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LIMITS AND EXCLUSIONS OF THE RIGHT TO LIFE UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND TURKISH LAW

AVRUPA İNSAN HAKLARI SÖZLEŞMESİ VE TÜRK HUKUKU KAPSAMINDA YAŞAMA HAKKININ SINIRLARI VE İSTİSNALARI

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ÖZ

Felsefi, ahlaki ve dini açıdan insan yaşamının değeri ve niteliği açısından tartışmalar devam ederken, hukuk sistemleri kişileri doğal ölüm olarak nitelendirilemeyecek durumlardan muhafaza etmenin yollarını aramaktadırlar. Her insan hem hukuki hem de insani açıdan bir değer taşır. Yaşama hakkı insanlığın en temel hakkı olarak kabul edilebilir. Kısaca her insan doğuştan yaşama hakkına sahiptir. Bu hak hukuk tarafından korunur. Yaşama hakkı, devletler tarafından hukuka aykırı bir şekilde yaşamdan yoksun bırakılmama hakkını içerir. Hükümetler, devletlerindeki herkesin hayatını korumak için olumlu adımlar atmakla mükelleflerdir. Bu amaçla, hem iç hukukta hem Avrupa İnsan Hakları Sözleşmesi'nde yaşama hakkını dokunulmaz bir hak ve hakların merkezi olarak kabul edilmektedir. Bu makale esas olarak Avrupa İnsan Hakları Sözleşmesi ve Türk hukuku kapsamında yaşama hakkını ele almaktadır. Ayrıca yaşama hakkının konusu, önemi ve istisnaları, bu hakkın korunmasında devletin sorumluluğu ve yaşama hakkına ilişkin özel durumlar analiz edilmiştir.

Anahtar Kelimeler: İnsan Hakları, Yaşama hakkı, Devletin Sorumluluğu, Ölüm Cezası, Avrupa İnsan Hakları Sözleşmesi.

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ABSTRACT

While philosophical, moral and religious debates continue in terms of the value and quality of human life, legal systems seek ways to protect individuals from situations that cannot be described as a natural death. Every person has a value from legal and humanitarian view. The right to life can be considered as the most basic right. In short, every human being has the right to live. This right is protected by law. The right to life involves the right not to be deprived of life illegally by states. The governments should take positive steps to protect the lives of everyone in their states. For this purpose, the right to life is accepted as an inviolable right and center of rights both in domestic law and in the European Convention on Human Rights. This article mainly deals with the right to life under the European Convention on Human Rights and Turkish law. In addition, the substance, importance and exceptions of the right to live, the responsibility of the state in the protection of this right and special cases related to the right to life are analysed.

Keywords: Human Rights, Right to life, Responsibility of the State, Death Penalty, European Convention on Human Rights.

INTRODUCTION

Life, which constitutes the subject of the right to life, has been defined by the Turkish Language Association as "the period between birth and death and life"¹. Human life is important in terms of the doctrine of fundamental rights and freedoms, and the right to life, which protects human life, is granted to every person. The primary element of fundamental rights and freedoms is the right to life. The social importance of the right to life is high as it constitutes a prerequisite for the realization of other rights². Andre Malraux³ says that "A man's life is nothing. But nothing can take the place of a person's life." According to Rousseau and Hobbes, who are considered to be the pioneers of the natural rights doctrine, although life is a gift given to man by nature, people are included in the social contract not to use life as they wish, but to secure it.⁴ As can be understood from the views on the right to life, the most important value that people have is life, and people tend to secure the right to life at the expense of giving up some of their freedoms⁵.

The right to life is considered one of the most fundamental rights in terms of the European Convention on Human Rights (ECHR)⁶. The right to life is enshrined in one of the conventions we are a party to and the article 2 of the ECHR stresses that everyone's right to life is protected by law and establishes a natural point of synthesis of legal safeguards⁷. No one's life can be intentionally ended, except for the execution, which is sentenced by the court for a crime punishable by the law with the death penalty. This right shall be protected by laws (international and national laws). No one shall be arbitrarily deprived of the right to life. The right to life is regulated in the article 3 of the United Nations (UN) Universal Declaration of Human Rights⁸ (UDHR) as "Everyone has the right to life, freedom and security of person". As there was a regulation in the same direction in the 1961 Constitution, the article 17 of the 1982 Constitution was framed as "Everyone has the right to live, to protect and develop their material and spiritual existence". It is understood that there is an obligation to respect and take the necessary measures to protect it. According to the jurisprudence of the European Court of Human Rights, the expression in the article 2 of the European Convention on Human Rights states that countries are obliged not only to refrain from unjustified death, but also to take appropriate measures to secure their people's lives. Although this article mentions deliberate killing, the European Court of Human Rights has expanded the scope of the right by evaluating events that are not intentional killing, but acts that endanger life without death within the

¹ TDK, "Yaşam", Retrieved September 23, 2023, from <https://sozluk.gov.tr/>.

² Barak, Aharon: Proportionality: Constitutional Rights and their Limitations, translated by Doron Kalir, Cambridge, Cambridge University Press, 2012

³ Malraux André, "Karşı Anılar", 1., translated by Ömer Laçiner. İletişim Yayınları: İstanbul, 2011.

⁴ Rousseau Jean Jacques, Toplum Sözleşmesi, 6., translated by Ömer Laçiner. İletişim Yayınları: İstanbul, 2011, p. 32.; Hobbes, Thomas, Leviathan, translated by Semih Lim, Kazım Taşkent Klasik Yapıtlar Dizisi, Yapı Kredi Yayınları, İstanbul, 2007, p. 96,127.

⁵ Doğmuş Simay, "AİHS Işığında Devletlerin Yaşama Hakkına İlişkin Pozitif Yükümlülükleri", Ankara: Seçkin Yayıncılık, 2018, p. 32-33;

⁶ Rehman Javid, International Human Rights Law, London: Pearson, 2010, p.187

⁷ Xenos, Dimitris, Taking the state's positive obligations seriously, Durham theses, Durham University, 2009. p.129.

⁸ Universal Declaration of Human Rights. Paris : United Nations General Assembly, 10 December 1948.

scope of the article 2 in many cases. As a result, people must be protected against themselves, against third parties and against states⁹.

In the preamble of the Universal Declaration of Human Rights, it emphasizes the recognition of the inherent dignity and the equal and inalienable rights of all members of the human family, freedom, justice and peace in the world. In general, conventions are made not to replace domestic legal systems for the protection of human rights, but to create an international guarantee for the effective protection of human rights at the national level. At the international level, special attention is given to the legal protection of human rights and seeks permanent solutions to protect people against all forms of abuse. Although there are many national and international regulations, none of these texts provide a clear definition of this right. In the current discussions, many questions have arisen regarding the concept of "life" in the context of technical and scientific progress, and especially the content of the right to life and the limits of this right are still a debated problem. Apart from this, an alarming number of cases concerning the violation of the right to life are brought before ECHR every year. States are the only entities that have the appropriate tools to provide effective protection and at the same time reduce all situations that could lead to violations of the right to life. If states cannot adequately protect the right to life, they should reconsider their policies and adopt effective protection tools.

The control mechanism established by the ECHR and their organs have contributed greatly to the development and protection of human rights with its practices and decisions. The member states of the convention are responsible for both arranging their domestic legislation in accordance with the convention in line with the decisions of the convention bodies and solving the problems arising from the implementation in accordance with the convention. Türkiye also makes various regulations in order to prevent human rights violations arising from practice and legislation. The second article of the European Convention on Human Rights is one of the most important articles, because the "right to life" is the foundation of other human rights. Without this right, the other rights cannot be protected well. The situation of Türkiye's human rights record is not particularly promising in terms of the right to life. According to the statistics of the European Court of Human Rights, Türkiye ranked first among the countries party to the Convention in terms of violations of rights between 1959 and 2018. Türkiye in terms of violations of the right to life; it ranks "second" among the countries against which a violation decision has been made¹⁰. For this reason, the second article of the European Convention on Human Rights, the "right to life" has been chosen as the subject of our study. The right to life has been examined within the framework of the European Court of Human Rights and the Turkish law system. The problem of interfering with the right to life has become an important agenda item, as it is considered as a preliminary feature at the national and international level. Today, it has become a universal acceptance that this intervention, which directly

⁹ Tezcan Durmuş, Erdem Mustafa Ruhan, Sancakdar Oğuz ve Önok, Murat "İnsan Hakları El Kitabı", 6. cilt. Ankara: Seçkin Yayınları, 2002, p. 86,99-108; Tacir Hamide, "Yaşama Hakkı Kapsamında Yaşamın Başlangıcı", Marmara Üniversitesi Hukuk Araştırmaları Dergisi, Prof.Dr.Nur Centel'e Armağan 19, no. 2 (2013), p. 1303; Doğmuş, p. 31-32.

¹⁰ https://www.echr.coe.int/Documents/Stats_violation_1959_2018_ENG.pdf (Access Date: 11.12.2022).

targets the physical integrity of the human being and tries to destroy it, cannot be justified for any purpose and reason other than the necessary conditions stated in laws (international or national laws). The aim of this study is to examine mainly the decisions of the European Court of Human Rights, to determine lawful-legitimate limits of the interventions on the right to life within the framework of legal principles, and to contribute to the success in the dimension of human rights.

Turkey has carried out very important reforms in many areas, including human rights, in recent years. However, the number of violations against Turkey regarding human rights in the international arena is high. These violations cause great loss of reputation in the international community. This study, which aims to analyze the right to life, especially within the framework of the ECHR jurisprudence, is considered to be important in that it can contribute to a certain extent to the correction of the Turkey's performance regarding the right to life. The aim of the study is to contribute to the process of improving the appearance of Turkey, which has the ideal of being an equal and respected member of the international community, regarding the right to life before the ECHR, by raising awareness. In this context, the study aims to fill the gap in this field to some extent, since there is no current work that directly and deeply addresses the right to life. In addition, it is expected to make a positive contribution to the process of evolution of judicial decisions in line with the ECHR decisions. In this context, the main purpose of this study is that it constitutes an evaluation of the scope of the right to life expressed in the second article of the convention about what the elements of this right consist of, what its limits are, the right to life in Turkey within the framework of the legal studies and changes regarding the right to life in Turkey. In the first part of the study, the right to life will be discussed in the context of human rights, and in this context, the right to life will be analyzed in the context of the beginning and end of life. In the second part, basic documents related to the right to life will be examined and the reflections of the right to life in Turkish law will be discussed. In the third section, the limits of the right to life will be discussed and the basic limitations will be mentioned. In the last section, the positive and negative obligations of the state will be discussed on the basis of controversial issues regarding the right to life (death penalty, euthanasia, abortion, use of force).

I. THE RIGHT TO LIFE IN THE CONTEXT OF HUMAN RIGHTS

Human rights is an issue that takes its power from human and human existence. Before the Second World War, there was not enough international regulation about human rights. With the Universal Declaration of Human Rights adopted in 1948, human rights were summarized in thirty articles, and the rights and freedoms contained in these articles found their place nearly everywhere. Although the right to life is included in declarations and treaties, it has not been fully defined in these documents. The right to life, which is recognized by globally approved theories but guaranteed by positive law, is the most basic of all other rights. In the documents after the Second World War, the understanding that the right to life cannot be

given by the state, but must only be recognized, was accepted¹¹. Gilles Deleuze¹² said that there are no human rights, there are the rights to life and living. Apart from the Universal Declaration of Human Rights (1948) and the International Covenant on Civil and Political Rights¹³ (1966), the right to life is included in the European Convention on Human Rights (1950) (article 2), the Inter-American Convention on Human Rights (1969)¹⁴ (article 4), the African Charter on Human and Peoples' Rights¹⁵ (1981) (article 4) and the European Union Charter of Fundamental Rights¹⁶ (2000). The philosopher Ioanna Kuçuradi says that human rights is one of the ideas with various values that humanity has created throughout its existence, and represents the idea of providing the opportunity for people to realize themselves. Kuçuradi thought that human rights are related to human dignity and to the knowledge of the value of some structural possibilities of human beings as a species. The right to life is not only a negative right, but also a positive right and should be defined separately from the social security right of the person. The right to life imposes various responsibilities on the state and all humanity. The state and humanity are responsible for ensuring the continuity of the physical integrity of the person¹⁷.

A. THE BEGINNING OF LIFE

The concept of human rights is explained through the definition of "being human" within the scope of both the abstract existence of the human and the concrete existence of the human in society. "Human" is at the center of human rights. The expression of "everyone" in the article 2 of the ECHR emphasizes that the right to life is granted to all people without exception. In law, human is expressed with the concept of the person. In the legal sense, a person is a legal subject who can be a party to legal relations, has rights and be liable (creditor and debtor). The legal system has accepted each individual as a person regardless of the differences of gender, race, religion, language, etc¹⁸. A person has some legal consequences¹⁹:

1. The person has a will and legal consequences can be attributed to the declaration of will.
2. The person can be a rightful owner and can be in debt.

¹¹ Opsahl Torkel. The Right to Life. In The European System for the Protection of Human Rights, translated by Ronald Macdonald, Franz Matscher and Herbert Petzold, 207-223. The Netherlands: Martinus Nijhoff Publishers, 1993

¹² Deleuze Gilles, "İnsan Hakları Üzerine", Tesmeralsekdiz(04), 2009.

¹³ International Covenant on Civil and Political Rights, General Assembly resolution 2200A (XXI). 16 December 1966.

¹⁴ Organization of American States, "Inter-American Convention on Human Rights", San José, Costa Rica: American States, 22 November 1969.

¹⁵ Organization Of African Unity, "African Charter on Human and Peoples' Rights". Nairobi, Kenya: Organisation of African Unity, 01 June 1981.

¹⁶ The European Union Charter of Fundamental Rights, "Official Journal of the European Communities", European Union, 18 December 2000.

¹⁷ Kuçuradi Ioanna, "İnsan Hakları: Kavramları ve Sorunları", Ankara: Türkiye Felsefe Kurumu, 2016.

¹⁸ Serozan Rona, "Tüzel Kişiler", İstanbul: Filiz kitabevi, 1994, p. 13.

¹⁹ Çağlayan Ramazan, "Hukukumuzda Kamu Tüzel Kişiliği Kavramı ve Kistasları", Uyuşmazlık Mahkemesi Dergisi, no. 7 (2016), p. 375.

3. The person has the right of ownership to own and dispose of assets.
4. The person has the responsibility for his/her actions and has to bear the legal consequences of his/her actions.
5. The person has the freedom to seek rights and has the right to file a lawsuit.

The beginning of life is among the controversial topics in the literature²⁰. Even if a fertilized egg is considered "potentially human", the issue of unfertilized eggs and sperm is among matters that need to be examined in terms of the right to life. There is no "consensus" regarding the scientific or legal definition of the beginning of life in Europe, and the issue is left to the discretion of the states²¹. Drawing a theoretical line between potential human being and human reproductive techniques is very difficult²². For instance, the ECHR stated that the embryo had no independent rights or interests in terms of UK law, and ruled that the embryo did not have a right to life and that its right to life had not been "violated"²³. There are three different theories on the subject: conception, viability and birth. The personality of the child begins in the womb. The mother has the right to bring her child to life in body integrity. It is generally accepted that the right to life begins with "birth time". The steps to expand the concept of the right to life in terms of the "unborn child" have not been successful. In the decision of *Paton (W.P.) v. United Kingdom*, App. No. 8416/78, Eur. Comm'n H.R. (1980), it was emphasized that the definition of "everyone" does not include the unborn child. There is no "consensus" on the scientific or legal definition of the beginning of life in Europe, and the issue is left to the discretion of the states. However, Article 4 of the American Declaration of Human Rights clearly regulates that the right to life begins with the "moment of pregnancy"²⁴. In terms of Turkish Law, the beginning of personality begins with "full and right birth" according to the article 28 of the Turkish Civil Code²⁵. Personality begins at the very moment the child is full born and ends by death. The child has the legal capacity at the very moment he/she enters mother's womb provided that he/she is born alive²⁶.

B. THE ENDING OF LIFE

Death is a natural and biological event and the law attributes some legal consequences to death. One of the most important consequences of this is the termination of personal rights with death. Death is the condition in which the circulatory, respiratory and nervous system functions, which are called the main life functions and give vitality to the person, stop working on their own, and cannot continue to work spontaneously even though these functions may

²⁰ Every culture, religion or community may have different ideas. For instance, the Catholic Church believes that life begins at conception. Murray Ross, Jenner John, *Revise HSC Studies of Religion 1*, Pascal Press, 2003, p. 132; Ling John R, *When does human life begin? Christian thinking and contemporary opposition*, the Christian Institute, 2011, p.7

²¹ *Vo v. France*, 08 July 2004, No. 53924/00, 82.

²² Wicks Elizabeth, *The Right to Life and Conflicting Interests*, New York: Oxford University Press, 2010, p. 17.

²³ *Evans v. United Kingdom*, 10.04.2007, No. 6339/05, 19,56

²⁴ Güzeldağ Sibel, "Avrupa İnsan Hakları Sözleşmesi ve Türk Ceza Kanunu Açısından Yaşam Hakkı İhlalleri", *Yüksek Lisans Tezi, Sosyal Bilimler Enstitüsü Kamu Hukuku*, Bursa: Bursa Uludağ Üniversitesi, 2020, p. 36.

²⁵ Kitapçoğlu Tülay, "Türk Ceza Kanunu'nda Çocuk Düşürme Suçu." *Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi* 18, no. 1 (2012), p. 298.

²⁶ Turkish Civil Code. "Official Gazette." No. 24607. 22 November 2001.

be activated again by some artificial means. In this case, there are debates in the legal order about which understanding, namely the Classical Conception of Death or the Brain Death Conception, should be accepted for the determination of the moment of death²⁷. According to the Classical Conception of Death, death occurs when the circulatory, respiratory and nervous systems, which are called the major life functions of a person, stop and the heartbeat ends. According to this criterion, which is also called "biological death" or "clinical death", death occurs with the last heartbeat and the last breath²⁸. According to the concept of brain death, it is an event that begins with the destruction of brain cells and occurs gradually over a certain period of time. The diagnosis of brain death is dependent on three conditions. These include deep coma, complete loss of brainstem reflexes, and cessation of spontaneous breathing. The brain is an organ that gives a person the quality of being human, and the person is considered dead when the brain functions stop²⁹. Article 2 of the Convention does clearly specify the beginning and end of the right to life. The scope of the word "everyone" in the regulation (everyone's right to life is protected by law) is not clearly specified. This uncertainty gives the wide discretion to member states in terms of regulations on the subject. The ECHR states that the right to life cannot be interpreted from a negative aspect and the right to die with the help of a third party or a public authority cannot be derived from Article 2 of the Convention³⁰.

In terms of Turkish Law, it is accepted that life ends when "all organs, including the brain, lose their function". Article 1 of the Regulation on Organ and Tissue Transplantation Services states that brain death is a clinical diagnosis and is the complete and irreversible loss of all brain functions. Turkish law accepts the concept of "brain death"³¹.

II. RIGHT TO LIFE AND FUNDAMENTAL DOCUMENTS

The first person to think and propose to divide human rights into generations according to the periods in which they emerged in 1979 was the Czech lawyer Karel Vasak³². Karel Vasak, a Human Rights Lawyer, suggested that human rights can be divided into three generations, inspired by the principles of the 1789 French Revolution summarized as "Liberty", "Equality" and "Solidarity". First generation rights are rights in areas where the state should "free" individuals, namely personal rights and political rights. Second generation are related to equality, the second principle of the French Revolution, and since they can only be achieved with positive (positive) interventions of the state in economic and social life, the rights in this

²⁷ Uygun, Çağatay, "Organ Ve Doku Nakli", İstanbul Barosu Dergisi, 2016, p. 163.

²⁸ Akıncı Şahin, "Türk Özel Hukukunda İnsan Kökenli Biyolojik Madde(Organ-Doku) Nakli Kavramı ve Bundan Doğan Hukuki", Ankara: Yetkin Yayınları, 1996, p. 104.

²⁹ Erman Barış, "Ceza Hukukunda Tıbbi Müdahalelerin Hukuka Uygunluğu", Ankara: Seçkin Yayınları, 2003, p. 222.

³⁰ Sanles Sanles v. Spain, 26 October 2000, No. 43335/99, p. 94; Pretty v. United Kingdom, 29 April 2002.No. 2346/02.

³¹ Regulation on Organ and Tissue Transplantation Services. «No: 28191.» Republic of Türkiye Ministry of Health. 2012.

³² Eide Asbjørn, "Economic, Social and Cultural Rights As Human Rights." In Economic, Social and Cultural Rights, edited by Asbjørn Eide, Catarina Krause and Allan Rosas, 21-41. Netherlands: Martinus Nijhoff Publishers, 1995, p. 21-22.; Çetin Evra, "1982 Anayasası'nda Sosyal Haklar ve Avrupa Sosyal Şartı'na Dair Spesifik Sorunlar", Yüksek Lisans Tezi, İstanbul Üniversitesi Sosyal Bilimler Enstitüsü Kamu Hukuku Anabilim Dalı, 2008, p. 16.

area are also of economic, social and cultural nature. Third generation rights depend on the development of the sense of solidarity between individuals and states and their implementation. This is called as the rights of solidarity and is the third of the principles of the French Revolution. Rights counted within the scope of the first generation rights are "classical rights", which are the first items of efforts to give legal power to human rights. It emerged as a result of the developments such as revolutions of the bourgeoisie against aristocracy and feudalism that started in the 17th century in the Western states and continued until the end of the 18th century. The right to life is enshrined in documents such as the 1776 American Declaration of Independence and the 1789 Declaration of the Rights of Man and the Citizen. Fundamental rights and freedoms such as personal security, property rights, freedom of the press and expression, freedom of religion and conscience, the right to assembly and demonstration, the right to petition, and the "principle of equality" are considered within the scope of first generation rights³³.

The right to life is the most basic human right and the condition of existence of all other human rights. In order to benefit from other rights, people must first be alive and survive. The right to life is one of the most universally recognized human rights since the American Declaration of Independence and the French Declaration of the Rights of Man and Citizen. In a "General Comment" of the United Nations Human Rights Committee, it was stated that the right to life is a superior right to which countermeasures cannot be taken even in the event of public danger threatening the life of the nation³⁴. The European Convention on Human Rights and the Constitution of the Republic of Türkiye recognized and protected the right to life as a human right. The "right to life" protects the person from public authority interventions which put an end to the physical and spiritual existence. In the situations of such interventions from private individuals, the state has the duty to prevent and/or impose sanctions as a result of the individual's ability to assert the right to life as a human right against the state. For this reason, the fact that people have the right to life imposes a duty on the state both not to end their lives and to prevent such attempts by others, and to define killing as a crime and impose a sanction³⁵. However, the duty of the state to protect people from dangers to their lives does not abolish the right of self-defense against intentional interventions in one's life. As a matter of fact, in the last paragraph of Article 17 of the Turkish Constitution, acts of killing that occur in "legitimate defense" are considered an exception to the right to life. The unjust use of public force or violence that does not result in death (although it is against human rights) is not an attack on the right to life, but on the prohibition of torture and ill-treatment or on personal immunity, depending on the situation. The right to life can only be violated by the act of ending one's life (killing), and the issue of "missing persons" is closely related to the right to life. The Human Rights Committee, which was established pursuant to the UN Convention

³³ Aybay Rona, "İnsan Hakları Hukuku, İstanbul: İstanbul Bilgi Üniversitesi Yayınları", 2015, p. 59-60.

³⁴ Gemalmaz Mehmet Salih, "Birleşmiş Milletler Medeni ve Siyasal Haklar Sözleşmesi İnsan Hakları Komitesi Kararında Yaşam Hakkı ve İşkence Yasağı", İstanbul: İstanbul Barosu Yayınları, 2002, p. 38.; United Nations, International Covenant on Civil and Political Rights, CCPR/C/GC/36, 3 September 2019, p.1

³⁵ Gölcüklü Feyyaz ve Gözübüyük Şeref, "Avrupa İnsan Hakları Sözleşmesi ve Uygulaması", 3. Ankara: Turhan Kitabevi, 2002, p. 160.

on Civil and Political Rights, again evaluated the phenomenon of "missing persons" as a special type of violation of the right to life in a "general comment" and asked the states parties to take measures against it³⁶.

According to those who interpret the right to life in a broad and comprehensive way, it also includes protection by public authorities against dangers and risks to life³⁷. However, if it is understood so broadly, it will be difficult to separate the right to life from some types of social security. In order to be able to judge that the state has violated the right to life in a concrete situation where there is danger to life, the life of a certain person must be actually and directly threatened and the public authorities must not have taken the necessary measures to prevent the danger even though they knew or could have known about this situation³⁸.

The death penalty was considered exceptionally legitimate, provided that it was imposed by the court, with Article 2 of the European Convention on Human Rights, but with the 13th Protocol, which entered into force in 2003, the death penalty was prohibited without exception. In addition, this protocol was ratified by Türkiye and Türkiye abolished the death penalty. In addition, it is seen that there are some exceptions related to the right to life in the second paragraph of the same article of the European Convention on Human Rights. To give an example, the act of killing will not violate the right to life under certain conditions:

1. Where a person is protected against unlawful acts of violence,
2. For the purpose of preventing the lawful arrest of a person or the escape of a person who has been lawfully detained,
3. In case of compulsory use of force within the framework drawn by the law in order to suppress the revolt,

The occurrence of these situations does not justify the use of force. The reason that legitimizes the use of force is that these situations necessitate the use of force. It should be known that the situations in the first two sentences can often be handled without the use of force. In addition, Türkiye added a fourth exception to the 1982 Constitution into the article 17. According to paragraph 3 of this article, "acts of killing that occur in compulsory situations where the use of a weapon is permitted by law during execution of arrest and detention warrants, preventing the escape of a detainee or a convict, suppressing an uprising or rebellion, martial law or during the execution of orders given by the competent authority in cases of emergency" does not violate the right to life.

With the right to live, countries/states have been prevented from killing people in general. Countries have a positive obligation to protect people's right to life. This obligation refers to the protection of people from unjust killing and concrete actions that target their lives. This means that countries punish unjust acts of killing. The European Court of Human

³⁶ Erdoğan Mustafa, "İnsan Hakları Teorisi ve Hukuku", Ankara: Hukuk Yayınları, 2019, p.180-181.

³⁷ Kaboğlu İbrahim Özden, "Özgürlükler Hukuku", Ankara: İmge Kitabevi, 2002, p. 272.

³⁸ Bozkurt Enver, "İnsan Haklarının Korunmasında Uluslararası Hukukun Rolü", Ankara: Nobel, 2003, p. 114.

Rights imposes two obligations, one positive and the other negative, on the states parties in paragraph 2 of Article 2. The positive obligations of the countries are to take the necessary measures to protect the right to life of the people living in their jurisdictions and to carry out an effective investigation in case of an unjustified end to the lives of the people. The negative obligation of countries is not to kill anyone unjustly³⁹. In addition, as the United Nations Human Rights Committee expressed in a comment, there is a strong tendency in the international arena to include the measures taken to reduce infant mortality and eliminate malnutrition within the guarantees required by the right to life⁴⁰.

The existence of this right is emphasized and protected in international and national positive law. The United Nations Universal Declaration of Human Rights states that “everyone has the right to life, liberty and security of person”. In addition, this right is protected in different ways in different laws. For example, the United Nations Code of Conduct for Law Enforcement Officials was adopted by the United Nations General Assembly's resolution in December 17, 1979 and with no 34/169. This text generally points to the need for the police to observe the principles of necessity and proportionality when using force. The European Convention on Human Rights regulated Article 2. For example, the state protects every person's right to life. Intentional killing is prohibited, except for the death penalty imposed by the courts. In addition, in some cases, due to the use of force that is not clearly more than necessary, death is not considered a violation of the right to life according to this article. The proportional defense of a person who is exposed to illegitimate coercion and violence is considered self-defense, and death that occurs in this situation is not a violation of the right to life. In addition, death that occurs as a result of suppression of uprising and rebellion within the framework of law in cases such as riots and to arrest people within the limits of the law or to prevent the escape of a person under lawful detention are not considered violations of the right to life. Article 2/2 on the right to life does not specify situations that allow the deliberate killing of a person. It describes that situations in which the use of force may be used could result in death as an unintended consequence. In addition, the use of force should not be more than necessary to achieve the goal, and the essence of the goal and the risk of death should be weighed and proportionality should not be overlooked⁴¹.

III. LIMITATIONS OF THE RIGHT TO LIFE

States should not interfere with the living space of the individual. However, in order to defend the right to life, countries are obliged to take the necessary measures to eliminate unjust attacks. However, these measures may differ from country to country. According to the European Convention on Human Rights, restrictions on the right to life can be classified in three ways⁴²;

³⁹ Arslan Zühtü, “Fundamental Rights and Liberties”. In *International Encyclopaedia of Laws*, edited by V. Bıçak and Z. Arslan, Turkey: Kluwer Law International, 2004, p. 172.; Erdoğan, p. 181-183.

⁴⁰ Erdoğan, p. 181-183.

⁴¹ Karaosmanoğlu Fatih, “İnsan Hakları”, Ankara: Seçkin Yayıncılık A.Ş., 2011, p. 226.

⁴² Karaosmanoğlu, p. 226.

A. IN THE LIGHT OF JUDGMENTS

According to the European Court of Human Rights, the death penalty imposed by the court on a person convicted of a crime punishable by the death penalty by the laws of the country and its execution are not considered a violation of the right to life (ECHR article 2/1). Türkiye ratified Protocol No. 6 to the European Convention on Human Rights, and as a result the death penalty was abolished. However, it has been accepted that exceptionally, a country can apply the death penalty within these limits due to acts that take place in the event of war and imminent war danger. But with Protocol No. 13 to the European Convention on Human Rights, the death penalty was abolished absolutely and in all cases. The Protocol entered into force on 1 July 2003. Türkiye signed this protocol on 9 January 2004. On 6 October 2005, the Turkish Grand National Assembly adopted the “Law on the Approval of Protocol No. 13 concerning the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances”⁴³ (Law No. 5409). The law entered into force by being published in the Official Gazette on October 12, 2005 and no. 25964. With the entry into force of Protocol No. 13, the death penalty has been abolished absolutely and in all cases⁴⁴.

B. IN THE LIGHT OF EXCEPTIONAL CIRCUMSTANCES

The right to life is one of the fundamental rights, but the protection it provides is not absolute⁴⁵. Deaths that occur in three exceptional cases where the use of force is necessary is not considered a violation of the right to life (Article 2/2 of the ECHR). In some exceptional cases, the use of force by law enforcement officers in a way that does not exceed absolute necessity is not considered an interference with the right to life. There are three exceptional cases;

1. In Case of Self-defence

In cases where force is used for protection against an unjust and ongoing attack against one's own or another person's life, death is not considered a violation of the right to life. However, in order to qualify as legitimate defence, the use of force must be only to repel an unjust attack on life, not property.

2. In case of carrying out the arrest or preventing the escape of the prisoner:

The case of arrest in line with the law or death resulting from the use of force to prevent the escape of a person who has been arrested in accordance with the law is not considered a violation of the right to life. But in these cases, the use of force must reach absolute, compulsory and inevitable levels and must not be used to kill.

⁴³ <http://www.mevzuat.adalet.gov.tr/html/24545.html>

⁴⁴ Cengiz Serkan, “Avrupa İnsan Hakları Mahkemesi Kararları Işığında Yaşam Hakkı”, TBB Dergisi , 2011, p. 385.

⁴⁵ Murray Daragh, Practitioners' Guide to Human Rights Law in Armed Conflict, 1. Baskı, Oxford University Press, New York, 2016, p. 1.

3. In case of suppression of uprising and rebellion:

In the case of suppression of an uprising or revolt in accordance with the law, death that occurs when the use of force constitutes an absolute necessity is not considered a violation of the right to life. However, in order to end the rebellion or insurrection with the use of force, state forces or third parties are not required to be in self-defense. The nature of the event must necessitate the use of force and must take place in proportion as the situation and circumstance justifies it.

C. LEGITIMATE WAR SITUATIONS

In the event of a war in a country, deaths caused by lawful war situations are not considered as a violation of the right to life (Article 15/2 of the ECHR). The McCann case is one of the good examples of the limitation of the right to life. The ECHR explained its case-law regarding the second article of the ECHR in its decision in this case, which was sued after the British soldiers suspected that they had assassinated three IRA members;

1. If the death of people occurred as a result of the use of force by law enforcement officers/soldiers; there must be an effective investigation into whether the use of force occurred in accordance with the law.
2. A balance should be sought between the scope of force and the interest which should be protected. Considering the outward appearance of the event, if the existence of justified reasons justifies the use of force, the fact that the external appearance changes later does not change the justification of the use of force.

In the McCann case⁴⁶, the British police were informed that an IRA group would carry out an assassination attempt by detonating a car bomb with a remote control. After the car was parked, 3 IRA members got out of the car and were ordered to be arrested. During the arrest, the British police took the impression from the attitudes of these three people that these people would detonate the car by pressing the button on them or in their bags. To prevent this from happening, the police killed these three IRA members by shooting them. It was later revealed that these people were terrorists, but that they did not carry weapons at the time of the incident and that there were no bombs in the car or on them.

In the absence of violation of the right to life, “the existence of a balance between the protected interest and the applied force is not enough to prevent the violation of the right to life. Units that carry out the operation during the operation must take measures to minimize the possibility of death during the use of power. In this case, the ECHR ruled that the security units did not act by considering possible death during the operation and decided that the limits of the right to life were exceeded. However, the claim for compensation was rejected on the grounds that the killed IRA members had the intention to plant a bomb.

On the other hand, in 2001, the Turkish Constitutional Court ruled that the third article of the law numbered 4178, which was added to the Anti-Terror Law No. 3713, was contrary to the seventeenth article of the Constitution about the right to life and annulled the

⁴⁶ McCann and Others / United Kingdom, 5 September 1995, No. 17/1994/464/545, www.echr.coe.int.

article. Annulled article: In the case of an attempt to shoot by disobeying the surrender order in operations against a terrorist organization, the security forces are authorized to hit the target directly and without hesitation in order to neutralize the terrorist. In this annulment decision, some opinions about the limitation of the right to life emerged;

- In case of non-compliance with the surrender order and an attempt to fire in the canceled article; methods of neutralization without using a weapon are not specified, and the authorization to use firearms, which should normally be given as a last resort, is given directly.
- The state is obliged to take all kinds of measures in order to protect the right to life. By law, the authority to use a weapon may be given in compulsory situations. However, in this case, in cases listed in the last paragraph of Article 17, authorized people can use weapons as a last resort.
- Disobeying the surrender order and attempting to use a weapon does not always make it necessary to shoot directly and without hesitation against the target. According to the nature of the events, without considering other remedies, the use of a weapon against the target directly and without hesitation leads to a violation of the right to life. For instance, there is a case concerning the shooting and wounding of a British citizen by Turkish armed forces during tensions in the United Nations buffer zone in Cyprus. The Court ruled that there had been a violation of Article 2 (right to life) of the Convention. The potentially lethal force used against the applicant was not considered “absolutely necessary” and was not justified by any of the exceptions permitted under Article 2 of the Convention⁴⁷.

IV. NEGATIVE AND POSITIVE OBLIGATIONS OF THE STATE

The right to life is the basis of other rights, since the individual can enjoy other rights as long as the individual lives. As emphasized in the verdicts of the ECHR, the right to life is one of the basic values of the democratic society that formed the Council of Europe with the prohibition of torture. It is stated in Article 2 of the Convention that the right to life is under the protection of the law, and the Convention brings both negative and positive obligations to the parties. The Court declared that the state's liability is not limited to cases involving deaths that are evidently caused by an official⁴⁸ and measures to be taken to protect the life of the individual⁴⁹ and administrative measures are included with legal regulation. This means that all kinds of regulations and measures are related to every subject to protect human life. Otherwise, the responsibility of the states arises. As an example, in the case brought by a person who lost nine relatives in a landslide that occurred as a result of the explosion of gases trapped in a covered landfill in Ümraniye, Istanbul in 1993, the Court decided that especially the

⁴⁷ *Andreou v. Türkiye*, 27 October 2009, No: 45653/99, 55, 59, 61.; the Human Rights Department of the Ministry of Justice Directorate General for International Law and Foreign Relations, *Silahlı Çatışmalar*. T.C. Adalet Bakanlığı, 2015.

⁴⁸ *Salman/ Türkiye*, 27 June 2000, No: 21986/93, 105.

⁴⁹ *L.C.B./United Kingdom*, 9 June 1998, No 23413/94, 36; *Lambert and Others v. France*, GC, 5 June 2015, No: 46043/14, 117

metropolitan and district municipalities did not take the necessary measures, Türkiye did not show a dissuasive example for the determination of responsibilities after the event and the elimination of grievances. It ruled that the right to life was violated because the state did not carry out an effective investigation and trial. The “obligation to protect by law” significantly restricts the freedom of action of legislative bodies because it concerns procedural regulations as well as fundamental guarantees⁵⁰. In “Oğur v. Türkiye⁵¹”, “Kılıç v. Türkiye⁵²” and “Gül v. Türkiye⁵³” cases, the ECHR emphasized that the legislation is not suitable for an independent and effective investigation in terms of crimes involving public officials or security forces and found a violation of Article 2 of the ECHR. Another example in this regard is the Talpis case. In this case, which is the subject of domestic violence that ended with the fact that the husband killed his wife, the Court stated that Italy did not show the necessary care to protect the applicant and violated its positive obligation regarding the right to life⁵⁴.

The right to life of individuals who are deprived of freedom is violated in criminal investigations about the practices of some states. The court decided that the death or disappearance of detainees, convicts and etc. under the control of the state is considered in many cases as a violation of the right to life. In addition to the state’s negative obligation, the state is under the obligation to protect the person against other causes that will endanger his/her life, and even protect people from themselves. For example, the failure to take measures to prevent detainees from committing suicide is considered a violation of the state's positive obligation⁵⁵. In the Oruk case⁵⁶, in the deaths of six children who were playing with an unexploded bomb in the area where a military unit was doing target practice, the authorities' failure to mark the shooting area with signs and not being interested in the fate of the ammunition used after shooting was the reason why the state was held responsible for violating the right to life. Also, while interpreting the obligation to protect people from themselves, the Court points out that it is necessary not to impose an unnecessary and unavoidable burden on the state, taking into account the difficulty of predictability of human behavior and the possibilities. In the Sarhan case, in the complaint of the shepherd who was seriously injured as a result of the explosion of a mine while grazing his sheep in the military zone on the border, the court decided that the state did not violate any of its obligations within the framework of the right to life⁵⁷.

The most important point taken into consideration in the implementation of which obligation is that the authorities know that the life of the person is at real and imminent risk.

⁵⁰ Lavrysen Laurens, Protection by the Law: The Positive Obligation to Develop a Legal Framework to Adequately Protect ECHR Rights. In: Haeck, Y., Brems, E. (eds) Human Rights and Civil Liberties in the 21st Century. Ius Gentium: Comparative Perspectives on Law and Justice, vol 30. Springer, Dordrecht, 2014.

⁵¹ Oğur v. Türkiye, 20 May 1999, No: 21594/93, 52, 85-86, 91.

⁵² Kılıç v. Türkiye, 28 March 2000, No: 22492/93, 39, 71-72, 74- 75.

⁵³ Gül v. Türkiye, 14 December 2000, No: 22676/93, 47, 91.

⁵⁴ Çağırın Mehmet Emin, “Uluslararası Alanda İnsan Hakları”, Ankara: Turhan Kitabevi, 2020, p. 339-340.; Talpis/ Italy, 2 March 2017, No: 41237/14, 124-5.

⁵⁵ Tanrıbilir/ Türkiye, 16 November 2000, No: 21422/93, 70.

⁵⁶ Oruk/ Türkiye, 4 February 2014, No: 33647/04, 67-8.

⁵⁷ Sarhan / Türkiye, 6 December 2016, No 55907/08, 58-9

In the Tanrıbilir case, in which detainees committed suicide, the court relied on this reasoning when determining that the state was not responsible. The fact that state officials did not play an active or passive role is not sufficient to eliminate the responsibility of the relevant state in events that result in death and a serious risk of death. Article 2 of the Convention imposes an obligation on the state to conduct an effective investigation in such cases, and any breach of this obligation is procedural in the Court's judgments as a violation of Article 2. For example, in the Aydın Eren and Others case⁵⁸, although Türkiye had not violated its obligation to protect life, it was later found procedural faulty due to its conduct during the investigation phase. For the implementation of the right to life as set out in the contract; in cases where the person's life is in serious danger (not necessarily the loss of life), the right to life may be violated. Examining the complaint of the applicant, who was in a coma for three years after a traffic accident in the case of Igor Shevchenko⁵⁹, severely injured, completely lost his ability to move on his own, and later decided that he lost his legal capacity, within the framework of the right to life, the Court stated that the positive obligation of the state includes the application of legal regulations to ensure traffic safety. It has ruled that the investigation of the traffic accident in question taking a long time and being inconclusive is a violation of the right to life. The positive and negative obligations of the state will be better understood, especially in the the sections of the death penalty, exceptions and special cases:⁶⁰

A. DEATH PENALTY

The most important exception to the right to life is the death penalty (Article 2 did not consider the execution of the death penalty as ordered by a national Court as the violation of the right to life). The debates and public opinion about limiting and finally abolishing this penalty happened and some scholars suggested to recognize that Article 7 of the International Covenant on Civil and Political Rights, which states that no one shall be subjected to torture or cruel, inhuman or degrading punishment, should be interpreted to prohibit the death penalty⁶¹. Later, most of the states parties have abolished the death penalty by making changes in their penal laws. Between 1989 and 1999, 40 countries abolished the death penalty. Some states, such as Türkiye, have actually sided with this understanding by not executing the sentence⁶². Also, Türkiye is a part to the EHRC annexe 13. This protocol states that the death penalty is not imposed under any circumstances⁶³.

⁵⁸ Aydın Eren and Others / Türkiye, 21 February 2006, No: 57778/00, 46,55

⁵⁹ Igor Shevchenko/ Ukraine, 12 January 2012, No:22737/04, 39-43,61-2

⁶⁰ Çağırın, p. 340-345.

⁶¹ Nowak, Manfred "Is the Death Penalty an Inhuman Punishment?" In *The Jurisprudence of Human Rights Law: A Comparative Interpretive Approach*, edited by T. S. Orlin, A. Rosas, and M. Scheinin. Turku, Finland: Abo Akademi University Institute of Human Rights, 2000, p.44.

⁶² Hood, Roger, and Carolyn Hoyle. "Abolishing the Death Penalty Worldwide: The Impact of a 'New Dynamic.'" *Crime and Justice* 38, no. 1 (2009), p. 6.; Hood, Roger, and Carolyn Hoyle, "The Abolitionist Movement: Progress and Prospects", *The Death Penalty: A Worldwide Perspective*, 4., Oxford: Oxford Academic, 2008.

⁶³ Human Rights Association, *Death Penalty Cannot Be Brought Back!*, retrieved from <https://ihd.org.tr/en/death-penalty-cannot-be-brought-back/>, 18 July 2016; Korff Douwe, *Yaşam Hakkı- Avrupa İnsan Hakları Sözleşmesi'nin 2. Maddesinin Uygulanmasına İlişkin Kılavuz Kitap*, translated by Özgür Heval Çınar and Abdulcelil Kaya, İnsan Hakları El Kitapları, No. 8, Avrupa Konseyi, Belçika 2006, p.90.

Based on these developments, the members of the European Council made a new regulation for the abolition of the death penalty. With the new regulation accepted as Protocol No. 6 to the Convention, the death penalty was abolished. States that want to become a party to the protocol must first abolish the death penalty in their own legal systems. Thus, as stipulated in Article 1 of the Protocol, the way to impose the death penalty or to execute previously given provisions is completely closed. However, the Protocol limits the scope of the death penalty ban for peacetime. According to the exception introduced in Article 2, the states accepting the Protocol may use provisions allowing the death penalty in their laws regarding crimes committed in time of war or when there is an imminent threat of war. About 20 years after this regulation, the members of the Council of Europe took a new step and decided that the abolition of the death penalty was necessary in order to fully protect the right to life and human dignity in the light of the findings of the ECHR. The decision is appeared as Protocol No. 13. In a short and clear way, the protocol declares that the death penalty is abolished under all circumstances.

B. OTHER EXCEPTIONS

Article 2 of the Convention, which declares the right to life as a fundamental right, imposes an obligation on the state to protect this right, while in the second paragraph, it stipulates that some acts that cause death may constitute an exception to this right in certain situations. Deadly circumstances that do not constitute a violation of the right to life are limited to three points: the protection of a person against unlawful violence; duly arresting or preventing the escape of a duly detained person; the lawful suppression of an insurrection or rebellion. The listed situations are also those that allow the use of force, so unintentional deaths as a result of the use of force are included in the exceptions. The importance of this emerges, for example, when questioning whether the security forces causing non-mortal injury in an incident falls within the scope of Article 2. The Court examined such a situation in the *Haasz and Szabo* case⁶⁴. The force used by the police against one of the applicants in the incident was not fatal. However, the Court stated that Article 2 also includes situations where it allows the use of force that may lead to unintentional death, and that this article was applied in many similar cases where the victim did not lose his life before, and stated that it would examine the applicant's complaint within the framework of the right to life. From this point of view, it determined that the force used against the applicant (shooting with a pistol) was potentially lethal and endangered not only the physical integrity but also the right to life, and decided that the right to life had been violated in the incident. It is not a "blank check" to allow state officials (security forces) to use force in the three exceptional cases. Because in the aforementioned provision, the term "absolute necessity" is used. In the above-mentioned cases, the use of force should have become an absolute necessity, and even as the Court's statement in the *Cangöz and Others* decision⁶⁵, it should be more than a definite necessity. Therefore, the determination of "absolute necessity" is dependent on more stringent rules than the determination of "necessity/obligation in a democratic society", which the Convention uses as a limitation

⁶⁴ *Haász ve Szabó/ Hungary*, 13 January 2016, No:11327/14 ve 11613/14, 43-67.

⁶⁵ *Cangöz and Others/ Türkiye*, 26 April 2016, No:7469/06, 105.

measure in the context of private life, freedom of belief, freedom of expression and freedom of assembly. Accordingly, the force must be strictly proportional to the purposes of the situations. Likewise, when making a decision in such an event, the Court must also calculate the conditions under which the incident occurred, along with the actions of law enforcement officers. Arbitrary and unrestricted behavior of law enforcement officers is absolutely against the Convention. All use of force must be done in accordance with national law and to the extent permitted by it. National laws must be elaborated against arbitrary use of force, and appropriate and effective measures must be introduced even in the inevitable use of force. Another important point that should be addressed by the state is the proof of these exceptional situations. The state itself is obliged to prove that death as a result of the use of force is in exceptional circumstances and that the state has minimized the risk of death by fulfilling all the requirements. This burden of proof cannot be given to an applicant.

C. SPECIAL CIRCUMSTANCES

The issue of euthanasia was discussed on the axis of the right to life and especially the right to die. Active euthanasia can be considered as the intentional ending of individual's life by another, motivated merely by the best interest of the individual who dies⁶⁶. Passive euthanasia is to permit a person to die without giving required treatment to save or extend the person's life⁶⁷ or is directly the withdrawal of treatment at the end of life⁶⁸. John Locke said that human rights cannot be given up, no one can give more authority than his/her own to someone else and a person does not have the authority to end his own life, nor is it possible for him/her to allow himself/himself to be killed⁶⁹. The concept of "the right to die" has gained importance in cases where the person suffers intense pain and suffering. The ECHR examines euthanasia on the axis of the right to life, the prohibition of torture, respect for one's private life and freedom of thought, religion and conscience. In the decision of Lambert and Others v. France, the ECHR gave the "discretionary power" to the states. For instance, euthanasia is forbidden in Türkiye. The Netherlands accepted both passive and active euthanasia while Belgium and Luxembourg are other countries that have recognized euthanasia⁷⁰. The Spanish parliament passed the euthanasia law that allows terminally ill or very seriously ill patients to end their suffering under strict rules. Spain became the fourth European country to allow euthanasia, with the law enacted in June 2021⁷¹. However, it is possible to deduce from Article 2 that euthanasia in cases where the patient does not consent should constitute a crime. The

⁶⁶ Brassington Iain. What passive euthanasia is. *BMC Med Ethics* 21, 41, 2020, p. 3

⁶⁷ Alanazi Mohammed Ratoubi, Alanzi Mansour Moklif. Is there a moral difference between killing and letting die in healthcare. *Int J Res Medical Sci.* 2015;3:1–10.

⁶⁸ Potter Jordan. The psychological slippery slope from physician-assisted death to active euthanasia: a paragon of fallacious reasoning. *Med Health Care Philos.* 2019 Jun;22(2):239-244

⁶⁹ 5 John Locke, *Two Treatise of Government*, London-1823, s. 114; McConnell, s. 45.

⁷⁰ Besiri Arzu, "Ötanazi ve Yaşam Hakkı", *TBB Dergisi*, 2009: 197- 200; Baykal Emel, "Yaşam Hakkı, Avrupa İnsan Hakları Sözleşmesi'ne ve Anayasa Mahkemesi'ne Göre Yaşam Hakkı", Yüksek Lisans Tezi, Kırıkkale Üniversitesi Sosyal Bilimler Enstitüsü Kamu Hukuku Anabilim Dalı, 2011, p. 37.

⁷¹ Sanmartin Berrak Kanbir Rodriguez, "Aktif, pasif ötanazi ve yardımcı intihar nedir? Hangi Avrupa ülkelerinde hangi uygulamalar var? ", 25 October 2021.

right to life does not include the euthanasia that a mentally ill or physically disabled person is subjected to without his or her consent⁷².

A situation regarding the right to life is whether people can end their own life and whether women have the right to terminate their pregnancy voluntarily. The *Pretty case*⁷³ is a good case to assess whether or not a person can end his/her own life. Mrs. Pretty, who was diagnosed with a neurodevelopmental disease that could not be cured by medical science at that time, and was subsequently completely paralyzed and was diagnosed with death in a very painful manner, requested permission from the United Kingdom to be killed by her husband. After his request was rejected by the United Kingdom, he applied to the European Court of Human Rights and claimed that the right to life in the second article of the Convention also gave him the right to end his life, and she argued that the United Kingdom, which rejected his request, violated the Convention. The court examined the allegation and decided that it was not correct to interpret the second article in a way that would give the right to kill oneself, and also decided that no individual or state could be an intermediary for this. To give another example, the *Haas case*⁷⁴ is an important case in this regard. The applicant was struggled with bipolar affective disorder for a long time and does not want to live anymore. The lethal substance he wanted was sold by pharmacies with permission, and since the psychiatric evaluations declared that the applicant did not comply with the necessary conditions for taking the drug, his request to take the drug was rejected. The person claimed that he has the right to decide when and how he would die and that he violated this European Convention on Human Rights regarding the right to life. The court decided that there was no violation of this issue, which the court dealt with under the private life article (article 8) of the Convention. The court said that the Convention did not give individuals a right to determine when and how they would die. The Court has declared that there is no common harmony between the countries regarding the decision of death of people, and therefore, the countries have a wide margin of appreciation.

Secondly, there is no certainty on whether the positive obligations stated in the second article of the Convention are applied to the fetus, and if the answer is positive, there is no certainty on which conditions and from when can be applied. Who is covered by the word "everyone" in the second article and when the life that needs to be protected begins are important questions to be answered. In the fourth article of the American Convention on Human Rights, the words "starting from the moment of conception" give the answers to the questions clearly. The ECHR, on the other hand, favors the judiciary to give the definitive answer, since the provision regarding the right to life is open to interpretation. However, the judiciary organs did not reach a clear conclusion on this issue. For example, in some of its decisions, the ECHR did not comment on the validity of the right to life for fetuses⁷⁵, and in others, it considers abortion necessary if the mother's life and health is at stake⁷⁶. In fact, in some cases where

⁷² Haris David, O'Boyle Michael, Bates Ed, Buckley Carla, Avrupa İnsan Hakları Sözleşmesi Hukuku, translated by Mehveş Bingöllü Kılıç, Ankara, Avrupa Konseyi Yayınları, 2013.

⁷³ *Pretty/ United Kingdom*, 29 April 2002, No: 2346/02, 39-40

⁷⁴ *Haas/ Switzerland*, 20 January 2011, No 31322/07, 56 -61

⁷⁵ *Boso/ Italy*, 5 September 2002, No:50490/99

⁷⁶ *Vo/ France*, 8 July 2004, No: 53924/00, 75

abortion was prevented, the ECHR considered this situation as "ill-treatment and torture"⁷⁷. As a result, regarding the second article, the Court has not made a definite judgment about the beginning of everyone's right to life and whether children who have not been born yet have the right to life⁷⁸. It is understood from the decisions made by the judicial organs on this issue that there is no jurisprudence or a legal perspective on this issue, and the biggest obstacle is the differences in the perspectives on the issue at the national level. In addition, the criminal liability of the individual in domestic law and the responsibility of the state under the Convention are different situations. The ECHR is not concerned with whether individuals are guilty or not. For the ECHR, it is important whether the state violates a human right protected under the convention⁷⁹.

CONCLUSION

Before the Second World War, there was not enough international regulation about human rights. Especially, human rights in Europe with the adoption of the ECHR in the 1950s gained a strong guarantee. Article 2 of the ECHR, which begins with the statement "Everyone's right to life shall be protected by law..."; has protected the right to life, which is one of the most fundamental values of democratic societies. Article 2 regulates that an individual's life cannot be arbitrarily terminated. However, Article 2 of the Convention did not clearly define the concept of the right to life and did not specify the scope of the right. The gap in this matter have been tried to be filled with the case law of the ECHR. The concept of the right to life caused controversial issues which abortion, euthanasia, hunger strike and the existence of the death penalty. There is not yet an internationally accepted understanding that people have the right to die by using suicide or euthanasia methods⁸⁰. While abortion finds application in some countries, it is prohibited by some countries. The ECHR has expressed an opinion that the regulation of the relevant subject is an "internal matter of the states" and that the states should bring regulations on the subject in line with their own national laws. The issue of euthanasia was discussed on the axis of the right to life and especially the right to die. The concept of "the right to die" has gained importance in cases where the person suffers intense pain and suffering. The ECHR examines euthanasia on the axis of the right to life, the prohibition of torture, respect for one's private life and freedom of thought, religion and conscience. In the decision of Lambert and Others / France, the ECHR gave the "discretionary power" to the states. For instance, euthanasia is forbidden in Türkiye. Among the regulations that bring exceptions to the right to life, there is the application of the death penalty. The death penalty, a method of punishment, is highly controversial. Individuals are left "undefended" before the state and it is a penalty that cannot be corrected in case of mistake. The death penalty was abolished with the Protocols Annex No. 6 and 13. Law enforcement is the guarantor of human rights, ensures and protects the public order and protects individual rights and freedoms. Law enforcement officers have the right to use force which is absolutely

⁷⁷ R.R. v. Poland, 26 May 2011, No: 27617/04.

⁷⁸ H./Norveç, 19 May 1992, No: 17004/90.

⁷⁹ Bahadır Oktay, "Yaşama Hakkı", Ankara: Seçkin Yayıncılık, 2015, p. 183.

⁸⁰ Mathieu, Bertrand. The Right to Life in European Constitutional and International CaseLaw. Belgium: Council of Europe Publishing, 2006

necessary and proportionate. Also, the article 2 of the Convention gives obligations the state for fulfilling. With the ECHR and additional protocols, the scope of the obligations of the state has been expanded against the protection of the right to life. The state should take preventive measures to protect innocent persons. It is an important decision in terms of "violation of the obligation to protect persons at risk.

The situation of Türkiye's human rights record is not particularly promising in terms of the right to life. According to the statistics of the ECHR, Türkiye ranked first among the countries party to the Convention in terms of violations of rights between 1959 and 2018. Between 1958 and 2018, the ECHR made 137 violation decisions against Türkiye regarding the "deprivation of the right to life" in terms of Article 2 of the Convention, and 219 violations in terms of the "obligation of effective investigation". Türkiye is in the "second place" with 356 violations of the right to life⁸¹. The right to life means that a person is born with a full body integrity, then the person develops his life appropriately, and lastly, there is no restriction, influence or attempt to destroy the existence. This right is such a right that if it is damaged, the person will be condemned from all other rights; because the person will no longer be alive. Life is something that is given once and can never be found when lost. Therefore, it is necessary to be careful when evaluating the right to life. While the protection of rights by the state is essential, there is no harm in saying that the most important perpetrator of the violation of the right to life is the state. This leads us to the fact that the right to life is a fundamental right that should not be violated by the state in any way by violating the law and the ECHR. Basically, this right should be guaranteed by the state and protected even under the most difficult conditions (war, state of emergency, etc.).

⁸¹ https://www.echr.coe.int/Documents/Stats_violation_1959_2018_ENG.pdf, (Access date: 12.12.2022).

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