

Can the Notion of Inhuman and Degrading Treatment be Applied to Socio-Economic Conditions?

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1. In a number of cases the European Commission and Court of Human Rights have applied Article 3 of the European Convention on Human Rights, whereby 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'. It is in the area of civil rights that the two Strasbourg bodies have relied primarily upon this Article: the bulk of the applications dealt with by the two supervisory bodies relate to the conditions of detention of persons deprived of their liberty (usually in prisons, in police custody or in mental institutions). Other applications raise the question whether corporal punishment in educational institutions can be regarded as inhuman and degrading, or whether extradition or deportation to a country where an individual is likely to be subjected to inhuman treatment is contrary to Article 3. In addition, the question has also been raised whether – at least in some instances – racial discrimination can be said to amount to inhuman or degrading treatment.¹

Recently, the European Commission has been given the opportunity of looking into the possibility of extending the notion of inhuman and degrading treatment to the area of social and economic rights: *Francine van Volsem v. Belgium* (decision of 9 May 1990, application No. 14641/89).²

2. Francine van Volsem, a Belgian national born in 1950, obtained the custody of her two children following her divorce. Being depressive and suffering from near-chronic respiratory problems, she was unable to hold a stable job. She therefore relied for her living on the alimony paid by her former husband. In addition, she lived on the social security provided by a social welfare centre (C.P.A.S.: 'Centre public d'aide sociale'). With the help of this Centre she had managed to obtain accommodation in a half empty block of council flats. In these, everything, and particularly the heating, ran on electricity; in addition, as the flats had been badly built, the consumption of electricity was very high, and in any case disproportionate to the low income of most of the inhabitants. The use of any other source of energy was prohibited.

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¹ For concise and up-to-date accounts of the case-law of the European Commission and Court of Human Rights on Article 3, see J.Ab. Frowein, 'Freiheit von Folter oder grausamer, unmenschlicher oder erniedrigender Behandlung und Strafe nach der Europäischen Menschenrechtskonvention', in F. Matscher (ed.), *Folterverbot sowie Religions- und Gewissensfreiheit im Rechtsvergleich* (1990) 69-79, and G. Cohen-Jonathan, *La Convention Européenne des Droits de l'Homme* (1990) 286-310.

² The decision has been published in 2 *Revue Universelle des Droits de l'Homme* (1990) 384-385, and commented upon by F. Sudre (ibidem, pp. 349-353) and C. Pettiti (in *Droit social* (1991) 87-88).

It should therefore come as no surprise that between 1981 and 1983 Mrs van Volsem was unable to meet the cost of her electricity bills. The C.P.A.S. took no notice of a request by Mrs van Volsem to provide financial help, or to at least support her case with the electricity company, S.A. Unerg. Thus the company cut off the electricity on 9 December 1983 (a very inappropriate period indeed). Mrs van Volsem took legal proceedings against this measure. The Brussels Tribunal of First Instance upheld her case (and the electric power was restored), but subsequently, on 25 February 1988, the Brussels Court of Appeal authorized S.A. Unerg to cut off the power. The company acted immediately upon this judicial order, in spite of the fact that meanwhile – it was now 14 May 1988 – Mrs van Volsem was caring for her grandchild and a doctor had issued a medical certificate stating that owing to respiratory problems the child needed a minimum level of heating. In the event, thanks to the intervention of a bank (the C.P.A.S. had refused any help), Mrs van Volsem was able to comply with the request of the company to pay the arrears and promised to pay future bills regularly: on 15 September 1988 the company reconnected her power, although at very low intensity (only two Amperes, producing a power of 440 Watts).³

In the application lodged with the European Commission of Human Rights, Mrs van Volsem claimed, among other things, that: 1) the electricity company was not a private enterprise; indeed, it was a public utility ('service public') and acted as representative ('mandataire') of the association of district councils, which in turn were to be regarded as representatives of the Belgian State; consequently, the measures taken by the company were to be imputed to the Belgian State; 2) the cutting off of electricity in a very cold period and subsequently the supply of a low power voltage amounted to inhuman and degrading treatment, proscribed by Article 3 of the European Convention on Human Rights. In this respect, the applicant drew the European Commission's attention to two points. First, she had never demanded free electricity; she had merely been unable to cover all the high electricity expenses regularly. Secondly, the company itself had conceded in its brief before the Brussels Court of Appeal that 'the provision of gas and electricity must be regarded in our State as based on the rule of law and in our community as indispensable to human dignity'.⁴

The petitioner concluded that, since the European Convention 'guarantees in Article 3 the right for everybody to have the basic goods indispensable for ensuring human dignity'⁵ the Belgian authorities had meted out inhuman and degrading treatment, by cutting off the electric power in the past and by threatening to do so in the future.⁶

3. It is well known that the European Commission of Human Rights is overburdened with hundreds of petitions and finds it difficult to deal quickly with them. The recent establishment of a new procedure was considered, then, as a way of solving this problem. This procedure is provided for in a new rule of procedure included in Protocol 8 to the Convention. Under the rule, now constituting Article 20 paragraph 3 of the Convention, 'The Commission may set up committees, each composed of at least three members, with the power, exercisable by a

³ The decision to supply a low voltage of electric power – so low that it can be regarded as absolutely inadequate for the needs of three persons living in a flat where everything runs on electricity – had already been taken as early as 1985.

⁴ L'alimentation en gaz et l'électricité doit être considérée dans notre Etat de droit et notre collectivité, comme indispensable à la dignité humaine, ce que l'intimée (la S.A. Unerg) ne conteste pas et que le premier juge au demeurant ne contestait pas non plus', in *Requete*, p. 5.

⁵ 'La Convention garantit en son article 3 le droit de chacun à bénéficier des biens de première nécessité indispensables à la dignité humaine.'

⁶ The applicant also invoked Article 8 protecting family life and in addition complained of having been unable to benefit from legal aid in Belgium for the purpose of bringing her case before the Court of Cassation.

Inhuman and Degrading Treatment

unanimous vote, to declare inadmissible or strike from its list of cases a petition submitted under Article 25, when such a decision can be taken without further examination'. On the strength of this provision, a Committee of three members of the Commission pronounced upon the case at issue and unanimously held that the application was inadmissible. It may be noted that resort to the new rule made it possible for the Commission to handle the case expeditiously: the application had been lodged on 5 December 1988, and the Commission delivered its decision on 9 May 1990.

As regards the question relating to Article 3, the Committee of three confined itself to making two points. First, it stressed that the question could arise of whether the severing of electric power should be imputed to the Belgian State. However, there was no need to delve into this issue, for in any event the petition was to be rejected on other grounds. Second, regarding the allegation that the measure complained of amounted to an inhuman or degrading treatment, the Committee stated that 'in the case at issue, the cutting off or the threat of cutting off electricity did not reach the level of humiliation or debasement needed for there to be inhuman or degrading treatment'.⁷

4. It is apparent from this decision that the Committee did not rule out the possibility of applying Article 3 to a case where social and economic conditions rather than alleged misbehaviour of public authorities impinging upon the area of civil rights were at stake. In other words, the Committee did not dismiss out of hand the contention that Article 3 also bans any social and economic treatment of persons that is so humiliating as to amount to inhuman treatment.

On this score the decision of the Committee cannot but be approved. It stands to reason that the scope of Article 3 is very broad; nothing could warrant its possible limitation to only physical or psychological mistreatment in the area of civil rights. Plainly, the concept of human dignity underpinning Article 3 and the prohibition of any treatment or punishment contrary to humanitarian principles embrace any measure or action by a public authority, whatever the specific field to which this measure or action appertains. Article 3 could therefore constitute an appropriate means for the Commission and the Court to make, if only in extreme cases, the protection of economic and social rights more incisive. It could constitute the bridge between the area traditionally covered by the Convention, hence guaranteed by the Commission and the Court – that of civil and political rights – and the broad field of social and economic rights.

The Committee's decision is however disappointing in two other – closely intertwined – respects.

First, it does not tackle an admittedly complex and intricate issue: that of the circumstances under which one can conclude that practical measures bearing on social life and the daily living conditions of a person may amount to inhuman or degrading treatment. This was a relatively new issue for the Commission,⁸ and one which was in addition not easy to solve. It therefore

⁷ 'La question peut se poser de savoir si la suspension des fournitures d'électricité peut être considérée comme un acte imputable à l'Etat défendeur. La Commission n'estime cependant pas nécessaire de procéder à l'examen de cette question, le grief devant être rejeté pour d'autres motifs.

En ce qui concerne l'allégation de traitement inhumain et dégradant, la suspension ou les menaces de suspension des fournitures d'électricité n'atteignaient pas le niveau d'humiliation ou d'avilissement requis pour qu'il y ait un traitement inhumain ou dégradant', ECHR, décision 14641/89, p. 3.

⁸ In a decision of 4 July 1979 Applic. No. 8247/78 (unreported) the Commission hinted that in some circumstances the lack of a pension could lead to inhuman or degrading treatment in breach of Article 3. (See A. Clapham, *The Fight against Poverty and Marginalisation: The Human Rights Dimension*, unpublished manuscript, p. 1). It is worth recalling that in the *Cyprus v. Turkey* case the Commission held that the fact that the Turkish authorities had withheld from detainees 'an adequate

required careful examination and in-depth analysis. Indeed, a ruling that the poor quality or insufficiency of public social services may be tantamount to inhuman or degrading treatment, would have far-reaching ramifications. For, if it were to be true that Article 3 guarantees the right of everybody to have their most basic social needs met, this would imply that Contracting States are duty-bound to provide basic social benefits to everybody under their jurisdiction. This would also give rise to a number of crucial problems, such as the question of whether the notion of democratic State underlying the European Convention bears the stamp of neo-liberalism or comes instead closer to that of the Welfare State.

Given the great number of intricate and closely related problems raised by this petition, it would have been appropriate for the Committee of three to have submitted it to the plenary Commission, where the various complex facets of the question could have been better explored and discussed (Article 20 paragraph 4 of the Convention envisages such an eventuality, for it provides that a committee 'may at any time relinquish jurisdiction in favour of the plenary Commission').

The second ground for disappointment, and indeed dissatisfaction, is that the Committee made its ruling without offering any insight into its reasoning. It did not motivate its decisions in any way: as pointed out above, the Committee merely stated that the cutting off of electricity 'did not reach the level of humiliation or debasement' needed for it to be considered as degrading or inhuman. No details were provided on the reasons for which that level was not reached in the case at issue. One is therefore at a loss to understand by what standards one can gauge whether or not practical measures of the type at hand or of a similar type exceed the threshold required.⁹

To be sure, it is very difficult to spell out clear-cut standards for appraising whether the kind of conduct under discussion attained the 'minimum level of severity' needed for treatment to be regarded as inhuman or degrading. When pronouncing on these difficult cases international bodies must perforce retain a large measure of discretion. Nevertheless, they ought at least to set out the 'indicators' they actually take into account when assessing a certain situation. In the case at issue, one may well wonder whether the Committee of three turned its attention to the economic conditions of the applicant, to her mental and physical state (in particular, to her being depressive and suffering from near-chronic respiratory troubles), to her having charge of two children and a grandchild, or to the attitude of the social welfare centre (the C.P.A.S.). Did the Committee ask itself whether in the area where Mrs van Volsem lived it was easy for a person in her conditions, or for her elder daughter, to find a job? Did it consider

supply of food and drinking water and adequate medical treatment' amounted to inhuman treatment in the sense of Article 3 (Report of 10 July 1976, paragraph 405).

⁹ In the past the European Commission has held that the notion of 'inhuman treatment' includes at least such treatment as deliberately causes severe suffering, whether mental or physical (see *Ireland v. the United Kingdom*, Commission's Report of 25 January 1976, in *Yearbook of the European Conv. of Human Rights*, 19, pp. 745 and 752). According to the Commission, 'treatment or punishment of an individual may be said to be degrading if it grossly humiliates him before others or drives him to act against his will or conscience' (*Greek case*, in Report of the Commission of 18 November 1969, *Yearbook*, cit., Vol. 12, p. 186). In the view of the Court treatment is degrading when it is such as to arouse in a person 'feelings of fear, anguish and inferiority capable of humiliating and debasing 'him and "possibly breaking" his physical or moral resistance' (*Ireland v. the United Kingdom*, Judgment of 18 January 1978, Series A No. 25, paragraph 167).

However, the Court has stressed that 'ill-treatment must attain a *minimum level of severity* if it is to fall within the scope of Article 3' (ibidem, paragraph 162; italics added). According to both the Court and the Commission, the assessment of this minimum 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' (ibidem, paragraph 162 as well as, for the Commission, *McQuiston et al. v. the United Kingdom*, dec. of 4 March 1986, p. 17).

Inhuman and Degrading Treatment

that the measures taken by the electricity company (cutting off of the power, and consequent supply of a derisory power flow coupled with the threat of a further cut-off) may have a different psychological or moral impact on persons, depending on their physical and psychological conditions? In addition, did the Committee attach any importance to the intent, or lack of intent, of meting out inhuman and degrading treatment?

One should assume that, in ruling the way it did, the Committee of three took into account most of these issues, perhaps others also. One may wonder why it refrained from indicating its methodology concerning its balancing of all the relevant circumstances.

5. Had the European Commission considered the application lodged by Mrs van Volsem in greater detail, it could have broken new ground, even if it eventually were to conclude that the application was inadmissible. It is a matter of regret that the Commission has missed this significant opportunity.

One of the consequences of the Commission's failure to make a searching examination of the case should be emphasized: the Commission has left all those who might be interested in invoking Article 3, owing to their dire economic or social conditions, without any yardstick by which to appraise whether or not they are entitled to benefit from that all-important provision.