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Mavronicola, Natasa

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## *Bouyid v Belgium*: the ‘minimum level of severity’ and human dignity’s role in Article 3 ECHR

Dr Natasa Mavronicola – Reader in Law, University of Birmingham  
([n.mavronicola@bham.ac.uk](mailto:n.mavronicola@bham.ac.uk))

### 1. Introduction

In September 2015, the Grand Chamber of the European Court of Human Rights (ECtHR) delivered an important judgment on Article 3 of the European Convention on Human Rights (ECHR) in the case of *Bouyid v Belgium*.<sup>1</sup> In *Bouyid*, the Grand Chamber was asked to consider whether single slaps inflicted on two persons – a minor and an adult – in police custody violated 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,<sup>2</sup> 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, though this will not be the focus of my comment. *Bouyid* has influenced a number of ECtHR judgments since.<sup>3</sup>

In this comment, I defend the majority’s finding of a substantive Article 3 violation on the facts, and demonstrate the significance of the Grand Chamber’s judgment in relation to how we understand the wrongs proscribed by Article 3. I focus on the fundamental basis of disagreement between the majority of the Grand Chamber and those who dissented 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,<sup>4</sup> and the way this relates to Article 3’s absolute character, which makes it non-displaceable –

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<sup>1</sup> *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.

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

<sup>3</sup> See, among many judgments making a finding of a substantive violation of Article 3 ECHR, *R.S. v Hungary* (Application no. 65290/14), Judgment of 2 July 2019 (on forced catheterisation amounting to inhuman and degrading treatment); *Azzolina and others v Italy* (Application nos. 28923/09, 67599/10), Judgment of 26 October 2017 (on repeated acts of violence and intimidation, reflecting a desire for punishment and revenge, amounting to torture); *Cazan v Romania* (Application no. 30050/12), Judgment of 5 April 2016 (on a lawyer’s sprain to his left ring finger sustained during attendance at a police station entailing a finding of degrading treatment).

<sup>4</sup> See *Ireland v UK* (Application no. 5310/71), Judgment of 18 January 1978 [Plenary], para 162; *Pretty v UK* (Application no. 2346/02, Judgment of 29 April 2002); 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.

that is, immune to trade-offs such as those applicable in relation to qualified rights such as privacy and freedom of expression.<sup>5</sup> In confronting this disagreement, I challenge the dissenters' unconvincing appeal to 'reality' in the interpretation of Article 3 ECHR and their allegations that the majority judgment entails the 'trivialising' of findings of violation of Article 3.<sup>6</sup> Reflecting on the way the majority of the Grand Chamber unpacked and applied the concept of human dignity in determining the question of substantive breach, I distil and defend the implications of the Grand Chamber's principled position and concrete finding.

The defence of *Bouyid* against claims that the judgment is unduly expansive of Article 3's scope or that it 'trivialises' Article 3 is particularly important at a time when the ECtHR's dynamic interpretation of the ECHR is regularly accused of 'mission creep'<sup>7</sup> or inappropriate and unpredictable expansionism.<sup>8</sup> The case note argues that the ill-treatment inflicted in *Bouyid* strikes at the heart of Article 3 ECHR, and is as egregious as it may be pervasive. *Bouyid* is accordingly illustrative of the imperative of interpreting the ECHR with the opposite of complacency, and with the readiness to find that the violation of even absolute human rights may lie in violence that – unduly – seems banal and 'everyday'.

## 2. The Grand Chamber's judgment: general principles and concrete findings

The case concerned two young men, one of whom was 17 at the time the events took place, who alleged that they had each been slapped in the face once by local police officers while being 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.<sup>9</sup> 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 Court's Fifth Section had referred to the principle that in order for ill-treatment to fall within the scope of Article 3 it had to attain a 'minimum level of severity' and had suggested that some forms of violence, although morally

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<sup>5</sup> Mavronicola, 'What is an "absolute right"?', *ibid* 734-735. Cf 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.

<sup>6</sup> *Bouyid* [Grand Chamber] (n 1), Dissenting Opinion of Judges De Gaetano, Lemmens and Mahoney, para 7.

<sup>7</sup> On this accusation as levied at the ECtHR by Jonathan Sumption, see Rosalind English, 'The Reith Lectures: Human Rights v Democracy', *UK Human Rights Blog*, 4 June 2019, <https://ukhumanrightsblog.com/2019/06/04/the-reith-lectures-human-rights-v-democracy/>.

<sup>8</sup> See, for example, Noel Malcolm, *Human Rights and Political Wrongs* (Policy Exchange 2017) 137-138.

<sup>9</sup> *Bouyid* [Grand Chamber] (n 1) para 54.

condemnable and likely domestically unlawful, would not fall within Article 3.<sup>10</sup> 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. It came to this conclusion by taking into account a number of factors that it considered relevant, including the 'atmosphere of tension' that prevailed between perpetrators and victims, 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.<sup>11</sup>

The majority of 14 judges at the Grand Chamber disagreed with the Fifth Section of the Court on whether the slaps reached the minimum level of severity. They were persuaded to depart from the Chamber's finding by rigorously reasoned arguments not only by the applicants' counsel but also by two third-party observations by the Human Rights Centre at Ghent University<sup>12</sup> and by REDRESS Trust.<sup>13</sup>

The applicants argued that the Court's Fifth Section wrongly departed from two related positions of principle within Article 3 case law. The first is a presumption of causality, which operates where an individual emerges with injuries sustained in detention: any injuries sustained in police custody are attributed to the police unless rebutted with relevant reasoned evidence. The second is the long-standing principle 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: that 'where the victim was deprived of his or her liberty...since the use of physical force inherently infringed human dignity, any such act was presumed to be serious and incompatible with art.3', unless this was rebutted by the perpetrator by

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

<sup>11</sup> *Ibid*, para 51.

<sup>12</sup> Available at: ??.

<sup>13</sup> Available at: <http://www.redress.org/downloads/bouyid-v-belgium-redress-intervention-18.07.2014.pdf>, accessed 12 April 2018.

showing that the force used had been rendered strictly necessary by the victim's behaviour.<sup>14</sup> This had not been shown by the police, according to the applicants. They argued that the tensions between their family and the local police, which had indeed been present, did not establish a need for use of force. They also made reference to reports indicating that police violence was rife in Belgium,<sup>15</sup> emphasising the case's wider significance for policing standards.

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,<sup>16</sup> particularly in light of the presumption of innocence.<sup>17</sup> Because the Belgian government disputed the facts alleged by the applicants, it did not offer an affirmative defence for the slaps that the applicants alleged they had sustained at the hands of police officers.

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 without serious long-term effects on the applicants. The Ghent Human Rights Centre argued that the first three factors outlined were irrelevant to the determination of whether something reached the Article 3 threshold. It then suggested that whilst the fourth factor outlined – in terms of the duration of the treatment and its ill-effects – 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, the Human Rights Centre argued. It also highlighted the prevalence of such police violence in Belgium as a systemic issue which required addressing.<sup>18</sup>

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 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.<sup>19</sup> The use of force in such circumstances

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<sup>14</sup> *Bouyid* [Grand Chamber] (n 1) para 57.

<sup>15</sup> *Bouyid* [Grand Chamber] (n 1) para 59.

<sup>16</sup> *Ibid*, para 66.

<sup>17</sup> *Ibid*, para 67.

<sup>18</sup> *Ibid*, para 76.

<sup>19</sup> *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.

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 European Committee for the Prevention of Torture.<sup>20</sup>

The Grand Chamber approached the case in the usual way, by setting out 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, and in that it is unqualified (making no provision for exceptions) and non-derogable, even in the context of the fight against terrorism and organised crime.<sup>21</sup> 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'.<sup>22</sup>

The Grand Chamber pointed out its long-held position 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.<sup>23</sup> 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 – accordingly, following its long-standing case law on this, the Court indicated that the onus is on the government to provide a satisfactory explanation of injuries occurring in detention and cast doubt on the account offered by the victim. This principle applies, according to the Grand Chamber, to any circumstances in which a person is 'under the control of the police or a similar authority'.<sup>24</sup> As the Court said, this approach to the standard of proof is justified not only by the authorities' superior or exclusive knowledge of the events, but also because of the vulnerable position in which persons in custody find themselves.<sup>25</sup> The ECtHR also reiterated that it has to apply a 'particularly thorough scrutiny' where there are allegations of an Article 3 breach.<sup>26</sup>

Turning to the substantive contours of the ill-treatment proscribed by Article 3 ECHR, the Court restated its frequently cited approach to the Article 3 'threshold': 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'.<sup>27</sup> The Court indicated that

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<sup>20</sup> *Bouyid* [Grand Chamber], *ibid*, para 79.

<sup>21</sup> *Ibid*, para 81.

<sup>22</sup> *Ibid*.

<sup>23</sup> *Ibid*, para 82. See, notably, *Ireland v UK* (n 4) para 161.

<sup>24</sup> *Ibid*, para 84.

<sup>25</sup> *Ibid*, para 83.

<sup>26</sup> *Ibid*, para 85.

<sup>27</sup> *Ibid*, para 86. For critical comment (and selected case law) on this test, see Mavronicola, 'What is an "absolute right"?' (n 5).

other factors relevant to the severity assessment could include the purpose, intention or motivation behind a treatment,<sup>28</sup> although an absence of an intent to humiliate or otherwise harm does not rule out an Article 3 breach;<sup>29</sup> and that regard must be had to context, including an ‘atmosphere of heightened tension and emotions’.<sup>30</sup> 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’,<sup>31</sup> but 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’, may be degrading and thus in breach of Article 3.<sup>32</sup>

In agreement with the applicants’ and third party intervener’s submissions, the Court thought it important to highlight the stringent approach it takes to violence against persons who come into contact with law enforcement officials:

[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.<sup>33</sup>

The Court’s stance signifies an appreciation of the power asymmetry that typically arises in any individual’s confrontation with law enforcement officials, which leads it to extend its presumption on recourse to physical force beyond circumstances of deprivation of liberty to whenever an individual ‘more generally, is confronted with law-enforcement officers’. It is worth mentioning, at this stage, that I have written elsewhere in defence of the Court’s application of a strict necessity test to determining whether the use of force is inhuman or degrading.<sup>34</sup> As I argue in the relevant case comment, the application of necessity does not contradict the absolute prohibition on inhuman or degrading treatment because Article 3 does not proscribe the use of force *per se*.<sup>35</sup> The Court’s strict necessity test, far from displacing the prohibition, appropriately serves to distinguish uses of force which are disrespectful of human dignity, and are thereby inhuman or degrading, from those that are not.<sup>36</sup>

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<sup>28</sup> *Bouyid* [Grand Chamber] (n 1), para 86, citing *inter alia* *Egmez v Cyprus* (Application no. 30873/96), Judgment of 21 December 2000), para 78; and *Krastanov v Bulgaria* (Application no. 50222/99), Judgment of 30 September 2004, para 53.

<sup>29</sup> *Bouyid* [Grand Chamber] (n 1), para 86.

<sup>30</sup> *Ibid*.

<sup>31</sup> *Ibid*, para 87.

<sup>32</sup> *Ibid*.

<sup>33</sup> *Ibid*, para 88, citations omitted, emphasis added.

<sup>34</sup> 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.

<sup>35</sup> *Ibid* 375.

<sup>36</sup> *Ibid* 377-382.

Turning its attention to human dignity, the Court underlined that, although the Convention does not refer explicitly to human dignity,<sup>37</sup> ‘the Court has emphasised that respect for human dignity forms part of the very essence of the Convention...alongside human freedom’.<sup>38</sup> It observed 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*,<sup>39</sup> and by the Court in judgments such as *Tyrer v UK*.<sup>40</sup> 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 assault on precisely that which is one of the main purposes of Article 3 to protect, namely a person’s dignity and physical integrity’.<sup>41</sup>

The Court gave short shrift to the Belgian Government’s attempt to dispute the applicants’ allegations, finding 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’,<sup>42</sup> on which the Court made a finding of breach of the investigative duty under Article 3 ECHR,<sup>43</sup> 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 in respect of State agents using force that has not been made necessary by the conduct of the individual they were confronting, and that such force ‘diminishes human dignity and is in principle an infringement of...Article 3’.<sup>44</sup> It emphasised that the term ‘in principle’ was not aimed at carving out situations in which recourse to physical force in such circumstances could be Article 3-compatible. For the Court, ‘[a]ny interference with human dignity strikes at the very essence of the Convention’.<sup>45</sup> 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

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<sup>37</sup> *Bouyid* [Grand Chamber] (n 1), 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.

<sup>38</sup> *Ibid*, para 89, citing – among other authorities – *Pretty v UK* (n 4).

<sup>39</sup> *Ibid*, para 90, citing *East African Asians v UK* (Application nos. nos. 4403/70, 4404/70, 4405/70, 4406/70, 4407/70, 4408/70, 4409/70, 4410/70, 4411/70, 4412/70, 4413/70, 4414/70, 4415/70, 4416/70, 4417/70, 4418/70, 4419/70, 4422/70, 4423/70, 4434/70, 4443/70, 4476/70, 4477/70, 4478/70, 4486/70, 4501/70, 4526/70, 4527/70, 4528/70, 4529/70 and 4530/70), Commission report of 14 December 1973.

<sup>40</sup> *Tyrer v UK* (Application no. 5856/72), Judgment of 25 April 1978.

<sup>41</sup> *Ibid*, para 33, cited in *Bouyid* [Grand Chamber] (n 1) para 90.

<sup>42</sup> *Bouyid* [Grand Chamber], *ibid* para 96.

<sup>43</sup> *Ibid*, paras 124-134.

<sup>44</sup> *Ibid*, para 101.

<sup>45</sup> *Ibid*.



an individual where it is not made strictly necessary by his conduct, *whatever the impact on the person in question*.<sup>46</sup>

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'.<sup>47</sup> The Court therefore found that the applicants' human dignity had been undermined and there had been a breach of Article 3 ECHR.<sup>48</sup>

Some general remarks followed, which served to provide further justification and explanation for the Court's finding, but also offered generalizable guidance on the application of Article 3 to violence in circumstances of power asymmetry or control by one individual over another. The Court emphasised 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',<sup>49</sup> and has a 'considerable impact' on the person on whom it is inflicted, particularly given the importance which the face can have in human interaction.<sup>50</sup> The Court underlined 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'.<sup>51</sup> According to the Court, this is particularly pronounced 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'.<sup>52</sup> To this the Court added that 'persons who are held in police custody or are even simply taken or summoned to a police station...and more broadly all persons under the control of the police or a similar authority, are in a situation of vulnerability', which entails that the police are under a duty to protect them.<sup>53</sup> As the Court put it, '[i]n inflicting the humiliation of being slapped by one of their officers they are flouting this duty'.<sup>54</sup>

Importantly, the Court rejected the Fifth Section's attribution of relevance to the victims' allegedly disrespectful or provocative conduct and the exasperation and

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<sup>46</sup> Ibid, emphasis added.

<sup>47</sup> Ibid, para 102.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid, para 103.

<sup>50</sup> 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 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 12 April 2018.

<sup>51</sup> Ibid, para 105.

<sup>52</sup> Ibid, para 106, citing *Petyo Petkov v Bulgaria* (Application no. 32130/03), Judgment of 7 January 2010, paras 42 and 47.

<sup>53</sup> *Bouyid* [Grand Chamber], *ibid*, para 107.

<sup>54</sup> *Bouyid* [Grand Chamber], *ibid*, para 107.

‘thoughtlessness’ of the police officers’ reaction, explicitly calling these factors ‘irrelevant’.<sup>55</sup> The Court rightly grounded this point in the absolute character of the Convention’s prohibition on torture and inhuman or degrading treatment or punishment, irrespective of the victim’s conduct. This is crucial: as gratuitous violence inflicted on a vulnerable person in the control of the authorities, the slap violated Article 3, and any unsavoury prior behaviour of the victims 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’.<sup>56</sup>

Finally, it observed ‘as a secondary consideration’ that the first applicant in *Bouyid* had been a minor and thus liable to be even more vulnerable, especially in psychological terms, to such ill-treatment.<sup>57</sup> 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 officials must therefore ‘show greater vigilance and self-control when dealing with minors’.<sup>58</sup>

Nonetheless, the Court was clear that the slaps had amounted to a breach of Article 3 as inflicted on *both* the adult and the minor applicant, 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.<sup>59</sup>

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 and to do so effectively. This was a unanimous finding, premised on the authorities’ failure to devote the requisite attention to the applicants’ allegations or to the nature of the act, and the undue length of the proceedings.<sup>60</sup> This case 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 finding of a substantive breach of Article 3,

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<sup>55</sup> *Ibid*, para 108.

<sup>56</sup> *Ibid*, citing *Davydov and Others v Ukraine* (Application nos. 17674/02 and 39081/02), Judgment of 1 July 2010.

<sup>57</sup> *Ibid*, para 109.

<sup>58</sup> *Ibid*, para 110.

<sup>59</sup> *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 2020).

<sup>60</sup> *Ibid*, paras 114-134.

was strongly worded. While 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',<sup>61</sup> the slaps did not attain the minimum level of severity required to cross the Article 3 threshold.<sup>62</sup>

They argued that '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'.<sup>63</sup> For these three judges, that was the very point of the words 'in principle' in the Court's case law regarding the use of force by law enforcement officials.<sup>64</sup> The 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'.<sup>65</sup> The dissenting judges were deeply scathing of elements of the majority's reasoning. Three focal points of criticism are worth outlining.

First, the dissenting judges 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'.<sup>66</sup> They considered rather that the Court ought 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'.<sup>67</sup> This largely echoes concerns such as those voiced by Judge Villiger in his dissent in the Grand Chamber judgment of *Vinter v UK*, concerning the compatibility with Article 3 of whole life imprisonment without parole, where he suggested that the Court in *Vinter* was unduly departing from its 'default' individualised, concrete, *ex post facto* assessment in Article 3 cases, whereby all relevant circumstances are considered before deciding whether the Article 3 threshold has been crossed.<sup>68</sup>

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<sup>61</sup> *Ibid*, Dissenting Opinion of Judges De Gaetano, Lemmens and Mahoney, para 3.

<sup>62</sup> *Ibid*, para 5-7.

<sup>63</sup> *Ibid*, para 5.

<sup>64</sup> *Ibid*.

<sup>65</sup> *Ireland v UK* (n 4), para 167.

<sup>66</sup> *Bouyid* [Grand Chamber] (n 1), Dissenting Opinion of Judges De Gaetano, Lemmens and Mahoney, para 6.

<sup>67</sup> *Ibid*.

<sup>68</sup> See *Vinter v UK* (2016) 63 EHRR 1, Partly Dissenting Opinion of Judge Villiger. 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.

Secondly, the dissenting judges criticised what they viewed as the majority's haphazard references to (human) dignity, suggesting that whilst they (the judges in dissent) 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 (human) dignity provided 'no indication of how the notion of human dignity is to be understood'.<sup>69</sup> Interestingly, this critique seems to be in tension with the prior critique: the dissenting judges first deplore the majority's efforts to provide generalizable *ex ante* guidance on Article 3 ill-treatment, and subsequently challenge the majority's failure to provide such guidance in respect of the demands of human dignity.

The final, and most forcefully made, criticism was levied against what the dissenting judges branded the 'trivialising' of findings of Article 3 ill-treatment.<sup>70</sup> The dissenting judges 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'.<sup>71</sup> They argued that this unduly high standard did not show proper appreciation of the difficulties that police may face in real-life situations and which might 'cause them to lose their temper'.<sup>72</sup> Given that the situation complained of presented a treatment that was 'far less serious' than ill-treatment in other cases the Court had unfortunately had to deal with, according to the dissenting judges, the Court's findings and conclusions risked 'being completely at odds with reality'.<sup>73</sup> They argued for '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.<sup>74</sup> The dissenting judges were, in this way, not only saying that factors such as provocation or limited concrete injury diminished the severity of what had occurred. They were also suggesting that the frequent, quotidian occurrence of such violence was a basis for *not* finding it to be a breach of Article 3.

#### **4. In defence of the majority's position: 'realism', context, the 'minimum level of severity' and human dignity**

Perhaps the most concerning aspect of the dissent is the dissenting judges' 'realism'. Their appeal to a 'grounding in reality' in the delimitation of Article 3 ill-treatment fuses 'is' and 'ought'. The argument appears to proceed as follows:

1. Article 3 prohibits torture as well as inhuman or degrading treatment or punishment in absolute terms, admitting of no displacement or trade-offs, and must therefore be seen as proscribing ill-treatment that we are not prepared to countenance.
2. Slaps in police custody occur and are likely to occur very often.

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<sup>69</sup> *Bouyid* [Grand Chamber] (n 1) Dissenting Opinion of Judges De Gaetano, Lemmens and Mahoney, para 4.

<sup>70</sup> *Ibid*, para 7.

<sup>71</sup> *Ibid*.

<sup>72</sup> *Ibid*.

<sup>73</sup> *Ibid*, paras 7-8.

<sup>74</sup> *Ibid*, para 9.

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 is one from 'is' to 'ought': the implicit thought process of the dissenting judges appears to be that 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: the prevalence of a particular form of ill-treatment does not vitiate its wrongfulness.<sup>75</sup> Torture, inhuman treatment, and degrading treatment, are as pervasive as they are egregious.

At worst, the dissenting judges' appeal to 'reality' appears to advocate for allowances to be made on the basis of prudential, extraneous policy considerations which have nothing to do with the substantive scope of the torture continuum proscribed by Article 3 ECHR, such as making ECtHR doctrine more palatable to Contracting States. Jeremy Waldron has underlined that this is incompatible with the absolute character of the prohibition:

We are certainly not permitted to follow...a realist logic proceeding on the basis of *modus tollens*:

- (1) If X is inhuman then X is prohibited;
  - (2) But because X is necessary [or widely desired or accepted], it is unthinkable that X should be prohibited;
- therefore, (3) X cannot be regarded as inhuman.<sup>76</sup>

As I argue below, beyond this 'is'- 'ought' jump and undue appeal to 'reality', the dissenting judges' substantive reasoning does not appropriately tackle the conceptual contours of the 'severity' of ill-treatment proscribed by Article 3 as it applies to the case at hand. Nonetheless, the critique regarding the uncertainty surrounding human dignity is, to an extent, well-grounded. Below, I offer some ideas of how we might understand the way human dignity grounds the majority's understanding of the minimum level of severity and their finding in *Bouyid*.

In *Bouyid*, following a line of similar pronouncements in earlier case law,<sup>77</sup> the majority of the Grand Chamber placed human dignity squarely at the centre of Article 3 alongside the broader claim that 'respect for human dignity forms part of the very essence of the Convention'.<sup>78</sup> According to the Grand Chamber, there is a 'particularly

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<sup>75</sup> The United Nations Special Rapporteur on Torture, Nils Melzer, recently underlined that 'torture and other cruel, inhuman or degrading treatment or punishment are still rampant in most, if not all, parts of the world': Report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN doc. A/HRC/34/54, 14 February 2017, para 14.

<sup>76</sup> Jeremy Waldron, *Torture, Terror and Trade-offs: Philosophy for the White House* (OUP 2010) at 297 (my additions in brackets).

<sup>77</sup> See, for example, *Pretty v UK* (2002) 35 EHRR 1, para 65; *Vinter* (n 68), para 113.

<sup>78</sup> *Bouyid* [Grand Chamber] (n 1), para 89.

strong link between the concepts of “degrading” treatment or punishment within the meaning of Article 3 of the Convention and respect for “dignity”.<sup>79</sup> The Court accompanied these points with allusions to a number of international and regional human rights instruments and related documents that refer to (human) dignity, including Protocol 13 to the ECHR, which abolishes the death penalty.<sup>80</sup>

The conception of human dignity that emerges in the Grand Chamber’s reasoning is *both* sensitive to the particular relational factors that determine the character of a particular treatment – including factors which go to the iniquity of the perpetrator’s act and the vulnerability of the victim’s circumstances – *and* distinguished from the subjective impact of the treatment at the same time, making the assessment of whether human dignity 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*.<sup>81</sup>

This statement of principle unequivocally affirms that what is at the heart of the prohibition enshrined in Article 3, and the ‘minimum level of severity’<sup>82</sup> threshold that the ECtHR suggests delimits the prohibition, is not a quantitative level of harm. Rather, Article 3 proscribes certain forms of absolute *wrongs*, including wrongs that result in significant suffering and other forms of harm. The minimum level of severity does not, contrary to misconceptions, refer to a certain scale of *harm*; rather, it concerns the gravity of the *wrong* committed.

As the Court recognises, the concept of human dignity can play a central role in delimiting these wrongs, not least degrading treatment or punishment.<sup>83</sup> Where a person is subjected to physical force not necessitated to repel their actions, they are treated as an object, without the minimum respect demanded by their humanity.<sup>84</sup> Human dignity is attacked in that the respect demanded by the elevated and equal fundamental moral status<sup>85</sup> of all human persons is denied. In the *Bouyid* case, the

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<sup>79</sup> Ibid, para 90. See, on this, Elaine Webster, *Dignity, Degrading Treatment and Torture in Human Rights Law: The Ends of Article 3 of the European Convention on Human Rights* (Routledge 2018).

<sup>80</sup> Ibid, especially paras 45-51 and 81-90. On Article 3 and the death penalty, see *Al Saadoon and Mufdhi v UK* (Application no. 61498/08), Judgment of 2 March 2010.

<sup>81</sup> Ibid, para 101 (emphasis added).

<sup>82</sup> The ‘minimum level of severity’ standard is repeated across a vast body of Article 3 case law. See, for example, *Ireland v UK* (n 4) para 162; *Gäfgen v Germany* (2011) 52 EHRR 1, para 88.

<sup>83</sup> For a thought-provoking account of precisely this dimension of Article 3 ECHR, see Elaine Webster, *Dignity, Degrading Treatment and Torture in Human Rights Law: The Ends of Article 3 of the European Convention on Human Rights* (Routledge 2018).

<sup>84</sup> See *Bouyid* [Grand Chamber] (n 1); and Mavronicola, ‘*Güler and Öngel v Turkey*’ (n 19).

<sup>85</sup> 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* (OUP 2013). See also 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 the applicants particularly vulnerable to the police-officers' abuse of power. As Jean Améry reflected on his experience of torture at the hands of the Gestapo, 'with the first blow from a policeman's fist, against which there can be no defense and which no helping hand will ward off, a part of our life ends and it can never again be revived';<sup>86</sup> by this he meant that on that first blow, what is lost is a certain trust in the world and in the relational sanctity we ascribe to each other's person. The dehumanisation inflicted in *Bouyid* unmistakably lies on the torture continuum: torture, after all, paradigmatically involves 'the assertion of unlimited power over absolute helplessness',<sup>87</sup> the 'reduction of the human...to the status of less than human'.<sup>88</sup>

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,<sup>89</sup> and not purely attacks on the interests or welfare of a particular person. This explains the objective standards applicable to cases such as *Bouyid* – or, a much earlier predecessor, *Tyrer v UK*<sup>90</sup> – in determining whether a particular treatment is degrading. In disrespecting the person's humanity, the infliction of physical force by a police-officer against a person entirely within the police-officer's control objectively attacks human dignity in breach of Article 3, irrespective of how painfully it is actually experienced. Thus, if a similar act took place against a particularly hardened criminal, it would objectively amount to an attack on human dignity in breach of Article 3 just the same. By way of illustration, the Grand Chamber in *Svinarenko and Slyadnev v Russia* put the matter as follows: 'Regardless of the concrete circumstances in the present case...holding a person in a metal cage during a trial constitutes in itself – having regard to its *objectively degrading nature*...– an affront to human dignity in breach of Article 3'.<sup>91</sup>

The dissenting judges' focus on what they (arguably wrongly) considered to be the limited concrete effects of the treatment on the victims elided the character of the treatment inflicted, which was objectively degrading irrespective of the nature, degree or duration of tangible harm it resulted in. It was the *wrong* committed against the

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three elements of the 'minimum core' of human dignity offered in Christopher McCrudden, 'Human Dignity and Judicial Interpretation' (2008) 19(4) *EJIL* 655, 679. For the idea of dignity as rank or status, see Jeremy Waldron, *Dignity, Rank and Rights* (OUP 2012), especially Lectures 1 and 2.

<sup>86</sup> Jean Améry, *At the Mind's Limits: Contemplations by a Survivor on Auschwitz and Its Realities* (Indiana University Press 2009) 29.

<sup>87</sup> David Luban, *Torture, Power, and Law* (CUP 2014) 128.

<sup>88</sup> Michelle Farrell, *The Prohibition of Torture in Exceptional Circumstances* (Cambridge University Press 2013) 246.

<sup>89</sup> 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.'

<sup>90</sup> See n 40 above.

<sup>91</sup> *Svinarenko and Slyadnev v Russia* App Nos 32541/08 and 43441/08, Judgment of 17 July 2014, para 138 (emphasis added).

applicants that reached the minimum level of severity, rather than the *harm* endured by them.<sup>92</sup>

The final point to make in defence of the majority's judgment concerns the methodological critique levied against the majority by the dissenting judges, to the effect that the majority's general observations in *Bouyid* 'failed' to adopt the *ex post facto*, 'all-things-considered' approach normally favoured by the ECtHR in Article 3 cases. The dissenting judges' position not only stands in contradiction with their appeal for clarity on the demands of human dignity. It is also flawed insofar as it favours an interpretive approach which undermines the robustness and preventive potential of an absolute right, as well as more broadly being in tension with the Court's own understanding of the rule of law, which demands a degree of certainty and predictability in the law. 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.<sup>93</sup> It is essential that the Grand Chamber offers 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.

Contrary to the dissenting judges' argument, favouring an interpretive approach that is oriented towards providing generalizable guidance does not undermine the context-sensitive character of the Court's interpretation of the wrongs of torture, inhumanity or degradation. It is true that the delimitation of the wrongs of torture, inhumanity and degradation must operate in a context-sensitive manner: context can help determine the boundaries between intimacy and violence, between self-defence and brutality, between the protection of a person and the violation of one's person. The majority's generalizable position of principle incorporates an acknowledgement that if someone were to attack an officer with a weapon, for example, the officer would be entitled to use strictly necessary force to repel this attack.<sup>94</sup> Yet it places the onus on the party presumptively holding more power to prove the necessity of any force deployed. There are broader contextual factors forming the rich backdrop to the majority's position of principle and consequent finding. These include the asymmetry of power between persons who wield State force – and hold the monopoly over certain forms of legitimate, or at least lawful, physical and coercive force – and persons within their control; the history, indeed the past *and* present, of widespread and well-documented abuses of power (asymmetries) in such contexts; and the enduring lack of accountability for such abuses.

## 5. Concluding thoughts

The search for the substantive contours of torture, inhumanity and degradation – ill-treatment that is absolutely proscribed by Article 3 ECHR – is paved with challenges

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<sup>92</sup> These points are elaborated upon in a forthcoming monograph – see n 59 above.

<sup>93</sup> See Mavronicola, 'What is an "absolute right"?' (n 5) 739-758.

<sup>94</sup> See the analysis of this above, in paragraph to n 36.



and contestation. The ECtHR is tasked with providing authoritative interpretation of these wrongs, and it is important to engage critically with the all too human way in which the Court has fulfilled its duties in this regard, not least with a view to helping refine the substance and method the Court adopts in delimiting the absolute. It is also important to highlight misplaced and misguided criticism. To argue, in effect, that certain forms of ill-treatment of persons at the hands of the police is frequent *and therefore* cannot be understood to be in breach of an absolute right is to jump from 'is' to 'ought' in a way which is both fundamentally problematic in regard to the interpretation of human rights and prone to evident regressive implications.

*Bouyid* is a significant Grand Chamber judgment that adopts an entirely appropriate stance with respect to violence in circumstances of power asymmetry, and places the burden of disproving abuse squarely on the more powerful party. It is also important in affirming that the 'minimum level of severity' threshold is qualitative and attached to the wrongfulness of the treatment, viewed through the lens of human dignity, rather than hinging on a quantitative determination of the treatment's impact on the person it is inflicted upon. Lastly, *Bouyid* represents an important moment in the ECtHR's development of its Article 3 and human dignity-related case law, as the Court increasingly employs human dignity reasoning more explicitly and elaborately towards identifying dehumanising treatment.<sup>95</sup> The ECtHR would do well to continue boldly and sensitively to unpack human dignity's demands in the specification of human rights – and corresponding State wrongs – and to acknowledge unequal power dynamics as it does so.

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<sup>95</sup> See, among other examples, *Vinter* (n 68); *Svinarenko and Slyadnev* (n 91).