



HUMAN RIGHTS 4 - TO BE OR NOT TO BE: RIGHT TO LIFE

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HIERARCHY?

- Basic steps are over, now enjoy the dancing;-)
- Literal trailer....
 - Once violated, difficult to remedy



INSTRUMENTS

- UDHR: „*Article 3 Everyone has the right to life, liberty and security of person.*“ (Freedom from fear)
- ICCPR:
 - „*Article 6*“
 1. *Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.*
 2. *In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.*
 3. *When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.*
 4. *Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.*
 5. *Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.*
 6. *Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.*“



INSTRUMENTS

- Contrast in simplicity: Second optional protocol 1989:
„Article 1
 1. *No one within the jurisdiction of a State Party to the present Protocol shall be executed.*
 2. *Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.* “ - we will come back soon



INSTRUMENTS

○ European Convention:

„Article 2

Right to life

- 1. Everyone's right to life shall be protected by law. 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.*
- 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:*
 - (a) in defence of any person from unlawful violence;*
 - (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;*
 - (c) in action lawfully taken for the purpose of quelling a riot or insurrection. “*



INSTRUMENTS

○ Protocol No. 6 to ECHR 1983:

„Article 1

Abolition of the death penalty

The death penalty shall be abolished. No one shall be condemned to such penalty or executed. – Is there a difference?

Article 2

Death penalty in time of war

A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. The State shall communicate to the Secretary General of the Council of Europe the relevant provisions of that law.“



INSTRUMENTS

- Protocol No. 13 - 2002:

„Article 1

Abolition of the death penalty

The death penalty shall be abolished. No one shall be condemned to such penalty or executed.“

The less complicated, the more absolute.... Occam's razor: „The simplest explanation is usually the correct one";-)



INSTRUMENTS

- EU Charter:

„Article 2

Right to life

- 1. Everyone has the right to life.*
- 2. No one shall be condemned to the death penalty, or executed.“*

Why the first paragraph may be so brief?



THE BEGINNING OF LIFE?

○ Foetus?

- Art. 6/5 ICCPR: *„5. Sentence of death ... shall not be carried out on pregnant women.“*
- Indent 9 of Convention on the Rights of the Child: *“Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth“*
- Art. 6/1 Czech Charter: *„(1) Everyone has the right to life. Human life is worthy of protection even before birth.“*
- third subsection of Article 40, Section 3, of the Irish Constitution: *"The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right."*



RIGHT TO DIE?

- ECHR *Pretty v. UK* 29 April 2002 – facts and your opinion:
 - The applicant is a 43-year-old woman. She resides with her husband of twenty-five years, their daughter and granddaughter. The applicant suffers from motor neurone disease (MND). This is a progressive neuro-degenerative disease of motor cells within the central nervous system. The disease is associated with progressive muscle weakness affecting the voluntary muscles of the body. As a result of the progression of the disease, severe weakness of the arms and legs and the muscles involved in the control of breathing are affected. Death usually occurs as a result of weakness of the breathing muscles, in association with weakness of the muscles controlling speaking and swallowing, leading to respiratory failure and pneumonia. No treatment can prevent the progression of the disease.



RIGHT TO DIE?

- 8. The disease is now at an advanced stage. She is essentially paralysed from the neck down, has virtually no decipherable speech and is fed through a tube. Her life expectancy is very poor, measurable only in weeks or months. However, her intellect and capacity to make decisions are unimpaired. The final stages of the disease are exceedingly distressing and undignified. As she is frightened and distressed at the suffering and indignity that she will endure if the disease runs its course, she very strongly wishes to be able to control how and when she dies and thereby be spared that suffering and indignity.
- 9. Although it is not a crime to commit suicide under English law, the applicant is prevented by her disease from taking such a step without assistance. It is however a crime to assist another to commit suicide.
- 10. Intending that she might commit suicide with the assistance of her husband, the applicant's solicitor asked the Director of Public Prosecutions (DPP), ... to give an undertaking not to prosecute the applicant's husband should he assist her to commit suicide in accordance with her wishes.



RIGHT TO DIE

- Answer of the ECHR

„39. *The consistent emphasis in all the cases before the Court has been the obligation of the State to protect life. The Court is not persuaded that “the right to life” guaranteed in Article 2 can be interpreted as involving a negative aspect. While, for example in the context of Article 11 of the Convention, the freedom of association has been found to involve not only a right to join an association but a corresponding right not to be forced to join an association, the Court observes that the notion of a freedom implies some measure of choice as to its exercise Article 2 of the Convention is phrased in different terms. It is unconcerned with issues to do with the quality of living or what a person chooses to do with his or her life. To the extent that these aspects are recognised as so fundamental to the human condition that they require protection from State interference, they may be reflected in the rights guaranteed by other Articles of the Convention, or in other international human rights instruments. Article 2 cannot, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die; nor can it create a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life.*



RIGHT TO DIE?

40. *The Court accordingly finds that no right to die, whether at the hands of a third person or with the assistance of a public authority, can be derived from Article 2 of the Convention. It is confirmed in this view by the recent Recommendation 1418 (1999) of the Parliamentary Assembly of the Council of Europe (see paragraph 24 above).*

...

42. *The Court finds that there has been no violation of Article 2 of the Convention.*“



CONNECTIONS WITH OTHER RIGHTS

- To Art. 3 ECHR: facts in Pretty

„44. She submitted that the suffering which she faced qualified as degrading treatment under Article 3 of the Convention. She suffered from a terrible, irreversible disease in its final stages and she would die in an exceedingly distressing and undignified manner as the muscles which controlled her breathing and swallowing weakened to the extent that she would develop respiratory failure and pneumonia. While the Government were not directly responsible for that treatment, it was established under the Court's case-law that under Article 3 the State owed to its citizens not only a negative obligation to refrain from inflicting such treatment but also a positive obligation to protect people from it. In this case, this obligation was to take steps to protect her from the suffering which she would otherwise have to endure.“ Your opinion?



CONNECTIONS WITH OTHER RIGHTS

- To Art. 3 ECHR: answer in Pretty

„55. *The Court cannot but be sympathetic to the applicant's apprehension that without the possibility of ending her life she faces the prospect of a distressing death. It is true that she is unable to commit suicide herself due to physical incapacity and that the state of law is such that her husband faces the risk of prosecution if he renders her assistance. Nonetheless, the positive obligation on the part of the State which is relied on in the present case would not involve the removal or mitigation of harm by, for instance, preventing any ill-treatment by public bodies or private individuals or providing improved conditions or care. It would require that the State sanction actions intended to terminate life, an obligation that cannot be derived from Article 3 of the Convention.*

56. *The Court therefore concludes that no positive obligation arises under Article 3 of the Convention to require the respondent State either to give an undertaking not to prosecute the applicant's husband if he assisted her to commit suicide or to provide a lawful opportunity for any other form of assisted suicide. There has, accordingly, been no violation of this provision.“*



CONNECTIONS



- Connected to right to good environment (L.C.B. against U.K. 1998): where do we have it?
- Article 37 of the EU Charter

Environmental protection

„A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.“



CONNECTIONS

- Social rights: Art. 12 ICESCR:

„Article 12

- 1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.*
- 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:*
 - (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;*
 - (b) The improvement of all aspects of environmental and industrial hygiene;*
 - (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;*
 - (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.“*



NEGATIVE OBLIGATIONS

- Structure of rights (Jellinek):
 - Negative (freedom from)
 - Positive (right to get)
 - Active (right to take part in)
 - Pasive (obligation)



POSITIVE OBLIGATIONS?

- ECHR stories.....: *Akkoc v. Turkey* (2000): Turkey did not fulfill its positive obligation by not protecting trade union (illegal according to Turkey) leader threatened by murder....realized...only 12 days of investigation, only several witnesses. Who is the applicant in Art. 2 cases? Here the widow.
- Always investigate suspicious deaths of people „embraced“ by the state: The Royal Commission into Aboriginal Deaths in Custody (RCIADIC) (1987-1991) studied and reported on the high level of deaths of Aboriginal people whilst in custody after being arrested or convicted of committing crimes: suicide, natural causes, medical conditions and injuries caused by police: *„It must never again be the case that a death in custody, of Aboriginal or non-Aboriginal persons, will not lead to rigorous and accountable investigations and a comprehensive coronial inquiry.“*



POSITIVE OBLIGATIONS?

- Osman v. U.K. 2003: professor killing a student and his father after sexual accusations – danger was not specific enough
- Watts v. U.K. 2010: applicant (born 1903!) forced to leave a house with care for seniors, whose functioning was cancelled by the local council – for ECHR it may influence their life, but not violate their right to life



POSITIVE OBLIGATIONS?

- Budayeva and others v. Russia (2008): Russian village on Caucasus destroyed by mudslides on a regular basis, state is not doing enough (Russia...),
 - Before the events of July 2000 the first applicant, her husband and their two sons, lived in Tyrnauz, in flat they owned on the seventh floor. On 18 July 2000 she and her family were asleep when the mudslide began. The first applicant claimed that no emergency warning was given, and the mudslide came as a total shock. They had a narrow escape and spent the night in the mountains. At about noon on the following day they returned to their flat. According to the first applicant, the mudslide appeared to have ended, and since there had been no warning or barriers to stop them, they thought that it must be safe to return home. Exhausted from the events of the previous night, they went straight to bed. However, shortly afterwards the first applicant was woken up by a friend and within minutes they felt the walls shake and heard a loud rumble, glass shattering, cries and people running. The first applicant and her older son only just managed to escape. The younger son was carried out by Ms K and rescued from the wreckage, but he sustained serious injuries, including cerebral and spinal contusion... The first applicant's husband...stayed behind to help her parents flee but was killed when the building collapsed after being hit by the mudslide. The first applicant's flat and all her possessions were flooded and destroyed by the mudslide. On 3 August 2000 the Prosecutor's Office of the Elbrus District decided not to launch a criminal investigation into the death of the first applicant's husband. Having found that he died as a result of the collapse of the building, it established that the death was accidental and not attributable to any criminal act.



POSITIVE OBLIGATIONS?

- Budayeva and others v. Russia (2008):

„The authorities were not implementing any alternative land-planning policies in the area that would dispense with the concept of the mud-defence facilities or suspend their maintenance.

In such circumstances the authorities could reasonably be expected to acknowledge the increased risk of accidents in the event of a mudslide that year and to show all possible diligence in informing the civilians and making advance arrangements for the emergency evacuation. In any event, informing the public about inherent risks was one of the essential practical measures needed to ensure effective protection of the citizens concerned.

The applicants consistently maintained that they had not received any warning until the mudslide actually arrived in the town.

The Court further notes that, in order to be able to inform the neighborhood of the mudslide hazard, the authorities would need to set up temporary observation posts in the mountains. However, the persistent requests of the specialised surveillance agency indicating that such posts were indispensable for ensuring the residents' safety were simply ignored.“



POSITIVE OBLIGATIONS?

- Budayeva and others v. Russia (2008):

„.... mud-retention dam and the mud-retention collector... were not adequately maintained. Accordingly, in exercising their discretion as to the choice of measures required to comply with their positive obligations, the authorities ended up by taking no measures at all up to the day of the disaster.

In the light of the above findings the Court concludes that there was no justification for the authorities' omissions in implementation of the land-planning and emergency relief policies in the hazardous area of Tyrnauz regarding the foreseeable exposure of residents, including all applicants, to mortal risk. Moreover, it finds that there was a causal link between the serious administrative flaws that impeded their implementation and the death of Vladimir Budayev and the injuries sustained by the first and the second applicants and the members of their family.

The authorities have thus failed to discharge the positive obligation to establish a legislative and administrative framework designed to provide effective deterrence against threats to the right to life as required by Article 2 of the Convention.“



POSITIVE OBLIGATIONS?

- Australian Royal Commission 1991
- Positive obligation compensating shortage of evidence for negative obligation violation
- ECHR: *Salman v. Turkey* 2000 – state has to show that death in a custody (including suicide in a death row: *Kuznecov v. Ukraine!*) was not its fault
- Or *Tas v. Turkey* 2000: father disappeared second day after release – connection to International Convention for the Protection of All Persons from Enforced Disappearance 2006



POSITIVE OBLIGATIONS?

- Your story: Giuliani and Gaggio v. Italy
 - What were the positive obligations here in stake?



EXCEPTION 1- DEATH BY POLICE FORCE OR ARMY

- Judgment of German Constitutional Court of 15 February 2006, 1 BvR 357/05

What logic have those two answers?

- „...*humanity and generally every rational nature is an end in itself (which is the supreme limiting condition of every man's freedom of action)*...“



EXCEPTION 1- DEATH BY POLICE FORCE

European Convention:

„2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

- (a) in defence of any person from unlawful violence;*
- (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;*
- (c) in action lawfully taken for the purpose of quelling a riot or insurrection. “*



EXCEPTION 1- DEATH BY POLICE FORCE

Nachova and others v. Bulgaria 2004 (facts):

„109. *The Court finds that the respondent State failed to comply with its obligations under Article 2 of the Convention in that the relevant legal framework on the use of force was fundamentally flawed and Mr Angelov and Mr Petkov were killed in circumstances in which the use of firearms to effect their arrest was incompatible with Article 2 of the Convention. Furthermore, grossly excessive force was used. There has therefore been a violation of Article 2 of the Convention as regards the deaths of Mr Angelov and Mr Petkov.*“

„118. *The Court reiterates in this connection that a prompt and effective response by the authorities in investigating the use of lethal force is essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts .*

119. *It follows that in the present case there has been a violation of the respondent State's obligation under Article 2 § 1 of the Convention to investigate the deprivation of life effectively.*“



EXCEPTION 1- DEATH BY POLICE FORCE

- Scylla and Charybda: the state has to show
 - That it has done enough (a contrario McCann, Farrell and Savage v. UK 1995 – they should never be allowed to come to Gibraltar)
 - That it has not done too much (a contrario Ogur v. Turkey 1999 – did not show that the attack was strong enough for counter shooting)

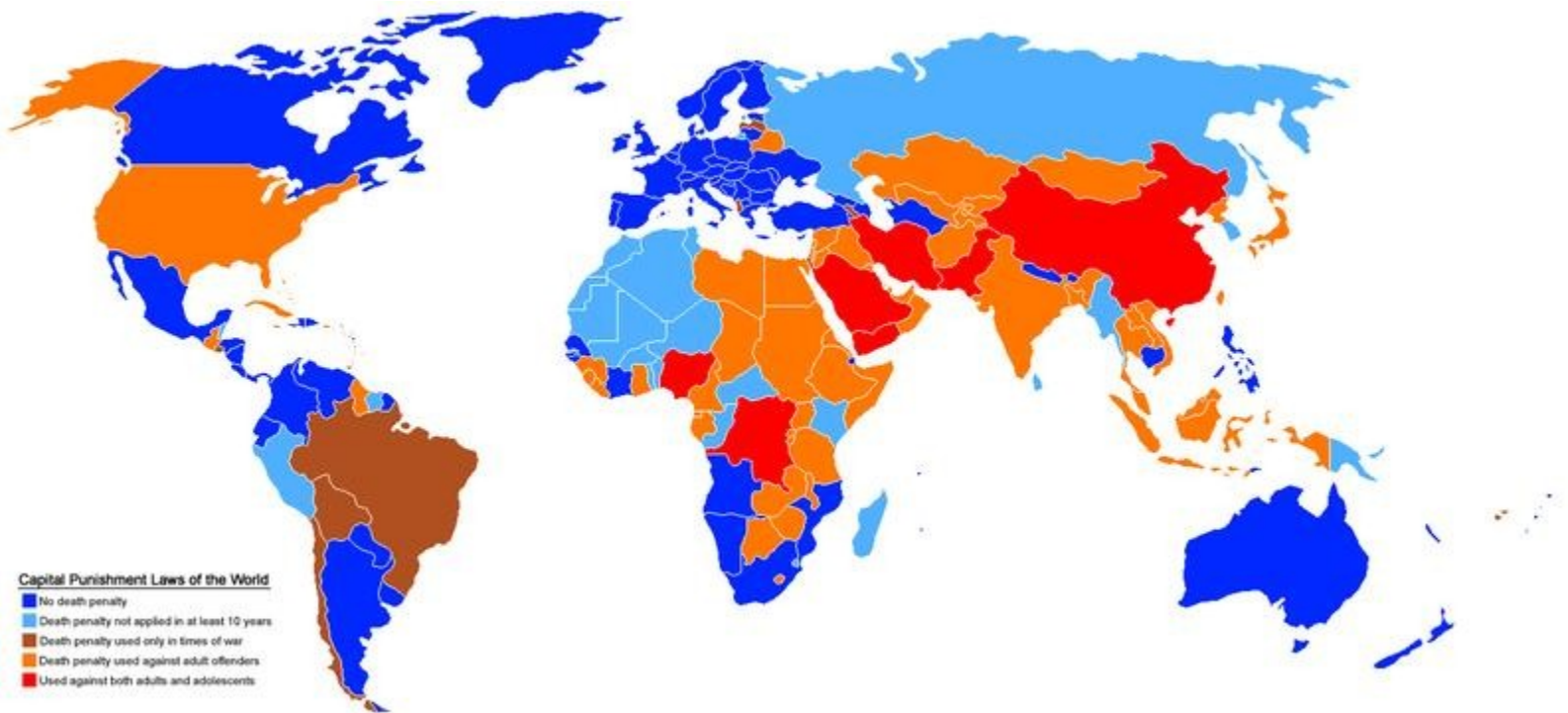


EXCEPTIONS 2 - DEATH IN WAR

- Hopefully not real....
 - African Commission: *Commission Nationale des Droits de l'Homme et des Libertés v. Chad 1995* – if a state is suppressing civil riots, any death of non-combatant by the state forces is attributable to the state



EXCEPTION 3 - DEATH PENALTY



Human Rights 4 - Right to life



EXCEPTION 3 - DEATH PENALTY

- Facts: who is „number one“ in executions? (2014 – 2466 reported death penalties + Number 1)
 - China (?)
 - North Korea (?)
 - Nigeria (659)
 - Egypt, Pakistan, Bangladesh, Tanzania, Iran
 - U.S. (72 in 2014)
 - ECHR Protocol No. 6 – everyone except Russia (factual moratory)
 - Protocol No. 13 – except Armenia, Azerbaijan and Russia



DISCUSSION

- Try to find as many arguments for and against death penalty as you can....

