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DO PRESENT CIRCUMSTANCES JUSTIFY A REVISION OF ARTICLE 3 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS?

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Abstract

The rights contained in Article 3 are of a non-derogable nature even in times of war and public emergencies. The prohibition of torture and in human or degrading treatment or punishment is expressed in a very strong language and no exceptions as such are attached to it. In its principled rhetoric, the European Court of Human Rights (ECtHR; the Court) consistently refers to the prohibition of torture and inhuman or degrading treatment in Article 3 of the European Convention on Human Rights (ECHR; the Convention) as absolute. The Court has declared that

many times that "even in the most difficult circumstances, such as the fight against terrorism, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment" and that "the philosophical basis underpinning the absolute nature of the right under Article 3 does not allow for any exceptions or justifying factors or balancing of interests". Taken at face value, these quotes lead to a straightforward, principled conclusion: because Article 3 is absolute, its application is a matter of scope only.

Keywords: ECHR Article 3, Torture, Inhuman Treatment, Degrading Treatment, Anti-Terrorism Laws in United Kingdom

INTRODUCTION

European Convention on Human Rights (The Convention) is the outcome of world war second, when Europe had suffered from a devastating destruction and the humanity had faced cruel atrocities. The survivals of those days are gathered and framed venerable instrument which contains all those rights and freedom, which are to be afforded by the persons and subsequently assign positive and negative obligations upon state parties to ensure respect for those rights and protect them by all means within their jurisdiction (signatory of the convention). The prohibition of torture and other forms of ill-treatment is enshrined in all the major international and regional instruments, and is absolute and non-derogable. The right to be free from torture and other cruel, inhuman or degrading treatment or punishment cannot be subjected to any form of balancing. The European Court on Human Rights stated that "even in the most difficult circumstance, such as the fight against organized terrorism or encountering the major crimes, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment. States, in the name of countering terrorism, which erode safeguards against torture and other cruel, inhuman or degrading treatment or punishment. Over the last couple of years, some governments, within and outside of the European Union, have taken measures which have contradicted their international obligations related to the prohibition of torture and other cruel, inhuman or degrading treatment or punishment. Some governments, in fact, use information obtained through prohibited treatment outside proceedings against a person accused of torture, transfer persons to countries where they risk being subjected to torture and other cruel, inhuman or degrading treatment or punishment, including by relying on diplomatic assurances or memorandums of understanding to avoid the obligation of non-refoulement.

Similarly, in one of his speech in the parliament, Charles Clarke, spoke on behalf of the current British Presidency of the Council of the European Union (EU), claimed that:

"The right to be protected from torture and ill-treatment must be considered side by side with the right to be protected from the death and destruction caused by indiscriminate terrorism".

States to take lawful measures to counter terrorism and their obligation to prevent and prohibit torture or other ill-treatment serve fundamentally the same purpose, the protection of the integrity and dignity of human beings. The prevention of torture and other type of ill treatment which is protected in Art 3 of the European Convention, which simply states that,

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment";

The convention prohibits in absolute terms torture or inhuman degrading treatment or punishment, irrespective of the victim's conduct … Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 even in the event of a public emergency to the life of the nation.

In the case of *Ireland v United Kingdom*, the Court provided some useful guidelines regarding the provisions of Article 3. The Court, in formulating a narrow approach, took the view that 'torture' means deliberate inhuman treatment causing very serious and cruel suffering, whereas 'inhuman treatment or punishment that causes intense physical and mental suffering.In the said case the Irish Government had brought proceedings against the UK alleging that persons taken in to the custody pursuant to the Civil Authorities (Special Powers) Act, Northern Ireland, 1922 were subjected to a treatment which in Convention terms amounted to torture, inhuman and degrading treatment contrary to Article 3. The Irish Government also alleged that detention without trial amounted to a violation of the right to liberty and security of the person as provided in Article 5, and the right to fair trial accorded in Article 6 of the Convention. In addition there was a claim of a violation of Article 14 (that the power if detention and internment were exercised in a discriminated manner). A particular source of concern was the methods of interrogation used by the British Security forces in Northern Ireland. They were engaged in the so- called 'interrogation in depth', that is the use of five techniques which included: 'wall standing' long period of standing in a stressed position; 'hooding', placing black hoods on the prisoners' heads; subjecting to noise; deprivation of sleep; and deprivation of food and drink.

The European commission did not find the violation of Article 5 and 14 but it did find that the use of five techniques of interrogation constituted 'torture and inhuman treatment, contrary to Article 3, The Commissions view, however, endorsed by the Court of Human Rights. The Court drew a distinction between the various facets of Article 3, that is, between 'torture' on the one hand 'inhuman; and 'degrading' treatment on the other. Torture as defined by the Court meant 'deliberate' inhuman treatment causing very serious and cruel suffering. Applying this,

test, it held that the use of the 'five techniques' and physical assault did not amount to torture, although it constituted 'inhuman and degrading treatment'.

While a treatment needs to reach a minimum threshold before being designated an inhuman, the crucial factor which distinguishes it from torture is the absence of a deliberate intent to cause suffering. Inhuman treatment could be the result of conditions or treatment in a place of detention, withholding of food, water, and medical treatment, rapes and assault preventive detention, failure to provide medical treatment, extradition or deportation, mental torture or solitary confinement. In assessing whether punishment is inhuman, subjective, consideration needs to be given to various factors including a physical and mental suffering, the applicant's sex, age, health, and sensibilities etc. Degrading treatment arises from and ordinary everyday meaning and would include gross humiliation through racial discrimination. In order to constitute degrading punishment, the humiliation and debasement involved must attain a particular level depending on, *inter alia*, the circumstances of the case, such as the nature and context of the punishment itself and the manner and method of its execution.

A striking example of the wide ambit of Article 3 to cover rights not expressly provided for in the convention is illustrated through the *Soering case*. In *Soering v. United Kingdom,* The applicant, who was a West German national, murdered his girlfriend's parents, with the complicity of his girlfriend. These offences were committed in the US state Virginia, where he and his girlfriend were students. After having committed these offences they fled to the United Kingdom. The United States government, under the term of the Extradition Treaty of 1972 between the United States and the United Kingdom, applied for the applicant and his girlfriend to be extradited to the United States. The girlfriend was extradited, and having pleaded guilty as an accessory to the murder, was sentenced to 90 years imprisonment. In the case of the applicant, the United Kingdom, while agreeing to extradite him, had sought assurances that if convicted he would not be given the death penalty. The applicant however appealed to the Strasbourg institutions. The death penalty *per se* prohibited by the Convention and the UK by extraditing Mr. Soering to the USA was not beaching any provision of the Convention or general international law. The applicant's primary claim was based on the prospect of his suffering from inhuman and degrading treatment under Article 3 while waiting for his execution in the state of Virginia.

The European Court of Human Rights, in upholding Soering's claim, took the view that if he was extradited to Virginia there would be a real risk of his being placed on death row, which would constitute a violation of Article 3. The court acknowledged that the imposition of death penalty *per se* in not in breach of Article 3. However, Article 3 prohibition could be breached in conditions where the death penalty was imposed only after 6-8 year's waiting period (the so-

called ‘death row’ phenomenon). That he was 18 when the offences were committed and there was psychiatric evidence of his mental instability were mitigating factors in favour of the applicant. Thus, in the words of the Court:

“Having regard to the very long period of time spent on death row in such extreme conditions, with ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant’s extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3”.

As in the case of Soering, there must exist a real risk as opposed to a mere possibility of facing inhuman or degrading treatment. The court in Soering attempted to narrow down the ambit of its decision with the proviso that such a ruling would be only made in view of “the serious and irreparable nature of the alleged suffering risked”. The narrow dictum has been fallowed in *Cruz Varas and other v. Sweden* and *Vilvarajah and others v. United Kingdom.* In the said case the appellants submit, in reliance on common law principles, that the obtaining of evidence by the infliction of torture is so grave a breach of international law, human rights and the rule of law that any court degrades itself and the administration of justice by admitting it. If, therefore, it appears that a confession or evidence may have been procured by torture, the court must exercise its discretion to reject such evidence as an abuse of its process.

The International prohibition of Torture

The preamble to the United Nations Charter (1945) recorded the determination of member states to reaffirm their faith in fundamental human rights and the dignity and worth of the human person and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained. The Charter was succeeded by the Universal Declaration of Human Rights 1948, the European Convention 1950 and the International Covenant on Civil and Political Rights 1966, all of which (in articles 5, 3 and 7 respectively, in very similar language) provided that no one should be subjected to torture or inhuman or degrading treatment. On 9 December 1975 the General Assembly of the United Nations, unanimously, adopted Resolution 3452 (XXX), a Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. This included (in article 1) a definition of torture as follows:

The Torture Convention contained, in article 1, a definition of torture, it means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of

having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.

Article 3 of ECHR

No State Party shall expel, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Present scenario

Discrimination: These Anti-Terrorism laws are a clear violation of Universal Declaration of Human Rights 1948, European Convention of Human Rights (1950) and Human Rights Act 1998, because they discriminate between nationals and non-nationals. United Kingdom's Terrorism Act 2001 is significant in this regard.

Unlawful detention: Detention without trial, and without charge, is effectively prohibited under Article 5 of the European Convention on Human Rights. However, following the events of 9/11, the British Government exercised its right to derogate from Article 5, on the basis of the Government's assessment of the risks posed to the country's security by certain people resident in the country. The Government persuaded Parliament to enact the Anti-terrorism, Crime and Security Act 2001 and, in terms of Section 23 of the Act, made an Order (the Human Rights Act 1998 (Designated Derogation) Order 2001), by means of which the Government acquired statutory powers to detain, without trial, aliens believed by ministers to pose a terrorist threat to the U.K. It was under that Order that the Home Secretary ordered the detention of these men.

Deportation: Most of the Anti-Terrorism laws permit the Government to deport any person from the home land which he thinks is dangerous to their home land.

Unlawful Intervention: These Anti-Terrorism laws also allowed intervening in to the jurisdiction of a foreign state in the name of war on "Terror". Like United States of American invasion in Afghanistan and then in Iraq without any approval from United Nation.

Violation of privacy: This Act gives tremendous powers to the police officer to stop and search or house arrest without warrant etc. hence, leading to the grave violations of Human Rights, fundamental freedoms and Civil Liberties because house arrest without trial is as damaging as imprisonment without trial. Furthermore, this Act also gives a power to law enforcing agencies in order to log-in to private documents through internet for investigation.

Freedom of expression: Freedom of expression is a qualified right, which means that the states can derogate from this right at the time of emergency. However, many anti-terrorism laws put restrictions on the freedom of expression and public gathering without justifying the intensity of the threat. Furthermore, These Anti-Terrorism laws also give Special powers and diminish conventional and traditional protection built into the fair trail process, For example, they may allow unusually long periods for the detention and questioning of suspects. Some philosopher argues in the favor of states this action that at the times of such emergency, normal civil liberties can be restricted given the overwhelming need for public protection. The contrary argument is perfectly reasonable: that it is precisely those 'civil liberties' which relates to the fairness of the trail process and to the detention and treatment of suspects which should be carefully protected at when there is strong political and social pressure on police and courts to bring perpetrators to justice. There is no point to the protection offered by civil liberties and human rights law if it can be set aside or diminished at times of crisis when they are most needed. Special powers can raise difficult questions relating to freedom of speech, of the press and of assembly. There may be a strong mood among the majority in society of hostility to the perpetrators of the attack and majority support for the government's response. Questioning this mood may be seen as supporting or being unsure about, terrorism or denying to society and to the government the support is deserves in difficult times. Yet, at the heart of freedom of speech, is protection of offensive and unpopular opinion. The extent to which this is undermined by the special powers needs to be considered. Again, state reactions to terrorism can be highly controversial. One view is that, at times of crisis, the main institutions of civil society, including the media, should rally to the national cause as defined by the government or not prints stories or takes actions that might undermine the national effort. The alternative is that it is precisely at such times, when special powers may be used and when military action may be being taken, that government should be most carefully scrutinized.

United Kingdom and the threat of Anti-Terrorism Laws

The recent decision of the European Court of Human Rights in Ahmad v UK dangerously undermines the well-established case law of the Court on counter-terrorism and non-refoulement towards torture, inhuman and degrading treatment or punishment. Although ostensibly rejecting the 'relativist' approach to Article 3 ECHR adopted by the House of Lords in Wellington v Secretary of State for the Home Department, the Court appeared to accept that what is a breach of Article 3 in a domestic context may not be a breach in an extradition or expulsion context. This statement is difficult to reconcile with the jurisprudence constant of the Court in the last fifteen years, according to which Article 3 ECHR is an absolute right in all its

applications, including non-refoulement, regardless of who the potential victim of torture, inhuman or degrading treatment is, what she may have done, or where the treatment at issue would occur.

The basic question regarding Anti-terrorism laws are to what extent these laws have the jurisdiction and for how long they are going to implement, despite the cease fire in Northern Island of the major paramilitaries, the government took the view that there was a continuing threat of Terrorism which warranted special legislation powers. The most controversial extension of Anti- terrorist legislation made by the Terrorism Act 2000 was to 'Domestic Terrorism'. The grave danger is that the Terrorism Act 2000 has a chilling and disproportionate effect on radical politics in UK particularly where a clear distinction is made between damage to property and violence against person is clearly mentioned in Criminal Law Act.

The ECtHR's and UK courts' case law concerning irreducible life sentences, in a series of judgments, the ECtHR strongly suggested that such sentences cannot be imposed on children the case *Vinter v United Kingdom*, is very significant in this regard. Nevertheless, it cannot yet be concluded that the UK position is substantially more human rights compliant than that in Australia at least insofar as adult offenders are concerned. For while the ECtHR was careful in *Vinter*to ensure that its challenge to the UK government was a limited one, that government and, at least on the face of it, the English courts has fiercely resisted the challenge that was made. So while the ECHR and the HRA have provided the Strasbourg and UK courts with a clear mandate to intervene where there have been legislative breaches of human rights. Thus enabling those courts to justify judicial involvement in some situations where judicial restraint is invariably exercised in Australia. The ECtHR and the UK courts do not enjoy complete freedom even courts in jurisdictions with Bills of Rights must ensure that they are not perceived to be self-aggrandizing.

The UK government has made it clear, following *Vinter*, that it will not easily be persuaded to amend its existing policy. Moreover, on the face of it at least, the English courts have only been slightly more compromising. In *McLoughlin*, the EWCA, after observing that it did not read *Vinter* "as in any way casting doubt on the fact that there are some crimes that are so heinous that just punishment may require imprisonment for life." However, the ECtHR has recognized that the law of England and Wales … does provide to an offender a 'hope' and the 'possibility of release in exceptional circumstances, which render the just punishment originally imposed no longer justifiable'.

A Strasbourg Chamber has recently accepted and acknowledged the efforts of English court in *McLoughlin*, which has provided the necessary degree of clarity and does not breach Article 3. However, on 1st June 2015, the case was referred to the GC, and the matter has been

heard on 21 October. While the Court have avoided creating the appearance that it is too often influenced by vociferous UK opposition to its judgments, a contrary conclusion has been served in the interests of those who are currently demanding that the UK withdraw from the ECHR.

CONCLUSION

The Judiciary can play a vital role in order to judge the interest of the society and the right of an individual in the frame work of Anti-Terrorism, Crime and Security Act 2001 which permits and the indefinite detention of foreigners designated as suspected international terrorists. In the Belmarsh Judgment which is the leading case in this scenario, where nine foreigners have been detained, revealed the miseries of this law and also the miscarriage of justices? Grave violations of Civil Liberty, Human Rights and fundamental freedoms have been demonstrated by the Government. Though, latter the House of Lord has accepted the appeal and acknowledged the loop hole in the law. But justice delay means justice denied.

The belief that torture is always wrong is, however, misguided and symptomatic of the alarmist and reflexive responses typically emanating from social commentators. It is this type of absolutist and short-sighted rhetoric that lies at the core of many distorted moral judgments that we as a community continue to make, resulting in an enormous amount of injustice and suffering in our society and far beyond our borders. This argument is not sound in the context of torture. First, the floodgates are already open and the argument made above shows that the torture is used widely, despite the absolute legal prohibition against it. Amnesty International has recently reported that it had received, during 2003, reports of torture and ill-treatment from 132 countries, including the United States, Japan and France. It is, in fact, arguable that it is the existence of an unrealistic absolute ban that has driven torture beneath the radar of accountability, and that legalization in very rare circumstances would in fact reduce instances of it. The second main argument is that torture will dehumanize society. It is not true in relation to torture than it is with self-defense, and in fact the contrary is true. A society that elects to favor the interests of wrongdoers over those of the innocent, when a choice must be made between the two, is in need of serious ethical rewiring.

A third counter-argument which can be concluded is that we can never be totally sure that torturing a person will in fact result in saving many innocent lives. This, however, is the same situation as in all cases of self-defense. Torture in order to save an innocent person is not the valid situation where it can be justifiable even in a real-life situation where the only option is between torturing a wrongdoer and saving an innocent person?

Thirdly, we must take responsibility not only for the things that we do, but also for the things that we can but fail to prevent. The reply that we are not responsible for the lives lost

through a decision not to torture a wrongdoer because we did not create the situation is code for moral indifference. Equally vacuous is the claim that we in the affluent West have no responsibility for more than 13,000 people dying daily due to starvation. Hopefully, the debate on torture will prompt us to correct some of these fundamental failings.

The UK and Strasbourg jurisprudence concerning irreducible life sentences provides some reason for optimism concerning the ability of Bills of Rights, and other strong human rights guarantees within a jurisdiction, to achieve desirable change in the criminal justice area. It is now to be hoped that, just as the ECtHR eventually felt able, in *Stafford*, to insist upon greater procedural safeguards for life sentence prisoners, an opportune moment will soon arrive for it to insist upon a procedure conforming to the requirements of Article 5(4) for whole-life prisoners once they have served the punitive component of their sentences.

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