Does the European Convention Allow a Conviction to be Based on Evidence Obtained Through Inhuman or Degrading Treatment?

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Whether the European Convention on Human Rights (‘Convention’) allows a conviction to be based upon evidence obtained through inhuman or degrading treatment - contrary to Article 3 of the Convention - has only recently been confronted by the European Court of Human Rights (‘ECtHR’), and the answer remains disappointingly unclear.² Article 3 of the Convention

¹ LL.B. St. Mary's College, University of Durham (2012); MSc Exeter College, University of Oxford (2013) with many thanks to the Centre for Criminology and Faculty of Law staff at the University of Oxford for their guidance and support. Any errors or omissions are my own.
provides that “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.” 3 The rights laid down in Article 3 of the Convention are not open to derogation even in times of emergency, and have been hailed as representing “one of the most fundamental values of democratic societies,” 4 and have been referred to by the ECtHR as absolute. 5

This essay argues that recent case law of the ECtHR has cast doubt on the absolute nature of this right by effectively severing it into two sections with different implications for the fairness of trials: evidence obtained by torture will automatically render a trial unfair, while evidence obtained by inhuman or degrading treatment, which provided the proceedings when viewed as a whole

3 Article 3, ECHR.
4 See e.g. Chahal v United-Kingdom (1996) 23 EHRR 413, [79]; Saadi v Italy (2008) 49 EHRR 30, [127].
are fair, may be perfectly compatible with the right to a fair trial in the absence of countervailing “public interest” factors. However, this gives rise to several inter-related questions: first, what are the underlying principles, if any, of the ECtHR’s approach to Convention rights, such as Article 3 and Article 8 and their link to Article 6? Secondly, what role does considerations such as “public interest” or other factors play in the Court’s Article 3 and Article 6 jurisprudence? Thirdly, what are the consequences of the Court’s approach in its interpretation of Article 3 vis-à-vis Article 6? This essay will argue that the result of the ECtHR’s approach has been a mass of incoherent case law, which has been marred by inconsistencies due to the ECtHR’s failure to formulate and apply a consistent set of underlying principles. It will further be argued that, as a result of the ECtHR’s approach the very structure of the Convention has been called into question. However, it will be questioned whether such academic criticisms

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6 Ashworth (n 2) 161.

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overlooks the structural limitations of the Convention and the supranational nature of the ECtHR.

To start the discussion, section 1 sets out the structure of the Convention. This section discusses the overarching structure of the Convention and the hierarchy of rights. Section 2 provides an overview of the ECtHR’s interpretation of Article 3. Section 3 establishes the relationship between Article 3 and Article 6 of the Convention. Section 4 explores the various theories or rationales for evidentiary exclusion and ECtHR jurisprudence and provides the answer to the central enquiry of this essay. This section also expands the discussion from the context of Article 3 vis-à-vis Article 6, to include the relationship between Article 6 and Article 8, to highlight the absence of any consistent or coherent underlying principles that can be discerned from ECtHR’s case law on these rights. Section five offers a conclusion and reviews the consequences of the ECtHR approach. This section also discusses whether
the search for an overarching principle to guide the ECtHR’s interpretation of the Convention is idealistic.

Not all rights are equal

There is no official ranking of the rights set out in the Convention, however, the structure of the Convention itself implies that the rights it safeguards are not all of equal importance. However, there are three arguments to conclude that there is a hierarchy of rights in the Convention. First, Article 15 of the Convention permits derogations from certain Convention rights “[i]n times of war or other public emergency threatening the life of the nation[…]to the extent strictly required,” with the

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7 P Roberts, ‘Excluding Evidence as Protecting Constitutional or Human Rights?’ in-L Zedner and JV Roberts (eds), Principles and Values in Criminal Law and Criminal Justice (OUP 2012) 187; see also Ashworth (n 2) 146.
8 Ashworth (n 2) 146.
exception of Articles 2, 3, 4(1) and 7.\textsuperscript{9} It is undeniably part of the object and purpose of the Convention that such non-derogable rights should enjoy a higher degree of protection and are, therefore, variously referred to in ECtHR jurisprudence as ‘absolute.’\textsuperscript{10} Nonetheless, even non-derogable rights are susceptible to express and implied internal limits at the definitional stage, and are thus not necessarily entirely unqualified.\textsuperscript{11}

Secondly, a hierarchy of rights in the Convention can be discerned from the differing degree to which the Convention admits qualifications upon its rights.\textsuperscript{12} For instance, qualifications circumscribe the right to respect for private life (Article 8), the right to freedom of


\textsuperscript{10} ibid; see also A Orakhelashvili, ‘Restrictive Interpretation of Human-Rights Treaties in Recent Jurisprudence of the ECHR’ (2003) 14(3) EJIL 529, 561.

\textsuperscript{11} Croquet (n 9) 313 (citing A Ashworth and M Redmayne, ‘The Criminal Process’ (4\textsuperscript{th} edn, OUP 2010) pp36-37).

\textsuperscript{12} Ashworth (n 2) 147.
thought and religion (Article 9), the right to freedom of expression (Article 10), and the right to freedom of assembly and association (Article 11).\textsuperscript{13} All of these rights are qualified by a second paragraph, which provides for state interference if it can be established that this is “necessary in a democratic society” on one of the stated grounds subject to the doctrine of proportionality.\textsuperscript{14}

Thirdly, situated between these two categories is an intermediary category, which Ashworth refers to as ‘strong rights’ and includes the right to liberty and security of the person (Article 5) and the right to a fair trial (Article 6).\textsuperscript{15} The rights contained in Articles 5 and 6 are not subject to any explicit qualification, however, the ECtHR has stated that they are not absolute.\textsuperscript{16}

\textsuperscript{13} ibid.
\textsuperscript{14} ibid.
\textsuperscript{15} ibid 147; see also Croquet (n 9) 313.
\textsuperscript{16} ibid,
ECtHR interpretation of Article 3 of the Convention

The brevity of Article 3 of the ECHR “masks the complexity of the issues engendered by its terms.”17 Article 3 encompasses five types of treatment: torture; inhuman treatment; degrading treatment; inhuman punishment; and degrading punishment.18 While the ECtHR does not always clarify precisely which type of treatment has occurred in cases of breach, the focus tends to lie on the thresholds that separate Article 3 from treatment that falls outside the prohibition in Article 3, as well as the threshold that separates torture from inhuman or degrading treatment or punishment.19 The leading case focusing on the distinction between torture and cruel, inhuman or degrading treatment is Ireland v United Kingdom,20 where the Court stated, “The Convention, with its distinction between torture and

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17 Addo & Grief (n 9) 510.
18 Mavronicola (n 5) 26-27.
19 ibid (collecting cases) (internal citations omitted).
20 Ireland v United Kingdom (1978) 2 EHRR 25.
inhuman or degrading treatment should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering.\textsuperscript{21}

In subsequent cases, the ECtHR has been extremely reluctant to attach the “special stigma”\textsuperscript{22} which accompanies a finding of torture.\textsuperscript{23} The reasons for the ECtHR’s reluctance are manifold and outside the scope of our discussion, however, they centre on the Court’s reluctance to open up Pandora’s box and destabilize its political support.\textsuperscript{24} Article 3 also encompasses certain positive obligations including, \textit{inter alia}, the adequacy of the criminal law and the criminal justice system in protecting individuals from suffering proscribed treatment at the hands of non-state agents;\textsuperscript{25} the provision of medical care and conditions of

\begin{footnotesize}
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\item \textsuperscript{21} ibid [167]; see also Mavronicola (n 5) 32.
\item \textsuperscript{22} ibid.
\item \textsuperscript{24} ibid.
\item \textsuperscript{25} ibid (citing \textit{A v United Kingdom} (1998) 27 EHRR 611, [20]).
\end{itemize}
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imprisonment, the requirement to protect vulnerable persons at known risk of suffering Article 3 treatment; and a requirement to investigate plausible complaints of the proscribed treatment.

While Article 3 is absolute at law—it is labelled as ‘absolute’ and declared to be applied as such by the ECtHR, “the mouthpiece of the law”-- exceptions or definitional restrictions can qualify rights that are traditionally perceived as absolute. For example, an absolute right subject to exceptions is the right to life (Article 2). Similarly, the rights against torture, inhumane and degrading treatment contained in Article 3 requires that a certain threshold be reached before it can

26 ibid (citing Alksanyan v Russia 52 EHRR 18).
27 ibid (citing Z v United Kingdom (2001) 34 EHRR 3, [73]).
28 ibid (citing Assenov v Bulgaria (1998) 28 EHRR 652 (finding obligation under Article 13); cf Aydin v Turkey (1997) EHRR 1866 (finding obligation under Article 3)).
30 Croquet (n 9) 314. For an in-depth discussion of the nature of absolute rights see Mavronicola (n 5).
31 ibid (e.g.-Article-2(2)(a)-(c)).
be triggered, which supposes a weighting of all the circumstances of the case,\textsuperscript{32} and involves a “degree of relativism,”\textsuperscript{33} and “allows for a measure of discretion.”\textsuperscript{34} In that sense, Article 3 ECHR suffers from definitional restrictions.\textsuperscript{35} The ECtHR has also made it clear that the boundaries between torture and the other forms of proscribed treatment or punishment will continue to shift, by stating, that the Convention is a “living instrument which must be interpreted in the light of present-day conditions,”\textsuperscript{36} and noting that “certain acts which were classified in the past as inhuman and degrading treatment as opposed to torture could be classified differently in the future.”\textsuperscript{37}

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\item[\textsuperscript{32}] ibid; see also Ashworth and Redmayne (n 11) 36-37.
\item[\textsuperscript{33}] D Feldman, ‘Civil Liberties and Human Rights in England and Wales’ (2\textsuperscript{nd} edn, OUP 2002) 242.
\item[\textsuperscript{34}] H Fenwick, ‘Civil Liberties and Human Rights’ (3\textsuperscript{rd} edn, Cavendish Publishing 2004) 44-45.
\item[\textsuperscript{35}] Croquet (n 9) 314 (citing Soering v United Kingdom (1989) 11 EHRR 439 (Ser.A) at 32 (noting even absolute rights can be the object of internal limits in the form of definitional restrictions)).
\item[\textsuperscript{36}] Mavronicola (n 5) 33 (collecting-cases).
\item[\textsuperscript{37}] ibid (internal citations omitted).
\end{itemize}
Linkage between Articles 3 and 6

Issues pertaining to the exclusion of evidence in legal proceedings that have been obtained in breach of one of the Convention rights, such as Article 3, have revolved around Article 6’s guarantee of a right to fair trial.\textsuperscript{38} Inadmissibility of evidence is never directly mandated by Article 6 of the Convention;\textsuperscript{39} however, the ECtHR’s jurisprudence shows that the use of evidence obtained in violation of a Convention right, particularly Article 3, is considered to violate the Convention, not because its use would breach these standards \textit{per se} but because they would breach a defendant’s right to a fair trial enshrined in Article 6.\textsuperscript{40}

\textsuperscript{38} Roberts (n 7) 187.

\textsuperscript{39} P Roberts and A Zuckerman, ‘Criminal-Evidence’ (2\textsuperscript{nd} edn, OUP 2010) 204.

Article 6 of the Convention monitors judicial proceedings that threaten deprivation of an individual’s rights under the Convention.\(^{41}\) It requires that all defendants receive a right to a fair and public hearing and articulates several standards to meet this requirement.\(^{42}\) The ECtHR considers a fair trial to be an adversarial one, where the proceedings embrace the principle of “equality of arms.”\(^{43}\) In relation to the admissibility of evidence, Article 6 when read in conjunction with Article 13, has been held to imply that there must be an effective procedure during a criminal trial by which to challenge the admissibility of evidence, which has been obtained unlawfully or in breach of the Convention.\(^{44}\) This has meant giving both parties a “real


\(^{42}\) ibid.


opportunity” to examine and challenge the evidence before them.\textsuperscript{45} Specifically, the ECtHR considers whether the domestic courts respected the rights of the defence to challenge the legitimacy of the evidence and whether the defence had the right to question witnesses.\textsuperscript{46} The ECtHR also considers whether incriminating statements are voluntarily made and whether the tainted evidence comprises a substantial or decisive basis for a conviction.\textsuperscript{47}

\textbf{Searching for rationales for evidentiary exclusion in ECtHR jurisprudence}

The ECtHR has considered the issue of whether evidence obtained in breach of Article 3 will violate Article 6 on a number of occasions.\textsuperscript{48} However, subsequent decisions of the ECtHR have never clearly

\textsuperscript{45} Gasper (n 41) 284 (internal citations omitted).
\textsuperscript{46} ibid.
\textsuperscript{47} ibid, see Section 4 \textit{infra} for discussion of such examples.
\textsuperscript{48} Emmerson \& Ashworth (n 44) 635 (collecting cases).
articulated a principled foundation or provided consistent reasoning leading to substantial academic criticism. Section 4.1 briefly discusses various theories of evidentiary exclusion and traces their role in the ECtHR’s jurisprudence relative to the relationship between Article 3 and Article 6, and expands the discussion to include the Court’s jurisprudence relative to Article 6 and Article 8. This section highlights what Ashworth has characterized as the ECtHR’s failure to support its conclusions with a consistent and coherent underlying principle. Building on the previous section, section 4.2 returns to the central enquiry that was posed at the beginning of this paper and highlights the shift towards “public interest” and “seriousness of the offence” as determinative factors.

49 See eg Ashworth (n 2), Roberts (n 7) 186-190; Mavronicola (n 5); and J Jackson (n 40) 138-143; P Roberts, ‘Normative Evolution in Evidentiary Exclusion: Coercion, Deception and the Right to a Fair Trial’ in P Roberts and J Hunter (eds), Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions (Hart Publishing 2012).
50 Ashworth (n 2) 159-161.
Rationales for evidentiary exclusion

Each of the evidentiary exclusion principles presented below have been much debated by evidence scholars, however, given the huge and complex debate surrounding their relative merits or deficiencies, these issues will not be dealt with and are kept outside the scope of this section. Instead, a brief overview will be presented of each principle to determine whether a common theme or principle can be gleaned from the ECtHR jurisprudence.

Jeremy Bentham is regularly invoked as the standard bearer for the reliability principle.\(^5^1\) In short, for reliabilists, “impropriety in criminal investigations is one thing and the admissibility of reliable evidence at trial quite another.”\(^5^2\) The core Behthamite premise is that if “you exclude evidence, you exclude justice.”\(^5^3\) However,

\(^{51}\) Roberts & Zuckerman (n 39) 179.
\(^{52}\) Roberts (n 7) 172.
\(^{53}\) Roberts & Zuckerman (n 39) 180 (internal citations omitted).
this Benthamite approach “reverses the order of priority between fact-finding and justice.” \(^{54}\) In contrast, the “deterrence theory” or “disciplinary principle,” which is still popular with some courts in the United States, \(^{55}\) holds that if a law enforcement officer knows that the evidence is likely to be excluded, they will be deterred from illegality and other investigative impropriety. \(^{56}\) Whatever the merits of this assertion, it is a rights-centred rationale, in that it regards respect for rights as the goal and selects deterrence as the means to achieve it. \(^{57}\)

Next, the separation principle treats each part of the criminal justice process independently. \(^{58}\) In other

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\(^{54}\) ibid.

\(^{55}\) Roberts (n 7) 173 (internal citations omitted).


\(^{57}\) Emmerson & Ashworth (n44) 643.

\(^{58}\) A Chehtman ‘The Philosophical Foundations of Extraterritorial Punishment’ (OUP 2010) 148-149 (citing A Duff et al., ‘The Trial
words, if a wrong was committed during an investigation, the police officers who carried it out should themselves be punished, but this should have no bearing on the situation of the defendant.\(^{59}\) In contrast, the “moral integrity” principle takes a different approach. It holds that a breach of, for instance, someone’s right not to be tortured during the criminal process would undermine the authority of the state to punish a defendant.\(^{60}\)

Finally, the protective or remedial principle, in the context of human rights, holds that the only way to give significant force to a person’s right, for instance, not to be tortured is to exclude the evidence obtained in violation of this right, and that it is much more important to uphold this right than to convict the guilty defendant.

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\(^{59}\) ibid 149.  
\(^{60}\) ibid.
in such a case.\textsuperscript{61} This approach aims to vindicate individual rights.\textsuperscript{62}

**Support for the separation thesis?**

Although the ECtHR has extended the concept of “fair trial” to cover pre-trial investigative techniques where “from the outset, the applicant was definitively deprived of a fair trial,”\textsuperscript{63} it has categorically rejected the proposition that the use of evidence obtained in violation of an accused’s privacy rights will necessarily result in a violation of Article 6.\textsuperscript{64} For instance, in *Khan v United Kingdom*,\textsuperscript{65} the ECtHR found a violation of Article 8, because the use of listening devices by the British police was not sufficiently governed by a legal framework at

\begin{itemize}
\item \textsuperscript{61} ibid; Roberts & Zuckerman (n 39); and see also Roberts (n 7) 186-190.
\item \textsuperscript{62} Roberts (n7) 186-190 (internal citations omitted).
\item \textsuperscript{63} Roberts (n 7) 187; see also *Teixeira de Castro v Portugal* (1998) 28 EHRR101,[39].
\item \textsuperscript{64} Roberts (n7) 187.
\item \textsuperscript{65} *Khan v United Kingdom* (2001) 31 EHRR 1.
\end{itemize}
the time, however, it found no violation of the applicant’s right to fair trial even though the only evidence against the applicant was obtained through the violation of his Article 8 rights. Judge Loucaides in a strongly worded dissent expressed the argument in favour of exclusion:

This is the first case which comes before the Court where the only evidence against an accused in a criminal case which also led to his conviction, was evidence obtained in a manner contrary to Article 8 of the Convention…[A] trial can[not] be fair, as required by Article 6, if a person’s guilt for any offence is established through evidence obtained in breach of the human rights guaranteed by the Convention.

66 Ashworth (n 2) 156.
67 Emmerson.&.Ashworth.(n 44) 638.
68 Khan (n 65) supra, Judge Loucaides (dissent).
Despite the dissent’s strong arguments, the majority rested its holdings on its Schenk v United Kingdom\(^{69}\) reasoning that “Article 6 of the Convention…does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law.”\(^{70}\) The Schenk reasoning, as developed by its progeny,\(^{71}\) holds that, where a defendant is permitted an opportunity to challenge the evidence and the trial court is permitted the discretion to exclude the evidence, as was the case in Khan, Article 6 will be satisfied.\(^{72}\) The majority adopted a similar approach in PG and JH v United Kingdom.\(^{73}\) In PG and JH, the Court found that the surveillance methods had violated Article 8 and found the facts to be analogous to Khan and, in fact, noted that the case was stronger than

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\(^{70}\) ibid [46].
\(^{71}\) Ashworth (n 2) 156 (noting that this reasoning was more recently repeated in Heglas v Czech Republic (2008) 48 EHRR 1018).
\(^{72}\) ibid; see e.g PG and JH v United Kingdom [2002] Crim LR 308, judgment of September 25 2011,\(^{79}\).
Khan because there was other evidence tending to confirm the applicant’s involvement.\textsuperscript{74} However, analogous to the rationale in Khan and Schenk, the Court proceeded to find no violation of the applicant’s right to fair trial since they “had ample opportunity to challenge both the authenticity and the use of the recordings.”\textsuperscript{75} These decisions are an express rejection of the “rights thesis” and “moral legitimacy thesis,”\textsuperscript{76} and suggest that they are underpinned by the “separation thesis.”\textsuperscript{77}

In contrast to the majority approach, the dissent endeavoured to give effect to the principle of effective protection in Articles 1 and 19 of the Convention,\textsuperscript{78} to ensure that all Articles of the Convention are safeguarded. Judge Tulkens’ sharp dissent questioned whether:

\textsuperscript{74}Emmerson & Ashworth (n 44) 639.
\textsuperscript{75}ibid (citing PG and JH (n 72) supra [71]).
\textsuperscript{76}Jackson (n 40) 138.
\textsuperscript{77}ibid; Ashworth (n 2) 157.
\textsuperscript{78}Ashworth (n 2) 157-161; Orakhelashvili, (n 10).
a trial can[not] be described as fair where evidence obtained in breach of a fundamental right guaranteed by the Convention has been admitted during that trial. As the Court has already had occasion to stress, the Convention must be interpreted as a coherent whole…The rights enshrined in the Convention cannot remain purely theoretical or virtual. 79

The dissent’s apparent rationale for exclusion is “a mixture of…the remedial theory [protective principle] and the moral integrity principle.” 80 In any event, there is no faithful adherence to the “separation principle” by the majority in analogous cases. For instance, in contrast to Khan and PG and JH, in Allan v United Kingdom, 81 the admission of evidence obtained by methods contrary to Article 8 was held to amount to a breach of Article 6,

79 PG and JH (n 72) supra (Judge Tolkens’ dissent)(emphasis-added).
80 Ashworth (n 2) 157; and Roberts & Zuckerman (n 39) 181-191.
81 Allan v United Kingdom (2002) 36 EHRR143.
where the unlawful recording was not simply of a spontaneous conversation but of a conversation manipulated by a police informant. By comparison, in Heglas v Czech Republic, where the unlawful recording of a conversation between the applicant and another person constituted a breach of Article 8, the ECtHR distinguished Allan and found no violation of Article 6. Similarly, as discussed in the next section, in the context of Article 3’s relationship to Article 6, the majority’s approach has shifted between the separation principle and variations of the moral integrity principle.

Support for the moral integrity or moral legitimacy principle?

Having failed to find a consistent underlying principle in the Court’s Article 8 vis-à-vis Article 6 jurisprudence,

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82 Emmerson & Ashworth (n 44) 640.
83 Heglas (n71).
84 Emmerson & Ashworth (n 44) 640; see also Ashworth (n 2) 158.
the focus now shifts to the Court’s interpretation of Article 3 vis-à-vis Article 6. The ECtHR approach in *Jalloh* where it held:

Incriminating evidence—whether in the form of a confession or real evidence—obtained as a result of…torture should never be relied on as proof of the victim’s guilt, irrespective of its probative value. Any other conclusion would only serve to legitimate…morally reprehensible conduct…[and]…afford brutality the cloak of law.\(^{85}\)

This comports with the moral integrity rationale to justify evidential exclusion in cases involving torture.\(^{86}\) Indeed, as highlighted by Judge Bratza’s concurring judgement in *Jalloh*, it was the central tenet of his argument that it should apply to *all* treatment covered by

\(^{85}\) *Jalloh v Germany* (2007) 44 EHRR 32, [105] (internal citations and quotation marks omitted).

\(^{86}\) Jackson (n 40) 137.
Article 3, not just instances where the treatment rises to the level of torture.\(^87\)

The more recent case of *Levinta v Moldova*\(^88\) took a similar approach to *Jalloh*;\(^89\) however, *Gäfgen v Germany*\(^90\) exposes the limitations of appeals to the moral integrity principle.\(^91\) In *Gäfgen*, the ECtHR reaffirmed that the prohibition on ill treatment of a person applies even in the event of a public emergency threatening the life of the nation and irrespective of the authorities’ motivations, be it to save a person’s life or to further criminal investigations.\(^92\) Yet, the Court immediately clouded its message by drawing a distinction between real evidence obtained directly from ill treatment violating Article 3 and the indirect

\(^{87}\) ibid, 137-138; see also *Jalloh* (n 85) [0]-[18].

\(^{88}\) *Levinta v Moldova* (2011) 52 EHRR 40 [63].

\(^{89}\) Jackson (n 40) 137.


\(^{91}\) Jackson (n 40) 141.

\(^{92}\) ibid 140.
evidential fruits of such violations. 93 Further, the Grand Chamber also reasoned that the applicant could no longer be classified as a ‘victim’ for purposes of Article 34, if the officers responsible for his mistreatment were punished and he was able to pursue an action for damages, thus, implicitly endorsing the separation principle. 94 The common thread connecting the Court’s Article 8 vis-à-vis Article 6 jurisprudence apply mutatis mutandis to the Court’s Article 3 vis-à-vis Article 6 jurisprudence: there is no consistent adherence by the Court to a consistent set of underlying principles as its decisions shift between an implicit endorsement of the separation principle, to the moral integrity principle, and rest elsewhere in subsidiary arguments. 95

93 ibid.
94 Ashworth (n 2) 158.
95 ibid.
Support for the remedial theory or protective principle?

While there is no reference in ECtHR jurisprudence to variations of what has been called the “protective or remedial principle,” could the protective principle hitch a ride on what Roberts calls “the ECHR Caravan?” Judge Loucaides dissent in Khan, Judge Tulkens’ dissent in PG and JH, as well as Judge Spielmann’s dissent in Bykov, strongly hint at a growing minority that may lead an eventual shift to a mix of the remedial or protective principle. However, this does not mean the protective principle would necessarily neatly fit into ECtHR jurisprudence.

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96 Roberts (n 7) 186.
97 Ashworth (n 2) 159.
98 ibid (observing that the “minority appears to grow in strength”)
99 Roberts (n 7) 186-190 (noting difficulties).
ECtHR case law: does the Convention allow a conviction to be based on evidence obtained through inhuman or degrading treatment?

Recalling from the above discussion that the Grand Chamber in Jalloh left open the broader question of whether every breach of Article 3 should render evidence inadmissible at trial, the majority’s judgment when read in conjunction with Gäfgen betrays what Ashworth calls “pragmatism before principle.” 100 The two decisions dealing with the relationship between Article 3 and Article 6, especially when read in conjunction with the decisions dealing with the relationship between Article 6 and Article 8, reveal a shift to reasoning that varies based on the seriousness of the offence charged and public interest grounds. 101

Returning to the majority’s decision in Gäfgen, the Court acknowledged that its previous case law had

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100 Ashworth (n 2) 158-161.
101 ibid.
not authoritatively settled the question whether the prosecution’s resort to evidence obtained through a violation of Article 3 necessarily rendered a trial unfair under Article 6.\(^{102}\) While the majority confirmed that exclusion may be a necessary remedy, its references to competing rights and public interest, hinted that not every violation of Article 3 necessarily leads to a violation of an applicant’s right to fair trial under Article 6: \(^{103}\)

The Court is further aware of the different competing rights and interests at stake. On the one hand, the exclusion of often reliable and compelling real evidence at a criminal trial will hamper the effective prosecution of crime. There is no doubt that the victims of crime and their families as well as the public have an interest in the prosecution and punishment of criminals, and in the present case that interest was of high

\(^{102}\) ibid 155.  
\(^{103}\) Gäfgen (n 90) [175]; see also Ashworth (n 2) 155.
importance...  

The Grand Chamber proceeded, through some tortured and, at points, questionable assessment of the facts, to hold that Article 6 had not been breached since:  

[t]he additional evidence admitted at the trial was not used by the domestic court against the applicant to prove his guilt...[T]here was a break in the causal chain leading from the prohibited methods of investigation to the applicant’s conviction and sentence in respect of the impugned real evidence.  

The majority’s opinion failed to convincingly respond to, let alone engage, the challenges and questions raised by the dissent. The end result is that the ECtHR does allow a conviction to be based on evidence obtained

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104 Gäfgen (n 90) [175], [178].  
105 Ashworth (n 2) 158.  
106 Gäfgen (n 90) [180], compare dissent (B) [5]-[6].  
107 Ashworth (n 2) 158-161.
through inhuman or degrading treatment, *provided, however*, that such treatment does not rise to the level of torture, and *provided, however*, that the applicant has had a fair opportunity to challenge the authenticity of the evidence before the national Court and the “public interest” factors and “the seriousness of the offence” weigh in favour of inclusion of the evidence. On a broader plane, the absolute prohibition in Article 3 is implicitly weakened by the Court's rejection of the fruit of the poisonous tree doctrine and this rejection sits uneasily with any strict conception of fairness in Article 6.\(^\text{108}\) Furthermore, the Court’s reference to “public interest” and “competing rights” adds fuel to the “consequentialist argument that inhuman treatment can be justified when its ends justify its means.”\(^\text{109}\) For many, the Court’s consequentialist approach is self-defeating because inhuman treatment is seen as a

\(^{108}\) M. Spurrier, ‘*Gäfgen v Germany*: Fruit of the Poisonous Tree’ (2010) EHRLR 513, 518-519.

\(^{109}\) ibid.
morally charged act, which affords no justification.\textsuperscript{110} However, the core problem with the decision in this regard “is its failure to lay down an unequivocal principle that can defeat the consequentialists \textit{ab initio}.”\textsuperscript{111}

**Consequences and conclusion**

As shown above, the Court’s recent case law has treated Article 3 as if it is “severable down the middle, so that torture on the one hand, and inhuman or degrading treatment on the other, may have different implications for the fairness of trials.”\textsuperscript{112} This has created an “impact loaded hierarchy”\textsuperscript{113} in the relationship between Article 3 and Article 6, and, most crucially, undermined the absolute nature of the rights in Article 3.\textsuperscript{114} However, the

\textsuperscript{110} ibid.
\textsuperscript{111} ibid.
\textsuperscript{112} Ashworth (n 2) 161.
\textsuperscript{113} Mavronicola (n 5) 33.
\textsuperscript{114} ibid.; see also Ashworth (n 2) 161; and Spurrier (n 108) 519.
ECtHR’s approach, not just in the context of Article 3’s relationship to Article 6, but also in the context of Article 8’s relationship to Article 6, reveals what Ashworth and others have observed is a shift towards malleable “public interest” and “public safety” factors as the determinative criterion in recent cases.\(^\text{115}\)

Next, this essay highlighted the ECtHR’s failure to identify any consistent underlying principle to promote, at a minimum, consistency in its Article 3 vis-à-vis Article 6 and Article 8 vis-à-vis Article 6 jurisprudence, let alone articulate a coherent argument that would link the various Convention rights.\(^\text{116}\) Similarly, as noted by Ashworth, even the subsidiary arguments the Court has advanced in individual cases, for instance, the *Schenk* line of reasoning, fail to provide any consistency since the Court has found evidence

\(^{115}\) Ashworth (n 2) 158-161.  
\(^{116}\) ibid.
inadmissible in entrapment cases,\(^{117}\) and in cases where evidence has been obtained in breach of Article 3.\(^{118}\) In a related vein, Ashworth has also criticized the Court’s frequent assertion that a trial may be fair overall if impugned evidence “plays a limited role in a complex body of evidence assessed by the Court,”\(^{119}\) since in other cases, where the disputed evidence is the lynchpin of the prosecution’s case,\(^{120}\) the ECtHR has nonetheless found no breach of Article 6.\(^{121}\)

For the ECtHR, in the context of criminal adjudications, clarity in articulating exclusionary rationales is a vital element to secure the compliance and respect of the rights guaranteed by the Convention.\(^{122}\) Progress towards greater clarity will require more sustained focus on the principles of fairness that underlie

\(^{117}\) Ashworth (n 2)160 (citing Teixeira de Castro (n 63); Ramausas v Lituania (2010) 51 EHRR 303).
\(^{118}\) ibid (citing Jalloh (n 85)).
\(^{119}\) ibid.
\(^{120}\) ibid (citing Khan (n 65))
\(^{121}\) ibid.
\(^{122}\) Roberts (n 49) 179-180.
a fair trial and a clearer link between the use of such evidence at trial and the fairness of the proceedings.\textsuperscript{123} However, three additional points bears mention. These call for greater consistency and coherence in principle in ECtHR jurisprudence overlook some major practical obstacles. First, as noted above, not all Convention rights are equal. Second, the Convention and ECtHR are ill equipped to deal with certain allegations by individuals or state parties.\textsuperscript{124} This point is thrown into sharp relief when set against the problem of systemic violations involving Article 3.\textsuperscript{125} Third, the Court’s shift to “public interest” and “public safety” factors can perhaps be seen as evidence of the Court’s attempt to retain flexibility and avoid opening up a Pandora’s box, potentially destabilizing the already

\textsuperscript{123} Jackson (n 39) 133 (citing S Summers, ‘Fair Trails: The European Criminal Procedural Tradition and the European Court of Human Rights’ (Hart Publishing 2007)).

\textsuperscript{124} Roberts (n 7) 186-190; Roberts (n 49) 179-180.

\textsuperscript{125} Aolain (n 24) 220-223, 225; Mavronicola (n 5) 4 (noting over 850 violations of Article 3 in the past 50 years).
tenuous political support enjoyed by the Court.\textsuperscript{126} Imagine the public outcry in cases like \textit{Gäfgen}, or in hypothetical cases involving a ‘ticking bomb.’ Third, while it is precisely in such “times of crisis that absolute values must remain uncompromised,”\textsuperscript{127} the Court’s self-imposed unwillingness to develop a coherent and consistent set of concepts and principles to link its decisions across the various Convention rights, may reveal that the Court is less interested in shining as a “beacon in international human rights litigation,”\textsuperscript{128} and more interested in adopting a pragmatic approach to its own self-preservation.\textsuperscript{129}

\begin{thebibliography}{9}
\bibitem{126} ibid; see also Croquet (n 9) 351-353.
\bibitem{127} \textit{Gäfgen} (n 90) (dissent-(B) [3]-[9]).
\bibitem{128} Ashworth (n 2) 160.
\bibitem{129} Aolain (n 24)-220-223, 225.
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Growth Without Institutions? The Case of China

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‘Crossing the river by feeling each stone’ refers to the pragmatic policy of Deng Xiaoping,³ to move ahead with economic reforms slowly and pragmatically. It appears that in the financial crisis, such a pragmatic approach, which reflects the conventional wisdom of a common Chinese; that is, conservatism, has saved China from crashing into a wall like its Western counterparts. The economic reform in China has been clearly one with

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² Lecturer, School of Law, University of Hull; E-mail: x.huang@hull.ac.uk. An earlier draft of this article has been presented in the Second Annual Conference of the Younger Comparativists Committee of the American Society of Comparative Law. The authors would like to express their gratitude for the comments received. Also, the financial assistance from the British Academy/Leverhulme Trust towards this project is gratefully acknowledged. The usual disclaimer applies.
³ Deng, the reformist leader of the Community Party of China, was in office between 1982 and 1987.
‘Chinese characteristics’. In contrast to those in Russia and Eastern Europe, there has not been any transfer of control from the state to the private hands. Whilst the separation of ownership and control have been viewed by commentary as the necessary feature of many Anglo-American corporations which dominate the world, the difficulty for China to make a clear break with its socialist past and leap into capitalism largely comes from the Chinese leadership’s rejection of privatisation. It appears the growth of China has followed a unique path of development. One notable example is that, although the economic reform started in 1978, a formal framework of company, financial and labour laws did not come until around mid-1990s. Moreover, only until mid-2000s were these laws then revised and polished to international standards. However, the growth of China

remained strong amid a fairly long period of ‘institutional void’.

This article first offers a brief explanation to the importance of re-considering institutions, especially after the financial crisis. Then, it discusses the role of these institutions in the context of China. One focus will be on the legal institutions in China. This article will consider different areas of law, for example, company, securities and labour laws, as well as their enforcement. Afterwards it goes on to discuss the role of other institutions such as politics, culture, as well as certain professionals. The final part concludes. This article seeks to present a comprehensive and contextual analysis of a spectrum of factors relevant to the growth of China, with the support of existing empirical evidence.

Reconsidering institutions after the financial crisis
There has been a very common assumption that financial markets are the cutting edge of institutional innovation and that countries without a highly developed system of financial markets are somehow backward or underdeveloped.\(^5\) From the experience of Japan and Germany, it appears that the two features of Anglo-American capitalism, namely dispersed ownership of companies and sophisticated financial markets are not necessarily the pre-requisites of prosperity.\(^6\) In fact, advocates of the continental system claim that this structure fosters long term planning, while a market-based system is said to encourage short term expectations of investors and responsive short term strategies by managers.\(^7\) Regrettably, the crash of the

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\(^6\) According to the findings from Levine, the US, the UK, Germany and Japan have very similar long-run growth rates, see R Levine, ‘Bank-Based or Market-Based Financial Systems: Which is Better?’ (2002) 11 Journal of Financial Intermediation 398.

global financial markets in 2007-08 has given the world economy a painful lesson.

The scene of the credit crunch was set up by the subprime mortgage crisis.\(^8\) The fall in expectations of property prices led to the rising defaults in subprime loans in 2006. In the next year, the US government assisted the rescue of Bear Stearns, one of the largest global investment banks. This rang the bell of the liquidity strains of major financial institutions. During 2008, housing market problems were recognised as widespread in the US, UK and other countries. House prices fell and supply of credit dried up. The funding problem of major mortgage providers, for instance, Fannie Mae, Freddie Mac and Northern Rock intensified. From September onwards, massive loss of

confidence materialised. The Bankruptcy of Lehman Brothers broke the traditional belief that some large institutions would be too big to fail. A mix of credit problems caused a chain reaction of collapse such as Washington Mutual, Bradford & Bingley and Icelandic banks. Exceptional government measures have then been deployed to prevent the problem from worsening. The Western world has ironically gone back to socialism whilst China is marching towards a market economy.

The original sin of Western capitalism revealed by the credit crunch is greed. Awards have not only been given to winners, but also to losers. For example, Fred Goodwin, the former chief executive of the Royal Bank of Scotland (RBS), who was stripped of his knighthood in 2012, was heavily criticised for taking a pension amounting to £700,000 per year.⁹ There is nothing

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⁹ BBC, ‘Former RBS Boss Fred Goodwin Stripped of Knighthood’ (31 January 2012), available at <http://www.bbc.co.uk/news/uk-politics-16821650>. Although the recent outcry for better corporate governance should not be taken lightly, the very basic objective of executive remuneration to attract, retain and motivate the executives
wrong in an employee receiving a pension proportionate to his position, but the problem is that under Goodwin’s leadership, RBS suffered an annual loss of £24.1 billion, the largest annual loss in the UK corporate history. RBS had to be bailed out and nationalised by the government. Therefore, his pension would effectively be paid out of the pockets of all taxpayers.

While the Chinese still well remember the calamity that followed from the Maoist centrally planned economy, the desire for an orderly society is deeply ingrained in the mentality of all Asians. Indeed, according to some commentators, many of Asia’s most successful entrepreneurs are keen to retain family control of the business, which enables them to take a long-term

view. But of course, the story of China is different. There is more than one Asian approach.

It all started in 1978, when gaige kaifang - the twin strategies of reform and opening-up the economy - was initiated. Reform first started from some rural areas, then to some small to medium enterprises in urban areas, and then to some larger state-owned enterprises (SOEs). The increasing economic prominence of China is clearly reshaping the international financial system. It has grown strongly over the last decade with averaged GDP growth at 9.1 per cent and almost unaffected by the financial crisis. Towards the new millennium, China’s state-owned sector looked like an economic disaster. In the aftermath of the Asian financial crisis, average profit margins in Chinese SOEs fell to close to zero. After ten years, in 2007, the combined profit of the 150 or so companies controlled by the state reached US$140

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billion.\textsuperscript{11} At the end of that year, out of the five largest companies in the world, three were SOEs including PetroChina, China Mobile and the Industrial and Commercial Bank of China (ICBC). As for the financial institutions, in 1999, Citigroup was the newly formed colossus. Ten years after in 2009, the top of the league table is dominated by China’s three largest banks: the ICBC, China Construction Bank and Bank of China (see Table 1 below). As for the stock market, the Shanghai Stock Exchange was at the time the fifth largest in the world, even above the London Stock Exchange.\textsuperscript{12} The development of China's stock market from 1991 to 2012 is given in Table 2 below. The demise of a dynasty brings about the rise of a new one. The surplus of state funds accumulates in the form of central bank reserves. China’s went up from nearly US$145 billion in 1998, to


\textsuperscript{12} Data from the World Federation of Exchanges, available at \textless http://www.world-exchanges.org\textgreater .
almost US$3,300 billion in 2012. These are typically invested almost exclusively in apparently risk-free government bonds or government guaranteed bonds. From a political economy perspective, holding an abundant amount of US debts has given China the competitive edge over the power struggle with the US on various policy issues. China has become both an economic and political superpower.

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