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The Legal Duty to Ban 'Conversion Therapy'

ILIAS TRISPIOTIS

This chapter argues that there is a legal duty under international human rights law to ban all forms of 'conversion therapy'. States are under a positive duty to do so because all forms of 'conversion therapy' fall within the protective scope of the absolute prohibition of torture, inhuman or degrading treatment under international human rights law. Specifically, this chapter claims that all forms of 'conversion therapy' amount at least to degrading treatment because they disrespect the equal moral value of LGBTQ+ people. They do so through a distinctive combination of two serious moral wrongs. Firstly, all forms of 'conversion therapy' put LGBTQ+ people at a proved, real risk of grave physical and mental harm. Secondly, all such 'therapies' directly discriminate on the grounds of sexual orientation and gender identity: they typically single out LGBTQ+ people to deny them key freedoms related to sexuality and gender identity.

Most parts of the following discussion focus on Article 3 ECHR. However, the chapter's overarching argument, namely that all forms of 'conversion therapy' amount at a minimum to degrading treatment, is not contingent on the ECHR. The article's arguments on the wrongness of 'conversion therapy'; the meaning of degrading treatment in human rights law; and the positive state obligations arising from the relationship between those two, apply more broadly to international human rights law.

The discussion unfolds in four substantive sections. The first section briefly discusses the legal relevance of drawing a distinction between different forms of 'conversion therapy'. The second section analyses the relationship of 'conversion therapy' with human dignity. The third section offers an interpretation of degrading treatment under Article 3 ECHR, which brings to the fore the tight normative links between discrimination, dignity and degradation. The final section analyses the consequences of the claim that all forms of 'conversion therapy' amount at a minimum to degrading treatment under international human rights law for the positive state obligations that arise in this context.[1]

I. PHYSICAL, 'TALKING', FORCIBLE, CONSENSUAL: THE COMPATIBILITY OF DIFFERENT FORMS OF 'CONVERSION THERAPY' WITH HUMAN RIGHTS LAW

Do all forms of 'conversion therapy' amount to a violation of the absolute prohibition of torture, inhuman or degrading treatment under UK and International Human Rights Law? If they do, then states are under a positive legal obligation to ban all forms of this practice. But if they do not, then the relevant positive state obligations would have to be adjusted accordingly. So, before turning to the content of positive state obligations in this area, it is important to clarify whether all different forms of 'conversion therapy' fall within the scope of the prohibition of torture, inhuman or degrading treatment. This and the next section will focus on

[1] Parts of this chapter, especially its first and fourth substantive sections, draw on I. Trispiotis and C. Purshouse, '"Conversion Therapy" as Degrading Treatment' (2022) 42(1) OJLS 104.

the ECHR and UK law. However, for reasons that this chapter will mention later, the proposed interpretation of degrading treatment applies to international human rights law more broadly.

Let me start with two specific forms of 'conversion therapy' that clearly violate Article 3 ECHR. First are extreme 'physical' forms of 'conversion therapy', such as those involving rape, electroshocks, forced examinations of genitals, injections of drugs etc.[2] Such extreme violence can cause severe physical and mental suffering, and therefore those forms of 'conversion therapy' violate Article 3 ECHR.[3] Arguably, depending on their severity, such 'physical' forms of 'conversion therapy' may constitute torture rather than degrading treatment.[4] That said, not only the severity of ill-treatment, but also its aim determines its position within the architecture of Article 3. As the ECtHR held in *Romanov*[5] and *Cestaro*,[6] the use of gratuitous violence that aims to debase others deserves the stigma attached to torture. Accordingly, because of their intensity and gratuitousness, violent 'physical' forms of 'conversion therapy' would likely amount to torture rather than degrading treatment.

Forcible 'conversion therapy' is a second form that clearly violates Article 3 ECHR.[7] This conclusion flows from case-law on forcible medical treatments. As the ECtHR held in *Herczegfalvy*, unless the forcible treatment inflicted upon a patient were a medical necessity, it amounts to degrading treatment.[8] The UK Court of Appeal reiterated this principle in *Wilkinson*.[9] More specifically, according to *Herczegfalvy* and *Wilkinson*, the forcible imposition of treatment on someone can be justified only when *substantial* benefits can arise from it.[10] Such benefits must be evidenced by 'established principles of medicine',[11] and would often require the cross-examination of medical practitioners.[12] Arguably 'conversion therapy' falls woefully short of this standard. There is evidence of its lasting harmful effects on the physical and mental health of LGBTIQ+ people.[13] No health benefits arise from 'conversion

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[2] Report of the Special Rapporteur on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN General Assembly, A/56/156, 3 July 2001, para 24.

[3] *Maslova and Nalbandov v Russia*, Application No. 839/02, 24 January 2008. Also *Aydin v Turkey*, Application No. 23178/94, 25 September 1997, para 86. Threats of violence can constitute torture; see *Selmouni v France*, Application No. 25803/94, 28 July 1999, para 101. Torture covers both physical pain and mental suffering; see *Gäfgen v. Germany*, Application No. 22978/05, 1 June 2010 (Grand Chamber) para 108.

[4] *Jalloh v Germany*, Application No. 54810/00, 11 July 2006 (Grand Chamber) para 67.

[5] *Vladimir Romanov v Russia*, Application No. 41461/02, 24 July 2008, paras 67–70.

[6] *Cestaro v Italy* Application No. 6884/11, 7 April 2015, paras 182 and 189. Also *Dedovski and Others v Russia*, Application No. 7178/03, 15 May 2008, paras 82–83.

[7] 'Forcible' is used to mark cases where a person undergoing 'conversion therapy' is not free to leave or stop the 'therapy'. So, the term 'forcible' does cover those who consented to 'conversion therapy' they knew they would not be able to leave if they changed their mind.

[8] *Herczegfalvy v Austria*, Application No. 10533/83, 24 September 1992, para 82.

[9] *R (on the application of Wilkinson) v The Responsible Medical Officer Broadmoor Hospital* [2001] EWCA Civ 1545, [2001] 1 WLR 419, per Hale LJ paras 77–80. This applies to both capacitated and incapacitated patients.

[10] ibid para 79; *Herczegfalvy* (n 8) para 82. There is a duty to give reasons whenever a patient should undergo medical treatment without their consent. See *R (Wooder) v Feggetter* [2002] EWCA Civ 554, [2002] 3 WLR 591; *R (B) v SS (Responsible Medical Officer)* [2006] EWCA Civ 28, [2006] 1 WLR 810, para 50.

[11] *Herczegfalvy* (n 8) para 82.

[12] *Wilkinson* (n 9) para 55.

[13] See e.g. UN Human Rights Council, *Practices of So-Called "Conversion Therapy": Report of the Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity,* 1 May 2020, A/HRC/44/53. Also, UN Human Rights Council, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover*, 27 April 2010, A/HRC/14/20, para 23. In addition, the harms of 'conversion therapy' are well-documented in medical

therapy', let alone the 'substantial' benefits that the law requires to justify its forcible imposition. Thus, its forcible imposition on children, adolescents or adults violates Article 3. This holds *regardless of* what form forcible 'conversion therapy' takes – e.g. a violent or a mild, non-physical form – and *regardless of* the age of its victims and their capacity to consent.[14]

That leaves us with mild, non-forcible forms of 'conversion therapy', such as non-physical, 'talking' sessions which pathologise certain sexualities or gender identities and attempt to eliminate them or repress their expression.[15] If non-physical and non-forcible forms of 'conversion therapy' also amount to degrading treatment, then every form of 'conversion therapy' – from its ultra-violent to its mildest 'talking' varieties, and in both forcible and non-forcible forms – would fall within the scope of the absolute prohibition of torture or CIDT in human rights law.

The argument in the rest of this chapter is based on the following premise. A consistent line of case-law in international human rights law suggests that one of the main aims of the prohibition of degrading treatment is to protect individuals from serious violations of human dignity. So, whether 'talking', non-forcible forms of 'conversion therapy' amount to degrading treatment depends on whether they amount to a serious violation of human dignity.

II. 'CONVERSION THERAPY' AS A SERIOUS VIOLATION OF HUMAN DIGNITY

'Conversion therapy' involves a distinctive combination of 1) a proved, real risk of grave harm for the physical and mental health of its victims;[16] and 2) direct discrimination on the grounds of sexual orientation or gender identity. This distinctive combination means that 'conversion therapy' is unlike other harmful practices or pseudo-therapies that are not inherently discriminatory. It also means that 'conversion therapy' is unlike instances of direct discrimination that do not involve a proved real risk of grave harm. That last point is important. 'Conversion therapy' is not homophobia or transphobia, despite typically being motivated by those prejudices. 'Conversion therapy' is a *practice* that aims to change or suppress a person's

literature. See e.g. BACP et al, *Memorandum of Understanding on Conversion Therapy in the UK*, October 2017, version 2 <https://www.bacp.co.uk/media/6526/ memorandum-of-understanding-v2-reva-jul19.pdf>; A. Bartlett, G. Smith and M. King, 'The response of mental health professionals to clients seeking help to change or redirect same-sex sexual orientation' (2009) 9(11) BioMed Central Psychiatry 7. See also Jack Drescher's chapter in this edited collection.

[14] The compulsion of the medical treatment overshadows whether the patient had the capacity to consent to the treatment. See *Wilkinson* (n 9) para 79; *R (B) v SS (Responsible Medical Officer)* [2006] EWCA Civ 28, [2006] 1 WLR 810, para 50.

[15] This does not include counselling which seeks to provide acceptance, support, facilitation and understanding of a person's sexual and gender identity. Such therapeutic interventions that do not pathologise any sexualities or gender identities but aim to provide acceptance and support to a person, do not amount to 'conversion therapy'. This is because they lack the element of pathologisation of certain sexualities or gender identities that all forms of 'conversion therapy' share, and therefore fall outside its scope. That is why some bans expressly exempt such practices from the scope of 'conversion therapy'. See e.g. the legislation adopted in Queensland (s 213F, Public Health Act 2005 as amended by s 28, Health Legislation Amendment Act 2020) and Victoria (s 5 Change or Suppression (Conversion) Practices Prohibition Act 2021). See also Lui Asquith's chapter in this edited collection.

[16] See n 13 above. Numerous studies are included in UN Human Rights Council, *Practices of So-Called "Conversion Therapy": Report of the Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity,* 1 May 2020, A/HRC/44/53.

sexuality or gender identity. It is that practice that ought to be legally banned, for the reasons outlined in this chapter – and elsewhere in this collection.

As I mentioned earlier, the prohibition of degrading treatment in human rights law aims to protect individuals from serious violations of human dignity. Does 'conversion therapy' violate human dignity? At first glance, 'conversion therapy' is morally wrong because it endangers the lives and health of LGBTQ+ people. Later parts of this book include qualitative survey results, reports from international organisations, healthcare data and testimonies of survivors, all of which demonstrate the grave injuries that 'conversion therapy' can inflict on LGBTQ+ people. This is wrong in and of itself, regardless of any comparison between people on the grounds of sexuality and gender identity.

At the same time, 'conversion therapy' is morally wrong for reasons that stretch beyond the grave risks it poses for the physical and mental health of its victims.[17] Unlike other harmful or medically negligent therapies, 'conversion therapy' singles out a protected socially salient group of people, i.e. LGBTQ+ people, for disadvantageous treatment. So, 'conversion therapy' is also, fundamentally, a problem of direct discrimination on the grounds of sexual orientation and gender identity. It is also an intrinsically wrongful form of discrimination, i.e. it is wrongful regardless of its effects. That is because alongside its proved potential for causing grave physical and psychological harm, 'conversion therapy' is *basically* disrespectful of the equal moral personhood of LGBTQ+ people.[18] All forms of 'conversion therapy' are *basically* disrespectful because, aside from their actual effects on the victims and aside from social conventions about what counts as disrespect, they fail to recognise that all persons are of equal moral value regardless of their sexuality and gender identity. Put differently, they fail to show what Stephen Darwall calls 'recognition respect'.[19] 'Conversion therapies' fail to show recognition respect because they fail to recognise that the status of LGBTQ+ persons as persons has to be appropriately integrated in one's deliberations about how to act. Apart from discounting the interests of LGBTQ+ people to physical and mental health, 'conversion therapy' manifests that *deliberative* failure in two other ways: it attacks core aspects of the identity of LGBTQ+ people by denying them crucial freedoms related to sexuality and gender identity; and it unfairly subordinates them on the grounds of sexuality. Let us look at those in more detail.

First of all, the practice of 'conversion therapy' is disrespectful for the equal moral personhood of LGBTQ+ people because it places less weight on some of their key autonomy interests without any good reason for discounting them.[20] 'Conversion therapy' explicitly marks out LGBTQ+ identities as inferior to heterosexual cisgender identities. As a result of

[17] This analysis of the wrongness of 'conversion therapy' distinguishes objections from the proved potential of 'conversion therapy' to cause grave physical and psychological harm from objections to the practice from its inegalitarian nature. However, the two objections are linked. Pain and injury can be objected to independently of their consequences to the affected people's options. But pain and injury are harmful also because they obstruct the pursuit of a person's options and relationships.

[18] On basic disrespect see B. Eidelson, *Discrimination and Disrespect* (OUP 2015) 84–90. Also J. Wolff, 'Fairness, Respect, and the Egalitarian Ethos' (1998) 27(2) Philos Public Aff 97, 107–110.

[19] S. Darwall, 'Two Kinds of Respect' (1977) 88(1) Ethics 36, 38. For the purposes of this chapter it is not necessary to offer a more detailed account of an egalitarian notion of respect. Rather, it suffices to show that 'conversion therapy' undermines respect (including self-respect) in specific ways.

[20] H. Frankfurt, *Necessity, Volition, and Love* (CUP 1999) 146–155.

that judgment, it affords less consideration to the interests of LGBTQ+ people.[21] Thus, even though the basis of less consideration is the sexuality or gender identity of the person, the responses constitutive of less consideration are focused on the person and their interests. All forms of 'conversion therapy' share one *autonomy-diminishing* goal: to restrict a host of profoundly important interests in relation to sexuality and gender identity.[22] Out of many possible examples, I will mention two here. The first is the individual interest to develop one's sexual attraction into sexual activity. Some forms of 'conversion therapy' are designed to suppress same-sex attraction; others to suppress the option to develop same-sex sexual attraction to same-sex sexual activity.[23] Both forms aim to suppress fundamental choices that are central to personal autonomy.[24] That is, choices that are central to the ideal of an autonomous life shaped by people's successive choices among valuable options of sexuality and gender identity. The second is the interest to take pride in one's sexuality and gender identity and make it part of one's public personality instead of staying 'in the closet'. This is another fundamental choice, central to personal autonomy, because self-repression of one's identity inhibits full participation in valuable aspects of public culture – from music to art to politics – that are influenced and permeated by diverse sexualities and gender identities.[25] As a result of attacking those fundamental choices, 'conversion therapy' also diminishes self-worth because persons measure their own sense of worth according to their ability to realise their capabilities, goals and dreams.[26] So, 'conversion therapy' disrespects the equal value of LGBTQ+ people by discounting, without any good reason, profoundly important interests that are central to personal autonomy. This is one of the reasons why it is wrong.

At the same time, 'conversion therapy' is disrespectful for the equal moral personhood of LGBTQ+ people also for reasons that extend beyond the harms it inflicts on the specific individuals who are subjected to it. 'Conversion therapy' depends on, and reflects, the systematic disempowerment of LGBTQ+ people that occurs in many societies. The message of 'conversion therapy' – a message of contempt or disdain for LGBTQ+ identities, which *can* and *ought to* be eliminated – is demeaning for all LGBTQ+ people; even for those that never get to experience 'conversion therapy' themselves.[27] This is because it reproduces, and promotes, the social images of LGBTQ+ people as abnormal, disgusting etc, which ground their pre-existing stigma.[28] In these ways 'conversion therapy' affects not only the people who

[21] N. Kolodny, 'Rule Over None II: Social Equality and the Justification of Democracy' (2014) 42(4) Philos Public Aff 287.

[22] Since 'conversion therapy' breaches autonomy-based duties, state intervention is legitimate. See J. Raz, *The Morality of Freedom* (OUP 1986) 416-417.

[23] The definitions of 'conversion therapy' in some of the existing laws against it cover practices that aim to convert, cancel or suppress sexual orientation or gender identity. For more details, see the Introduction of this edited collection.

[24] J. Gardner, 'On the Ground of Her Sex(uality)' (1998) 18(2) OJLS 167, 172-173. The question of whether sexuality constitutes an immutable characteristic, or a fundamental choice, has no bearing on whether people are entitled to protection from 'conversion therapy'. In either case, sexuality and gender identity are so central to self-determination that the harms of 'conversion therapy' amount to an attack on the autonomy of LGBTQ+ people.

[25] ibid 176-178.

[26] D. Réaume, 'Discrimination and Dignity' (2003) 63(3) La L Rev 645, 673; Wolff (n 18) 107; T. Khaitan, 'Dignity as an Expressive Norm: Neither Vacuous Nor a Panacea' (2012) 32(1) OJLS 1.

[27] On the demeaning message of discrimination see D. Nejaime and R. B. Siegel, 'Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics' (2015) 124 Yale L J 2516, 2574–2578.

[28] M. Nussbaum, *From Disgust to Humanity: Sexual Orientation and Constitutional Law* (OUP 2010) 2–26.

are subjected to it, but also LGBTQ+ people in general and the attitudes of other people towards them. In fact, it is hard to divorce the absence of a legal ban on 'conversion therapy' in most European countries from a social context of historical stigmatisation on the basis of homosexuality.[29] Consider the hypothetical example of a similar practice with the inverse aim, namely a 'therapy' whose express aim is to convert heterosexual people to homosexuals. It is unlikely that such a practice would not be illegal.[30] But people cannot function as equals in their societies if the state does not protect everyone from abusive practices, like 'conversion therapy', targeting sexuality and gender identity. Consider another example, real this time. States do take action against illegitimate forms of coercive interference with important aspects of individual identity, such as religion. The ECtHR, for instance, has repeatedly found that exploiting a power imbalance under specific circumstances, e.g. in a military environment,[31] in order to coerce someone to change their religion amounts to 'improper proselytism' which enjoys no protection under the ECHR.[32] Comparisons like these illustrate that 'conversion therapy' relies on, and reflects, a social order in which LGBTQ+ people have less power and are shown less respect than heterosexual cisgender people, and in which their needs are marginalised.[33] Those wider, subordinating effects of 'conversion therapy' furnish another decisive objection against it.

It might be objected that the arguments above apply only where LGBTQ+ persons are forcibly subjected to 'conversion therapy' and not in cases where individuals choose to undergo it. If a 'therapy' provider has done enough to warn others about the potential risks from 'conversion therapy', then anyone who nevertheless chooses to undergo it is responsible for any harm they suffer. The next section will rebut this objection: 'conversion therapy' is among those forms of ill-treatment that human rights law prohibits in an absolute sense.[34] Whether an individual consented to their 'conversion' is therefore irrelevant. What matters is whether in light of the harmfulness of 'conversion therapy' the state did enough to protect people from it.

There is an additional point though. This consent-based objection is based on an overly narrow interpretation of the moral significance of choice: what matters is the fact of a person's choice, rather than the circumstances under which a person made that choice.[35] However, such an interpretation is misleading because a choice has elevated moral force only when the

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[29] The force of this objection depends on an analysis of socio-historical particularities which determine the meaning of an act. See D. Hellman, *When is Discrimination Wrong?* (Harvard UP 2008) 34-59.

[30] A historical example can be seen in the debates surrounding of s 28, Local Government Act 1988. See J. Moran, 'Childhood Sexuality and Education: The Case of Section 28' (2001) 4 Sexualities 73.

[31] *Larissis v Greece*, Application No. 23372/94, 24 February 1998, para 51.

[32] This argument does not suggest that there is a positive state obligation to ban all forms of proselytism. It only aims to show that the legitimacy of proselytism depends, to a significant extent, on an evaluation of the background conditions in which it takes place. See *Nasirov and Others v Azerbaijan*, Application No. 58717/10, 20 February 2020, para 65; *Jehovah's Witnesses of Moscow and Others v Russia*, Application No. 302/02, 10 June 2010, para 122. More broadly, egalitarian considerations can justify restrictions on freedom of religion or belief; see I. Trispiotis, 'Religious Freedom and Religious Antidiscrimination' (2019) 82(5) MLR 864.

[33] S. Moreau, *Faces of Inequality* (OUP 2020) 39-66; N. Bamforth, 'Sexuality and Citizenship in Contemporary Constitutional Argument' (2012) 10(2) I•CON 477; C. Stychin, *Governing Sexuality: The Changing Politics of Citizenship and Law Reform* (Hart 2003) 12-13.

[34] Art 3 makes no provision for exceptions and no derogation is permissible under Art 15(2) ECHR. See e.g. *Soering v United Kingdom*, Application No. 14038/88, 7 July 1989, para 88.

[35] This distinction draws on Scanlon's distinction between narrow ('forfeiture') and broad ('value of choice') interpretations of the moral significance of choice. See T. M. Scanlon, *What We Owe to Each Other* (Harvard UP 2000) 256-267.

conditions under which it is made are right.[36] As we saw above, 'conversion therapy' depends on a social context of historical stigmatisation on the basis of homosexuality. The relationship of that context with the pressure on many LGBTQ+ persons to resist their sexuality or gender identity – a pressure that heterosexual, cisgender persons do not experience – has independent moral significance. It is this inherent coerciveness of 'conversion therapy' – which stems from a context of well-known, historical, widespread disapproval of LGBTQ+ identities – that led the 2020 UN Report on 'conversion therapy', submitted by the UN SOGI to the UN Human Rights Council, to call for a full ban on 'conversion therapy' regardless of individual consent.[37] As the UN SOGI, Victor Madrigal-Borloz, put it 'the most comprehensive approach is to prohibit all practices of "conversion therapy", including faith-based organization-based counselling, by any person for any reason'.[38]

Several countries have brought in bans on 'conversion therapy'. Those bans each differ in their scope, including as to whether they include an exception for valid informed consent. For instance, Malta was the first country in the Council of Europe to introduce a comprehensive ban on 'conversion therapy' through the Affirmation of Sexual Orientation, Gender Identity and Gender Expression Act 2016. This Act makes it a criminal offence to force 'conversion therapy' on a person; to perform it, regardless of consent, to a vulnerable person; and to advertise its provision. So, although Malta excludes adults who freely consent from the ban, its ban's definition of 'vulnerable adult' opens the door for consent to be invalidated on grounds that are broader than the usual coercion-based grounds required to annul consent.

Closer to the UN recommendations are countries that have introduced comprehensive bans on 'conversion therapy' without exceptions for individual consent. This can be seen in the legislation recently passed by the Parliament of Victoria in Australia. The Change or Suppression (Conversion) Practices Prohibition Act 2021 does not include any exception for adults to provide their informed consent to 'conversion therapy'. In Article 5(1), it is stated that 'a change or suppression practice means a practice or conduct directed towards a person, whether with or without the person's consent'. Another example is Canada, which in 2022 enacted changes to its Criminal Code in order to effect a comprehensive ban on 'conversion therapy'. Prior to this, partial bans existed in the provinces of Ontario (since 2015) and Nova Scotia (since 2018), which criminalised 'conversion therapy'. The Canadian Government had previously attempted to pass Bill C-6 banning 'conversion therapy', however this was impeded by the dissolution of the Canadian Parliament in September 2021. This previous version of the Bill included a consent exception for adults to undergo 'conversion therapy', which was strongly opposed by campaigning groups such as No Conversion Canada. This is something that Jordan Sullivan and Nick Schiavo discuss in Part III of this edited collection. Importantly, the new Bill C-4 removes the consent exception for adults and creates four new offences related to performing 'conversion therapy'. Other examples of countries which have recently legislated against 'conversion therapy' without including any exceptions for adults who consent to the practice, include France and New Zealand.

[36] ibid 260. Under a narrow account of the moral significance of choice the 'background' conditions are important only if they affect the voluntariness of choice.
[37] Practices So-Called "Conversion Therapy" (n 13) at 21-22.
[38] Ibid at 18.

To be clear, the argument here is not that consent is irrelevant in determining whether a certain conduct amounts to prohibited ill-treatment under human rights law. Indeed, to return to the ECHR, certain treatments may violate Article 3 ECHR precisely because they were forced on someone.[39] However, the argument here is that an overly narrow interpretation of the moral significance of choice, which focuses *only* on consent and overlooks the background conditions under which a decision is made, is under-inclusive. As the next section shows, a narrow account of freedom of choice would be unable to explain key parts of the case-law under Article 3 ECHR, where significant emphasis is placed on the circumstances under which someone was ill-treated, such as the existence of widespread and well-known prejudice against a protected group or the vulnerability of the victim, rather than on whether an individual had a choice to avoid ill-treatment. The role of such factors can be captured only by a broader account of the moral significance of choice, according to which in order for a decision to be legitimate the conditions have to be right before passing onto whether the person's choice or consent is sufficient. This broader account is morally preferable, but its full defence cannot be pursued further here.

A final point to emphasise. So far, I have argued that 'conversion therapy' is wrong because it disrespects the standing of LGBTQ+ people as equals. That does not mean that 'conversion therapy' is wrong *because* it is based on incorrect beliefs about the moral worth of LGBTQ+ persons. Of course, the view that LGBTQ+ persons are of lesser value is fundamental to many instances of 'conversion therapy'. But not all instances of 'conversion therapy' necessarily rest on such a judgment of inferior status. Consider a religious group that offers 'conversion therapy' to save gay men from eternal damnation. Their intervention does not necessarily rely on the assumption that LGBTQ+ people are intrinsically less valuable than others. In fact, their intervention might be taken to suggest the exact opposite, namely that *because* LGBTQ+ people are of equal value, they deserve to be saved through their 'treatment'. Nevertheless, even benevolent forms of 'conversion therapy' that do not rely on a direct judgment about the equal value of LGBTQ+ people as persons fail to accord them the equality of respect that their status as persons demands. This is because their interests – in relation to health and personal autonomy – are unwarrantedly taken to matter less than the interests of others; and, more specifically, less than the interests of heterosexual people in those very matters. Therefore, the wrongness of 'conversion therapy' does not depend on the beliefs of the 'therapist' but on a theory about the normative significance of being a person, which entails that certain considerations should not be taken as a reason for certain actions.

In summary, 'conversion therapy' is wrong because it disrespects LGBTQ+ persons. It disrespects them not only because it places them at real risk of grave physical and mental harm; or only because it denies them key freedoms related to sexuality and gender identity; or only because it depends on, and reflects, their social subordination. 'Conversion therapy' disrespects LGBTQ+ persons for *all* those reasons, at the same time. Both by design and in effect 'conversion therapy' flouts protected areas of liberty and equality which are, as the next section will further discuss, inherent in the idea of human dignity. This partial sketch of the wrongfulness of 'conversion therapy' is meant to offer a set of reasons that, though incomplete,

[39] Force-feeding (e.g. *Nevmerzhitsky v Ukraine*, Application No. 54825/00, 5 April 2005) and force-sterilisation (e.g. *V.C. v Slovakia*, Application No. 18968/07, 8 November 2011) are examples of that.

is sufficient for the overall purpose of this chapter, namely, to support the view that all forms of 'conversion therapy' fall within the scope of the absolute prohibition of torture and CIDT in international human rights law.

III. DISCRIMINATION, DIGNITY, DEGRADATION

The previous section set out the reasons why all forms of 'conversion therapy', even 'talking', non-forcible forms, amount to a serious violation of human dignity. This section will link the discussion with the meaning of degrading treatment in International Human Rights Law. It is argued that one of the main aims of the prohibition of degrading treatment is to protect individuals from serious violations of human dignity, which are specified in detail. Although the focus of this section is on Article 3 ECHR, it is submitted that the proposed interpretation applies more widely in International Human Rights Law. That point is confirmed by the interventions in favour of a ban on 'conversion therapy' by the UN SOGI, which was discussed earlier on, as well as by the UN Committee Against Torture, whose position is discussed in the next section.

Recall that my focus here is on so-called 'talking' forms of 'conversion therapy'. For the reasons discussed earlier on, physical and forcible forms of 'conversion therapy' fall clearly within the protective scope of the absolute prohibition of torture, inhuman or degrading treatment. But do 'talking' forms of 'conversion therapy' reach the level of severity that is required to trigger the protection of the prohibition of degrading treatment in law?

Let us examine some examples of the type of degradation prohibited by Article 3 ECHR. Consider the case of *Bouyid*, where the ECtHR held that one slap by a police officer to the face of someone in custody constituted degrading treatment, even though the victim did not experience serious physical or mental suffering.[40] The ECtHR stressed that whenever persons are deprived of their liberty they are in 'a situation of vulnerability'.[41] Vulnerability here is a 'context-sensitive' judgment that reflects the dependency and relative powerlessness of individuals in custody.[42] In that context, the authorities are under a duty to protect them[43] and any recourse to violence which has not been strictly necessary 'diminishes human dignity and is, in principle, an infringement of […] Article 3.'[44] Under those circumstances, even one slap to the face of a person constitutes a 'serious attack on the individual's dignity'.[45] The ECtHR added two more specific reasons for that finding. Firstly, a slap to the face 'affects the part of the person's body which expresses his individuality, manifests his social identity and constitutes the centre of his senses – sight, speech and hearing – which are used for

[40] *Bouyid v Belgium*, Application No. 23380/09, 28 September 2015 (Grand Chamber) para 112.
[41] ibid para 107. The vulnerability of an applicant is an aggravating factor when assessing whether ill-treatment is severe enough to fall under Article 3. See L. Peroni and A. Timmer, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law' (2013) 11 I•CON 1056.
[42] C. Heri, 'Shaping Coercive Obligations through Vulnerability: The Example of the ECtHR' in L. Lavrysen and N. Mavronicola (eds), *Coercive Human Rights: Positive Duties to Mobilise the Criminal Law under the ECHR* (Hart 2020) 93-116; A. Timmer, 'A Quiet Revolution: Vulnerability in the European Court of Human Rights' in M. A. Fineman and A. Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate 2013) 162-164.
[43] *Bouyid* (n 40) para 107.
[44] ibid paras 88 and 100.
[45] ibid para 103.

communication with others.'[46] A slap to the face is therefore a particularly acute form of disrespect for the equal moral personhood of the other. Secondly, the officers were in a superior position and had power over the applicants when they slapped them. When such a power imbalance exists, even a single slap degrades the person – it puts him down. It expresses that the victim counts for less; that he is powerless under the control of law-enforcement officers and is morally inferior to them.[47]

Thus, looking closely at *Bouyid*, an act is degrading when it satisfies two conditions. Firstly, to degrade is to treat others in ways that express disrespect for their equal moral worth. Treating others as if they are objects rather than human persons or denying others the minimum requirements of personal autonomy and self-respect is incompatible with the inherent dignity of persons.[48] Secondly, to degrade also requires that the person or entity acting has sufficient power or status to put others down.[49] Those two conditions track the close links between degrading treatment and dignity in our moral vocabulary. It is important to investigate further though whether, when those two conditions are satisfied, an act can be classed as degrading under Article 3 ECHR even in the absence of material effects on the victims.[50] Let us consider some more examples.

The links between degrading treatment and human dignity also emerge in *Identoba*.[51] In *Identoba* the ECtHR found a violation of Article 3, taken in conjunction with the prohibition of discrimination under Article 14, because the state authorities failed to provide adequate protection to LGBT citizens during their peaceful march on the International Day Against Homophobia.[52] Because of inadequate police intervention, the LGBT demonstrators were subject to homophobic aggression and verbal abuse by counter-demonstrators. LGBT flags and posters were ripped apart; a big mob surrounded the demonstrators, called them 'faggots' and 'perverts', and threatened to 'crush' them and 'burn them to death'.[53]

Similarly to *Bouyid*, *Identoba* shows that the classification of a treatment as 'degrading' under Article 3 is not contingent on its effects on the victims. Even absent any physical injury or serious mental suffering, ill-treatment can still be classed as 'degrading' if it amounts to an 'affront to human dignity'.[54] *Identoba* is a good example of that. What proved significant in this case was that the recipients of the aggression were in a precarious position because of widespread homophobic prejudice against them.[55] It was in this context that the homophobic

[46] ibid para 104.
[47] ibid para 106.
[48] In *Bouyid*, the ECtHR emphasises the 'strong link' between human dignity and degrading treatment, and that even in the absence of 'actual bodily injury or intense physical or mental suffering' treatment showing 'a lack of respect for or diminishing human dignity' may be classed as degrading. See *Bouyid* (n 40) paras 87 and 90. See also N. Mavronicola, 'Bouyid and Dignity's Role in Article 3 ECHR' *Strasbourg Observers*, 8 October 2015 <https://strasbourgobservers.com/2015/10/08/bouyid-and-dignitys-role-in-article-3-echr/>.
[49] Hellman (n 29) 34-58; J. Hampton, 'Forgiveness, Resentment and Hatred', in J. G. Murphy and J. Hampton (eds), *Forgiveness and Mercy* (CUP 1988) 52.
[50] The ECtHR suggests so in *Bouyid* (n 40) para 87.
[51] *Identoba and Others v Georgia*, Application no. 73235/12, 12 May 2015, para 71.
[52] The police authorities had been informed 'well in advance' of the LGBT community's intention to hold a march in the centre of Tbilisi on 17 March 2012. See ibid para 72.
[53] ibid paras 69 and 70.
[54] ibid para 65. Also, *Eremia v the Republic of Moldova*, Application No. 3564/11, 28 May 2013, para 54; and *Gäfgen v. Germany*, Application No. 22978/05, 1 June 2010 (Grand Chamber) para 103.
[55] *Identoba* (n 51) paras 68 and 70.

and transphobic abuse that they experienced had the effect of arousing feelings of fear, anguish and insecurity that were incompatible with their dignity.[56] In such circumstances

> the question of whether or not some of the applicants sustained physical injuries of certain gravity becomes less relevant. All of the thirteen individual applicants became the target of hate speech and aggressive behaviour […] Given that they were surrounded by an angry mob that outnumbered them and was uttering death threats and randomly resorting to physical assaults, demonstrating the reality of the threats, and that *a clearly distinguishable homophobic bias played the role of an aggravating factor* […], the situation was already one of intense fear and anxiety. The aim of that verbal – and sporadically physical – abuse was evidently to frighten the applicants so that they would desist from their public expression of support for the LGBT community.[57] (emphasis added)

So, wrongful discrimination is an aggravating factor when considering whether ill-treatment reaches the threshold set by Article 3.[58] The ECtHR has reiterated this principle in *M.C. and A.C.*,[59] and in *Aghdgomelashvili*,[60] both of which, similarly to *Identoba*, involved ill-treatment that was motivated by homophobic and/or transphobic hatred. In *Oganezova*, the ECtHR found a violation of Article 3 in conjunction with Article 14 ECHR in a case involving a sustained and aggressive homophobic campaign against an LGBT activist, including an arson attack against the community club she ran.[61] The applicant did not suffer actual physical injury.[62] However, that was not decisive.[63] Against the background of sustained homophobic harassment against the applicant, which took place in a context of widespread 'negative attitudes' towards the LGBT community in Armenia, the ECtHR found that her ill-treatment must have aroused in her 'feelings of fear, anguish and insecurity which were not compatible with respect for her human dignity and, therefore, reached the threshold of severity within the meaning of Article 3 of the Convention taken in conjunction with Article 14.'[64]

What those cases clearly show is that wrongful direct discrimination plays a key role in the determination of whether an instance of ill-treatment falls within the scope of Article 3 ECHR. Even instances of ill-treatment that do not cause intense physical or psychological suffering can find themselves into the scope of Article 3 ECHR whenever the aim behind them was to discriminate.[65] Notably, those links between discrimination and degrading treatment mirror the interpretation of the prohibition of torture or CIDT by the CAT, which has

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[56] ibid.
[57] *Identoba* (n 51) para 70.
[58] ibid para 67. Also *Begheluri and Others*, Application No. 28490/02, 7 October 2014, para 173.
[59] *M.C. and A.C. v Romania*, Application No. 12060/12, 12 June 2016, paras 116–118.
[60] *Aghdgomelashvili and Japaridze v Georgia*, Application No. 7224/11, 8 October 2020, paras 44 and 48–49.
[61] *Oganezova v Armenia*, Application No. 71367/12, 17 May 2022.
[62] Ibid at para 88.
[63] Ibid. at para 95.
[64] Ibid.
[65] *Identoba* (n 51) para 65. The ECtHR has repeatedly held that racial discrimination is a 'special affront to human dignity' and can as such amount to degrading treatment under Article 3. See *Moldovan v Romania*, Application No. 41138/98, 12 July 2005, para 110; *Nachova and Others v Bulgaria*, Application Nos. 43577/98 and 43579/98), 6 July 2005 (Grand Chamber), para 145.

emphasised that the discriminatory use of violence is a determining factor in the classification of an act as torture or CIDT.[66]

Sometimes wrongful discrimination may be in itself so severe as to constitute an 'affront' to human dignity in violation of Article 3.[67] An early example comes from the decision of the European Commission of Human Rights in *East African Asians*.[68] The case involved the re-imposition of immigration control on the citizens of the UK and Colonies coming from East Africa, who were henceforth not able to enter 'the only State of which they were citizens – the United Kingdom'.[69] A combination of two factors led the Commission to conclude that the discrimination they suffered amounted to degrading treatment. Firstly, differential treatment on the basis of race constitutes 'a special form of affront to human dignity'.[70] Secondly, the applicants were 'publicly' disadvantaged by discriminatory legislation. The public nature of the measures against them was an additional 'aggravating' factor when assessing whether discrimination constitutes degrading treatment under Article 3.[71] Similarly, in *Cyprus v Turkey* the ECtHR held that Greek Cypriots living in northern Cyprus suffered severe discriminatory restrictions on the grounds of ethnic origin, race and religion.[72] Once again, because of the grounds on which they were discriminated against *and* because their suffered discrimination was 'public' (i.e. induced by the state[73]), the ECtHR held that it amounted to degrading treatment. A closer look at those two factors, i.e. the ground of discrimination and its 'public nature', is crucial to understand when discrimination can be severe enough to constitute an 'affront' to human dignity and therefore violate Article 3.

Firstly, for the purposes of 'conversion therapy', is sexual orientation discrimination a 'special' affront to human dignity like racial discrimination? After years of evolution, the jurisprudence of the ECtHR suggests that the answer is now yes. Sexual orientation concerns 'a most intimate'[74] and 'vulnerable'[75] aspect of life. Any differential treatment based on sexual orientation requires 'very weighty reasons' to be justified.[76] In *Smith and Grady* the ECtHR held that treatment grounded on 'a predisposed bias on the part of a heterosexual majority against a homosexual minority' may, in principle, fall within the scope of Article 3.[77] An example of sexual orientation discrimination that amounted to degrading treatment under Article 3 comes from *X v Turkey*.[78] In *X*, the prison authorities placed an inmate in solitary confinement because they assumed that his sexual orientation put him at risk of harm from other inmates. No risk assessment was carried out and no explanation was given as to why the

[66] UN Committee Against Torture, *General Comment No. 2*, 24 January 2008, CAT/C/GC/2, paras 20–21. Discrimination also features in the definition of torture in Art 1 CAT.
[67] See e.g. *Oganezova*, n 61 above, at para. 80.
[68] *East African Asians v United Kingdom* (1981) 3 EHRR 76.
[69] ibid para 196.
[70] ibid para 207.
[71] ibid para 208.
[72] *Cyprus v Turkey*, Application No. 25781/94, 10 May 2001, paras 306–309.
[73] ibid paras 245 and 292–293.
[74] *Dudgeon v United Kingdom*, Application No. 7525/76, 22 October 1981 (Grand Chamber) para 52.
[75] *X v Turkey*, Application No. 24626/09, 27 May 2013.
[76] *Vallianatos and Others v Greece*, Application Nos. 29381/09 and 32684/09, 7 November 2013 (Grand Chamber) para 77.
[77] *Smith and Grady v United Kingdom*, Application Nos. 33985/96 and 33986/96, 27 September 1999, para 121.
[78] *X v Turkey* (n 75).

applicant was deprived of even limited access to outdoor activities.[79] The ECtHR held that placing the applicant in solitary confinement – a measure reserved for inmates, unlike the applicant, charged with violent offences[80] – without adequate justification was a degrading form of sexual orientation discrimination.[81]

Cases like *X*, *Identoba*, and *Oganezova* bring discrimination on the grounds of sexual orientation or gender identity in line with the earlier discussed cases on racial discrimination: they confirm that, under certain circumstances, wrongful direct discrimination is a special affront to human dignity in violation of Article 3.[82] When state authorities abuse LGBTQ+ people, or when they refuse or systematically fail to protect them from abuse that they knew or ought to have known about, that is a degrading form of direct discrimination. As such, even absent any serious material effects on the victims,[83] it violates the substantive limb of Article 3 read together with Article 14 ECHR. This principle rightly reflects the well-established links between discrimination and degrading treatment in international human rights law. For instance, as the UN High Commissioner for Human Rights has argued, sexual orientation discrimination can dehumanise its victims, which is often a necessary condition for torture and ill-treatment to occur.[84]

Secondly, we saw that the 'public nature' of discrimination is an aggravating factor when assessing whether discrimination is severe enough to fall under Article 3.[85] This factor reflects the interrelation of control and powerlessness, which is salient in the ECtHR's interpretation of degrading treatment.[86] Cases like *East African Asians* and *Cyprus v Turkey*, where the government institutionalises discrimination, are paradigms of some persons being openly treated as 'objects' in the power of the authorities.[87] In other cases, like *Identoba*, *M.C.*, *Aghdgomelashvili* and *Oganezova*, questions of abuse of power emerge again, albeit in a different fashion. When the state authorities systematically fail to prevent or investigate hatred-induced violence towards LGBTQ+ people that they knew or ought to have known about, they undermine public confidence in the state duty to keep everyone physically and morally secure.[88] Moral security depends on having one's moral standing recognised as a limitation to

[79] ibid para 56.
[80] ibid para 53.
[81] ibid para 57.
[82] P. Johnson and S. Falcetta, 'Sexual Orientation Discrimination and Article 3 of the European Convention on Human Rights: Developing the Protection of Sexual Minorities' (2018) 43(2) ELR 167, 175–176.
[83] *Identoba* (n 51) para 70; *MC* (n 59) paras 117–119.
[84] UN Human Rights Council, *Annual Report of the United Nations High Commissioner for Human Rights: Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on their Sexual Orientation and Gender Identity*, 19th Session, 17 November 2011, A/HRC/19/41, para 34.
[85] Of course, being an aggravating factor, the 'public nature' factor is neither necessary nor sufficient to find a case of discrimination in violation of Article 3. See e.g. *Lyalyakin v Russia*, Application No. 31305/09, 12 March 2015, para 69; *Svinarenko and Slyadnev v Russia*, Application Nos. 32541/08 and 43441/08, 17 July 2014 (Grand Chamber) para 115.
[86] The approach of the ECtHR is similar to the approach of the UN CAT in this regard. See UN General Assembly, *Extra-Custodial Use of Force and the Prohibition of Torture and Other Cruel, Inhuman or Degrading Treatment*, 20 July 2017, A/72/178.
[87] *Tyrer v United Kingdom*, Application No. 5856/72, 25 April 1978, para 33.
[88] In cases involving the rights of transgender people, the ECtHR has held that respect for dignity requires the protection of moral security. See *Van Kück v Germany*, Application No. 35869/97, 12 June 2003, para 69; *I. v United Kingdom*, Application No. 25680/94, 11 July 2002, para 70; *Christine Goodwin v United Kingdom*, Application No. 28957/95, 11 June 2002, para 90.

what may legitimately be done to them, and that their welfare is treated as morally important by the state.[89] When a protected group is already the target of prejudice, the failure of the authorities to offer them reasonable protection is a paradigmatic affront to their moral standing – it stamps them with a badge of inferiority.

Some of the most egregious forms of direct discrimination degrade their victims precisely because of the open way that they deny them profoundly important autonomy interests[90] and self-respect.[91] This reason might not hold in cases involving non-intentional or indirect forms of discrimination, where the psychological suffering and stigma might be somewhat less.[92] As a result, those would be captured only by Article 14 and not by Article 3 ECHR. Thus, this analysis does not suggest that wrongful discrimination always amounts to degrading treatment under Article 3. An interpretive judgment, similar to what these pages offer, is required to determine if an instance of discrimination spawns the type of serious degradation prohibited by the provision. Apart from the ground of discrimination, another factor affecting this interpretive judgment is its 'public nature'; although, as we saw, 'public' discrimination does not require that discrimination is widely publicised.[93] The 'public nature' factor is just another way of expressing a paradigm feature of degradation, namely that it rests on a significant disparity in power between two parties. It is because of that power disparity that an action degrades rather than merely insults others.

One final caveat before moving on. The power or status disparity in degrading treatment does not require that ill-treatment is forced on an individual. Although this is often the case, e.g. when ill-treatment occurs in custody, the requirement for a power/status disparity does not extinguish the possibility for individual voluntary action. In cases like *Identoba*, *Oganezova*, *M.C. and Aghdgomelashvili*, the emphasis of the Court's interpretation is not on whether the ill-treatment in question was forced on the applicants. The emphasis was on the circumstances of widespread prejudice under which individuals were ill-treated and on the fact that, under *those* circumstances, state authorities either outright abused, or refused to provide reasonable protection to, the individuals in question.[94] So, as discussed earlier, although consent is not irrelevant in determining whether conduct amounts to degrading treatment, focusing *only* on individual consent detracts from an evaluation of the background conditions in which ill-treatment was inflicted. Those background conditions have independent moral significance, which stems from the aim of the prohibition of degrading treatment to protect individuals from serious violations of human dignity.

To recap, an act is degrading if it expresses the unequal moral worth of the other *and* if the person acting occupies a position of power over the victim such that their actions can put the other down. This explains why direct discrimination on the grounds of sexual orientation and gender identity can sometimes amount to degrading treatment under Article 3. Before

[89] J. Wolfendale, 'Moral Security' (2017) 25 J Pol Phil 238, 244. Also C. Nikolaidis, 'Unravelling the Knot of Equality and Privacy in the European Court of Human Rights and the US Supreme Court: From *Isonomia* to *Isotimia*' [2018] HRLR 719, 736.
[90] G. C. Lury, *The Anatomy of Racial Inequality* (Harvard UP 2002) 58.
[91] T. Khaitan, *A Theory of Discrimination Law* (OUP 2015) 126-128; S. Bagenstos, "Rational Discrimination", Accommodation, and the Politics of (Disability) Civil Rights' (2003) 89 Va L Rev 825.
[92] S. Moreau, 'What is Discrimination' (2010) 38(2) Philos Public Aff 143, 177-178.
[93] On the contrary, degrading discrimination can take place in a prison, see e.g. *X v Turkey* (n 75).
[94] ibid paras 72–73.

examining if 'conversion therapy' fulfils those conditions of degradation, two final issues need addressing: firstly, whether the wrongness of a degrading act depends on the intentions of the wrongdoer; and, secondly, whether it depends on its subjective perception by the victim or others.

In response to the first question, the wrongness of degrading treatment depends on the objective meaning carried by it rather than the mental state of the wrongdoer. A slap to the face of a person has a different, i.e. degrading, social significance when it happens in a police station rather than outside a pub. Failing to offer reasonable protection to vulnerable people from predictable hatred-induced violence has degrading meaning when we talk about the state authorities rather than one's next door neighbours. The condition that degrading treatment must express that the other is not of equal moral worth is satisfied depending on the social or conventional meaning of the conduct. Thus, the intentions of the wrongdoer are not decisive for whether an act is degrading. This objective-meaning interpretation of degrading treatment emerges clearly in the case-law of the ECtHR. The ECtHR has repeatedly held that the intention to debase or humiliate is not a necessary condition of degrading treatment.[95] A finding of degrading treatment is possible even when the intention to degrade is absent. In *Gäfgen*, the officers who threatened to torture the applicant claimed that they were trying to save a child's life.[96] Yet their motives made no difference to the Court's assessment, which was that torture or degrading treatment cannot be justified 'even in circumstances where the life of an individual is at risk.'[97]

As for the second question, since what determines whether an act is degrading is its meaning in a particular social context, the emphasis is not on how the victim experienced their ill-treatment. This might appear counter-intuitive because the word 'degrading' focuses on the impact of an act on its victim. Starting from *Ireland v UK*,[98] the ECtHR often reiterates that a treatment is degrading if it arouses in its victim 'feelings of fear, anguish and inferiority capable of humiliating and debasing them.'[99] In other cases, the ECtHR stresses that degrading treatment goes beyond the inevitable element of humiliation arising from 'legitimate punishment'[100] or 'mandatory military service.'[101] These terms denote that the subjective experience of ill-treatment is central to its wrongness.

That is not the only available interpretation though. The focus of degrading treatment on its impact on the victims does not mean that the term refers to their subjective experience.[102] It refers to what happens to the person in relation to an objective standard of dignity, i.e. that each person is entitled to be treated as a moral equal. In the hypothetical scenario that the applicants in *Bouyid* thought that they deserved being slapped whilst in custody, their treatment would still be degrading. That is why the ECtHR has held that although treatment can be degrading

[95] *Svinarenko* (n 85) para 114; *V v United Kingdom*, Application No. 24888/94, 16 December 1999 (Grand Chamber) para 71.
[96] *Gäfgen* (n 54) para 107.
[97] ibid
[98] *Ireland v United Kingdom*, 18 January 1978, 2 EHRR 25, para 167.
[99] *Tysiąc v Poland*, Application No. 5410/03, 20 March 2007, para 67.
[100] *Lyalyakin* (n 85) para 69.
[101] *Chember v Russia*, Application No. 7188/03, 3 July 2008, para 49.
[102] In the jurisprudence of the ECtHR degradation is closer to being demeaned, in the sense that the person wronged does not have to feel that their moral status has been lowered. See Hampton (n 49) 44-45.

when it humiliates, humiliation per se is not a necessary condition of degrading treatment.[103] Nor is it necessary to be humiliated in the eyes of others.[104] A homophobic crowd might not think that it is humiliating for LGBTQ+ people to be publicly abused while police are standing by – as it happened in *Identoba*. But insofar as the police inaction expresses the unequal moral worth of the LGBTQ+ people in question, their inaction is degrading.

So far, it was argued that the ECtHR uses the word 'degrading' as an evaluative term. This section sketched answers to two key components of the complex interpretive judgments that are necessary to flesh out degrading treatment. Firstly, it was argued that an action is degrading if it expresses the unequal moral worth of the victim and if the person acting has power over the victim such that their actions can put the other down. It is for this reason that certain instances of direct discrimination amount to degrading treatment. Secondly, it was argued that neither the intentions of the wrongdoer nor the subjective perception of the victim determines whether an act is degrading.

IV. POSITIVE STATE OBLIGATIONS

So far it was argued that an act is degrading if it expresses the unequal moral worth of the other and if the wrongdoer has sufficient power over the victim. Wrongful discrimination is a key aggravating factor in this context. It is arguable that all forms of 'conversion therapy' – not just its 'physical' or forcible forms – fulfil those two conditions of degradation. Treating LGBTQ+ people as though they are of less value is an intrinsic feature of 'conversion therapy'. Every form of the practice manifests contempt for LGBTQ+ identities. That contempt is acted upon through a pseudo-'therapeutic' practice that seriously violates the dignity of LGBTQ+ people by brazenly disrespecting the equal value of their autonomy, health and wellbeing – and by putting them at real risk of grave harm because of their sexuality or gender identity.

It is worth reiterating that 'conversion therapy' is an affront to human dignity regardless of whether any LGBTQ+ persons that go through it get *actually* physically or mentally harmed by it. Physical or mental harm aside, 'conversion therapy' is inherently degrading for its victims and survivors – and for LGBTQ+ people more broadly – because it contemptuously disregards the interests and welfare of LGBTQ+ people.[105] Even when not stated explicitly, the degrading message of 'conversion therapy' is intelligible to its recipients because it reflects and repeats a widely understood message, which is that heterosexual and cisgender identities are 'normal' and desirable, whereas other gender identities or expressions of sexuality are not. This message is intelligible to its recipients because *they* are part of the same community of shared meanings as those who try to 'convert' them. That is why 'conversion therapy' is degrading even when

[103] *Poltoratskiy v Ukraine*, Application No. 38812/97, 29 April 2003, para 131.
[104] As the ECtHR held in *M.S.S.* it 'may well suffice that the victim is humiliated in his own eyes, even if not in the eyes of others'. *M.S.S. v Belgium and Greece*, Application No. 30696/09, 21 January 2011 (Grand Chamber) para 220.
[105] Expressive harms can directly injure, and function differently from ideological or purely subjective injuries. 'Expressive Harms and Standing' (1999) 112(6) Harvard L Rev 1313; R. H. Pildes and R. G. Niemi, 'Expressive Harms, "Bizarre Districts", and Voting Rights: Evaluating Election-District Appearances After *Shaw v Reno*' (1993) 92 Mich L Rev 483.

that was not the intention of the 'therapy' provider or how it was conceived by the individual victims.[106]

The expressive harms of 'conversion therapy' encapsulate some of the practice's most profound yet predictable consequences for the interests of its victims. However, it is important to remember that the message conveyed by 'conversion therapy' is not the source of why the practice is wrong. As we saw, 'conversion therapy' is inherently incompatible with the sense of self-worth that we associate with dignity. Self-worth requires that a person is secure in their identity as an individual, including as a member of those communities with which they identify. 'Conversion therapy' eradicates this sense of self-worth. Its aim is to limit the options of LGBTQ+ persons in some of the most valuable and intimate spheres of life. The freedoms 'conversion therapy' brazenly denies would not be denied to a heterosexual cisgender person. Therefore, 'conversion therapy' treats LGBTQ+ people as if they are not of equal moral worth to heterosexual cisgender persons, as if they are second-class. Put otherwise, 'conversion therapy' is degrading *because* it discounts the interests of LGBTQ+ people absent any good reason for doing so. Its degrading character results from the way it wrongs individuals – and this chapter's respect-based account offers a plausible explanation of that wrong.

Recall though that a degrading act also requires that its perpetrator has sufficient power or status over the recipient of ill-treatment. 'Conversion therapy' fulfils that condition too. A significant power imbalance is inherent in the practice. 'Conversion therapy' is typically offered by members of established social institutions, such as faith groups or medical experts, who hold greater power or status in relation to individual victims. The last part of this edited collection includes chapters written by survivors of 'conversion therapy'. All of them point to the significant disparity of status between the religious actors, doctors, psychotherapists etc. who act as the 'enlightened' 'therapy'-providers over the benighted 'converts'.[107] It is through this disparity of power or status that the disrespect expressed by 'conversion therapy' does not just insult its victims but degrades them.

So, to sum up, all forms of 'conversion therapy' amount at a minimum to degrading treatment, and therefore violate the ECHR and UK human rights law, because all combine disrespect for the equal moral worth of LGBTQ+ persons with a significant imbalance of power or status between the parties involved. As such, all forms of 'conversion therapy' should be absolutely prohibited, and no consequentialist reasoning provided by the state or others can justify them. Where particular forms of 'conversion therapy' sit on the scale of Article 3 ECHR, i.e. whether particular 'therapies' constitute torture rather than degrading treatment, would depend on their deliberateness, the involvement of state agents, their specific purpose and the status of the victim in the context of the case.[108]

This chapter grounds the wrongfulness of 'conversion therapy' on its basic disrespect for the equal moral value of LGBTQ+ people. However, my account should not be taken to suggest

[106] Subordinated groups do not choose the social meanings imposed on them by society's institutions, such as religious groups or medical experts. L. Melling, 'Religious Refusals to Public Accommodations Laws: Four Reasons to Say No' (2015) 38 Harvard J L & Gender 177; M. Lim and L. Melling, 'Inconvenience or Indignity? Religious Exemptions to Public Accommodations Laws' (2014) 22(2) J L and Pol'y 705.
[107] Practices So-Called "Conversion Therapy" (n 13) at 16.
[108] See e.g. N. Mavronicola, *Torture, Inhumanity and Degradation under Article 3 of the ECHR: Absolute Rights and Absolute Wrongs* (Hart 2021) Ch 3; M. Nowak and E. McArthur, 'The Distinction Between Torture and Cruel, Inhuman or Degrading Treatment' (2006) 16(3) *Torture* 147.

that the deleterious consequences of 'conversion therapy' for the health and wellbeing of LGBTQ+ persons do not matter. On the contrary, the reasons why all forms of 'conversion therapy' amount at a minimum to degrading treatment are at least partly determined by its predictable consequences for the interests of its victims.[109] That is clearly reflected in international human rights law. According to the Yogyakarta Principles, states are under an obligation to prohibit all forms of 'conversion therapy'.[110] This obligation flows from the absolute prohibition of torture or CIDT in international human rights law. The concluding observations of the UN Committee Against Torture (CAT) on two recent state periodic reports confirm this. Commenting on the seventh periodic report of Ecuador, the CAT called on the state to close all private centres where such 'therapies' are practiced and hold anyone involved into account.[111] Similarly, in its concluding observations on the fifth periodic report of China, the CAT expressed concern about reports that private and state clinics offered 'conversion therapy', including 'involuntary confinement in psychiatric facilities'.[112] Although in 2014 a Beijing court ordered one such clinic to pay compensation to a victim, the CAT criticised China's 'failure to clarify whether such practices are prohibited by law, have been investigated and ended, and whether the victims have received redress'.[113] The CAT stressed that China should ban 'conversion therapies', as well as all other 'forced, involuntary or otherwise coercive or abusive treatments' against LGBTQ+ people.[114] This last point is crucial because it shows that the CAT attaches little significance to individual consent to such 'therapies': states are under a duty to outlaw all 'abusive treatments' targeting LGBTQ+ people rather than just forcible 'conversion therapy'.[115]

Moving back to the ECHR, it is clear that public authorities must not engage in the provision of 'conversion therapy' because that would violate Article 3 ECHR. This is not the end of the matter though. Article 3 generates a range of positive state duties, out of which two are particularly important here.[116] The first is the general, or framework, state duty to set up an effective system deterring and punishing acts of ill-treatment, backed up by enforcement

[109] So, legal intervention against 'conversion therapy' is justified, at least in part, by appeal to the states of affairs it promotes. This (broadly) consequentialist view differs to rule utilitarianism because it is unconcerned with benefit maximisation. See T. M. Scanlon, 'Rights, Goals and Fairness', in T. M. Scanlon (ed), *The Difficulty of Tolerance* (CUP 2003) 33-39.

[110] The Yogyakarta Principles Plus 10, Principle 10 E. Although the Yogyakarta Principles are not legally binding, they are highly influential as they remain the most comprehensive identification of state human rights obligations in relation to sexual orientation and gender identity. See M. O'Flaherty and J. Fisher, 'Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles' (2008) 8(2) HRLR 207, 237-247.

[111] UN Committee Against Torture, *Concluding Observations on the Seventh Periodic Report of Ecuador*, CAT/C/ECU/CO/7, 11 January 2017, para 49.

[112] UN Committee Against Torture, *Concluding Observations on the Fifth Periodic Report of China*, CAT/C/CHN/CO/5, 3 February 2016, para 55.

[113] ibid

[114] ibid para 56.

[115] ibid. Also UN Human Rights Council, *Annual Report of the United Nations High Commissioner for Human Rights: Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on their Sexual Orientation and Gender Identity*, 19th Session, 17 November 2011, A/HRC/19/41, para 56.

[116] Apart from 'framework' and operational positive duties, Article 3 ECHR also gives rise to investigative duties. Those fall outside the scope of this chapter.

mechanisms for the prevention, suppression and punishment of breaches.[117] This framework duty extends to ill-treatment administered by private actors.[118] The second is the more specific positive state duty to take operational measures when the authorities knew or ought to have known at the time of the existence of a real and immediate risk of ill-treatment against identified individuals from the acts of a third party.[119] While the negative duty not to engage in torture or CIDT is absolute, the positive obligations arising from the prohibition are capable of modification on grounds of proportionality. That is, they must be interpreted in ways that do not impose a disproportionate burden on the authorities,[120] and there is also latitude as to how they can be fulfilled.

One important point on the operational duties arising from Article 3. As CEDAW has noted, the requirement for an immediate risk of ill-treatment, which can be traced back to *Osman*,[121] is problematic in cases of gender-based violence or abuse.[122] This is because that requirement prevents capturing cases where successive episodes of gender-based violence against specific individuals or groups do show that the risk of ill-treatment is real, but where the wrongdoer is not in the direct vicinity of the victim. Drawing on CEDAW's work, in *Volodina* the ECtHR tacitly accepted that in cases of gender-based violence the standard against which operational state duties are assessed spans a wider window of time, starting from when the risk of ill-treatment is real, even if not imminent.[123] For that reason, states must carefully consider the particular context of the case including any past history of violence.[124] As Judge Pinto de Albuquerque argued, that standard is satisfied if the authorities know or ought to know that a specific group of people is subject to repeated abuse.[125] It is posited that for exactly those reasons, that amended standard of assessment of operational state duties under Article 3 is fully applicable to recurring violent or abusive practices based on sexual orientation or gender identity, such as 'conversion therapy'.[126]

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[117] See e.g. *Đorđević v Croatia*, Application No. 41526/10, 24 July 2012, para 138; *Beganović v Croatia*, Application No. 46423/06, 25 June 2009, para 71; *Nachova* (n 65) para 96; *A v United Kingdom* (1998) 27 EHRR 611, para 22.

[118] *Šečić v Croatia*, Application No. 40116/02, 31 May 2007, para 53; *Moldovan and Others v Romania*, Application Nos. 41138/98 and 64320/01, 12 July 2005, para 98; *M.C. v Bulgaria*, Application No. 39272/98, 4 December 2003, para 151. See also *Gezer v Secretary of State for the Home Department* [2004] EWCA Civ 1730, [2005] HRLR 7. See also, *mutatis mutandis*, *Commissioner of Police of the Metropolis v DSD* [2018] UKSC 11, [2019] AC 196 per Lord Neuberger at [88].

[119] *Osman v United Kingdom*, Application No. 23452/94, 28 October 1998 (Grand Chamber) para 116. On the application of the *Osman* test in the context of Article 3 see *Đorđević* (n 117); also *Z and Others v United Kingdom*, Application No. 29392/95, 10 May 2001 (Grand Chamber) para 255. The UK courts apply the *Osman* test in cases involving complaints under Article 3. See *DSD* (n 167) per Lord Neuberger paras 92–98; *R (Munjaz) v Ashworth Hospital Authority* [2005] UKHL 58, [2006] 2 AC 148 paras 78–80.

[120] *Đorđević* (n 117) para 139.

[121] *Osman* (n 119) para 116.

[122] UN Committee on the Elimination of Discrimination Against Women, *V.K. v Bulgaria*, Communication No. 20/2008, 15 October 2008, para 9.8.

[123] *Volodina v Russia*, Application No. 41261/17, 9 July 2019, para 86.

[124] ibid.

[125] Separate opinion of Judge Pinto de Albuquerque, in *Volodina* (n 123) para 12.

[126] This is congenial to the presumption set in *Re E*, namely that the authorities knew or ought to have known about the existence of a real risk of ill-treatment whenever a breach has occurred, and then recurred, over a period of time. See *Re E v Chief Constable of the Royal Ulster Constabulary and another* [2008] UKHL 66, [2009] 1 AC 536.

With this amendment to operational state duties in mind, let us go back to the framework state duty under Article 3. Recall that the framework duty refers to the primary state obligation to take legal measures designed to ensure that individuals are not subjected to proscribed ill-treatment – including ill-treatment administered by private individuals. Let us focus on how this framework duty applies to 'conversion therapy'. The framework duty under Article 3 often translates to a state duty to mobilise the criminal law against proscribed forms of ill-treatment. We must be careful here though because although criminal law is typically presumed to be an effective tool of deterrence and retribution,[127] widening the web of criminalisation in the name of human rights protection carries significant risks.[128] Criminalisation as part of the framework duty under Article 3 has emerged in a wide range of cases including rape;[129] sexual abuse of minors;[130] disproportionate police violence;[131] ill-treatment in custody;[132] and domestic violence.[133] The reasons behind the state duty to criminalise certain forms of ill-treatment are not always entirely clear.[134] For instance, although the examples above involve physical abuse, the ECtHR has also justified the need for criminal law protection based on the argument that degrading treatment seriously affects human dignity and psychological wellbeing,[135] regardless of whether injuries of a certain degree of severity have been inflicted.[136]

So, does the framework duty under Article 3 require criminal law protection against 'conversion therapy'? For the reasons discussed earlier, all forms of 'conversion therapy' attain the minimum level of severity to trigger the applicability of Article 3 because all amount to a serious violation of human dignity: they directly discriminate against LGBTQ+ people by placing their physical and mental health at real risk of grave harm; and they can arouse in their victims feelings of fear, anguish and inferiority capable of debasing them.[137] On that account, and applying *Volodina* and *Myumyun* by analogy,[138] the positive framework state duty under Article 3 can justify the criminalisation of the provision of all forms of 'conversion therapy'.[139]

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[127] For a critical appraisal of this presumption see L. Lazarus, 'Positive Obligations and Criminal Justice: Duties to Protect or Coerce', in L. Zadner and J. Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice* (OUP 2012) 135-157; F. Tulkens, 'The Paradoxical Relationship between Criminal Law and Human Rights' (2011) 9 JICJ 577.

[128] N. Mavronicola, 'Coercive Overrech, Dilution and Diversion: Potential Dangers of Aligning Human Rights Protection with Criminal Law (Enforcement)', in L. Lavrysen and N. Mavronicola (eds), *Coercive Human Rights: Positive Duties to Mobilise the Criminal Law under the ECHR* (Hart 2020) 183-202.

[129] *M.C. v Bulgaria* (n 118) para 166; *X and Y v The Netherlands*, Application No. 8978/80, 26 March 1985.

[130] *M and C v Romania*, Application No. 29032/04, 27 September 2011.

[131] *Cestaro* (n 6) para 225.

[132] *Myumyun v Bulgaria*, Application No. 67258/13, 3 November 2015, para 77.

[133] *Volodina* (n 123) para 81.

[134] L. Lavrysen, 'Positive Obligations and the Criminal Law: A Bird's-Eye View on the Case Law of the European Court of Human Rights', in L. Lavrysen and N. Mavronicola (eds), *Coercive Human Rights: Positive Duties to Mobilise the Criminal Law under the ECHR* (Hart 2020) 29-55, 43.

[135] *Myumyun* (n 132) para 74.

[136] *Volodina* (n 123) para 81.

[137] That is enough for a treatment to qualify as 'degrading' under Art 3 ECHR. See *Identoba* (n 51) para 65.

[138] See n 123 and n 132.

[139] Malta, for instance, has criminalised the provision of 'conversion therapy'. Specifically in the UK, the authorities cannot claim that they were unaware of the risks of 'conversion therapy'. The 2018 National LGBT Survey showed that significant numbers of LGBTQ+ people have been offered 'conversion therapy'. See See UK Government Equalities Office, *National LGBT Survey: Research Report* (July 2018) 33 and 83-92. In addition, in 2017, the leading medical professional bodies in the UK, including NHS England and NHS Scotland, signed a Memorandum of Understanding on ending 'conversion therapy'; see BACP (n 13) para 3.

Simply put, states must legally ban 'conversion therapy', and they can choose to do so through criminal law. What the framework duty under Article 3 requires is legal provisions that are sufficiently tailored to the human rights offence concerned. So, other options of legal action against 'conversion therapy', such as civil means of redress, could also be used. In fact, as later chapters of this edited collection argue, it might well be that civil means of redress are preferable against certain forms of 'conversion therapy'.[140]

V. CONCLUSION

This chapter argued that 'conversion therapy' is wrong because it disrespects the equal moral value of LGBTQ+ persons. All forms of 'conversion therapy' combine 1) well-documented, real risks of grave harm for the physical and mental health of LGBT+ persons; and 2) direct discrimination on the grounds of sexual orientation or gender identity. Through this distinctive combination of wrongs, all forms of 'conversion therapy' amount to a serious violation of human dignity. Therefore, they fall qualitatively within the scope of the absolute prohibition of torture or CIDT under international human rights law. More specifically, this chapter illustrated why all forms of 'conversion therapy' – physical and non-physical, forcible and non-forcible – amount at a minimum to degrading treatment. As a result, states are under a positive obligation to take effective measures to protect LGBTQ+ persons from the harms of 'conversion therapy'. The first important step in that direction is introducing a legal ban on all forms of this practice.

More detail than what this chapter could include is required on the precise mix of civil and criminal law protections that would be sufficient against 'conversion therapy' in different jurisdictions and legal contexts. The chapters in Parts II and III of this edited collection focus on the specific topics of children's rights, trans rights, religious rights, and transitional justice in the context of 'conversion therapy', as well as on the fundamental importance of engaging with survivors. Legislators and policymakers ought to take those perspectives into account in order to progressively end the abusive practice of 'conversion therapy' through the law but also beyond it.

From the perspective of the prohibition of torture, inhuman or degrading treatment, which was the focus of this chapter, it is unlikely that the Member States of the Council of Europe can fulfil their positive framework duties under Article 3 ECHR without adopting specific legal provisions against 'conversion therapy' that define the scope of the practice and clarify which public authorities have a duty to act against 'therapy' providers. Such provisions must also set out remedies, support, reporting mechanisms for victims, and also the types of interim measures that could be taken in this context. The framework state duties under Article 3 ECHR require this basic legal apparatus firmly in place.

[140] *Mitkus v Latvia*, Application No. 7259/03, 2 October 2010, para 76. See K. Kamber, *Prosecuting Human Rights Offences: Rethinking the Sword Function of Human Rights Law* (Brill 2017) Ch 1.