

Deconstructing and Reconstructing the Definition of Inhuman Treatment in International Law

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Abstract : The prohibition on 'inhuman treatment' constitutes one of the central tenets of modern international human rights law. It is incorporated in principal international human rights instruments including Article 5 of the Universal Declaration of Human Rights, and Article 7 of the International Covenant on Civil and Political Rights. However, in the absence of any legislative definition of the term 'inhuman', its interpretation becomes challenging. The aim of this article is to critically analyze the interpretation of the term 'inhuman' in international human rights law and to suggest a new approach to construct its meaning. The article is composed of two central parts. The first part is a critical appraisal of the interpretation of the term 'inhuman' by supra-national human rights law institutions. It highlights the failure of supra-national institutions to provide an independent definition for the term 'inhuman'. In fact, those institutions consistently fail to distinguish the term 'inhuman' from its other kin terms, i.e. 'cruel' and 'degrading.' Very often, they refer to these three prohibitions as 'CIDT', as if they were one collective. They were primarily preoccupied with distinguishing 'CIDT' from 'torture.' By blurring the conceptual differences between these three terms, supra-national institutions supplemented them with a long list of specific and purely descriptive subsidiary rules. In most cases, those subsidiary rules were announced in the absence of sufficient legal reasoning explaining how they were derived from abstract and evaluative standards embodied in the prohibitions collectively referred to as 'CIDT.' By opting for this option, supra-national institutions have created the risk for the development of an incoherent body of jurisprudence on those terms at the international level. They also have failed to provide guidance for domestic courts on how to enforce these prohibitions. While blurring the differences between the terms 'cruel,' 'inhuman,' and 'degrading' has consequences for the three, the term 'inhuman' remains the most impoverished one. It is easy to link the term 'cruel' to the clause on 'cruel and unusual punishment' originating from the English Bill of Rights of 1689. It is also easy to see that the term 'degrading' reflects a dignitarian ideal. However, when we turn to the term 'inhuman', we are left without any interpretative clue. The second part of the article suggests that the ordinary meaning of the word 'inhuman' should be our first clue. However, regaining the conceptual independence of the term 'inhuman' requires more than a mere reflection on the word-meaning of the term. Thus, the second part introduces philosophical concepts related to the understanding of what it means to be human. It focuses on 'the capabilities approach' and the notion of 'human functioning', introduced by Amartya Sen and further explored by Martha Nussbaum. Nussbaum's work on the basic human capabilities is particularly helpful or even vital for understanding the moral and legal substance of the prohibition on 'inhuman' treatment.

Keywords : inhuman treatment, capabilities approach, human functioning, supra-national institutions

Conference Title : ICHR 2017 : International Conference on Human Rights

Conference Location : Paris, France

Conference Dates : June 25-26, 2017