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BOUYID V BELGIUM: THE ‘MINIMUM LEVEL OF SEVERITY’ AND HUMAN DIGNITY’S ROLE IN ARTICLE 3 ECHR

Natasa Mavronicola*

Abstract:

The Grand Chamber of the European Court of Human Rights recently delivered an important judgment on Article 3 ECHR in the case of *Bouyid v Belgium*. In *Bouyid*, the Grand Chamber was called upon to consider whether slaps inflicted on a minor and an adult in police custody were in breach of Article 3 ECHR, which provides that ‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment’. Overruling the Chamber judgment in the case, the Grand Chamber ruled by 14 votes to 3 that there had been a substantive violation of Article 3 in that the applicants had been subjected to degrading treatment by members of the Belgian police; it found that there had been a breach of the investigative duty under Article 3 also. In this comment, I focus on the fundamental basis of disagreement between the majority of the Grand Chamber and those who found themselves in dissent, on the question of whether there had been a substantive breach of Article 3. The crux of the disagreement lay in the understanding and application of the test of ‘minimum level of severity’, which the ECtHR has established as decisive of whether a particular form of ill-treatment crosses the Article 3 threshold, seen also in light of Article 3’s absolute character, which makes it non-displaceable – that is, immune to trade-offs of the type applicable in relation to qualified rights such as privacy and freedom of expression. I consider the way the majority of the Grand Chamber unpacked and applied the concept of dignity – or ‘human dignity’ – towards finding a substantive breach of Article 3, and briefly distil some of the principles underpinning the understanding of human dignity emerging in the Court’s analysis.

Keywords:

Human rights, European Convention on Human Rights, Violence, Article 3 ECHR, Torture and Inhuman and Degrading Treatment and Punishment, Human Dignity

1. Introduction

The Grand Chamber of the European Court of Human Rights recently delivered an important judgment on Article 3 ECHR in the case of *Bouyid v Belgium*.¹ In *Bouyid*, the Grand Chamber was called upon to consider whether slaps inflicted on a minor and

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¹ *Bouyid v Belgium* (Application no 23380/09), Judgment of 28 September 2015 [Grand Chamber]. References to ‘the ECtHR’ or ‘the Court’ in this judgment are references to the findings of the *majority* of the Grand Chamber. The dissenting judgments are discussed separately and clearly distinguished.

an adult in police custody were in breach of Article 3 ECHR, which provides that ‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment’. Overruling the Chamber judgment in the case,² the Grand Chamber ruled by 14 votes to 3 that there had been a substantive violation of Article 3 in that the applicants had been subjected to degrading treatment by members of the Belgian police. The Grand Chamber unanimously found that there had been a breach of the investigative duty under Article 3 also.

In this comment, I focus on the fundamental basis of disagreement between the majority of the Grand Chamber and those who found themselves in dissent, on the question of whether there had been a substantive breach of Article 3. The crux of the disagreement lay in the understanding and application of the test of ‘minimum level of severity’, which the ECtHR has established as decisive of whether a particular form of ill-treatment crosses the Article 3 threshold,³ seen also in light of Article 3’s absolute character, which makes it non-displaceable – that is, immune to trade-offs of the type applicable in relation to qualified rights such as privacy and freedom of expression.⁴ I consider the way the majority of the Grand Chamber unpacked and applied the concept of dignity – or ‘human dignity’ – towards finding a substantive breach of Article 3, and briefly distil some of the principles underpinning the understanding of human dignity emerging in the Court’s analysis.

There have been increasing references to human dignity in the interpretation of Article 3 in some prominent judgments of the Grand Chamber, notably in *Vinter v UK*,⁵ where the Court found that the imposition of sentences of whole life imprisonment without the prospect of release through a suitable review mechanism constituted a breach of Article 3 ECHR; and *Svinarenko and Slyadnev v Russia*,⁶ where the Court found that the practice of keeping remand prisoners in a metal cage during court hearings amounted to degrading treatment in breach of Article 3 ECHR. To those who see human dignity as a nebulous or unduly malleable concept,⁷ this may not be an entirely welcome development. Nonetheless, as I suggest below, there is good reason to view the Court’s reasoning and the particular instantiation of human dignity that it puts

² *Bouyid v Belgium* (Application no 23380/09), Judgment of 21 November 2013 [Fifth Section].

³ See *Ireland v UK* (1979-80) 2 EHRR 25, para 162; *Pretty v UK* (2002) 35 EHRR 1; the threshold is discussed in Natasa Mavronicola, ‘What is an “absolute right”? Deciphering absoluteness in the context of Article 3 of the European Convention on Human Rights’ (2012) 12(4) *Human Rights Law Review* 723, 749.

⁴ Mavronicola, ‘What is an “absolute right”?’ *ibid* 734-735. Cf Steven Greer, ‘Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really “Absolute” in International Human Rights Law?’ (2015) 15 (1) *Human Rights Law Review* 101.

⁵ *Vinter and others v UK* (Applications nos 66069/09, 130/10 and 3896/10), Judgment of 9 July 2013 [Grand Chamber].

⁶ *Svinarenko and Slyadnev v Russia* (Applications nos 32541/08 and 43441/08), Judgment of 17 July 2014 [Grand Chamber].

⁷ The literature on the subject is vast and ever-growing; consider Christopher McCrudden, ‘Human Dignity and Judicial Interpretation of Human Rights’ 19(4) *European Journal of International Law* 655; cf Paolo G. Carozza, ‘Human Dignity and Judicial Interpretation of Human Rights: A Reply’ (2008) 19(5) *European Journal of International Law* 931. See also Christopher McCrudden (ed.), *Understanding Human Dignity* (OUP 2013).

forward as appropriate and, indeed, promising in terms of elucidating the Court's reasoning on Article 3 ECHR.

As the Human Rights Centre at Ghent University, who acted as third party interveners, highlighted:

The Grand Chamber judgment in *Bouyid* may well become a decisive moment in the Court's case law on the interpretation of the notions of torture and inhuman or degrading treatment under Article 3 ECHR and, as a result, on the extent of the protection offered against police violence under the Convention. In this respect, we submit that the judgment of the Fifth Section in *Bouyid* unacceptably lowers the standard of protection against police violence traditionally offered by Article 3 ECHR and urge the Grand Chamber to reconsider the threshold question under Article 3 ECHR by paying particular attention to the importance of elements that were ignored by the Fifth Section, namely the **abuse of power** by police officers over persons who are under their complete **control** and therefore in a state of **vulnerability**.⁸

As I argue below, the majority's findings in *Bouyid* rightly heeded the forceful points made in this submission. Nonetheless, whilst the argument made by in the submissions of the Human Rights Centre at Ghent University was that in instances of police abuse of their powers – as was the case at issue – the threshold of severity should be lowered, I argue that the minimum threshold of severity remained constant – and was rightly found to have been crossed.

2. Facts, submissions and findings

The case concerned two young men, one of whom was 17 at the time the events took place, who alleged that they had been slapped in the face once by local police officers while they were detained at a police station. The young men claimed to have been victims of degrading treatment. They further complained that the investigation into their complaints had been ineffective.⁹ The Court examined the complaints solely under Article 3 ECHR.

The allegations that the young men had been slapped had been disputed by the police officers concerned. Nonetheless, the ECtHR's Grand Chamber found the facts as alleged by the applicants to be sufficiently proven for the purposes of considering whether Article 3 ECHR had been breached.

In its judgment, the Fifth Section Chamber of the ECtHR had referred to the principle that in order for ill-treatment to fall within the scope of Article 3 it had to attain a

⁸ *Bouyid v Belgium* (Application no 23380/09), Third Party Intervention of Human Rights Centre of Ghent University, available at <http://www.hrc.ugent.be/wp-content/uploads/2015/09/Bouyid.pdf>, accessed 22 October 2015 (emphasis in original).

⁹ *Bouyid* [Grand Chamber] (n 1) para 54.

'minimum level of severity' and had suggested that some forms of violence, although morally condemnable and likely domestically unlawful, would not fall within Article 3.¹⁰ The Chamber had then found that the acts complained of by the applicants would not, in the circumstances of the case, constitute treatment in breach of Article 3, concluding as follows:

Even supposing that the slapping took place, in both cases it was an isolated slap inflicted thoughtlessly by a police officer who was exasperated by the applicants' disrespectful or provocative conduct, without seeking to make them confess. Moreover, there was apparently an atmosphere of tension between the members of the applicants' family and police officers in their neighbourhood. In those circumstances, even though one of the applicants was only 17 at the time and whilst it is comprehensible that, if the events really took place as the applicants described, they must have felt deep resentment, the Court cannot ignore the fact that these were one-off occurrences in a situation of nervous tension and without any serious or long-term effect. It takes the view that acts of this type, though unacceptable, cannot be regarded as generating a sufficient degree of humiliation or debasement for a breach of Article 3 of the Convention to be established. In other words, in any event, the above-mentioned threshold of severity has not been reached in the present case, such that no question of a violation of that provision, under either its substantive or its procedural head, arises.¹¹

The majority of 14 judges at the Grand Chamber disagreed with the Fifth Section of the Court on this. They were persuaded to depart from the Chamber's finding after rigorously reasoned arguments not only by the applicants' counsel but also by two third-party observations by the Human Rights Centre at Ghent University¹² and by REDRESS Trust.¹³

Arguing that the Court should find a substantive breach of Article 3 ECHR, the applicants complained that the Court's Fifth Section wrongly departed from a presumption of breach of Article 3 at the hands of State agents in circumstances where an individual emerges with injuries sustained in detention. They also argued that where a person is deprived of his or her liberty, the use of physical force against them inherently infringes human dignity and is presumed to be incompatible with Article 3 – a presumption which can only be rebutted by proving that the use of force had been made strictly necessary by the victim's actions. This had not been shown by the police, according to the applicants. They argued that tensions between their family and the local police, which had indeed been present, did not establish a need for use

¹⁰ *Bouyid* [Fifth Section] (n 2) paras 43-48.

¹¹ Ibid, para 51.

¹² See n 8 above.

¹³ *Bouyid v Belgium* (Application no 23380/09), Third Party Intervention of REDRESS, available at: <http://www.redress.org/downloads/bouyid-v-belgium-redress-intervention-18.07.2014.pdf>, accessed 22 October 2015.

of force. They also made reference to reports indicating that police violence was rife in Belgium.¹⁴

The applicants also argued that there had been a procedural breach of Article 3 in that the investigation conducted into their allegations did not meet the requirements of the ECtHR's case law on the investigative duty under Article 3. A number of shortcomings in the investigation were set out, including the omission of pertinent evidence from the file and non-disclosure of certain evidence to the applicants.

On the other hand, the Belgian government argued that, while it could be accepted that a rebuttable presumption of a causal link between injuries occurring in custody and police actions applied, and that the police actions could be presumed to be serious when inflicted on someone in custody, there had been no reason to call the police officers' statements into question in the context of the 'thorough' – as the government alleged – investigation conducted,¹⁵ particularly in light of the presumption of innocence.¹⁶ The Belgian government argued that the fact that prosecution had not been pursued on evidentiary grounds in this instance did not undermine the principle that any recourse to physical force that was not made necessary by the person's own conduct diminished human dignity and would in principle constitute a violation of Article 3.¹⁷ It further insisted that there had been an effective official investigation which had not established that the facts alleged by the applicants had occurred,¹⁸ and that the case should not therefore be seen as an exemplary case tackling police violence.¹⁹

The Human Rights Centre of the University of Ghent noted in their submissions that the Fifth Section of the Court, in reaching the conclusion that the Article 3 severity threshold had not been reached, had taken into account allegations of the applicants' provocative behaviour, the tensions between the Bouyid family and the local police, the fact that the slaps had not been aimed at eliciting confessions and that they had taken place as isolated acts and had had no serious long-term effects on the applicants. The Human Rights Centre argued that the first three factors outlined were irrelevant in light of the Court's case law on Article 3. It then suggested that whilst the fourth factor outlined was relevant, the fact of police officers abusing their power against a person deprived of his liberty should lead to the severity threshold being lowered, not least in light of that person's helplessness and consequent vulnerability. This was especially so in the case of minors deprived of their liberty. It also highlighted the prevalence of such police violence in Belgium as an issue which required addressing.

REDRESS submitted that use of physical force by law enforcement agents was only allowed under international human rights law when no more than necessary, referring to an array of legal materials. It stressed the ECtHR's own principle that any

¹⁴ *Bouyid* [Grand Chamber] (n 1) para 59.

¹⁵ *Ibid*, para 66.

¹⁶ *Ibid*, para 67.

¹⁷ *Ibid*, para 70.

¹⁸ *Ibid*, para 71.

¹⁹ *Ibid*, para 72.

recourse to force against someone deprived of liberty which had not been made strictly necessary by that person's conduct diminished human dignity and was in principle in breach of Article 3.²⁰ The use of force in such circumstances straightforwardly reached the minimum level of severity according to REDRESS, in light of individuals' particular vulnerability when under the complete control of the authorities. REDRESS also stressed the double vulnerability of minors in detention, as highlighted by multiple actors and sources, including the Committee for the Prevention of Torture.²¹

The Grand Chamber set out certain general principles before applying them to the facts at issue. It reiterated that Article 3 of the ECHR enshrines one of the most fundamental values of a democratic society and that, unlike other Convention rights, it is an absolute right in that it is not conditional on the individual's good behaviour, unqualified (making no provision for exceptions) and non-derogable, even in the fight against terrorism and organised crime.²² It also stated that 'the prohibition of torture and inhuman or degrading treatment or punishment is a value of civilisation closely bound up with respect for human dignity'.²³ It pointed out that whilst in principle the standard of 'beyond reasonable doubt' is adopted for proving the facts that constitute an Article 3 breach, strong inferences or 'similar unrebutted presumptions of fact' may be adequate.²⁴ Such strong presumptions will arise in particular where the events lie in the exclusive knowledge of the State authorities, which is the case in relation to persons in custody – following its long-standing case law on this, the Court indicated that the burden of proof is then on the government to provide a satisfactory explanation of injuries occurring in detention and cast doubt on the account offered by the victim. As the Court said, this is justified in light of the vulnerable position in which persons in custody find themselves.²⁵ This principle applies to any circumstances in which a person is 'under the control of the police or a similar authority', as the Court said.²⁶ Finally, the ECtHR reiterated that it has to apply a 'particularly thorough scrutiny' where there are allegations of an Article 3 breach.²⁷

Turning to the substantive contours of the ill-treatment proscribed by Article 3 ECHR, the Court restated its oft-repeated test that '[i]ll-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3' and that 'assessment of this minimum depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim'.²⁸ The Court indicated that other relevant factors could include

²⁰ Ibid, para 78. See, on this, Natasa Mavronicola, '*Güler and Öngel v Turkey: Article 3 of the European Convention on Human Rights and Strasbourg's Discourse on the Justified Use of Force*' (2013) 76(2) *Modern Law Review* 370.

²¹ *Bouyid* [Grand Chamber], ibid, para 79.

²² Ibid, para 81.

²³ Ibid.

²⁴ Ibid, para 82.

²⁵ Ibid, para 83.

²⁶ Ibid, para 84.

²⁷ Ibid, para 85.

²⁸ Ibid, para 86. For critical comment (and selected case law) on this test, see Mavronicola, 'What is an "absolute right"?' (n 3).

the purpose, intention or motivation behind a treatment,²⁹ although an absence of an intent to humiliate or otherwise harm does not rule out an Article 3 breach;³⁰ and that regard must be had to context, including an ‘atmosphere of heightened tension and emotions’.³¹ The Court then recounted indicators of Article 3 ill-treatment, suggesting that in order for ill-treatment to reach the minimum level of severity it must usually involve ‘actual bodily injury or intense physical or mental suffering’;³² yet it proceeded to suggest that even in the absence of these aspects, treatment which ‘humiliates or debases an individual showing a lack of respect for or diminishing his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual’s moral and physical resistance’, the Court may find it degrading and thus in breach of Article 3.³³ The Court added that it may be enough that the victim is humiliated in her own eyes, even if not in the eyes of others,³⁴ thus highlighting that degradation may relate to the particular sensibilities of the victim.

With clear relevance to the facts of the case, the Court made the following statement:

[T]he Court considers it particularly important to point out that, in respect of a person who is deprived of his liberty, or, more generally, is confronted with law-enforcement officers, any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is, in principle, an infringement of the right set forth in Article 3.³⁵

Turning its attention to the value of dignity, the ECtHR posited that, despite the Convention not mentioning dignity explicitly,³⁶ ‘the Court has emphasised that respect for human dignity forms part of the very essence of the Convention...alongside human freedom’.³⁷ It indicated that ‘there is a particularly strong link between the concepts of “degrading” treatment or punishment within the meaning of Article 3 of the Convention and respect for “dignity”’, a point made by the Commission in *East African Asians v UK*,³⁸ and by the Court in *Tyrrer v UK*³⁹ and repeated a number of times thereafter. As the Court reminded us, the latter case involved a finding of degrading punishment in the birching of the applicant because he had been treated as ‘an object in the power of the authorities’ and this was ‘an

²⁹ Ibid, para 86, citing *inter alia* *Egmez v Cyprus* (2002) 34 EHRR 29, para 78; and *Krastanov v Bulgaria* (2005) 41 EHRR 50, para 53.

³⁰ Ibid, para 86.

³¹ Ibid.

³² Ibid, para 87.

³³ Ibid.

³⁴ Ibid.

³⁵ Ibid, para 88, citations omitted.

³⁶ Ibid, para 89. The Court nonetheless highlighted that human dignity is mentioned in the Preamble to Protocol No. 13 of the Convention, which prohibits the death penalty in all circumstances.

³⁷ Ibid, para 89, citing – among other authorities – *Pretty v UK* (n 3).

³⁸ Ibid, para 90, citing *East African Asians v UK* (1995) 19 EHRR CD1.

³⁹ *Tyrrer v UK* (1979-80) 2 EHRR 1.

assault on precisely that which is one of the main purposes of Article 3 to protect, namely a person's dignity and physical integrity'.⁴⁰

Moving on to the application of these principles to the facts at hand, the Court gave short shrift to the Belgian Government's disputing of the facts and found that the marks on, and psychological condition of, the applicants as attested by medical certificates were consistent with the applicants' allegations of having been slapped while being interrogated in the police station. Noting the 'major shortcomings in the investigation',⁴¹ on which the Court made a finding of breach of the investigative duty under Article 3 ECHR,⁴² the Court found it was impossible to conclude that the police officers' denials constituted the accurate version of events. The Court then returned to the principle that where an individual is deprived of liberty or confronted with law-enforcement officials, the officials' use of physical force which has not been made necessary by her conduct 'diminishes human dignity and is in principle an infringement of...Article 3'.⁴³ It sought to emphasise that the words 'in principle' did not entail that there were any situations in which recourse to physical force in such circumstances could be Article 3-compatible on the basis of not reaching the severity threshold. For the Court, '[a]ny interference with human dignity strikes at the very essence of the Convention'.⁴⁴ Thus:

...any conduct by law-enforcement officers *vis-à-vis* an individual which diminishes human dignity constitutes a violation of Article 3 of the 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.⁴⁵

Given that the Belgian Government had never accepted that the slaps had been inflicted, it had not made a case for the slaps having been made strictly necessary by the applicants' conduct – rather, it appeared that the slaps were impulsive responses to what was perceived to be the applicants' disrespectful attitude, which was 'certainly insufficient to establish such necessity'.⁴⁶ The Court therefore found that the applicants' dignity had been undermined and there had been a breach of Article 3 ECHR.⁴⁷

Some general remarks followed, with the Court emphasising that 'in any event' a slap by a law-enforcement agent of an individual under his control is a 'serious attack on the individual's dignity',⁴⁸ and has a 'considerable impact' on the person on whom it is inflicted, particularly given the importance which the face can have in human

⁴⁰ Ibid, para 33, cited in *Bouyid* [Grand Chamber] (n 1) para 90.

⁴¹ *Bouyid* [Grand Chamber], ibid para 96.

⁴² Ibid, paras 124-134.

⁴³ Ibid, para 101.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Ibid, para 102.

⁴⁷ Ibid.

⁴⁸ Ibid, para 103.

interaction.⁴⁹ Moreover, the Court noted that ‘even one unpremeditated slap devoid of any serious or long-term effect on the person receiving it may be perceived as humiliating by that person’.⁵⁰ The Court emphasised that this is particularly the case when the slap is inflicted by law-enforcement officials on persons under the officials’ control ‘because it highlights the superiority and inferiority which by definition characterise the relationship between the former and the latter in such circumstances’ and such unlawful and immoral act may arouse in these persons ‘a feeling of arbitrary treatment, injustice and powerlessness’.⁵¹ The Court then proceeded to make a point about vulnerability worth quoting in full:

Moreover, persons who are held in police custody or are even simply taken or summoned to a police station for an identity check or questioning – as in the applicants’ case – and more broadly all persons under the control of the police or a similar authority, are in a situation of vulnerability. The authorities are consequently under a duty to protect them... In inflicting the humiliation of being slapped by one of their officers they are flouting this duty.⁵²

Importantly, the Court then moved on to reject the Chamber’s approach in relation to the victims’ allegedly disrespectful or provocative conduct and the exasperation and ‘thoughtlessness’ of the police officers’ reaction, calling these factors ‘irrelevant’.⁵³ The Court premised this point on the absolute character of the right enshrined in Article 3, which prohibits torture and inhuman and degrading treatment and punishment irrespective of the conduct of the victim. This is crucial: the slap constituted an assault on the victims’ human dignity, contrary to Article 3 of the ECHR, in amounting to gratuitous violence inflicted on a vulnerable person in the control of the authorities; the idea that the wrongfulness of this slap was somehow mitigated by factors relating to the unpalatable prior behaviour of the victims was dismissed because it did not in any way alter the character of the wrong committed. The Court proceeded to highlight that Article 3 ECHR ‘establishes a positive obligation on the State to train its law-enforcement officials in such a manner as to ensure...that no one is subjected to torture or treatment that runs counter to that provision’.⁵⁴

Finally, it highlighted ‘as a secondary consideration’ that the first applicant in *Bouyid* had been a minor (17 years of age) and thus liable to be even more vulnerable,

⁴⁹ Ibid, para 104. The Court here mentioned *S.A.S. v France* (Application no. no. 43835/11), Judgment of 1 July 2014, a mention which is noted critically in Stijn Smet, ‘*Bouyid v. Belgium: Grand Chamber Decisively Overrules Unanimous Chamber*’, *Strasbourg Observers*, 1 October 2015, available at: <http://strasbourgobservers.com/2015/10/01/bouyid-v-belgium-grand-chamber-decisively-overrules-unanimous-chamber/>, accessed 22 October 2015.

⁵⁰ Ibid, para 105.

⁵¹ Ibid, para 106, citing *Petyo Petkov v Bulgaria* (Application no 32130/03), Judgment of 7 January 2010, paras 42 and 47.

⁵² *Bouyid* [Grand Chamber], ibid, para 107.

⁵³ Ibid, para 108.

⁵⁴ Ibid, citing *Davydov and Others v Ukraine* (Application nos. 17674/02 and 39081/02), Judgment of 1 July 2010.

especially in psychological terms, to such ill-treatment.⁵⁵ The Court made a general statement that certain behaviour towards minors may be incompatible with Article 3 ECHR because they are minors, even if it might be found acceptable in the case of adults, and that law-enforcement officers must therefore 'show greater vigilance and self-control when dealing with minors'.⁵⁶

Nonetheless, the Court found that the slaps had amounted to a breach of Article 3 as inflicted on *both* the adult and the minor member of the Bouyid family in amounting to recourse to physical force which had not been made strictly necessary by their conduct, thus diminishing their dignity. It distinguished the ill-treatment from inhuman treatment and torture in that it had not resulted in notable bodily injuries or serious mental or physical suffering, and found that it had constituted degrading treatment.⁵⁷

The Court also found that the investigation into the allegations of ill-treatment had been inadequate, in breach of the procedural positive obligation under Article 3 to investigate credible allegations of ill-treatment proscribed by Article 3 and to do so effectively.⁵⁸ This was a unanimous finding. This comment does not focus on this aspect of the judgment.

3. The dissent's focal points

The dissenting opinion of Judges De Gaetano (Malta), Lemmens (Belgium) and Mahoney (UK), who disagreed with the substantive finding of a breach of Article 3, was strongly worded. Whilst they endorsed the general principles set out by the majority in paragraphs 81-90 of the Grand Chamber judgment and took it as given that the applicants had been slapped while under police control, they did not agree with the majority that this could be characterized as degrading treatment in breach of Article 3. Although unacceptable, they said, and likely to constitute a breach of professional ethics, as well as a tort or criminal offence 'in a democratic society',⁵⁹ this treatment did not attain the minimum level of severity required to cross the Article 3 threshold.⁶⁰ This was so despite the slap amounting to an interference with human dignity, as they saw it: 'there are forms of treatment which, while interfering with human dignity, do not attain the minimum level of severity required to fall within the scope of Article 3'.⁶¹ For these three judges, that was the very point of the words 'in principle' whenever the Court has reiterated that where the use of physical force diminishes human dignity, it will 'in principle' constitute a breach of Article 3.⁶² The

⁵⁵ Ibid, para 109.

⁵⁶ Ibid, para 110.

⁵⁷ Ibid, paras 111-112. The distinction between inhuman treatment and degrading treatment on the basis of tangible injury can be contested – I consider this further in Natasa Mavronicola, *Torture, Inhumanity and Degradation under Article 3 of the ECHR: Absolute Rights and Absolute Wrongs* (Hart Publishing, forthcoming in 2016).

⁵⁸ Ibid, paras 114-134.

⁵⁹ Ibid, Dissenting Opinion of Judges De Gaetano, Lemmens and Mahoney, para 3.

⁶⁰ Ibid, para 5-7.

⁶¹ Ibid, para 5.

⁶² Ibid.

dissenting judges cited *Ireland v UK*, in which the ECtHR had asserted that there can be ‘violence which is to be condemned both on moral grounds and also in most cases under the domestic law of the Contracting States but which does not fall within Article 3 of the Convention’.⁶³ The dissenting judges were at times deeply scathing of the majority’s reasoning. Three focal points of criticism are worth mentioning.

First, the dissenters were critical of the majority’s approach to the Court’s role in Article 3 cases, suggesting that ‘[i]t is not for the Court to impose general rules of conduct on law-enforcement officers; instead, its task is limited to examining the applicants’ individual situation to the extent that they allege that they were personally affected by the treatment complained of’.⁶⁴ They considered rather that it was crucial to focus on the specific circumstances of the case and assess them *ex post facto*, not to adopt what they called the ‘eminently dogmatic position’ that ‘any conduct by law-enforcement officers which diminishes human dignity constitutes a violation of Article 3, irrespective of its impact on the person concerned’.⁶⁵

Secondly, the dissenters criticised what they saw as the majority’s haphazard references to (human) dignity, suggesting that whilst they were prepared to accept that the slaps inflicted on the applicants diminished human dignity, the majority’s references to a range of documents and other sources relating to dignity provided ‘no indication of how the notion of human dignity is to be understood’.⁶⁶ Interestingly, this critique seems to stand fundamentally at odds with the prior critique: the dissenting judges first stand against an approach which seeks to provide general principles regarding the sort of treatment which will be found to be contrary to Article 3 in *ex ante* fashion, and at the same time challenge the majority’s failure to unpack the value of human dignity and what it entails for our understanding of the terms of Article 3.

The final, and most forcefully made, criticism is against what the dissenters branded the ‘trivialising’ of findings of Article 3 ill-treatment.⁶⁷ The dissenters expressed concern that the majority’s judgment ‘may impose an unrealistic standard by rendering meaningless the requirement of a minimum level of severity for acts of violence by law-enforcement officers’.⁶⁸ The dissenters argued that this unduly high standard did not show proper appreciation of the difficulties that police may face in real-life situations and which may ‘cause them to lose their temper’.⁶⁹ Given that the situation complained of, according to the dissenters, presented a treatment that was ‘far less serious’ than ill-treatment in other cases the Court had unfortunately had to deal with, the Courts’ findings and conclusions risked ‘being completely at odds with

⁶³ *Ireland v UK* (n 3), para 167.

⁶⁴ *Bouyid* [Grand Chamber] (n 1), Dissenting Opinion of Judges De Gaetano, Lemmens and Mahoney, para 6.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*, para 4.

⁶⁷ *Ibid.*, para 7.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

reality'.⁷⁰ They argued that 'a more nuanced assessment of the facts of the case, with a stronger grounding in reality', which should have yielded a finding of no violation of Article 3.⁷¹ With this criticism, the dissenters were calling openly for factors such as the provocation of police by the victims and the limited concrete injury sustained by the victims to count towards finding that the threshold of severity was not crossed; more implicitly, they seem to have been calling for the majority to acknowledge the frequent, seemingly pedestrian (or pedestrianised by the dissenters) occurrence of such violence as a basis for *not* finding it to be a breach of Article 3.

Aside from the self-contradiction arising in the criticism outlined above, namely in accusing the majority of being overly principled whilst at the same time attacking them for their lack of principled engagement with dignity, there is a more insidious quality to what the dissenting judges appear to be saying. It lies in their association of 'is' with 'ought'. The argument appears to proceed as follows:

1. Article 3 is an absolute right, admitting of no displacement or trade-offs, and must therefore be seen as proscribing ill-treatment which we are not prepared to countenance.
2. Slaps in police custody occur and are likely to occur very often.
3. Given that slaps in police custody occur and are likely to continue to occur very often, we ought to be prepared to countenance them.
4. Slaps in police custody therefore ought not to be found to be in breach of Article 3.

The problem with this argument is that the jump from 2 to 3 and then to 4 is one from 'is' to 'ought': because X (in this case, gratuitous violence against someone in custody) is a frequent occurrence, X ought not to be cast as an absolute *wrong*. This is a problematic way to reason Article 3: torture is torture, and inhuman treatment is inhuman treatment, and degrading treatment is degrading treatment, irrespective of how frequently they might occur in the potentially sinister workings of our State machinery. Moreover, as I argue below, the dissenters' substantive reasoning beyond this 'is'- 'ought' jump does a poor job of pinning down the contours of the 'severity' of ill-treatment proscribed by Article 3 and applying it to the case at hand.

Nonetheless, the critique regarding the majority's opaque references to and reliance on (human) dignity is largely well-grounded. Below, I offer some ideas of how to understand the way human dignity informs the majority finding in *Bouyid*.

4. The 'minimum level of severity' and dignity

In *Bouyid*, following a line of similar pronouncements in earlier case law, the majority of the Grand Chamber placed human dignity squarely in the centre of Article 3 and indeed suggested that 'respect for human dignity forms part of the very essence of the

⁷⁰ Ibid, paras 7-8.

⁷¹ Ibid, para 9.

Convention'.⁷² According to the Grand Chamber, there is a 'particularly strong link between the concepts of "degrading" treatment or punishment within the meaning of Article 3 of the Convention and respect for "dignity"'.⁷³ The Court did this after alluding to a number of international and regional human rights instruments and related documents which refer to dignity, including Protocol 13 to the ECHR, which abolishes the death penalty.⁷⁴

What the Court appears to be saying is that Article 3 prohibits absolutely certain attacks on human dignity, which is a value that underpins the Convention, although not explicitly mentioned in its text. Moreover, the concept of human dignity in the Grand Chamber's reasoning is *both* sensitive to the particular relational factors that determine the character of a particular treatment – factors which go to the iniquity of the perpetrator's act and the vulnerability of the victim's circumstances, for example – *and* distinguished from the subjective human experience of the treatment at the same time, making the assessment of whether it has been 'diminished' or otherwise attacked an objective question. As the Grand Chamber put it:

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 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*.⁷⁵

Although the Court went on to indicate that '[a] slap has a considerable impact on the person receiving it',⁷⁶ the principle affirmed in *Bouyid* that physical force inflicted by a law-enforcement officer on a person entirely under his or her control – thus without the strict necessity of recourse to physical force – amounts to an attack on human dignity and thus to degrading treatment contrary to Article 3,⁷⁷ elucidates what Article 3 proscribes. Article 3, which is an absolute right admitting of no derogation or exception, is not there purely to protect human beings from suffering certain forms of *harm* – rather, it proscribes certain forms of absolute *wrongs*, including but not isolated to wrongs which result in significant human suffering and other forms of harm.

The concept of human dignity is central, as the Court recognises, to delimiting at least some of these wrongs, not least degrading treatment or punishment. Substantively, human dignity has two interwoven aspects which are relevant to these wrongs: one is chiefly tied to the principle of treating persons with a special kind of respect which distinguishes them from objects or non-human animals; the other relates to providing

⁷² *Bouyid* [Grand Chamber] (n 1), para 89.

⁷³ *Ibid*, para 90.

⁷⁴ *Ibid*, especially paras 45-51 and 81-90. On Article 3 and the death penalty, see *Al Saadoon and Mufdhi v UK* (2010) 51 EHRR 9.

⁷⁵ *Ibid*, para 101 (emphasis added).

⁷⁶ *Ibid*, para 104.

⁷⁷ *Ibid*, paras 90-113.

or not denying the bare essentials required for human flourishing and personality development.⁷⁸ Where a person is subjected to physical force not necessitated to repel her actions, she is treated as an object, without the minimum respect demanded by her humanity;⁷⁹ where a person is imprisoned for life without a fragment of concretely realisable hope of release she is denied essential foundations for basic human flourishing.⁸⁰ The case law reflects these ideas. In these instances, human dignity is attacked: the respect demanded by the elevated and equal moral status⁸¹ of all human beings is denied. In the *Bouyid* case, the Court recognises that the applicants were treated as objects in the control of the authorities: the objects of the police-officers' temper, in a context of control which cast perpetrator and victim in profoundly unequal positions and rendered respect for the equal moral status of the applicants particularly vulnerable to the police-officers' abuse of power.

There is also something structurally significant about human dignity in the way that it (admittedly opaquely) informs the Court's reasoning: attacks on human dignity constitute assaults on the collective human conscience that human rights are grounded in,⁸² and not purely attacks on the interests or well-being of a particular person. This explains the objective standards applicable to cases such as *Bouyid* – or, a much earlier predecessor, *Tyrer v UK*⁸³ – in determining whether a particular treatment is degrading. In disrespecting the person as a human agent, the infliction of physical force by a police-officer against a person entirely within the police-officer's control, and thus vulnerable to this police-officer's acts, objectively offends human dignity in breach of Article 3, irrespective of how it is actually experienced. Thus, if a similar thing occurred against a particularly hardened criminal, it would objectively amount to an attack on human dignity in breach of Article 3 just the same.

In *Svinarenko*, the Grand Chamber put it thus:

Regardless of the concrete circumstances in the present case, the Court reiterates that the very essence of the Convention is respect for human dignity and that the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective. It is therefore of the view that holding a person in a metal cage during a

⁷⁸ See Béatrice Maurer, *Le principe de respect de la dignité humaine et la Cour européenne des droits de l'homme* (La documentation Française, 1999) 50-51. But see Stephen Riley, 'Human Dignity: Comparative and Conceptual Debates' (2010) 6(2) *International Journal of Law in Context* 117, 120.

⁷⁹ See *Bouyid* [Grand Chamber] (n 1); and Mavronicola, 'Güler and Öngel v Turkey' (n 20).

⁸⁰ See *Vinter v UK* (n 5) and Natasa Mavronicola, 'Crime, Punishment and Article 3 ECHR: Puzzles and Prospects of Applying an Absolute Right in a Penal Context' (2015) 15(4) *Human Rights Law Review* 721.

⁸¹ This is an adaptation of the 'basic moral status' alluded to by John Tasioulas in 'Human Dignity as a Foundation for Human Rights' in McCrudden, *Understanding Human Dignity* (n 7). See also the three elements of the 'minimum core' of human dignity offered in McCrudden, 'Human Dignity and Judicial Interpretation' (n 7) 679.

⁸² See Jack Donnelly, *Universal Human Rights in Theory & Practice* (Cornell University Press 2003), 14: 'The moral nature that grounds human rights says that beneath this we must not permit ourselves to fall.'

⁸³ See n 39 above.

trial constitutes in itself – having regard to its *objectively degrading nature* which is incompatible with the standards of civilised behaviour that are the hallmark of a democratic society – an affront to human dignity in breach of Article 3.⁸⁴

The character of the treatment inflicted, constituting an objective wrong amounting to degradation irrespective of the nature and degree of *harm* it has resulted in, was missed by the dissenting judges in *Bouyid*, who instead went to great lengths to highlight that the minimum level of severity demanded for a finding of substantive breach of Article 3 has not been reached, largely because the ill-treatment was isolated and its concrete effects on the applicants were not significant or long-term. What they failed to appreciate is that it was the *wrong* committed against the applicants which reached the minimum level of severity, rather than the *harm* endured by them.⁸⁵

A final point worth making concerns the methodological critique launched by the dissent against the Court, to the effect that its general observations in *Bouyid* ‘failed’ to adopt the *ex post facto*, ‘all-things-considered’ approach normally favoured by the Court in Article 3 cases.⁸⁶ Contrary to the position of the dissenting judges, I consider that the Court’s efforts to provide *ex ante* guidance on what amounts to a breach of Article 3 are to be welcomed both from a rule of law perspective, and in light of the fundamental importance of Article 3 as an absolute right. It is essential that the Grand Chamber offer guidance through rules on what is required and what is proscribed under Article 3, with a view to ensuring that it is respected rather than flouted.

5. Concluding thoughts

The search for the substantive contours of torture, inhumanity and degradation – ill-treatment which is absolutely proscribed by Article 3 ECHR – is paved with challenges and contestation. There is no question that the ECtHR, which is charged with providing authoritative interpretation of these terms, could be doing a better job of this, through clearer and more coherent reasoning. Yet it is also important to highlight misplaced and misguided criticism. For example, to argue that certain ill-treatment of vulnerable persons at the hands of the police is frequent and therefore cannot be seen to be in breach of an absolute right is to jump from ‘is’ to ‘ought’ in a way which is both theoretically problematic in regard to human rights and prone to regressive implications. Moreover, suggesting that the harm-based approach to the ‘minimum level of severity’ threshold better captures the ‘nuances’ of the proscribed wrongs than the majority’s focus on human dignity, as the dissenting judges in *Bouyid* seemed to do, misses the real nuance of Article 3, which does not simply proscribe infliction of pain and suffering, but rather particular forms of *wrongful* inflictions of such pain or suffering.

⁸⁴ *Svinarenko v Russia* (n 6), para 138 (emphasis added).

⁸⁵ I elaborate on these points further in my forthcoming monograph – see n 57 above.

⁸⁶ A similar point was made by Judge Villiger in *Vinter v UK* (n 5) – I comment on it in Natasa Mavronicola, ‘Inhuman and Degrading Punishment, Dignity, and the Limits of Retribution’ (2014) 77(2) *Modern Law Review* 277, 301–305.

At the same time, *Bouyid* represents an important moment in the ECtHR's development of its Article 3 and, particularly, its human dignity-related case law. Given human dignity's increasingly recognised centrality to Article 3, and arguably the whole of the Convention, the ECtHR must be bold enough to unpack its meaning and implications with regard to the human rights – and corresponding State wrongs – encapsulated in Article 3 and the ECHR more generally.