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OF EUROPE



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EUROPEAN COMMISSION  
OF HUMAN RIGHTS

Application No. 5856/72

Anthony M. TYRER

against

THE UNITED KINGDOM

Report of the Commission

(Adopted on 14 December 1976)

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## I. INTRODUCTION

The following is an outline of the case as it has been submitted by the parties to the European Commission of Human Rights.

The applicant, Anthony Tyrer, is a citizen of the United Kingdom. He was born in 1956 and is resident in Castletown, Isle of Man.

### 1. The substance of the applicant's complaints

The application concerns the birching of the applicant for an offence of assault occasioning actual bodily harm. On 7 March 1972, at the age of 15, he was sentenced by the juvenile court, Castletown, Isle of Man, to three strokes of the birch for this offence, to which he had pleaded guilty. He appealed against sentence but his appeal was dismissed on 28 April 1972 and the sentence was carried out the same day.

The applicant complained to the Commission that this judicial corporal punishment was in breach of Art. 3 of the Convention as it was degrading punishment within the meaning of that Article. The applicant also complained that it was discriminatory contrary to Art. 14 being mostly ordered in cases of persons from financially and socially deprived homes, but he subsequently withdrew this allegation. He further claimed that there had been a violation of Art. 8 by the United Kingdom authorities, through the Isle of Man courts, insofar as such punishment destroys "family well-being" and also a violation of Art. 13 as no remedy existed to rectify the violation. Finally he complained of a breach of Art. 1 by virtue of these alleged breaches.

### 2. Proceedings before the Commission

The present application was lodged with the Commission on 21 September 1972 and registered on 27 September 1972.

On 19 July 1974 the Commission accepted the applicant's withdrawal of his complaint under Art. 14 and declared inadmissible his complaints under Arts. 1, 8 and 13. However, it declared the application admissible insofar as it raised issues under Art. 3, either alone or in conjunction with Art. 14. Concerning Art. 14, it considered, ex officio, that such punishment could be discriminatory on the basis of age or sex as it was applicable to male children and male young persons only. This decision was reached after having obtained written observations from the parties on the admissibility of the application in which the respondent Government stated that they did not wish to contest the application's admissibility insofar as it might raise an issue under Art. 3.

Written submissions on the merits were received from the applicant on 10 October 1974 and from the Government on 8 April 1975.

The parties were invited to an oral hearing on the merits of the case in Strasbourg on 7 and 8 October 1975 at which they also submitted their conclusions.

The applicant was represented at this stage before the Commission by Mr. W.A. Nash, Legal Officer to the National Council of Civil Liberties (the NCCL), Mr. L. Grant of the Law Clinic, University of Kent at Canterbury, Mr. Cedric Thornberry, Barrister-at-Law, Lecturer in law, and Mr. Nigel Rodley, Legal Officer of Amnesty International, although acting in his private capacity.

The respondent Government was represented by Mr. D.G. Gordon-Smith, as Agent, who was assisted by Mr. A. Collins, Barrister-at-Law, Mr. J.W. Corrin, Attorney-General of the Isle of Man, Miss Sally Austin, Legal Adviser, Home Office, Sir William Dale, Barrister-at-Law and Mr. J.C. Haines, Treasury Solicitors Department.

In January 1976 the Commission was notified by Messrs. Dickinson, Cruikshank and Co., Solicitors, Isle of Man, on behalf of the applicant, that the applicant wished to withdraw his application and informed the Commission that he had already withdrawn his instructions from the NCCL.

On 9 March 1976 the Commission considered this notification and decided it could not accede to the applicant's demand since the case raised questions of a general character affecting the observance of the Convention which necessitated a further examination of the issues involved.

3. The present Report has been drawn up by the Commission in pursuance of Art. 31 of the Convention after deliberations and votes in plenary session, the following members being present:

MR. G. SPERDUTI, Acting President (Rules 7 & 9  
of the Rules of Procedure)

J. E. S. FAWCETT, President  
O. A. NØRGAARD  
F. ERMAKORA  
E. BUSUTTI  
L. KELLBERG  
B. DAVER  
J. OUSTERS  
J. A. FROWEIN  
G. JORUNDSSON  
R. J. DUPUY  
G. TENEKIDES  
S. TRECHSEL  
B. KIERNAN  
N. KLECKER

4. The text of the report was adopted by the Commission on 14 December 1976 and is now transmitted to the Committee of Ministers in accordance with Art. 31 (2).

5. A friendly settlement of the case has not been reached and the purpose of the Commission in the present Report, as provided in Art. 31 (1) is accordingly:

- (1) to establish the facts, and
- (2) to state an opinion as to whether the facts found disclose a breach by the respondent Government of its obligations under the Convention.

6. A schedule setting out the history of proceedings before the Commission, the Commission's decision on the admissibility of the application and the relevant penal laws of the Isle of Man are attached hereto as Appendices I-III. An account of the Commission's unsuccessful attempt to reach a friendly settlement has been produced as a separate document (Appendix IV).

7. The full text of the pleadings of the parties together with the documents lodged as exhibits are held in the archives of the Commission and are available to the Committee of Ministers, if required.

## II. ESTABLISHMENT OF THE FACTS

8. The facts of the case as submitted by the parties may be summarised as follows:

On 7 March 1972 the applicant, then 15 years of age and of previous good character, together with three other boys pleaded guilty at Castletown Juvenile Court, Isle of Man, to unlawful assault occasioning actual bodily harm to one Robert Marshall, a prefect at Castle Rushen High School in Castletown, contrary to Section 60 of the Criminal Code 1872. Apparently the motive for the assault was that the prefect had reported the boys for taking beer into the school as a result of which they had been caned. On the same day he was sentenced to three strokes of the birch in accordance with Sections 8 and 10 of the Summary Jurisdiction Act 1960 (Isle of Man).

The applicant then appealed against his sentence to the Staff of Government Division at the Manx Court of Criminal Appeal. The appeal was heard on the afternoon of 28 April 1972 and the Court, after having ordered the applicant's medical examination, in the morning, dismissed the appeal. The Court found that the attack on the prefect had been very serious and that the sentence was lawful, no question having been raised as to its legality.

The birching was administered at about 6.30 p.m. the same day in the following manner: The applicant was detained in a room in the police station and was told he would have to wait another half hour as a doctor could not be found. At first his parents waited with him and then his father left to see what was happening. The doctor arrived about an hour and a quarter later. It was the same doctor who had given him a ten minute medical check earlier that day. He and his father were taken to another room by a policeman. There were three policemen in the room and the applicant was told to take down his trousers and underpants and bend over a table. He was held by two policemen while the third officer administered the punishment. At the first stroke of the birch pieces of the birch broke. His father apparently lost his temper and after the third stroke of the birch he "went for" one of the policemen and had to be restrained by two officers. The officer who had given the applicant the birching left the room quickly. The applicant was then told to "get out of here". His skin had been raised by the birching, although not cut, and he was sore for about a week and a half afterwards.

### III. SUBMISSIONS OF THE PARTIES

#### A. The applicant's submissions

##### 9. The facts

Concerning the birching itself, the applicant claimed that his head was held by a policeman "in a sort of ninety degree position" so that he could not see what was happening and that at the first stroke of the birch, which was very painful, part of the birch broke, scattering pieces all over the room. He was not sure whether the doctor was present throughout although she had been there at the beginning. Finally, he stated that he was in a distressed state throughout the whole procedure, particularly on the day of the birching itself when the proceedings began at 10 a.m. but he was not birched until 6.30 in the evening.

##### 10. The law

The applicant made six submissions of law:-

a) that the facts of this case constituted a breach of Art. 3 of the Convention being torture or inhuman or degrading treatment or punishment, or any combination of these, by any common understanding of these terms;

b) that the breach was exacerbated by the discriminatory nature of the punishment, being applicable to male children and young persons, contrary to Art. 14;

c) that, in the alternative, if no independent breach of Art. 3 were established by the Commission, there was a breach of Art. 3 in conjunction with Art. 14;

d) that the United Kingdom Government were responsible for these violations of the Convention in the Isle of Man, not because they had accepted such responsibility under Art. 63 of the Convention but because the Isle of Man is clearly an integral part of the metropolitan area of the United Kingdom;

e) that, in the alternative, even if the Commission consider that the United Kingdom Government declarations under Art. 63 are relevant there are no local conditions in the Isle of Man which warrant a different evaluation of the standards applicable under Art. 3 of the Convention from that of the United Kingdom.

Furthermore, he submitted that the complex constitutional relationship between the Isle of Man and the United Kingdom is of no relevance to this question and to the United Kingdom's obligations under the Convention;

f) that, even if the Commission should disagree with this last proposition and find that there are special conditions which necessitate the application of lower standards in the Isle of Man, nevertheless, the facts of this particular case still constitute a clear breach of Arts. 3 and 14.

11. In support of his principal submission that there was a breach of Art. 3 of the Convention, the applicant pointed out that many countries including the United Kingdom and most of the member States of the Council of Europe abolished judicial corporal punishment years ago or never had such a punishment.

12. In the case of the United Kingdom, judicial corporal punishment was abolished by the Criminal Justice Act 1948 following the recommendations of the Report in 1938 of the Departmental Committee on Corporal Punishment /Command Report 5684 March 1938/, hereinafter referred to as the Cadogan Report.

The applicant referred the Commission to several paragraphs in the Report and its conclusions. The Report concluded that although no evidence had been presented of brutality or cruelty in the administration of birching, judicial corporal punishment should be abolished as it was an ineffective and possibly harmful punishment in some cases and inimical to modern developments in the treatment of juvenile offenders, it being of a purely punitive nature and containing no element of reform.

The Departmental Committee was of the opinion that such punishment was unsatisfactory because of the difficulty of establishing proper safeguards for the selection of the appropriate cases. The purpose of judicial corporal punishment was to give the offender a "short, sharp shock" as soon as possible after the offence but by the time essential medical and social enquiry reports were obtained or an appeal heard the immediacy of the punishment was lost. Furthermore, the efficacy of the punishment would be greatly diminished in the likely event that the offender's parents disagreed with the sentence and sympathised with their child. In any event, the Committee commented, the average police officer had no liking for the duty of birching and there was more risk of the punishment being too light rather than unduly severe.

The Cadogan Report distinguished between corporal punishment administered by parents or teachers from judicial corporal punishment. It was likely that the former punishment would be administered by someone with whom the punished boy had a relationship either of love and/or respect and the punishment would quickly follow the offence. Judicial corporal punishment, on the other hand, was impersonal, involved a considerable delay after the offence, if the correct procedure were followed, and was surrounded by such an atmosphere of importance and ritual as to make it quite unsuitable for use in such cases.

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To justify the continuance of such a system, the Report commented in 1958, would require very special reasons such as evidence that, unlike other methods of dealing with juvenile offenders, it effectively deterred subsequent criminal activity. However, despite emotive argument one way or the other, the Cadogan Report concluded that there was no evidence of its exceptional efficacy as a deterrent. In 1958 the emphasis of penal policy on juvenile delinquency was on reform and many new more suitable methods of treatment had been devised. In practice, therefore, both in Magistrates' Courts and custodial institutions, such as borstals, judicial corporal punishment of young offenders had become obsolete.

13. The applicant then referred to the 1960 Report of the Advisory Council on the Treatment of Offenders, "Corporal Punishment" [Command Report 1213 November 1960], hereinafter referred to as the Barry Report. The Report considered a proposal to reintroduce judicial corporal punishment in the United Kingdom but rejected such a proposal for the same reasons as the Cadogan Report. The United Kingdom Government accepted the conclusions of this Report also.

14. The applicant emphasised that the delay pending appeal from his sentence and the uncertainty and mental anguish caused thereby constituted inhuman and degrading treatment.

15. However, the applicant pointed out that he was the first to take advantage of his right of appeal, and referred to "Against birching: Individual Corporal Punishment in the Isle of Man" [December 1975] by Angela Kneale in which it is asserted that often juvenile offenders are not informed of their right of appeal and the birching occurs all too hastily after conviction.

16. The applicant considered that Mrs. Kneale's book illustrates the inhuman and degrading nature of birching. Mrs. Kneale concludes that, contrary to public opinion in the Isle of Man, many of the birchings have been ordered in the cases of offences of dishonesty and not for serious crimes of violence. Furthermore, she is of the opinion that the punishment is degrading, if not barbaric, particularly in the light of the fact that in some cases the offender has been cut by the birch. Her book quotes the Seventh Report of the Commissioners on the Criminal Law in 1843 which stated that "(whipping) is a punishment which is uncertain in point of severity, which inflicts an ignominious disgrace on the offender, and tends, we believe, to render him callous, and greatly to obstruct his return to any honest course of life".

17. The applicant alleged that the inevitable adverse publicity for the person so punished is inhuman and degrading as is its effect on that person's family, for example, his own father. It was also submitted that the weight of medical opinion is opposed to birching, as demonstrated by the psychiatric evidence considered in the Cadogan and Barry Reports which on balance was opposed to judicial corporal punishment.

18. The applicant purported to substantiate his contention that such punishment is contrary to Art. 3 by reference to other international norms:

Art. 31 of the Council of Europe's and the United Nations' Standard Minimum Rules for the Treatment of Prisoners state "Corporal punishment ... and all cruel, inhuman and degrading treatment shall be completely prohibited as punishments for disciplinary offences".

Similar explicit or implicit prohibitions exist in Art. 32 of the Geneva Convention on the Protection of Civilian Persons in Time of War, Art. 87 of the Geneva Convention on the Treatment of Prisoners of War, Art. 12 (2) of the Geneva Conventions on the Amelioration of the Condition of the Wounded and Sick of the Armed Forces in the Field, and at Sea. /See Jean S. Pictet "III Commentary -- The Geneva Conventions of 12 August 1949, Geneva, International Committee of the Red Cross 1960 pp. 38 and 141."/

19. Finally, the applicant inferred from the agreed withdrawal of application No. 176/56, Greece v. the United Kingdom, in which whipping had been alleged, that the United Kingdom Government accepted that such corporal punishment was undesirable, should be stopped and was a probable breach of Art. 3.

20. He concluded therefore that judicial and administrative corporal punishment is recognised internationally as inhuman and degrading.

#### B. The submissions of the respondent Government

##### 21. The facts and the relevant law in the Isle of Man

The respondent Government agreed with the facts as stated by the applicant except, it was submitted, that a doctor was present throughout the birching, that the applicant's head was not held and only a few small pieces broke off the ends of the birch at the first stroke as it was dry. They commented that no excessive force was used, the applicant showed no signs of distress when the birching was over and was examined afterwards by a doctor who found that the skin had not been broken.

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The relevant penal law and practice of the Isle of Man were annexed to the Government's submissions and are reproduced in the Annex to the Decision on Admissibility (Appendix II) and in Appendix III herewith. It was noted that corporal punishment for petty theft under the Larceny Act 1946 was to be repealed, leaving such punishment for violent offences only.

22. Law and practice in general in the United Kingdom and Territories

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The Respondent Government referred to the abolition of judicial corporal punishment in the United Kingdom following the recommendations of the Cadogan Report that such punishment was inappropriate for the treatment of juvenile offenders. Parliament gave effect to this recommendation in the Criminal Justice Act 1948 as did the Northern Irish Parliament in the Treatment of Offenders Act (Northern Ireland) much later in 1968.

The Government pointed out that the Isle of Man is not a part of the United Kingdom, but a dependency of the Crown with its own legislative assembly, courts of law and administrative and fiscal systems. However, the United Kingdom Government are responsible for the Island's defence and international relations and the Crown is ultimately responsible for its good government. The Crown acts through the Privy Council on the recommendation of Ministers of the United Kingdom Government in their capacity as Privy Counsellors. The Home Secretary is the Privy Counsellor charged with prime responsibility for Island affairs.

The legislative assembly of the Isle of Man is the Court of Tynwald. It consists of the Lieutenant Governor who is appointed by, and is the representative of the Crown, of 24 members elected by adult universal suffrage constituting the House of Keys, and of seven members elected by the House of Keys, who, with three ex officio members, constitute the Legislative Council. The Court of Tynwald legislates for the Island in domestic matters, such legislation requiring ratification by Her Majesty in Council. It is the responsibility of the Home Secretary to advise the Privy Council in each instance whether or not to recommend to Her Majesty that an Island law should be ratified.

The United Kingdom Parliament has power to legislate for the Isle of Man but, because of a constitutional convention, does not usually use this power in domestic affairs, such as penal policy, without the concurrence of the Isle of Man. The Isle of Man has retained judicial corporal punishment as it considers that it not only deters young hooligans coming as tourists to the Island but it also keeps law and order in check on the Island, although it is conceded that the crime rate, including that for violent crimes, has increased, as it has in other countries.

The respondent Government acknowledged that the Isle of Man's retention of corporal punishment conflicts with their own policy and views but, in the absence of some consideration overriding the said constitutional convention, they are unable to impose conformity with those views.

The Government, however, also acknowledged that an international obligation would be an example of such an overriding consideration but contended that corporal punishment, per se, is not in breach of Art. 3.

They noted that 14 other territories for which the United Kingdom is equally responsible under Art. 63 retain corporal punishment although it is infrequently imposed.

### 23. Art. 3

The United Kingdom Government submitted that Art. 3 of the Convention does not prohibit all forms of corporal punishment. In support of their contention reference was made firstly to the dictionary definitions of the key words in the Article. Something is "inhuman" if it is of such brutality or barbarity that it is not proper to human being and degrading if it is such as to lower in estimation, character or quality, or to debase morally.

The Commission in the Greek case considered as inhuman "such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable" and degrading if it "grossly humiliates" or drives someone "to act against his will or conscience" Volume II, Part I, of the Report of the Commission, page 17. It is submitted, therefore, that what is inhuman or degrading is a question of degree and account must be taken of the purpose of the treatment reasonably assessed by the responsible authority.

The Government further contended that the acknowledgment of the judicial death penalty in Art. 2 indicated that corporal punishment, of which death is the most severe, is not precluded by Art. 3. Furthermore, the Preamble to the Convention refers to fundamental freedoms which, according to the Travaux Préparatoires, had been long accepted by democratic countries (Mr. Teitgen, France, Travaux Préparatoires, Collected Works, Vol. I, p. 101). A right to immunity from corporal punishment could not be so classified as judicial corporal punishment existed in many countries at that time and the United Kingdom, a leader in such matters, had only recently abolished it.

The respondent Government concluded, therefore, that judicial corporal punishment is not as such prohibited by Art. 3. As already said, it is a question of degree but depending on such factors as the age, sex or type of offender and the community concerned. This is illustrated by the Commission's comment in the Greek case that the degree of rough treatment which prisoners or the public tolerate "varies between different societies and even between different sections of them". They noted that although the Barry Report opposed the reintroduction of corporal punishment nevertheless public opinion was strongly in favour of it, a factor which should also be taken into account.

The United Kingdom Government submitted that the Convention accords some latitude to Governments in such affairs particularly in the case of territory to which Art. 63 applies. Art. 63 (3) provides that "the provisions of this Convention shall be applied in such territories with due regard, however, to local requirements". In this respect, it is to be noted that the Court of Tynwald had considered the question of corporal punishment in 1963 and 1965 and decided to retain it for the reasons stated above.

Finally, the Government stressed that the facts of this case certainly do not constitute a breach of Art. 3 of the Convention, particularly in view of the safeguards applied such as the medical examinations which the applicant underwent.

24. Art. 3 in conjunction with Art. 14

The United Kingdom Government informed the Commission that corporal punishment is not limited in the Isle of Man to males under 21 but may also be imposed on adult males convicted of armed robbery or robbery with violence and prisoners for grave disciplinary offences.

It was submitted that no absolute or partial right to immunity from corporal punishment is conferred by the Convention. However, if the Commission were to decide otherwise, the Government considered no Art. 14 issue could arise. On the other hand, a difference in treatment which has "no objective and reasonable justification" (Belgian Linguistic Case, Yearbook 1968, Vol. II, p. 832, p. 864) could raise an issue under Art. 14. In this case therefore factors of age and sex have an important bearing on the acceptability of corporal punishment and should be objectively and rationally assessed by the national authority.

The Government concluded that it would be absurd to decide that while corporal punishment itself is not contrary to Art. 3 it is in breach of Art. 14 as such punishment is not imposed on everyone.

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IV POINTS AT ISSUE

25. The following issues arise under the Convention:
- (1) whether judicial corporal punishment in the Isle of Man constitutes a breach of Art. 3 of the Convention and, consequently, whether the birching of the applicant constituted such a breach;
  - (2) whether the judicial corporal punishment of males in the Isle of Man is in violation of Art. 14 of the Convention;
  - (3) whether, having regard to Art. 63(3) of the Convention, there are any local requirements in the Isle of Man which are relevant to the application of Arts. 3 and 14 of the Convention.
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## V. OPINION OF THE COMMISSION

26. In this application the Commission is only concerned with the question of judicial corporal punishment and not any other form of corporal punishment. This means that the Commission has to judge the nature of the punishment in this case, without taking into account the practice or legality of whipping in educational institutions.

### Art. 3 of the Convention

27. The central issue raised by this application is whether judicial corporal punishment, such as birching, in the Isle of Man constitutes a breach of Art. 3 of the Convention.

28. Art. 3 provides that:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

29. As to the definition of these terms, the parties have referred the Commission to its jurisprudence in the inter-State cases, in particular the Greek Case (Applications No. 3321/67, Denmark v. Greece; No. 3322/67, Norway v. Greece; No. 3323/67, Sweden v. Greece; No. 3344/67, Netherlands v. Greece.)

30. In these applications, the Commission was of the opinion that,

"The notion of inhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation is unjustifiable. The word 'torture' is often used to describe inhuman treatment, which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment. Treatment or punishment of an individual may be said to be degrading if it grossly humiliates him before others or drives him to act against his will or conscience." (Yearbook 12, The Greek Case, p. 186)

The Commission reaffirmed this opinion in another inter-State case, the Irish Case (Part II of the Report of the Commission in Application No. 5310/71, Ireland v. the United Kingdom of Great Britain and Northern Ireland).

31. Similarly, the Commission followed this approach in the 31 applications lodged by East African Asians against the United Kingdom. In these cases, the Commission considered in detail the notion of degrading treatment (pp. 84-87 of the Report of the Commission in the East African Asians Cases). The Commission referred to the dictionary definition of the term that treatment is degrading "if it lowers him in rank, position, reputation or character, whether in his own eyes or in the eyes of other people". It went on to state that for the purposes of Art. 3 of the Convention this definition had to be narrowed and that such treatment could only be degrading "in the sense of Art. 3 where it reaches a certain level of severity" (p. 85, paragraph 189, ibid.)

32. The Commission does not consider that corporal punishment in the Isle of Man falls within the meaning of torture or inhuman treatment or punishment as understood in its previous jurisprudence or by any ordinary understanding of those terms. However, it is of the opinion that a clear issue arises within the meaning of the phrase "degrading treatment or punishment".

33. In this respect, reference to the previous jurisprudence of the Commission in inter-State cases is not necessarily relevant to an application of this kind. These inter-State cases have arisen out of emergency situations and involved allegations of atrocious ill-treatment such as torture or treatment akin to torture.

34. Perhaps the simple dictionary definition of degrading is too wide for the purposes of Art. 3 of the Convention, as the Commission concluded in the East African Cases. However, in those cases the Commission was against a restrictive interpretation of the right guaranteed by the Convention (p.86, paragraph 192, ibid.)

35. Judicial birching humiliates and disgraces the offender and can therefore be said to be degrading treatment or punishment. This is particularly evident in the procedure used for birching in the present case, including the fact that persons between 14 and 21 years of age have to strip off their trousers when being birched.

36. It is contended by the Isle of Man authorities that this punishment deters further criminal activity by the offender and deters other youths from such behaviour. This is the only reason that has been put forward by the United Kingdom Government to justify the retention of judicial corporal punishment in the island.

37. However, it is doubtful whether corporal punishment has any specific deterrent effect. The Government's own Reports before the Commission, the Cadogan and Barry Reports, bear this out.

38. Such considerations as the necessary delays involved with the execution of judicial corporal punishment, the possible disapproval of the punishment by the parents of the offender and the possibility of thereby making a martyr or hero of the youth, the failure of children and young persons to recognise or understand the retributive or deterrent justification of birching, the difficulties of assessing the suitability of the offender for this type of punishment and the difficulties for the persons, usually police officers, who have to administer the punishment, led the Hon. Edward Cadogan and his colleagues to conclude in 1938 as follows:

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"In view of all these considerations, and having regard to the opinions formed by persons of long experience and mature judgment, we have come to the conclusion that, as a court penalty, corporal punishment is not an effective method of dealing with young offenders. We do not regard it as a suitable penalty for serious cases: these require constructive methods of treatment, designed to deal with the causes and conditions underlying the offence, and corporal punishment is essentially non-constructive. In other cases - e.g. some simple cases of damage to property or other offences due purely to a spirit of mischief - there is not the same need to train or re-educate the offender, and some form of sharp summary punishment may be all that is required. We believe that there may be a few cases of this kind in which some form of corporal punishment would provide the element of punishment required: but even for these we do not think that corporal punishment, in any form in which it could be ordered by a court, would be a suitable or effective remedy. Judicial birching is surrounded with an atmosphere of importance which makes it quite unsuitable for use in these minor cases" (paragraph 30 of the Report of the Departmental Committee on Corporal Punishment, Cmnd. 5684, 1938).

The Hon. Mr. Justice Barry and his colleagues agreed with the Cadogan Committee "that judicial corporal punishment has no special or unique influence as a deterrent" and "for that reason it is unlikely to affect the incidence of crime" (paragraph 51 of the Report of the Advisory Council on the Treatment of Offenders, Cmnd. 1213, 1960).

39. The Commission is of the opinion that birching as a punishment ordered by a court and administered as provided for in the Isle of Man is an assault on human dignity which humiliates and disgraces the offender without any redeeming social value. Furthermore the Commission observes that other persons involved may be humiliated or disgraced by the whole procedure.

40. For these reasons the Commission concludes that judicial corporal punishment constitutes a breach of Art. 3 of the Convention and, consequently, its infliction on the applicant was in violation of this provision of the Convention.

Art. 14 of the Convention

41. Art. 14 of the Convention provides

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

42. The applicant submitted that the legislation in the Isle of Man relating to corporal punishment is clearly discriminatory as whipping is limited to males only, in respect of a wide range

of offences from grievous bodily harm to petty theft. In the Belgian Linguistic Case the Court said that the principle of equality of treatment was violated if "the distinction had no objective and reasonable justification" (Yearbook 11, p. 866). It was the applicant's contention that no such justification existed and he therefore concluded that the birching he received was a breach of Art. 14 of the Convention which aggravated the alleged breach of Art. 3.

43. The Government refuted these submissions. They contended that no issue whatsoever arose under this Article, as they considered that there was no breach of Art. 3 of the Convention, that limiting the punishment to males of certain ages or for certain offences was reasonable and that it would be absurd to suggest that the punishment must be imposed on all alike.

44. The Commission, however, does not consider it necessary to pursue an examination of this issue. It is sufficient that the Commission has concluded that there was a violation of Art. 3 in this case and that, therefore, judicial corporal punishment should not have been applied to anybody.

#### Art. 63 of the Convention

45. Art. 63 of the Convention provides that

- "1. Any State may at the time of its ratification or at any time thereafter declare by notification addressed to the Secretary General of the Council of Europe that the present Convention shall extend to all or any of the territories for whose international relations it is responsible.
2. The Convention shall extend to the territory or territories named in the notification as from the thirtieth day after the receipt of this notification by the Secretary General of the Council of Europe.
3. The provisions of this Convention shall be applied in such territories with due regard, however, to local requirements.
4. Any State which has made a declaration in accordance with paragraph 1 of this Article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Commission to receive petitions from individuals, non-governmental organisations or groups of individuals in accordance with Article 25 of the present Convention.

46. The Commission does not consider that it is relevant to go into the constitutional status of the Isle of Man in relation to the United Kingdom. It is sufficient for the purposes of this

application that the United Kingdom Government made a declaration under Art. 63 (1) of the Convention, at the material time, extending the application of the Convention to the Isle of Man and that, in accordance with Arts. 63 (4) and 25, the right of individual petition to the Commission from the Isle of Man has been accepted.

47. As to the local requirements mentioned in Art. 63(3), the Commission does not find any significant social or cultural differences between the Isle of Man and the United Kingdom which could be relevant to the application of Art. 3 in the present case.

#### CONCLUSION

48. The Commission finds by a vote of fourteen against one that the judicial corporal punishment inflicted on the applicant was in breach of Art. 3 of the Convention.

Secretary to the Commission      Acting President of the Commission

(H.-C. KRUGER)

(G. SPERDUTI)

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Application No. 5856/72: Tyrer v. United Kingdom

Dissenting Opinion of Mr. Kevin Mangan

1. The main issue in this case is whether a judicial punishment (three strokes of a birch rod), administered, pursuant to a court order, to a youth of fifteen years of age, constituted "degrading treatment or punishment" of that youth infringing Article 3 of the Convention of Human Rights.
2. The Commission was thinking along the right lines, in my opinion, when it said in its Report in the East African Cases, (31 Applications lodged by East African Asians against the United Kingdom) that the dictionary meaning of "degrading" was too wide and involved some qualification of degree, in the context of the Convention, such as "gross", "severe", or "grave".
3. I have, on a few occasions in my early life, suffered slaps from the hand of a concerned, though sometimes angry, parent. During my school career, I, and my fellow pupils, were often slapped on the hand by the teacher with a heavy leather strap for various reasons of school discipline: in my school, though not in others, this punishment was applied in the class room, in the presence of the other pupils. It, thus, involved physical pain and some degree of humiliation. I am, now, what I am. I do not consider that my parents or teachers subjected me to degrading treatment or punishment.
4. As a parent, I sometimes administered slaps to my sons. More recently, I find myself with four grand-sons between four and eight years of age who, occasionally, seem to me to merit a slap from the hand of a parent, or grand-parent. I realise that I am moved mainly by primitive instincts in thinking thus. I have not made any deep study of writings on corporal punishment of children, or on animal behaviour, but I have an opinion that most animals have a parental instinct which initiates the administration of physical checks and punishments by parents to their offspring. I think I am right in saying that one of the best publicised writers on child care and training in this century, who had for long advised against corporal punishment of children by parents, has recently modified his views and conceded that such punishment can be beneficial to parent and child, at times.
5. The "whipping" ordered by the Manx juvenile court to be administered to the applicant in this case, at his then age of 15 years, was no more physically severe than many parents, or teachers, in many countries, still consider themselves justified in administering to their offspring or pupils. The restraints and precautions to be observed by those administering the sentence of three strokes of the birch, in the Isle of Man, are laid down in the controlling statute and directive (set out in Appendix III) and ensure that the punishment is administered in private and is not physically excessive. The punishment imposed in the particular case by the judicial organs of the community (including a hearing on appeal by a second court) was for a planned, serious, physical assault in a public street

by a group of boys on a single fellow school-boy: an offence against the peace and good order of the community. The punishment was carried out with the controls laid down and without public display or humiliation. Where, then, is the element of "degradation" which distinguishes this chastisement from that administered by a parent or teacher?

6. I consider that to bring such chastisement within the scope of Article 3, the element of "degradation", if it exists at all (and such existence must first be proved) must, at least, be of some considerable (or "gross", "severe" or "grave") substance.

7. The earlier terms with which "degrading" is associated in Article 3, ("torture" or "inhumanity") reflect the concern which moved the framers of the Convention in the post World-War-Two era. The later term "degrading" should be construed in context and such construction, in common-law countries at least, would probably be considered to attract the so-called eiusdem generis rule. Apart from the internal construction of Article 3, its placement in the first three articles of Section I emphasises the gravity and substance of the inhuman acts against which it was directed.

8. The majority of the Commission find (par. 35) that "judicial birching humiliates and disgraces the offender and can therefore be said to be degrading treatment or punishment." I can find no clear evidence that humiliation or disgrace of the offender was the design, in general, of the law applied, or of its application in this particular case.

9. Even if a tendency to humiliate or disgrace were established, it does not necessarily follow that the degree of humiliation or disgrace inflicted must be equated to degrading treatment or punishment within the meaning of Article 3.

10. I, therefore, disagree with the proposition, as I understand it, in paragraphs 31 to 35 of the majority opinion, that the Manx judicial birching is, *prima facie*, "degrading treatment or punishment" and, therefore, is a breach of Article 3, unless it can be justified, in the context of a case in which Article 63 applies.

11. There is a factor in the prescribed method of whipping in the Manx code which is alleged to add an element of degradation and which the majority report (par. 35, end) says is "particularly evident". In paragraph 8 of the summary of facts it is mentioned that the applicant was told to take down his trousers and under-pants, and in the course of the oral hearing some use was made by one of the applicant's counsel of the emotive expression "ritual flagellation" to describe what took place. The Governor's direction of May, 1960, par. 3 (Appx. III of this Report) provides in positive terms that "the whipping shall be inflicted on the posterior over the child's ordinary cloth trousers". This directive seems vague on the point as

to whether it applies only to a "child" under age 14, in distinction from a "young person" over that age. There is no positive direction that a young person over 14 must lower his trousers for a whipping. If custom, or some other provision of the relevant law which I may have overlooked, does require such preparation, I would consider that the motive is not self-evidently to "humiliate or disgrace". It is just as likely, in my opinion, to be stipulated in order to ensure that the subject feels a substantial degree of pain or does not prepare a defensive padding.

12. Having examined this factor, I do not consider it adds any sufficient element to the process of punishment inflicted to render degrading something which is not otherwise self-evidentially degrading within the sense of the Convention.

13. I, therefore, come to the conclusion that the applicant has not proved that he was a victim of a breach of Article 3.

14. While, on the view I take on the main issue, under Article 3, consideration of Article 63(3) is not necessary, I feel I should express my views on the application of that Article in the light of the opinion of the other members of the Commission.

15. The Isle of Man is a small, compact and still somewhat isolated island community, in spite of recent developments in travel and communication facilities. It has a long history of parliamentary semi-independence and democracy. The views of such a clearly distinguishable political entity cannot reasonably be ignored or treated as irrelevant. The Attorney-General of the Isle of Man was a member of the team representing the respondent Government and addressed the Commission on the political history and status of the Island and the internal problems created for his government by the campaign for the abolition of judicial corporal punishment.

16. I consider that the existence of law providing for corporal punishment in the Isle of Man, and other jurisdictions, at the time when the Convention first entered into force, is relevant to consideration of this case under Article 63. The deterrent, as distinct from the retributive or punitive, effect of such punishment may be open to debate: but I do not think the debate is finally closed. It is not necessary to close it for the purposes of this case. The very existence in the Isle of Man of strong communal support for the retention of the existing provisions for judicial corporal punishment for young offenders seems to me to be a possible significant cultural or social difference between that community and the United Kingdom of Great Britain and Northern Ireland. I think that support was not seriously disputed by the applicant's counsel.

17. The majority report of the Commission claims (par. 37) that "it is doubtful whether judicial corporal punishment has any specific deterrent effect" and refers to the reports of two British Government enquiries (Cadogan and Barry Reports) to bear this out.

These Reports merely reach a "not proven" conclusion and, as far as I can now ascertain, did not examine the Manx law and environment. The view quoted in Paragraph 38 of the majority opinion, from these Reports is that judicial corporal punishment has no "special or unique influence as a deterrent". This is not to say that it has not a deterrent effect which, as asserted by the Manx people, or a considerable number of them, may be specially relevant and effective in their environment. The difficulty of providing custodial punishment in a small community and the special problems of dealing with offenders amongst large numbers of young summer day trippers to the Island were adverted to in the course of the case.

18. The practices and views on punishment of young persons in the various communities involved in the preparation of the Convention, at the time it was concluded, and the really great evils against which it was mainly directed must be considered in determining what it was that the parties agreed to curb. Protagonists of further provisions for the betterment of human conditions cannot, in my view, validly extend the scope of the Convention without further negotiation and agreement between the States parties to it.

19. In my view, the local feeling in the Isle of Man in favour of the retention of judicial corporal punishment is a sufficient factor to justify, under Article 63(3), the continuing reluctance of the British Government to over-ride that feeling.

20. I do not consider that the applicant has established that the punishment he complained of was "degrading treatment or punishment" within the true intended meaning of Article 3. I do not consider that any case has been established under Article 14 of the Convention. I would, therefore, favour a report that the facts of this case do not disclose any breach of the Convention in relation to the applicant in this case.

APPENDIX I

## History of Proceedings

Item	Date	Note
Date of introduction of application	5 September 1972	
Date of registration	7 September 1972	
Commission's deliberations and decision to join this application with the applicant's co-accused, Andrew Hays, application No. 5775/72, to notify the United Kingdom Government of the applications and to invite their observations on their admissibility	19 December 1973	MM. Sperduti Fawcett Busuttil Daver Opsahl Mangan Custers Polak Frowein
Date of Government's observations on admissibility	24 April 1974	
Date of applicant's observations on admissibility in reply	10 June 1974	
Commission's deliberations and decision to declare admissible that part of the application which raised issues under Art. 3 of the Convention, either alone or in conjunction with Art. 14, to declare inadmissible that part of the application which the applicant had withdrawn concerning the complaint under Art. 14 of the Convention that the punishment was discriminatory as it was primarily imposed on persons from financially and socially deprived backgrounds and to declare inadmissible application No. 5775/72 from Andrew Hays.	19 July 1974	MM. Sperduti Fawcett Ermacora Walter Daver Opsahl Mangan Nørgaard Polak Frowein



Item	Date	Note
Date of applicant's observations on the merits of the case	10 October 1974	
Date of Government's observations on the merits of the application in reply	8 April 1975	
Deliberations of the Commission and decision to hold an oral hearing on the merits of the case in July 1975	26 May 1975	MM. Esmacora Fawcett Velter Busuttil Kellberg Daver Mangan Polak Jörundsson Dupuy Tenekides Trechsel
Request by applicant for postponement of the oral hearing until medical evidence on corporal punishment could be submitted	10 June 1975	
Receipt of medical evidence from the applicant	25 June 1975	
Deliberations of the Commission and decision to hold an oral hearing on the merits of the case in October 1975	9 July 1975	MM. Sperduti Fawcett Triantafyllides Busuttil Kellberg Daver Mangan Custers Nørgaard Polak Frowein Dupuy Tenekides Trechsel Klecker

Item	Date	Note
Oral hearing on the merits of the application	7 and 8 October 1975	<p>MM. Sperduti Fawcett Nørgaard Ermacora Triantafyllides Busuttil Kellberg Mangan Daver Custers Polak Frowein Jörundsson Dupuy Tenekides Trechsel Klecker</p> <p>Applicant represented by:</p> <p>MM. W. Nash C. Thornberry N. Rodley</p> <p>Government represented by:</p> <p>MM. D.G. Gordon-Smith A. Collins J.W. Corrin J.C. Haines Sir William Dale Miss S. Austin</p>
Commission's deliberations	8 October 1975	<p>MM. Sperduti Fawcett Nørgaard Ermacora Triantafyllides Busuttil Kellberg Mangan Daver Custers Polak Frowein Jörundsson Dupuy Tenekides Trechsel Klecker</p>

Item	Date	Note
Commission's deliberations and decision not to accede to the applicant's purported withdrawal of application at that stage since the case raised questions of a general character affecting the observance of the Convention which necessitated a further examination of the issues involved	9 March 1976	MM. Nørgaard Fawcett Ermacora Busuttil Kellberg Daver Opsahl Custers Polak Frowein Jörundsson Dupuy Tenekides Trechsel Mangan
Commission's deliberations	14 July 1976	MM. Sperduti Fawcett Busuttil Kellberg Daver Custers Polak Frowein Dupuy Tenekides Trechsel Mangan Klecker
Commission's deliberations	30 September 1976	MM. Sperduti Fawcett Nørgaard Ermacora Triantafyllides Busuttil Kellberg Daver Opsahl Mangan Custers Polak Frowein Jörundsson Dupuy Tenekides Trechsel Klecker

Item	Date	Note
Commission's deliberations December 1976 and final vote		MM. Sperduti Fawcett Nørgaard Ermacora Busuttil Kellberg Daver Mangan Custers Frowein Jörundsson Dupuy Tenekides Trechsel Klecker