

THE ABSOLUTE CAPACITY TO BE KILLED AND THE RIGHT TO LIFE AS EXEMPLIFIED BY THE EUROPEAN CONVENTION

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Abstract. The state remains the main arena of human existence and action. Woven from a dense network of political, economic, social and cultural connections, it dictates the conditions in which people are born, function and die. The decision whether individuals or their entire groups will live or die remains at the discretion of the *arcana imperii*. One of its manifestations is the use of the death penalty. The right to life, being the most important of the numerous catalogue of human rights, represents an institutional attempt to limit the powers of the state in this regard, an attempt which he has proven to be successful in the European space.

Keywords: absolute capacity to be killed, the right to life, the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950

INTRODUCTION

The book “Homo Sacer, Sovereign Power and Bare Life”¹ by Giorgio Agamben opens with a terminological distinction between *zoē* and *bios*, at the very beginning emphasizing and focusing reader’s thoughts on the ambiguity of the concept of *life*. Created as early as by the Greek civilization, they have laid the foundations for the understanding of a system generated by mutual relations between the state, its tools and individuals. If *zoē* is to be perceived as a fundamental dimension of life, more specifically life itself, life as such, then *bios* is to be viewed as its derivative – typical of a given person’s, or persons’ model of life on the biological level – that can typify and classify, organizing individuals in this or other manner in line with the exigencies of a situation and development stage. *Zoē* is as much as *bios* an autonomous value. Such distinction does not disqualify one value against the other; at least it is assumed not to hierarchize them. Instead, through a linguistic attempt to dissociate or contrast, it gives salience to their correlative functions. Life may go on for life itself. Tying life so understood with *bios* is

¹ See Agamben 2008.

nothing else than navigating it to a specific destination, making it a process aiming at the implementation of more or less complex set of objectives that may, often radically, alter their quality, if not their essence. This happens so, perhaps not with an immediate effect, or unfolds not instantaneously, since the upsides are more visible than downsides when *bios* assumes the shape of or crystallizes into the state. Then, it is *zoē* that in this ratio seems to be a constant, regardless of any changes that accompany the man, to become and preserve nature which is subject to biological laws with their invariability and inevitability. It is difficult to see political *bios* as *constans* since it grows on too many variables (e.g. economic, social, cultural) that undergo an intensified fluctuation, with its attaching laws falling subject to commensurate fluctuations. One thing, however, seems certain. Since *bios* feeds on life, it will generate an increasingly complex politics that will address the question of nothing else but its effective i.e. good cultivation and development, not necessarily from the perspective of *zoē*. The expansion of state structures in the process of historical development, primarily in the sense of the extension of competences makes the character of feedback between *zoē* and *bios* evolve for the latter to become not so much secondary, ectypal and of value to the former as dominant, but still not primary, and parasitic till the lines between them become blurred. The change in the nature of relationship results in rejecting the concepts of Greek democracy as they fall useless no longer reflecting the root of the matter, and in replacing them with the concepts from Latin culture. Extreme politicization of life leads to its defenselessness (becoming bare), delimiting in their mutual relationship the stage when it is not the man that creates politics, but politics that creates the man (*homo sacer*). Totalization of statehood does not exclude the application of maverick practices that make people live in the conviction that they are preserving their independence of the state and of others, which may in general render it likely for the bare life to subsume them. In every epoch and in line with its existing conditions, life undertakes actions that allow freeing from the shadow of statehood structures and escaping the entrapment in the indistinguishability through the manifestation of one's autonomy by applying to this end measures such as human rights that politics relies upon.

1. BIOPOLITICS AND LAW

One of the central tools of biopolitics is law in its objective sense understood as a set of norms governing selected areas of reality. It coalesces with the idea of state to such an extent that what the science of law does is not separate but combine the concepts (e.g. the theory of state and law) so as to underline their inherent relationship to such an extent that parodying

Roman formula of marriage, one might say: where you – the state – a e, there will also I – the law – be. In fact, law sanctions the essence of the state construct which nothing else but sovereignty is. It is through sanction that a sovereign allows law to operate in its structures, bringing it out of the grey sphere as an unsatisfying incomplete construct in the form of traditions, customs, morality or religion. Law builds the framework and foundations for the state, thereby organizing bare life. Yet it is a sovereign that decides what is right and what is wrong (behaviors socially desirable and non-desirable from the state's perspective) for the bare life, rewarding for the former and punishing for the latter, also in the form of lawmaking. The most essential in this context, from the perspective of bare life, remains the sovereign's competence to decide on its life or death in reliance upon law mechanisms. In a broader sense, it may attach to all situations of disposing of life in the interest of or for the reasons concerning the state, e.g. making sacrificial offerings to gods by the Aztecs, drafting recruits in armed conflicts or the duty to perform work potentially hazardous due to any danger or natural disaster. Nevertheless, in a stricter sense, it is associated with the admissibility of death penalty, sentencing and execution. Philosophers, sociologists, religion and culture anthropologists, who set and maintain current trend in this area, share the opinion that you cannot call the blood dripping from scaffold as justice (you should denote it more precisely: administration of justice). Indeed, an expert in law or a law practitioner can understand that sanctioning death penalty evokes so prevalent and growing an abomination. Lawyer, however, cannot disregard the fact that the law in this very case is not made merely to blindfold oneself and use sword in the name and interest of a sovereign. On the contrary, its duty is to not let the situation happen when the Queen of Hearts in Alice in Wonderland irreversibly eliminates everybody for any cause with a succinct order: "Behead her or him" [Carroll 2015]. If the king embodies the state as one of the most famous and historical *bon mots* reads, then by introducing substantive and procedural restrictions to capital punishment sentencing, the law does nothing else but also control the absolutism of its phantom body [Sowa 2011] in this respect.

2. THE STATE'S RIGHT TO PUNISH

Ius puniendi has evolved together with the concept of sovereignty and with a set of its constituent prerogatives accordingly. It could even be argued that the transformation of the sovereign's image, not of a type of status, but of the scope of this status or subjectivity has triggered changes in its right to punish. Paradoxically, given the nature of life, only at the end of times which are to bring together a lion and a lamb, a child and a cobra, will the sovereign be deprived of the attribute of prosecution

and punishment of the ones that do not abide by its law, for the state will lose *raison d'être* since we will reach an originally desired effect: order without law, and harmony in place of chaos. Regardless of how and when such life reaches said stage, one cannot escape noting cultural orderliness and relaxation of law on punishment, its constant civilization-driven polishing which had the iron maiden sent to the museum of forensic science and the executioner sent on retirement. This, understandably, does not look likewise everywhere. Here, it seems very unlikely to compare totalitarian China and any West European country, where the former sees human rights as a fantasy of the latter and as the evidence of political expansion against each other through (an alleged) appropriation of sovereignty that consists in interfering with the other country's home affairs. Departing, however, far enough from the humanitarianism of the Hammurabi Code manifested in its promulgation, hardly anyone will seriously question the right to punish, including finally, at least in extreme situations with death, as long as they love their life. Alongside *ius puniendi*, which went through different stages, assuming manifold forms, applying a wide array of strategies, not exclusive of such which from the perspective of currently applicable systems of law are perceived as degenerate and hence unacceptable, there were and are situations when the state kills people, whether citizens or foreigners, not relying on any rules of law, acting beyond its limits, beyond its legitimacy. In such instances, resort is had to establishing new social categories that exhibit and justify uselessness or social harm, hence unfavourable, if not hostile existence of groups of people. In communist countries, it was, for instance, the people's enemy. If a sovereign is methodical and always needs to have legal grounds for its actions, it enacts law such as the Nuremberg Laws, and then what guarantees survival is the criterion raised by law, e.g. Aryan blood purity back to the seventh generation. In the occupied countries, including Poland, German occupier protected life that was in demand by granting it a special status and including its compatriots (*Volksdeutch*) in the nation. In the USA, homeland to eugenics, the life burdened with genetic disorders, specifically with mental deficiency, was viewed as not worth living. Life in all of such types of and in similar situations was or may not only be deemed redundant or unnecessary, but also requires elimination, extermination as something, not as somebody because it is not somebody, as it does not qualify as a prey for dragon for the simple reason that it has lost the attribute that the monster desires. Life which then becomes absolutely sensitive and defenseless to the extreme cannot defend itself with law, since it is no longer applicable. Man in such situations is not punished but eliminated. *Ius puniendi* does not apply to a sacred man, which additionally accentuates an exceptional bareness of his life. From the perspective of law, *homo sacer*, is even no longer entitled to death penalty; nor is he subject to law whatsoever. Today, there is one exception

– human rights – created and subsidiarily implemented by international community, relativized to an individual, not to this or that status, in it, being or not a national of a given country. Notwithstanding the fact that law comes to the forefront in the assessment of a situation of bare life, the exclusion from the ranks of Leviathan and by virtue of its decision, albeit not necessarily within the meaning of law or with its contravention, it does have a broader context since it pertains to every sphere i.e. politics, economy, culture, to name the most essential, in which the state and an individual operate, as well as to their mutual relation. Convicted without sentence, deprived of everything, in a situation of a permanent risk of death, the man becomes a living nonbeing marginalized to the dimension of ghetto in every possible sense and committed finally to being consumed and digested by *anus mundi* [Kielar 2004], regardless of the form it assumes, whether it be gas chambers of KL Sachsenhausen or ditches of Katyń.

3. BIOPOLITICAL PARADIGM OF THE CAMP AND HUMAN RIGHTS

Depersonalization, objectification and consequently ordination of *homini sacer* from the life of other members of community, which resulted and will result at least in isolation and probably in less or more violent extermination preceded or not by biological exploitation, has affected and, as there is nothing more vicious than the circle of history, will potentially affect not only those who have tied citizenship knot with a given country (Turkish Ormians), but also nationals of foreign countries (Poles allegedly standing in the German nationals' way of developing their *lebensraum*). The existence or exercise of sovereignty over specific category of people was not and is not a priority to recognise any life as not worth living. The life was and is necessary to be sustained in the condition short of kosherness and to be exterminated. There may be a multitude of reasons, which may either repeat or give way to new ones, for seeing man's life as unworthy and embedding it within the framework of a biopolitical paradigm of camp. What painful experiences of millions of people, mostly of those who suffered Gehenna of the World War II, have shown is that it is no coincidence that their catalogue corresponds with the anti-discriminatory clauses on the exercise of human rights of the contemporarily passed international acts of law on human rights protection. They consist of two parts: specific and general. Among standard prerequisites of a diverse prohibited treatment of specific nature, there are: sex, race, colour, language, religion, political and other opinions, nationality or social background, membership of a national minority, property, birth or disability.² Majority of binding or non-binding

² E.g. Convention on the Rights of the Child of 1989, Article 2(1).

international acts either reflects the foregoing formula or modifies it in compliance with the subject-matter of regulation.³ The Universal Declaration of Human Rights (UDHR) of 1948 stands out as an exception. Here, the anti-discrimination clause was extended by the prohibition of distinguishing people in reliance upon political, legal or international status, the territory (country, area) they reside in, and current degree of sovereignty (Article 2). The UDHR is interesting inasmuch as it acknowledges not only the criteria of discrimination based on people's individual features, but also the ones that result from the current but multifactorial situation of a person that an individual recognizes or would like to recognize as a sovereign and a person which cannot exercise sovereign powers of the state or exercises them to a limited extent (occupied territories, colonies, mandate territories, failed states). Furthermore, international acts of law on human rights of general type supplement prerequisites, in particular the aggregate one which by expressing awareness of the states' extraordinary ingenuity that propels *perpetuum mobile* of persecutions regardless of times and circumstances comes down to the prohibition of discrimination for any other cause than mentioned so far, by extension to its admissibility in generality.⁴ Anti-discrimination clauses strengthen other types of stipulated provisions,⁵ including such that set forth a specific jurisdiction concept⁶ and allow or not limitations in the exercise of human rights.⁷ Alternatively, they permit an extension of their application in substantive aspect⁸ and provide for the sets of guarantees of a formal type.⁹

4. AGAINST DISCRIMINATION

Prohibition of discrimination and other protection mechanisms are linked to the catalogue of rights and freedoms differing in respect of the objectives pursued by the states devising a specific international act of law. International agreements show significant similarities in this regard, and it is merely the context of a given act of law that allows their differentiation

³ E.g. International Convention on the Suppression and Punishment of the Crime of Apartheid of 1973, Article II.

⁴ E.g. The American Convention on Human Rights of 1969, Article 1(1).

⁵ In other sources of international law such mechanisms do not exist (e.g. non-binding resolutions of international organizations), or they are decoded otherwise (e.g. custom). Thus, I focus on the treaty law.

⁶ E.g. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984, Article 2.

⁷ E.g. The Convention on Cybercrime of 2001, Article 15(2).

⁸ E.g. The European Social Charter of 1961, Article 19(6).

⁹ E.g. International Convention on the Elimination of All Forms of Discrimination of 1966, Article 11-4.

and an in-depth qualification. In the International Covenant on Civil and Political Rights of 1966 (Article 6), it is a human right of the first generation. However, in its twin International Covenant on Economic, Social and Cultural Rights of the same year, it holds a status of a human right of the next generation (Article 11). Under the construction of a political right, life is safeguarded against its arbitrary deprivation. On a social dimension, protection of life consists in ensuring that it reaches an adequate level. As history has demonstrably shown, depriving man of not only the first, but also of the second type of safeguards may render the life bare. This may also be very well exemplified by guillotining political enemies during the French Revolution of 1789, causing death of allied soldiers in Japanese prison camps in the World War II by meagre food rations, or even “sentencing” people to death by starvation practised in German extermination camps for crimes against their rules.¹⁰ This is very well reflected by the Convention on the Prevention and Punishment for the Crime of Genocide (1948) which uses this concept to denote murder of the group members and a deliberate creation of life conditions meant to cause their entire or partial physical deterioration (Article II a and c). A representative example of the application of said mechanism is the politics of extermination pursued by Nazi Germany against subhumans (a possible synonym of *homines sacri*, since man is seen as “no good” for different reasons), primarily Jews. There are also situations when not only for political reasons, but also concurrently due to an adopted economic policy, the whole nation starts living a bare life, either in labor camps or dying of hunger in the aftermath of an artificially provoked famine, respectively, e.g. Ukrainian *hodomor* as repression for no social consent to the introduction of communism. Against this backdrop, quite different, at least *prima facie*, seems to be the case of death of hunger of not strictly determined up till now, yet even in its lowest dimension, of an overwhelming number of the Chinese due to the secondary effect of the great leap forward. In this situation, a sovereign did not act under *ius puniendi*. Also, no one was found different, nor worse. Yet, the scale of experiment affected the whole country and its effects were suffered by the whole population, with a deliberately withheld for years and ineffective rescue operation. Undoubtedly, its life became bare. Perhaps the camp reality may manifest itself in this manner, not exclusively in the classic version of the Gulag archipelago. Most certainly, no general or master treaty on human rights will fall short of an explicitly established right to life, since it has been a right of the rights or a primeval right because before it came into existence life had already been there. Human rights provided for by international acts of law of specialized nature will to a lesser or greater degree evoke its emanation. The right to life is, in consequence, ahead of other

¹⁰ For instance, Father Maksymilian Maria Kolbe died in this way.

human rights, a foundation, upon which all the remaining rights build up to finally assist in this or that way in its retention (e.g. the right to food¹¹) or maintenance of its quality, style (e.g. the right to access cultural goods¹²). In the European Convention,¹³ such nature of the right to life is expressed through its position. It opens in Article 2 a catalogue of conventional rights and of those which transpire from Additional Protocols. Despite their formal equality, it is the essence, nature and functions of the right to life that affect the relations with other rights and freedoms, including their construction and context of application. In case law, Article 2 belongs to the most fundamental democratic values of communities of the Member States jointly forming the Council of Europe.¹⁴ Accordingly, all exceptions to the right to life must be interpreted narrowly.¹⁵ However, actions for the benefit of life protection within the meaning of Article 2 are to be feasible and effective.¹⁶ Specific status of the right to life in a treaty confirms that it is inadmissible for the State to evade the performance of pertinent obligations even during the war or other social risks threatening the nation's life,¹⁷ e.g. flu epidemic in Hongkong.

5. CONVENTION ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

European Convention is an agreement on human rights of the first generation. The right to life is distinguished from other rights and freedoms envisaged by the Convention in the context of the status of political and civil rights. Its overriding priority is to protect life against sovereign's arbitrariness and abuse of power, as well as to retain clearly delimited borderlines

¹¹ E.g. Additional Protocol to the American Convention in the Area of Economic, Social and Cultural Rights of 1988, Article 12.

¹² *Ibid.*, Article 14.

¹³ In view of quite a good number of international treaties laying down the right to life, I have limited my study to the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (European Convention). Not only does the rationale of my choice transpire from the effectiveness of the system, but also from political and economic experience of its several members (invasions and appropriation of other countries' sovereignty through colonialism), which offers clear overview of subsequent types of clauses applied in the human rights protection praxis. Furthermore, it is unfortunately from the cultural circles of said countries that the world's largest totalitarisms have derived so far.

¹⁴ E.g. ECHR, *Lopes de Sousa Fernandes v Portugal*, 56080/13, judgment of 20 September 2017, § 164.

¹⁵ E.g. ECHR, *Bubbins v the UK*, 50196/99, judgment of 17 March 2005, § 134.

¹⁶ E.g. ECHR, *Mocanu and others v Romania*, 10865/09, judgment of 17 September 2014, § 312.

¹⁷ Article 15(2) European Convention. See, e.g. ECHR, *Velikova v Bulgaria*, 41488/98, judgment, § 68.

of exercising *ius puniendi* for the man not to be brought down to the level of *homo sacer* in this very aspect. However, broader literal understanding of the right to life encourages more freedom in the interpretation. The first sentence of Article 2(2) provides that every man's life is subject to protection by virtue of law. Not only does the concept of the right to life encompass a negative obligation to refrain from a deliberate and unlawful deprivation of life¹⁸ (e.g. murdering political enemies in the torture chambers of secret police), but also a positive obligation to undertake measures aimed at its continuation¹⁹ (e.g. implementing programs to prevent cardiovascular diseases). Protection of life following from the first sentence of Article 2(1) requires, in the first instance, that the State devise institutional, legal, administrative frameworks oriented towards prevention, prosecution and punishment of crimes against human life,²⁰ which primarily comes down to making good law, including criminal law, and ensuring efficient and effective administration of justice in its broadest sense. Even if contemporary democracies, upon going through the current stage of media festival, pupate entirely into one ideology system or end up as anarchies, then human rights and shaping criminal regimes in line with the right to life do remain their acquis. Law must clearly and precisely enough define what is deemed and construed as crime against life, premises of liability for specific types of prohibited acts and the level of penalty.²¹ If it is to substantively fulfil the assigned functions of preventing offences against life, it must be accessible, legible and severe enough. In the situations of a concrete enough threat of criminal nature to an individual's life caused by another person (not only the state official), it is the duty of state authorities to undertake operational measures for its protection.²² It does not mean that the state has to penalize every conduct that may result in the loss of life, e.g. implementation of a general obligation to undertake an instant rescue operation and punishment for inaction.²³ There are no obstacles, and it is rather viewed as normal and justifiable to build legal systems to allow under circumstances, which are stipulated and already standard in the practice of criminal law, not only an exclusion of guilt or liability, but also an essentially balanced and rational use of and derogation from the application of the penalty mechanism. Granting amnesty to the convicted for murder does not amount to a breach of the Article 2.²⁴ Violations of international law, specifically crimes against

¹⁸ See e.g. ECHR, *Association X v the UK*, 7154/75, decision on admissibility of 12 July 1978.

¹⁹ See e.g. ECHR, *Kılıç v Turkey*, 22492/93, judgment of 28 March 2000, § 62.

²⁰ ECHR, *Makaratzis v Greece*, 50385/99, judgment of 20 December 2004, § 57.

²¹ On the concept of law: see e.g. ECHR *Sunday Times v the UK*, judgment of 26 April 1979.

²² E.g. ECHR, *Osman v ZK*, 50385/99, judgment of 28 October 1998, § 115.

²³ European Commission of Human Rights (EComHR), *Hughes v the UK*, 11590/85, Decision on admissibility of 18 July 1986.

²⁴ EComHR, *Dujardin v France*, 16734/90, decision on admissibility of 2 September 1991.

humanity might fall subject to a different assessment. Civil liability may be found sufficient.²⁵ The state is not required to react to any type of a life threat.²⁶ It seems unlikely to foresee all risks or monitor all people's conducts unless we decide to introduce modern society surveillance technologies modelled on Chinese solutions that tap into new technologies and reject the idea of human rights in this or other respect. Meanwhile, the Member States of the Council of Europe interpret the right to life in its entirety and in line with the objective and subject-matter of the European Convention.²⁷ Public authorities may look to or have regard to established priorities and correspondingly to available funds. The obligation to act is to be met when the threat is real and direct.²⁸ Law is to set forth the principles on which an activity that threatens man's life may be carried out, whether it be the use of gun by the police,²⁹ or running the city waste dump.³⁰ Pending the interpretation of the right to life, there will arise problems that reflect pertinent questions not governed up till now or not sufficiently governed by domestic law.³¹ These are abortion,³² right to death³³ and euthanasia.³⁴ Viewing the right to life from a social perspective, as a human right

²⁵ E.g. ECHR, *Calvelli and Ciglio v Italy*, 32967/96, judgment of 17 January 2002, § 53.

²⁶ E.g. EComHR, *Widmer v Switzerland*, 20527/92, decision on admissibility 10 February 1993.

²⁷ E.g. ECHR, *Yaşa v Turkey*, 22495/93, judgment of 2 September 1998, § 64.

²⁸ E.g. ECHR, *Mastromatteo v Italy*, 37703/97, judgment of 24 October 2002, § 68.

²⁹ E.g. ECHR, *Nachova and others v Bulgaria*, 43577/98, judgment of 6 July 2005, § 96.

³⁰ E.g. ECHR, *Öneryıldız v Turkey*, 48939/99, judgment of 30 November 2004, § 73.

³¹ Brief mention only due to excessively comprehensive material for the limits imposed on the text.

³² Voluntary abortion under certain circumstances does not amount to a breach of Article 2. See e.g. EComHR, *H. v Norway*, 17004/90, decision on admissibility of 19 May 1992; ECHR, *Boso v Italy*, 50490/99, decision on admissibility of 5 September 2002. Even in the case of an involuntary abortion, the Court resigned from determining whether *nasciturus* is a person (subject/an individual) within the meaning of the right to life and assessed the case from the perspective of a would-be mother's situation and protection of her rights. Taking also account of the whole case law, the manner such protection is granted points to the fact that the unborn are not protected within the meaning of Article 2 of the European Convention, since they are not separate individuals and thus they are not human beings. Hence it is not far from a consent to eugenic practices. See e.g. ECHR, *Vo v France*, 53924/00, judgment of 8 July 2004.

³³ The right to death as a counterweight or a flipside to the right to life does not exist in the European Convention. See: ECHR, *Pretty v the UK*, 2346/02, judgment of 29 April 2002.

³⁴ The incidents of depriving comatose people of their lives have been publicized by at least some media, which evokes fear if euthanasia will be used on a regular basis in this respect. The thing is, such people cannot freely express their will. Due to (as termed in case law) a high degree of complexity and the nature of the issue (moral, medical, legal questions), the states are given a wide leeway in this aspect. There are very few residual decisions (e.g. *Sanles Sanles v Spain*, 48335/99, decision on admissibility of 26 October 2000). In one judgment so far which sums up and gathers previous *acquis* of the European Convention control authorities on euthanasia, the Court examined the case from the angle of ensuring

of the second generation, mainly in the context of health protection, with hospitals not being so expensive that one might be better off dying³⁵ is another strand of interpretation.

6. PROTECTION OF LIFE IN SUBSTANTIVE RESPECT

The state's construction of a life protection system within the meaning of the European Convention should involve preventive measures. Provided that loss of life may result from any activity, whether public or other, prevention from life risks must correspond to the type of such risks and entail reasonable grounds in actual circumstances. Running activity, by definition, dangerous, in particular economic one must be first regulated, having regard to its specificity and the risk it poses to human life. It is necessary for the law to provide for every stage of undertaking a given type of activity, inclusive of the control and surveillance principles. Further, devised rules should be applied where effective and protective measures are to be implemented for the benefit of persons whose life is threatened by running a potentially hazardous activity. Public right to information on existing risk³⁶ is one of such preventive measures. If there is no relation between an alleged exposure to life risk and the facts, the state is under no obligation to act.³⁷ The approach is similar in the event of no factual and direct danger to human life or man's physical integrity.³⁸ Prevention is perceived as a broad

procedural guaranties transpiring from Article 2 and did not find any breach. The judgment disappoints as it circumvents the essence of the problem. It is trite, showing that if remedies have been ensured, the state abides by its obligations. Such remedies are in the country, against which the complaint has been launched since the times of Napoleon. Conclusions are nothing but surprising, then. It is a pity that the Court assumed the axiom that another person may in fact express consent on behalf of an ill person in such a condition, and on such issue. Meanwhile, it may be agreed that an institution of the power of attorney might apply here even if it has already existed. Absence of any reaction to the fact that a multiday dying of hunger and dehydration may be called a good death is inconceivable. See: ECHR, *Lambert and others v France*, 46043/14, judgment of 5 June 2015. This case shows that bareness of life may not only underlie the state – individual relationship, but also exhibit horizontal nature.

³⁵ A paraphrase of the poem "Born into this" by Charles Bukowski. The question is beyond this article research area. On that issue see Łasak 2013.

³⁶ E.g. ECHR, *Öneryıldız v Turkey*, 48939/99, §§ 71 and 90.

³⁷ In the event when nuclear weapons are tested and reports indicate that radiation has not reached the level dangerous to the soldier present in the proximity, however, not involved in the tests at any stage, the state is not held liable for leukemia his child, born after said tests, is diagnosed with. Otherwise, child's parents should be informed of an existing risk to its health and, probably, life or adequate steps towards child itself should be taken. ECHR, *L.C.B. v the UK*, 23413/94, judgment of 9 June 1998, §§ 36-41.

³⁸ See e.g. ECHR, *Fadeyeva v Russia*, 55723/00, decision on admissibility of 16 October 2003; establishing wide enough sanitary sectors around smelter plants to protect local people

concept that also embraces the state's objectives in the area of public health protection such as prevention of smoking-related diseases, prevention of alcoholism, leaving here, however, a wide leeway.³⁹ Most often, however, this term pertains to the protection of a man from deprivation of life due to other person's crime, e.g. murder of a co-prisoner perpetrated by a prisoner⁴⁰ or suffocation of the detained due to incapacitation methods used by the police.⁴¹ Prevention, also in this sense, embraces the whole community, which may require an application of rational and effective penal policy.⁴² Setting preventive mechanisms in motion is to be effected with the observance of human rights and proportionality of costs incurred by public authorities.⁴³ Yet the selection and financing of priorities cannot result in the refusal or withholding of assistance in a situation of a real threat to life.⁴⁴ Inaction of judicial authorities in the implementation of the rights to life through the application of preventive measures is very well observed when the state through the use of all possible methods fights against, connives or gives tacit consent to the fight against those who it sees as unwelcome or undesired for the system due to dissimilar politics or publicizing inconvenient truth. Hence, inter alia, the life of many journalists in Ukraine under the rule of the president Kuczma, as well as that of the persons of Kurdish origin peacefully protesting against politics in the south-eastern region of Turkey has become bare. Such situations usually lead to the ascertainment of negligence in the protection of life, and thereby to the breach of Article 2 in substantive aspect.⁴⁵

7. PROTECTION OF LIFE IN PROCEDURAL RESPECT

Protection of life in substantive respect is supplemented in the European Convention with guaranties of procedural nature developed to establish and explain reasons for and circumstances of every incident of people's death

from pollution.

³⁹ See e.g. EComHR, *Wöckel v Germany*, 32165/96, decision on admissibility of 16 April 1998; *Barrett v the UK*, 30402/96, decision on admissibility of 9 April 1997.

⁴⁰ ECHR, *Paul and Audrey Edwards v the UK*, 46477/99, judgment of 14 March 2002.

⁴¹ ECHR, *Saoud v France*, 9375/02, judgment of 9 October 2007.

⁴² Example: careful and balanced application of a parole for a person concerned to not commit further offences, not excluding crimes against life. See ECHR, *Mastromatteo v Italy*, 37703/97.

⁴³ See e.g. ECHR, *Branko Tomašić v Croatia*, 46598/06, judgment of 15 January 2009, § 51; *Mikayil Mammadov v Azerbaijan*, 4762/05, 17 December 2009, § 99.

⁴⁴ ECHR, *Kontrová v Slovakia*, 7510/04, judgment of 31 May 2007, the case of a mentally ill man, which police had knowledge of. He killed his own children and then himself.

⁴⁵ ECHR, *Gongadze v Ukraine*, 34056/02, judgment of 8 November 2005, §§ 169 and 180; *Akkoç v Turkey*, 22947-8/93, judgment of 10 October 2000, § 94.

insofar as it follows from any reasons other than natural ones. It is the only avenue to take to effectively ensure the right to life to everybody who is subject to the state's jurisdiction. Therefore, provisions that envisage relevant procedures, which will allow to examine what in fact has taken place in a given case, to find the perpetrator and eventually to hold him responsible, must complement the part of law that sets forth substantive grounds for human life protection. Methodology and type of said procedure to be set in motion should correspond with the nature of death circumstances. It is not always required that penal proceedings be instituted. Nonetheless, when it comes to a homicide, formal investigation proceeding is required as this act invariably leads to criminal responsibility.⁴⁶ Furthermore, in some cases, especially when it comes to the use of force which causes death, it may be started with the knowledge of the state officials.⁴⁷ This principle is applied to all other types of deaths, also to situations when death occurs as a result of a hazardous activity, or in the aftermath of negligence on the part of public authorities. When it has been established that they did nothing whatsoever to prevent life risk and that the indictment was not brought against the guilty of omissions, then potentially, such situation is deemed as breach of Article 2 regardless of other legal measures, whether civil, administrative or disciplinary, used by the parties concerned.⁴⁸ The obligation of the enforcement of procedural aspect of the right to life also arises when death has not been ascertained or is unascertainable as is often the case with missing persons, when a person was detained by the police or by other state officials and since that time their fate remains unknown.⁴⁹ Article 2, so construed, is to secure both an effective implementation of domestic law pertinent to the right to life and performance of duties by competent entities.⁵⁰ The state is not discharged from holding investigation proceedings due to exceptional circumstances which justify introducing the state of emergency.⁵¹ Even when the European Convention does not allow evading the protection of the right to life. The duty to act arises at the moment knowledge is acquired on the case that requires examination. The mode of proceeding largely depends on the state's legal tradition and the type of act. It must, however, from the perspective of strict compliance with Article 2, satisfy the prerequisite of effectiveness.⁵² Effective proceeding is

⁴⁶ ECHR, *Caraher v the UK*, 24520/94, decision on admissibility of 10 November 2000.

⁴⁷ ECHR, *McCann and others v the UK*, judgment of 27 September 1995, §§ 157-64.

⁴⁸ ECHR, *Öneryıldız v Turkey*, 48939/99, §§ 92-3.

⁴⁹ Turkey was found guilty of a violation of this obligation after its attack on Northern Cyprus in 1974 due to its failure to investigate the case of nearly 1500 missing civilians. ECHR, *Cyprus v Turkey*, 25781/94, judgment of 10 May 2001, § 132.

⁵⁰ See e.g. ECHR, *Anguelova v Bulgaria*, 38361/97, judgment of 13 June 2002, § 137.

⁵¹ See e.g. ECHR, *Tanrikulu v Turkey*, 23763/94, judgment of 8 July 1999, § 110.

⁵² E.g. ECHR, *Nachova and others v Bulgaria*, 43577/98, § 111.

run by independent and sovereign, within the meaning of law and practice, institutions,⁵³ in reasonable time,⁵⁴ and ensures that factual circumstances of death are established, perpetrator found and prospective decision-making triggered in respect of punishing said perpetrator.⁵⁵ The necessity of the implementation of the right to life in procedural dimension is very well illustrated by the cases where political conflicts constitute the very foundation, as in the case of Northern Ireland or Turkey.⁵⁶ The absence of an objective examination and explanation of matters of this type was or is conducive to the escalation of tension and inability to break the vicious circle of the use of force, because notwithstanding the exclusivity of the State to use duress or coercive measures (the use of force), the second party, unwilling to be treated as *homini sacer*, reacts likewise.

8. THE CATALOGUE OF EXCEPTIONS

Life protection as set forth in the European Convention is of no absolute nature. Under Article 2, human life may be taken in four ways. The fact that the catalogue of exceptions is deemed closed, every one of them with attaching conditions of the use of force, does not change the crux of the matter, namely, that it is admissible in general. Deprivation of life under Article 2(1) pertains to the cases of enforcing the conviction for an offence statutorily punishable by death. Death penalty may be as much a sovereign's decision as such was its intention in making the law in the highest hierarchically form. Theoretically, every crime might be punishable by death penalty. In the aftermath of the development of the criminal law, which is undoubtedly under the influence of the law that safeguards human rights, it is assumed that the highest of admissible sanctions should pertain in compliance with the principle of proportionality to the most serious ones.⁵⁷ The society should be aware that specific acts are punishable by death, which means that law in this respect must be accessible and understandable.⁵⁸ In view of the risk that the administration of justice might be extended to pursue unlawful aims and thereby death penalty used instrumentally, it is argued that adjudication in this respect belongs exclusively to courts, institutions presumed to be impartial and independent in accordance with Article 6

⁵³ See e.g. ECHR, *Kelly and others v the UK*, 30045/96, judgment of 4 May 2001, §§ 95 and 114.

⁵⁴ See e.g. ECHR, *Armani da Silva v Z the UK K*, 5878/08, judgment of 30 March 2016, § 237.

⁵⁵ See e.g. ECHR, *Centre for Legal Resources on behalf of Valentin Câmpeanu v Romania*, 47848/08, judgment of 17 July 2014, § 145.

⁵⁶ See e.g. ECHR, *Hugh Jordan v the UK*, 24746/94, judgment of 4 May 2001; *Kaya and others v Turkey*, 56370/00, judgment of 20 November 2007.

⁵⁷ ECHR, *Soering v the UK*, 14038/88, judgment of 7 July 1989, § 104.

⁵⁸ See e.g. ECHR, *Amann v Switzerland*, 27798/95, judgment of 16 February 2000, § 56.

of the European Convention. Non-observance of procedural rules transpiring from Article 6 and 7 in the course of ruling on death penalty may result in the ascertainment of the infringement of Article 2.⁵⁹ Abolitionist tendencies in the Member States of the Council of Europe led in 1983 to the adoption of the Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms on the abolition of death penalty (P-6), by virtue of which death penalty has been abolished. Nobody is to receive such sentence, nor must it be carried out.⁶⁰ P-6, however, still admits death penalty for acts committed in times of war or of imminent threat of war. Yet this option is excluded by the Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms on the abolition of death penalty (P-13) of 2002. Out of 47 Member States of the Council of Europe, 46 ones agreed to be bound by P-6 and 44 are concurrently parties to P-13. Russia merely signed the first of said treaties.⁶¹ However, in view of the conditions of membership for the new countries, Russia had to introduce moratorium on death penalty in the time of peace. Also, neither Armenia nor Azerbaijan are the parties to P-13.⁶²

9. KILLING A MAN IN ANOTHER PERSON'S DEFENSE AGAINST UNLAWFUL VIOLENCE

Three following situations where deprivation of life is not construed inflicted in contravention of the right to life are envisaged by Article 2(2). These are: killing a man in another person's defense against unlawful violence, lawful arrest or preventing the escape of a lawfully detained person, and quelling riots or insurrections. It is not deemed in conflict with the right to life to kill a person in another person's defense against unlawful violence in compliance with law and if absolutely necessary. Vast majority of the cases in this area of the European Convention application concerns real fight (e.g. IRA's activity) or alleged fight (e.g. war to create an independent country of Chechnya⁶³) against terrorism or situation when the fight for political independence in a specific dimension involves acts of terror (e.g. Turkish issues⁶⁴). The Court has also been confronted with the cases

⁵⁹ See e.g. ECHR, *Nicolae Virgiliu Tănase v Romania*, 41720/13, judgment of 25 June 2019, §§ 172-182, *Öcalan v Turkey (no 2)*, 24069/03, judgment of 18 March 2014, §§ 177-89.

⁶⁰ Article 1.

⁶¹ See https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/114/signatures?p_auth=PHgqOdNr [accessed: 27.07.2020].

⁶² See https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/187/signatures?p_auth=PHgqOdNr [accessed: 27.07.2020].

⁶³ See e.g. ECHR, *Khamila Isayeva v Russia*, 6846/02, judgment of 15 November 2007.

⁶⁴ See e.g. ECHR, *Gül v Turkey*, 22676/93, judgment of 14 December 2000.

resultant from the involvement of the parties to the European Convention in international antiterrorist coalitions that implied stationing of their armed forces in the country (e.g. Iraq) that exhibits such problems. Soldiers of said coalitions so located at military bases must repeatedly decide on the use of force in self – or other army unit members’ defense, or even more broadly, defending those people they are responsible for.⁶⁵ It is against the backdrop of such cases that the direction of interpretation of Article 2(2)(a) and thereby the fundamental elements of proper implementation have been shaped. Compliance with law means that the state officials act in accordance with domestic law and the European Convention. Domestic legislator does not need to copy or repeat the provisions of Article 2. Yet it is necessary to preserve their essence. If there happens to appear a literal disparity between said acts of law, then the methodology of domestic law interpretation and application is verified from the perspective of compliance with the European Convention. When domestic courts have regard for the need to comply with the standards following from Article 2, then it is not construed as infringed.⁶⁶ The force that is likely to result in an individual’s death may be used solely to reach the aim set forth in Article 2(2)(a). Nevertheless, the absolute necessity test is applied differently, conditional upon whether and to what extent the state authorities control the situation, and upon difficulties that usually accompany decision-making in such a sensitive sphere.⁶⁷ Prior knowledge or its absence on the crime that poses threat to citizens’ life has been viewed as one of the differentiating elements.⁶⁸ It is assumed in the case-law that political choices made in connection with defeating terrorism and similar phenomena are not subject to assessment pending the control of the European Convention implementation.⁶⁹

10. LAWFUL ARREST OR PREVENTING THE ESCAPE OF A LAWFULLY DETAINED PERSON

The use of force is also permitted within the meaning of the European Convention, Article 2(2)(b), insofar as it is lawful and absolutely necessary to detain or prevent escape of a person lawfully deprived of liberty. The conditions of absolute necessity and legality of the use of force subject to exception under Article 2(2)(b) correlate strictly and tightly. The use of force is

⁶⁵ See e.g. ECHR, *Jaloud v Holland*, 47708/08, judgment of 20 November 2014.

⁶⁶ See e.g. ECHR, *McCann and others v the UK*, judgment of 27 September 1995, §§ 152-153.

⁶⁷ See e.g. ECHR, *Tagayeva and others v Russia*, 26562/07, judgment of 13 April 2017, § 481.

⁶⁸ See e.g. ECHR, *Choreftakis and Choreftaki v Greece*, 46846/08, judgment of 17 January 2012, §§ 48-49.

⁶⁹ See e.g. ECHR, *Finogenov and others v Russia*, 18299/03 and 27311/03, judgment of 4 June 2012, §§ 212-213.

deemed lawful when the person lawfully detained is either arrested or prevented from escaping only when it is absolutely necessary in a specific situation. Given the nature of a protected interest under Article 2, said criteria are construed narrowly. The use of force by the state officials to effect arrest or prevent the escape of a person lawfully detained may, however, be also justified when reliance on the reasonableness of such actions proves unjust and contrary to original judgment and assessment of situation.⁷⁰ An alternative way of thinking might cripple the law enforcement regime with prejudice to the entire community and would expose its officials to unjustifiable risk in performing duties assigned to them.⁷¹ Concurrently, it is presumed that there is no necessity to use force if the person to be arrested does not pose any risk to life and limb and is not likely to commit any aggravated assault. Correspondingly, the state official should not use force even if s/he did not complete a task.⁷² Notwithstanding the fact that the European Convention and its Article 2(2)(b) permit an action consisting in the use of force, which may finally lead to the death of an individual against whom it has been used, the state officials do not exercise unlimited discretion in decision making and implementing in respect of arrest or detention. Mitigation of life risk is deemed a primary guideline in this field.⁷³

11. QUELLING RIOTS AND INSURRECTIONS

In various national legislations and implementation praxes, the concepts such as riots and insurrections may differ. The case-law pertinent to Article 2(2)(c) of the European Convention treats them as autonomous terms, taking account of *acquis* of the states concerned and having regard to the context of the treaty and methodology of its implementation. Presumably, there is no single exhaustive definition of riots. A gathering of 150 people hurling bangers at a patrol of soldiers with a risk of a bodily injury is an example of riots.⁷⁴ The appearance of analogous elements, albeit markedly intensified in a specific case, gave grounds to believe that riots had broken out in that country, which allowed lawful use of force.⁷⁵ Given the circumstance of a concrete case, riots may trigger or lead to an uprising. Said approach

⁷⁰ ECHR, *Andreou v Turkey*, 45653/99, judgment of 27 October 2009, § 50.

⁷¹ See e.g. ECHR, *McCann and others v the UK*, judgment of 27 September 1995, § 200.

⁷² ECHR, *Nachova and others v Bulgaria*, 43577/98, § 95.

⁷³ See e.g. ECHR, *Wasilewska and Kałucka v Poland*, 28975/04 and 33406/04, judgment of 23 February 2010, § 48.

⁷⁴ ECHR, *Stewart v ZK*, 10044/82, decision on admissibility of 10 July 1984.

⁷⁵ ECHR, *Güleç v Turkey*, report of 27 July 1998, § 232. The Court accepted EComHR findings as correct. Also: ECHR, *Şimşek and others v Turkey*, 35072/97 and 37194/97, judgment of 26 July 2005.

is illustrated by riots sparked by detainees against prison regimes.⁷⁶ This type of case-law reveals how much in fact the concepts of what an insurrection may be in the European Convention differ from the way it is captured in the national legal systems, where it also refers to, but is not limited to, prisoners' revolt, or it constitutes a patriotic uprising against the invader. Historically, it has only been Chechen cases that may be examined from that very perspective. In determining said cases, the Court referred to such wordings as: illegal armed insurgency or attacks by illegal armed groups. Russia insisted that determination of such cases be pursued from the perspective of implementation of Article 2(2)(a), and not paragraph c. Finally, the Court spoke in general on the issue of the application of Article 2(2) and held that the right to life had been infringed. It is worth noting that Russia did not disclose a complete documentation, hence the Court, in all probability, intended to preserve impartiality in the assessment of the situation.⁷⁷ The trend the construction exhibits is that a similar approach pertains to both riots and insurrections. In the first instance, what transpires directly from the substance of Article 2(2)(c) is that the use of force in such situations must be lawful, which means that it cannot become to constitute, for example, an administration of justice by the army and its members without the court's decision on the case.⁷⁸ Furthermore, the use of force is to take place subject to the conditions of an absolute necessity and proportionality. Thus armed forces warned of meeting an illegal Communist Party of Maoists, and in fact not attacked, could have arrested them instead of opening fire and slaughtering with shrapnel.⁷⁹

CONCLUSIONS

Recently, the President of USA, Donald Trump, after talks with the leader of China, Xi Jinping, has admitted with a disarming frankness that he did not introduce any sanctions against this country in view of important trade negotiations. It may therefore be presumed that he will undertake talks with everybody who like the Chinese will offer 250 bn dollars worth of investments that will support the economy of his country. Not only had he been expected to raise the issues of the persecution and repressions of the Uighurs and of Islamic minorities in China, but also to impose sanctions on China. As he added, tariffs, which he imposed on Beijing, were

⁷⁶ See e.g. ECHR, *Leyla Alpan and others v Turkey*, 29675/02, judgment of 10 December 2013, § 84.

⁷⁷ See e.g. ECHR, *Isayeva v Russia*, 57950/00, judgment of 25 February 2005, §§ 179-200.

⁷⁸ See e.g. ECHR, *Khashiyev and Akayeva v Russia*, 57942/00 and 57945/00, judgment of 24 February 2005, §§ 136-147.

⁷⁹ See e.g. ECHR, *Cangöz and others v Turkey*, 7469/06, judgment of 29 March 2016, §§ 105-149.

“significantly worse than any sanctions you could imagine.” Perhaps he was right and economic arguments are certainly not entirely devoid of rationality. Beijing has been accused by human rights organizations of aiming at “cultural genocide” of Muslim minority, closing up hundreds of thousands Uighurs in re-education camps, running mass surveillance and suppressing religion and traditions.⁸⁰ The Old Continent is not entitled to come up with any criticism because it has developed its economic cooperation with China to such an extent that it even established ASEM, a formal forum for dialogue with this country modelled on the EU structure, three pillars of which hide the problem of Uighurs and of the observance of human rights in China in general. China loudly reiterates that human rights are nothing else than a philosophy of European conquistadors, those who largely showed to the Chinese and other nations what bare life had meant before this notion even saw the light of science. Thus, watch your yard or mind your own business. But, do we mind our own business? Since the end of World War II, Europe has been taking actions to eliminate institutions, mechanisms, phenomena which are the nerve center of bare life areas where a sovereign’s competence to serve death penalty is most pivotal. In this sense, thanks to the efforts undertaken by the Member States of the Council of Europe, Europe has become the only region in the world free from any tribute in the form of an absolute likelihood of being killed that the state systems have been imposing on people since the dawn of their existence. This is an indisputable, rational and tangible effect that deserves recognition. It has been achieved through making law termed human rights, undoubtedly subordinated to sovereign’s will, but also having regard to its commitment to protecting a human being from descending into *homo sacer*. European countries have selected an international agreement model. The USA, reluctant to be bound by treaties on human rights, prefer to apply their own law, however only externally, an example of which is the global Magnitsky Act, by virtue of which sanctions could have been imposed on China in respect of the Uighurs case. What is essential is not the formula itself as it hinges on a specific legal tradition, but a feeling of an urgent need to adopt and effectively implement it. Whether it will prove so depends, however, not on law, but on those who apply it as has been demonstrated on the one hand by Russia and China, and on the other by European countries and the USA. Human rights are not panacea but only one of potential remedies. Murder is Easy, quoting the title of one of Agatha Christie’s bestsellers,⁸¹ especially when committed by the state, and whoever was successful may feel tempted to try again. It is not the nature of the state but of a man who participates,

⁸⁰ See <https://www.radiomaryja.pl/informacje/d-trump-nie-wprowadzilem-sankcji-przeciwko-chinom-z-uwagi-na-negocjacje-handlowe/2> June 2020 [accessed: 21.06.2023].

⁸¹ London: Pan Books Ltd., 1951.

establishes and constitutes it. Assumedly, law should operate as monk's hair shirt to prevent a sovereign from immoderation in squandering human life. If necessity was long ago univocally recognized as the mother of invention, then human rights were devised at the right time. Times along with communities have been changing undeniably fast. Human rights may prove insufficient to follow structural transformation of the states and communities, and then they will have to be replaced with other institutions better adapted to the existing state of affairs. Before-the-law status had not meant lawlessness but only until Cain killed Abel. From that very moment on, to combat negative social phenomena, all state systems invented themselves a goddess termed law, with her cult most likely to last until their very end. Her significance to the protection of a man has been variable, because it has not been entirely dependent on her.

REFERENCES

- Agamben, Giorgio. 2008. *Homo Sacer, Sovereign Power and Bare Life*. Warszawa: Wydawnictwo Prószyński i s-ka.
- Carroll, Lewis. 2015. *Alice's Adventures in Wonderland*. London: Macmillan.
- Kielar, Wiesław. 2004. *Anus mundi*. Wrocław: Atut.
- Łasak, Katarzyna. 2013. *Prawa społeczne w orzecznictwie Europejskiego Trybunału Praw Człowieka*. Warszawa: EuroPrawo.
- Sowa, Jan. 2011. *Fantomowe ciało króla. Peryferyjne zmagania z nowoczesną formą*. Kraków: Universitas.