violated and hence, remain absolute (Gewirth, 1982, p. 350).

When it comes to the conflict of rights, Gewirth did not hold on to his prior position that in such cases there is none but allowed for the possibility that a potential conflict between rights that safeguard objects of an equal importance emerged (Gewirth, 1982, p. 351). He suggested that in this kind of conundrum, it is the negative right that should be prioritized over the positive ones, not only because positive actions carry the certainty (of Adam's mother dying, in Levinson's example), which cannot be said for negative actions and omissions, but also since the inaction or omission does not lead to the same exclusive responsibility or the same degree of culpability (Gewirth, 1982, p. 352)[14]. With

[14] The infringement of mother's right would require Adam's positive action of torturing her to death. However, in the case of others, Adams' omission (by not conducting torture) cannot be

the contemporary human rights theory in mind, it seems appropriate to make a slight terminological alternation and use the terms negative and positive *obligations* of the particular right (Shelton and Gould, 2013, pp. 562-586). Although absolute rights generate a number of both negative and positive obligations, Mavronicola rightly argued that there is no positive obligation to violate the negative obligation under an absolute right (Mavronicola, 2021, p. 13). That is to say, there is no positive duty for Abrams to torture his mother to death. Or, in the case of abduction, many positive obligations for the State arise, such as the one concerning effective investigation, but there is no positive duty to torture the kidnapper in order to find out where the hostage is (Mavronicola, 2021, p. 13)[15]. Positive obligations cannot be and are not meant to be without boundaries and committing absolute wrongs should not be the way of protecting persons from a general or concrete risk of harm (Mavronicola, 2021, p. 25). Jeremy Waldron also acknowledged that there is no philosophical consensus regarding the conflict of rights (Waldron, 2010, p. 32). While some emphasize the distinction between acts and omissions or the structures of agent-relativity, which would err equating violation of one's rights and failure to save another's life by refusing to violate rights (Nozick, 1974, p. 30), others, mostly consequentialists, object to this kind of logic considering it unreasonable and unacceptable (Sen, 1988, pp. 191-196, as cited in Waldron, 2010, p. 32). Proponents of the first view would rightly argue that refusing to intentionally violate the right of A even though it is crucial for saving the life of B can by no means amount to disrespecting B, for the fact that responsibility lies solely with those who actually killed B (Waldron, 2010, p. 32). Either way, it is worth mentioning that some authors even interpreted Gewirth's wording as claiming that absolute rights can only be those «that survive conflicts with other rights» (Addo and Grief, 1988, p. 514).

After all, for Gewirth, it was a tribute to the absolutist thesis that it could only be challenged by Levinson's utterly unrealistic assumptions (Gewirth, 1982, p. 351)[16].

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regarded as killing them but rather letting them die, or more precisely, failing to intervene to prevent their deaths (Gewirth, 1982, p. 351).

[15] Mavronicola also explained that due to the specification of the right, such a positive obligation does not exist, (Mavronicola, 2021, p. 14).

[16] Mavronicola also agreed that Levinson embraced rather than disputed Gewirth's theory, even though he was explicit in his understanding that there are no absolute (moral) rights (Mavronicola, 2021, p. 11).

In the same year when the two scholars communicated their discussion, Jack Donnelly published his contribution regarding natural rights, in which the issue of absolute rights was also tackled (Donnelly, 1982, pp. 391-405)[17]. To start with, he took the view that if there were any absolute rights, then only one natural right could exist, since assuming that rights cannot conflict with each other would be unrealistic (Donnelly, 1982, p. 395). He also indicated that the idea of absolute natural rights was incompatible with both logic and experience (Donnelly, 1982, p. 395). The presented case was the terrorist who is holding a hostage and threatening with a world-will-end catastrophe unless some individuals are killed in the name of people's justice and the only way to stop him is shooting or otherwise killing the hostage (Donnelly, 1982, p. 396). Although Donnelly correctly noted that shooting is that act that would violate hostage's right to life, he claimed that only extreme, nearly mindless deontologist would qualify the act as immoral (Donnelly, 1982, p. 396). Therefore, the conclusion was that even the most basic natural rights are «relatively absolute at best» (Donnelly, 1982, p. 396). Although he admitted that human rights as the strongest moral claims available usually take priority over utilitarian considerations, for Donnelly treating rights as absolute was simply an unjustified exaggeration (Donnelly, 1982, p. 396).

Still within the realm of contemplating natural rights, completely opposite route was taken by John Finnis. For him, killing an innocent person with the aim of saving lives of some hostages is an act which of itself does nothing but damage the basic value of life (Finnis, 1980, p. 119). The goods that will presumably be obtained as an outcome of the release of hostages, should it happen at all, would not be obtained by the act of killing *per se*, but by a distinct, subsequent act, which would be only one of many consequences of the act of killing (Finnis, 1980, p. 119). Simply put, it is indeed possible that the consequences of an act seem likely to be very good and to directly promote further basic human good, but these goods will not be secured (if at all) as consequences of one-and-the-same act, but of other acts (by different person, at different time and place, as a result of another free decision…). So, Finnis revealed that consequences, however foreseeable or

[17] At the very beginning of the paper, Donnelly clarified that contemporary human rights doctrines are grounded in natural rights theory of human rights, since human rights are natural for their source being human nature (Donnelly, 1982, p. 391).

certain they may appear to be, cannot be commensurably evaluated, leading to the conclusion that «net beneficial consequences» is actually an absurd general objective or criterion, as well as that consequences cannot be used to characterize the act itself as anything other than an intentional act of, in the given example, killing (Finnis, 1980, p. 121). For that reason, he proclaimed consequentialism to be «morass of arbitrariness» (Finnis, 1980, p. 124), its reasoning to be senseless and as a result, suggested its exclusion due to the naively arbitrary limitation of focus to the purported calculus «one life versus many» (Finnis, 1980, p. 119)[18]. Finally, the consequences in the form of damage to one basic value can never be outweighed by consequences in the form of benefit to other basic value(s), since each value is objectively basic, primary and incommensurable with others in terms of objective importance (Finnis, 1980, pp. 118-119, 121-122)[19]. Few decades later, Finnis maintained his stance by openly admitting that some human (or natural) rights are absolute, since certain kinds of acts ought never to be done owing to an indefeasible, exceptionless moral duty of justice that every individual has (Finnis, 2016, p. 195).

In outlining essential features of his own right-based theory and criticism of utilitarianism, John Laslie Mackie differentiated between «basic abstract *prima facie* rights», such as rights to life, health, liberty, pursuit of happiness and absolute rights, such as the one to «equal respect in the procedure that determine the compromises and adjustments between the other, *prima facie*, rights» (Mackie, 1984, p. 87)[20]. As most of the rights are *prima facie* ones,

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[18] Finnis explained senseless in a way that no plausible sense can be admitted to the consequentialist terms such as a «greatest net good», «best consequences», «lesser evil», «smallest net harm» or «greater balance of good over bad than could be expected from any available alternative action» (Finnis, 1980, p. 112).

[19] That is to say, for Finnis it would be morally wrong to commit the act that would lead to damaging basic values, such as for authorities to kill one in order to save millions. This argument was openly criticized as inadequate by Michael J. Perry, who argued that different basic values are indeed commensurable, since they can all be compared to a single standard and claimed that even Finnis admitted this fact along the lines. Therefore, according to Perry, it is possible to make a judgment on whether the consequences of an act in a form of benefit would overweight the consequences in the form of damage to basic values (in terms of the same standard). Be that as it may, Perry admitted that even if it turns out that the benefits would prevail, that would still not mean that one is morally obliged to commit the act leading to them (Perry, 1998, pp. 97–98).

[20] Some of the main objections against utilitarianism that he underlined was that maximizing of utility may call for sacrificing the well-being of one individual, without limit, with an aim

Mackie explained that they are defeasible and capable of being overridden, because they can conflict with one another (Mackie, 1984, p. 88). Once again, he stood against utilitarianism, by explaining that a resolution of such conflicts should be found by balancing them against one another, instead of weighing their merits against some different standard of value, such as utility (Mackie, 1984, p. 88). In any case, Mackie is among those who recognized that there are certain absolute rights, that cannot be overridden.

Not all scholars that dealt with the topic of absolute rights used this term directly or devoted their writings to its conceptualisation. Some have simply deliberated on torture, as a paradigmatical example of such a category, in an attempt to get the ball rolling.[21] In words of Alan M. Dershowitz, «torture remains a staple of abstract philosophers debating the virtues and vices of absolutism» (Dershowitz, 2002, p. 200). For Edward Peters, torture is «the supreme enemy of humanitarian jurisprudence» and «the greatest threat to law and reason that the 19th century could imagine» (Peters, 1996, p. 75). Along with the piracy and slavery, torture can be regarded as *hostis humani generis*[22]. Despite the fact that it was back in 1911 when the article on torture in the *Encyclopaedia Britannica* stated that «the whole subject is now one of only historical interest as far as Europe is concerned» (*Encyclopedia Britannica – A Dictionary of Arts, Sciences, Literature and Other Information*, Vol. 27, p. 72), torture remains to this day well and alive not only in academic debates but also in practice.

Widely cited on the matter is Henry Shue, who emphasized that apart from slavery, no other practice is so universally and unanimously condemned as far as international law and human rights conventions are concerned (Shue, 1978, p. 124). He ingeniously depicted the essence of torture by characterizing it as «the ultimate shortcut» (Shue, 1978, p. 141). In his effort to prove that all torture must be considered reproachful, although

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of promoting that of others, which is exactly what right-based theories stand against. In other words, he opposes the fact that utilitarianism treat all persons as one homogenous group, without taking into account their individual interests, as an «egoist would weigh together all his own desires or satisfactions» (Mackie, 1984, pp. 86-87).

[21] Torture was debated in this sense even by Bentham, who supported it in certain cases and Kant, who opposed it as part of categorical imperative against improperly using people as means for achieving noble ends (Langbein, 1977, p. 68).

[22] An enemy of all mankind.

attempts to justify its use can still be found in both literature and policy (Shue, 1978, p. 124), he made several important points.

For torture to be morally less unacceptable, Shue suggested that it must be constrained in the sense that victim needs to have an effective option for surrender, a way to put an end to the particular treatment (Shue, 1978, p. 131). Such a surrender may usually be realized by complying with the requirements of the torturer. Simply put, the victim must be informed of the purpose of torture and capable of performing an action that will fulfil that purpose in order to secure permanent cessation of further torture (Shue, 1978, p. 131). To test whether such a «constrained torture» could exist, Shue differentiated between two types of torture.

Terroristic torture, which is said to be the prevalent one, amounts to the treatment which aim is to intimidate wider public and not the victim itself (for instance, in order to suppress opposition, coup or put down guerrilla movements) (Shue, 1978, p. 132). He described it as the purest possible example of violating the Kantian principle that individuals should never be used merely as means (Shue, 1978, p. 132). In those cases, torturers will not have any particular reason to reduce the suffering to the minimum necessary amount, quite the contrary, most severe torture (possible even one leading to death of the victim) will make the strongest impact on others (Shue, 1978, p. 132). Therefore, there is nothing that the victim can do to stop it, hence it clearly cannot be characterized as the torture that allows for escape (Shue, 1978, p. 132).

Different type of torture is interrogational, with a clear objective of extracting information, so the goal is actually something that the victim could have control over (Shue, 1978, p. 133). Shue admitted that in practice, this kind of torture is not less brutal or reduced to the minimum necessary sternness compared to the first one (Shue, 1978, p. 134). Still, he went on to examine whether at least in theory it could satisfy the constraint of possible compliance. But the answer again appears to be negative because the victim will never be able to convince the torturer that the compliance is completed and that every relevant information is provided (if any is known at all in the case of the wrong person captured) (Shue, 1978, p. 135)[23]. It is highly unlikely that the torturer will be persuaded to stop the torture simply by the

[23] Shue also differentiated between interrogating the ready collaborator, the innocent bystander, and the dedicated enemy. For more, see Shue, 1978, pp. 134-137.

victim telling all there is to tell (Shue, 1978, p. 136)[24]. The slightest doubt will always remain part of this transaction and it will, in most cases, lead to further maltreatment, which is why pure cases of interrogational torture are almost only imaginable in theory (Shue, 1978, p. 140). For this reason, neither the first nor the second type of torture are capable of being constrained.

Generally, Shue insisted that for any torture to be justified, certain conditions must be satisfied prior to any cruel action (Shue, 1978, p. 137). Hence, few examples were offered, such as that the purpose of the torture must be supremely morally important and transparent in a manner that it has defined and reachable endpoint (Shue, 1978, pp. 137, 141)[25]. Nevertheless, whatever those constraints are, terroristic torture is a type of practice that almost certainly cannot be kept within any reasonable bounds, since empirical evidence show not only its uncontrollability, but also its metastatic tendency (Shue, 1978, p. 139, p. 143). Only in philosophical cases we can be assured that the practice of torture once authorized will not be expanded and abused[26].

Still, Shue made one remark that consequentialists could use as a sign that he conceded in spite of any of his previous considerable endeavours to prove that torture should never be permitted since it can never be justified. After referring to one of the «ticking bomb» scenarios, he admitted that interrogational torture may be permissible in such cases (Shue, 1978, p. 141). This is of considerable symbolic importance, due to the immense importance that consequentialist attach to the «ticking bomb» scenarios. As Waldron recollected, according to Bentham, saving one criminal and abandoning 100 innocent persons to the same fate was blind and vulgar humanity (Waldron, 2010, p. 217 citing W. L. and P. E. Twining, 1973, p. 347).

However, Shue continued to explain how unlikely the circumstances of these cases are, since they are always constructed in a way that make it seem as if everything is certain - the terrorist is not a suspect but certainly a perpetrator, he is not bluffing, but he certainly did plant a bomb, the device

[24] Shue emphasized this point by recalling the infamous maxim of the Saigon police: «If they are not guilty, beat them until they are» (Shue, 1978, p. 135).

[25] Terroristic torture would have to be the least harmful mean for fulfilling the supremely important objective (Shue, 1978, p. 137).

[26] Waldron also paraphrased Shue's point, see Waldron, 2010, p. 220.

is not jammed but certainly will explode if not deactivated and so forth (Shue, 1978, p. 142)[27]. He even altered the saying that in jurisprudence hard cases make bad law to state that in philosophy artificial cases make bad ethics (Shue, 1978, p. 141).

Richard Matthews disapproved of this point, claiming that Shue rejected torture because of wrong reasons, since the issue is not whether the «ticking bomb» scenarios represent hard cases, but the fact that they are completely ingenuine, irrational and purely abstract, hence have nothing in common with the world of humans and should not be part of debates about torture (Matthews, 2008, p. 88). Be that as it may, Shue's premise was that conclusions for ordinary cases simply cannot be drawn from extraordinary ones (Shue, 1978, p. 141). In words of Sumner B. Twiss, «Shue expressed deep suspicion about using extremely implausible cases to inform our moral intuitions about bedrock proscriptions» (Twiss, 2007, p. 366), hence Matthews's remark is actually not too far from Shue's reasoning. Therefore, Shue did not pay homage to consequentialists by allowing the possible permissibility of torture in artificial philosophical cases,[28] but highlighted that such cases, apart from being unrealistic, indicate that in order to be morally justified, interrogational torture must be conducted with a sort of surgical precision that is plainly unfeasible. After all, he did come to a conclusion that there is no reason for weakening the current (absolute) legal prohibition on torture (Shue, 1978, p. 143).

Philip L. Quinn also maintained that «ticking bomb» examples are hard cases (Quinn, 1996, p. 151). Since in those cases some find that torture can be justified, he claimed that the absolute moral prohibition of torture is not part of the common shared morality (Quinn, 1996, p. 152). Even though Quinn openly regarded himself as an absolutist (Quinn, 1996, p. 153), he was sceptical about the fact that one single argument against torture can serve to persuade all, given that moral justifications are always relative to different epistemic contexts across the world (Quinn, 1996, p. 168). Accordingly, he proposed that various sets of considerations (from religious to secular) must be presented to members of different societies and insisted that through collective effort over time it is possible to attain an overlapping consensus on absolute wrongness of torture, just as once was

[27] Much of Gewirth's concrete absolutism resembles this line of Shue's reasoning.

[28] *Cf.* Waldron, 2010, p. 118.

achieved regarding slavery (Quinn, 1996, p. 167). This position was also in accordance with that of Waldron, who stated that all modern moral cultures share the idea of some kind of standards defining maltreatment that people should not be expected to go through (Waldron, 2010, p. 317),[29] hence in this regard there is at least an inclination towards universalism. On top of that, international law itself rests on such common standards protecting human rights (Waldron, 2010, p. 329).

Finally, it is worth noting that there are even consequentialists who stood against torture. For his part, Lincoln Allison, as a utilitarian, was less optimistic than Bentham on possible benefits of torture, due to his awareness of torture's extremely corrupting effect (Allison, 1990, p. 24). Although he was of the view that it would be both convenient and morally attractive if torture was able to produce welfare that would outweigh the harm it carries, he determinedly concluded that it cannot (Allison, 1990, p. 24).

IV. Absolute Human Rights After the Global War on Terrorism

The September 11th attacks (hereinafter: 9/11), embodied in series of coordinated commercial airplane highjackings and suicide attacks executed in 2001 by militant extremists associated with al-Qaeda, took nearly 3 000 lives (Bergen, 2023). These attacks combined were the deadliest terrorist event ever (Statista Research Department, 2022), which represents a greatly disturbing point in history because it destroyed a landmark of a city that is amongst the world's largest, on the soil of the «Land of Liberty» that has one of the most advanced intelligence agencies (Kumar, 2023) and armies (Statista Research Department, 2023). On the list of the ten deadliest terrorist attacks in the period from 1972 to 2023, 9/11 remains the only one that did not take place in Asia or Africa (Statista Research Department, 2022). The response of the United States was to launch the Global War on Terrorism initiated by President George W. Bush, which included wars in Afghanistan and Iraq and a series of diplomatic, financial and other efforts to eradicate terrorism around the world ("Global War on Terror", Official webpage of the George W. Bush Presidential Library). An additional outcome was the

[29] Still, Waldron's approach was rather moderate, since he explicitly stated that he did not base his ideas «on the existence of moral universals» (Waldron, 2010, p. 317).

establishment of the extrajudicial detention facility in Guantánamo Bay, strategically positioned outside the US territory and infamous for, *inter alia*, allegations of using various forms of torture during interrogations (Nolen, 2023), physical and psychological techniques that had been outlawed, for instance by the European Court of Human Rights after their use by British forces against terrorist suspects in Northern Ireland in the early 1970s or by the Israeli Supreme Court after their use by security forces in Israel against terrorist suspects in the 1990s (Waldron, 2010, p. 186)[30].

The pervasive aftermath of the 9/11 reached every aspect of society, and academia and the judiciary were no exception[31]. Waldron noticed that even international law was beginning to be scrutinized and reconsidered, with proliferation of academic pieces reassessing its true nature, questioning whether it should be considered as law at all and rethinking the commitment to international legal institutions (Waldron, 2010, p. 15). In words of Olivier De Shutter, «the so-called "War on Terror" has led to a renewed focus on the question of whether torture may be inflicted on suspected terrorists who may be detaining "valuable" information – information, that is, that could save lives of innocent people» (De Shutter, 2014, p. 295). Law and moral philosophy classes thrived on hypothetical situations that played with comparing and balancing extreme levels of pain inflicted by a torturer on an informant with the amount of pain that could be avoided by using the information obtained in time (Waldron, 2010, p. 217). Scholars opposing the absolute status of the prohibition of torture were reappearing more than ever as if the attacks offered them new arguments for their defence of the state power and security against the preservation of human rights (Waldron, 2010, pp. 22-23). Apparently it was the experience of terrorism that amplified previous arguments *pro* torture of those who had taken this view all along, while at the same time it changed the minds of some who had been opposing torture prior to 9/11.

Waldron observed that it was not just the hard men of state security agencies (Waldron, 2010, p. 187), but prominent legal scholars that are usually committed to civil liberties who accepted that possibility of torture

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[30] See also Israeli Supreme Court, *Public Committee against Torture in Israel v. The State of Israel*, H.C. 5100/94, 53(4) P.D. 817 (1999).

[31] One of the topics that piqued after the attacks was concerning the place of Islam in liberal democracies, see Lépinard, 2020, p. 1.

under judicial supervision,[32] whereas in the philosophical discussion the option of using torture was becoming increasingly acceptable, if not even morally requisite in the context of the ticking bomb scenarios, which were progressively starting to seem realistic after the 9/11 events (Waldron, 2010, p. 6, pp. 217-218). But Waldron also recalled David J. Luban's view that the aim of the ticking bomb scenario is to compel even the most liberals who uphold the absolute prohibition of torture to justify and permit it at least in this one hypothetical scenario (Waldron, 2010, p. 218)[33]. Once they do, they acknowledge that their moral principle can be violated and as a result, they can no longer claim the moral high ground and they find themselves «in mud with consequentialists», waiting to see «how much further down [they] will go» (Waldron, 2010, p. 218).

Marie-Bénédicte Dembour noted worrying judicial trends in this period, including decisions that «would have been barely imaginable before September 2001» (Dembour, 2006, p. 95). She pointed out the notorious *Suresh case* of the Supreme Court of Canada,[34] in which it was stated that breaching of the *non-refoulement* principle would usually be a violation of the Canadian Charter of Rights and Freedoms, but that such a deportation is still a possibility in Canada (Bourgon, 2003, p. 184)[35]. To borrow Dembour's interpretation, the court said that the principle is not absolute, in spite of it having an absolute status in international law (Dembour, 2006, p. 95). Significantly enough, such a stance is contrary to previous rulings of the same court rendered before 9/11[36]. Stephane Bourgon is also convinced that the *Suresh* case is a manifest example of «the climate of insecurity and times of uncertainty» that were brought by terrorism of September 11th (Bourgon, 2003, p. 185).

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[32] Waldron was citing and referring to Dershowitz.

[33] See also Luban, 2005, p. 1440.

[34] Supreme Court of Canada, *Manickavasagam Suresh v. Canada (Minister of Citizenship and Immigration) and the Attorney General of Canada*, 11 January 2002, SCC 1.

[35] Stephane Bourgon rightly argued that the Court should have considered whether such a prohibition is at least a norm of customary international law binding on Canada, if not even a *jus cogens* norm (Bourgon, 2003, p. 174).

[36] Supreme Court of Canada, *Singh v. Minister of Employment and Immigration*, 4 April 1985, 1 SCR 177, para. 47; Supreme Court of Canada, *United States v. Burns*, 15 February 2001, 1 SCR 283.

Equally indicative is the UK Court of Appeal's ruling from 2002 stating that indefinite detention of aliens suspected of terrorism without trial was permissible under the ECHR[37] and in 2004 that evidence possibly obtained by using torture in a foreign jurisdiction need not be inadmissible[38]. In addition, Dembour emphasized the reactions following the decision in *Boumediene v. Bush*, when the US Supreme Court concluded that the Military Commissions Act, which barred foreigners held as «enemy combatants» from challenging their detention, was an unconstitutional suspension of the writ of *habeas corpus* guaranteed in the Constitution. Reports of the decision varied from «major victory for civil liberties» in the *New York Times* to «judicial imperialism of the highest order» in the *Wall Street Journal* (Chesney, 2008, p. 851). According to John Yoo, author of the controversial «Torture Memos», in which torturous acts were referred to as «enhanced interrogation techniques» with the objective of their final legalization,[39] the decision reflected «a failure to appreciate the danger posed by terrorism» (Yoo, 2008).

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[37] Court of Appeal (Civil Division), *A and Others v. Secretary of State for the Home Department*, [2002] EWCA Civ 1502, [2003] 1 All ER 816, 25 October 2002. See also Dembour, 2006, p. 96.

[38] Court of Appeal (Civil Division), *A and Others v. Secretary of State for the Home Department*, [2004] EWCA Civ 1123, [2004] All ER (D) 62 (Aug), (Approved Judgment), 11 August 2004. See also Dembour, 2006, p. 96. «The Secretary of State [...] was not precluded from relying [...] on evidence coming into his hands which had or might have been obtained through torture by agencies of other states over which he had no power of direction», as cited in Waldron, 216. This decision was overturned by the House of Lords in *A. (F.C.) and Others v. Home Secretary*, House of Lords decision, December 8, 2005, see Waldron, 2010, p. 216.

[39] It was part of the efforts of lawyers within the Bush administration trying to develop arguments to avoid legal constraints and limitations regarding torture and maltreatment of detainees, as part of their broader counterterrorism policy. Examples of «enhanced interrogation techniques» are prolonged sleep deprivation, binding in stress positions and waterboarding. The aim was to adopt narrower understanding of torture, so that it did not accommodate all cases of intentional infliction of pain during interrogations. The «Torture Memo», also known as «Bybee Memo» argued not only that the US would not be violating its international obligations by using those «enhanced interrogation techniques» on enemy combatants, but also that ultimately there is no international court that could take issue with their interpretation of the Convention against Torture. See De Schutter, 2014, pp. 296-297. See also "A Guide to the Memos on Torture", *The New York Times*, ND, https://archive.nytimes.com/www.nytimes.com/ref/international/24MEMO-GUIDE.html (accessed 17.06.2023)

One of the most controversial authors, at least in terms of how much criticism he met over the years, must be Alan M. Dershowitz[40]. Since he was often misinterpreted, it is important to highlight that he opposed torture as a normative matter, and he insisted that all his proposals were made with an aim of eliminating or at least reducing the use of torture[41].

Based on his empirical certainty that many nations around the globe are still stealthily practicing torture in their efforts to prevent terrorism, he suggested that it would be more acceptable for the democracy and the rule of law if some forms of nonlethal torture were allowed under the condition of judicial warrant and supervision (Dershowitz, 2002, p. 232).[42] His additional argument was that torture must sometimes be effective in crime prevention, otherwise it would not still be used by many countries (Dershowitz, 2002, p. 158).

He found formal, visible, accountable and centralized systems to be more controllable than off-the-books practices (Dershowitz, 2002, p. 232). Also, such a system which requires judicial authorization would reduce the amount of applied physical violence, thus it would protect a suspect's rights much better (Dershowitz, 2002, p. 232). Dershowitz was convinced that both judges and law enforcement officials would be unwilling to activate the authorization procedure unless they have compelling evidence that the suspect indeed possesses information for preventing an imminent terrorist attack (Dershowitz, 2002, p. 233)[43]. Finally, he stressed that «absolute

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[40] Dershowitz eventually tried to underline that he advocated pro-torture ideas well before 9/11, but the fact is that his most prominent pieces regarding the topic was published after these events, as well as that in his hypothetical examples he relies heavily on 9/11 scenario. See Dershowitz, 2002, p. 221.

[41] In his words: «My argument is not in favor of torture of any sort. It is against all forms of torture without accountability.» (Dershowitz, 2004, pp. 257-290).

[42] One form of non-lethal torture that he strongly suggested was "a sterilized needle inserted under the fingernails to produce unbearable pain without any threat to health or life» (Dershowitz, 2002, p. 211).

[43] Even though he admitted that «there are no guarantees that individual officers would not engage in abuses on their own, even with a warrant requirement», he did not mention the very probable possibility that a complex and strict procedure of judicial supervision would actually demotivate officials, who will consequently continue with their off-the-book use of torture, see Dershowitz, 2004, p. 290. Waldron similarly criticized Dershowitz, by stating that it cannot just be assumed that the intelligence officials will not lie or misuse their torture related authorities, since he understood some parts of Dershowitz's texts as if he himself acknowledged that there

opposition to torture —even nonlethal torture in the ticking bomb case— may rest more on historical and aesthetic considerations than on moral or logical ones" (Dershowitz, 2002, p. 217).

On the other hand, Waldron aptly pointed out that there is no assurance that nonlethal methods would not turn into more deadly and oppressive forms of torture, which is why he «draws the line at torture" (Waldron, 2010, p. 219). He insisted that the line should stay where the law demands it to be and where the human rights norms has insisted it should be drawn (Waldron, 2010, p. 219).

Dershowitz's case for pro-nonlethal torture was described as a «stunningly bad idea» by Jean Bethke Elshtain (Elshtain, 2004, p. 83). Being one of the authors who actually changed their reasoning regarding torture after the events of 9/11 (Elshtain, 2004, p. 77),[44] Elshtain did not advocate its legalization, since torture should never become routine, but she accepted that the prohibition could sometimes be overridden (Elshtain, 2004, pp. 83-84). Despite her claim that she stood neither with Kant nor with Bentham, for deontology making torture impossible while utilitarianism making it too easy and too tempting (Elshtain, 2004, pp. 78-79), she concluded that normative condemnation of torture must be complemented with «appropriate consequentialist considerations» (Elshtain, 2004, p. 87). For her, denouncing «Torture 2», *i.e.*, coercive interrogation was «a form of moral laziness» (Elshtain, 2004, p. 88)[45].

Waldron deprecated her approach for not being direct enough (Waldron, 2010, p. 8). Not only could Elshtain have elaborated more on the specific forms in which «Torture 2» may appear in real life, but she could have also reflected on different inhuman and degrading treatments that are already encompassing «techniques short of torture» (Waldron, 2010, pp. 8-9).

Being confident that the wrongness of torture was not changed after 9/11 attacks, he was not persuaded that Elshtain and other philosophers

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was something insincere in the proposal to allow only nonlethal torture. To Dershowitz's argument that abuses in the Abu Ghraib prison in Iraq would be prevented if his judicial warrant mechanism was implemented, Waldron argued that Abu Ghraib was very far from the «ticking bomb» scenario (Waldron, 2010, pp. 219-221).

[44] See also Waldron, 2010, pp. 7-8.

[45] Comparingly, Torture 1 was denoted as extreme forms of physical torment (Elshtain, 2004, p. 87).

that were of one mind truly believed that 9/11 affected our moral values (Waldron, 2010, p. 10). Just the opposite, his interpretation was that they wanted to say that terrorist attacks simply provoked unthinking absolutists to consider more thoroughly torture, which they had long ago qualified as permissible in extreme cases (Waldron, 2010, p. 10), or in short, as if they wanted to say, «we told you so».

Prior to 9/11 torture was and after 9/11 it remains both moral and legal abomination (Waldron, 2010, p. 4). Thinking of Nozick, for whom rights are side-constraints on the pursuit of general good and Dworkin, for whom they are like trumps over considerations of general utility, Waldron was full of hope that there are still those who truly believe in resilience of rights against considerations such as general utility or security (Waldron, 2010, p. 10). After all, he concluded that revising certain rights may sometimes be acceptable, but this should not apply to rights that the law traditionally regarded as absolute (Waldron, 2010, p. 11). Waldron clarified that by absolute he refers to non-derogable rights and highlighted that combating terrorism should be limited by «certain absolute legal and moral constraints», since «some rights were designated long ago as absolutes precisely because of the temptation to rethink them or relativize them in times of panic, insecurity, and anger" (Waldron, 2010, p. 11).

Apart from absolute rights, civil liberties are indeed balanced against security considerations in line with the consequentialist reasoning. Waldron goes as far as to state that civil liberties are «a matter of more or less», that they are not even defined until some balancing exercise is undertaken (Waldron, 2010, p. 30). In the new atmosphere after 9/11, he noticed the trend of proposing re-balancing, since a balance that was previously considered acceptable now needed to be reconsidered (Waldron, 2010, p. 22). Simply put, civil liberties must give way if the reasons in their favour remain the same while something is added to the reasons on the other side and the added part in this case is the new or increased threat from terrorism (Waldron, 2010, pp. 27-28).

However, Waldron opposed this view by claiming that recalculation after 9/11 can only be seen as requiring us not to accept less liberty and grant the state more power for the sake of the greater security but to have greater courage and brave a higher risk for preserving the same amount of liberty (Waldron, 2010, p. 25). He added that the documented display of incompetence and rivalry within US intelligence and law enforcement agencies, who already

possessed significant powers leading up to 9/11, provides no grounds to assume that granting them more power would enhance their effectiveness in tackling this exceedingly challenging task (Waldron, 2010, p. 45).

As part of a broader criticism of consequentialism, Waldron underlined that we are expected to perceive civil liberties from the perspective of their consequences, which leads to the conclusion that if the consequence of a certain degree of liberty is an increased level of risk, that must be considered when deciding whether that degree of liberty should be maintained (Waldron, 2010, p. 44). However, he insisted that «we must be sure that the diminution of the liberty will in fact have the desired consequence», or in other words that the case for reducing liberty must be based on the actual prospect that if liberty is reduced, security will not be abused but enhanced (Waldron, 2010, p. 44). Contrary to what a consequentialist would claim, Waldron is of the opinion that we can never know what the prospect is and whether it is worth giving up a civil liberty in order to readjust balance (Waldron, 2010, p. 44)[46]. Security is not to be treated as a good to be maximized by the society, but as a goal to be achieved, as much as possible, as it is also a matter of more or less (Waldron, 2010, p. 185). In his words, «civil liberties are often regarded as rights, and the idea of "rights as trumps" is precisely the idea that rights are not to be regarded as vulnerable to routine changes in the calculus of social utility» (Waldron, 2010, p. 28).

Hardly is there anybody who believes that balance of rights *versus* rights or some other consideration should be readjusted whenever it appears that some other right-bearer has something to gain from that adjustment, but it needs to be justified by structured arguments that consider special character of rights, moral considerations and intricacies of various relations between one person's rights and another's (Waldron, 2010, p. 33).

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[46] Waldron also pointed out one paradox in this context. Specifically, he cited President Bush's statement that the terrorists who threaten us do so precisely because they hate our freedoms and seek to scare us away from exercising them. However, Waldron raised the question of whether the terrorists' strategy is actually to provoke those who are supposed to protect us into curtailing our rights. In other words, «if the state's reaction to A's attack on B is to curtail B's rights, can we really say that it is A's attack that is the standard threat to rights?». Waldron was certain that the argument of enhancing security which B is supposed to need in order to enjoy her rights cannot be used to justify depriving B of her rights, as doing so would postulate the very same thing (taking away rights by the state in the face of terrorist attack) as both the problem and the solution! (Waldron, 2010, p. 175).

Be that as it may, he was well aware that the majority of theories opposing routine trade-offs between rights and consequences still aim to accommodate some sort of «out» in order to avoid the so-called *ruat caelum*, *i.e.*, extreme absolutism that would allow heavens to fall (Waldron, 2010, p. 31). Waldron remarked that 9/11 can be regarded as Nozick's «catastrophic moral horror» (Waldron, 2010, p. 31). As a matter of fact, Nozick acknowledged the question whether side constraints are absolute or they may be violated in order to escape the catastrophic moral horror, but avoided answering it (Nozick, 1974, p. 36). For Waldron, the issue is not to be found in the occurrence of such horror, but in the question of whether the abrogation of rights is the right means to circumvent it (Waldron, 2010, p. 31).

While noticing that 9/11 attacks is the closest we have ever got to the real-life ticking bomb scenario, Waldron insisted, just as Shue did, that only a few cases are as precise as philosophical hypotheticals make them appear or as certain as Dershowitz formulated them to be (Waldron, 2010, pp. 41-42). Following Shue's argument on torture's metastatic tendency, he remembered that last hundred years proved that torture cannot be kept under rational control (Waldron, 2010, p. 42).

Moreover, Waldron insisted that the usage of the ticking bomb scenario is silly because torture is hardly ever used in the real world to gather crucial information about specific ticking bombs, but to collect numerous small and seemingly insignificant pieces of data which may only gain importance when combined with other pieces of similar data obtained through various means (Waldron, 2010, p. 219). Dishonesty of the ticking bomb scenario was found in the attempts to use a far-fetched scenario, better suited for a TV thriller than the real world, in order to deliberately undermine the integrity of certain moral positions (Waldron, 2010, p. 219).

While on the subject, some important contributions regarding torture were also published during the first decade of the 21st century, probably provoked by the wave of 9/11 related discussions.

Sumner B. Twiss emphasized several effects of torture that stem from its inherently destructive nature (Twiss, 2007, p. 358). Firstly, he pointed to its detrimental implications on the victim itself, which amount not only to permanent physical injuries and potential disabilities, but also psychological consequences, such as trauma, chronic depression (often followed by suicidal attempts), anxiety, nightmares, paranoia, flashbacks, and irreversible alternations of brain patterns (Twiss, 2007, p. 358). From this point of view,

it is not surprising that Twiss underlined how for majority of survivors rest of their lives are like living death (Twiss, 2007, p. 358).

Another set of considerations regards victim's social environment (Twiss, 2007, p. 358).[47] Victims of torture usually develop trust issues and aggressive behaviour, which ultimately damages their family and social relations (Twiss, 2007, p. 359). Systemic use of violence in any community generates collective trauma for the whole society and eventually makes it morally and historically dysfunctional (Twiss, 2007, p. 360)[48].

Finally, taking a cue from Shue, Twiss highlighted torture's metastatic tendency, since there is empirical evidence indicating likelihood that the practice will become routinized and uncontrollable (Twiss, 2007, p. 360). Following Shue's lead on differentiating between various types of torture, Twiss insisted that it is well documented how interrogational torture will eventually slide into terroristic or recreational torture or even how terroristic torture will turn into recreational, irrespective of any countervails (Twiss, 2007, p. 362)[49].

Moreover, unreliability of interrogational torture for gathering accurate intelligence was also stressed, since torturer can never be completely certain that provided information are correct and/or complete, which usually leads to over-torture (Twiss, 2007, p. 361). Terroristic torture often cannot be separated from punitive torture, because both of them have the ultimate goal of controlling others through fear (Twiss, 2007, p. 361). As for recreational torture, it is transparently wrong based on a strong moral intuition that it provokes (Twiss, 2007, p. 363), or in words of Judith J. Thomson, its wrongness is «a nontrivial necessary moral truth» (Thomson, 1990. pp. 18-20)[50].

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[47] The fact that torture also has destructive elements on others is the reason why some, including Twiss, refers to a direct victim of torture as the «primary victim».

[48] History is fabricated when actual practices are denied by official statements and records and therefore, detached from reality, hence false history can only be remedied through later public disclosure of torture, for instance, through prosecutions or special truth commissions (Twiss, 2007, p. 360).

[49] According to Twiss, interrogational torture has purpose of acquiring information or a confession, punitive torture is a form of punishment for a crime, terroristic torture tends to control a population by instilling fear, while recreational torture is simply used for fun. Twiss even described recreational torture as «useless violence», but it is highly debatable whether there is such a thing as «useful violence».

[50] Her position is also worth mentioning: «I cannot bring myself to believe that what makes it wrong to torture babies to death for fun (for example) is that doing this would be disallowed

Therefore, Twiss reminded that upon informed reflection, it is obvious that torture *per se* is intrinsically and grievously harmful not only for the victim, but also for other persons and communities and that it is highly probable that the practice will eventually become standardized, which all lead to the apprehension that all torture is absolutely wrong and should be stringently and non-derogably prohibited «for the benefit (or minimization of harm) for all» (Twiss, 2007, p. 363-364). Hence, «all human beings have an absolute non-derogable right not to be tortured» (Twiss, 2007, p. 364).

But Twiss also admitted that, unlike Quinn, he is confident that the absolute prohibition of torture is actually already deeply rooted and securely grounded due to its being a subject of an overlapping consensus (Twiss, 2007, p. 364). Namely, hardly is there any moral system in the world that would permit assaulting a person in a way that torture does - by inflicting a pain so severe that it effectively unmakes a person from the inside (Twiss, 2007, pp. 364-365). Since virtually all religious and moral systems recognize the concept of human dignity in some way[51] and demand that every person *qua* person should be inviolable, hence denounce violation of individual's dignity through torture (Twiss, 2007, p. 365).

After all, he rejected that the case of absolute prohibition of torture can be undermined by the ticking bomb scenario, both for its implausibility that Shue already described and the fact that it inflicts fear and anxiety into the reasoning, instead of sharpening our moral intuition (Twiss, 2007, p. 367). Nevertheless, should this scenario actually threaten national security in the real-life cases, an appropriate reaction would be to improve intelligence gathering and develop prevention mechanisms instead of authorizing torture (Twiss, 2007, p. 367). According to Twiss, the main task of invoking the ticking bomb scenario is actually to divert our attention from the devastating nature of torture and doing so is morally dangerous (Twiss, 2007, pp. 366-367).

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by any system of rules for the general regulation of behaviour which no one could reasonably reject as a basis for informed, unforced general agreement. My impression is that explanation goes in the opposite direction—that it is the patent wrongfulness of the conduct that explains why there would be general agreement to disallow it» (Thomson, 1990, p. 30).

[51] That can be, for instance, as an intrinsic value *per se*, or through the personification of God or even as an expression of a cosmic soul (Twiss, 2007, p. 365).

Similar attitude towards the phenomenon of the ticking bomb scenario was adopted by Richard S. Matthews. Even though ticking bombs appear to be detonating all around the literature, he described the hypothesis as both conceptually and empirically wrong (Matthews, 2008, p. 70). The view that was taken boils down to the pseudo-consequentialist nature of the argument, since ticking bomb scenarios are factually inconceivable due to their ignorance towards, *inter alia*, set of conditions required to conduct torture in practice, torture's institutional nature, its empirical consequences and creating a demonizing myth of the «terrorist» (Matthews, 2008, p. 96). In words of Alfred W. McCoy, logical weaknesses of the ticking bomb scenario stem from its «improbable, even impossible, cluster of variables» (Matthews, 2008, p. 72)[52].

To Fritz Allhoff's remark that as a moral philosopher, he is not interested in whether torture would ever be morally permissible in practice, but rather only in theoretical arguments *pro et contra* its principal justifiability and testing whether a hypothetical case for torture can ever be constructed, Matthews replied that if understood that way, torture loses its real meaning and bears «no relation to possible empirical instantiations», since it can never be detached from its practical traits and consequences (Matthews, 2008, p. 96)[53].

The point is that «such ahistorical and nonempirical ethical theorizing created the moral illusion that torture is justifiable» (Matthews, 2008, p. 97)[54]. That is also why he defied Eitan Felner's view that the ticking bomb hypothesis can find its use in ethical classrooms (Matthews, 2008, p. 98)[55].

Shue's invocation of the premise that «hard cases make bad law» was rejected as well, because ticking bomb scenario is not a hard case, but rather an ingenuine one, due to its belonging to «the abstract realm of pure logical possibility» and the fact that it is divorced from the world of human beings (Matthews, 2008, p. 98). He used M. Cherif Bassiouni's assertion that no scenario seen in Abu Ghraib, Guantanamo Bay or Afghanistan come even

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[52] See McCoy, 2006, p. 192.

[53] He is referring to Allhoff, 2005, p. 260.

[54] He continued to explain that applied ethical problems should not be used in this manner, since the ticking bomb scenario does nothing more than force one to admit that if the given premises are true, then the conclusion must be true. Nevertheless, it does not reveal whether the premises are really true, (Matthews, 2008, p. 88).

[55] For Felner's argument see Felner, 2005, p. 42.

close to the ticking bomb scenario to confirm his stand that empirical correlate to the imagined scenario can never exist. (Matthews, 2008, p. 98) (Bassiouni, 2005, p. 259). Simply put, given its impossibility, ticking bomb scenario should not have any impact on debates regarding torture (Matthews, 2008, p. 98).

With regard to the consequentialist's reasoning, Matthews reminded that, for instance, Oren Gross, who defended the absolute prohibition of torture, still suggested that «if the circumstances are extreme enough, consequentialist reasoning obliges public officials to torture» (Matthews, 2008, p. 15). Matthews was, though, explicit that even if we were to employ some sort of consequentialist calculations, torture can never be considered as a lesser evil or as happiness maximizing (Matthews, 2008, p. 136). The underlying reason is considerable suffering it imposes not only on the victims and their family members, but also on the torturer (through psychological damage and impacts on family and social life) and wider community (Matthews, 2008, p. 136). Trauma that is inseparably linked with this practice is transgenerational and leaves far-reaching repercussions (Matthews, 2008, p. 208). In addition, it undermines social, political, and economic institutions within the targeted community, hence destroying it in the long run (Matthews, 2008, p. 208).

Oddly enough, defenders of torture openly proclaim that torture can be acceptable only as a last resort and only in exceptional circumstances, but at the same time ignore the obvious need for a state to prepare, tutor and train officials in order for them to become capable of conducting it when the time comes (Matthews, 2008, p. 210). State can torture only if it creates routine system of violence, *i.e.*, systemic violence, which is why torture can never be exceptional (Matthews, 2008, p. 216).

When it comes to the argument about preservation of national security, Matthews recalled that David Rieff pointed out that it is a mistaken belief that torture can prevent a ticking bomb from exploding, a belief that only shows complete misapprehension of intelligence, because policies on gathering intel are far more complicated than the elimination of ticking bombs (Matthews, 2008, p. 94)[56]. As ex US marine interrogator explained, skills required for successful interrogation are sympathy, warmth, frankness and

[56] See also Rieff, 2002, p. 108.

an overall friendly approach, rather than violent and torturous methods (Matthews, 2008, p. 219)[57].

The logical incoherence of claiming that something that will inevitably become routinized will be used only exceptionally, together with the fact that torture's effectiveness and possible benefits can never prevail its outstandingly harmful consequences for the victim, for the family and for the wider community, clearly indicate that it can never be a lesser evil (Matthews, 2008, p. 119, 210). These are all reasons for Matthews to insist that even utilitarians must also absolutely oppose torture (Matthews, 2008, p. 210)[58].

The question of potential existence of absolute human rights was also briefly raised by Griffin in his treatise that Tasioulas described as «the most significant philosophical meditation on human rights to emerge in the human rights-intoxicated era» (Tasioulas, 2014, p. 9). Being mainly invested in the topics of identification of relevant criteria for the use of term «human rights», their normative content and weight, Griffin plainly expressed determination that human rights cannot be absolute, since they can conflict not only with each other, but also with other moral considerations, such as welfare or justice (Griffin, 2008, p. 68)[59]. Nevertheless, certain ambivalence can be sensed in his admission that there are values, such as our personhood, that resist trade-offs through what he calls «discontinuities», meaning that no amount of conflicting value can ever exceed them (Griffin, 2008, p. 68). He even acknowledged that such a stance may echo absolutism but insisted that it does not support it (Griffin, 2008, p. 80). Griffin did not support consequentialism either, for its cost-benefit calculations being based on assumptions that are oversimplified, unreliable and not probable enough (Griffin, 2008, pp. 70-71)[60]. Finally, it is worth mentioning that while discussing equality, he pointed out Mackie's example of absolute right and offered his own definition of the concept, stating that right is absolute because it is a moral standing itself, and morality can never recommend suspending the moral point of view (Griffin, 2008, p. 39).

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[57] For more on the former US marine interrogator's stands, see Moran, 2007, p. 251.

[58] Based on these reasons, he is convinced that both utilitarian and virtue-ethical traditions are perfectly capable of supporting exceptionless prohibitions (Matthews, 2008, p. 179).

[59] For the analysis of right-welfare and right-justice conflicts see Griffin, 2008, pp. 63-66.

[60] He suggested a view for what he says is neither utilitarianism nor consequentialism, but a kind of teleology. For more Griffin, 2008, p. 73.

V. Conclusion

Waldron's stances are worthy of recollection even in the conclusion. Not only was he sceptical that «everything is different after 9/11», as a significant proportion of literature suggested at the time, but he also maintained that certain legal prohibitions were constructed exactly for the situations in which it will be challenging to conform to them (Waldron, 2010, p. 189). Thus, the prohibition of torture was established specifically for scenarios where temptation to use torture is greatest, such as in war and terror, and if the prohibition cannot withstand these circumstances, its value is diminished in all other situations (Waldron, 2010, pp. 189-190).

In any case, Waldron admitted that after 9/11 it was not particularly difficult to ridicule the idea of an absolute prohibition, at least as a matter of moral philosophy (Waldron, 2010, p. 216). He acknowledged that most of the scholars who were not already a part of the consequentialist camp remained quite moderate in their deontology, since they were ready to turn their back on the absolutes once confronted with Nozick's «catastrophic moral horror» (Waldron, 2010, p. 217). Hence, deontological principles usually prove to be frail should enough pressure is applied (Waldron, 2010, p. 217).[61] Waldron unapologetically accused academics of being afraid to appear unrealistic if they defend absolutism, so they cave in and allow moral restraints to be abandoned when the stakes are high enough, since creatively imagined extreme circumstances can make any moral absolute look silly (Waldron, 2010, p. 217).

He concluded with an unpleasant point, that «for a culture supposedly committed to human rights, we have amazing difficulty in even conceiving—without some sort of squirm—the idea of genuine moral absolutes» (Waldron, 2010, p. 217).

The point he continually maintained is that some acts are contrary to the very spirit of law and torture is one of them (Waldron, 2010, p. 221). In this regard, Waldron cited H.L.A. Hart's concept of «the minimum content of natural law», the idea that there are certain types of rules that a

[61] Interestingly enough, Waldron reminded how David Sussman's distinguished accounts explaining inherent wrongness of torture and accounts demonstrating that what is inherently wrong may never in any circumstances be done, for that «inherently» does not imply «absolutely». See Sussman, 2005, pp. 2-3.

legal system could not do without, considering «humans as they are and the world as it is», because such rules are so fundamental to a legal system that without them all other rules would be pointless (Waldron, 2010, p. 215)[62].

There may be some things appearing justifiable in theory, yet its permissibility could significantly affect the rest of the law, which is a compelling reason for not allowing them (Waldron, 2010, p. 222). Hence, legal prohibition of torture should remain intact, even if «we cannot make a case in purely philosophical terms for a moral absolute» (Waldron, 2010, p. 221). Otherwise, the integrity of our legal system would be jeopardized, leading us to depart from a state in which our law has «a general virtue of non-brutality» and arrive to a point where such a trait would be compromised and corrupted (Waldron, 2010, p. 246). The thought of allowing most atrocious of practices is offensive to contemporary ideas of decency, dignity, and our civilization's accomplishments[63].

After all, it is worth reminding that «nothing in the history of modern secular ethical theory gives reason to expect that general agreement on a single comprehensive ethical theory will ever be achieved» (Adams, 1993, p. 93), and the same probably stands for this topic.

Having said that, the aim of this paper was to illuminate main arguments about absolute rights of the scholars from opposed ethical theories that has long been contemplating this concept, as well as to show how their thoughts may have changed over time, especially after 9/11 attacks. An inquiry of this kind can be valuable because periodic summaries of philosophical views, emphasizing the most convincing arguments, have the potential to bring the current state of affairs closer to an agreement, which is pivotal for the fact that «the strength of a legal prohibition depends on the level of moral and political consensus behind it» (Waldron, 2010, p. 216). The paper may contribute to the broader discourse by offering a comprehensive analysis of the philosophical conceptualisations of absolute rights, aiming to inform and guide not only future scholarship, but also practical human rights rea-

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[62] Hart claimed that those are the prohibitions restricting the use of violence in killing or inflicting bodily harm; rules that ensure mutual abstinence from inflicting harm; rules requiring forbearances; rules which require respect for property, division of labor and co-operation and that a legal system must contain sanctions, see Hart, 1961, pp. 193-200.

[63] Similar wording can be found in the case US Supreme Court, *Hope v. Pelzer*, 27 June 2002. 536 U.S. 730, 737. For the constitutionalisation in regard to the human rights law see Matijević, 2021.

sonings. The ongoing engagement with these critical issues is essential for advancing the understanding and implementation of human rights in a way that respects both individual positions and collective well-being.

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