Principles of Public Law

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RIGHT TO LIFE

20.1 Introduction

The right to life operates in relation to two aspects of State power. The first is the ability of public authorities to kill people, through capital punishment or the mobilisation of its police and armed forces to quell civil unrest. The second is the role of public authorities in regulating individuals' decisions over their own life and death, by way of terminating pregnancy, assisted suicide, or the killing of other citizens. In addition to these direct controls, the State, as the largest supplier of medical services, has an indirect role in making decisions about the rationing of health care, which may lead to people's death.

The right to life as it is formulated and interpreted in rights instruments is not absolute. Article 2 of the European Convention on Human Rights (ECHR), for example, allows for a number of situations in which deprivation of life will not violate the Convention:

> 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.

The Sixth Protocol to the ECHR, which the UK ratified in 1999, abolishes the use of the death penalty in peacetime. Under the Protocol, individuals are granted a right not to be condemned to such a penalty or executed. The use of the death penalty in time of war or imminent threat of war is permitted. Until 1998, the UK retained the death penalty for treason and piracy with violence, and, for this reason, it did not sign the Protocol at the time, since it obliges States to abolish the death penalty as it exists in law, even though in practice it is never carried out. These remaining capital offences were abolished by the Crime and Disorder Act 1998.

On a personal level, the right to life is said to oblige States to recognise and uphold autonomy of choice. This right, the argument goes, protects an individual's ability to make personal decisions about life and life's values for

him or herself. In this chapter, we examine the role of the State in preventing assisted suicide and euthanasia and the exercise of choice as part of the right to life (see below, 20.6). The inclusion of this freedom of choice in the right to life is not universally accepted, and it is a feature of the rather open ended nature of this right that it can be deployed by opposing sides of an argument; the right to independent choice by a terminally ill patient as part of his or her quality of life is often set against the argument that the right to life is so absolute that the State cannot be called upon to condone its termination. Sedley LJ has observed recently that:

> It is one of history's ironies that, having now put the judicial taking of life behind us, the law's ability to sanction the taking, or more urgently the non-prolongation, of life by others is likely to come dramatically to the fore ... in matters of life and death the law has a fraught journey ahead which is going to jolt our notions of justice.

The law is thus inextricably involved at each end of the spectrum of the right to life, however unrelated the issues may appear: whether they involve the use of lethal force by special security forces, or the administration of morphine to a terminally ill patient.

20.2 State killing

The right to life, as set out in the ECHR, is limited in a number of situations (see above, 20.1). Despite these limitations, it is arguable that the threshold requirements for the legitimate exercise of State power, in the context of the right to life, should be high. For example, the police should not be permitted to justify a shoot to kill policy under any of the exceptions to the right to life. After a death occurs at the hands of the police or armed forces, the State should provide full judicial investigation into the circumstances of death to ascertain whether the killing was justified or not. Neither of these requirements is actually specified in the article. It is a matter of interpretation for the court determining the scope of the right in any particular instance. In the UK, the issue of State killing by the police and armed forces arises most often in Northern Ireland, where the Criminal Law (Northern Ireland) Act 1967 permits the use of lethal force to prevent crime or to effect the arrest of offenders or suspected offenders or of 'persons unlawfully at large'. The force used must be 'reasonable in the circumstances'. Judges in the UK are, on the whole, reluctant to rule that the use of force in combating terrorism is unreasonable, although in *McCann and Others v UK* (1996), the question was raised as to whether the criterion of 'reasonability' in English law matches up to Art 2(2) of the ECHR which stipulates that lethal force can only be justified on the basis of 'necessity'.

McCann was the first case to reach the Strasbourg Court on the question of Art 2. The Court ruled, by a slim majority, that the killing of three unarmed

members of the IRA in Gibraltar by undercover British soldiers who apparently believed they were on a bombing mission did not come within any of the permissible exceptions to Art 2. On the facts, the Court found that the soldiers' 'honest belief' that the shooting was necessary to prevent the people detonating bombs was sufficient to exonerate them from liability, as State actors, for breach of Art 2. This aspect of the judgment suggests that the Strasbourg approach to the issue of justification for lethal force is not far from the British one. However, the Court did find a violation of Art 2 by the UK, because there had been other ways in which the arrest operation could have been planned without risk to the suspects' lives. Under the relevant prevention of terrorism legislation, such action could be justified if it were 'reasonable'; under the Convention it could only be justified if it was 'necessary'. The European Court of Human Rights did not rule that the legislative standard itself was in terms a breach of Art 2; the Court is generally reluctant to examine, in abstract, the compatibility of the wording of particular laws with the terms of the Convention. The view of the majority of the judges was that, in relation to the standard of reasonableness in national legislation, 'the difference between the two standards is not sufficiently great that a violation of Art 2(1) could be found on this ground alone'. The finding that the action against the suspected terrorists could have been planned differently and therefore violated Art 2 has important implications for the organisation of police operations, since it will be incumbent on police authorities to explain in legal proceedings after the event why they did not take a less risky course of action.

The European Court of Human Rights does not always find a violation where an alternative course of action could have been possible; if the planning of the operation survives ECHR scrutiny, the Court is slow to condemn operational failure. In *Andronicou v Cyprus* (1998), the Cypriot police and security forces attempted a rescue operation on a besieged house where A was holding C at gunpoint. During the operation, both A and C were shot dead. The victims' families claimed that Art 2 had been breached. The court held that the use of force by the police for the 'defence of any person from unlawful violence' under Art 2(2) could be justified by the policemen's honest belief that it was necessary to kill A in order to rescue C, even if this honest belief later turned out to be wrong. This case, therefore, suggests that the approach of the Court in future claims under Art 2 is to find that the 'absolutely necessary' test under Art 2 will be satisfied by the honest belief of the agents of the State.

20.3 Duty to prevent death

The State should observe the right to life by criminalising killing by private individuals. The case law under Art 2 of the ECHR indicates, however, that this obligation extends only so far as a duty on the State to provide police and security forces to enforce the criminal law against killing. The Strasbourg

authorities have so far refrained from ruling on the appropriateness and efficiency of signatory States' anti-crime measures.

It is not clear either from the ECHR or from the common law to what extent the duty to prevent death applies beyond the scope of deliberate killing. There is no duty to rescue in English law, so there is no obligation on a passer-by on right to life principles to extract a victim from the wreckage of a car or a drowning child from a lake. This contrasts with the position in French law, under which it is a criminal offence, even for a stranger, to fail to come to the assistance of victims of an accident. This made it possible for the authorities to press charges against the paparazzi who pursued the Princess of Wales' car to the site of the fatal crash in August 1997, although the prosecutions were subsequently dropped because no causal link could be established between the paparazzi's activities and the fatal accident. The immunity from a duty to rescue also extends in English law to official rescuers. In a case involving the deaths of four children on a canoeing party, the company which had organised the expedition settled the claims by the victims' families for their allegedly negligent handling of the outing. The company then sought an indemnity from the Coastguard service for failing to answer emergency calls promptly and failing to come to the assistance of the troubled expedition. The court held that the Coastguard service had no private duty of care to the families (*OLL v Secretary of State for Transport* (1997)).

In general, the European Commission and Court of Human Rights have taken a similar view of the obligations arising out of Art 2:

> Whether risk derives from disease, environmental factors or from the intentional activities of those acting outside the law, there will be a range of policy decisions, relating, *inter alia*, to the use of State resources, which it will be for Contracting States to assess on the basis of their aims and priorities [*Osman v UK* (1999)].

Neither national courts nor the European Court of Human Rights wish to impose liability on the State under the right to life where such liability would have resource implications. For example, the Commission has ruled that Art 2 does not extend to an obligation on States to provide indefinite bodyguard services in order to protect one of their citizens from threatened attack: *X v Ireland* (1973).

On the other hand, the police, and other public bodies, are sometimes liable for the deaths of people who are in their care, even though they have not caused the deaths. In *Kirkham v Chief Constable of Manchester* (1989), the Court of Appeal held the police liable for the suicide of a man in their custody whom they knew to be suffering from clinical depression. The police may also be held liable for the suicides of prisoners of sound mind. However, recently, the House of Lords has ruled on this issue, saying that where a prisoner of sound mind commits suicide by taking advantage of a breach of duty by the authorities (in this case, the prisoner hanged himself from a cell hatch which

had been negligently left open) the police, though liable, would not have to pay full damages. The award would be reduced to take account of the prisoner's responsibility in causing the loss by his own intentional act (*Reeves v Commissioner of Police for the Metropolis* (1999)).

Until recently, the police have enjoyed an immunity from liability for any step they take, or may fail to take, in the course of the investigation into behaviour which may result in one individual killing another. When the family of one of the Yorkshire Ripper victims attempted to sue the police in negligence for failing to identify and detain the murderer, the House of Lords took the view that the police owed no general duty of care to identify and capture an unknown criminal, even though there might be a foreseeable risk to a class of potential victims – in that particular case, young women (*Hill v Chief Constable of West Yorkshire* (1989)). The House of Lords considered that any finding of such a duty would paralyse police activity, because the police would have to justify every step they took in the investigation of a crime with the result that manpower and resources would be diverted from the investigation and prevention of crime to the defending of procedures in court cases.

This immunity from suit in English law has come up for consideration in the European Court of Human Rights under Arts 2 and 6 (the right to a fair trial). In *Osman v UK* (1999), the Court considered an argument that the failure of the police and social services to prevent the murder of a schoolboy's father by one of the teachers after they had been warned about the teacher's suspicious activities was a violation of the victim's right to life under Art 2 of the ECHR. The applicants also argued, inter alia, that the immunity of the police under the rule in *Hill* was a breach of their right of access to court under Art 6. The Court rejected the claim under Art 2. On the facts of the case, they concluded that the police had not erred in concluding that the deceased had been at risk. However, the Art 6 argument was successful. The Court took the view that blanket immunity of the police from negligence actions by victims' families violated the applicants' right under Art 6 to air the substance of their claim before a court of law. Although it concerned Art 6 rather than Art 2, the decision in *Osman* has certain implications for the enforcement of criminal legislation in national law. If agents of the State know that they may have to justify in future litigation each step they have taken to prevent a murder, or each opportunity missed, in the course of an investigation, it may have the effect of making them more alert to the sort of early warnings of impending catastrophe they received in *Osman's* case.

20.4 Asylum, deportation and extradition

Appeals to the right to life are often made in judicial proceedings challenging the State's decision in refusing entry or enforcing departure of aliens. In *Bugdaycay v Secretary of State for the Home Department* (1987), the applicant challenged the Home Office's decision to disallow his asylum application on the basis that he faced a real risk of death if he returned to his home country. The court, upholding his application on *Wednesbury* grounds (see above, 15.5.1), stated that, in cases where 'the most fundamental of all human rights' were at stake, in other words the individual's right to life, judges must apply the 'most anxious scrutiny' to the lawfulness and reasonableness of the administrative decision in question. The failure, in other words, of the immigration authorities to take on board the risk to the applicant's life amounts to a failure to take account of a legally relevant consideration, one of the preconditions for *Wednesbury* unreasonableness.

Strasbourg case law in this area often involves a consideration of the prohibition under Art 3 of inhuman and degrading treatment. Article 3 is pleaded together with Art 2, where the threat to the applicant's life is covered by one of the permitted exceptions to Art 2. This Article, it will be remembered, permits the death penalty in countries which have not yet ratified the Sixth Protocol. In *Soering v UK* (1989), the Court was therefore unable, on the basis of Art 2, to prevent the UK from extraditing S to the US where he faced the death penalty. However, his argument under Art 3 succeeded, since the 'death row phenomenon' in the view of the Court amounted to 'inhuman and degrading treatment'. It did not matter that the UK itself was not responsible for the conditions suffered by prisoners awaiting the imposition of the death penalty in the US. The liability of the State was engaged by the fact that it was prepared to expose him to that risk.

20.5 The right to medical treatment

Appeals to the right to life have been couched not only in negative terms, urging the State not to take action that would lead to the violation of that right, but in positive terms as well, requiring the State to take positive action to ensure the preservation of the right. Although doctors are private parties and medical negligence actions against doctors are governed by private law principles, the State, as the main supplier of medical services, is implicated in many decisions taken by doctors with wider application. In *R v Cambridge Health Authority ex p B* (1995), the health authority was advised by medical experts that the applicant, a child suffering from a rare form of leukaemia, had only a very slim chance of surviving a bone marrow operation. Relying on this opinion and on the fact that they had finite resources, the authority decided to withhold funding for the operation, although they acknowledged that the applicant would probably die if she did not have the transplant. The High

Court ruled that the health authority had acted illegally: 'where the question was whether the life of a girl aged 10 might be saved by however slim a chance the responsible authority had to do more than toll the bell of tight resources'. In Laws J's view, once the infringement of the right had been established, the health authority had to prove that there was a substantial public interest justification in refusing medical treatment. This conclusion was overturned on appeal. The Court of Appeal ruled that it was for the authority concerned to allocate its budget in the way it thought best. One bone marrow transplant operation may mean 20 fewer hip replacement operations; it was not for the courts to conduct this difficult balancing exercise. We can conclude from this decision that, whilst a State may be under a positive obligation to legislate in order to prevent individuals from killing each other, this positive duty will not be extended to the provision of medical treatment, since this involves the allocation of scarce resources. Whilst this seems harsh on the individual patient, it has to be acknowledged that the exclusion of a certain number of patients from treatment due to the scarcity of resources should not be a justiciable issue, since there are no 'right' or 'wrong' decisions that the authorities can make in these circumstances, except on clinical medical grounds, which judges on the whole are not qualified to consider.

The European Commission and Court of Human Rights take a similar view of the State's obligations to prevent risks arising from disease. Although the Commission has said in the past that Art 2 'enjoins the State not only to refrain from taking life intentionally but, further, to take appropriate steps to prolong life' (*X v UK* (1978), and in *LCB v UK* (1998)), the European Court of Human Rights suggested that Art 2 might impose an obligation on the authorities to provide individuals with information about life threatening environmental conditions. The hint that such a duty was within the scope of the State's obligations to safeguard the lives of those within its jurisdiction has been tempered by later *dicta* in *Osman*. Here, the Court observed that:

> ... such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising.

20.6 The right to refuse medical treatment

Medical intervention usually involves the invasion of bodily integrity, which amounts to a trespass in civil law and a battery in criminal law in the absence of the patient's consent. A mentally competent adult can effectively refuse treatment, even if this leads to his or her death (*Re T (An Adult) (Consent to Medical Treatment)* (1993)). A Jehovah's Witness patient, for example, is perfectly entitled to refuse a blood transfusion (*Re T* (1992)). To get round the

problems this creates for doctors treating patients who are not in a position to give that consent, the law has had to come up with a variety of somewhat artificial solutions. In emergency situations, the patient is deemed to have given (implied) consent for life saving treatment.

Much more difficult questions arise in non-emergency situations, again involving patients who cannot, for one reason or another, give consent, where doctors should only take action when it is necessary (*Re F* (1990)).This question arose in the case of *Airedale Trust v Bland* (1993), where the parents of a victim of the Hillsborough football stadium disaster had asked the hospital to withhold all treatment to enable their son to end his life with dignity and with the least possible suffering. The doctors, concerned that such an action would expose them to a charge of murder, sought a declaration from the court on the lawfulness of the proposed action. The House of Lords said that the test of what is in the best interests of a patient must be determined not by the court itself, but by reference to a reasonable and competent body of medical opinion (the so called *Bolam* test).

It might be asked why, if the State is under no positive obligations to ensure life – for example, to rescue – it should provide limitless funds to hospitals to keep patients alive who are in reality enduring what Lord Hoffmann described in the *Bland* case as a 'living death'. The answer is partly practical; allowing doctors to respond to pressure from unscrupulous relatives to hasten their patients' death and hence the distribution of their estate would place an unbearable burden of responsibility on doctors.

With the advance of medical science, it is increasingly difficult to determine when 'death' actually occurs; this definitional difficulty makes it much harder to determine when it is legitimate to withdraw life support from a comatose patient.

One way around this problem is to enable individuals to make their wishes known in advance by means of a 'living will'. This sets out the intentions of a patient which should be observed by the family and medical profession when the person concerned is no longer in a position to give rational consent. The present government is considering proposals to give the concept of living wills statutory force, so that any doubts about the voluntariness of the wishes expressed by the patient about future medical care can be matched against specific statutory requirements.

It is still unlawful for a doctor to administer drugs which would positively shorten life – the only way to avoid prosecution is via the doctrine of 'double effect'. This means that, in a reasonable body of professional opinion, the quantity and combination of drugs administered were indeed necessary and indispensable to prevent suffering, even though they carried with them the risk of shortening life, and that the patient consented. Otherwise, 'assisted suicide' – a doctor's compliance with a competent terminal patient's wishes to die – is still a crime.

Whatever position one takes in the euthanasia debate, there are important democratic arguments to be acknowledged. If we accept that the core value of democratic rights is the right to choose according to one's own convictions and not those of society in general, the argument in favour of controlled euthanasia acquires some moral weight. The difficulty of regulating 'assisted suicides', so that doctors do not risk being pressured by relatives or the exigencies of hospital administration from hastening death in the wrong situation, is not an excuse for the failure to the State to recognise the fundamental right of a patient to choose when to die:

> Of course the law must protect people who think it would be appalling to be killed, even if they had only painful months or minutes to live anyway. But the law must also protect those with the opposite conviction: that it would be appalling not to be offered an easier, calmer death with the help of doctors they trust. Making someone die in a way others approve, but he believes contradicts his own dignity, is a serious, unjustified, unnecessary form of tyranny [Dworkin, R, *Freedom's Law*, 1997, Oxford: OUP, p 146].

Dworkin's view is that the State has to balance its duty to protect individuals from irrational decisions to hasten their own death against the citizen's right to choose to die without being subjected to the religious or ethical convictions of society as a whole. The right to life – which includes the right to choose to die – is an important democratic right, since it contains within it not only the individual's right to choose freely his or her next course of action, according to his or her own moral perceptions, but the person's fundamental right to privacy.

In a case concerning the constitutionality of laws prohibiting assisted suicide in the US, a group of philosophers, including Dworkin, submitted an *amicus curiae* brief to assist the Supreme Court in its deliberations. They commented:

> Most of us see death – whatever we think will follow it – as the final act of life's drama, and we want that last act to reflect our own convictions, those we have tried to live by, not the convictions of others forced on us in our most vulnerable moment.

The respondents in this case – three terminally ill patients and four physicians – argued that a mentally competent person had a constitutional right to control the circumstances of his or her imminent death. The Supreme Court rejected their application, holding that:

> The value to others of a person's life is far too precious to allow the individual to claim a constitutional entitlement to complete autonomy in making a decision to end that life [*Washington v Glucksberg* (1997)].

In this country, suicide was a criminal offence until 40 years ago. While the felony was still being punished, families of suicides would be left destitute as the State forfeited all the property of the offender. The harshness of the law

was finally alleviated when the Suicide Act 1961 abolished the common law offence. But the fear of voluntary death still runs deep in society, as the Supreme Court decision above demonstrates, and it may be many years before the terminally ill who are suffering from severe pain can claim a right to autonomy to choose the manner of their death.

20.7 Pre-birth medical intervention

Abortion

Foetuses have limited protection in English law. Abortion is legal before 24 weeks of gestation when carried out by a medical practitioner, provided that any of the circumstances listed in the Abortion Act of 1967 are present, such as risk of injury to the physical or mental life of the mother. However, foetuses themselves do not have rights in English law until they are born alive (*C v S* (1988)); so a father cannot apply for an injunction on behalf of a foetus to prevent an abortion (*Paton v British Agency Service* (1979)), and a foetus cannot be placed under the wardship jurisdiction (*Re F (In Utero)* (1988)).

The father in the *Paton* case took his complaint to Commission of Human Rights, saying that the proposed abortion would violate the foetus's right to life under Art 2 (*Paton v UK* (1980)). The Commission ruled that Art 2 did not grant an absolute right of life to a foetus. The lack of consensus on when life begins (gamete? blastocyst? embryo? 10 day old foetus? 20 week foetus?) has made it difficult for the Strasbourg institutions – or any other international rights body for that matter – to arrive at any definitive position as to the right to life of unborn children under Art 2. Abortion issues that are brought before the court by the pregnant mother are usually linked with the mother's right to privacy under Art 8. It is clearly easier for such a claimant to satisfy the 'victim' requirement for admissibility purposes than a foetus, which has no legal status. Nevertheless, in *Bruggeman and Scheuten* (1978), the Commission indicated that the protection of 'others', which constituted one of the permissible infringements to the right to privacy, included 'the life growing in the womb'. Pregnancy was held to compromise a woman's right to privacy, since her life was bound up with that of the developing foetus.

Provision of information about the availability of abortion services may not be suppressed under anti-abortion laws: *Open Door Counselling v Ireland* (1992). This case, which arose as a result of a provision in the Irish Constitution criminalising abortion. However, in arriving at their decision that there had been a breach of Art 10, the Court in this case did consider that the right to life under Art 2 may sometimes restrict the availability of abortion. We will see from the discussion of Art 10 that it can be limited in the interests of the rights of 'others' (see below, 24.6). The respondent State argued that the foetus was an 'other' whose interests the law should protect; but the Court did

not address this argument, since it was peripheral to the central issue of freedom of expression. Instead, it based its decision on the finding that the prohibition of abortion information was a disproportionate measure to achieve the protection of morals. Since the laws of different countries on abortion differ considerably from each other, the Court allows a very wide margin of discretion in this area.

So we can see that, by simply ruling that the foetus is not a constitutional person and therefore not a rights holder, we have not circumvented the problems presented by the abortion debate. We have to recognise that the State does prohibit abortion at a certain stage of viability. If the foetus is not a rights holder, why should the woman's right to privacy be infringed at all, at whatever stage of pregnancy? This is a difficult question, to which there are no easy answers. One possible answer is that the State interferes with our rights to protect all sorts of things and creatures who have no 'rights' recognisable under orthodox constitutional theories – so, for example, our freedom to hunt and eat is curtailed in respect of endangered species, and laws have been passed protecting certain types of landscapes and habitats from development. In the same way, the development of the foetus towards infancy in the late stages of pregnancy engages the State's interests, due to the medical risks inherent in late termination of pregnancy and lack of scientific consensus as to the level of sentience of the developed foetus. This, it is generally accepted, justifies the interference with the pregnant woman's freedom of choice, although at no stage is it established that the foetus has a right independent of that of its mother.

Birth

Similar issues arise where a mother's freedom of choice as to the method of delivery conflicts with the medical profession's opinion as to her safety and the risk to the life of the unborn child. In *Re MB (Caesarean Section)* (1997), the Court of Appeal ruled that a mentally competent patient had an absolute right to refuse consent to medical treatment (in this case, a Caesarean section) for any reason, irrational or rational, even though this might lead to the death of the child or herself; but, in the case of the mentally incompetent, a declaration should be sought from the court in order for the correct decision to be made. In this case, the court deemed the woman to have been rendered temporarily incompetent by her fear of the anaesthetic injection necessary to the performance of the operation. On the other hand, the court specifically rejected the argument that it should take into account the interests of the foetus and balance them against the mother's interests. That case appears to suggest that incompetence may be quite easy to establish; however, that aspect of the ruling in *MB* has to be reconsidered in the light of the judgment by the Court of Appeal in *R v Collins ex p S* (1998). Here, the court confirmed that the rights to autonomy of a mentally competent woman outweighed the interests of the unborn child, as well as her own interests in her self-preservation. The

applicant was suffering from pre-eclampsia, a condition which involved serious risks to her life and that of the foetus during the natural birth process. Despite medical advice to this effect, she refused treatment and advice to proceed with a Caesarean delivery. The hospital authorities applied for a declaration from the High Court to dispense with her consent, whereupon a Caesarean section was carried out. In ruling the action of the authorities to be unlawful, the Court of Appeal observed that:

> When human life is at stake the pressure to provide an affirmative answer authorising unwanted medical intervention is very powerful. Nevertheless the autonomy of each individual requires continuing protection even, perhaps particularly, when the motive for interfering with it is readily understandable. If it has not already done so medical science will no doubt one day advance to the state when every minor procedure undergone by an adult would save the life of his or her child, or perhaps the life of a child of a complete stranger. The refusal would rightly be described as unreasonable, the benefit to another human life would be beyond value, and the motives of the doctors admirable. If however the adult were compelled to agree, or rendered helpless to resist, the principle of autonomy would be extinguished.

The current position in national law, then, is clear: that the rights of a mentally competent adult override those of the foetus, even if the process of giving birth threatens the life of the adult as well as the unborn child.

Pre-birth diagnosis

Health authorities are frequently sued for the costs of caring for severely handicapped children who are born as a result of the failure of the medical staff to detect congenital abnormalities which would have given the mother the opportunity to terminate the pregnancy. These claims, somewhat bizarrely labelled 'wrongful life' claims, can be brought in the name of the children themselves in some jurisdictions such as the US. Such actions are really disguised claims for insurance from the State to ease the burden of the parents responsible for looking after a child. In this country such claims for wrongful life, taken by the child itself, are ruled out by legislation, although it is possible for the parents to take legal action. It is also possible for a perfectly healthy child to be the subject of litigation for negligent failure to diagnose early pregnancy where the mother would have proceeded with an abortion, or if the child has been born as a result of a negligent sterilisation operation (*Thake v Maurice* (1988)).

20.8 Assessment

Although the right to life is recognised both in the common law and the legislation of the UK, we have seen that case law of the European Court of Human Rights has cast some doubt on the adequacy of domestic measures for protecting it.

The immunity of the police from liability in respect of failure to investigate and take measures that may prevent a murder, where the potential victims and the suspect are well known, is arguably a shortcoming in the State's duty to prevent private killing; the relationship of proximity between the police and the potential victims in some cases should give rise to a duty of care. The European Court of Human Rights has held an immunity to be contrary to Art 6 of the ECHR (see above, 20.3).

As we have seen from the foregoing pages, the approach by the European Court of Human Rights to right to life claims is somewhat cautious. It is Art 2 more than any of the other articles in the Convention which makes it aware of its position as a supranational body whose decisions should not interfere excessively with the laws and policies of Signatory States. An adverse judgment under Art 2 is a significant statement about the Member State's human rights record, one that, as we have seen, the Court has only arrived at once against the UK.

In the light of this, the right to life has been given relatively restricted scope under the ECHR. It is suggested that national judges should have more leeway in extending the article to cover a greater range of activities that threaten life in the UK. The Indian Constitution, for example, has been relied upon by individuals claiming that severe pollution by industrial plants have threatened their right to life; these claims have been upheld by the Indian Supreme Court. Article 2 could become a valuable tool for environmental regulation in this country. That this is not a wholly unlikely development has been illustrated in a recent judgment by the European Court of Human Rights in *Guerra v Italy* (1998). This case involved claims that the applicants' right to life, the right to freedom of information and the right to privacy and family life had been violated by the failure of the State to provide important information about hazardous pollution emanating from a factory 1 km away from the applicants' village. Although the Court upheld their claim on the right to family life alone, two of the judges considered the claim to fall within the scope of Art 2 as well, 'where substantial grounds can be shown for believing that the persons concerned face a real risk of being subjected to circumstances which endanger their health and physical integrity, and thereby put at serious risk their right to life'. It has to be acknowledged, however, that even if the scope of the protection offered by Art 2 were to be extended in accordance with these dissenting judgments, the link between the failure to supply information and the risk to the applicant's life would have to be more direct than is evident from the *Guerra* case. It has been stressed in the foregoing sections that Art 2 does not impose positive obligations on States, apart from obliging them to pass criminal legislation prohibiting murder; however, it is suggested that it would not be too radical an extension of the Court's current jurisprudence to propose that the right to life under Art 2 covers the provision of a safe environment.

RIGHT TO LIFE

Negative obligations: the prevention of State killing

The right to life prohibits State killing and also engages the State's liability in its capacity of regulator of individuals' decisions over life and death.

Article 2 of the ECHR protects the right to life, subject to certain exceptions; capital punishment is permitted and agents of the State can use lethal force to quell riots, prevent arrests or prevent violence. The Sixth Protocol to the ECHR, shortly to be ratified by the UK, requires the abolition of the death penalty in all Member States.

In *McCann v UK* (1996), the first case to reach the European Court of Human Rights on the question of Art 2, the court ruled that the killing of three unarmed members of the IRA in Gibraltar by undercover British soldiers who apparently believed they were on a bombing mission could not be justified by any of the permissible exceptions to Art 2 because there had been other ways in which the arrest operation could have been conducted without risk to the suspects' lives.

Positive obligations

The right to life is generally recognised as a negative right only. This means that it prevents violations by States of the protected interest rather than requiring the State to take positive measures, apart from passing legislation criminalising private killing. The common law position is the same; the police enjoy immunity from negligence suits in respect of the steps they take to prevent murder, and there is no common law duty to rescue where no relationship of care exists. Neither national courts nor the European Court of Human Rights are prepared to impose liability under right to life principles where this would involve non-justiciable questions of policy and resource allocations. This is particularly true in the case of medical treatment: *R v Cambridge Health Authority ex p B* (1995).

Asylum and deportation decisions

The State may be liable under Art 2 (right to life) or Art 3 (prevention of inhumane treatment) of the ECHR if it allows an asylum seeker or a deportee to return to a country where he or she faces persecution or possible death,

even if that risk does not arise out of direct action by the authorities in the receiving State. A State is prevented, for example, by Art 3 from deporting a person suffering from a life threatening disease to a country where there is inadequate health care.

The right to die

The right to life has provided no easy answer to the euthanasia debate. In the UK, 'assisted suicide' is still a crime. Neither Art 2 of the ECHR or any other formulation of the right to life has been extended to permit the medical profession or private individuals to take positive measures to assist someone to die, whatever the circumstances. In extreme cases, where the patient is in a coma, the court will consider whether a reasonable body of professional medical opinion would agree whether cessation of medical treatment is in the patient's best interests. On the other hand, the law recognises the absolute right of individuals to refuse consent to medical treatment, even where such refusal would lead to the death of that individual or to the death of a foetus.

Pre-birth intervention

Foetuses do not enjoy rights under national or international law, so abortion is not a breach of the right to life, although termination of pregnancy is prohibited at a certain stage of the development of the foetus. The parents of a severely handicapped child may take legal action against the medical profession for failing to diagnose deformities before birth which would have given the mother the opportunity to terminate the pregnancy, although actions for 'wrongful life' in these circumstances, taken by the child itself, are prohibited by legislation in the UK.