Strip searches through the lens of the prohibition of inhuman and degrading treatment in European human rights law

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1. Introduction

It has been twenty years since the European Court of Human Rights' ('ECtHR' or 'the Court') first found that a body search amounted to a violation of Article 3 of the European Convention on Human Rights ('ECHR'), which provides that: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'.[1] In its judgment in *Valašinas v Lithuania*, the ECtHR centred on the search alone – a strip search – despite the applicant's argument that *both* his general conditions of imprisonment and the search he had been subjected to were incompatible with the right.[2] Finding that the detention conditions did not violate Article 3, the ECtHR focused on what it was about the search, in which the applicant was searched naked in front of a female officer and was asked to squat while his genitals and food were examined by officers not wearing gloves, that brought the experience within the scope of the Article 3 prohibition. The Court described this constellation of factors as having 'diminished' the applicant's human dignity.[3]

Making judgements about what respect for dignity demands has become critical in the context of body searches, as in the treatment of prisoners more generally in international[4] as well as European human rights law.[5] There is a single reference to respect for human dignity in the original (1955) UN Standard Minimum Rules for the Treatment of Prisoners ('The regime of the institution should seek to minimize any differences between prison life and life at liberty which tend to lessen the responsibility of the prisoners or the respect due to their dignity as human beings').[6] This principle was integrated in the original iteration of the Council of Europe's European Prison Rules in 1973, and these rules accorded an even more prominent role to respect for human dignity as a basic principle. The rules state that imprisonment 'shall be effected in material and moral conditions which ensure respect for human

[1] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos 11 and 14* (1950) ETS 005.
[2] *Valašinas v Lithuania*, no. 44558/98, 24 July 2001.
[3] *Valašinas*, ibid para. 117.
[4] See, e.g. UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, Article 10; UN General Assembly, United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules) 17 December 2015, A/RES/70/175; UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85.
[5] E.g. *Kudła v Poland* [GC], no. 30210/96, 26 October 2000, para. 92.
[6] United Nations, Standard Minimum Rules for the Treatment of Prisoners (n 4) para. 60(1).

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dignity'.[7] Moreover, with reference to Article 3 ECHR especially, European human rights law has come to provide a relatively rich foundation for understanding the line between treatment that respects human dignity and treatment that does not.

The doctrine that has been developed by the ECtHR provides a significant lens for understanding – and questioning – the practice of body searches within carceral contexts and their significance for human dignity. The Court's baseline is that body searches are not inherently incompatible with Article 3.[8] We can thereby draw from the case law a number of insights which reflect push and pull factors, moving body searches above or below a line of respect for human dignity according to the ECtHR. We can also draw insights from the case law around the nexus between respect for human dignity and justifications for body searches in the name of prison security. In its line of judgments since 2001, the Court has mediated between ideas of necessity and appropriateness of conduct, within assessments of the 'nature and context'[9] of body search practices.

The Article 3 perspective is especially interesting because the relevant doctrine has been developed against the backdrop of Article 3's "absolute" character. That is, Article 3 ECHR enshrines a right which cannot be displaced by extraneous considerations. The absolute character of Article 3 is tied to its significance in safeguarding human dignity. As the ECtHR has repeatedly underlined, 'respect for human dignity forms part of the very essence of the Convention',[10] and Article 3 represents a commitment that is 'closely bound up with respect for human dignity'.[11] Besides the complexity arising in the concretisation of human dignity in the context of body searches, the ECtHR's assessment of the compatibility of body searches with Article 3 raises questions relating to this right's absolute character. Notably, if body searches are rationalised as being necessary in the pursuit of security or "order", how can such rationales be squared with Article 3's non-displaceability? Features of body searches and their assessment by the ECtHR may also be seen to raise further questions with respect to Article 3's absolute character: Can an activity so ubiquitous – so "banal" even, in the eyes of those who execute it – be deemed to violate an absolute right? Given that body searches are predominantly (considered) justified in their application to those imprisoned, does this call the unconditionality of Article 3's protection into question? By unpacking the ECtHR's approach we can begin to provide clarity in answer to such questions, and to assess the response of human rights courts to body search practices.

In national legal and policy contexts across the Council of Europe, the demands of Article 3 ECHR constitute, or should constitute, one key element of regulating search

[7] Council of Europe Committee of Ministers, European Standard Minimum Rules for the Treatment of Prisoners, Resolution no. R(73)5, adopted 19 January 1973, para. 5(3) and para. 3 and 58; see also Council of Europe Committee of Ministers, Recommendation Rec(2006)2-rev of the Committee of Ministers to member States on the European Prison Rules[1], 11 January 2006, revised and amended 1 July 2020.
[8] *Frérot v France*, no. 70204/01, 12 June 2007, para. 38.
[9] See, e.g., *Garabayev v Russia*, no. 38411/02, 7 June 2007, para. 75.
[10] *Bouyid v Belgium* [GC], no. 23380/09, 28 September 2015, para. 89.
[11] *Bouyid*, ibid para. 81.

practices. Glimpses of the relevance of Article 3 to shaping regulatory standards and practices in national contexts are indeed visible within Article 3 case law and related sources.[12] Such glimpses indicate the relevance of the Strasbourg case law to shifting policy discourse (see also Daems 2014). Beyond the Council of Europe, the ECtHR's interpretation of Article 3 is significant for other international human rights monitoring bodies. It is the Strasbourg Court that has had the most extensive opportunities to develop the interpretation of the "inhuman and degrading treatment" elements of the broader Article 3 prohibition of torture (Webster 2018, p. 4-5). Article 3 jurisprudence can therefore form an important part of discourse around body searches. At the same time, we recognise, as other scholars have long observed, that rules based on "dignity" and "abstract" human rights are not easily translated into practice by those with power to institute change, or into improved outcomes for those who are imprisoned (Liebling 2011; Daems 2014). Nevertheless, the approach of the ECtHR should be examined for the influential role that it plays within the development of these rules. And while high profile examples regarding body searches from within the ECtHR's case law on the prohibition of inhuman and degrading treatment (and the protection of private life)[13] may be well known, this paper offers an in-depth look beyond the surface of the ECtHR's case law, from the perspective of an holistic view of Article 3 jurisprudence, and by drawing upon extensive research on the Court's interpretation of this right (inc. Webster 2018; Mavronicola 2021).

In this chapter, we outline key aspects of the ECtHR's doctrine, on Article 3 in general and body searches in prisons in particular.[14] We identify *strip searches* as the core of the Article 3 case law on body searches (on the scope of the term 'body searches', see Daems, Chapter 1 in this volume). We draw out three principles relating to strip searches: (1) strip searches must not be routine and must be justified on protective grounds, (2) strip searches must not be conducted with intent to humiliate, debase or cause distress, and (3) strip searches must be performed in a dignity-respecting manner. We unpack each of these principles in turn, examining the elements of strip searches and their contextual settings that should be understood as either constitutive of inhuman and/or degrading treatment, or as compatible with human dignity (and, by implication, Article 3). This process necessarily incorporates our own interpretation since only so much is visible in the doctrine about the nature of the wrongs captured in the text of Article 3 (Webster 2016). A further challenge is that the Court is not always precise about how particular experiences are characterised (as inhuman or degrading or both). Filling the space in the doctrine is of heightened importance when we want to understand prospectively whether something would

[12] See spate of cases against the Netherlands in 2006: *Sylla v Netherlands*, no. 14683/03, 6 July 2006; *Baybaşın v Netherlands*, no. 13600/02, 6 July 2006; *Salah v Netherlands*, no. 8196/02, 6 July 2006; see, too, the European Committee for the Prevention of Torture reports cited therein and in much of the rest of the case law we refer to in this chapter.

[13] *Wainwright v UK*, no. 12350/04, 26 September 2006.

[14] The ECtHR has addressed body searches outside of prisons. Two recent examples are *Aghdgomelashvili and Japaridze v Georgia*, no. 7224/11, 8 October 2020 (strip searches during a police raid of office premises of an LGBTQ organisation) and *Safi and others v Greece*, no. 5418/15, 7 July 2022 (outdoor strip searches of a group of persons under the control of state authorities in a migration context).

fall within the scope of inhuman and/or degrading treatment. Our starting point is that the interpretation of these wrongs, by the Court or by others, including us, is a 'morally loaded evaluative endeavour' (Mavronicola 2021, p. 56). This view is underpinned by certain understandings of how the ECtHR judges, and we as interpreters outside of the judicial context, do or should operate as actors interpreting legal text (Webster 2018, pp. 11-12). Presently, this implies that we outline what is visible in the Court's case law and that we then go beyond this to explain, or interpret, the doctrine. This process provides a basis for engaging critically with the Court's approach, and for contemplating how it may evolve in the future.

2. The Doctrine

2.1. Article 3 ECHR: An unconditional, context-sensitive standard

It is firmly established in Strasbourg doctrine that Article 3 ECHR enshrines an 'absolute right'.[15] To explain what this signifies, the ECtHR has juxtaposed Article 3 with rights that permit legitimate interference,[16] or can be departed from during public emergencies 'threatening the life of the nation',[17] or whose protection can be limited because of someone's wrongful conduct. The Court has underlined that 'even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the conduct of the person concerned' and that '[t]he nature of the offence allegedly committed by the applicant is therefore irrelevant for the purposes of art.3'.[18] The fact that Article 3 makes no provision for lawful interference for the fulfilment of a legitimate aim, does not allow for any derogation even in a public emergency, and protects everyone unconditionally, makes it an invaluable source of protection for persons who have been found to have committed criminal offences warranting a term of imprisonment.

These 'components' of absoluteness reflect the idea that the right's protection is not *displaceable* on the basis of extraneous considerations (Mavronicola 2021). This non-displaceability entails that the *content* of the right is of the utmost significance. The determination of whether something amounts to inhuman and/or degrading treatment or punishment draws the line between potentially lawful treatment and conclusively unlawful treatment (Webster 2018, p.1; Mavronicola 2012).

The Court delineates what it often refers to as the Article 3 "threshold" primarily by reference to what it calls a 'minimum level of severity': according to the Court, 'ill-treatment must attain a minimum level of severity if it is to fall within the scope of

[15] *Derman v Turkey*, no. 21789/02, 31 May 2011, para. 27.
[16] See, e.g., Articles 8(2), 9(2), 10(2), 11(2) ECHR.
[17] *Ireland v UK* [Plenary], no. 5310/71, 18 January 1978, para. 163. Article 15(2) ECHR provides: 'No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4(1) and 7 shall be made under this provision'.
[18] *Gäfgen v Germany* [GC], no. 22978/05, 1 June 2010, para. 87.

Article 3'.[19] It has frequently repeated that the assessment of whether the particular circumstances evince an Article 3 violation 'is, in the nature of things, relative; it 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, etc' (emphasis added).[20] Within the 'all the circumstances' umbrella, the Court has also referred to 'the nature and context of the treatment or punishment, the manner and method of its execution',[21] as well as to 'whether the victim [was] in a vulnerable situation'.[22]

The criteria of 'nature and context' of the treatment[23] may be seen as the overarching factors operating in the ECtHR's "relative" assessment of severity, forming the basis for considering relevant contextual factors that determine the relational and qualitative severity at issue. The "nature" of the treatment, in particular, offers a gateway for considering the intent, purpose and/or attitude of those engaging in the act or omission under consideration. The criterion of "context", in turn, enables a consideration of various contextual factors that shape the experience of relevant actors and any vulnerabilities and power asymmetries at issue.

By way of general guidance on its assessment – or what Waldron refers to as "benchmarks" (Waldron 2010, p. 273) of inhuman treatment/punishment and degrading treatment/punishment – the Court has observed that treatment or punishment 'has been held … to be "inhuman" because, *inter alia*, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering'.[24] It has described degrading treatment or punishment as that 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'.[25] The Court has suggested that the 'public nature' of treatment or punishment 'may be a relevant or aggravating factor in assessing whether it is "degrading" within the meaning of Article 3'.[26] The Court has also on occasion referred to treatment or punishment 'driving the victim to act against his will or conscience'[27] or as having 'adversely affected his or her personality in a manner incompatible with Article 3'[28] as degrading. As discussed below, both inhuman and degrading treatment/punishment can be understood as capturing dignity harms that encompass the denial of 'the status owed to human beings' (Vorhaus 2021, e.g. p. 434).

[19] *Ireland v UK* (n 17) para. 162.
[20] *Ibid*; see also, e.g., *Svinarenko and Slyadnev v Russia* [GC], nos. 32541/08 and 43441/08, 17 July 2014, para. 114.
[21] See, e.g., *Garabayev* (n 9) para. 75.
[22] See, e.g., *Khlaifia and others v Italy* [GC], no. 16483/12, 15 December 2016, para. 160.
[23] See, for example, *Garabayev* (n 9) para. 75.
[24] See, e.g., *Stanev v Bulgaria* [GC], no. 36760/06, 17 January 2012, para. 203; *Jalloh v Germany* [GC], no. 54810/00, 11 July 2006, para. 68.
[25] *Pretty v UK*, no. 2346/02, 29 April 2002, para. 52. See also *Ireland v UK* (n 17) para. 167.
[26] *Svinarenko and Slyadnev v Russia*, nos. 32541/08, 43441/08, 17 July 2014, para. 115.
[27] *Keenan v UK*, no. 27229/95, 3 April 2001, para. 110.
[28] *Iacov Stanciu v Romania*, no. 35972/05, 24 July 2012, para. 165.

While it may be assumed that 'punishment' can be subsumed within the term 'treatment', we should not overlook significant dimensions of punishment and 'treatment associated with it'.[29] Punishment carries the implication of something undesirable or unpleasant being meted out in response to a behaviour considered to be unacceptable (see, generally, the nuanced account in Duff 2001). According to the Court, in order 'for a punishment or treatment associated with it to be "inhuman" or "degrading", the suffering or humiliation involved must go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment'.[30] The Court appears to consider the legally permitted or mandated loss of liberty as "legitimate", and has accordingly repeatedly indicated that, in respect of measures imposed on persons in detention, Article 3 only captures measures that subject persons to 'distress or hardship exceeding the unavoidable level of suffering inherent in detention'.[31] In determining what exceeds this level of suffering, the Court relies on the context-sensitive assessment it employs to delineate the Article 3 "threshold".

2.2. The ECtHR's position on body searches

The ECtHR's starting point in respect of body searches is that they are not contrary to Article 3 ECHR *per se*.[32] However, at least since its landmark judgment in *Valašinas*,[33] the ECtHR has viewed body searches with suspicion, on the understanding that they are likely to raise an issue under Article 3. It therefore specifically looks for the justification underpinning the search, as well as examining the manner in which the search is performed, and the wider context in which it occurs. The Court's approach in this respect may be likened to its attitude to other 'suspect' measures taking place within carceral contexts, such as the imposition of (additional) restrictions on movement and interaction. The Court accepts that a degree of restrictive incarceration may be applied in a way which remains respectful of the dignity of the person insofar as it is applied solely and only to the extent necessary to avert risks posed by the acts of the person subjected to it, with due safeguards for that person's health and wellbeing, and with the onus of demonstrating both justification and safeguards resting on the State authorities (Mavronicola 2015).

Article 3 judgments on body searches concern strip searches, in which individuals were partially undressed[34] or fully undressed.[35] They have tended to include visual

[29] *A and others v UK* [GC], no. 3455/05, 19 February 2009, para. 127.
[30] *A v UK*, ibid para. 127.
[31] *Kafkaris v Cyprus* [GC], no. 21906/04, 12 February 2008, para. 96.
[32] *Frérot* (n 8) para. 38.
[33] *Valašinas* (n 2). The Court's former sister body, the European Commission on Human Rights, had previously considered body searches. See *McFeeley and Others v UK* (Commission Decision), no. 8317/78, 15 May 1980. This Decision concerned routine, intrusive body searches, which were found not to amount to inhuman or degrading treatment.
[34] E.g. *Iwańczuk v Poland*, no. 25196/94, 15 November 2001.
[35] E.g. *Savičs v Latvia*, no. 17892/03, 27 November 2012.

anal inspections (including when individuals have been directed to bend over or squat)[36] and sometimes have included the touching of genitals, as well as visual genital inspections.[37] The Court has described strip searches involving anal and/or genital inspections as 'full body' searches.[38]

The ECtHR has repeatedly indicated that it accepts that 'strip-searches may be necessary on occasions to ensure prison security or to prevent disorder or crime'.[39] So even though the Court recognises that strip searches are likely, by their nature, to be experienced as invasive and humiliating,[40] and "humiliation" evokes the Court's characterisation of degrading treatment, the Court does not consider strip searches to be conclusively unlawful. It nonetheless shows a readiness to scrutinise the (purported) necessity of such searches, and the Court's suspicion and consequent scrutiny of the particular measure or practice deepen in line with the degree of intrusion involved in the search.[41] Moreover, according to the Court, strip searches must be performed in a way that is "appropriate" and does not lead to suffering or humiliation which goes 'beyond the inevitable element of suffering or humiliation connected with this form of legitimate treatment'.[42] The latter aspect of the Court's delimitation of Article 3-compliant strip searches, which relies on an assumed understanding of what suffering or humiliation is "inevitable" within a "legitimate" strip search, somewhat begs the question.

The flip side of the Court's acceptance that strip searches which are justified by considerations of necessity may not violate Article 3, is that the Court is not prepared to accept the *routine* and thereby not clearly justified performance of strip searches. In *Piechowicz*, it found that where a strip search 'was carried out as a matter of routine and was not linked to any concrete security needs, nor to any specific suspicion concerning the applicant's conduct', it was bound to 'have diminished [the applicant's] human dignity and caused him feelings of inferiority, anguish and accumulated distress which went beyond the unavoidable suffering and humiliation involved in the imposition of detention', and accordingly violated Article 3.[43]

The ECtHR is sensitive to the presence of what it deems as *arbitrariness* in the practice of strip searches, both in terms of undue uniformity (in the sense of routine strip-searching), and in terms of undue variability. In *Frérot*, for example, the Court was 'struck by the fact that the application of the most intrusive procedures in terms of physical intimacy varied from one place of detention to another in the applicant's

[36] E.g. *Sylla v The Netherlands*, no. 14683/03, 6 July 2006; *Frérot* (n 8); *Michał Korgul v Poland*, no. 36140/11, 21 March 2017; *Roth v Germany*, nos. 6780/18 and 30776/18, 22 October 2020.
[37] E.g. *Valasinas* (n 2); *Wainwright v UK*, no. 12350/04, 26 September 2006.
[38] E.g. *Michał Korgul* (n 36), para. 42.
[39] *Lorsé and others v Netherlands*, no. 52750/99, 4 February 2000, para. 72. See also *Iwańczuk* (n 34) para. 59.
[40] *Frérot* (n 8) para. 38 (citations omitted).
[41] *Frérot* (n 8) para. 38 (citations omitted).
[42] Ibid.
[43] *Piechowicz v Poland*, no. 20071/07, 17 April 2012, para. 176.

case'.[44] It noted that the most intrusive inspections (in the form of anal inspections) had not been clearly shown to have been 'based each time on strong and specific suspicions'.[45] The ECtHR found that the element of arbitrariness added to the feelings of inferiority and anxiety associated with the strip search to make the humiliation experienced go beyond what the Court called 'the – unavoidable and hence tolerable – level that strip-searches of prisoners inevitably involve'.[46] The Court therefore treats the absence of tailored justification as giving rise to an arbitrariness that pushes the treatment over the Article 3 "threshold".

Even if a strip search is justified and not deemed arbitrary by the Court, the *manner* in which it is conducted may bring it within the scope of the prohibition under Article 3. The Court has elaborated that strip searches 'should be carried out in an appropriate manner with due respect for human dignity'.[47] An additional relevant factor, which the Court sees as shaping the character of the treatment, is the intention on the part of those conducting the search. While the Court has confirmed that the position of principle that an intention to humiliate or cause distress is not an essential component of ill-treatment under Article 3 applies to strip-searches, it is sensitive to any intent to humiliate or cause distress. In *Iwanczuk*, for example, the Court indicated that 'regard must be had to the intentions of the persons inflicting [the treatment], namely whether they acted with a deliberate intention to degrade or humiliate'.[48] The Court noted that the applicant had been 'insulted and derided'[49] by the guards performing the strip search before it made a finding of degrading treatment. The Court has also treated as an aggravating factor the presence of a particularly coercive element in respect of intrusive searches: in *Frérot*, it indicated that 'the humiliation felt by the applicant was aggravated by the fact that on a number of occasions his refusal to comply with such measures led to his being placed in a punishment cell'.[50]

The baseline then, is that although strip searches are not incompatible with Article 3 *per se*, they are *prima facie* suspect. There are several principles we may distil from the ECtHR's case law that can act as guidelines to avoid strip searches being characterised as inhuman and/or degrading within the meaning of Article 3. Strip searches must not: (1) be routine and must be justified on relevant grounds, (2) be motivated by intent to humiliate (including as a means to an end, for example to intimidate or punish), and (3) be conducted in a manner that is incompatible with human dignity. If an incident or regime falls foul of any one of these requirements, it is likely to be found to be contrary to Article 3. A closer look at these principles allows us to better understand what it is about such features of strip searches that is problematic from the perspective of Article 3, and why.

3. The Principles

[44] *Frérot* (n 8) para. 46.
[45] Ibid para. 47.
[46] *Ibid.*
[47] *Dejnek v Poland*, no. 9635/13, 1 June 2017, para. 60.
[48] *Iwańczuk* (n 34) para. 57.
[49] *Ibid.*
[50] *Frérot* (n 8) para. 47.

3.1. Strip searches must not be routine and must be justified on relevant grounds

For the ECtHR to deem the performance of strip searches compatible with Article 3 ECHR, a necessary – but not sufficient – requirement is that such searches be justified on what the ECtHR considers appropriate grounds that render such a search necessary. If strip searches take place as a matter of *routine* rather than necessity grounded in appropriate justification, the Court is likely to find them to be insufficiently justified and hence incompatible with Article 3 ECHR. In this section, we draw out two interconnected points in relation to 'justification': The first aims to clarify how we should understand what the Court means when it refers to, and permits, justification in this context. The second aims to clarify *why* searches that are justified on relevant grounds may be compatible with Article 3, and conversely, why searches that are not justified on relevant grounds may be incompatible with Article 3.

What are "appropriate" grounds for undertaking a strip search, in the Court's view? While we are not given a comprehensive treatment of this issue within the doctrine, it is clear from the Court's approach that, to be Article 3-compatible, strip searches must be performed for reasons relating to the protection and safety of persons within the prison context, as opposed to reasons or motives associated with purposes such as intimidation or further punishment. In *Iwanczuk*, which concerned the strip search of a prisoner exercising his right to vote, the ECtHR placed emphasis on the applicant's 'peaceful behaviour during the entire period of his detention and the fact that he was not charged with a violent crime and had no previous criminal record', and determined that there were no 'grounds on which to fear that he would behave violently'[51] and thereby justify the strip search, concluding that he had been subjected to degrading treatment. The reasoning of the Court indicates that there must be a *protective* justification for such a search – notably to protect (a) person(s) from violence or harm (see also Spalding 2021, pp. 461-462).

Moreover, the strip search must be *necessary* in the sense that only such a search can perform the protective role assigned to it – accordingly, if less intrusive measures may sufficiently fulfil the purpose of ensuring protection, and such measures are available to or indeed pursued by the authorities, the Court may find the implementation of strip searches unnecessary and thereby incompatible with Article 3. This is illustrated in *Piechowicz*, in which the Court reasoned as follows:

> Having regard to the fact that the applicant was already subjected in addition to several other strict surveillance measures, that the authorities did not rely on any concrete convincing security needs and that, despite the serious charge against him, he apparently did not display any disruptive, violent or otherwise dangerous behaviour in the remand centre, the Court considers that the practice of daily strip-searches applied to him for two years and nine months must have diminished his human dignity and caused him feelings of inferiority, anguish

[51] *Iwańczuk* (n 34) para. 56.

> and accumulated distress which went beyond the unavoidable suffering and humiliation involved in the imposition of detention...[52]

The Court concluded that Article 3 had been violated in the circumstances of the case.

Article 3 does not involve a prohibition on using force or invading bodily integrity *per se*. Rather, the Court's context-sensitive assessment determines whether an act which forcibly or non-consensually impinges upon another's body is, or is not, inhuman or degrading. For example, the Court has repeated that Article 3 'does not prohibit' the use of force in narrow, 'well-defined circumstances', insofar as the Government proves that such force is indispensable and not excessive in repelling violence.[53] The Court has, in addition, indicated that incursions on bodily integrity that amount to medically necessary treatment may, provided certain conditions are met, be compatible with Article 3.[54] The Court has also stated that a medical procedure, such as the taking of saliva samples, performed in defiance of the will of the individual subjected to it for the purposes of obtaining evidence of their involvement in a criminal offence, is not 'as such' prohibited by Article 3.[55]

The question arises of whether the Court is, in effect, justifying inhuman or degrading treatment in the context of strip searches and thereby contradicting the absolute character of Article 3 ECHR. A key textbook on the ECHR takes precisely this view in relation to the use of force, suggesting that case law such as that outlined above effectively establishes 'recognized exceptions to the absolute nature of Article 3' (Harris et al. 2009, p. 70). The Court might appear to be *qualifying* Article 3's protection, by carving out circumstances in which "indispensable" ill-treatment is lawful. Yet what the doctrine confirms instead is that justification may play a role in determining whether a treatment or punishment is inhuman or degrading in character. To make sense of this, the criterion of "severity" delineating Article 3's "threshold" must be understood as qualitative and as attaching to the *wrong* rather than purely to the harm at issue.

The 'minimum level of severity' appears to delimit Article 3 by means of a requirement that a certain quantum of suffering or humiliation be established in order for a finding of violation of Article 3 to be made (see Farrell 2015). This warrants reconsideration. Rather than being a merely quantitative concept attached to the degree of harm at issue, severity is tied to the *wrong* in inhuman and in degrading treatment or punishment. It attaches to the character of the act, omission or situation and not simply to its consequences for the victim(s) (see Mavronicola 2021). Accordingly, severity goes beyond the degree of humiliation or anguish suffered. Two lines of case law that illustrate this most clearly are cases in which the Court is

[52] *Piechowicz* (n 43) paras. 175-176 (citations omitted).
[53] *Güler and Öngel v Turkey*, nos. 29612/05 and 30668/05, 4 October 2011, para. 28. This is the approach in *Rehbock v Slovenia*, no. 29462/95, 28 November 2000, para. 72. See also Mavronicola 2013.
[54] See, for example, *Nevmerzhitsky v Ukraine*, no. 54825/00, 5 April 2005, para. 94; *Herczegfalvy v Austria*, no. 10533/83, 24 September 1992, para. 82; *Naumenko v Ukraine*, no. 42023/98, 10 February 2004, para. 112.
[55] *Jalloh* (n 24) paras 67-74.

prepared to recognise that the infliction of considerable suffering may *not* be inhuman or degrading if the relevant act, omission or situation is respectful of human dignity; and cases in which an act that has only minor – or even what some might label trivial[56] - harmful impact on an individual is nonetheless found to reach the 'minimum level of severity'. The case law on the justified use of force exemplifies the former, while the case of *Bouyid*[57] exemplifies the latter.

Bouyid concerned single slaps in the face inflicted on two young men by local police officers while they were detained at a police station. In a Chamber judgment, the ECtHR found that the 'threshold of severity has not been reached in the present case'.[58] The majority (14 judges) in the Grand Chamber disagreed. They stressed that Article 3 is 'closely bound up with respect for human dignity'[59] and 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.[60]

The ECtHR found that the applicants' allegedly disrespectful attitude was 'certainly insufficient to establish such necessity'.[61] The Court therefore found that the applicants' human dignity had been undermined and there had been a breach of Article 3.[62]

Bouyid potently illustrates that 'severity' does not stem straightforwardly from the degree of harm or suffering inflicted, but relates to the character of the treatment at issue. The violation inflicted on the applicants in *Bouyid* was an abuse of power that may be viewed as a microcosm of the totalitarianism found in torture (see Luban 2014, p. 48).[63] Its severity pertained to its character and not merely to its consequence.

Many instances of forcible - meaning, for our purposes, not freely consented to – impingement upon one's body may be inhuman or degrading, but not all are. This is what the ECtHR means when it states that Article 3 'does not prohibit' the use of force in certain circumstances. The overarching reasoning of the Court in regard to the use of force emerges in *Muradova* – according to the Court: 'Recourse to physical force which has not been made *strictly necessary* by a person's own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 of the Convention' (emphasis added).[64]

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[56] *Bouyid* (n 10) Dissenting Opinion of Judges De Gaetano, Lemmens and Mahoney, para. 7.
[57] *Bouyid* (n 10).
[58] Ibid para. 51.
[59] Ibid para. 81.
[60] Ibid para. 88, citations omitted.
[61] Ibid para. 102.
[62] Ibid.
[63] On torture's totalitarianism see David Luban, *Torture, Power and Law* (CUP 2014) 48.
[64] *Muradova v Azerbaijan*, no. 22684/05, 2 April 2009, para. 109. See also *Bouyid* (n 10) para. 88.

The Court's position is that only force which has been made strictly necessary by the individual's conduct can potentially be understood as respecting rather than brutalising the person (see Waldron 2005, pp. 1726-1727). The strict necessity assessment the ECtHR employs also shows sensitivity to relevant context, notably to the power asymmetry at play in situations where persons are confronted by State agents. The Court places an onus on the State to demonstrate the strict necessity of forcible impingement upon a person's body.[65]

All of this is relevant in unpacking the way that justification impacts on the Article 3 compatibility of strip searches. As *Bouyid* demonstrates, a person's dignity can be disrespected, and their right under Article 3 violated, even if they have not been gravely harmed. This is particularly the case where, in a situation of substantial power asymmetry, someone's bodily integrity is forcibly impinged upon without any justification grounded in the strict necessity of fending off violence and/or protecting the person subjected to the intervention or any other person. The ECtHR's approach suggests that wholly unjustified or insufficiently justified strip searches, which often equate to routine strip searching, constitute inhuman or degrading treatment. This appears to reflect the view that unnecessary, *routine* strip searches, which effectively express the notion that the person being searched can be intruded upon at will, are fundamentally not respectful of dignity.

By insisting on justification demonstrating the concrete and current necessity of performing a strip search upon one's person, the Court delineates a baseline of respect demanded by Article 3 ECHR. What is also apparent from case law going as far back as *Valašinas,* is that while justificatory reasoning rooted in *protection* will tend to be accepted in principle by the Court, problematic reasons or purposes that are tied to, for example, punishment, intimidation, control, or humiliation will tend to be deemed a basis for making a finding of an Article 3 violation. The role of *appropriate* justification in this context is therefore to distinguish Article 3-incompatible intrusions from potentially Article 3-compatible intrusions, subject to the additional criteria we outline in the following sections.

3.2. Strip searches must not be conducted with intent to humiliate

Within Article 3 ECHR, intention to "degrade or humiliate"[66] is a non-essential but relevant characteristic of inhuman and/or degrading treatment or punishment. Clarifying why intent is non-essential simultaneously illuminates why it is nevertheless relevant. The discussion below will suggest that in the context of strip searches, the relevance of intent lies in what it communicates within the relationship between the agent who conducts the search and the person subjected to the search. If there is evidence of an agent's intent to humiliate, debase, or cause distress in the conduct of a strip search, this can be understood to communicate active denial of the person's dignity.

[65] See, in this regard, the Court's reasoning in *Güler* (n 61) paras. 28–29; and in *Bouyid* (n 10) para. 102.
[66] *Iwańczuk* (n 34) para. 57.

Article 3 case law indicates that intent relates differently to degrading treatment compared to inhuman treatment. The relevance of intent in the Court's degrading treatment case law emerged specifically in relation to the 'humiliation and debasement' benchmarks of degrading treatment.[67] It is well-established that the Court may arrive at a finding of degrading treatment whilst accepting that the actors in question showed no intent to humiliate or debase.[68] Even active non-intent does not eliminate the possibility of the Court recognising humiliation or debasement.[69] This is because degradation from the perspective of Article 3 must be understood as a social fact judged with reference to social norms; a judgment as to whether a person has been subjected to degradation is influenced but not determined by the subjective perspective of the agent conducting the search (Webster, 2018, pp. 69-72).

The relationship between intent and inhuman treatment is somewhat opaque in the case law. The benchmarks of inhuman treatment remain based on a description of the circumstances in one early case[70] in contrast to the broader range of benchmarks that have developed in relation to degrading treatment. Inhuman treatment is characterised as treatment that is, *inter alia*, premeditated, applied for hours and causes bodily injury or intense physical and mental suffering.[71] If treatment is premeditated and prolonged, one can assume an inherent intent on the part of the actor(s) responsible. However, inhuman treatment is not a closed category ('*inter alia*') and the Court has also accepted that treatment can be characterised as inhuman in the absence of intent.[72] The place of intent can be clarified by reflecting on the conceptual underpinnings of inhuman treatment in light of the Court's jurisprudence as a whole, in particular when seen in relation to degrading treatment and torture (Webster 2018, pp. 125-126). Inhuman treatment tends to be characterised by relations of power asymmetry, and to involve a relational interaction of some kind (in contrast to degrading treatment; Webster, 2018, pp. 131-135). Within such asymmetric relationships, indifference on the part of the power-holder (including a set of actors forming part of a public authority) towards the humanity (human status) of the powerless person can give rise to inhuman treatment (Webster, 2018, pp.132-134). On this reading, indifference as an attitude of disregard (Webster, 2018, pp. 132-135) may be deliberately aimed at dehumanising the person but it need not be. Intent is not an essential feature.

Nevertheless, for both inhuman and degrading treatment, intent – where it is present – matters. This is the key point for understanding the principle that strip searches must not be conducted with an intent to humiliate, debase or cause distress. When determining the presence or absence of intent, the Court tends to examine the reported speech and conduct of the actors inflicting the treatment[73] and whether the treatment

[67] *Raninen v Finland*, no. 20972/92, 16 December 1997, para. 55; *T v UK* [GC], no. 24724/94, 16 December 1999, para. 69.
[68] *T v UK*, ibid para. 69; see also *Bouyid* (n 10) para. 86.
[69] *Farbtuhs v Latvia*, no. 4672/02, 2 December 2004.
[70] *Ireland v UK* (n 17) para. 167.
[71] Ibid.
[72] *Mahmut Kaya v Turkey*, no. 22535/93, 28 March 2000, para. 118.
[73] *Iwańczuk* (n 34) paras. 57, 59.

was carried out in public[74] (i.e. where 'in public' means 'with witnesses'; this is discussed in relation to humiliation specifically by Silver et al. 1986, p. 278-279). If the Court considers that there is evidence of intent to humiliate, debase or cause distress on the part of those involved in conducting the search, this factor forms part of the Court's holistic 'context-sensitive, relational and qualitative' assessment (Mavronicola, 2021, p. 105) of whether a strip search will be specified as, or will form part of broader conditions (such as a high security regime or generalised detention conditions) specified as, inhuman and/or degrading. Going back to its reasoning in *Valašinas*, it appears that the Court sees an intent to humiliate or cause distress (including as a means to an end, such as intimidation) as indicative of active and deliberate dignity denial. In summary, searches conducted with intent to humiliate or cause distress will point towards an expression of denial of a person's human status, and will likely cross the Article 3 threshold.

3.3. Strip searches must not be conducted in a manner that is incompatible with human dignity

In addition to concern with *why* strip searches are carried out, the case law reflects a core concern with *how* they are carried out. A recurring part of the assessment of strip searches in Article 3 case law relates to the "manner" in which strip searches are conducted.[75] The ECtHR has stated that strip searches 'should be carried out in an appropriate manner with due respect for human dignity'.[76] Similar language is found in recommendations of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which has stipulated that strip searches must be 'carried out in a manner respectful of human dignity'.[77] In a sense, the requirement that strip searches must be conducted in a way that respects human dignity can be seen as an overarching requirement, like the requirement that conditions of detention should be compatible with human dignity. However, 'appropriate manner' also points towards something more specific regarding *conduct*, and the precise manner in which officials undertake searches can be determinative of the acceptability or unacceptability of a search from a dignity perspective. To safeguard against dignity disrespect, Article 3 case law establishes certain red lines for the conduct of strip searches: they must be conducted in a private setting in which the person searched is only visible to those searching them, and they must be conducted by persons of the same sex. Explaining these red lines in the Court's approach means explaining why these specific features are relevant and how they might be seen to protect against dignity disrespect.

"Conduct" is best understood to refer to the process of an interaction between an agent who conducts a search and the person subjected to the search. This interaction, and the way in which it unfolds, is the space in which dignity-communication takes place.

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[74] *Raninen* (n 67) para. 55.
[75] E.g. *Valasinas* (n 2) para. 117; *Iwanczuk* (n 34) para. 59; *Savičs* (n 35) para. 133.
[76] *Dejnek v Poland*, no. 9635/13, 1 June 2017, para. 60.
[77] E.g. European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, (report from visit to Poland 26 Nov - 8 Dec 2009), para. 94.

What happens within the interaction itself is significant when judging whether dignity has been disrespected, distinct from how that interaction might be perceived by those actually involved in conducting or being subjected to a search. As discussed in relation to 'intent to humiliate', the specification of a strip search as inhuman or as degrading (in 'social fact') is not necessarily determined by the attitude of the person(s) conducting the search. Similarly, the specification of a strip search as inhuman or degrading is not determined by the subjective perspective of the person subjected to a search (Webster, 2018, p. 70-71; see also Vorhaus, 2021, p. 437-441). In other words, neither the subjective perspective of the agent, nor the subjective perspective of the person subjected to the search displaces the significance of the interaction itself. A focus on "conduct" should be understood as a focus on the interaction, and on how this occurrence or process might communicate dignity disrespect.

Interactions need not have an obviously "severe" effect or even a physical component to be deemed to communicate dignity disrespect. We can understand the communication, or expression, of dignity disrespect to have an intrinsic symbolic dimension. "Symbolic" should not be interpreted in this context as less-than-real, or as having no impact. Rather, as Kuch argues in discussing the 'rituality of humiliation', to say that humiliation is symbolic is to say that it is intrinsically constituted at least in part by a symbolic dimension (Kuch, 2011, p. 50). This dimension is not an incidental feature of treatment that is incompatible with human dignity, but a constitutive one (Kuch, 2011, p. 50-52; Vorhaus, 2021, p. 455-456). Dignity disrespect is always a symbolic wrong (Vorhaus, 2021) in the sense that it *represents* exclusion from the human community (Webster, 2018, p. 85). The manner in which a strip search is conducted is problematic from an Article 3 perspective when it can be judged to symbolise such exclusion.

A key idea in unpacking the Court's red lines regarding private settings and searches being undertaken by persons of the same sex is the idea of "humiliation", which is at the core of the ECtHR's approach to interpreting degrading treatment. Humiliation is a term used in everyday language but within Article 3 it must be seen to have a circumscribed meaning which fits with the text of the Article as a whole and its overarching purpose. In this context, humiliation is best understood with reference to a person's regard towards themselves as a human being and the way in which this basic form of self-respect can be eroded by experiences of profound powerlessness. (Webster, 2018, p. 64-76 drawing on the work of a range of scholars, including Isaiah Berlin, Avishai Margalit, William Ian Miller, and Maury Silver et al.). Self-respect is tied up with social norms, and thus with social judgements about occurrences of humiliation. It is 'a self-regarding attitude that is developed and sustained or undermined in the social environment' (Webster, 2018, p. 73). This aligns with an understanding of dignity itself as essentially relational (Malpas, 2007).

A person's regard towards themselves as a human being can be undermined by loss of an ability to live up to social standards befitting human persons (Webster, 2018, p. 74-75), and this inability to protect 'basic interests' (Margalit, 1996, p. 211) symbolises extreme powerlessness. Strip searches, already taking place within a context of

physical power asymmetry in interpersonal relationships with prison staff (Margalit, 1996, p. 268), communicate something about a person's basic ability to protect intimate interests. These intimate interests are 'personal boundaries', which are commonly related, in literature, to profound powerlessness (see discussion in Webster, 2018, p. 75). The violation of personal boundaries can communicate profound powerlessness, and in turn, symbolic exclusion from the human community, i.e. a violation of human dignity (Webster, 2018, p. 75-76). Humiliation always communicates a 'gesture of exclusion' (Kuch, 2011, p. 48). In his discussion of privacy, Margalit writes that 'violation of privacy can serve as an extreme form of humiliation in that those whose privacy is violated are shown that they lack even minimal control over their lives […]' (Margalit, 1996, p. 207). Vorhaus, writing on degradation in the penal context, refers to denial of 'opacity respect' (Vorhaus, 2021, p. 453). A prisoner, including in the context of a 'full-body strip search', is 'deprived of control [...] over how she presents herself, over what she chooses to reveal to others' (Vorhaus 2021, p. 454). This is seen to culminate in a symbolic dignitary harm in that it symbolises less-than-human status (Vorhaus 2021, p. 454-455).[78] Referring specifically to intimate body searches, Margalit describes 'searching people's private parts against their will' as 'the prototypical example of a humiliating gesture' (Margalit, 1996, p. 210-211).

Experiences of profound powerlessness, then, can be understood to have the capacity to erode basic self-respect. Since humiliation (and degradation) is judged with reference to social norms, whether humiliation occurs with or without witnesses is relevant but not determinative. The presence of witnesses is inherently relevant because even one witness may create a context (or a dynamic; Klein 1991, p. 101) which can reinforce an individual's perception of what they are experiencing as humiliating (Silver et al. 1986, p. 278-279). In other words, the presence or absence of witnesses can alter the experience of the person even if it does not determine whether we, from the outside, view the situation as humiliating in social fact. Restricting witnesses thereby removes one potentially aggravating factor. Further, the presence of witnesses is relevant because it can reveal an intent to humiliate on the part of those conducting a search. The Article 3 case law associates strip searches carried out in public with intent to humiliate[79] because deliberate conduct of a strip search before witnesses ('in public') can be seen as a way of expressing active dignity denial towards the person being searched. This helps to make sense of the principle visible in the case law that strip searches must be conducted in a private setting in which the person searched is only visible to the person(s) conducting the search.

The principle regarding the conduct of strip searches by persons who are not of the same sex similarly concerns a potential aggravating factor. It is not obvious from Article 3 case law whether strip searches conducted by persons not of the same sex are seen to be capable of constituting a dignity violation in and of themselves, or as giving

[78] Vorhaus discusses this point through the lens of experiences which have, and are often deliberately intended to have, public witnesses (Vorhaus, 2021, p. 453) but, arguably, the point is equally relevant for thinking about strip search situations where the person conducting the search is the only other person present; see below).
[79] *Iwańczuk* (n 34) para. 57-59.

rise to an unacceptable risk of sexual violence, or both.[80] Assuming that such searches are inherently capable of constituting a dignity violation, taken alone or in combination with other treatment, this principle must be approached with reference to social norms, not only around powerlessness but also around gender and the social significance of intimate searches by persons of the opposite sex. Bernstein, for example, places 'sex-differentiated' (Bernstein, 2015, p. 152) norms as central to his philosophical examination of the moral injury constituted by rape. This account accords a foundational significance to a connection between self-respect and an ability to exercise autonomy in terms of self-presentation of different aspects of embodiment, which, he argues, are deeply rooted in ideas projected onto female embodiment specifically (in particular p. 293-299). Such perspectives may point towards possible understandings of the relevance of sex in the body search context. Some such account is necessary to make sense of the Court's stance on the acceptability of strip searches conducted by persons of the same sex as distinct from strip searches conducted by persons not of the same sex; in other words, to make sense of why the former might be more readily seen to constitute a symbolic expression of denial of a person's human status than the latter.

Indeed an account like Bernstein's, whilst suggesting a rationale for the relevance of social norms around sex, at the same time makes a distinction on this basis problematic. This is fundamentally because human dignity is understood to be coextensive with the body, i.e. all bodies. Bernstein describes the body as a morally bounded and protected sphere, captured by the notion of 'bodily integrity' (Bernstein, 2015, e.g. pp. 60-61). Powerlessness has a foundational connection to loss of bodily integrity, and so to a violation of bodily autonomy (Bernstein, 2015, p. 327). Bernstein writes: 'Bodily integrity involves recognizing the body as a limit, so that to physically interfere with a person's body—to touch, to mark, to directly manipulate, to invade, to violate the body—involves crossing an absolute moral boundary' (p. 60). This is a challenge from the point of view of the ECtHR's approach — and indeed all approaches that start from the position that strip searches are not inherently degrading. Ultimately, Bernstein's perspective might underpin an argument that all strip searches have a particular symbolic significance when combined with a lack of consent and structural power imbalance. The ECtHR has not gone so far as to recognise this symbolic significance as rendering all such searches incompatible with Article 3.

Ultimately, as Skinns et al point out, in these loaded circumstances what remains fundamental is a person's sense of being treated as someone of equal worth to those with whom they are interacting: a sense of being 'treated like a human being' (Skinns et al., 2020). The use of "dignity" language to represent a yardstick for the acceptability

[80] On this point, the explanatory notes to the Bangkok Rules, pertaining specifically to the treatment of women, view the conduct of searches by persons not of the same sex as problematic in and of themselves. This comes across in the view that "[s]pecial sensitivity should be demonstrated in the case of women […] because they are likely to feel the humiliation of undergoing intimate searches particularly." (Footnote omitted). UN General Assembly, *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules)*, A/RES/65/229, 16 March 2011, Rule 19). This refers to the conduct of the search itself and not a risk of further violence.

of strip searches, and the expression of this in baseline safeguards, aligns with other regional and international law standards and interpretations.[81] Together, the elements that make up the conduct of strip searches negotiate the line between dignity respect and disrespect.

4. Strip Searches in (Carceral) Context

One dimension of the Court's approach to strip searches is that, in assessing whether they are necessary for protective purposes, it will take into account other measures contributing to safety and reducing the likelihood that any dangerous items will be in a detained person's possession. Besides examining strip searches in their wider context, the Court also often opts for assessing the cumulative conditions of detention to determine compliance with Article 3. It therefore frequently considers the performance of strip searches as part of a detention regime that it then deems contrary to Article 3 as a whole.[82] In such cases, a finding of an Article 3 violation on the basis of the applicant's cumulative conditions or experience of detention makes it challenging to establish whether the strip searches would have been found to have violated Article 3 on a freestanding basis. Nonetheless, the Court's doctrine in 'cumulative' cases suggests that strip searches are often recognised as being a key part of an environment that oppresses and dehumanises persons in prison.

A challenge that arises in determining whether the conditions of detention within which strip searches occur may reach the Article 3 'threshold' is the Court's repeated assertion that, for such a finding to be made, the distress or hardship experienced must 'go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment'[83] and, specifically within a detention context, be 'of an intensity exceeding the unavoidable level of suffering inherent in detention'.[84] The notion of suffering that is 'inherent in detention' raises significant questions from a penological perspective, which the Court has not explicitly confronted. Nonetheless, some parameters of the Court's thinking in this area can be discerned from the case law (see, further, Mavronicola 2015).

First, it is clear that, for the Court, the lawful deprivation of liberty must entail bounded, rather than potentially boundless, suffering (Mavronicola 2021, p. 114). The ECtHR's doctrine indicates that while it considers lawfully ordained imprisonment and its attendant suffering to be prima facie "legitimate", a number of factors may augment the severity involved to a degree that crosses the Article 3 "threshold". These include situational factors or personal characteristics that place the person detained in a particularly vulnerable position, such as illness, disability, advanced age, or other

[81] See Inter-American Commission on Human Rights, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, 13 March 2008, No. 1/08, Principle XXI; UN General Assembly, *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, 8 January 2016, A/RES/70/175, Rule 50.
[82] See, e.g., *Piechowicz* (n 43).
[83] *A v UK* (n 29) para. 127.
[84] *Savičs* (n 35) para. 146.

circumstances (consider, for example, sexual orientation or gender expression that does not conform to cis-heteronormative expectations) that may deepen one's vulnerability in the prison environment.[85] Additionally, it is clear that the ECtHR considers the violent treatment of persons in detention, including physical, sexual and mental abuse, as not being 'inherent in detention' – indeed it often finds the intentional and purposeful infliction of abuse in such circumstances to amount to torture.[86]

Moreover, regimes of detention that essentially *extinguish* liberty – by being highly restrictive and/or intrusive – will tend to be found to violate Article 3 ECHR. The Court treats with particular suspicion regimes of imprisonment that suppress human interaction. It has repeatedly underlined that total sensory and social isolation is incompatible with Article 3 per se: according to the Court, '[c]omplete sensory isolation coupled with total social isolation can destroy the personality and constitutes a form of inhuman treatment which cannot be justified by the requirements of security or any other reason'.[87] Other restrictions on interaction which 'fall short of complete sensory isolation' may still violate Article 3, according to the Court, which has suggested that '[w]hile prolonged removal from association with others is undesirable, whether such a measure falls within the ambit of Article 3 of the Convention depends on the particular conditions, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned'.[88] Moreover, the ECtHR has made it clear that even where such regimes may be deemed justified, their harmful effects should be counteracted through positive measures, including taking steps to provide 'mental or physical stimulation'.[89]

The Court's approach to conditions of detention which are highly restrictive as well as intrusive is demonstrated in some of the case law on strip searches, given that such searches are often part of a broader 'regime' of surveillance and control. It has repeatedly found that certain regimes involve an *overreach* of restriction and intrusion, which cannot be deemed necessary for people's protection. In a series of cases concerning the 'dangerous detainee' prison regime in Poland, for example, the ECtHR held that:

> taking into account the cumulative effects of the "dangerous detainee" regime on the applicant, the Court finds that the authorities did not provide sufficient and relevant reasons which could justify, in the circumstances of the case, the severity of the measures taken. In particular, the authorities failed to show that the impugned measures were necessary in their entirety to attain the legitimate aim of ensuring prison security.[90]

[85] See, e.g., *Farbtuhs* (n 69) para. 61; *Helhal v France*, no. 10401/12, 19 February 2015, para. 63.
[86] See, among many cases, *see, for example, Karabet and others v* Ukraine, nos. 38906/07 and 52025/07, 17 January 2013; *Dedovskiy and others v Russia*, no. 7178/03, 15 May 2008.
[87] *Öcalan v Turkey* [GC], no. 46221/99, 12 May 2005, para. 191; *Onoufriou v Cyprus*, no. 24407/04, 10 December 2009, para. 69.
[88] *Onoufriou*, ibid para. 69.
[89] *Piechowicz* (n 43) para. 173.
[90] *Karykowski v Poland*, no. 653/12, 12 January 2016, para. 39; *Prus v Poland*, no. 5136/11, 12 January 2016, para. 38; *Romaniuk v Poland*, no. 59285/12, 12 January 2016 para. 46. See also *Filas v Poland*, para. 36.

Given the growing centrality of rehabilitation as the overarching criterion by which dignity-compliance is determined in the prison context post-*Vinter*[91] (analysed in Mavronicola 2015, pp. 737-743), it seems reasonable to predict that the circumstances in which highly restrictive and/or intrusive prison regimes will be deemed Article 3-compliant will increasingly narrow and require both frequent and ever more robust justification rooted in protection, as well as positive measures mitigating the harm that such regimes tend to cause.

Nonetheless, the idea that a (substantial) degree of suffering is a "normal" aspect of imprisonment and that it is only aberrations from this norm that bring the experience(s) of imprisonment over the Article 3 threshold not only begs the question, but also suggests that common elements of the prison experience may be unduly presumed legitimate and shielded from scrutiny. An enduring question is the extent to which the ECtHR may ultimately come to question, on a "wholesale" basis, prison itself (Mavronicola 2021, p. 118). The growth in penal abolitionist thinking (e.g. Coyle & Scott 2021) is relevant in this respect: it invites at the very least a more sweeping interrogation of what is understood as acceptable, "tolerable" or to-be-tolerated suffering or distress in the penal context, by not taking the legitimacy of the prison as 'a given'.[92]

5. Conclusion

The assessment of whether a practice is contrary to the right not to be subjected to inhuman or degrading treatment or punishment is, within the parameters of the European Convention and the ECtHR's interpretation of the Convention, a high-stakes determination of the lawfulness of State action and of State authorities' compliance with the demands of human dignity. Given the right's absolute character in particular, the ECtHR's doctrine provides an important lens for examining how ideas of necessity mediate against judgments of appropriateness of conduct. Crucially, the right's absolute character also means that its protection is acutely significant for those who are most vulnerable to the heavy hand or cruel indifference of the State. We have sought to examine the application of Article 3 to body searches, notably strip searches, with this in mind.

We have observed that the Court does not consider strip searches to cross the "threshold" set by Article 3 in all their manifestations. Yet while the Court's approach involves conducting a context-sensitive assessment of whether Article 3 is violated in any given case, it is possible to distil from the Court's reasoning and findings a set of principles that can serve to guide norm-appliers and other stakeholders on an *ex ante* basis. The Court's approach is that a strip search that is undertaken for protective purposes and is necessary to achieve such purposes may be respectful of the dignity

[91] *Vinter and others v UK* [GC], no. 66069/09, 130/10 and 3896/10, 9 July 2013. On the centrality of rehabilitation in determining prison regimes' compliance with Article 3, see, for example, *Harakchiev and Tolumov v Bulgaria*, nos. 15018/11 and 61199/12, 8 July 2014, paras 264-267.

[92] See text in n 30 above.

of the person being intruded upon if conducted in a dignity respecting manner. Conversely, unnecessary, routine strip searches are fundamentally not respectful of that person's dignity; strip searches intended to humiliate or cause distress are not respectful of the person's dignity; and strip searches performed in ways that convey dignity disrespect, including when carried out in public and by persons of the opposite sex, are unlawful. We have sought to unpack and flesh out these criteria in some detail, based on a holistic view of the ECtHR's doctrine, to provide an enhanced insight into the relationship between them and the substance of each.

Besides the utility of distilling these principles for the purposes of guidance, what we hope we have offered is an account of the dignity dimensions of Article 3's application to strip searches within the carceral context and an attempt to make sense of the Court's approach in light of these dimensions, but also a clearer basis for engaging critically with the Court's thinking and its concrete implications. A particular issue ripe for critique is the way legitimacy and acceptability are assumed in respect of common elements of the prison "experience" within the reasoning of the Court. We believe that there is considerable scope for reflecting further on the direction(s) that the doctrine will, or should, take in this regard, in light of the increasing centrality of the rehabilitative aim within imprisonment since the Grand Chamber judgment in *Vinter v UK*[93] and the case law that has followed it. In particular, what can be deemed the 'unavoidable level of suffering [and humiliation] inherent in detention', and its relationship to practices such as strip searches, should be seen as continuously evolving in light of rehabilitation's ascendancy within European human rights law, and as being potentially subject to more radical transformation alongside a growth in penal abolitionist thinking and campaigning.

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