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THE RIGHT TO LIFE – PROHIBITION OF DEATH PENALTY AND RIGHT TO LIFE IN PRISON

The right to life is non-derogable right that cannot be denied even in time of war or other public emergency threatening the life of the nation. The right to life is one of the highest social values without which all other rights and freedoms lose their significance. The European Convention of Human Rights imposes both positive obligation to protect the right to life and a negative obligation not to take life. Negative obligation includes state duty not to take life intentionally or negligently. A duty to safeguard life incorporates twofold approach, a duty to provide an effective and impartial investigation in cases of death resulting from the activities of state officials and a duty to safeguard and protect life. The author analyses both positive and negative state's obligation. The aspect of the state's positive obligation to protect life is assessed through protection of prisoners against killing and violence by other detainees and through the duty to offer prisoners healthcare, while the negative aspect is analyzed through the prohibition of death penalty. The author elaborates practice of the European Court of Human Rights and how interpretation of right to live progressed over time in these two specific groups of cases.

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1. Right to life in the criminal justice

The right to life was gradually developed from a religious belief in the sanctity of human life, through philosophical considerations of human life value to the right to life in international law (Wicks, 2010, p. 22). In international law, the right to life finds its most general recognition in article 3 of the Universal Declaration of Human Rights, article 6 of the International Covenant on Civil and Political Rights and article 2 of the European Convention on Human Rights (ECHR).

The right to life stands at the heart of human rights protection, since individuals cannot enjoy any of the rights guaranteed to them unless their physical existence is ensured (Tomuschat, Lagrange, Oeter, 2010, p. iii). In other words, the right to life is an inherent principle, because all other rights depend on the right to life (Mathieu, 2006, p. 15).

Although it is centrally placed, there are challenges to identify parameters of this right, because what starts as the lest problematic of rights becomes distinctly problematic (Griffin, 2008, p. 213).

In accordance with article 2 of the Universal declaration of Human Rights and articles 2 and 26 of the International Covenant on Civil and Political Rights, everyone is entitled to the protection of the right to life without distinction or discrimination of any kind, and all persons shall be guaranteed equal and effective access to remedies for the violation of this right. Article 6 of the International Covenant on Civil and Political Rights recognizes the inherent right of every person to life, and it is supreme right from which no derogation is permitted even in situations of armed conflicts.[1]

Article 2 of the ECHR, present compromise agreed by the Committee of Ministers that includes definition of right and narrowly listed exceptions (Wicks, p. 44). Article 2 (1) lays down the general principle that everyone's right to life shall be protected by law.

Article 2 (2) lists the conditions under which deprivation of life is not regarded as being in violation of the ECHR. An exception of Article 2 in the deprivation of life can be established only when the use of force is no more than absolutely necessary. In addition, the conditions are set in an exhaustive list, covering three situations: defence, prevention of escape, and quelling a riot or insurrection. The exceptions included the death penalty

[1] General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, Human Rights Committee, 2018.

and lethal force in some circumstances of law enforcement. The death penalty was abolished with Protocol No. 6 specifically on the abolition of the death penalty, on 28 March 1983, and with Protocol No. 13 on the abolition of the death penalty in all circumstances, on 3 May 2002. Protocol No. 6 to the European Convention on Human Rights abolishes the death penalty in peacetime. It came into force on 1 March 1985. With Protocol No. 6, Europe's position changed from tolerating to prohibiting statutory killing. Protocol No. 13, which entered into force on 1 July 2003, bans the death penalty in all circumstances, including for crimes committed in times of war and imminent threat of war.

The enforcement of the ECHR will be elaborated in depth, especially in relation to death penalty and protecting life of persons deprived of liberty. Special focus will be on the interpretation of the right within the jurisprudence of the European Court of Human Rights.

2. Prohibition of death penalty

The right to life in criminal law also influenced sentencing policy. This influence is especially elaborated in relation to death penalty. The right to life under the ECHR expressly permits the death penalty, but optional protocols to the Treaty have prohibited it and the position of states has evolved since adoption of the ECHR (Schabas, 2002, p. 260). From the beginnings of the Council of Europe there were parliamentarians who were advocating that the human rights organisation cannot reject the anti-death penalty sentiments (Yorke, 2010, p. 233). It took over the 30 years of debates against the death penalty and the regional restriction of the punishment occurred in 1983 when Protocol No. 6 was adopted on the removal of the death penalty in times of peace. This was result of the new dynamic following the Second World War that was to erupt in the 1980s (Hood, Hoyle, 2009, p. 6). The Explanatory Report on Protocol No. 6 states that Protocol affirms the principle of abolition of the death penalty and presents a centralised affirmation of an already existent state practice.[2] The Protocol No. 6 established obligation of the Member States to delete where appropriate, the death penalty from its law to become Party to the Protocol. More debates were required for the removal of death penalty in the wartime and only in 2003, Protocol No. 13 was adopted.

[2] Explanatory Report to the Protocol 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of Death Penalty, Strasbourg, 28.IV.1983, p. 2.

Every Council of Europe member state has signed and ratified Protocol No. 6, except Russia, which has signed but not ratified.[3] In relation to Protocol No. 13, which provides for the total abolition of death penalty, all Council of Europe member states but three have ratified Protocol No. 13. Armenia has signed but not ratified the Protocol, while Azerbaijan and Russia have not signed it.[4] Following acceptance of the Protocols No. 6 the Council of Europe member states strongly committed themselves to abolition, not only in their states but also called for universal abolition and insisted on the maintenance in the meantime of existing moratoria on execution in Europe.[5] Armenia was the last member state which abolished death penalty in peacetime in 2003, while Latvia was the last member state that abolished death penalty in wartime in 2012. However, the debates concerning the death penalty continue to arise. In many European countries leading politicians argue in favour of reinstatement of the death penalty (Toth, 2020, p. 3). Consequently, the public support to the re-introduction of death penalty is increasing in some European countries due to strengthening of populism.[6]

Due to the ECHR wording and lack of precise language in Protocols No. 6 and No. 13 that say that article 2 is amended, the European Court of Human Rights is forced to implement a Convention that expressly permits the death penalty, although there is now widespread acceptance of Protocol No. 6 and Protocol No. 13 that prohibit the imposition of the penalty.[7] The European Court of Human Rights adopted position that the normal method of Convention amendment is through the state practice in signing and ratifying optional protocols and asked for state unanimity to enable it to present an interpretation that article 2 had been amended.[8] This decision outlines the fact that the development of abolition of death penalty in member states does not necessarily signaling amending interpretation of article 2 (Mowbray, 2005, p. 65.

[3] Chart of signatures and ratifications of Protocol 6 available at: https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=114

[4] Chart of signatures and ratifications of Protocol 13 available at: https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=187

[5] 2nd Summit of the Heads of State and Government of the Council of Europe, 1997.

[6] In 2017 in Hungary 52% would accept it in certain cases of life-threatening offences, available at: https://dailynewshungary.com/hungary-stands-beside-death-penalty/

In 2020, in France survey showed that 55% of the French people support reintroduction of the death penalty, available at: https://www.rfi.fr/en/france/20200917-new-poll-shows-jump-in-number-of-french-people-in-favour-of-the-death-penalty

[7] Only Russia has not ratified Protocol 6.

[8] *Öclan v. Turkey*, Application No. 46221/99, judgement of 12 May 2005, para. 162.

However, the right's coherence is seriously damaged by an interpretation that permits executions in many states but prohibits extradition to those states for individuals who were arrested in an abolitionist state. To overcome the problem to interpretate that extradition to the country where person may face the death penalty is contrary to the right to life, the European Court of Human Rights created concept of the death row phenomenon and took position that death penalty could present inhuman and degrading punishment and treatment due to conditions facing an individual on death row, including very often long wait for execution (Matić Bošković, 2020, 69). In the case *Soering v. the United Kingdom*[9] the Court found that extradition to the United States would represent violation of article 3, particular because of the death row phenomenon where people spent several years in extreme stress and psychological trauma awaiting to be executed.[10]

The method of execution of death penalty was also subject of the Court assessment. The Court declared that exposure of a women to a risk of being stoned to death give rise to a violation of article 3 of the Convention.[11]

In November 2005 the Court modified its approach and interpretation of the deportation of a suspect with possibility of facing the death penalty. In the case *Bader and others v. Sweden*[12] the Court considered that article 2 may be implicated if a member state deports an alien who has suffered a denial of fair trial in the receiving state, the outcome of which is likely to be the death penalty.[13] The Court took position that only the risk of an execution is required and the determining factor in this case was the unfair trial.

3. Protecting life of persons deprived of their libertyin the practice of the European Court of Human Rights

The principle that prisoners retain all rights apart from the right to liberty is recognized in several international and regional legal instruments (Kempen, 2008, p. 23). Specifically, rule 2 of the 2006 European Prison Rules states that "*persons deprived of*

[9] Application no. 14038/88, judgement of 7 July 1989.

[10] See: case Poltoratski v. Ukraine, application no. 38812/97, Kouznetsov v. Ukraine, application no. 39042/97, Nazarenko v. Ukraine, application no. 39483/98, Dankevitch v. Ukraine, application no. 40679/98, Aliev v. Ukraine, application no. 41220/98 and Khokhlitch v. Ukraine, application no. 41707/98, judgments of 29 April 2003; G.B. v. Bulgaria, application no. 42346/98 and Iorgov v. Bulgaria, judgments of 11 March 2004.

[11] Case *Jabari v. Turkey*, Application no. 40035/98, judgement of 11 October 2000.

[12] Application No. 13284/04, judgement of 8 November 2005.

[13] Para. 42-48.

their liberty retain all rights that are not lawfully taken away by the decision sentencing them or remanding them in custody".

The right to life of detainees remains an issue which is often neglected in the academic discussions (Fournet, 2010, p. 177). The indiscriminate scope of application of article 2 undoubtedly covers all individuals, including detainees, therefore states must take the necessary steps to protect the life of those detained in prison. The vulnerability of detainees, any possible influence of the deprivation of liberty and the state's obligation to protect them must bring along extra attention in handling and approach to each individual case (Thoonen, 2017, p. 167). The situation is a bit more complicated regarding the suicide prevention in prisons (Thoonen, Duijst, 2014, p. 121)

As recognized in the jurisprudence of the European Court of Human Rights, the states need to take appropriate steps to safeguard the lives of those within their jurisdiction. In 2006 the Court found that there had been a violation of Article 2 in the *Renolde v. France* case,[14] since French authorities had not taken the necessary measures to protect the life of detainee, who hanged himself in July 2000 in the prison cell, where he was in pre-trial detention. The Court also observed that prisoners known to be suffering from a serious mental disturbance and to pose a suicide risk. The important detail of this case was that in the same month he had already tried to commit suicide and that he had had issues with his mental health. For the Court, the state was obviously dealing with a prisoner known to be suffering from serious mental disturbance and posing a risk of suicide and, hence, someone who would have needed special attention. In addition, the Court noted that mentally ill persons are considered vulnerable and call for special protection. Another problem pointed out was the handing out of medication without any checking of whether the person is actually taking it. Based on those facts, the European Court of Human Rights held that the suicide of a mentally ill prisoner was attributable to the authorities' failure to take adequate measures.[15]

In the case *Mitic v. Serbia*,[16] the Court emphasized again that authorities are responsible only if they knew or ought to have known about the real and immediate risk of suicide and, if so, did all that could reasonably have been expected of them to prevent that risk. In this case, the lack of any suicidal tendencies and normal behavior were sufficient for

[14] Application No. 5608/05, Judgement of 16 October 2008.

[15] Similar position was taken in the case *Çoşelav v. Turkey,* application no. 1413/07, judgement of 9 October 2012; *Ketreb v. France,* application no. 38447/09, judgement of 19 July 2012.

[16] Application No. 31963/08, judgement of 22 January 2013.

the Court not to criticize authorities for not taking special measures to prevent suicide. In the absence of any specific cause for caution regarding a detainee's mental state, standard precautionary measures to prevent suicide and supervise prisoners are considered sufficient[17] and the suicide was not found to be the responsibility of the state.

The European Court of Human Rights has also used the right to life under article 2 as a mechanism to engage the right to health of prisoners, including the right to medical treatment (Lines, 2008, p. 17). The role of health service in prison is very complex due to frequency of self-injures, suicide, prevention of transmission of infectious diseases, and the identification, recording and reporting of all those indicators that imply action that do not comply with legal norms (Pavlović, 2019, p. 54).

The state's obligation to protect health and provide medical care necessary to safeguard life of detainees is related to making available general medical services in prison and providing medical assistance after use of force (Milenkovska, 2012, p. 142). Failing to provide required medical treatment violates the right to life.

In the case *Makharadze and Sikharulidze v. Georgia*[18] the European Court of Human Rights confirmed as a general principle the obligation of the national authorities to protect the health and well-being of persons who have been deprived of their liberty (para 71). Furthermore, the Court recognized the obligation of the authorities to provide individuals in the custody with the medical care necessary to safeguard their life. Such interpretation of the Court is based on the understanding that persons in custody are in a vulnerable position, since they cannot protect their rights and satisfying their needs on the own initiative. Hence the authorities are under a duty to protect them and provide adequate healthcare and necessary resources to work (Mitrović, 2018, p. 230).

The European Court of Human Right jurisprudence highlighted that medical care has to be provided timely. In the case *Anguelova v. Bulgaria*[19], the Court identified violation of article 2 due to failure to provide timely medical assistance. The person died after having spent several hours in police custody after his arrest for attempted theft. When seeing the condition of the person deteriorating, police delayed contact between Mr. Zabchikov and a doctor and failed to call an ambulance. Consequently, where an individual is taken into

[17] More information available in The State's positive obligations under Article 2 of the Convention to protect an individual from self-harm, (2017) European Court of Human Rights, p. 12.

[18] Application No. 35254/07, judgement of 22 November 2011.

[19] Application No. 38361/97, judgement of 13 June 2002.

police custody in good health but later dies, it is incumbent on the state to provide a plausible explanation of the events leading to this death (para 110).[20]

Furthermore, the Court stressed the positive obligation of the states to make regulations compelling hospitals to adopt appropriate measures for the protection of patients' lives. This position is presented in the case *Tarariyeva v. Russia*[21] where a prisoner died from post-surgical complications, although for more than two years proceeding his death Mr. Tarariyev had been in detention and custodial authorities had been fully aware of his health problems. The Court found that the decisive element for the assessment of the adequacy of medical care at the prison hospital is whether it possessed the necessary facilities to perform surgical interventions successfully and deal with post-operative complications. In the *Tarariyeva* case the adequate facilities were conspicuously lacking, since the prison hospital was not adequately equipped for dealing with massive blood loss.[22] In addition, the prison hospital staff treated him as an ordinary post-operative patient rather than an emergency case with the consequence that surgery was performed too late.

Medical care also needs to be provided properly by administering the necessary medical treatment. In the case *Gagiu v. Romania*[23], the prisoner's medical file mentioned chronic hepatitis but he did not receive proper treatment. In consequence, his chronic disease was aggravated. Instead of receiving the treatment prescribed by the surgeons and specialists following the tests carried out at the municipal hospital, Mr. Gagiu was not admitted to the prison hospital but placed in an ordinary cell until the day before he died. The Court found that the prison authorities had not acted with due diligence in providing the applicant with the necessary medical care and that there had been a serious failure on their part to protect the health of a person in their custody.

The Court also took position on state obligation when it comes to the prevention of spreading of contagious diseases. In the case *Shelley v. United Kingdom*[24] the Court clarified that matters of health care policy, in particularly as regards general preventive measures, are in principle within the margin of appreciation of the domestic authorities

[20] See also *Selmouni v. France*, application no. 25803/94, para 87; *Salman v. Turkey*, application no. 21986/93, para 97; and *Velikova v. Bulgaria*, application no. 41488/98.

[21] Application No. 4353/03, judgment of 14 December 2006.

[22] Paras 87 and 88.

[23] Application No. 63258/00, judgement of 24 February 2009.

[24] Application 23800/06, decision on admissibility of 4 January 2008.

who are the best placed to assess priorities, use of resources and social needs. In this concrete case, the decision of the authorities not to implement a needle-exchange programme for drug users in prisons was not found in violation of the convention (Coggon, 2009, p. 130). However, in the case *Poghosyan v. Georgia*[25] in considering the systemic problems of medical care in Georgian prisons, the Court held that state authorities are required to take the necessary legislative and administrative measures to prevent the spreading of contagious diseases, to introduce a screening system for prisoners upon admission and to guarantee prompt and effective treatment (para 70).

In relation of a murder in prison, the Court has considered the state to have an obligation to take preventive operational measures to protect individuals identifiable in advance as potential target of a lethal act. In the case *Paul and Audrey Edwards v. UK*[26], Mr. Edwards had been arrested and taken to a police station, where he was placed in a cell with another inmate who had a history of violence and assault and had been diagnosed as schizophrenic. Some time later, Edwards was found to have been stamped and kicked to death. The violation of article 2 was found because of failure of those acting earlier in the case, namely doctors, police and court to pass on to the prison authorities information relevant to the murderer's condition and of the inadequate nature of screening process when he was admitted to prison (Harris, O'Boyle, Bates, Buckley, 2014, p. 211). In assessing alleged violation, the Court stressed that it is important to focus not only on what authorities knew as a subjective approach, but on what authorities ought to know as an objective approach (para 55). The Court found that the possible risks from inmate had been identified and noted that the medical information ought to have been brought to the attention of the prison authorities. However, in this case there was a series of shortcomings in the transmission of information to the prison admissions staff, and the screening examination on arrival was brief.

4. The state's procedural obligations

A procedural obligation under article 2 is not explicitly mentioned in the Convention. However, the development of a duty to investigate human rights violations of international law appeared in the early 1980s (Ariav, 2012, 856). The early development of the duty was promoted through the case law of the Inter-American Court of Human Rights and the Human Rights Committee. The duty to investigate first receive wide attention and greater status only when it was made legally binding for the parties to the

[25] Application no. 9870/07, judgement of 24 February 2009.
[26] Application no. 46477/99, judgement of 14 March 2002.

European Convention on Human Rights in the case *McCann and others v. the United Kingdom* in 1995.[27] The procedural obligations of the state was first formulated in the context of the use of lethal force by state agents where the court held that a general legal prohibition of arbitrary killing by the state agents would be ineffective in practice if there existed no procedure for reviewing the lawfulness of the use of lethal force by state authorities (para 161). Following the *McCann* case, the Court's jurisprudence has evolved and extended to the circumstances in which investigations may be undertaken (Chevalier-Watts, 2010, p. 703). The duty to investigate was defined narrowly in *McCann* case. The Court qualified restricted obligation to cases of death and refused to comment on the exact procedure of investigation, but rather require some form of effective investigation.

However, the Court jurisprudence has developed over time and restrictions have been reduced. In relation to cases that give rise to the duty to investigate, the Court expanded the obligation to investigate to cases of severe injury that do not result in death and cases of disappearances. When it comes to the requirements for an investigation, the Court deviate from initial interpretation and established requirements for the effective investigation that state have to fulfill. Building on previous jurisprudence, the Court established criteria in the case *Hugh Jordan v. the United Kingdom*[28] (Curtice, Sandford, 2009, p. 446). The Court determined that an investigation must be independent, prompt, adequate, allow public scrutiny and involve the next of kin of the victim (para 133).

For an investigation to be independent it is necessary for the persons responsible for investigation to be independent from those implicated in the events. The Court defined means of independence in the case *Armani Da Silva v. the United Kingdom*[29] as not only a lack of hierarchical or institutional connection but also a practical independence (para 232). It is not required to have absolute independence, but rather a sufficient independence of the persons and structures whose responsibility is likely to be engaged (para 223).

The Court also required in the case *Armani Da Silva v. the United Kingdom* that investigations should be prompt, while in the case *Giuliani and Gaggio v. Italy*[30] to proceed with reasonable expedition. The Court accepts that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, but a

[27] Application no. 18984/91, judgement of 27 September 1995.

[28] Application no. 24746/94, judgement of 4 May 2001.

[29] Application no. 5878/08, judgement of 30 March 2016.

[30] Application no. 23458/02, judgement of 24 March 2011.

prompt response by the authorities in investigating use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law (*Giuliani and Gaggio v. Italy*, para 305)

Furthermore, in *Armani Da Silva* case the Court provided interpretation of the adequate investigation as investigation capable of leading to a determination of whether the force used was or was not justified in the circumstances (para 243). The authorities must take whatever reasonable actions to secure the evidence concerning the incident (para 233). The investigation's conclusions must be based on a thorough, objective, and impartial analysis of all relevant elements (Olesk, 2015, p. 120).

The Court also require a sufficient element of public scrutiny of the investigation. This requirement does not go so far as to require all aspects of the proceedings to be disclosed since it may involve sensitive issues, thus the Court stated in *Giuliani and Gaggio v. Italy* that degree of public scrutiny may vary from case to case (para 304).

Related to the involvement of the next of king, the Court took position in the case *Al-Skeini and Others v. the United Kingdom*[31] that they should be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.

In the case *Slimani v. France*[32], the Court concluded that the state must investigate of their own motion, and it cannot be left to the initiative of representatives of the deceased to lodge a formal complaint (para 47-50).

The reversed burden of proof has been explained in the case *Salman v. Turkey*[33] wherein the Court stressed that where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within state control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during such detention. The burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation (para 100).

In the case *Trubnikov v. Russia*[34] the Court noted that the obligation to set up an effective judicial system does not necessarily require criminal proceedings to be brought in every

[31] Application no. 55721/07, judgement of 7 July 2011.
[32] Application no. 57671/00, judgement of 27 July 2004.
[33] Application no. 21986/93, judgement of 27 June 2000.
[34] Application no. 63638/09, judgement of 5 July 2005.

case if civil, administrative, or disciplinary remedies would be available for the victims (para 79).

Conclusions

Through the history, the protection of life evolved and developed, from death penalty to modern doctrine which requires from states not only to refrain from taking the life of citizens but also have to be active in protecting lives.

Especially, after Second World War, the right to life became part of the several international and regional legal instruments. For European states the most relevant one is the European Convention on Human Rights and article 2, accompanying by Protocols No. 6 and 13. However, the jurisprudence of the European Court of Human Rights is significant for better understanding, interpretation, and application of the ECHR wording. The evolving approach of the European Court of Human Rights influenced on development of standards and indicators relevant for the member states and their authorities to be used as a guide on complying with the ECHR.

The ECHR and the Court jurisprudence influenced on the sentencing policy and abolition of death penalty as punishment. The Court case law is also relevant in cases of extradition to countries where death penalty is still allowed, and the Court established doctrine of death row to reject extradition. In addition, the possible lack of fair trial also was used by the Court to reject extradition to countries with the death penalty.

The protection of lives of persons deprived of their liberty pose positive obligation to states to ensure health services of satisfactory quality and to screen and monitor physical and mental health of prisoners for determining whether person pose a danger to himself or to third person. The Court took objective approach in the case law and in their assessment test if the prison authorities knew or ought to know about the existence of risk or threat to life.

In many countries deaths in prisons is long-standing issue. Although it is not explicitly set in the ECHR, the Court through its jurisprudence developed procedural obligation of the state to effectively investigate deaths and injuries in the prison. When it comes to the death in the prison, the Court analyzed different situations, from those in which agents of the state caused the death to situations in which the state has allowed the death of citizen in prison (suicide, homicide, misadventure). However, in all cases the Court stated a clear

expectation that authorities will conduct effective investigation. Furthermore, the Court specified elements of effective investigation, such as independent, prompt, adequate.

The article presented various obligation of state authorities in relation to right to life of persons deprived of their liberty and prohibition of death penalty. Purpose is to systemize requirements related to the protection of right to life of persons deprived of their liberty and ensure informed decision making by relevant authorities.

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