Key Cases on Human Dignity under Article 3 ECHR

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Abstract

This contribution provides a brief analysis of some of the key cases where recourse to human dignity has been central to the finding of an Article 3 ECHR violation. These cases are notable for the way in which human dignity is used, in conjunction with the recognition of especial vulnerability, to expand and broaden the scope of protection. In addition, human dignity is being used to prohibit treatment that would entail an abuse of the vulnerability of the victim by the state, even though no material harm is experienced by the victim. As it is only possible to offer an analysis of a small sample of these cases, this contribution focuses on those representing a substantial evolution or exemplifying a sustained pattern in the judicial use of human dignity. The cases that have been chosen also reflect the main themes covered throughout this special issue.

Introduction

Human dignity has been recognised as the "very essence" of the European Convention on Human Rights (ECHR) in the jurisprudence of the Strasbourg Court.[2] This implies that human dignity is a foundational value that provides the rationale for the generation and protection of Convention rights, as well as unites those rights around a common core.[3] More broadly, respect for human dignity is seen as central to

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[2] *SW v United Kingdom* and *CR v United Kingdom* [1995] 21 E.H.R.R. 363 [44]; *Pretty v United Kingdom* (2002) 35 E.H.R.R. 1 [65].

[3] For description of the role that human dignity plays as a fundamental value, see Aharon Barak, *Human Dignity: The Constitutional Value and the Constitutional Right* (Cambridge: CUP, 2015), p. 49-68.

establishing an integrated system in which democracy and the rule of law serve to protect and promote that overarching value.[4] In addition to this foundational role, human dignity has also been deployed in judicial reasoning in order to shape the scope and application of Convention rights. This role can be seen in relation to most of the rights in the Convention, but it is no more prominent then in the context of Article 3. Indeed, human dignity has now become integral to the assessment of what constitutes degrading treatment.

As discussed here, recourse to human dignity has been central to the finding of an Article 3 violation. What is notable about these cases is the way in which human dignity has been used, in conjunction with the recognition of especial vulnerability, to expand and broaden the scope of protection. This trend has not gone unnoticed, and has led to criticisms that the dignity-vulnerability connection is being used transform the Convention into a scheme of social rights.[5] In addition, human dignity is being used to prohibit treatment that would entail an abuse of the victim's vulnerability, even though no harm is experienced by the victim. This has led to separate criticisms that human dignity is being misused in order to 'distort the jurisprudence of Article 3' and render the protection 'unworkably wide'.[6]

As it is only possible to offer an analysis of a small sample of these cases, this contribution focuses on those that represent a substantial evolution or exemplify a sustained pattern in the judicial use of human dignity. The cases that have been chosen also reflect the main themes covered throughout this special issue. They are addressed

[4] "The European Convention on Human Rights must be understood and interpreted as a whole. Human rights form an integrated system for the protection of human dignity; in that connection, democracy and the rule of law have a key role to play." *Refah Partisi (The Welfare Party) and Others v Turkey* (2002) 35 E.H.R.R. 3 [43].

[5] A Sajó, "Victimhood and Vulnerability as Sources of Justice" in D. Kochenov, G. de Búrca, and A. Williams, *Europe's Justice Deficit?* (Oxford: Hart Publishing, 2015), p.346

[6] S. Riley, 'Commentary on Bouyid v Belgium' (November 10, 2015), http://echrblog.blogspot.com/2015/11/commentary-on-bouyid-v-belgium.html [Accessed January 6, 2019].

in the following order: detention and imprisonment; asylum seekers and refugees; LGBT and sexual minorities.

1. Detention and Imprisonment

Case: *Vinter and Others v United Kingdom* (2016) 63 E.H.R.R. 1

Summary: Imposing a whole life sentence without the prospect of release or review was a violation of Art 3 ECHR.

Key Quote: "[A]s the German Federal Constitutional Court recognised in the *Life Imprisonment* case…it would be incompatible with the provision on human dignity in the Basic Law for the State forcefully to deprive a person of his freedom without at least providing him with the chance to someday regain that freedom. It was that conclusion which led the Constitutional Court to find that the prison authorities had the duty to strive towards a life sentenced prisoner's rehabilitation and that rehabilitation was constitutionally required in any community that established human dignity as its centrepiece. Similar considerations must apply under the Convention system, the very essence of which, as the Court has often stated, is respect for human dignity." [Para 113]

Analysis: In *Vinter* the Grand Chamber draws on the decision of the German Constitutional Court, in the *Life Imprisonment Case,* to establish human dignity as a principle that requires an emphasis on the rehabilitative goal of imprisonment. Underpinning the reasoning, at least implicitly, is an account of human dignity that requires respect for the free development of human personality.[7] On this account, the capacity for self-transformation is constitutive of the human person; each person is

[7] This connection is made more explicit in the *Life Imprisonment Case*. See: E. Eberle, 'Human Dignity, Privacy, and Personality in German and American Constitutional Law' (1997) Utah Law Review 963.

thus able to critically reflect on their past and make choices to revise their personality, so that they can change who they are and who they will become. The course of a human life is thus not predetermined, but can be reshaped through the efforts of the person whose life it is.

However, this power to shape our own lives is twinned with the recognition of our moral responsibility towards others. This is particularly evident in the *Life Imprisonment Case* upon which the Grand Chamber draws. As is highlighted in that case, human dignity is linked to a conception of the human person as not 'isolated and self-regarding' but 'related to and bound by the community'.[8] This calls for an individual to recognise that they are part of a network of relationships in which the needs and interests of others should be part of our circle of concern. Our actions, in this regard, are to be guided by a sense of 'social need, personal responsibility and human solidarity'.[9]

The decision of the Grand Chamber draws on these twin dimensions – self-transformation and responsibility - when it requires the state to recognise the capacity of the prisoner to make significant progress towards becoming a responsible member of society. The prisoner, therefore, must be recognised as capable of atoning for their past wrongs and improving themselves with the view to future reintegration.[10] Whole life orders, without the prospect of release or review, deny this recognition. They treat the prisoner as beyond redemption, their character fixed by the actions of their past. In so doing, they deny a fundamental aspect of the humanity of the prisoner – their capacity to change.[11]

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[8] *Life Imprisonment Case*, 45 BVerfGE 187, 227 (1977).

[9] E. Eberle, 'Observations on the Development of Human Dignity and Personality in German Constitutional Law: An Overview' (2013) 33 Liverpool Law Review 201, p. 207.

[10] *Vinter* [112].

[11] "The judgment recognises, implicitly, that hope is an important and constitutive aspect of the human person. Those who commit the most abhorrent and egregious of acts and who inflict untold suffering upon others, nevertheless retain their fundamental humanity and carry within themselves the capacity to change." Concurring opinion of Judge Power-Forde in *Vinter*.

This pessimistic outlook also deprives the prisoner of the experience of possibility upon which hope depends. Thus, there is a sense in which the future of the prisoner reveals nothing new, just more of the same; their life is 'frozen in non-movement'.[12] Without the experience that the future is open to possibility, there is the substantial risk, as David Luban notes, that the prisoner will not be able to form goals that are the basis for having motivations – leading ultimately to a breakdown in the personality of the prisoner.[13] In addition, without a sense that their actions carry any significance, there is the risk that the prisoner will view their lives as devoid of purpose or meaning, and thus lose their sense of self-worth. All that the prisoner has left to cling to, as Sir John Laws suggests in *Wellington*, is mere survival. This is not, as he goes on to argue, sufficient to safeguard human dignity.[14]

Case: *Bouyid v Belgium* (2016) 62 E.H.R.R. 32

Summary: Slaps to the face to a minor age 17 and adult in custody by a police officer was degrading treatment even though they were devoid of any serious or long-term effects.

Key Quote: "Any interference with human dignity strikes at the very essence of the Convention...For that reason any conduct by law-enforcement officers vis-à-vis an individual which diminishes human dignity constitutes a violation of Article 3 of the

[12] Y. Jewkes and J. Bennett, *Dictionary of Prisons and Punishment* (London: Routledge, 2013), p. 293.

[13] D. Luban, 'Treatment of prisoners and torture' in M. Düwell et al (eds), *The Cambridge Handbook of Human Dignity* (Cambridge: CUP, 2014), p.447.

[14] "… [A] prisoner's incarceration without hope of release is in many respects in like case to a sentence of death. He can never atone for his offence. However he may use his incarceration as time for amendment of life, his punishment is only exhausted by his last breath…It is…liable to be disproportionate - the very vice which is condemned on Article 3 grounds - unless, of course, the death penalty's logic applies: the crime is so heinous it can never be atoned for. But in that case the supposed inalienable value of the prisoner's life is reduced, merely, to his survival: to nothing more than his drawing breath and being kept, no doubt, confined in decent circumstances. That is to pay lip-service to the value of life; not to vouchsafe it." *R (Wellington) v Secretary of State for the Home Department* [2007] EWHC 1109 (Admin) [54].

Convention. That applies in particular to their use of physical force against an individual where it is not made strictly necessary by his conduct, whatever the impact on the person in question." [Para 101]

Analysis: *Bouyid* represents a significant recalibration of concepts established under Article 3. In previous cases, statements had been made to the effect that certain forms of assault on human dignity, that involve the use of physical force by law enforcement officers, might not attain the minimum level of severity to qualify as degrading treatment for the purposes of Article 3.[15] In other words, there may be circumstances where the duration, effect and purpose of the physical force is not serious enough to constitute a violation of Article 3, even though that force represents an attack on human dignity. Rejecting this approach, the majority found in *Bouyid* that any physical force used by law enforcement officers that attacked human dignity would represent an attack on what Article 3 was designed to prevent. And, as a result, establishing that such an attack had occurred was to be treated as determinative of whether the Article 3 severity threshold has been crossed.

In terms of identifying an attack on human dignity, the Court adopted a bright-line rule that all force used by law enforcement officers that was not made strictly necessary to repel the actions of the applicant would constitute such an attack. Yet, as the minority notes, the reasoning in support of this claim remains opaque in *Bouyid.* Nonetheless, Natasa Mavronicola argues that it is possible to identify principles underpinning the understanding of human dignity adopted by the majority.[16] Most notably, she suggests that human dignity acquires an objective quality in the reasoning of the majority, so that the subjective experience of the treatment was considered less relevant to establishing an attack on human dignity.[17] What was

[15] This was the view of the dissenting judges in *Bouyid*, following an examination of the previous cases.
[16] N. Mavronicola, "Bouyid v Belgium: The "minimum level of severity" and Human Dignity's Role in Article 3 ECHR" (2016) *Cyprus Human Rights Law Review* 1.
[17] Ibid p.13.

considered particularly relevant by the Court was the *meaning* that the treatment expressed in light of the *context* in which it occurred.

With regards to context, the Court emphasised the situational vulnerability of the applicant stemming from the asymmetrical relationship of power in which they stood with respect to the police officers. This especial vulnerability was treated as generating a duty on the part of the police officers to protect the welfare of the applicant. The duty of protection thus defined how the power of the police officers should be exercised, whereas the slaps to the face represented a clear abuse of that power. Those slaps, therefore, distorted the proper basis of the relationship that should define the interaction between the police and those within their power. It is by situating those slaps within their relational context that the Court was able to assess the meaning they conveyed. Thus, the Court indicated that the high-handed conduct of the police was to be interpreted as accentuating the relational inequality that existed between the parties and impressed on the applicant that they were inferior and powerless.[18] Therefore, this treatment represented the infliction of a humiliation on the applicant that suggested that were insignificant, and was to be seen as a device to put them in their place. According to the Court, such treatment remains wrong in the absence of any serious material effects on the applicant.

The Court did go on to recognise the material effects in *Bouyid*, but this was after it had already established that dignity had objectively been assaulted. It seems that this discussion was aimed at bolstering the reasoning that a slap to the face was not an insignificant use of force, as had been suggested in the dissenting judgment. In this light, Natasa Mavronicola has argued that the Court is deploying human dignity

[18] "[W]hen the slap is inflicted by law-enforcement officers on persons under their control…it highlights the superiority and inferiority which by definition characterise the relationship between the former and the latter in such circumstances. The fact that the victims know that such an act is unlawful, constituting a breach of moral and professional ethics by those officers and – as the Chamber rightly emphasised in its judgment – also being unacceptable, may furthermore arouse in them a feeling of arbitrary treatment, injustice and powerlessness" *Bouyid v Belgium* (2016) 62 E.H.R.R. 32 [106].

in order to recognise a broader range of 'absolute wrongs' under Article 3, rather than just 'absolute harms' that involve human suffering.[19] To add to this, these wrongs can be further characterised as *expressive* wrongs, in the sense that they are concerned with what the meaning of the act expresses in regards to the value of the human person. Such wrongs, as Tarunabh Khaitan argues, do not depend on the victim suffering material harm.[20] Thus, if a person lacking consciousness is slapped whilst in the care of another, it would still represent an abuse of power that wrongly conveys the message that the applicant is worthless.

Case: *M.S. v United Kingdom* (2012) 55 E.H.R.R. 23

Issue Raised: The delay in transferring a person with a psychiatric disorder and displaying disturbed behaviour from a police cell to a mental health facility constituted a violation of Article 3.

Key quote: "[T]he…applicant was in a state of great vulnerability throughout the entire time at the police station, as manifested by the abject condition to which he quickly descended inside his cell. He was in dire need of appropriate psychiatric treatment, as each of the medical professionals who examined him indicated. The Court considers that this situation, which persisted until he was at last transferred to Reaside early on the fourth day, diminished excessively his fundamental human dignity…" [Para 44]

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[19] N. Mavronicola, "Bouyid v Belgium: The "minimum level of severity" and Human Dignity's Role in Article 3 ECHR" (2016) *Cyprus Human Rights Law Review* 1, p13.

[20] T. Khaitan, 'Dignity as an Expressive Norm: Neither Vacuous Nor a Panacea' (2011) 32 Oxford Journal of Legal Studies 1, pp.6-8. See also Denise Réaume, who argues that; "[Dignity] can . . . be dishonoured through a failure to show respect, through the treatment of others as less than creatures of inherent worth. Thus dignity is violated by such a failure of respect, whatever the empirical consequences of that failure for those affected. Harm to dignity need not be contingent upon a showing of other specific effects, whether psychological or material." D. Réaume, 'Discrimination and Dignity' (2003) 63 *Louisiana Law Review* 645, p.676.

Analysis: *M.S.* represents a further step in a consistent line of cases that have deployed human dignity in conjunction with vulnerability to assess the conditions of detention of those who are mentally-ill. As Alexandra Timmer has noted, this 'underpinning [of] dignity with vulnerability considerations' led the Court in *M.S.* to establish a more 'holistic picture of the sufferings of the applicant: a picture that includes contextual factors such as embodiment, location, mental state and material realities'.[21] More specifically, within this holistic picture, there was recognition that the applicant, who suffered from a pre-existing illness of the mind, was particularly vulnerable to the surrounding environment in which they were located. The applicant thus had his mental distress prolonged, and even exacerbated, by being detained in a police cell without appropriate medical assistance for a period longer than was acceptable. Moreover, his personality was adversely affected by these conditions, as he was, for instance, unable to determine his actions in accordance with his personal identity or maintain relationships with other human beings.[22] The state can be responsible for these conditions, as seen in *M.S.*, where they arise from failings in the coordination between different bodies, rather than as a result of a specific intention to humiliate. This is in accordance with the idea that human dignity can be depreciated not only as a result of a malice, but also where there the system and structures as a whole demonstrate a lack of concern for the needs of the applicant.[23]

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[21] A. Timmer, 'A Quiet Revolution: Vulnerability in the European Court of Human Rights' in M. Fineman and A. Grear, *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Aldershot: Ashgate, 2013), p.166.

[22] Although referring to Article 8, in *Bensaid v United Kingdom* (2001) 33 E.H.R.R 205 the European Court of Human Rights held that; "Mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity. Article 8 protects a right to identity and personal development and the right to establish and develop relationships with other human beings and the outside world. The preservation of mental stability is in that context an indispensable precondition to effective enjoyment of the right to respect for private life" [47].

[23] D. Bedford, '"MS v United Kingdom": Article 3 of the ECHR, Detention and Mental Health' (2013) 1 EHRLR 72, pp. 77-78.

Where the mental distress manifests in patterns of disturbed behaviours, these behaviours can also have an adverse impact on the physical condition of the person. In *M.S.*, for instance, the relevant disturbed conduct exhibited by the applicant resulted in self-harm, such as banging his head against a wall and hitting his chest, and self-debasement, involving the smearing of his naked body with food or faeces, licking the walls of his cell, and drinking water from the bowl of his toilet. The Court held that the applicant had 'descended' in his police cell into an 'abject condition' that was beneath his human dignity. Due to the vulnerability of the applicant, there was no requirement that he verbally express in a coherent or intelligible manner the experience of his dire situation. He did not, therefore, need to point to any ill-effects *caused* by the detention. It is enough, in this context, that the applicant appears to be suffering from acute mental distress, as evidenced by their condition, and their detention is not in accordance with standards of best medical practice and guidance from international organisations.

As I have discussed elsewhere, human dignity is deployed in cases like *M.S.* in order to respond to circumstances where the breakdown in mental stability, prolonged or exacerbated in detention, leads to a serious decline in appropriate self-regard.[24] In these circumstances the destabilisation of mental health leaves the victim unable to care about their basic material needs or daily living tasks, resulting in material suffering. In relation to the more self-destructive behaviours, human dignity is also deployed in order to address the bodily enactment of unmanageable psychic pain; some of the behaviours of the applicant can, therefore, be viewed as an outward expression of inner distress that the person is unable to articulate in words, and as the means to relieve or cope with the stress involved in a situation that they find overwhelming.[25] Responses to these circumstances can, on occasion, be misdirected at

[24] D. Bedford, "Human Dignity in Great Britain and Northern Ireland" in P. Becchi and K. Mathis (eds), *Handbook of Human Dignity in Europe* (Berlin: Springer, 2019), pp. 19-20.
[25] Ibid.

only containing the disturbed behaviour of those who are disordered, rather than providing appropriate assistance to address the distress of the person that lies behind that behaviour. This is acknowledged by the Court in *M.S.* when it refers to the opinion of the CPT that criticises police practices that involve, for instance, tying the person to a chair naked so that they are unable to self-harm.[26] Such examples highlight the inability of the police to provide the holistic support that is needed for any extended period. A response that respects dignity, in contrast, is one that treats the prisoner as a whole, integrated person, whose bodily suffering has a psychosocial origin. This means providing a solution at the psychosocial level of the person in order to address a problem that is expressed at the level of the body.

2. Asylum Seekers and Refugees

Case: *M.S.S. v Belgium and Greece* (2011) 53 E.H.R.R. 2

Issues Raised: The living conditions of asylum seekers in Greece constituted treatment that was incompatible with Article 3 ECHR. It is this aspect of the case which is the focus of discussion here.

Key Quote: "The Court reiterates that it has not excluded the possibility "that State responsibility [under Article 3] could arise for 'treatment' where an applicant, in circumstances wholly dependent on State support, found herself faced with official indifference when in a situation of serious deprivation or want incompatible with human dignity" [Para 253]

Analysis: *M.S.S* breaks new ground in the way in which it expands Article 3 to cover the living conditions of those outside detention. However, there is some confusion about what aspects of the reasoning were critical to establishing an Article 3

[26] *MS* [30].

violation.[27] On the first, narrow, account, it was the fact that Greece had been committed to providing the essential needs of asylum seekers via the adoption of the EU Reception Directive, that was critical.[28] On this account, considerations of human dignity and vulnerability are relevant *only* to establishing that material deprivation *can raise an issue* under Article 3, and that, where these considerations are in play, a finding of a violation is *not excluded*. But those considerations, whilst necessary, are not sufficient for establishing state responsibility. In addition, consideration needs to be given to the grounds upon which the state owes an obligation to avoid material deprivation. The Grand Chamber, at various points, hints that the obligation arose in this case because Greece had assumed responsibility to provide for material needs through the implementation of the Directive.[29] This indicates that the authorities would not have been responsible for the degrading living conditions of the applicant, had Greece not adopted measures that required action to be taken.

The second account grounds the responsibility to take action in the fact of the dependency of the applicant on the state. Thus, state responsibility arises under Article 3 whenever an applicant, due to their acute vulnerability, is completely reliant on the state to avoid a situation of serious deprivation that is incompatible with human dignity.[30] The obligations to respond, on this account, is not voluntarist in nature, and thus assumed by the state, but is derived from the relationship of dependency that the applicant finds themselves in. A breach of that obligation requires only a stance of official indifference on the part of the authorities towards the situation of the applicant. This may arise, and is perhaps even more likely to arise,

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[27] S. Velluti, 'The relationship between the ECJ and the ECtHR: the case of asylum' in K. Dzehtsiarou et al (eds), *Human Rights Law in Europe: The Influence, Overlaps and Contradictions of the EU and ECHR* (London: Routledge, 2014) pp.178-179.

[28] L. Lavrysen, '*M.S.S. v. Belgium and Greece* (2): the impact on EU asylum law' (24 February, 2011), http://strasbourgobservers.com/2011/02/24/m-s-s-v-belgium-and-greece
[Accessed 8 January, 2019].

[29] *M.S.S.* [249-250].

[30] G. Clayton, 'Asylum seekers in Europe: *M.S.S. v. Belgium and Greece*' (2011) 11 *Human Rights Law Review* 758, p. 769.

where the state fails to adopt *any* measures in response to the serious deprivation faced by the vulnerable applicant.

Despite these different approaches, both accounts recognise that exposure to certain material conditions can be incompatible with human dignity. As I have discussed elsewhere, human dignity is key in this context to capturing the way in which material deprivation impacts on the human person as a multidimensional whole.[31] Human dignity is used, in particular, to emphasise the emotional suffering of the applicant, which is a consequence of their bodily insecurity. This widens the focus beyond whether the applicant had been afflicted by intense bodily illness or injury, or was close to being so afflicted, as the basis for determining whether the threshold of severity have been crossed.[32] Thus, in *MSS*, serious deprivation was held to be incompatible with dignity due to the humiliation and desperation that accompanied the inability of the applicant to attend to their basic bodily needs.[33] Adding to these experiences of precarity, according to the Grand Chamber, was the permanent state of fear that the applicant faced due to the constant threat of attack to his bodily integrity.[34] The life of the applicant had, as a result, been reduced to the daily struggle to avert harm and survive, with no hope that that his situation might improve. As noted in *Vinter*, discussed earlier, the total loss of hope that life offers anything more than mere survival can lead to a deterioration in the personality of the applicant and can threaten to deprive them of their sense of self-worth.

Part of the assessment in these cases is whether the applicant has access to the means to safeguard their dignity. Central to this is the vulnerability of the applicant, which is used to evaluate the effectiveness of the authority's effort and the degree of

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[31] D. Bedford, 'Human Dignity in Great Britain and Northern Ireland' in P. Becchi and K. Mathis (eds), *Handbook of Human Dignity in Europe* (Berlin: Springer, 2019), p.16.

[32] This can be seen in the role that human dignity played in the United Kingdom in cases that dealt with the destitution of asylum seekers in contrast to cases where human dignity considerations were absent. See: R. Edwards and P. Billings, 'R. (Adam, Limbuela and Tesema) v Secretary of State for the Home Department - a case of "mountainish inhumanity"?' [2006] Journal of Social Security Law 169.

[33] *M.S.S* [263].

[34] Ibid [254].

personal responsibility that the applicant shares for their situation. At several points in the judgment, therefore, the Grand Chamber dismisses the efforts of the authorities, such as providing information leaflets and 'pink cards' that entitle the applicant to work, on the grounds that these measures did not demonstrate 'due regard' for the vulnerable situation of the applicant.[35] With respect to the 'pink cards', for instance, the Grand Chamber acknowledged that the administrative obstacles, lack of command of the language, lack of any support network, and unfavourable economic conditions, meant that the applicant had no realistic access to employment as a means to provide for his own essential needs. As such, the applicant could not be held responsible for his situation. Here, then, vulnerability entails an attentiveness to the lived realities of asylum seekers, and the concrete options open to them. In particular, there is a need to examine how those options of the asylum seeker are shaped by the political, social and economic structures in which they are embedded.[36]

3. LGBT Rights and Sexual Minorities

Case: *Identoba v Georgia* (2018) 66 E.H.R.R. 17

Summary: Members of the LGBT community were attacked verbally and physically by counter-protesters whilst on a march. The Georgian authorities had failed to prevent and investigate degrading treatment that had been motivated by prejudice. This was a violation of Art 3 taken in conjunction with Art 14.

Key Quote: "[D]iscriminatory treatment as such can in principle amount to degrading treatment within the meaning of Article 3 where it attains a level of severity such as to constitute an affront to human dignity." [Para 65]

[35] Ibid [257 - 262].

[36] For a discussion on how such conditions shape our choices, see M. Fineman, The Vulnerable Subject and the Responsive State' (2010) 2 *Emory Law Journal* 241.

Analysis: *Identoba* builds on previous cases that recognise that discriminatory treatment, including on grounds of sexual orientation, can meet the threshold of severity required for a violation of Article 3 ECHR.[37] In some of those previous cases, it had been recognised that "in certain circumstances" discrimination might represent a "special" or "particular" affront to human dignity that would then constitute degrading treatment.[38] David Hoffman and John Rowe have summarised this as meaning that discrimination would amount to an Article 3 violation when the 'humiliation and indignity suffered by the victim is sufficiently intense'.[39] This suggests that there are instances of discrimination that can affront human dignity that do not call for a finding of a violation of Art 3, as they do not meet the severity threshold. However, *Identoba* would seem to indicate that *any* discriminatory treatment that constitutes an affront to human dignity would in principle meet the threshold of severity for the purposes of Article 3. Whilst the reference to "in principle" might mean that there are still exceptions, in *Bouyid*, discussed above, it was held that "in principle" could not be interpreted to mean that an attack on dignity through the use of physical force by law-enforcement officers could fall outside the scope of Article 3.

Identoba, therefore, would seem to suggest that human dignity is the touchstone for determining whether discriminatory treatment violates Article 3. This raises the question of what features of such treatment, which might otherwise fall to be considered under another Convention right in conjunction with Article 14 ECHR, or separately under Article 1 of Protocol 12 to the European Convention on Human Rights, transform it into an affront to human dignity under Article 3. It also involves

[37] See e.g. *Smith and Grady v United Kingdom* (1999) 29 E.H.R.R. 493 [121].

[38] *East African Asians v United Kingdom* (1973) 3 E.H.R.R. 76 [207]; *Nachova and Others v Bulgaria* (2006) 42 E.H.R.R. 43 [145].

[39] D. Hoffman and J Rowe, 'Human Rights in the UK: An Introduction to the Human Rights Act 1998' (London: Pearson Longman, 2006) p.144.

a determination of the dividing line between absolutely prohibited forms of discrimination that assault dignity and those forms that can be justified.

Some guidance is implicitly given in *Identoba*, in which the Court recognised that bias-motivated verbal abuse, or hate speech, combined with aggressive behaviour, had the effect of arousing feelings of fear, anguish and insecurity that were incompatible with human dignity. It was considered relevant, in this regard, that the conduct of the counter-protesters was directed at supporters of the LGBT community, who had rendered themselves vulnerable through their association with a group in a precarious position, and thus become targets of the prejudicial attitudes of sections of society.[40] In this light, the conduct of the counter-protesters was directed at discouraging association with the effect of reinforcing the isolation of the homosexual community.[41] Moreover, that conduct had to be seen as a public expression of the predisposed prejudice that was felt towards the homosexual community, rather than an isolated act of hate.[42] Thus, the conduct had to be understood in light of the prevailing social conditions at the time, which were characterised by the way in which homosexual people were vulnerable to being treated as inferior members of the community and were already facing a climate of general fear and anxiety.

Notably, the Court recognised that the intense fear and anxiety experienced by the applicants was present prior to any resort to physical assaults, and that the absence of any injuries by some members of the group was 'less relevant' to establishing an Article 3 breach.[43] Against this backdrop, resort to physical aggression was treated as underscoring the reality of the threats that had given rise to intense fear and anxiety incompatible with Article 3. Those 'feelings of emotional distress' were then 'exacerbated' by the lack of timely police protection. To allay those feelings, the Court

[40] *Identoba* [68].

[41] Ibid [70].

[42] Ibid [68].

[43] Ibid [70].

held that there was an obligation to provide 'heightened protection' for a vulnerable community; that meant maintaining a strong police presence prior to the situation degenerating into physical violence and focusing on enabling the peaceful protest to continue by addressing the aggressive behaviour of the counter-protesters.[44] In this light, the bias-motivated violence was not the only, or even the main, factor in establishing that the discriminatory treatment crossed the Article 3 threshold.

In earlier decisions it had been accepted that non-violence based discriminatory treatment could constitute an assault on human dignity and lead to a violation of Article 3. Thus, in *East African Asians*, the European Commission on Human Rights found degrading treatment when immigration controls restricted the right of certain classes of UK citizens of Asian descent, who were living in former colonies in East Africa, to enter and settle in the UK.[45] More recently, in *X v Turkey*, the Court found that solitary confinement and denial of outdoor activities, which had been imposed because of the sexual orientation of the applicant, was incompatible with Article 3 taken in conjunction with Article 14.[46] The Court, in reaching this conclusion, found that that the complete isolation of the applicant had resulted in 'both mental and physical suffering and a feeling of profound violation of his human dignity'.[47] The legitimate concerns about the safety of the applicant, who was perceived to be at risk of physical harm from other inmates, was considered insufficient to justify the total denial of intersubjective relationality.

X, as with *Identoba*, might cast doubt on whether the earlier decision in *Smith and Grady* would be decided in the same way today. In that case, the Court refused to recognise the ban on homosexuals in the military, which involved an intrusive and protracted investigation and dismissal process, as degrading treatment.[48] This was

[44] Ibid [72-73].

[45] *East African Asians v United Kingdom* (1973) 3 E.H.R.R. 76.

[46] *X v Turkey* (App. No.24626/09), judgment of 25 October 2012.

[47] Ibid [45].

[48] *Smith and Grady v United Kingdom* (1999) 29 E.H.R.R. 493.

despite the fact that the policy was treated as being of a 'particularly grave nature' that was 'undoubtedly distressing and humiliating to the applicants'.[49] Although not discounting that the discrimination could fall within the scope of Article 3, the Court merely found that the differential treatment was not serious enough to attain the Article 3 threshold. This has led some to suggest that discrimination incompatible with Article could be established only where the treatment is "grossly humiliating", which would correspond with the older references in the case law to the need for a "special affront" to human dignity. However, after *X* and *Identoba*, there may have been a lowering of the severity threshold through the removal of these previous qualifications. In this light, a strong case can be made that the discrimination in *Smith and Grady* was incompatible with human dignity in light of the nature of the investigation process, and should thus be recognised as degrading treatment.[50]

Some Concluding Reflections

What is apparent from the above analysis is the role that human dignity plays in extending the scope of Art 3 to address the needs of persons in vulnerable situations. In some cases, this has been achieved through adjusting the threshold at which the minimum level of severity is set, perhaps even leaving that concept less relevant to the assessment of some breaches, such as where the case involves resort to physical force by law-enforcement officers. Other cases have seen positive obligations under Article 3 extended into the socio-economic sphere, with the aim of protecting human dignity.

Whilst these developments represent a widening of protection, the Strasbourg Court has not yet articulated a concept of human dignity that can explain its various

[49] Ibid [122].

[50] P. Johnson, *Homosexuality and the European Court of Human Rights* (London: Routledge, 2013) p.205. See also; See E. Webster, 'Degradation: A Human Rights Law Perspective' in P. Kaufmann et al, Humiliation, Degradation, Dehumanization: Human Dignity Violated (New York: Springer, 2011) p.73.

uses under Art 3 ECHR. Nonetheless, certain themes can be identified from the cases discussed in this contribution. In particular, human dignity is closely connected to the concept of vulnerability. In some cases, vulnerability is used to define the relational context that is relevant to assessing whether human dignity have been violated. Other cases highlight the material needs of the applicant that flow from their embodied vulnerability, and the dependence of the individual on the state to provide for those needs.

Whilst embracing vulnerable embodiment, human dignity is also used to place emphasis on the inner emotional world of the applicant that is affected by the lack of basic bodily security. This inner dimension extends to the sense of hope that the applicant has that their future will remain worth living, which can be eroded in circumstances where, for instance, an individual has no prospect of reintegration within society, or where their life is reduced to the struggle to survive. It is clear that human dignity also embraces a vision of the human being as bound to society and connected to others. By recognising these various dimensions, human dignity encourages a more holistic assessment of the sufferings of the individual.