

Does Article 2 of the European Convention on Human Rights Adequately Protect the Right to Life?

Saad Nasser Alqahtani

Department of Law, College of Business Administration,
Prince Sattam Bin Abdulaziz University, Al-Kharj, Saudi Arabia

Abstract: Article 2 of the European Convention on Human Rights (ECHR) came into force in 1953 as a result of World War 2 to protect the right to life. It states that no one shall be deprived of his life intentionally. This study has an exception provided in Article 2 (2) which allows the states to use force in “absolutely necessary” circumstances. This exception has been expanded to give authorisation to the state to use force under certain condition. It means that this exception can be overused by the state to justify taking lives and thus, not protecting adequately the right to life. It is also argued that Article 2 does not offer sufficient protection as it only focuses on the right to life (not being killed) and does not consider many other rights, such as civil rights. This study only prohibits deprivation of life and not the risk of deprivation of life. It is thus, concluded that Article 2 does not adequately protect the right to life as it does not cover many aspects such as civil rights and the foetus’s right to life.

Key words: ECHR, Article 2, Article 2 (2), Right to life, the strasbourg court, authorisation

INTRODUCTION

In the after math of World War 2 which killed mln. of lives, especially in Europe (Weisser, 1996), there arose a tendency to protect lives in the continent. As a result, the European Convention on Human Rights (ECHR) came into force in 1953 (Marston, 1993). While the convention protects many fundamental rights, Article 2 deals with right to life. This study requires the signatory states not to take people’s lives. It stipulates that no one shall be deprived of his life intentionally.

An exception to this right is provided in Article 2(2). It allows the states to use force in “absolutely necessary” circumstances. Unfortunately, this exception has been expanded in many cases decided by the Strasbourg court. It has authorised the use of force by police and the states authorities under certain conditions. The first condition is that the use of force has to be in response to a threat; the second is that the use of force should be based on good reasons and honest belief. This means that the “absolutely necessary” condition given in Article 2(2) tends to be nugatory, since, a mere threat and an honest belief are sufficient to use force and thus kill.

This study argues that Article 2 does not offer sufficient protection as it only focuses on the right to life (not being killed) and does not consider many other rights such as civil rights. This study only prohibits deprivation of life and not the risk of deprivation of life. For example, a man who works in a factory which might affect his life or

his children as a result of the lack of equipment is not considered as a violation of Article 2. The ‘start’ of life is unclear as per this study. Due to this, many lives might not be protected, such as foetus’s right to life. The exceptions under Article 2 have also been expanded by the European Court of Human Rights (ECHR). It has given the state authorities the right to use force in response to a threat (although, an honest belief is required).

MATERIALS AND METHODS

What are the limits of the right to life? The right to life can be defined as the right not to be killed intentionally, according to Article 2 of the ECHR. This is evident in Article 2(1) which states, no one shall be deprived of his life intentionally, save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. States have thus the obligation to protect human lives. This obligation, not only prevents states from violating the right to life but also requires them to prevent others from doing so. This extended obligation could be seen in *Osman v UK* when the court held that the states would be obliged to protect a person from a real, immediate risk to his or her life (Monti, 1999; Mowbray, 2012).

The right to life has also been amended to give relatives the right to end the life of a persistently incompetent patient. This was shown in *Lambert and Others v France* when a decision was made by relatives to

end the life of a family member who was in a vegetative state and was artificially fed and hydrated through a gastric tube. The ECHR ruled that to end a patient's life, both positive and negative obligations of the states should be considered, that is "take appropriate steps to safeguard the lives of those within the jurisdiction of the State" and "refrain from intentional taking of [a] life. In this case and according to the ECHR, the doctor who was treating the patient intended to allow death to relieve suffering and this action based on the French Public Health Code, satisfied the stated negative obligation. In terms of the positive obligation related to allowing the patient's death, the Commission Court (of the ECHR) held that important safeguards such as the patient's decision to withdraw from the treatment, had to be satisfied according to the national law. These conditions were satisfied in this case. The court considered that the regulatory framework of the public health code and the patient's expressed wish to his wife not to be kept alive through artificial means were sufficient to satisfy the positive obligation as far as his desire was in accordance with the national law. However, this would not mean that Article 2 could be interpreted as the right to death. In *Pretty v UK* an ill lady wished to commit suicide and wanted her husband to assist her as she could not do so, by herself. The UK law allows committing suicide but prohibits a person from assisting another to commit it (Williams, 2010). The ECHR stated that it was not persuaded that Article 2 shall be interpreted as involving the right to die and therefore, enforcing the states to enact rules permitting it.

In contrast to the right to end life, a question might arise about the start of life. This problem could be observed on many occasions concerning whether a foetus is considered a human being and therefore, entitled to the protection of his or her right to life (Boyle, 1979). In *VO v France*, the Grand Chamber (of the ECHR) declined to answer whether the unborn child was a person. It has been argued that a foetus is part of the woman's body; therefore, she has the right to terminate its life (Kim, 1990). Some countries such as the United States (US), uphold this right as its constitution protects an individual's right to privacy, especially in the area of childbearing (Rodgers, 1985). This supports the idea that a foetus is not considered a person. Thus, abusing its life shall not be considered a violation of Article 2.

On the other hand in *Roe v Wade*, the US Supreme Court ordained a woman's right to terminate her pregnancy prior to the viability of her foetus (Phillips, 1991). Once a foetus is viable, abortion is prohibited unless the mother's life is in danger. Canada also prohibits abortion (in some period) (Rodgers, 1985) which

suggests that a foetus is considered a person at a certain stage of its development (Gertler, 1985). This acknowledgement could be supported in several kinds of law. For instance, in property law, courts recognise some rights of the unborn to be heirs to estates but these rights are realised only after the foetus is born (Kim, 1990). Medical evidences support the argument that a foetus is a person and not merely a part of the mother's body. The first medical evidence is that a foetus has a genetic makeup that is distinguished from that of the mother. The second evidence is that medical practice can now provide ways to protect the foetus from some procedures which means that the foetus can be secured separately from the mother's body. Medical practitioners can now identify a non-viable foetus which can play a role in the mother's obligations to her foetus. Certain countries in some period of time such as Canada and the US, consider a viable foetus a person thus such obligations should be fulfilled.

These obligations encompass both moral and legal types. The moral obligation could be justified because a foetus is the child of the mother who therefore has a moral responsibility towards her foetus (Phillips, 1991). The legal obligation involves the view that the foetus is a person with a life of his or her own; therefore, aborting a foetus means killing a person and harming him or her could cause legal repercussions. This legal obligation was clearly recognised in *Grodin v Grodin* when a child brought a case against her mother who was taking tetracycline during her pregnancy, causing discolouration of the child's teeth. The court held that the child had the right to bring a negligent conduct case against her mother as the former had the right to be born with sound mind and body.

Considering a foetus a person has many consequences. Courts and commentators have argued that courts should overrule a woman's objection to undergo a caesarean section when the life of the foetus is at stake (Phillips, 1991). This suggests that a woman cannot refuse any medical care for the sake of her foetus as her refusal is the equivalent of child neglect. It means that foetus has a legal personality. This personality is independent from the mother personality even if it did not exist in reality. In other words, foetus has rights which means he or she might sue for any infringement of these rights under tort law. As a result of the above-mentioned argument, women might not be legally allowed to have abortions in states that consider a foetus a person as in the case of Canadian law (in some periods of time) which prohibits abortion unless the woman's life is in danger (Rodgers, 1985).

Considering a foetus, a person might give rise to another question about the liability of preventing pregnancy. This means the prevention of many lives of children who need the combined genes from men and women in order to be born. In *Griswold*, the court prohibited the use of birth control by married couples (Kim, 1990). This supports the idea that preventing pregnancy might be similar to abortion as they both aim to prevent the birth of the child. The only difference is that abortion terminates the life of the foetus while contraception prevents the foetus from developing in the woman's body. In the past, many laws prohibited birth control such as the Federal Comstock law of 1873 in the US which prohibited importing or transporting any medicine for the prevention of conception (Hudson, 1960). Many states in the US also enacted laws similar to the federal law. This past prohibition might be perceived as the protection of possible children (a generation) from any commercial and political exploitation. Such exploitation might be observed in political parties' methods to satisfy the public by increasing the outcome for individuals through decreased birth rates as many sociologists claim that raising the living standards is almost impossible with the current population growth rate. It is admitted that pharmaceutical companies play an important role in countries' economies. The promotion of drugs that prevent pregnancy is beneficial to companies and thus, to the national economy. Consequently, protection against possible political and economic aims must be taken into consideration.

Another question that might arise in the light of protecting lives under Article 2 of the ECHR concerns civil rights and whether these are protected under the article; namely, the extent to which the civil death penalty violates it. Civil death is a historical punishment established in the Roman Empire (Manza and Uggen, 2004). This punishment disregards the entire civil rights of an individual which means that he or she is no longer considered a person with civil rights. Thus, others are allowed to kill him or her or damage his or her properties and many civil actions could be taken against him or her without being protected by the government. This punishment is currently perceived in different ways. It could be a disenfranchisement of some or most civil rights for instance, the deprivation of citizenship as a punishment inflicted by a government for certain crimes. As a result, the punished individual is prevented from practising many civil rights such as voting, being elected, working, travelling as a citizen, having access to free education and many other rights. Surprisingly, the US once had a punishment called civil death (Chin, 2012) in a similar vein as that of the Roman Empire's which

extinguished most of the punished individual's civil rights and placed him or her outside of the law's protection (Manza and Uggen, 2004).

Other punishments only revoke some of these rights. The disenfranchisement could be observed in many forms such as prevention of voting by prisoners. Disenfranchisement caused a human rights issue in the UK when the government prevented prisoners from voting and participating in a political decision (Easton, 2006). In *Hirst v UK*, the plaintiff who was sentenced to life imprisonment for manslaughter argued that a prisoner had the right to vote even with such a sentence. The ECHR held that there was a violation of Protocol 1, Article 3. Contrary to this in *Scoppola v Italy*, the plaintiff had killed his wife and injured one of his sons and was sentenced to life imprisonment but was rehabilitated after 30 years of imprisonment. The ECHR held that there was no violation of Protocol 1, Article 3 as persons under a temporary ban from public office shall not vote for the duration of that ban. It could be noted from the previous judgement that limiting civil rights could be accepted, if it was temporary. Nevertheless, it is questionable whether this temporary prevention can include more or most rights and whether civil death could also be included.

Some individuals might also be prevented from exercising their civil rights due to non-criminal offences. One of these reasons is the government's non-recognition of them as citizens. This issue is clearly shown in non-citizen groups of people in Kuwait called Bidoon (Russell and Al-Ramadhan, 1994). They came from different places for many reasons such as the Iraq-Iran war and have lived in Kuwait for a long period. The Bidoon population totals more than 250,000 individuals who live without citizenship because the government does not grant nationality unless there is a blood relation (Alnajjar, 2001). In other words, the father has to be a citizen, so his children can be citizens, too. Thus, Bidoon are denied most civil rights such as free education, healthcare, voting, being elected, employment opportunities and being granted other civil rights of citizens. It means living a life with limited civil rights in comparison to citizens.

Another pertinent question that might arise is the extent to which neglecting the provision of sufficient equipment for individuals with special needs could be a violation of Article 2. As stated this article provides the right to life which also means that persons should have no obstacles that can prevent them from leading normal lives. In other words, individuals with special needs might be unable to live normally, if special equipment is not provided such as for driving to work, shopping, walking and many other fundamental activities. Thus, such

individuals need assistance in life. This means that their lives might be curtailed to a large degree if the equipment provided by the state is insufficient, since, they would be unable to perform basic functions independently. It could then be argued that not offering special-needs equipment violates Article 2 as this group of people cannot lead the average lives of individuals in the 21st century.

In short, Article 2 does not answer important questions such as when the right to life starts in other words, whether a foetus is considered a person and therefore should be protected from any kind of harmful action such as abortion. This leads to another question which is the liability of using birth control as it aims to prevent a foetus from developing and therefore, reduces the possibility of many new-born children. Article 2 also does not include civil rights as part of its focus. It means that civil death might not be considered as the research focuses only on the right of being literally alive. This is indicated in its exception, Article 2(2) which allows the right to kill in certain circumstances such as in defence of any person from unlawful violence, preventing the escape of a person who is lawfully detained and a lawfully taken action for the purpose of quelling a riot or an insurrection. It means that Article 2 enforces states to protect the right to life by not violating it (negative obligation) and preventing others from doing, so, (positive obligation). The application of this aspect is covered in the next section.

RESULTS AND DISCUSSION

How Article 2 is applied? States are required to refrain from violating Article 2(1) which stipulates, no one shall be deprived of his life intentionally. It means that any violation of the right to life of individuals is prohibited, including punishments imposed by states through laws, such as the death penalty (Hood and Hoyle, 2009). This could be seen in *Ocalan v Turkey* when the Ankara State Security Court found that Ocalan was involved with an armed gang as the leader of a terrorist group called Kurdistan Worker's Party; Therefore, he was sentenced to death. The ECHR held that the death penalty violated Article 2, stating, "Capital punishment is no longer permissible under Article 2. Thus, the Ankara State Security court commuted the death penalty to life imprisonment. This means that Article 2 does not exclude terrorists from this protection. This protection also requires states not to deport individuals who will be facing a real risk such as the death penalty (Garrod, 2010; Sattjes, 2009). This could be seen in many cases such as *Soering v UK* and *Al-Saadoon v UK*; in both cases, the

ECHR held that the states were obliged not to deport any individual to countries that would apply the death penalty against him or her.

Article 2 also requires states to take steps to safeguard the right to life within their jurisdictions (Weekes, 2005; De Than, 2003). These safeguards are seen in many forms such as in security force's operations. For instance, in *Isayeva, Yusupova and Bazayeva v Russia*, the plaintiffs were in a large convoy of vehicles that was trying to flee the fighting between the government and an insurgent group through a "humanitarian corridor" but the road was blocked and the convoy was turned away. Shortly afterwards, bombs were dropped by a Russian military aircraft, killing many people, including two children of the first plaintiff. The ECHR held that a breach of Article 2 occurred due to the lack of sufficient care in planning the security force's operation. The same judgement was shown in *Ergi v Turkey* when Ms Ergi was killed in the government's ambush of the Kurdistan Worker's Party. The ECHR ruled that Article 2 was infringed due to the lack of sufficient care in the security force's operation against the terrorist group. In contrast, sufficient care of safeguards could be seen in *Andronicou and Constantinou v Cyprus* when the government tried to rescue a lady who was detained by a young man in his apartment. The government took many safeguarding steps such as calling a special police unit to handle the situation in order to minimise the risk to lives, conducting prolonged negotiations and giving the officers strict instructions not to use their weapons unless their lives were in danger. The officers used force as a result of the young man's decision to open fire against them. The Strasbourg court held that the state took sufficient care in planning the operation; therefore, there was no abuse of Article 2.

Despite the safeguards enforced by Article 2, it is argued that this article is inadequate for many reasons. The first reason was noted in *Osman v UK* in which the ECHR stated that in modern societies where there were difficulties in policing them, the obligation would only apply if the states knew or ought to have known that any "real and immediate risk" existed that threatened lives. A question might arise about the level of risk that would constitute a real and immediate danger. It is unclear how to distinguish between real and unreal risks. Lord Phillips observed that the search for this kind of risk was a search for a chimera (Weekes, 2005). It has also been argued that if the risk to a life is not immediate and real it simply means that it is not a risk. Therefore, there is no such thing as unmediated risk. It is suggested that only the probability of a life being vulnerable to a risk must be extended to be considered an abuse of Article 2.

Assuming that merely the vulnerability to a risk to life is part of Article 2 could lead to the main consequence that any fatality or neglect that caused the deprivation of lives could be considered an abuse of Article 2. This could be seen in *LCB v UK* when the plaintiff argued that the UK authorities' failure to warn her father that she was vulnerable to contracting leukaemia abused her right to life. This risk was based on her father's work as he was exposed to radiation from the UK's nuclear testing before her birth. Unfortunately, the court held that Article 2 was not expanded to protect against such a risk. This decision might be based on the fact that Article 2 protects only the actual deprivation of life rather than protecting against any possibility that might threaten the lives of others. In other words, to apply Article 2, a person's life itself must be affected such as being killed while the mere idea that the right to life is vulnerable to being affected as a result of a certain action is not protected under Article 2. Another example could be seen in *Keenan v UK*, when the plaintiff claimed that the treatment of her son (who had a mental illness) under the authorities' custody led him to commit suicide. Sadly, the ECHR did not accept this fact as an abuse of Article 2. It seems that Article 2 covers only the deprivation of life itself, not merely the risk to life as the ill treatment could be considered to some extent as a risk to life. States are required to decrease any possible action such as an inhumane act that may increase the number of deaths. This obligation is based on the fact that states have the power to organise all activities in their regions, therefore, they are obliged to protect human rights in these places. As a result of the above-mentioned argument, not including the mere risk to life in the scope of this study might be considered a limitation.

Not including the mere risk of life under Article 2 might cause serious consequences for instance the unethical human experimentations which received much attention for a long period as it jeopardises human life and arguably is a violation of Article 2 (Morin, 1998). Considering the doctrine of the ECHR, however, the unethical human testing for medical purposes for instance, might not be a breach of Article 2 if it does not deprive human life as the court refused to accept that merely the risk of life is a violation of Article 2 in the previous 2 cases (*LCB* and *Keenan v UK*). A possible reason for not putting the risk of life in the scope of Article 2 is that it might be utilised to charge states and companies for their activities that might put lives in danger. For example, industrialised nations might be accused of risking lives as gas emissions from their factories harm the ozone layer, thus, causing skin cancer. This risk is prevalent in the US where skin cancer is

considered the most common type of all cancers (Mintzis, 1986). It affects 1 out of 7 people in that country. Likewise, South Africa has 1 of the highest rates of skin cancer in the world (Newton, 1994). Thus, industrial waste and by products harm and negatively impact human lives, their actions are not considered in violation of Article 2. Even food companies that produce unhealthy food loaded with preservatives might cause harm and even cut many lives short. This includes fast-food restaurants which proved to cause an increase in morbidity and mortality rates (Stockton and Baker, 2013).

The second reason for arguing that Article 2 is inadequate is that Section 2 (2) gives states the right to use force when "absolutely necessary" under 3 main exceptional circumstances which might lead to the deprivation of life. The first exception is the "defence of any person from unlawful violence" as shown in *McCann v UK* when the ECHR held that the police's use of force did not violate Article 2. The second exception is "in order to effect a lawful arrest or to prevent the escape of a person lawfully detained". In *Nachova and Others v Bulgaria*, the ECHR ruled that using force to prevent the escape of persons who were lawfully detained was acceptable. Nevertheless, in this case, the escaped prisoners did not commit any violent crime which meant that they did not pose any danger to the public thus killing them was unnecessary according to Article 2 (2). The 3rd exception is an "action lawfully taken for the purpose of quelling a riot or insurrection". This could be seen in *Gulec v Turkey*, when the plaintiff's son was killed as a result of quelling a riot the government forces used bullets in doing so. The ECHR ruled that states had the right to quell an insurrection but the government's lack of resources such as water cannons or tear gas, might render this incident a violation of Article 2 (2), since, using bullets was uncalled for.

Despite the above-mentioned exceptions, the ECHR held that the state's use of force could be justified, if it was based on good reasons and honest belief in responding to a threat. This might deprive the phrase "absolutely necessary" of its significance, since, merely good reasons and honest belief are sufficient to authorise the killing by the states. This interpretation gave rise to issues in many cases. For instance, in *McCann v UK*, the Strasbourg court held that the use of force by the police authorities who killed the suspects did not violate Article 2 but the organisation of the operation did (Cumper, 1995). This meant that any threat to the police might be a reasonable cause for them to use force against others, thus, justifying killing due to a mere feeling of being threatened. An example of using force as a justification for killing in response to a perceived threat is *R (Bennett)*

v HM Coroner for Inner South London EWHC 196. Bennett, who had a mental health problem and a lighter that resembled a pistol was killed by the police because they thought that he would use what they mistook for a gun against the public (Cross, 2006). The judge ruled that shooting based on a mistake was similar to the circumstances in *McCann v UK* where the ECHR decided that the use of force in response to a perceived threat did not violate Article 2, even if it was based on a mistake. The judge explained that good reasons and honest belief could justify the use of force. The decision in *McCann v UK* provides strong evidence of this interpretation. Thus, the phrase “absolutely necessary” offered weak protection, since, it did not provide victims with any safeguard against nervousness or threats perceived by the police which might lead to mistaken killing. For this reason, it could be argued that exceptions should not be confined to what is written in Article 2 (2).

The doctrine of justifying killing as a response to a threat might be expanded to include not only an immediate danger or risk but also future risks. Police authorities might kill suspects if the former thought that the latter would commit future offences. This action might be applied widely, especially against terrorist groups, when a region is suffering from their actions. Thus, a broader interpretation of using force might be justified. For example, in a soldier shot a driver of a car, thinking that the driver and the passengers were terrorists who might commit terrorist acts in future. The Northern Ireland court held that, although, it was a mistaken shooting it was justified as it was the soldier’s response to a perceived threat and thus, compatible with the ECHR decision in *McCann v UK*. Surprisingly, the ECHR ruled that the soldier’s act did not breach Article 2. This might give states broad discretion in interpreting what a threat is thus, allowing killing based on this interpretation. Even a case of a mistaken killing does not violate Article 2, unless it is not based on good reasons and honest belief as these two conditions are required by the ECHR to allow killing by state authorities.

CONCLUSION

This study has covered the limits of the right to life and its application. In the first aspect, the study has discussed the limits of the right to life and when life starts. It has questioned the possibility of applying Article 2 of the ECHR in the case of a foetus. It has also questioned whether this article protects civil rights, namely, whether the civil death punishment abuses Article 2. The second aspect has focused on the application of Article 2 and the state’s duty to provide safeguards to protect the right to

life. It has covered the exceptions to protecting lives as written in Article 2 (2) which stipulates the extent to which these exceptions have been expanded.

This study concludes that Article 2 does not adequately protect the right to life as it does not cover many aspects such as civil rights and the foetus’s right to life. It has been shown that there is no clear answer from the Strasbourg court regarding the beginning of life in *Vo v France*, it has declined to rule whether life starts from the foetus stage or afterwards. Article 2 also does not emphasise civil rights and whether civil death is considered a violation of this article due to the fact that civil death means not granting any civil rights to the individual. The exceptions stated in Article 2 have deprived it of its importance after the ECHR decision allowing the use of force in perceived threatening conditions, requiring only good reasons and honest belief. It is suggested that Article 2 must provide a much wider scope of protection and decrease the possibility for the authorities to use force to address future challenges, such as human cloning and the extent to which they are considered as human and thus being protected under Article 2.

ACKNOWLEDGEMENT

This research does not get any specific financial support/fund from any agency. We thank to the editorial team and Anonymous reviewers to help us in improving the quality of study.

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