Article

Theory Culture & Society

Theory, Culture & Society
2017, Vol. 34(1) 75–95

DOI: 10.1177/0263276416657881
tcs.sagepub.com

SAGE

Biopolitics, Thanatopolitics and the Right to Life

Muhammad Ali Nasir
University of Heidelberg

Abstract
This article focuses on the interrelationship of law and life in human rights. It does this in order to theorize the normative status of contemporary biopower. To do this, the case law of Article 2 on the right to life of the European Convention on Human Rights is analysed. It argues that the juridical interpretation and application of the right to life produces a differentiated governmental management of life. It is established that: 1) Article 2 orients governmental techniques to lives in order to ensure that both deprivation and protection of lives is lawful; 2) A proper application of Article 2 grounds itself on a proper discrimination of lives which causes Article 2 to be applied universally but not uniformly to all juridical subjects; 3) The jurisprudence of Article 2 is theoretically appreciable only in a 'politics of life'. Finally, the article ends with a plea to analyse other fundamental human rights in the context of 'biopolitical governmentality'.

Keywords
biopolitics, Foucault, governmentality, human rights, right to life

Introduction

After Foucault, it has become commonplace to find 'life itself' as an object of scientific and political discourses.[1] If this is what allows power to make someone live or let die (Foucault, 2003: 247), it is not without 'risks', as Foucault reminds us (Foucault, 2000, 2003: 253–4). At present, influential works discern within these 'risks' the Janus-head reality of biopolitics. For them, contemporary biopolitics is 'thanatopolitics', i.e. as determinative of life's possibilities (e.g. Agamben, 1998, 2005 ; Mbembe, 2003). The contention that life is reduced almost to death is supported by examples: use of extraordinary renditions and preventive detentions by liberal democracies, the prison setup of Guantánamo Bay, the blockade of Gaza. One is told

Corresponding author: Muhammad Ali Nasir. Email: muhammad.alinasir@hotmail.com
Extra material: http://theoryculturesociety.org/

that the occurrence of these events and processes is becoming widespread (c.f. Agamben, 1998: 117; 2005: 2). However, the fact that such exercises of power are either kept secret or generate scandals when disclosed in detail is important. This fact requires one to focus on those models oriented to life with whose normative tools such 'scandalous' exercises of power are countered. This article analyses the question of life and politics oriented to life in a framework that is both normative and becoming paradigmatic: human rights.[2] By focusing on the interrelationship of law and life in human rights, it is argued that the modes of governmentality oriented to life produce a much more complex management of lives than allowed by those emphasizing thanatopolitical aspects of modern biopolitics and law.

To present this thesis, one fundamental human right is analysed: the right to life. This right is decisive because all other human rights presuppose a certain 'life' to which they can be attached. I begin by analysing how this right orients certain governmental techniques to the question of life. This governmental capacity is required by human rights from a concrete politico-legal guarantor of the right to life, since a legal framework unable to perform this function makes all the other human rights ineffective as well. I then examine the differential meaning accorded to lives with respect to which their legal protection works. I argue that the right to life applies universally but not uniformly to all juridical subjects. The second section focuses on the way this jurisdictional link ties life more bindingly to regulatory frameworks. Therefore, the juridical interpretation and application of the right to life produces a differentiated governmental management of life. The third section argues that the interrelationship of law and life in the right to life cannot be understood solely in legal terms alone. Then, any work that focuses on one aspect of biopower (e.g. deprivation) instead of others (e.g., protection, optimization) is vulnerable to producing a uniform narrative valid for all circumstances. Finally, the article introduces the concept of 'biopolitical governmentality'. It ends with a plea for extending the analysis offered here to other fundamental human rights.

Given the fact that human rights are a vast domain, I selectively focus on European human rights law. This selection is pragmatic because commentators have pinpointed the comparative effectiveness of the human rights standards in Europe (e.g. Danchin and Forman, 2002: 192; Therborn, 2001: 83). In order to establish my points, the focus is on the case law of Article 2 on the right to life of the European Convention on Human Rights as it is interpreted by the European Court of Human Rights. Although the overall argument is based on selected cases which are explored, I attempt to trace different 'lines of force' – to use an expression from Foucault (2007: 108) – that go on to assemble the analyses surrounding those case laws. This would help in drawing a rough outline of the workings of the right to life in particular and human rights in general.

§1. The Right to Life at the Fringes

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 defense 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. (Article 2: Right to Life)

Article 2 protects life. But, it also specifies – and consequently allows for – circumstances when life may be lawfully taken away. Article 2 cannot be derogated even in times of emergency or warfare. However, lawful deaths resulting from warfare are allowable as per Article 15 of the Convention. Among others, what this means is that the legal protection of lives – and its withdrawal – depends both on surrounding circumstances a life finds itself to be in and on the way it conducts itself during such moments.

I begin this section by reading two judgments delivered by the European Court of Human Rights in 2011. The first case law deals with a scenario where the Russian authorities tackled a hostage-taking situation: *Finogenov*. The second case concerns the application of Article 2 in the aftermath of a war situation: *Al-Skeini*. I focus on these 'extreme' situations in order to explore the occurrence of violence, its connection to lives, and the way the right to life legally addresses the phenomenon of violence and determines the legitimate relation of violence with life. This section establishes that: 1) Article 2 orients governmental techniques to lives in order to ensure that both deprivation and protection of lives is lawful; 2) A proper application of Article 2 grounds itself on a proper *discrimination* of lives. This causes Article 2 to be applied universally but not uniformly to all juridical subjects.

§1a. Finogenov and Others v. Russia

In order to look at how Article 2 functions, I begin by examining *Finogenov*. The hostage situation is useful in order to look at the phenomenon of violence as a parallel is drawn between the occurrence of lawful and unlawful violence. In *Finogenov*, the applicants complained that the way the Russian state authorities tackled the October 2002 hostage crisis in which more than 130 hostages died as a result of the use of a narcotic gas during a counter-terrorism operation violated the rights of the victims under Article 2 (para. 3). Further, it was alleged that the

investigations following the incident did not fulfil the requisite standards. Consequently, a procedural lag was alleged. Now, in those circumstances where violence occurs that either threatens legitimate violence backed by legal rules or challenges it, Article 2 legally permits the use of lethal force to counter unlawful violence. In the jurisprudence of human rights, the legal room to use violence and the constrictions surrounding it only address law-enforcement officials. It means that only a concrete politico-legal authority (i.e. an established nation-state) is allowed room to wage lawful violence. Given that lethal but lawful violence needs to be both effective and efficient in combating unlawful violence, Article 2 itself cannot be relied on to determine what means and procedures ought to be expended in specific circumstances. Any such constriction presupposes that there can be delineable solutions for unexpected problems. And this will, as an effect, fatally constrict the capacity of the state authorities to combat unlawful violence (paras. 207-8). The role of Article 2 is only to determine later whether 'feasible precautions' had been taken during such situations in order to minimize human losses (para. 208; c.f. *Ireland v. the UK*, para. 214). This interconnection between law and life in the right to life requires that the state authorities be given a laxer margin to deal with those situations wherein violence erupts both unexpectedly and forcefully from illegal quarters (para. 209). Consequently, in *Finogenov*, the Court applied different degrees of scrutiny to different aspects of the situation, depending on whether the state authorities were taken by surprise or were in control of the situation (para. 216).

The analysis of the right to life in *Finogenov* takes place from four different angles. Each angle requires a different rationale and produces different results. First, the overall situation was looked at, that is, whether the use of force in this case was required. It was granted that the use of force pursued a legitimate aim of protecting persons 'from any unlawful violence' (para. 218). The storming of the building and the use of gas did not run counter to Article 2 because the behaviour of terrorists could not be adequately predicted (para. 221).

Further, the Court acknowledged that the demand of hostage takers that Russian forces withdraw from Chechnya was 'unrealistic', since such a move from the government would 'have been tantamount to a *de facto* loss of control over part of the Russian territory' (para. 223). Importantly, this runs counter to the political logic of protecting territorial integrity, for which the human rights standards in the Convention make explicit room (e.g. the limitation clauses). By having challenged law violently, terrorists desecrate their own dignity and that of others, and it is this concern of maintaining 'dignity' as such which causes law to allow deprivation of terrorists' lives, so that their deaths are per definition just(ice).[3] In those unavoidable cases, where deprivation of terrorists' lives also means that those who are being terrorized may be deprived

of their lives in the process, law grants permission to execute counter-terror moves based on the effectiveness of measures take. These 'collateral' deaths, despite being presumed in the calculations of life and death with respect to the effective damage, are always tragic. However, from a political-legal perspective, this does not prove effective violence as being in itself tragic since the urgency to kill terrorists precedes rescuing terrorized lives. Given the circumstances, the use of force in this case was deemed unavoidable (para. 223).

Second, although the use of narcotic gas was an ad hoc solution for which there existed no prior legal rule explicitly (para. 229), it was acknowledged that its use was a tailor-made response in view of an unusual situation (para. 230). In the prior calculations relating to pain and death, the objective to 'neutralize' terrorists made the use of gas acceptable even if it could be later argued that gaseous fumes affect all. Thus, despite the fact that the state authorities could predict that gaseous fumes would cause unknown suffering, measures were taken to increase the efficacy of using such a strategy with maximum care. This dual attention – that is, sufficient infliction of pain on one hand, and necessary precautions with respect to that infliction on the other – was in line with Article 2.

Third, in the matters dealing with rescue and evacuation operation, the positive obligations of the state authorities were engaged in ensuring necessary precautions, prompt evacuation, and timely medical assistance (para. 237). For the Court proceedings, it required that the official reports (compiled by the Public Health Department, the Centre for Disaster Medicine, and witness testimonies of several senior-level officials in the public health system and rescue services) should be compared with other evidence (the testimony of the rescue workers and the medical personnel on the field, expert evidence, victim statements, etc.) (para. 241). More importantly, the Court opined that a thorough scrutiny could be applied to the medical issue of aid and rescue, in contrast to the military and 'political' aspects of the situation (para. 243). Given inadequate information exchange between various services, limited on-the-field coordination of various services, inadequate logistics, among others, it was concluded that there was a breach of Article 2 as far as positive obligations on the state authorities were concerned (para. 266).

Fourth, in the aftermath of the operation, Article 2 required that the relatives of victims should be provided with satisfactory explanations of deaths. This is necessary in order to establish the degree of authorities' responsibility for those deaths (para. 273). The facts that all witnesses were not interviewed, the record file of the crisis cell was destroyed, the circumstances of the rescue operation were not thoroughly analysed, and the investigating team was not 'independent' meant that there was a violation of Article 2 on this count too (para. 282).

§1b. *On Life, Law, and Violence in* Finogenov

Three things are important. First is the meaning of specific lives depending on their conduct and surrounding circumstances. The hostages were Russian citizens held captive in order to put some demands before the Russian authorities. They therefore stand in-between the violence of Chechen 'terrorists' and the counter-violence of the Russian authorities. The terrorists challenged the law with the threat of unlawful violence and put certain lives illegally in danger. In order to uphold the law, it is required that certain other lives (i.e. law enforcement personnel) deal with this situation on behalf of the law (so that legal violence in such situations is always justifiable counter-violence), whose possible exposure to death does not contradict their right to life. In this sense, counter-terrorism does not counter the possibility of elimination of lives per se; it directs this elimination to certain ends in a way that public order buttressed by legal rules is maintained.

Second is the connection of these lives to a juridical context. The hostages as rights-holders can also make the legal violence protecting them accountable, if it exceeds a certain threshold. Article 2 provides here both the objective of protecting lives and offers the test through which it can be measured whether the authorities were able to aptly protect lives. As per Article 2, terrorists can be lawfully killed only when the situation is critical and the danger high. It also means that if the harmful effects of their activities can be preempted without the loss of their lives, it is preferable that it should be done.[4] Importantly, it entails that even during such critical situations, this (terrorizing) life maintains a tenuous but nevertheless palpable link with its right to life (c.f. Agamben, 1998: 54, 111) – a rationale that required clarification from the Russian authorities that only the suicide bombers were shot while unconscious who could have woken to blow themselves up, and that other terrorists were killed in the ensuing gunfight (para. 100).[5] The fact that the law enforcing agencies are constricted within the limitations imposed by the right to life requires an entire assemblage (police, elite counter-terrorist units, hospitals, emergency wards) and a scrupulous show of care (criminal law, proper training, medical briefings, investigations) by the state authorities in order to justify actions leading to deprivation of lives.

The third point concerns the legal guarantee of the right to life depending on the differential meaning accorded to lives. The way the hostages are to be rescued depends on the tackling capacity of the state authorities and the temporal unfolding of the situation. The way the terrorists are to be dealt with depends on their weapons, their determination and will, possible training and expertise, their past record, lapse of time and their conduct, their demands and behaviour (paras. 192, 213, 220). Further, there is required a complete disclosure of counter-terrorism and rescue operations in order to determine whether the right to life has been

complied with. Thus, Article 2 is also applied on the circumstances surrounding the planning and control of the rescue operation (c.f. *McCann v. the UK*, para. 150). Consequently, the right to life here works differently for specific subjects based both on differential meanings accorded to lives, and on – in Alexy's words – 'legal and factual possibilities' (Alexy, 2010: 47).

In order to impose positive and negative obligations on the state authorities, Article 2 cannot be but governmental. It is by drawing on a diversity of strategies (arms and aims, rescue operations, planning and control), personnel (soldiers, special squads, doctors) and institutions (crisis cells, health committees, hospitals) that the right to life shapes the way they have to operate. Thus, legal rules have to insert themselves into these governmental practices, even if they maintain a certain distinctiveness. It is because of this functionality that the right to life both requires such investments of power to become concrete and goes on to constrict their operation as they come under its purview. It is on the basis of this twofold force that it can be legally determined whether Article 2 has been complied with or not. It also means that the legal decision bases itself on certain truth mechanisms involving knowledge (medical discourse, statistics, psychology), techniques (autopsy, cross-examinations, documentations, photos and videos, testimonies), and expertise (expert reports, fact finding missions, investigations bodies). These are then measured in view of the objectives (minimum human loss, effective action, upholding law and territorial integrity). It is correct to say that the right to life connects life to law both for its protection and exceptions. It would nevertheless be hasty to say that the deprivation, or even protection, of a life is solely a legal question. This is because legal regulation of lives remains connected with specific processes of knowledge and governmental techniques, and the role of legal rules is to ensure a proper management of lives through its force of legitimate violence.

§1c. Al-Skeini and Others v. the UK

Cannot it be said that where legal protection is removed, such as in war scenarios, there is a legal production of lives with ineffective or token rights (Agamben, 1998)? The strength of Article 2 lies in its capacity to regulate kindred situations, such as war scenarios, without in turn permitting the legal guarantor an absolute derogation. In order to analyse how Article 2 functions in the aftermath of a war, I now look at a second case: *Al-Skeini*. This case arose out of the British administration of southern Iraq as a 'caretaker' provisional administrator in the wake of the 2003 occupation of Iraq (para. 12). Each of the six applicants in *Al-Skeini* alleged killings by the British troops of their relatives: five while the troops were on patrol, and one in a detention facility (paras. 25–71). The focus on a wartime scenario is useful because in such a scenario the

establishment of order explicitly presupposes deprivation of certain 'dangerous' lives and stringent control of 'incompliant' others.

In *Al-Skeini*, the British government argued that the Convention was not applicable, since, as per Article 1, the UK did not have jurisdiction over the area (paras. 109–119). The government acknowledged that the question of rights (in line with international human rights and humanitarian law contra the 'regional' Convention) could be applicable so far as the sixth applicant was concerned, who was tortured and killed in a British detention facility, and not for those who were killed in their homes or streets by patrolling troops (para. 118). Given dismantling of the Ba'athist regime and occupation of Basra by the British armed forces, the Court opined that the question of Article 2 applied in this case (para. 143, 149–151). This was necessary in order to prevent a 'vacuum' of protection emerging from within the 'legal space of the Convention' (para. 142).

Further, the fact that during the period in question British forces were maintaining law and order in Iraq and administering civil affairs (para. 21) entailed that the UK exercised 'the public powers normally to be exercised by a sovereign government' (para. 149). Legally, this fact created a 'jurisidictional link' between the UK and the deceased, since the only politico-administrative power that could be looked upon to *legally* guarantee human rights in that area during that time was the British (para. 149). Thus, when it becomes difficult to discern a nation-state proper ensuring the political rights associated with national citizenship, subjects at present continue to remain within the protectable ambit of human rights (c.f. Arendt, 1973: 299). As such, the claims of those subjects to their *human* right to life simultaneously create a *legal* link between their protected capacities and the effective on-the-ground power. This take reflexively concretizes that power by permitting it 'non-arbitrary' use of lethal force (para. 163).

It is important to note that the notion of non-arbitrariness may become flexible since the UK confronted a security dilemma in 'the aftermath of the invasion' (paras. 161, 168).[6] Even then, Article 2 retains its force by requiring that there ought to be a procedural mechanism in place, in order to discern whether the lives were taken 'in conformity with the rules of engagement' (para. 170; 168–177). It would therefore be simplistic to interpret Article 2 as allowing life or disallowing it, since it more fundamentally works to develop an entire mechanism to preempt situations where lives may be at risk (*L.C.B. v. the UK*, para. 36). Similarly, Article 2 is to follow those situations where lives have been deprived in order to determine the lawfulness of those measures (the procedural limb of Article 2). In the present case, a violation was found of the procedural requirements of Article 2 because there was an absence of proper postmortem investigations, even if the killings might not be substantively unlawful.

Three points are important. First is the way Article 2 works during wartime or in its immediate aftermath. Like other legal standards during

such times, Article 2 bases itself on a distinction of combatants and non-combatants. This demarcation marks out the manner through which non-combatants are to be protected and through which combatants are to mortally deal with each other. Further, the legal application of Article 2 means that those combatants who combat an occupying power which is constrained through the standards of human rights are to be deprived of their lives with justification, since they 'criminally' kill the military personnel of an occupying power without being able to justify that deprivation of life through human rights. It is because of this fact that the deprivation of lives by a human rights' constrained occupying power can be legally investigated and justified but reaches its normative limits for deprivations from those actors who are not so constrained.

Second is the way Article 2 relates this regulation of conduct to its standards. Among others, it means that the state protecting the right to life is to train its personnel through seminars, briefings, guidelines, or expert talks, in compliance with the human rights standards in order to ensure that 'others' are deprived of their lives as per the normativity of human rights alone (e.g. para. 24). The interconnection of the right to life with a concrete state assemblage also answers the reason why, within the jurisprudence of Article 2, a state may train its soldiers to kill and also require from them that they expose their own lives to mortal danger without in turn violating the right to life of soldiers or making its soldiers the very nemesis of this right.

Third is the connection of this process with the legal order. The fact that the applicants can invoke Article 2 as legal subjects from a belligerent occupant generates further power-effects. It reflexively requires from subjects that they ensure in their claims that they were non-combatants through testimonies, witnesses, autopsies, and the like. It is so since being a 'civilian' alone at such moments is not enough. On the other hand, it regulates the conduct of the warring state that, by violating human rights, is required to ensure its protection by tailoring its conduct in line with the human rights standards without in turn abandoning its warring stance.

Overall, three points can be noted. First, the interpretive praxis of the right to life requires concrete methods and tools. Even in those situations that are far from normal, certain conditions have to be fulfilled (e.g. proper planning of operations, objective investigations) in order that the corresponding practices operate within the limits of the legally permissible. In order to govern life, that is, to regulate its protection and deprivation, Article 2 requires a 'strict proportionality to the achievement of aims set out in subparagraph 2(a), (b), and (c) of Article 2' (*McCann*, para. 149). More importantly, albeit the right to life draws on and regulates the distinctions between insurgents, rebels, terrorists, or separatists, it cannot problematize such prior 'political' distinctions.

Second, Article 2 regulates life and ties it with law only by legally regulating a broader field of social practices (e.g. provision of adequate medical facilities, conducting objective postmortem investigations). It also means that during such times when the effectiveness of law reaches a minimum, constricting those events and processes later through the legal arm allows the right to life to intervene into that situation with the force of law. It entails that only those politico-legal assemblages that operate within the threshold of legality can lawfully deprive others of their lives. By doing so, Article 2 problematizes the conduct of conduct (c.f. Foucault, 1983: 208–28). It governs conduct by tying the claims of subjects with the juridical field, which in turn determines one's claim to the right to life as life is impacted by the weapons used, legal rules in place and political necessities, among others. It conducts government by allowing law to determine the peculiar content of specific lives, their juridical statuses, and the manner in which they can be exposed to legal violence or protected from illegal violence. In sum, those legal setups that more carefully *discriminate* lives on the basis of their conduct are the ones whose deprivation of lives can be more easily justified.

§2. On Life and Law in the Right to Life

This section argues that: 1) The jurisprudence of Article 2 is theoretically appreciable only in a 'politics of life', as this legal right orients governmental techniques to lives. 2) The focus of such a politics is not simply protection and deprivation but more importantly optimization. The argument offered in this section primarily focuses on a case law dealing with euthanasia: *Pretty v. the UK*.

In *Pretty*, the applicant, who suffered from a motor neuron disease, alleged that the refusal of British authorities to grant immunity from prosecution to her husband if he assisted her in committing suicide infringed her rights, notably under Article 2 (*Pretty*, para. 7). Since the issue of voluntary euthanasia/assisted suicide is referred to in the jurisprudential literature of liberal tradition as a moral paradox (e.g. Dworkin, 1994; Habermas, 2001; McMahan, 2002; Raz, 2012), focusing on *Pretty* will be useful in providing us with an anchor for present reflections. The concern here is not in addressing the dilemma but in unpacking the governmental tactics surrounding this issue.

Before reading *Pretty*, it is important to look at how a life is interpreted in a specific way in cases dealing with euthanasia. One is told that such lives suffer from conditions of 'degeneracy and incurability' (*Pretty*, para. 3). What needs to be looked at is the way the conditions of 'degeneracy and incurability' discursively function. Apart from an analysis of the biochemical composition of bodies, it also requires that the overall biological situation be measured in accordance with the biomedical norms. The juxtaposition of a diseased body with such normativity

allows knowledge to circulate around the patients that establishes their projected life expectancy and determines the form and content of possible 'suffering' they will have to confront as time passes. It is because of this dynamic that it becomes possible to speak about pain and suffering of patients on behalf of patients even in cases where the patients lose their expressive and motor capacities, as can be seen to a large extent in *Pretty* (para. 8).

For legal analysis, it means that in such cases the capacities of the subject (agency, deliberation, volition, physical integrity) and the force of their claims are dependent on the observations of the general consultant, neurologist, neonatologist, cardiologist, surgeon, or obstetrician. Further, it entails that the substance of legal claims of a subject is affected when there is a change in the variables constituting the medical sciences, such as in those situations where a specific disease becomes curable or where pain suffered becomes bearable through newer palliatives. Such discursive variables do not stand here in contradistinction to freedom. It is so since they not only sustain a life in the first place but also open up a field of claims for the specific subject in order that the range of choices available to it is expanded. In order to elaborate the latter point, let us look at the way the claims of the subject are handled in *Pretty*.

It is from within that subject position that the applicant posited the counter-claim that she bore a right either to continue her life or to terminate it. The applicant argued that her circumstances and the possible difficulties she would have to face in future necessitated that she approach the question of her life autonomously (*Pretty*, para. 8). Further, in the calculus of pain where her 'life expectancy was poor' vis-à-vis the 'undignified' final stages of disease, a question of Article 3 prohibiting inhuman and degrading suffering also arose (*Pretty*, para. 8, para. 44–46). Reading the text of Article 2, she also argued that it protects the right to life and not 'life' per se, which meant that Article 2 did not protect a life from the threats that may come from that life itself (*Pretty*, para. 35). Now, only after a life is seen as such does it become possible to turn its regulation into a legal question. This requires that the claims in question be measured with the legal precedents, national law-making concerns, and surrounding moralities and sensibilities (the Court drew on observations from the Catholic Bishops' Conference and Voluntary Euthanasia Society). This allows the law to measure the juridical claim to the right to life by contrasting the applicant's circumstances (unrelieved and severe pain, weariness of the dying process, loss of control over bodily functions) with concrete objectives (prevention of abusive medical practice, respect of autonomous decisions, end of useless suffering, protection of the vulnerable). The fact that there were sound regulatory standards in place as regards health and medical practice in the UK and that the national law pursued a legitimate aim of

protecting life was in line with Article 2, out of which the Court opined that it would be presumptuous to infer a 'right to die' (*Pretty*, para. 39).[7]

In order to observe the management of lives, let us look at the regulatory capacity of Article 2. To work itself through the social body Article 2 matches the meaning of a specific life with surrounding legal rules, moralities and political climate, etc. Given the fact that there is already an inbuilt space to orient the government of lives to such variables, it becomes difficult to see Article 2 as operating like a structural automaton that produces similar results with similar inputs. It is therefore important to look at the fact, also pointed out in *Pretty* (para. 26), that several European countries permit voluntary euthanasia and assisted suicide. Importantly, it is neither the legalization nor the criminalization of assisted suicide that contravenes Article 2. Thus, Article 2 draws broad but nevertheless strict limits on the permissible within which specific legislating states can operate and within which they are given a space to orient their law in line with their specific societal evolution without in turn violating the substantive provisions of the right to life.

Thus, Article 2 incorporates difference only by delimiting the prior shape of acceptable differences. In order to look at this point legalistically, one can note different governmental dynamics operative under different regimes. In those countries where euthanasia is permitted, the governmental problematic is to supervise closely the medical and hospital practices, determine the form of legally acceptable consents to terminate lives, identify the possible stakeholders that are to be engaged with in the end-of-life decisions, redraw criminal codes, preempt and account for potential negligence and malpractice, identify in what manner clinicians are to give larger doses to the patients, ensuring slower and painless transition towards death, and draw out the list of diseases where euthanasia is permissible, among others.

In those countries where euthanasia is not permitted, the governmental problematic is to provide psychological care and therapy to incurable patients, determine the way their expenses are to be allotted to hospitals, prevent criminal 'private' practices to the contrary, arrange for the methods falling in line with honourable deaths, and insert the prolonged sustenance of lives and their traumatic ends as categories into the health insurance framework, among others. In both cases, Article 2 regulates the situations in such a way that its legal dictates are not violated. The strength of the right to life is to turn all those specific variables with which a life is connected, such as, for example, life-saving machines, artificial feeding tubes, medical care services, and hospital regulations, into a question of Article 2. Therefore, all these variables can be contested in terms of Article 2, even when they do not flow from it.

Therefore, the right to life not only addresses deprivation or protection of lives but also their optimization. Then, the role of Article 2 is appreciable only in an overall 'politics of life' that orients government

techniques to lives in view of subjects' human rights. We can return to *Pretty* for this point. It is correct to say that it is the concern of life itself which cannot allow Article 2 to be interpreted as 'conferring on an individual the entitlement to choose death rather than life' (*Pretty*, para. 39). Nonetheless, so far as the jurisprudence of Article 2 is concerned, it can become problematic for the positive obligations of states if they palpably fail to provide life-saving facilities to its populace, since the right to life requires that the states 'take appropriate steps to safeguard the lives of those within its jurisdiction' (*L.C.B. v. the UK*, para. 36). It is in this sense that the prior medico-technological infrastructure works as an enabling condition in *Pretty* whose social function, general access, and truth cannot be problematized but only its specific use (c.f. Foucault, 1991: 58).

It means that the right to life requires that there should be an effective system of regulation and control that identifies and forestalls dangers posed to life (*Öneryildiz v. Turkey*, para. 90). Even in those cases where the activities are dangerous, such as, for example, nuclear tests, toxic industrial emissions and urban waste production, Article 2 requires that those unpalatable but permissible activities be constrained through laws. Thus, the state authorities are respectively required to forestall in advance through appropriate mechanisms dangers respectively associated with nuclear testing for military purposes (*L.C.B.*, para. 36), release of toxic emissions (*Guerra v. Italy*, para. 58), and aftereffects of large-scale waste disposal sites (*Öneryildiz,* para. 90). Of course, the success with which authorities are able to guarantee this varies on a case to case basis. In any case, what is important to note is the way the possible margin of error in the provision of such positive obligations also forms a part of the jurisprudence of Article 2.

As examples, one can note here the cases dealing with the negligent practices of health professionals (c.f. *RK and AK v. the UK*, para. 36) or law-enforcing agencies (*Osman v. the UK*). It is because of this complex interconnection of life and law that the right to life only gives the law-enforcing agencies room to wage lawful violence, and not to terrorist groups, as in *Finogenov* or insurgent networks that British troops faced in the post-Saddam Iraq. Then, the room to wage lawful violence is not only reserved for specific historically established nation-states that are politically recognized, but for those political bodies that bear certain administrative structures, the focus of which is on both protection and optimization of life. And it is only because of this capacity in which those states can be held accountable both for inaction (positive obligations) and action (negative obligations) that they are given a margin of discretion in the implementation of human rights, and may be offered a margin of error in certain cases where they legitimately lag lest they be overburdened (*Osman*, para. 116).

If Article 2 orients governmental techniques to lives, this means that an application of Article 2 ties life more bindingly to such regulatory

frameworks. As can be seen in *Pretty*, the legal decision to permit or prohibit euthanasia turns on an analysis of a 'legislative and administrative framework in place' (*Öneryildiz*, para. 72). It not only means that Article 2 works through such a field, but also that the understanding as to what is to be construed by unlawful killing is a function of that framework. Thus, Article 2 requires from the legal guarantor that it put in place an effective 'legislative and administrative framework' (say, police, courts, criminal law) that both establishes deterrence protecting life and lays down the conditions of lawful deprivation of life. Importantly, the effectiveness of such a framework lies in its capacity to attune itself in view of the government of lives, as can be seen in *Finogenov* and *Al-Skeini*, for instance. In sum, the juridical interpretation and application of the right to life produces a differentiated governmental management of life.

§3. Biopolitics Again

This section argues that: 1) The governmental management of life cannot be understood solely in legal terms alone. 2) Any work that focuses on one aspect of biopower (e.g. deprivation) instead of others (e.g. protection, optimization) is vulnerable to producing a uniform narrative not valid for all circumstances. These points are established by focusing on the broader case law of Article 2.

The interrelationship of law and life in the right to life requires that one trace the way the processes of knowledge and modalities of power work on life that goes on to determine the connection of that life with the juridical context. Even if one focuses on law as a vantage point from which to analyse the way subjects are governed, it is important to note that law interpellates itself only by working through a prior field of governmental praxis. In this sense, the legally effective role of Article 2 is to develop mechanisms surrounding those practices (penal and criminal system, the centralization of violence, hospital and health services) that ensure that such governmental praxis stays within the fold of the permissible. This connection of law and governmentality calls for law's coercive capacity in order to ensure that the existing rules are being complied with and that an overall optimum is sustained (Foucault, 2003: 266).

Logically, it is not the meaning of lives that is legal per se (Esposito, 2008: 28); it is their regulation, tied as it is to legal concepts and rules. It means that the governmental practices surrounding different lives operate differently depending on their specific subject positions, such as, for example, incarcerated convict or soldier, war prisoner or on-the-ground combatant, the mentally unstable or terminally ill. Similarly, once legal rules constrain regulatory frameworks in line with their standards, those regulatory frameworks are backed with a threat of legitimate violence.

Importantly, it entails that subjects are neither simply constituted by law (since power is not simply localized as law) nor solely governed by it (since power is diffused). This fact – that law is connected with differential governmental practices which articulate it – makes any ontological interpretation as to the nature of law untenable.[8]

Thus, a repressive hypothesis is unable to theorize the way lives are optimized. True, the right to life does not ban all killings per se. True, it bans only those deprivations of lives that are seen as 'arbitrary' (*McCann*, para. 161). What is, however, important to look at is the way these notions (of protection, preservation, and optimization) are seen as non-arbitrary. Thus, the strength of legal decision-making lies not simply in ensuring that the specific juridical subject who alleges a violation of Article 2 be legally compensated, but that the institutional apparatus of the legal guarantor be reoriented towards the question of life in a manner that it provides for, and intervenes to collectively ensure, the optimization of individual lives. Further, what is one to make of the fact that the right to life orients even those conditions where human life meets its limitations (such as those dealing with finitude, illness, suffering, degeneration, and mortality) to a politics of life? In *Pretty*, for instance, the discourse that enables the termination of life to be spoken of is itself oriented to such a politics: the extent of pain (psychological, emotional, physical) and its unbearableness, alleviation of pain through the end of life, increasing degradation of living circumstances, autonomy over life, the quality and the sanctity of life.

At a general level, this point can be discerned by glancing through the procedural limb of Article 2's interpretative praxis that requires proper and prompt investigations by the authorities following deaths possibly occurring in violation of Article 2. As noted in *Finogenov* and *Al-Skeini*, this exercise requires certain institutional assemblages, truth-establishing procedures, techniques and know-how that are oriented to the question of death. In this sense, it is important not to take the signifiers 'life' and 'death' at face value but to focus on their place in discursive setups – conceptualized as they are in and through 'discourses, decisions, programs, actions' (Fassin, 2009: 48). For instance, the procedural limb of Article 2 elevates death from an event situated in an unpredictable temporal domain to a veritable discursive category that then propels certain techniques to come to the fore, such as that of obtaining truths, dispensing justice, preempting avoidable deaths, identifying efficient mechanisms to end dangerous lives with minimal possible loss to valuable ones, measuring vulnerable social spots and institutional failures, and evaluating the governmental conduct of the state.

What is important is to explore whether such practices are in conformity with the legal standards of rights and then to analyse the manner through which the application of rights functions (e.g. how the spaces of detention are considered as rights-friendly). It can be argued that it is in the phenomenon of 'disappearances', which definitely forms the bulk

of Article 2's caseload, that one can discern the tendency of killing without being sacrificed of those taken away and later killed by state personnel (c.f. Agamben, 1998: 54). Now, it is important to note that the phenomenon of disappearances does not take place through legal mechanisms but through administrative regulations – and in the light of necessities or exigencies of the situation. Nonetheless, if the capacity of the sovereign is thus, why would it want to keep such affairs secret, or put them under circumlocution when critically analysed from the perspective of human rights? It points to a more complicated relationship between law and life at present.

Therefore, to discern a singular paradigm (Agamben, 1998: 117; Mbembe, 2003: 40) is presumptuous, not only because the specific biopolitical techniques have undergone transformation (euthanasia is no longer connected to the purification of race through *Genesung* or the improvement of the life-stock of the population, for instance) but also because different rationales and governmental techniques surround specific biopolitical issues now (as we noted while reviewing the situation where euthanasia was permitted and where it was not).What we need to focus on is the way legal rules connect the diversities of practices to produce their own concrete laws. It is because of this reflexive power that law not only has to respect lives, except in those cases where there are absolute necessities, but the protection of lives also gets connected both to the respect for law and the legal acknowledgement of absolute necessities confronted by the state authorities (as can be seen in *Finogenov*, for instance).

Finally, it must be granted here that there are certain 'risks' in the process through which the guaranteeing of the right to life takes place. The text of Article 2 is itself surrounded by various conditions and exemptions. These are what the right to life already finds life to be in, for example, the unpredictability of human conduct (Article 2(2a)), the penal and criminal system (Article 2(2b)), the monopoly of state violence and the challenges to public order through riot or insurrection (Article 2(2c)), and the necessities of legal emergencies, including the incidence of warfare (Article 15). What Article 2 does is to ensure that the unpredictably of human conduct is tackled with absolute care, the penal and criminal system remains within the threshold of the humane, the monopoly of state violence within that of absolute necessity, and the incidence of warfare within the permissible.

Resultantly, Article 2 enables an apt regulation of violence to which lives are exposed. What makes such a process politically charged is that when these incidences (warfare, emergencies) and processes (penal and criminal system, the political centralization of violence) are constrained within the defined threshold through Article 2 in particular or human rights in general, their existence and occurrences are concomitantly given a token of legitimacy.[9] However, it would be misguided to assert that such risks are paradigmatic of Article 2, since this obfuscates the way this right functions and blurs sociopolitical possibilities. Instead of using

tools that 'describe everything but analyze nothing' (Rabinow and Rose, 2006: 199), what is required is that one focus on practices in a manner that is sensitive to the specific coordinates through which these practices are operative.

Conclusion: Toward biopolitical governmentality

This article has focused on the formal juridical infrastructure of the right to life as it is articulated with modes of governmentality oriented towards life. It argued that the right to life applies universally but not uniformly to all juridical subjects because the content of their legal rights depends on their subject positions and their location in regulatory frameworks. Thus, the right to life draws on governmental practices that tease out various values and utilities of life (Foucault, 1978: 144), and connects these with a concrete legal-political guarantor. With this, an important question comes to the fore: If the right to life functions within and because of a governmental praxis oriented to life, then how should we re-conceptualize the point of coincidence between life and law in specific fundamental human rights (e.g. Nasir, 2015, 2016)?

This requires situating human rights in a 'biopolitical governmentality'. It is biopolitical since the question of *bios* is of interest to human rights as long as its connection can be established with a human. Then, this interest focuses on 'power over man insofar as man is a living being' (Foucault, 2003: 239). It requires analysing differential discursive setups which approach life as an object to make it, say, bearable and productive, support it during vulnerability, constrain its dangerous potential – that is, to study those setups upon whose rationales and tools human rights rely, and the way they are consequently legitimized through the normative instrument of rights. It is governmental because the problems of life and population are posed within technologies of government (Foucault, 2008: 323). Consequently, practices of government 'rationalize' these arts and materialize their objectives (Foucault, 2007: 108). By focusing on human conduct in its various forms, these practices regulate subjects (Foucault, 1983: 341; 2007: 108–9; Dean, 2009: 17–21; Senellart, 2007). Therefore, human rights function by requiring from a politico-legal guarantor that it protect humans by putting in place appropriate regulatory frameworks. The concept of biopolitical governmentality thus focuses on the way normative claims of rights *function*, that is, the way they remain sensitive to the differential meanings accorded to lives and the construction of practices around those lives that consequently makes rights effective.

Talk of biopolitical governmentality notes how rights plug the legal being of a subject into governmental frames (Foucault, 1978: 144). It is so because the guarantee of human rights, such as private life, thought or

belief, and expression, positions those capacities as objects of analysis. Focusing on the way specific human rights are understood is important because, from a legal perspective, talk of human rights does not mean anything substantial if it lacks this specification. Consequently, an effective guarantee of these human rights depends on the way governmental practices place those human aspects in their proper social place. Thus, legal decision-making requires that specific governmentalities be tailored in view of these capacities so that the legal subject who is being managed fits into an autonomous society as a human.

Acknowledgements

I would like to thank Barry Hindess and Ben Golder for their comments and suggestions on an earlier version of this article. Special thanks are due to the four anonymous reviewers and editors of *TCS* for their feedback at every stage of this study.

Notes

1. Focusing on the idea of 'life itself' (the phrase coming from Franklin, 2000, and Rose, 2001), the literature on biopolitics has shifted more to an analysis of the impact of life sciences on living organisms (e.g. Rose, 2006; Rabinow, 1996, 1999). Fassin notes that this is 'one possible exploration of the anthropology of life' (Fassin, 2009: 48). This is because it is not only organic life which is at stake here but also the way life is approached from legal (as that of a juridical subject) and political (as that of citizen and population) perspectives.
2. One can see here, for instance, the important role human rights standards have played in the critical evaluations of the somber situations in, for example, Guantánamo Bay (e.g. HRW, 2008; Amnesty, 2011) and Gaza (e.g. UN, 2009; HRW, 2009a, 2009b; Amnesty, 2009, 2014a, 2014b; B'Tselem, 2015).
3. Thus, the legal application of the right to life does not mean that *everyone* is given a right to *live*. In a legal sense, terrorists continue to possess the 'right to have rights', and it is because of staying within this juridical ambit that their human right to life allows for a justified deprivation of their lives.
4. The fact that legal analysis of this situation only measures the response in line with the standards of Article 2 entails that law cannot account for and consequently legitimize the basis on which the response was made (e.g. the reason that hostage-takers had held out too long, which affected the international prestige of Russia, or that giving in to demands of hostage-takers would establish a dangerous precedent).
5. Although Article 2(1) allows for the death penalty, Article 2 Protocol 6 abolished it during peacetime and Protocol 13 now abolishes it in all circumstances. It needs to be noted, however, that the abolishment of the death penalty *does not mean an abolishment of all lawful deaths*.
6. Since the UK was an occupying power in the aftermath of war, Article 2 could not be invoked by the residents of Basra for, say, provision of a clean environment. Consequently, the level of legal protection varies with political belongingness and the effectiveness of the legal-political guarantor. It is because of this fact that international politics based on human rights focuses

on developing apt legal and political frameworks to guarantee human rights even at times when such a project cannot be justified through the legal standards of human rights (Nasir, 2015a: 1005–11).

7. Therefore, in the discourse on choice and freedom, 'conscience', as a matter of policy, is a construct. This tallies with the fact that 'conscience' chooses certain things and not others, and is aware of the way it has to choose the 'choosable' in a manner that remains politically acceptable. In substance, if not in content, politics (or a certain form thereof) already underpins 'conscience'.
8. While commenting on Tertullian's articulation of monarchy and economy in administration, Agamben (2011) hints at the fact that 'the 'mystery of the economy', interpreted by those very persons who impersonate it and are its actors, 'is not an ontological, but a practical mystery' (pp. 43–4).
9. Somewhat controversially, one can also say that a side effect of putting a certain 'ethic' on these processes and events may even work to regularize them (e.g. Schmitt, 2007: 54; Asad, 2003: 116).

References

Agamben G (1998) *Homo Sacer: Soveriegn Power and Bare Life*. Stanford: Stanford University Press.

Agamben, G (2005) *State of Exception*, Attell K (trans). Chicago: University of Chicago Press.

Agamben G (2011) *The Kingdom and the Glory: For a Theological Genealogy of Economy and Government*. Stanford: Stanford University Press.

Alexy R (2010) *A Theory of Constitutional Rights*, Rivers J (trans). Oxford: Oxford University Press.

Amnesty (2009) Demand dignity: Troubled waters – Palestinians denied fair access to water. *Amnesty International,* 27 October. Available at: http://www.amnestyusa.org/pdf/mde150272009en.pdf (accessed 7 February 2015).

Amnesty (2011) USA: Guantánamo: A decade of damage to human rights and 10 anti-human rights messages Guantánamo still sends. *Amnesty International,* 16 December. Available at: http://www.amnesty.org/en/library/asset/AMR51/103/2011/en/43fe877f-92c6-44b8-ad3e-4840db5d0852/amr511032011en.pdf Amnesty (accessed 8 February 2015).

Amnesty (2014a) Families under the rubble – Israeli attacks on inhabited homes. *Amnesty International,* 5 November. Available at: http://www.amnestyusa.org/sites/default/files/familiesundertherubble.pdf (accessed 7 February 2015).

Amnesty (2014b) Israel and the Occupied Palestinian Territories: 'Nothing is immune': Israel's destruction of landmark buildings in Gaza. *Amnesty International,* 9 December. Available at: http://www.amnesty.org/en/library/asset/MDE15/029/2014/en/469b8cd3-f2b3-4d3e-ad5b-bb7d2c1e4f20/mde150292014en.pdf (accessed 8 February 2015).

Arendt H (1973) *The Origins of Totalitarianism*. London: Harcourt Brace and Co.

Asad T (2003) *Formations of the Secular: Christianity, Islam, Modernity*. Stanford, CA: Stanford University Press.

B'Tselem (2015) Black flag: The legal and moral implications of the policy of attacking residential buildings in the Gaza Strip, summer 2014. *B'Tselem – The Israeli Information Center for Human Rights in the Occupied Territories,*

January. Available at: http://www.btselem.org/download/201501_black_flag_eng.pdf (accessed 8 February 2015).
Danchin P and Forman L (2002) The evolving jurisprudence of the European Court of Human Rights and the protection of religious minorities. In: Danchin P and Cole E (eds) *Protecting the Human Rights of Religious Minorities in Eastern Europe*. New York: Columbia University Press, pp. 192–221.
Dean M (2009) *Governmentality: Power and Rule in Modern Society*. London: Sage.
Dworkin R (1994) *Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom*. New York: Vintage.
Esposito R (2008) *Bios: Biopolitics and Philosophy*, Campbell T (trans). Minneapolis: University of Minnesota Press.
Fassin D (2009) Another politics of life is possible. *Theory, Culture & Society* 26(5): 44–60.
Foucault M (1978) *The History of Sexuality Vol I: An Introduction*, Hurley R (trans). New York: Pantheon.
Foucault M (1983) Afterword: The subject and power. In: Dreyfus H and Rabinow P (eds) *Michel Foucault: Beyond Structuralism and Hermeneutics*. Chicago: University of Chicago Press, pp. 208–228.
Foucault M (2000) The risks of security. In: Faubion J (ed) *Power: The Essential works of Michel Foucault, 1954–1984*. New York: New Press, pp. 365–381.
Foucault M (2003) *'Society Must Be Defended': Lectures at the Collège de France, 1975–76*. New York: Picador.
Foucault M (2007) *Security, Territory, Population: Lectures at the Collège de France, 1977–1978*. Basingstoke: Palgrave Macmillan.
Foucault M (2008) *The Birth of Biopolitics: Lectures at the Collège de France, 1978–1979*. Basingstoke: Palgrave Macmillan.
Franklin S (2000) Life itself: Global nature and the genetic imaginary. In: Franklin S, Lury C and Stacey J (eds) *Global Nature, Global Culture*. London: SAGE, pp. 188–227.
Habermas J (2001) *Die Zukunft der menschlichen Natur: Auf dem Weg zu einer liberalen Eugenik?* Frankfurt: Suhrkamp Verlag.
HRW (2008) Locked up alone: Detention conditions and mental health at Guantánamo Bay. *Human Rights Watch,* June. Available at: http://www.hrw.org/sites/default/files/reports/us0608_1.pdf (accessed 7 February 2015).
HRW (2009a) Rain of fire: Israel's unlawful use of white phosphorous in Gaza. *Human Rights Watch,* March. Available at: http://www.hrw.org/sites/default/files/reports/iopt0309web.pdf (accessed 7 February 2015).
HRW (2009b) Precisely wrong: Gaza civilians killed by Israeli drone-launched missiles. *Human Rights Watch,* June. Available at: http://www.hrw.org/sites/default/files/reports/iopt0609web_0.pdf (accessed 6 February 2015).
Mbembe A (2003) Necropolitics. *Public Culture* 15(1): 11–40.
McMahan J (2002) *The Ethics of Killing: Problems at the Margins of Life*. Oxford: Oxford University Press.
Nasir MA (2015a) Between the metropole and the postcolony: On the dynamics of rights' machinery from the northwestern tribal belt to the 'mainland' Pakistan. *Environment and Planning D: Society and Space* December: 1003–1021.

Nasir MA (2015b) Governing (through) religion: Reflections on religion as governmentality. *Philosophy & Social Criticism*, 15 June.
Nasir MA (2016) Weighing words: On the governmentality of free speech. *Social and Legal Studies* February: 69–92.
Rabinow P (1996) *Making PCR: A Study in Biotechnology*. Chicago: University of Chicago Press.
Rabinow P (1999) *French DNA: Trouble in Purgatory*. Chicago: University of Chicago Press.
Rabinow P and Rose N (2006) Biopower today. *BioSocieties* 1(2): 195–217.
Raz J (2012) Death in our life. *Social Science Research Network,* 28 May. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2069357 (accessed 5 February 2015).
Rose N (2006) *The Politics of Life Itself: Biomedicine, Power, and Subjectivity in the Twenty-First Century*. Princeton: Princeton University Press.
Schmitt C (2007) *The Concept of the Political*, Schwab G (trans). Chicago: University of Chicago Press.
Senellart M (2007) Course context. In: Foucault M (ed) *Security, Territory, Population: Lectures at the Collège de France 1977–1978*. New York: Picador, pp. 369–402.
Therborn G (2001) Europe's breaks with itself: The history, modernity, and the world future of Europe. In: Cerutti F and Rudolph E (eds) *A Soul for Europe: On the Cultural and Political Identity of the Europeans*, Vol. II. Leuven: Peeters.
UN (2009) Human rights in Palestine and other occupied Arab territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict. *UN – Office of the High Commissioner for Human Rights,* 25 September. Available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf (accessed 7 February 2015).

Muhammad Ali Nasir is a doctoral candidate of political theory at the University of Heidelberg in Germany. His doctoral work analyses European human rights law from the perspective of governmentality. His recent publications include 'Droning, zoning and organizing: Kafkaesque reflections on the nomos of the earth in the north-western tribal belt of Pakistan' (*Space & Polity*) and 'Reading Malir Cantonment in Karachi, Pakistan: Some notes on residential barracks and spatial dynamics' (*Contemporary South Asia*).