

THE RIGHT TO LIFE GUARANTEED BY THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND IT'S EXCEPTIONS

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Abstract in original language

The dogma of human rights is the articulation in the public morality of world politics of the idea that each person is a subject of global concern. The article that follows this short introduction aims to explain the importance of the ultimate human right, the right to life and the very topical issues of the exceptions to the right to life protected by the European Convention for the protection of Human Rights and Fundamental freedoms. Hopefully I will reveal that a violation of the supreme right makes a fallacy the recognition of the other rights. De lege ferenda concrete steps need to be made as more and more complicated issues are likely to appear now days.

Key words in original language

Human rights; the right to life; euthanasia; abortion; use of force; the European Convention for the protection of Human Rights and Fundamental freedoms; the European Court of Human Rights.

1. SITUATING THE RIGHT TO LIFE WITHIN FUNDAMENTAL RIGHTS.

From the standpoint that human rights are a matter of internal legislation, human rights law has extended internationally becoming “a fact of the world” in order to assure democracy, international security and peace. Human Rights are the fundamental rights which are pre-eminent in all European systems of law, whether under Council of Europe or the European Union.

When fighting for the rights of black people in the U.S.A Martin Luther King was promoting all over the planet non-discrimination, “An injustice anywhere is a threat to justice everywhere” he said. “The building of Human rights is one of the foundations stones on which we will build in the world an atmosphere in which peace will grow”, Eleanor Roosevelt stated when talking about the Universal Declaration of Human Rights (hereinafter referred to as the “Universal Declaration”).

Therefore, for the promote and respect of Human Rights treaties and convents were adopted in the world to assure that human rights violations such as occurred in Nazi Germany will never repeat. But equally and less happily 60 years after the liberation of the Nazi death camps and 30 years

after the Cambodian killing fields, the promise of never again is ringing hollow. However, the public discourse of peacetime global society has a common moral language which is that of human rights.

The first and primary right of a human is the right to exist. The connections between law and life are indisputably, and crucially, rooted in the fundamental rights that a national constitution translates into positive law. Yet the right to life raises a torrent of doctrinal discussions. Which human beings have the right to exist? Does the right apply only to those who are consciously capable of asserting it? Or may a person's exercise of the right be asserted by a representative person or body? If a right, is it an absolute one, or must it be reconciled with other rights of equal value? The texts of national constitutions offer little help on these questions: at best they lay down the principle that there is a right to life, without really explaining what it means. In practice, interpreting the scope of the right to life is left to constitutional or international courts.

If *de iure* all human rights are equivalent because of their nature, is not less true that *de facto* some appear less important than the others. However, this doesn't have to lead to the minimising of the other rights guaranteed by the Convention on Human Rights and fundamental Freedoms (hereinafter referred to as the "European Convention"), but this reality can't be hidden.¹

The rights of each individual depend on the existence of the biological process that is life. Human rights pertain both to humanity and to real individuals sustained by the life process. The right to life is thus intended to protect the biological process that is a precondition of existence for the individual who possesses rights and freedoms. In this sense we must consider the right to life to be the primary right of every human being.

In my approach I intend to expand and extend the understanding of the right to life because there exists a paradox when dealing with intangible rights and alleviations are evoked which *a priori* lead to antinomy.

The Council of Europe decided to adopt an instrument that makes binding the rules stated by the Universal Declaration, since that document was a declaration and therefore not legally binding, for the member states. The European Convention came into force in 1953 after it had been ratified by the necessary number of states required for it to do so. From its initiation, the European Convention has had more practical effect than the Universal Declaration or the other regional conventions, largely due to the European Court of Human Rights (hereinafter referred to as the "European Court") power to award damages to plaintiffs, as well as the need of member states

¹ For a thoroughgoing study of the issue regarding a hierarchy of human rights see: J. F. Renucci, *European Human Rights*, Hamangiu Publishing, 2009, Bucharest, p. 83-85.

to reform their legislation to retain membership of the Council when found in breach of the Convention.²

The European Convention is not only intended to harmonize the European standards with the national ones, but also to perform a specific function of legitimization. It comes closer to making clear what the actual content of the right to life, where it has a substantive meaning, actually is. In the same context, the European Court has shown that unlike the classic type of international treaties, the European Convention includes not only simple mutual commitments of the contracting States, but creates objective obligations which, under the Preamble, benefits from a collective guarantee. Hopefully after the European Court of Justice has effectively incorporated the provisions of the Convention into European Union law, giving them added impact on those states who are members of both the Union and the Council, it will bring even more effectiveness through case law.

Dicționar - Afișaji dicționarul detaliat

verb

minimaliza

reduce la minimum

diminua

It is placed in the first substantive article that: ‘Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally...’ There was, until recently, only one justiciable, negative right, meaning to the right to life, which was to control or ban the use of capital punishment. Any other meaning of the right to life made it some form of positive right exhortation to the state to do everything in its power to protect the supreme right, even with exact exceptions who are made for protecting the right to life even if it authorizes the use of lethal force. The way in which the right is formulated is extremely important, particularly in the light of current debates about protection of the human embryo and about euthanasia. It can exist either as a right possessed by the individual, or as a duty, incumbent on public authorities, individuals or both, not to seek to harm life.

² This was particularly the case with Central and East European countries where the national constitutional courts found it extremely helpful that they could buttress their own civil rights decisions with reference to the need to show compliance with the Convention to gain international respectability and, even more, to secure admittance to the European Union;

Together with article 3 which prohibits torture the European Court notes that article 2 enshrines one of the basic values of the democratic societies making up the Council of Europe. The circumstances in which deprivation of life may be justified must therefore be strictly construed. The Court also emphasizes the article's importance by saying that when confronted with a case where an applicant alleges a breach of the right to life, the Court must subject allegations of breach of this provision to the most careful scrutiny.

Thus, a violation of the right to life, a right from which all other rights flow, makes a fallacy the recognition of the other rights. In this sense, we must consider the right to life to be the primary right of every human being and thereto the interdictions consecrated by the European Convention must be considered major, because of their nature and importance in protecting and promoting the right to life in Europe. In the case *Pretty v. the United Kingdom* the Court says that "without life, one cannot enjoy any of the other rights set out in the Convention"³. In this context, the European doctrine says that the right to life is a absolute right, opposable erga omnes. Using even more evocative language, the Hungarian Constitutional Court has, indeed, described it as 'the Mother Right', the one from which others can be deduced.

2. THE RIGHT NOT TO BE DEPRIVED OF LIFE. DEATH PENALTY REGLEMENATION

Initially the interpretation of the right to life was somehow simplistic and consisted in the right not to be deprived of life, this meaning the protection of the individual's life against potential assaults on it. In essence this involved criminal-law prohibition of murder and prohibition of the death penalty.

Nearly all liberal democracies have abolished the death penalty immediately after World War two and Central and Eastern European (CEE) nations becoming democracies also have done the same since the end of the Cold War.⁴ Arguably the CEE states had no choice, given that they all sought membership of the Council of Europe and becoming a member supposed to

³ The European Court of Human Rights, case of *Pretty v. the United Kingdom* 29 April 2002; This argument can also be seen in the case *The European Court of Human Rights, case of Kasa v. Turkey* 20 May 2008;

⁴ In the case of Hungary the court rushed to make its decision ahead of the Council membership date because it was so determined to demonstrate the new civic values of the transition;

adopt the European Convention which effectively requested the ban of a arbitrary execution.⁵

The final part of paragraph 1 of the 2nd article of the European Convention prohibits the death penalty with some exception: “save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law”.

Something that is important about article 2 paragraph (1) is that the Court which sentences a person to death shall be independent and impartial.⁶ Besides the fact that the death sentence must be prescribed in the domestic law of the state in question, the character of the Court which convicts the person must be in line with article 6 (1) of the Convention, which states the right to a fair trial. It is also stated by the Court that “the most rigorous standards of fairness can be observed in the criminal proceedings”. The demand for the death penalty to be stated in the domestic law of the state in question also means that the law has to be accessible and foreseeable to the public. Apart from the fact that the right to life is protected by the Convention as mentioned above, it is also established from article 15 (2) that states are not allowed to derogate from that right:

“No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision”. *Ascultați Citiți fonetic*

Therefore we can also interpret that what Protocol no. 6 is permitting under article 2, the abolition of the death penalty in peace time:

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

There is another additional protocol of the European Convention, relatively new, signed at Vilnius in 2002 which also regulates the prohibition of the death penalty, Protocol no. 13 concerning the abolition of the death penalty in all circumstances, its article 1 making it clear:

⁵ Acceptance of the Convention, of the jurisdiction of the European Court in interpreting it, and of the right of individuals to petition the ECHR for protection, are now obligations of membership in the Council. Virtually all member states have incorporated the Convention into their domestic law so their own courts can apply it where an individual claims a breach of one of the rights it contains.

⁶ The European Court of Human Rights, case of *Öcalan v. Turkey* 12 May 2005, p. 32 para. 166.

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

In Europe considerable progress in a short period of time has been made in the issue regarding the death penalty, nevertheless in the world there still are a bunch of states, even democratic ones, who still permit death penalty. Their internal high rate of criminality being the primary argument at the moment seems like a good alternative in fighting criminality. But at international level the reality of juvenile death penalty persists, which is not an European issue but a vexatious one for each human, even if the juvenile death penalty is prohibited under international law and the prohibition is absolute. The Convention on the Rights of the Child, to which all those who infringe it⁷ are parties, prohibits capital punishment for individuals who were under 18 at the time of the crime.

3. THE RATHER NEW CONCEPT OF LIFE

At a later stage, biomedical intervention in life processes occasioned a radical rethink. More recently, the right to life has come to encompass the conditions applying to scientific and medical intervention in the creation, development or interruption of the life process itself. Human life is no longer simply a reality that the law sets out to protect; is also an artifact requiring rules and regulations to govern what people do with it and to it. Those rules are currently as likely to be made by ethics committees as by parliaments or regulatory authorities.

The questions now are where life begins and ends, and how much control the individual is allowed over his or her own life, or the life of another person, in the context of scientific or medical intervention on human beings.

There so on one hand is a personal right as it has enforceability, meaning that right-holders can assert a claim in protecting it, seek satisfaction of it, before a court.

The right to life cannot be made conditional, being a inherent right; it cannot be made dependent on factors such as nationality, behaviour or state of health.

On the other hand is a non-personal right where its purpose is protecting the human embryo or foetus. The European approach, based essentially on the concept of seeking a balance between protection of the embryo's life and respect for the mother's freedom, is, however, less protective of human embryos outside the mother's body.

⁷ Recent cases in: Iran, Saudi Arabia and Sudan;

3.1 THE RIGHT TO LIFE PRIOR TO BIRTH. ABORTION.

Furthermore is important to elevate a few issues regarding the right to give life, which may take the direct form of an individual right of access to procreation technology.⁸

Beginning with the beginning is important when talking about abortion in order to understand the meaning of it. „Everyone's right to life shall be protected by law.” Why was the ‘everyone’ term used? It also includes an unborn child? The status of the unborn child was raised, but remained unresolved before the European Commission of Human Rights.

The right to inherit is notably attributed to the conceived but unborn child the Commission concluded. In an application from the United Kingdom, which concerned the Abortion Act 1967, the commission observed that the term ‘life’ may be subject to different interpretations in different legal instruments, depending on the context in which it is used. The general usage of the term ‘everyone’ in the convention tends to support the view that it does not include the unborn. The limitations, in paragraphs (1) and (2) of the European Convention, of ‘everyone’s’ right to life, by their nature, concern persons already born and cannot be applied to the foetus. The authorization, by the United Kingdom authorities, of the abortion complained of was compatible with Article 2 paragraph (1) of the Convention, ‘because, if one assumes that this provision applies at the initial stage of pregnancy, the abortion is covered by an implied limitation, protecting the life and health of the woman at that stage, of the “right to life” of the foetus’.

The reluctance of the European Commission to offer an authoritative answer to the question when life begins is probably due to the wide divergence of thinking that exists within Europe on this matter. While some believe that life begins with conception, others tend to focus upon the point when the foetus becomes ‘viable’, or upon live birth.

At a European level with the notable exception of Ireland, article 40 of the Irish Constitution which acknowledges the right to life of the unborn, and Slovak Republic, article 15 of the Constitution which includes the provision “Human life is worthy of protection even prior to birth”, Europe’s legal systems do not recognise the embryo as a person capable of holding rights, regarding it, rather, as a constitutionally protected “object” or, more properly, the object of constitutional protection.

⁸ For a thoroughgoing study regarding the right to life prior to birth see B. Mathieu, *The Right to Life*, Council of Europe Publishing, Belgium, 2006, p. 106-113;

Like the Austrian Constitutional Court has ruled the right to life can be guaranteed only from birth onwards, basing this view on the article 2 of the European Convention.

Looking at the E.U.'s principal act in this matter, the European Union Charter of Fundamental Rights we can conclude that it doesn't protect the life of the foetus or embryo as such, in that it ascribes the right to life simply to "everyone" rather than "all human beings".

One of the arguments is also that even if the right to life not imply a individual right to do with one's life as one pleases, abortion cannot be seen as a right to destroy the embryo carried by the pregnant woman. Here, protection of the mother's freedom as an individual, understood to include the right not to undergo the excessive constraint of an unwanted pregnancy, is weighed against protection of the embryo's life, and is deemed to justify decriminalising abortion in certain circumstances, relating to the length of the pregnancy, the condition of the foetus and so on.

Even if regarded with reluctance by a majority of religious faiths abortion was not generally made a criminal offence in most jurisdictions until the 19th century, in part because it was dangerous for the woman that, before the advent of modern medicine, it hardly presented a serious threat to the prevailing moralities.

Most Western societies began to liberalize their abortion laws from the 1960s onward. Some countries, most notably the Republic of Ireland and Germany, have not followed the trend to legalize abortion.

The German Constitutional Court's repeated striking down of legislative attempts to legalize abortion is the only example, to date, of a country where such action has been taken on the grounds that abortion is forbidden by its equivalent of a bill of rights. In countries where a justiciable bill of rights exists, abortion has inevitably become a matter for intense legal conflict, because such lists of rights almost inevitably contain, explicitly or by implication, two core values which conflict in the case of abortion; there is, at the same time, a form of a right to life applicable to the foetus, and also some version of a right to privacy, to self-determination or to the inviolability of the person on the part of the mother. Thus courts have been forced into choosing between irreconcilable values.

There is probably no country where abortion is effectively absolutely forbidden on any ground at all, including that of saving a woman's life, and the actual debate over abortion rights is really about the extent to which, and the reasons for which, abortions may be controlled by the state. While countries vary widely in their legislation, there are common fundamental issues. These questions concern the stage of pregnancy at which the state may impose controls in the interests of the woman's health, the stage at which a foetus becomes viable, most intensely focusing on the issue of the

right to life, and also whether or not the doctor has a duty to counsel against abortion on the grounds either of morality or of the woman's psychological health.

Even in Germany, the ban on abortion is of this nature; there and elsewhere, constraints tend to be not only about the conditions under which abortion may be permitted, but also the exact way in which the legal system will characterize abortion. Germany, for example, insists on continuing to regard abortion as a crime, but one which will not usually be punished. Elsewhere, Spain being a good example, constitutional courts have placed the right to abortion under quite restrictive conditions, often because it was politically possible neither to ban it completely nor simply to permit it.

The problem abortion presents for constitutional law in many countries is that, while women's rights to control over their bodies has to be inferred from rather vague constitutional guarantees of autonomy or privacy, the right to life is usually much more clearly written down. Thus, if a foetus is to be regarded as 'alive', abortion becomes a question of balancing two rights against each other, and not a simple question of whether the state can control a woman's pregnancy. Extremely subtle doctrinal arguments have been made, one of the most complex being in Hungary, to establish both that the state must protect all life, including in some sense foetal life, but to 'balance' this against women's rights.

3.2 THE ACT OF EUTHANASIA. A RIGHT NOT TO LIVE?

Defined as causing the death of a seriously ill or dying person, undeniably infringes the principle that killing is prohibited. The fact that the person killed has consented to, or more precisely, requested death, may be accepted as justifying the lethal act in certain circumstances.

Whether carried out in a public institution or authorised by the law in a private institution, euthanasia constitutes an attack on life by, or under the supervision of, the public authorities. It thus falls directly within the scope of Article 2 of the Convention and it not only recognises the right to protection of life as a personal right but also places an objective legal prohibition on intentional killing. Thus, for the purposes of the Convention, the "victim's" consent or request does not justify any exception to the rule. Nor is euthanasia covered by any of the exceptions set out in Article 2 Paragraph (2) of the Convention.

The question is framed differently, however, this if it is addressed in the light of a document such as the European Union Charter of Fundamental Rights that confines itself to recognition of the personal right to life. The very few relevant constitutional-court judgments support the ban on euthanasia on the ground that it constitutes a violation of the basic prohibition on intentional killing. The European Court, however, probably in response to legislative developments in some European countries, is

beginning to move away from that approach. In effect, the question now being asked concerns the existence of a right to death.

Two imperatives come into play in relation to euthanasia: the individual's right to self-determination and the prohibition on killing. We need to draw a distinction here between, on the one hand, the patient's refusal of treatment, which represents the exercise of personal freedom, though it may conflict with the doctor's duty to protect life; and, on the other, a potential recognition of the patient's right to have his or her life ended, which conflicts with the prohibition on killing that doctors are bound to observe.

The decision of the German Federal Administrative Court suggests that the practice of euthanasia (i.e. mercy killing of one individual by another) is incompatible with a human being's inherent right to life. Protagonists of euthanasia, however, argue that existence in a persistent vegetative state is not a benefit to a person suffering from a terminal illness.

The main principles invoked in rulings on these issues are those of dignity and freedom, but there has been some ambiguity in their application. No legal system gives individuals a general right to have themselves killed. While suicide falls within the sphere of personal autonomy and freedom, it also cannot be regarded as a right.

Recourse to active euthanasia depends on a medical diagnosis and a medical decision that the patient is suffering from a serious and incurable illness that threatens his or her life. The primary assessment of the situation is thus that of a doctor and the concern is not the will of the patient but rather an objective evaluation of his or her condition. Only in the context of all this can a doctor comply with a patient's wish. From that perspective, euthanasia might be seen as an exceptional right accorded to doctors to cause death in circumstances where the patient's condition justifies it and the patient requests it.

In practice, the first judgment in which the European Court took a position on the question of active euthanasia was in the case of *Pretty v. United Kingdom* of 29 April 2002. The applicant was a paralysed woman suffering from an incurable degenerative disease. The court stated it was "not persuaded that 'the right to life' guaranteed in Article 2 could be interpreted as involving a negative aspect" – that is, a right not to live. It therefore concluded that there was no right to die, whether at the hand of another person or with assistance from a public authority. In support of its findings it cited Recommendation 1418 (1999) of the Parliamentary Assembly of the Council of Europe. A key consideration here is the fact that Article 2 of the European Convention, with certain explicit exceptions, prohibits all intentional killing. Citing a "soft-law" document, the court declared it was not persuaded that an individual could be killed outside these explicit exceptions. It thus accepted that the provisions of other international

agreements might be taken into account as possible grounds for non-observance of the Article 2 prohibition.

4. THE LEGAL EXCEPTIONS PROVIDED BY THE EUROPEAN CONVENTION

Like it was mentioned above the right to life is an inherent right, the use of the term ‘inherent’ is intended to emphasize the supreme character of the right to life: a right which is not conferred on the individual by society or by the state, but which inheres by reason of one’s humanity. It follows, therefore, that one’s right to life cannot be taken away by the state or waived, surrendered or renounced by him, since a human being cannot be divested, nor can he divest himself, of his humanity.

Nevertheless, not all violence on the part of public authorities are unlawful. Paragraph (2) of Article 2 of the Convention is quite precise on this point. It states that deprivation of life may result “from the use of force which is no more than absolutely necessary:

in defence of any person from unlawful violence;

in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

in action lawfully taken for the purpose of quelling a riot or insurrection”.

The acts involved in these cases are of various types. Firstly there are acts which, while lawful in themselves, were accompanied by violence that caused death. An individual’s expulsion from a country is an example. In such cases, even though the act that was accompanied by violence is lawful, the violence is not necessarily so. In other scenarios, violence, such as the use of firearms, may be lawful but the circumstances in which death was inflicted may be judged to constitute infringement of the right to life. In a third type of case, where other requirements take precedence over the right to life, the lethal act is deemed to be permissible.

The tool used to distinguish between a lawful and an unlawful attack on life is the principle of proportionality. Thus, for example, ruling in a case concerning refusal to release a prisoner suffering from a serious and incurable illness, the Spanish Constitutional Court took into consideration both the nature of the threat to the prisoner’s life and the public-security requirements potentially justifying his continued imprisonment.

Constitutional court rulings on these questions and doctrine explanations have been given numerously.

Furthermore, a decision of the European Court of Human Rights *Kaya v. Turkey* from 19th February 1988:

“The applicant, Mr Mehmet Kaya, a Turkish national, was born in 1949. His brother, Mr Abdülmenaf Kaya, was killed on 25 March 1993 in the vicinity of Dounay village in the district of Lice, south-east Turkey. The applicant and the Turkish Government provide different accounts of the circumstances surrounding Mr Abdülmenaf Kaya’s death. The applicant claims that Mr Abdülmenaf Kaya, while unarmed, was shot dead by soldiers of the Turkish security forces, after which the soldiers planted a Kalashnikov assault rifle on his body. The government claims that on the day in question the soldiers came under fire from members of the PKK. They returned fire and following the gun battle a body was found with a rifle beside it.

The same day a District Government Doctor and the Public Prosecutor for Lice were flown to the scene of the incident by helicopter. After conducting an external examination of the body at the place of the incident the doctor drew up an on-the-spot report concluding that the cause of death was cardiovascular insufficiency as a result of the wounds caused by firearms. It was in his view neither necessary nor practical to carry out a full autopsy. It appears that the Public Prosecutor of Lice initiated a preliminary investigation. However, on 20 July 1993, he issued a decision of non-jurisdiction and transferred the case file to the Public Prosecutor of the Security Court of Diyarbakir State. The case is apparently pending before that court as well as before the Lice Administrative Board.

The Court recalled its settled case-law to the effect that the establishment and verification of the facts are primarily a matter for the Commission. In the instant case there were deeply conflicting accounts of the circumstances in which the victim was killed. The Court noted that the Commission’s fact-finding had been seriously hindered by the failure of the applicant and of an alleged key eyewitness to testify before the Commission’s Delegates at the hearing of witnesses in Diyarbakir. While the Court expressed a number of doubts about the credibility of the government’s account of the killing, it considered nevertheless that there was an insufficient factual and evidentiary basis on which to conclude that Abdülmenaf Kaya was, beyond reasonable doubt, intentionally killed by the security forces in the circumstances alleged by the applicant.

The Court recalled that Article 2 of the European Convention requires by implication that there should be some form of effective official investigation launched when individuals have been killed as a result of the use of force by agents of the state. It noted in the instant case that the death of the applicant’s brother could not be considered a clear-cut case of lawful killing by the security forces having regard to the fundamentally divergent accounts of what happened on the day in question. It rejected the government’s contention that it had only been necessary to comply with minimum formalities in order to dispose of the case. The Court considered that the investigation undertaken by the authorities was seriously deficient in regard

to the forensic examination, the autopsy and the attempt to take any concrete steps thereafter to investigate the circumstances surrounding the killing. The Court was struck in particular by the fact that the Public Prosecutor appeared to take it for granted that Abdülmenaf Kaya was a terrorist who had been killed while taking part in an attack on the soldiers. The Court concluded that neither the presence of armed clashes in the region nor the high incidence of fatalities can displace the obligation under Article 2 of The European Convention to ensure effective investigations into deaths arising out of armed clashes with security forces. The authorities had failed to comply with this obligation in the present case. The European Court accordingly concluded that there had been a violation of Article 2 of The European Convention”.

5. CONCLUSIONS

It's very important to give real meaning to the principle of responsibility in order to protect human rights. The respect for national sovereignty has no longer to be used as an excuse for inaction in face of so much violence's of the human rights. And De lege ferenda concrete steps need to be made as more and more complicated issues are likely to appear now days.

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