Anja Krasser*

Compulsory Vaccination in a Fundamental Rights Perspective: Lessons from the ECtHR

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Abstract: The multiple COVID-19 vaccines developed over the past months are typically thought of as the only means to meet the challenges posed by the current pandemic. Still, public opinion on vaccines is heavily divided. And, of course, discussions about compulsory vaccination, oftentimes based on fundamental rights arguments, tend to become heated. This note¹ analyses the issues at hand based on the case law of the European Court of Human Rights (ECtHR).

Keywords: compulsory vaccination, Human Rights, European Convention on Human Rights, European Court of Human Rights, COVID-19

1 Introduction

When the case of *Vavricka v Czech Republic* was brought before the ECtHR in 2015, the significance of the Court's assessment of the case could not have been foreseen. Parents in the Czech Republic had refused to have their children vaccinated for various reasons, including their religious reservations, and were punished with either fines or exclusion from kindergarten.²

Today, more than five years later, COVID-19 has a firm grip on Europe and the world. Even before breakthroughs in vaccine development were achieved, there were discussions about whether vaccinations would or should be made

1 This note builds on the arguments developed in the author's master thesis Anja Krasser, 'Die grundrechtliche Zulässigkeit einer Impfpflicht in Österreich' (Universität Graz 2019) which have previously been summarized in Anja Krasser, 'Zur grundrechtlichen Zulässigkeit einer Impfpflicht' (2020) 2020/206 RdM 136.

2 *Vavricka v Czech Republic* App no 47621/13 (ECtHR, 8 April 2021).

***Corresponding author: Anja Krasser**, Research and Teaching Fellow, University of Graz, REWI Graz Faculty of Law Graz, Austria. E-mail: anja.krasser@uni-graz.at. The author acknowledges the financial support by the University of Graz.

compulsory.³ Opponents of (compulsory) vaccination often cite 'fundamental rights' as the basis for their stance.⁴

But what do 'fundamental rights' - or rather: what does the ECtHR as the final European authority on the common European body of fundamental rights – have to say about compulsory vaccination? This note aims to provide a brief survey of the Court's case law with regard to compulsory vaccinations, including the most recent decision, *Vavricka v Czech Republic*, and thus attempts to serve as a guide when it comes to predicting how the Court might rule on (possible) future cases.

2 What is 'Compulsory Vaccination'?

Unsurprisingly, a vaccination system in which the enforcement of a duty to vaccinate is ultimately ensured by the compulsory administration of the vaccine constitutes 'compulsory vaccination'. However, in most cases, states opt for rather indirect, relative forms of enforcement, which imply negative consequences in the case of the refusal to vaccinate but do not include compulsory administration.⁵ Such indirect means may be fines or the linking of one's vaccination status to the enjoyment of certain (non-essential) services, like preschool, or situations, eg attending a concert. Considering that medical interventions are only to be carried out with the free and informed consent of the person concerned,⁶ it seems appropriate to define every vaccination system that mandates any negative consequence as a result of refusing to carry out a vaccination as 'compulsory

3 See eg Lee Berthiaume, 'Canadians divided over making COVID-19 vaccine mandatory' *National Observer* (28 April 2020) <<https://www.nationalobserver.com/2020/04/28/news/canadians-divided-over-making-covid-19-vaccine-mandatory>> accessed 8 February 2021 or Peter Illetschko and Tanja Traxler, 'Wird es eine Impfpflicht gegen Corona geben?' *Der Standard* (20 March 2020) <<https://www.derstandard.at/story/2000115938976/wird-es-eine-impfpflicht-gegen-corona-geben>> accessed 24 February 2021.

4 Doug Donovan, 'Vaccine Opponents unite around a 'Civil Liberties' Argument on Social Media, Study finds' (2020) <<https://hub.jhu.edu/2020/10/02/anti-vaccine-movement-unites-around-civil-liberties-argument/>> accessed 1 February 2021.

5 See eg Italy or France. Fortunato D'Ancona and others, 'The law on compulsory vaccination in Italy: an update 2 years after the introduction' (2019) 24(26) *Eurosurveillance* 1900371 <<https://www.eurosurveillance.org/content/10.2807/1560-7917.ES.2019.24.26.1900371>> accessed 24 February 2021; Daniel Lévy-Bruhl and others, 'Assessment of the impact of the extension of vaccination mandates on vaccine coverage after 1 year, France, 2019' (2019) 24(26) *Eurosurveillance* 1900301 <<https://www.eurosurveillance.org/content/10.2807/1560-7917.ES.2019.24.26.1900301>> accessed 24 February 2021.

6 Christoph Grabenwarter, *European Convention on Human Rights* (Commentary, Beck Hart Nomos-Verl-Ges 2014) Art 8 para 29.

vaccination' subject to justification, as these consequences can (and are intended to) influence one's decision to get vaccinated. This seems to be in line with the definition of compulsory vaccination underlying the Court's recent decision *Vavricka v Czech Republic*: the Court speaks of 'compulsory vaccination', although the duty cannot be directly imposed, the highest fine for not vaccinating one's child is EUR 400, which can only be imposed once, and the exclusion from educational institutions only concerns preschool, which is not part of the Czech Republic's mandatory education.⁷ In the Court's opinion 'the consequences [of non-compliance] borne by the applicants cannot be meaningfully dissociated from the underlying duty. On the contrary, they flow immediately and directly from the applicants' attitude towards it and are therefore intrinsically connected to it.'⁸ Hence, even if a vaccination is never forcefully administered, the negative effects, arising as a direct consequence of non-vaccination, may limit the ability to exercise fundamental rights and constitute an interference.⁹ However, certain legal consequences interfere more intensely with fundamental rights than others, which is why the choice of these consequences subsequently has an influence on the assessment of proportionality of compulsory vaccination.¹⁰

3 Interferences with Fundamental Rights

In this section, arguments raised against (compulsory) vaccination will be examined with regard to their coverage in the fundamental rights to which they refer. The analysis will focus on the right to life (Article 2 ECHR), the right to respect for private and family life (Article 8 ECHR) and the freedom of thought, conscience and religion (Article 9 ECHR), since the Court and the European Commission of Human Rights, have dealt with alleged interferences with said rights by vaccination in previous cases.¹¹ First, the argument that '[t]he risk of death associated with

⁷ See *Vavricka v Czech Republic* (n 2) para 73 ff.

⁸ Ibid para 259.

⁹ See ibid para 263.

¹⁰ See ibid para 303. For example, the compulsory administration of a vaccine, as an interference with vital aspects of the right to respect for private life, namely with the bodily integrity and the right to self-determination (see 3.2. below), can be considered more seriously than the exclusion of a person from attending an event or the payment of a fine.

¹¹ See eg *Boffa et al v San Marino* App no 26536/95 27 (Commission Decision, 15 January 1998); also, none of the other provisions seem applicable. *A priori*, one could probably still consider examining an interference with the prohibition of torture, but an approved, safe vaccination should not amount to the minimum threshold required by Art 3 ECHR.

vaccinations is high¹², as voiced in *Boffa and 13 others v San Marino*, will be assessed in the light of the right to life. Secondly, various arguments relating to Article 8 ECHR are evaluated, which can essentially be broken down into wanting the state not to interfere with personal decisions because ‘it’s none of its business’.¹³ Lastly, conscientious objection is dealt with, as invoked in *Vavricka v Czech Republic*.¹⁴ In the course of this assessment, the note will also address the question, whether positive obligations concerning vaccinations are to be derived from the existing case law.

3.1 ‘The Risk of Death Associated with Vaccinations is High’

Diseases are part of life. Some, of course, as the current COVID-19 pandemic shows, affect our daily lives more severely than others. Some, again, have lost their terrifying nature mainly because of vaccines.¹⁵ The WHO estimates that vaccinations against diphtheria, tetanus, pertussis, influenza and measles save the lives of up to 3 million people each year.¹⁶ But vaccinations do not offer absolute protection and side effects as well as vaccine-associated deaths, however rare, can occur.¹⁷ It is therefore reasonable to consider whether, and if so how, the right to life addresses such situations.

Article 2 ECHR aims at protecting the life of every human being. The scope of protection encompasses cases with a fatal outcome, but also includes situations in which life was endangered, even if death did not occur eventually. Situations merely endangering health but not life, however, are not covered by the scope of protection of Article 2 ECHR, but by the scope of Article 8 ECHR.¹⁸

¹² Ibid; see also Tara C Smith, ‘Vaccine Rejection and Hesitancy: A Review and Call to Action’ (2017) 4(3) *Open forum infectious diseases* ofx146, 2 regarding the argument that ‘vaccines are “toxic”’.

¹³ This attitude of the opponents of vaccination is also reflected in their emphasis on ‘informed consent’ in their arguments, see Smith (n 12), 1.

¹⁴ *Vavricka v Czech Republic* (n 2).

¹⁵ See eg Centers for Disease Control and Prevention, ‘Diseases You Almost Forgot About (Thanks to Vaccines)’ (8 May 2020) <<https://www.cdc.gov/vaccines/parents/diseases/forgot-14-diseases.html>> accessed 18 February 2021.

¹⁶ World Health Organization, ‘Vaccines and immunization: What is vaccination?’ (2020) <<https://www.who.int/news-room/q-a-detail/vaccines-and-immunization-what-is-vaccination>> accessed 18 February 2021.

¹⁷ Centers for Disease Control and Prevention, ‘Common Questions About Vaccines’ (14 May 2019) <<https://www.cdc.gov/vaccines/parents/FAQs.html>> accessed 18 February 2021.

¹⁸ William Schabas, *The European Convention on Human Rights: A commentary* (Oxford commentaries on international law, first edn, Oxford University Press 2015) 124 ff.

Article 2 ECHR not only obliges states to refrain from lethal acts, it also imposes a comprehensive obligation to adequately protect the lives of those under their jurisdiction — the resulting *positive obligations* require the state to actively do ‘all that could have been required of it to prevent the applicant’s life from being avoidably put at risk’.¹⁹ The extent of the measures that the state ‘could have been expected to take’ is determined by whether the state ‘knew or ought to have known’ of the risk, taking into account the information available to the state at that time.²⁰ The effective functioning of this protection is to be ensured by implementing appropriate legal frameworks as well as enforcement/control mechanisms, and by conducting effective investigations into deaths, even if the states are not responsible themselves.²¹ These principles also apply to the sphere of public health.²² But if all necessary measures were taken, appropriate regulations are in place and an effective investigation was conducted, the state cannot be held accountable.²³ However, the Court does not define which particular measures are to be taken, as this falls within the state’s ‘margin of appreciation’ – therefore a variety of measures can fulfil the imposed positive obligations.²⁴

For the case of vaccinations, which interfere with an individual’s bodily integrity, this means that the right to life is only affected when potentially life-threatening circumstances arise in the individual case.²⁵ Such a threat posed by the vaccination is conceivable, for example, in the case of allergies or other contraindications on the part of the person concerned.²⁶ The possible side effects of vaccinations, which represent health hazards but do not pose a serious risk to life, do not cross the threshold of Article 2 ECHR.²⁷

19 *LCB v the United Kingdom* App no 23413/94 (ECtHR, 9 June 1998) para 36.

20 Ibid para 41; see for an in depth analysis of the implementations of ‘knew or ought to have known’ Vladislava Stoyanova, ‘Fault, knowledge and risk within the framework of positive obligations under the European Convention on Human Rights’ (2020) 33(3) *Leiden Journal of International Law* 601 <<https://www.cambridge.org/core/article/fault-knowledge-and-risk-within-the-framework-of-positive-obligations-under-the-european-convention-on-human-rights/805829D63D36E84DF9A1F9764A81C32A>>.

21 See *Lopes de Sousa Fernandes v Portugal* App no 56080/13 (ECtHR, 19 December 2017) para 189; Schabas (n 18) 126 et seqq.

22 See *Calvelli and Ciglio v Italy* para 48 f (ECtHR, 17 January 2002) para 48 f or *Vo v France* 53924/00 (ECtHR, 8 July 2004) para 88 f or most recently *Vavricka v Czech Republic* (n 2) para 282.

23 Schabas (n 18) 131 et seqq.

24 Council of Europe/European Court of Human Rights, ‘Guide on Art 2 of the European Convention on Human Rights: Right to life’ (2018) para 35.

25 See *Boffa et al v San Marino* (n 11) 33.

26 Anja Krasser, ‘Zur grundrechtlichen Zulässigkeit einer Impfpflicht’ (n 1) 136.

27 Schabas (n 18) 126; *Vilnes and Others v Norway*, App nos 52806/09 and 22703/10 (ECtHR, 5 December 2013) para 234.

Vaccine-associated deaths, on the other hand, clearly do fall within the scope of protection. Since the primary aim of vaccination programs is to protect the individual concerning as well as the population as a whole, these are technically to be regarded as unintentional killings, for which the state is additionally required to have breached its obligation to take ‘appropriate steps to safeguard life’²⁸ to be liable. In this regard the Decision rendered by the erstwhile European Commission on Human Rights *Association of Parents v the United Kingdom* explicitly states that if a state maintains a control and monitoring system that aims to minimize vaccine-associated side effects, isolated fatalities do not constitute an interference with the right to life.²⁹ This, of course, can only be true for isolated fatalities that were unforeseeable. Therefore, a prerequisite for the states to ensure compliance with the positive obligation to protect lives is, that an individual examination has been made to rule out the existence of contraindications.³⁰ This, consequently, implies the obligation to provide for exceptions to the duty to vaccinate when medically indicated.

Compulsory vaccination is therefore not *per se* an interference with the right to life in its manifestation as a prohibition of intentional killings – as long as sufficient precautionary measures are in place – not even if isolated life-threatening events or deaths occur.³¹

But could Article 2 ECHR, on the other hand, oblige the state to introduce compulsory vaccination through its positive obligations? The state’s duty to protect its population from foreseeable or typical threats to life, does also include requirements for the sphere of health care.³² In order to prevent threats, the states

28 *Association of Parents v the United Kingdom* App no 7154/75 31 (Commission Decision, 12 July 1978), 32 et seq.

29 Ibid. This understanding of state accountability also underlies the decision of *Lopes de Sousa Fernandes v Portugal* (n 21), in which the Court clarifies that ‘where a Contracting State has made adequate provision for securing high professional standards among health professionals and the protection of the lives of patients, matters such as an error of judgment on the part of a health professional or negligent coordination among health professionals in the treatment of a particular patient cannot be considered sufficient of themselves to call a Contracting State to account from the standpoint of its positive obligations under Article 2 of the Convention to protect life’. It must therefore be concluded that if even negligence or an error of judgement triggers state accountability in exceptional cases only, individual fatalities that were not foreseeable and occur despite a check for contraindications and all necessary precautions - thus neither negligence nor an error of judgement are to blame – these cannot be attributed to the state either.

30 See explicitly *Vavricka v Czech Republic* (n 2) para 301 with further reference to *Association of Parents v the United Kingdom* (n 28) 33 and *Solomakhin v Ukraine* App no 24429/03 36 (ECtHR, 6 May 2008) para 36.

31 See Anja Krasser, ‘Die grundrechtliche Zulässigkeit einer Impfpflicht in Österreich’ (n 1) 26.

32 See *Lopes de Sousa Fernandes v Portugal* (n 21) 164 et seqq; Schabas (n 18) 131 et seq.

must enact protective regulations, including such dealing with infectious diseases, as the uncontrolled spread of infectious diseases can pose a threat to the population.³³

This threat shows, inter alia, when comparing the incidence of diseases before to the incidence after the introduction of a vaccine. For example, in 1952 over 21.000 cases of paralytic poliomyelitis, caused by the poliovirus, were reported in the US. After the introduction of the inactivated polio vaccine in 1955, cases have decreased significantly: to 2.525 cases in 1960 and only 162 cases from 1980 to 1999.³⁴

However, an infection with a disease is generally not to be qualified as a direct threat to life, which means that Article 2 ECHR is again only affected in situations in which a life-threatening factor enters into the equation. It is conceivable that life is endangered by infection, for example, people belonging to a high-risk group who cannot be immunized. This applies to people without a fully working immune system, eg because they suffer from chronic illness or severe allergies, undergo chemotherapy or are simply too young or too old to be safely vaccinated.³⁵ These people are more dependent on 'herd immunity', which describes the condition that the disease can no longer spread as easily because a large part of the population has been vaccinated and is therefore immune.³⁶ Non-vaccinated people endanger herd immunity, and by that endanger those dependent on herd immunity, as they do not contribute to it through their own immunity³⁷ and additionally contract and spread infectious diseases more easily.³⁸ The existence of this (abstract) danger to life is known to the states, as the existence of regulations tackling the problem of

33 See *Lopes de Sousa Fernandes v Portugal* (n 21) para 165, where the Court states that the positive obligation to take appropriate steps to safeguard lives 'must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake'.

34 Concepcion F Estivariz, Ruth Link-Gelles and Tom Shimabukuro, 'Poliomyelitis' (2020) <<https://www.cdc.gov/vaccines/pubs/pinkbook/polio.html>> accessed 18 February 2021.

35 Vaccine Knowledge Project, 'Herd immunity (Herd protection)' (2019) <<https://vk.ovg.ox.ac.uk/vk/herd-immunity>> accessed 9 February 2021. However, the administration of vaccines to these groups of people is not unsafe in any case but depends on the vaccine concerned and other circumstances (see thereto Ahmet Arvas, 'Vaccination in patients with immunosuppression' (2014) 49(3) *Türk Pediatri Ars* 181 <<https://pubmed.ncbi.nlm.nih.gov/26078660/>>).

36 Vaccine Knowledge Project (n 35). But herd immunity can't be achieved for all diseases, which is the case for example with tetanus.

37 On the existence of a moral obligation to contribute to herd immunity and an 'institutional responsibility' of the state to enable it by implementing vaccination policies, see Alberto Giubilini, *The Ethics of Vaccination* (Palgrave Studies in Ethics and Public Policy, Palgrave Pivot, Cham 2019) ch 2, 29–58.

38 See Jessica Flanigan, 'A defense of compulsory vaccination' (2014) 26(1) *HEC Forum* 5, 8 et seq.

infectious diseases³⁹ demonstrate, which is why a failure to act, at least in the case of epidemics or pandemics, where the abstract danger becomes concrete, would qualify as an interference.⁴⁰

Since there are no specifications as to which measures need to be taken in order to comply with the duty to protect life,⁴¹ different approaches may be permissible in the organization of health care systems. Moreover, there is no agreement among the Convention states on how to deal with infectious diseases, which generally enlarges the margin of appreciation left to the states.⁴² The states therefore have a great deal of discretion in their choice of means. Thus, although there is an obligation to take measures to immunize the population in general, this obligation can be met both through compulsory vaccination and through voluntary vaccination plans. But the absence of an obligation to introduce compulsory vaccination does not in turn constitute a prohibition to introduce such a comparatively strict measure,⁴³ as, in the words of the Court, '[m]atters of health care policy, in particular as regards general preventive measures, are in principle within the margin of appreciation of the domestic authorities who are best placed to assess priorities, use of resources and social needs'.⁴⁴ However, situations where only compulsory vaccination can fulfil the obligation to protect life are conceivable. Namely, if the established vaccination plans are proven to be unable to adequately protect vulnerable groups,⁴⁵ because herd-immunity could not be achieved, and non-coercive means to increase vaccination coverage were tried and failed.⁴⁶

39 Eg the Austrian Epidemics Act (Epidemiegesetz 1950), BGBl 186/1950 idF BGBl I 37/2018 1950 (Nationalrat) or the German Infection Protection Act (Infektionsschutzgesetz vom 20 Juli 2000 [BGBl I S 1045], das zuletzt durch Artikel 4a des Gesetzes vom 21 Dezember 2020 [BGBl I S 3136] geändert worden ist).

40 See Grabenwarter (n 6) para 19 on the positive obligation to protect the 'vulnerable', but also Francesca Camilleri, 'Compulsory vaccinations for children: Balancing the competing human rights at stake' (2019) 37(3) NQHR 245, 251 and Ingrid Jez, 'Die Impfpflicht in Zeiten der Migration – eine bipolare Patientin?' in Jennifer Carvill Schellenbacher and others (eds), *Migration und Integration – wissenschaftliche Perspektiven aus Österreich: Jahrbuch 4/2018* (Migrations- und Integrationsforschung Band 010, first edn. V&R unipress 2018) 94.

41 Council of Europe/European Court of Human Rights, 'Guide on Art 2 of the European Convention on Human Rights: Right to life' (n 24) para 35.

42 *Vavricka v Czech Republic* (n 2) para 278.

43 See eg *Acmanne v Belgium* App no 10435/83 256 (Commission Decision, 10 December 1984).

44 See *Shelley v the United Kingdom* App no 23800/06 (ECtHR, 4 January 2008) and also *Vavricka v Czech Republic* (n 2) para 274.

45 Eg Camilleri (n 40), 251 and 256.

46 For the ethical principle of using coercion only as last resort, see Giubilini (n 37) ch 3, 59–93.

Finally, the obligation to conduct an effective investigation⁴⁷ also applies to vaccine-associated deaths, as a link between vaccination and death can only be established through appropriate investigations. This is due to the fact that death shortly after the administration of a vaccine may be coincidental and not causal, as, eg, it is possible that the cause of death may be completely unrelated to the vaccination or death was caused by inappropriate handling, contamination or other medical errors, but not by the vaccine itself.⁴⁸ If the investigations were insufficient or completely omitted, this would constitute an interference.⁴⁹

3.2 ‘It’s None of Your Business!’

Article 8 ECHR is one of the most prominent fundamental rights of the ECHR. It protects the individual’s private sphere and family life by, first, prohibiting (unjustified) interferences of state agents themselves and, second, imposing a wide range of positive obligations on the states to ensure the respect for private and family life, eg through adequate legal framework.⁵⁰ The notion of family life is affected when measures potentially interfere with the special relationships that make up a family, like those between parents and their children.⁵¹ It is more difficult, however, to identify the scope of the term ‘private life’, because, according to the Court, the notion of ‘private life’ cannot be defined conclusively,⁵² which in turn makes it applicable to a vast number of situations. But, as a guide, the case law of the Court and the Commission has identified several typical cases falling within the scope of Article 8 ECHR. The notion of private life thus includes, at any case, situations that concern one’s identity, individuality, integrity, self-determination, personal relationships relevant to the development of one’s

47 Schabas (n 18) 134; *McCann and Others v the United Kingdom* App no 18984/91 (ECtHR, 27 September 1995) paras 157–164.

48 See Kathleen R Stratton, Cynthia J Howe and Richard B Johnston, *Adverse Events Associated with Childhood Vaccines: Evidence Bearing on Causality* (1994) 274 et seqq or Elaine R Miller and others, ‘Deaths following vaccination: What does the evidence show?’ (2015) 33(29) *Vaccine* 3288 <<https://pubmed.ncbi.nlm.nih.gov/26004568>> accessed 19 February 2021.

49 Anja Krasser, ‘Zur grundrechtlichen Zulässigkeit einer Impfpflicht’ (n 1) 137.

50 Schabas (n 18) 366 et seq.

51 Council of Europe/European Court of Human Rights, ‘Guide on Article 8 of the European Convention on Human Rights: Right to respect for private and family life, home and correspondence’ (2018) 246.

52 *Costello-Roberts v the United Kingdom* App no 13134/87 (ECtHR, 25 March 1993); Schabas (n 18) 369 et seqq.

personality⁵³ and the protection of personal data.⁵⁴ One of the main underlying principles is autonomy,⁵⁵ which is also regularly used by opponents of compulsory vaccination as a basis for their argumentation. Whether and which interference with Article 8 ECHR would be realized through compulsory vaccination is therefore discussed in the following. Interferences with the right to respect for one's home or correspondence, equally protected by Article 8 ECHR, through vaccinations are not to be expected.

3.2.1 'My (Private) Life – My Decision'

The notion of 'private life' essentially safeguards the right to make decisions over one's own body and life.⁵⁶ This consequently includes health related decisions as well.⁵⁷ Medical treatment typically interferes with one's physical (also possibly one's psychological or even moral) integrity and may generally only be carried out with the consent of the person concerned.⁵⁸ The case-law of the erstwhile Commission and the Court considers every medical intervention against the will of the individual an interference with Article 8 ECHR, even if the intervention is of minor intensity.⁵⁹ As compulsory vaccination in its absolute form is by definition carried out regardless of whether one has consented or not, the lack of consent as well as the intrusion of the person's physical integrity undoubtedly interfere with Article 8 ECHR.⁶⁰ In *Vavricka v Czech Republic*, however, the Court went one step further and held that the duty to get vaccinated and the consequences attached to it cannot be dissociated.⁶¹ Thus, even if no vaccination was actually administered against one's will, the direct negative consequences arising from the non-compliance with the duty to get vaccinated constitute an interference with the right to respect for private life, thereby also subjecting relative, indirect forms of compulsory vaccination to the scrutiny of the Court.⁶²

⁵³ See *Pretty v the United Kingdom* App no 42197/98 (ECtHR, 29 April 2002).

⁵⁴ Schabas (n 18) 382.

⁵⁵ *Pretty v the United Kingdom* (n 53) para 61.

⁵⁶ Grabenwarter (n 6) Art 8 para 7.

⁵⁷ Schabas (n 18) 371.

⁵⁸ Ibid 370 et seq.

⁵⁹ *X v the Netherlands* App no 8239/78 (Commission Decision, 4 December 1978); *X v Austria* App no 8278/78 156 (Commission Decision, 13 December 1979); *Boffa et al v San Marino* (n 11) 34; *Acmanne v Belgium* (n 43) 255; *Solomakhin v Ukraine* (n 30) para 33.

⁶⁰ *Solomakhin v Ukraine* (n 30) para 33; Grabenwarter (n 6) Art 8 para 29.

⁶¹ *Vavricka v Czech Republic* (n 2) para 259.

⁶² Ibid para 263 et seq.

Another way the freedom of choice, as the essence of Article 8 ECHR, manifests is in the ability to decide whether certain personal information – data – should remain secret. This particularly applies to health data.⁶³ Therefore the collection, storage and use of data by the state, if no consent was given, is an interference requiring justification.⁶⁴ Also states must enact legal frameworks capable of preventing abuse or arbitrary use of personal information.⁶⁵ Data protection is relevant for compulsory vaccination as its effective monitoring would most likely require an overview of the vaccination status of the population, ie the collection, storage and processing of this information. This would thus constitute a further interference with Article 8 ECHR if the individuals did not agree or the legal framework was deemed insufficient or was not enacted at all. At least for member states of the EU, however, a sufficient legal framework should be in place through the General Data Protection Regulation.⁶⁶

But ‘private life’ also has an external component that encompasses relationships with other persons and the outside world.⁶⁷ Compulsory vaccination does interfere with this aspect of Article 8 ECHR if a failure to have been vaccinated is sanctioned by exclusion from a certain social group relevant for the shaping of one’s personality.⁶⁸ This is the case, eg, for kindergarten or schools, that play an important role in a child’s development,⁶⁹ if the attendance would only be allowed with the mandated immunization, as it is the case for example in Italy⁷⁰,

63 Schabas (n 18) 383.

64 Grabenwarter (n 6) Art 8 para 30.

65 Schabas (n 18) 383 et seq.

66 See Article 4 of the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1.

67 Schabas (n 18) 369; *Botta v Italy* App no 24139/93 [32] (ECtHR, 24 February 1996); *Niemietz v Germany* App no 13710/88 [29] (ECtHR, 16 December 1992) para 29. Social gatherings that do not primarily contribute to the development of the personality may be protected by the freedom of assembly and association.

68 *Vavricka v Czech Republic* (n 2) para 306; Schabas (n 18) 369 et seq.

69 See eg David Osher and others, ‘School Influences on Child and Youth Development’ in Zili Sloboda and Hanno Petras (eds), *Defining Prevention Science* (Springer US 2014); the importance of preschool to a child’s development was also acknowledged in *Vavricka v Czech Republic* (n 2) para 306.

70 See Fortunato D’Ancona and others, ‘The law on compulsory vaccination in Italy: an update 2 years after the introduction’ (2019) 24(26) *Eurosurveillance* 1900371 <<https://www.eurosurveillance.org/content/10.2807/1560-7917.ES.2019.24.26.1900371>> accessed 12 November 2019.

France⁷¹ or all US states.⁷² This type of sanction could raise additional problems with regard to the right to education, protected under Article 2 of Protocol No 1. However, in *Vavricka v Czech Republic*, the Court saw no need to examine the compatibility of the exclusion from preschool with the right to education, stating that all problems had already been conclusively dealt with under Article 8 ECHR.⁷³ Unfortunately, this leaves the question of whether this assessment is only due to the fact that preschool is not mandatory in the Czech Republic unanswered. The court, thus, indeed missed an opportunity to clarify its understanding of the relationship between the right to education and the right to respect for private life, as criticized in Judge Lemmens' partly concurring and partly dissenting opinion.⁷⁴

Another way of developing relationships with the outside world is through work.⁷⁵ Accordingly, restrictions on the access to a profession affect Article 8 ECHR.⁷⁶ If a state would plan compulsory vaccination for health personnel only, the required immunization would constitute a prerequisite for the exercise of these professions and thus constitute an interference.⁷⁷

The positive obligations regarding health-related issues deriving from the protection of private life basically correspond with those under Article 2 ECHR, whereby for the demarcation of the two scopes it must be clarified whether there is a danger to life (→ Article 2 ECHR) or a mere danger to health (→ Article 8 ECHR). For example, Article 8 ECHR also requires protective measures for hospitals in order to ensure the respect for the physical and mental integrity of patients.⁷⁸ In the case of compulsory vaccination schemes, Article 8 ECHR could, therefore, require states to make sure that if several vaccines were available, the one best suited for the individual is ordered to minimize negative effects on the individual's health.

⁷¹ See Daniel Lévy-Bruhl and others, 'Assessment of the impact of the extension of vaccination mandates on vaccine coverage after 1 year, France, 2019' (2019) 24(26) *Eurosurveillance* 1900301 <<https://www.eurosurveillance.org/content/10.2807/1560-7917.ES.2019.24.26.1900301>> accessed 12 November 2019.

⁷² National Conference of State Legislatures, 'States With Religious and Philosophical Exemptions From School Immunization Requirements' (29 January 2021) <<https://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx>> accessed 20 February 2021.

⁷³ *Vavricka v Czech Republic* (n 2) para 345.

⁷⁴ See *ibid* PARTLY CONCURRING AND PARTLY DISSENTING OPINION OF JUDGE LEMMENS para 3.

⁷⁵ Grabenwarter (n 6) Art 8 para 17.

⁷⁶ Council of Europe/European Court of Human Rights, 'Guide on Article 8 of the European Convention on Human Rights: Right to respect for private and family life, home and correspondence' (n 51) para 115.

⁷⁷ Anja Krasser, 'Die grundrechtliche Zulässigkeit einer Impfpflicht in Österreich' (n 1) 39.

⁷⁸ *Vasileva v Bulgaria* App no 23796/10 (ECtHR, 17 March 2016) paras 63 et seqq; Council of Europe/European Court of Human Rights, 'Guide on Article 8 of the European Convention on Human Rights: Right to respect for private and family life, home and correspondence' (n 51) para 25.

However, an obligation to introduce compulsory vaccinations cannot be derived from Article 8 ECHR either. Just as with Article 2 ECHR, the state must, under certain circumstances, provide for measures to eradicate diseases,⁷⁹ but the Court does not specify which means are to be implemented to do so. The fact that there is no obligation does, once again, not in turn constitute a prohibition to introduce compulsory vaccination as choice of means.⁸⁰

3.2.2 ‘Vaccination is Not in My Child’s Best Interest’

(Compulsory) medical treatment of children is often brought before the Court by the parents as legal representatives.⁸¹ In addition to the interferences with Article 8 ECHR concerning the child itself – the interference with its bodily integrity etc – it should be considered whether the limitation of the parents’ freedom to make decisions on behalf of their children constitutes a separate interference. This freedom of choice relates to the specific relationship between parents and children, protected under Article 8 ECHR within the ‘respect for family life’,⁸² which is why the notion of family life deserves closer attention when it comes to compulsory vaccination.⁸³

The right to respect for family life is primarily aimed at enabling families to life together and protecting the special relationships which form a family.⁸⁴ Whether a certain relationship is considered a ‘family’ depends on the existence of close family ties, which can manifest themselves in several ways, for example through cohabitation or other indications of commitment (not necessarily marriage).⁸⁵ This also applies to the relationship between parents and their children, which is why

⁷⁹ See *Shelley v the United Kingdom* (n 44).

⁸⁰ Anja Krasser, ‘Zur grundrechtlichen Zulässigkeit einer Impfpflicht’ (n 1) 138.

⁸¹ See eg *Marckx v Belgium* App no 6833/74 (ECtHR, 13 June 1979).

⁸² Council of Europe/European Court of Human Rights, ‘Guide on Article 8 of the European Convention on Human Rights: Right to respect for private and family life, home and correspondence’ (n 51) 211 ff; see also Camilleri (n 40), 251.

⁸³ In the recent case of *Vavricka v Czech Republic* (n 2), the Court did not find it necessary to elaborate on the right to respect for family life, most likely because five of the six applications were brought before the Court on behalf of the children concerned. Only Mr Vavricka complained about the negative consequences for himself as a father, but not from the perspective of the right to respect for family life.

⁸⁴ *Marckx v Belgium* (n 81); Council of Europe/European Court of Human Rights, ‘Guide on Article 8 of the European Convention on Human Rights: Right to respect for private and family life, home and correspondence’ (n 51) para 246.

⁸⁵ Council of Europe/European Court of Human Rights, ‘Guide on Article 8 of the European Convention on Human Rights: Right to respect for private and family life, home and correspondence’ (n 51) para 210.

the existence of close family ties may need to be proven under certain circumstances.⁸⁶

A specific aspect of the relationship between parent and child is the area of education/upbringing. The right of parents to educate their children as they please is protected by Article 8 ECHR, but Article 2 of Protocol No 1 constitutes a *lex specialis* for the area of state educational institutions, hence, only situations without reference to such institutions remain within the scope of Article 8 ECHR.⁸⁷ But parents are not entirely free to make decisions concerning their children, they rather should be guided by the best interests of the child, which may override the interests of the parents.⁸⁸ In this regard the ECtHR expressly ruled out that parents have an enforceable right to make decisions that are potentially detrimental to the child's health or development.⁸⁹

The guiding principle for a decision that complies with the best interests of the child is to weigh up, based on empirical evidence, 'the relative risk of harm produced through two incompatible decisions'⁹⁰ taking into account the individual child – for vaccination these two incompatible decisions are whether or not to vaccinate.⁹¹ Since vaccines, even if side effects and complications can never be completely ruled out, are fundamentally safe and the risks associated with an illness therefore generally outweigh the risks of a vaccination,⁹² the Court ruled that it is in the child's best interests to attain the highest possible standard of health and thus be immunized against serious diseases, unless the specific child is particularly at risk of adverse reactions and thus dependent on a high rate of immunization in its environment.⁹³ Conversely, the decision not to immunize one's child can potentially harm the child and its health by increasing the risk of catching certain diseases, again, unless the particular child is unfit for vaccination.⁹⁴ Therefore, while there is no interference with Article 8 ECHR in neither a decision for nor a decision against vaccination, the fact that parents have no right to make a potentially harmful decision means that compulsory vaccination cannot

86 *L v Netherlands* App no 45582/99 (ECtHR, 1 June 2004) paras 35 et seqq.

87 Grabenwarter (n 6) P1 - 2 para 11.

88 *Sahin v Germany* 30943/96 (ECtHR, 8 July 2003) para 66.

89 See *Ibid* and *Elsholz v Germany* App no 25735/94 (ECtHR, 13 July 2000) para 50.

90 Angus Dawson, 'The Determination of the Best Interest in Relation to Childhood Immunisation' (2005) 19/1 *Bioethics* 72, 82.

91 *Ibid*.

92 Anja Krasser, 'Die grundrechtliche Zulässigkeit einer Impfpflicht in Österreich' (n 1) 41 f; Jesser-Huß, 'Impfen und Kindeswohl' in Gerhard Aigner and others (eds), *Schutzimpfungen - rechtliche, ethische und medizinische Aspekte* (Schriftenreihe Ethik und Recht in der Medizin Band 11, Verlag Österreich 2016) 127.

93 *Vavricka v Czech Republic* (n 2) para 288.

94 *Ibid*.

interfere with such a right either, if exceptions in medically indicated cases are provided for.

For the area of family life, the positive obligations relating to the limitation of the parents' autonomy and responsibility are mainly procedural.⁹⁵ The state has to enable normal family life as far as possible.⁹⁶ With regard to vaccination this means, among other things, that a withdrawal of custody as a sanction for not vaccinating would most likely go too far and constitute an interference, because taking children into care is only permissible as a last resort and under exceptional circumstances.⁹⁷ Moreover, the respect for family life imposes on the authorities the obligation to make their decisions with reference to each individual case and with the involvement of the persons concerned.⁹⁸ The involvement of the persons concerned would probably require a minimum of information about the vaccinations to be carried out, their benefits and risks.⁹⁹

3.3 Conscientious Objection to Vaccination

For some, the need to analyze the introduction of compulsory vaccinations in terms of their compatibility with religious attitudes and convictions may not seem obvious, but vaccinations and religion/convictions are more closely linked than it may appear at first sight. This is because some vaccines contain ingredients that are not easily compatible with the doctrines of some religions, as the following examples, which do not claim to be exhaustive, show. First, some vaccines contain porcine gelatin, which must not/should not be consumed according to Jewish or Muslim teachings. While it is sometimes argued by representatives of both religions that the ban on pork applies only to oral intake and not, for example, to injections, or that it is not to be considered a sin if there is no suitable kosher/halal alternative, this cannot be assumed for all members or subgroups of these religions. For some Christians, the fact that certain types of viral vaccines need cell

⁹⁵ Council of Europe/European Court of Human Rights, 'Guide on Article 8 of the European Convention on Human Rights: Right to respect for private and family life, home and correspondence' (n 51) para 216.

⁹⁶ *Marckx v Belgium* (n 81) 31.

⁹⁷ See *Neulinger and Shuruk v Switzerland* App no 41615/07 (ECtHR, 6 July 2010) para 136.

⁹⁸ See *Penchevi v Bulgaria* App no 77818/12 57 (ECtHR, 10 February 2015) para 57 and *Elsholz v Germany* (n 89); Council of Europe/European Court of Human Rights, 'Guide on Article 8 of the European Convention on Human Rights: Right to respect for private and family life, home and correspondence' (n 51) para 216.

⁹⁹ Anja Krasser, 'Die grundrechtliche Zulässigkeit einer Impfpflicht in Österreich' (n 1) 44.

lines deriving from aborted fetuses clashes with their religious beliefs.¹⁰⁰ Also, some Christian denominations consider vaccinations an intervention in divine providence.¹⁰¹

Apart from religious concerns, the fact that vaccines do sometimes contain animal components or are tested on animals, as this is a prerequisite to release vaccines in public in many countries, eg the EU member states,¹⁰² may cause problems for vegetarians and vegans. Again, some representatives make exceptions when practicable alternatives are not available,¹⁰³ but this cannot be generally assumed.¹⁰⁴

For all these reasons it should be examined whether the refusal to vaccinate may be protected under Article 9 ECHR. To do so, it is necessary to define, at least roughly, the terms used to describe the scope of Article 9 ECHR: ‘thought’, ‘conscience’, ‘religion’ and ‘belief’.

The word ‘thought’ describes purely internal, intangible processes, such as making a decision or to have, develop or change certain intentions or opinions. As long as these internal processes have not yet manifested in any way, they are protected by the freedom of thought. Since paragraph two of Article 9 ECHR only provides for justifications for interference in the various forms of ‘manifestation’, the protection of the *forum internum* is to be regarded as absolute and any form

100 John D Grabenstein, ‘What the world’s religions teach, applied to vaccines and immune globulins’ (2013) 31(16) Vaccine 2011, 2013.

101 See eg a study on the reasons not to vaccinate of an orthodox protestant minority in the Netherlands Wilhelmina L M Ruijs and others, ‘How orthodox protestant parents decide on the vaccination of their children: a qualitative study’ (2012) 12(1) BMC Public Health 408 <<https://bmcpublihealth.biomedcentral.com/articles/10.1186/1471-2458-12-408>> accessed 16 April 2021.

102 See Annex I, Part II, F 1.4 of Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use [2001] OJ L 311/67.

103 Vegetarian Society, ‘The Pfizer Covid-19 Vaccine Info’ <<https://vegsoc.org/lifestyle/the-pfizer-covid-19-vaccine/>> accessed 21 February 2021; Samantha Fry, ‘Is my medication vegan?’ <<https://www.vegansociety.com/news/blog/my-medication-vegan>> accessed 21 February 2021.

104 In the light of the current situation it may be interesting to know that neither the AstraZeneca nor the Pfizer/Biontech vaccine contains animal products, see Medicines and Healthcare products Regulatory Agency, ‘Decision. Regulatory approval of COVID-19 Vaccine AstraZeneca: Information for healthcare professionals and the public about the COVID-19 Vaccine AstraZeneca.’ <<https://www.gov.uk/government/publications/regulatory-approval-of-covid-19-vaccine-astra-zeneca>> accessed 21 February 2021; Medicines and Healthcare products Regulatory Agency, ‘Decision. Regulatory approval of Pfizer/BioNTech vaccine for COVID-19: Information for healthcare professionals and the public about the Pfizer/BioNTech vaccine.’ <<https://www.gov.uk/government/publications/regulatory-approval-of-pfizer-biontech-vaccine-for-covid-19>> accessed 21 February 2021.

of state interference/indoctrination is inadmissible.¹⁰⁵ As soon as thoughts materialize, these materializations are no longer protected under the freedom of thought but may be protected, eg, under the freedom of expression or the freedom of religion, depending on their form and content.¹⁰⁶

‘Conscience’, on the other hand, is more than a mere thought. It is a ‘qualified’ thought, namely one that should serve the person concerned as a guide to decide what is right or wrong.¹⁰⁷ Every time a person considers what would be ‘good’ or ‘bad’ in a specific situation and then acts according to his or her result, this is a decision of conscience.¹⁰⁸ The freedom of conscience protects the right to develop one’s conscience freely, to not be forced to disclose matters of conscience (*forum internum*) and to behave accordingly.¹⁰⁹ Conscience can, but does not necessarily have to be religiously motivated or embedded in a personal belief without contradiction, as protected under the notion of freedom of religion.¹¹⁰

It can be assumed without further argument that established religions are also ‘religions’ within the meaning of the ECHR. However, the protection of religions is not limited to these, but in principle also includes new or less widespread religious communities.¹¹¹ However, when it comes to new or less common religious groups with no consensus among the member states on whether they are to be treated as a ‘religion’, the Court relies on the position of the domestic authorities as it does not consider itself responsible ‘to decide *in abstracto* whether or not a body of beliefs and related practices may be considered a “religion”’¹¹². But religious communities that do not qualify as a religion may still be protected as a belief.¹¹³ A belief is defined a set of convictions that meets the criteria of ‘cogency, seriousness, cohesion and importance’¹¹⁴ and provides a ‘coherent view of fundamental problems.’¹¹⁵ The freedom of religion and belief protects the right to have a religion or belief (*forum internum*) as well as the right to manifest it.¹¹⁶

105 Jim Murdoch, *Protecting the right to freedom of thought, conscience and religion under the European Convention on Human Rights* (Council of Europe 2012) 18; Grabenwarter (n 6) Art 9 para 5.

106 Schabas (n 18) 423.

107 Ibid 424.

108 Ibid.

109 Grabenwarter (n 6) Art 9 para 5.

110 Ibid.

111 Grabenwarter (n 6) Art 9 para 7.

112 Ibid Art 9 para 8; *Kimly et al v Russia* App no 76838/01, 32782/03 (ECtHR, 1 September 2009) para 79.

113 Schabas (n 18) 425.

114 See *Campbell and Cosans v the United Kingdom* App nos 7511/76, 7743/76 (ECtHR, 25 February 1982) para 36; *X v Germany* App no 8741/79 (Commission Decision, 10 March 1981) 138.

115 Grabenwarter (n 6) Art 9 para 15.

116 Grabenwarter (n 6) Art 9 para 9.

3.3.1 'I Don't Believe in Vaccines'

As far as the *forum internum* of the freedom of thought and the freedom of conscience is concerned, the state may, as explored above, not interfere.¹¹⁷ However, having or developing a negative attitude or conviction towards vaccinations would not be prevented if compulsory vaccinations were implemented, nor would the disclosure of one's vaccination status necessarily lead to an exploration of one's thoughts or opinions relating to vaccines.¹¹⁸ Hence freedom of thought and freedom of conscience relating to the *forum internum* would not be affected by compulsory vaccination.

But it is conceivable that compulsory vaccinations interfere with the *forum externum* of freedom of conscience, namely if one qualifies the decision to be vaccinated as a decision of conscience. This is not far-fetched, as in many cases the personal decision for or against vaccination also has an impact on society as a whole, and thus ethical considerations may well enter into it.¹¹⁹ If one decides not to be vaccinated because of his/her conscience, then the compulsory order interferes with the right to act in accordance with one's conscience at first glance. However, the ECtHR rejects a right to oppose state orders by invoking incompatibility with one's conscience, provided that a generally and neutrally phrased act exists as the basis for the order.¹²⁰ If the act introducing a potential obligation to vaccinate were therefore to be qualified as generally and neutrally phrased, there would be no interference with the freedom of conscience.¹²¹

3.3.2 'It's Against My Religion/Beliefs!'

While 'vaccination rejection' per se can hardly be a religion in itself, there are religious communities, some of which clearly meet the criteria for a protected religion, whose doctrines reject vaccination or its ingredients, as already stated above.¹²² The refusal to vaccinate could then be qualified as a practice or rite and thus receive the protection of the freedom of religion.¹²³ Should the religious

¹¹⁷ Murdoch, *Protecting the right to freedom of thought, conscience and religion under the European Convention on Human Rights* (n 105) 18.

¹¹⁸ Anja Krasser, 'Die grundrechtliche Zulässigkeit einer Impfpflicht in Österreich' (n 1) 51.

¹¹⁹ See Giubilini (n 37) as a whole but ch 1 in particular.

¹²⁰ *C v the United Kingdom* App no 10358/83 (Commission Decision, 15 December 1983) 142; Grabenwarter (n 6) Art 9 para 6. A right to conscientious objection, however, has been established by the Court for compulsory military service.

¹²¹ Anja Krasser, 'Die grundrechtliche Zulässigkeit einer Impfpflicht in Österreich' (n 1) 52.

¹²² Grabenstein (n 100).

¹²³ Anja Krasser, 'Die grundrechtliche Zulässigkeit einer Impfpflicht in Österreich' (n 1) 53.

community in question not be granted the status of a religion by the Court, however, protection would still potentially be available under freedom of belief, if the requirements set out for a 'belief', are met.

In order to offer a 'coherent view on fundamental problems' in the sense of a protected belief, it takes more than individual, incoherent opinions. Being convinced, for example, that vaccinations would only benefit pharmaceutical companies, is not enough for a belief. Yet, it should be noted, that opinions, which do not meet the criteria of a belief may nevertheless be protected under Article 10 ECHR.¹²⁴ A set of beliefs that can do justice to the holistic approach the Court follows when analyzing a belief, on the other hand, is veganism, as a 'philosophy and way of living which seeks to exclude - as far as is possible and practicable - all forms of exploitation of, and cruelty to, animals for food, clothing or any other purpose'¹²⁵. Indeed, the Commission held in *W v the United Kingdom* 'that the Vegan convictions with regard to animal products fall within the scope of Article 9 para 1 (Art 9-1) of the Convention'.¹²⁶

Mandatory vaccination could conflict with these protected beliefs. For example, if there were penalties for not vaccinating, as this would effectively be a punishment for practicing one's own beliefs.¹²⁷ But even without a penalty, the very fact that there is an obligation to act contrary to one's convictions is already a problem.¹²⁸ This could possibly lead to a positive obligation that obliges the state to mitigate conflicts between obligations to act and ones convictions by providing for exceptions or alternative behavior, as internationally some US states or Australia, among others, have done.¹²⁹

The case law, however, imposes significant barriers on the scope of Article 9 ECHR. Generally, protection of the *forum externum* under Article 9 depends on two things: first, whether it is a protected conviction, and second, whether the act in question constitutes a 'manifestation'. In *Boffa and 13 others v San Marino*, the Commission explicitly stated that vaccinations do not constitute an interference

124 In this context, refusal to vaccinate could also be considered an expression of this opinion. However, in *Gough v the United Kingdom*, the Court held that when expressing an opinion, one is 'under a general duty to respect the country's laws' and to pursue one's 'desire to bring about legislative or societal change in accordance with them'. See *Gough v the United Kingdom* App no 49327/11 (ECtHR, 28 October 2014) para 175.

125 The Vegan Society, 'Definition of veganism' <<https://www.vegansociety.com/go-vegan/definition-veganism>> accessed 22 February 2021.

126 *W v the United Kingdom* App no 18187/91 (Commission Decision, 10 February 1993).

127 See *Kokkinakis v Greece* App no 14307/88 36 (ECtHR, 25 May 1993).

128 See *Buscarini et al v San Marino* App no 24645/94 (ECtHR, 18 February 1999) 34.

129 See Daniel A Salmon and others, 'Compulsory vaccination and conscientious or philosophical exemptions: past, present, and future' (2006) 367(9508) *Lancet* 436.

with the freedom of thought, conscience and religion, as ‘the term “practice” does not cover each and every act which is motivated or influenced by a religion or belief’.¹³⁰ Those acts must rather be central to the expression of a religion or belief.¹³¹ The commission further emphasized that the obligation to be vaccinated in San Marino applied to everyone, regardless of religion. In *Vavricka v Czech Republic*, in which three of the applicants also complained of an alleged violation of Article 9 ECHR, the Court cited the Commission’s reasoning in *Boffa*.¹³² It also referred to the cases of *Bayatyan v Armenia*¹³³ and *Pretty v the United Kingdom*¹³⁴, again to emphasize that not every conviction entails the protection of Article 9 ECHR.¹³⁵ On the merits, the Court found the complaint inadmissible under Article 9 ECHR, as it did not find Mr Vavricka’s arguments to be coherent.¹³⁶

However, the decision does not completely rule out addressing objections to potential compulsory vaccination schemes under Article 9 ECHR. On the contrary, it appears that, with a properly substantiated claim, the Court would have been willing to address the issue. However, it can be assumed that in cases where the persons affected by the measure themselves refuse medical treatment on the grounds of incompatibility with Article 9 ECHR, such as in *Pretty*, the court will nevertheless preferably decide on the basis of Article 8 ECHR, as it established that in these situations it considers the autonomy and self-determination of a person as primarily affected.¹³⁷

4 To Justify or Not to Justify, that is the Question

As established above, compulsory vaccination

- may interfere with Article 2 ECHR,
- undeniably interferes with several aspects protected under Article 8 ECHR, and
- may conceivably interfere with Article 9.

130 *Boffa et al v San Marino* (n 11) 27 et seq.

131 *Arrowsmith v the United Kingdom* App no 7050/75 (Comission Decision, 5 December 1978) para 71; Murdoch, *Protecting the right to freedom of thought, conscience and religion under the European Convention on Human Rights* (n 105) 21 et seq.

132 *Vavricka v Czech Republic* (n 2) para 331.

133 *Bayatyan v Armenia* App no 23459/03 (ECtHR, 7 July 2011).

134 *Pretty v the United Kingdom* (n 53).

135 *Vavricka v Czech Republic* (n 2) para 332 et seq.

136 *Ibid* 344 et seqq.

137 Murdoch, *Protecting the right to freedom of thought, conscience and religion under the European Convention on Human Rights* (n 105) 73; *Pretty v the United Kingdom* (n 53) para 82.

But these interferences only constitute violations if they cannot be justified. Whether and how an interference can be justified is determined by the respective fundamental right itself. For Article 2 ECHR it is provided in its paragraph 2 that killings (or threats to life) which are attributable to the state do not constitute a violation only if they occur in one of the following circumstances: first, in defense of any person from unlawful violence; second, in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; or third, in action lawfully taken for the purpose of quelling a riot or insurrection.¹³⁸ But given that adequate safeguards are in place, compulsory vaccination does not constitute an interference with Article 2 ECHR. Without these safeguards, however, there would be a violation of Article 2 ECHR, since vaccinations cannot be attributed to any of the purposes provided for in Article 2 para (2) ECHR.

For Articles 8 and 9 ECHR, on the other hand, it must be examined whether the interferences caused by compulsory vaccination can be justified. The requirements thereto are found in the respective paragraphs (2) and are, in most parts, identical. Accordingly, an interference is justified if it is based on an appropriate legal basis (prescribed by law), pursues a legitimate aim and is necessary in a democratic society.¹³⁹

The situation is somewhat different with regard to the possible positive obligations that may arise in the context of compulsory vaccination. When deciding whether a positive obligation exists, a ‘fair balance that has to be struck between the general interest of the community and the interests of the individual’.¹⁴⁰ While the considerations underlying the justification test, as applied to interferences with negative obligations, play a role in striking this balance,¹⁴¹ it is no justification test. Therefore, if the state does not comply with an established positive obligation, this constitutes a violation.

4.1 How to Introduce Compulsory Vaccination

As far as the court’s examination of justification is concerned, the focus is clearly on whether the interference is ‘necessary in a democratic society’. The issue of whether the interference is ‘prescribed by law’ and if it pursues a ‘legitimate aim’

¹³⁸ Art 2 para 2 ECHR.

¹³⁹ As the possible interference with Article 2 Protocol No 1 was mentioned, it should be noted that interference with this guarantee can also be justified on the basis of a legitimate aim and proportionality, and the structure is therefore in principle consistent with that of Articles 8 and 9, see *Leyla Şahin v Turkey* App no 44774/98 [154] (ECtHR, 10 November 2005).

¹⁴⁰ *Rees v the United Kingdom* 9532/81 para 37 (ECtHR, 17 October 1986).

¹⁴¹ *Ibid.*

was treated as more of a formality in previous cases dealing with compulsory vaccination.¹⁴² This shows, for example, in *Solomakhin v Ukraine*, where the Court answered these questions in one sentence only: 'The Court further notes that such interference was clearly provided by law and pursued the legitimate aim of the protection of health.'¹⁴³ Admittedly, the Court dealt with these two conditions at greater length in *Vavricka v Czech Republic* than in *Solomakhin v Ukraine* – however, this was not due to any particular problems arising, but probably rather to the particular relevance of the case, of which the Court was seemingly aware, as indicated by some strikingly detailed elaborations in the judgment.¹⁴⁴

To be considered 'prescribed by law' there must be an act attributable to the state that introduces the measure but there is no restriction to written laws.¹⁴⁵ Further, this act must meet formal and substantive requirements. Formally, it has to be enacted in accordance with the national legal order, ie by the competent organ and following the prescribed procedure.¹⁴⁶ There is no limitation to primary legislation, 'legal acts and instruments of lesser rank' can equally fulfil the requirement of 'prescribed by law'.¹⁴⁷ Also, the content of this act must be 'clear, foreseeable, [...] adequately accessible'¹⁴⁸ and must be subject to mechanisms that preclude misuse.¹⁴⁹

The 'legitimate aims' at least one of which a measure must further in order for it to be potentially justified are listed in the respective paragraphs 2 of Articles 8 and 9 ECHR.¹⁵⁰ Both, Article 8 and 9 ECHR allow interferences in the interest of 'public safety', the 'protection of health or morals' and 'the protection of the rights and freedoms of others'; Article 8 further includes 'national security', 'the economic well-being of the country' and 'the prevention of disorder or crime'.¹⁵¹ In order to justify compulsory vaccination, several of the legitimate aims could be considered applicable. In addition to the 'protection of the rights and freedoms of others', the 'protection of health' is, unsurprisingly, particularly relevant. Since vaccinations

¹⁴² See eg Murdoch, *Protecting the right to freedom of thought, conscience and religion under the European Convention on Human Rights* (n 105) 35.

¹⁴³ *Solomakhin v Ukraine* (n 30) para 35.

¹⁴⁴ See for example the detailed explanation of how the Court assesses the 'necessity in a democratic society' in *Vavricka v Czech Republic* (n 2) para 273 et seqq.

¹⁴⁵ Schabas (n 18) 402 and 435 et seq.

¹⁴⁶ Ibid.

¹⁴⁷ *Vavricka v Czech Republic* (n 2) para 269.

¹⁴⁸ *Silver and others v UK* App nos 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, 7136/75 (ECtHR, 25 March 1983).

¹⁴⁹ Schabas (n 18) 403. See also *Sunday Times v the United Kingdom* App no 6538/74 (ECtHR, 26 April 1979) 49.

¹⁵⁰ Schabas (n 18) 404 and 436.

¹⁵¹ See Article 8 para 2 ECHR and Article 9 para 2 ECHR.

against diseases, which are transmissible from one person to another, protect the individual, but also society,¹⁵² the protection of health is affected in both its individual and societal dimension.¹⁵³ In the context of Article 8 ECHR, the legitimate aim of ‘prevention of disorder or crime’ would also be conceivable, if the intentional and/or negligent endangerment of others by communicable diseases is forbidden by law in the jurisdiction concerned.¹⁵⁴

4.2 The Individual vs the Community

To determine if a measure can be considered ‘necessary in a democratic society’, the Court held that it must decide on ‘whether the interference complained of corresponded to a “pressing social need”, whether it was “proportionate to the legitimate aim pursued”, [and] whether the reasons given by the national authorities to justify it are “relevant and sufficient”’.¹⁵⁵ Because the Court has repeatedly only found interferences with the right to respect for private life when it comes to compulsory vaccination, the following remarks are primarily related to Article 8 ECHR.

The requirements placed on the state when examining ‘necessity in a democratic society’ depend significantly on the margin of appreciation left to it. In *Vavricka v Czeck Republic* the Court gave a detailed assessment on the extend thereof with regard to compulsory vaccination. It emphasized that there is a consensus among Member States and specialized international bodies that the highest possible vaccination coverage should be pursued. But because there is no consensus on how this aim should be achieved and the Court considers that making vaccination a matter of legal duty can be regarded as raising sensitive

152 There are vaccines that do not prevent the transmission of the respective disease, like the inactivated vaccine against polio (if the transmission can be prevented too it is called ‘sterilizing immunity’, for a quick overview of the term see Chia-Yi Hou, ‘What is sterilizing immunity and do we need it for the coronavirus?’ *The Hill* (8 June 2020) <<https://thehill.com/changing-america/well-being/prevention-cures/501677-what-is-sterilizing-immunity-and-do-we-need-it>> accessed 4 February 2021). However, even vaccines that do not prevent the transmission can lead to herd immunity and thereby protect the community – but a much higher number of people has to be immune to achieve that goal (see thereto Zaria Gorvett, ‘Can you still transmit Covid-19 after vaccination?’ (3 February 2021) <<https://www.bbc.com/future/article/20210203-why-vaccinated-people-may-still-be-able-to-spread-covid-19>> accessed 4 February 2021).

153 *Boffa et al v San Marino* (n 11) 34.

154 Eg in Austria the intentional and negligent endangerment of others by communicable diseases subject to notification is prohibited by §§ 178 and 179 of the Austrian Penal Code.

155 *Sunday Times v the United Kingdom* (n 149) 62.

ethical and moral issues, the margin of appreciation left to the states should be a wide one.¹⁵⁶

By invoking the duty to protect the life and health of the population, arising from Articles 2 and 8 of the ECHR, and the duty to prevent infectious diseases as far as possible, that various international documents stipulate, the Court acknowledged decreasing vaccination rates as ‘a pressing social need’.¹⁵⁷ Further, it considered the goal of achieving the highest possible vaccination coverage rates as well as achieving herd immunity, if possible for the respective disease, as ‘relevant and sufficient’ reason for ordering compulsory vaccinations.¹⁵⁸

When examining the necessity in a democratic society, however, the clear focus of the Court is on assessing proportionality.¹⁵⁹ Thereby, the Court examines whether the interests served, and the interests harmed by the measure at stake strike a fair balance.¹⁶⁰ Concerning compulsory vaccination, these interests are the state’s interest of promoting the health of the community and the individual’s interest not to have his/her rights interfered with.¹⁶¹ Accordingly, a weighing of interests takes place, taking into account the relevant features of the vaccination scheme, such as the choice of sanctions, the existence of exemptions, procedural safeguards or the availability of compensation.¹⁶² In *Vavricka v Czech Republic* the Court did find the introduction of compulsory vaccination to be proportionate to the aim pursued. It held ‘that it cannot be regarded as disproportionate for a State to require those for whom vaccination represents a remote risk to health to accept this universally practiced protective measure, as a matter of legal duty and in the name of social solidarity, for the sake of the small number of vulnerable children who are unable to benefit from vaccination.’¹⁶³ Roughly speaking, compulsory vaccination is therefore permissible if the burden on the individual caused by compulsory vaccination is less severe than the burden on society without it.

One weakness of the judgment, which Judge Wojtyczek rightly complains about in his dissenting opinion,¹⁶⁴ however, is that the Court failed to address the

¹⁵⁶ *Vavricka v Czech Republic* (n 2) para 273 et seqq.

¹⁵⁷ *Ibid* para 281 et seqq.

¹⁵⁸ *Ibid* para 285 et seq.

¹⁵⁹ Benedikt Pirker, *Proportionality analysis and models of judicial review: A theoretical and comparative study* (European Administrative Law Series vol 8, Europa Law Publ 2013) 199.

¹⁶⁰ Janneke Gerards, ‘How to improve the necessity test of the European Court of Human Rights’ (2013) 11(2) *Int J Const Law* 466, 470 et seq.

¹⁶¹ See eg *Solomakhin v Ukraine* (n 30) para 36.

¹⁶² *Vavricka v Czech Republic* (n 2) para 290 et seqq.

¹⁶³ *Ibid* para 306. See also *Acmanne v Belgium* (n 43) 256, *Boffa et al v San Marino* (n 11) 35; *Solomakhin v Ukraine* (n 30) para 36.

¹⁶⁴ *Vavricka v Czech Republic* (n 2) DISSENTING OPINION OF JUDGE WOJTYCZEK para 9 et seqq.

individual vaccinations ordered. While the Court stated that the vaccines in question are considered 'standard and routine vaccination of children against diseases that are well known to medical science', it does not refer to any other characteristics of the vaccines. As a result, the judgement is somewhat lacking in substance in that respect, even though one might eventually reach the same conclusion, namely that the compulsory order of all these vaccines is indeed proportionate. For example, the Court did not consider it necessary to distinguish between vaccinations that provide herd immunity and vaccinations that do not.¹⁶⁵ Vaccinations that only protect the individual were thus measured by the same standards as vaccinations that can protect the individual as well as society. While not to diminish the importance of protecting each individual child, these differences should be taken into account.

But the ability of a vaccine to achieve herd protection is not the only factor influencing proportionality. In the following, an overview of factors that can affect proportionality, while not presuming to be conclusive, shall be given. A separate assessment for each proposed compulsory vaccination must be carried out, as the individual factors may differ considerably.

Relevant factors¹⁶⁶ for determining whether the introduction of compulsory vaccination is proportionate are: First, the risks accompanying the vaccine¹⁶⁷ and the respective disease¹⁶⁸ have to be taken into consideration; these risks are, eg side effects, long-term consequences or death to be expected from the vaccination/the disease, as well as the probability of their occurrence. The more likely side effects and long-term consequences occur after a vaccination, the greater the weight of the interest of the person concerned in the non-execution. Here, in addition to the abstract risk of side effects, the individual risk of the person concerned (ie possible contraindications) must be taken into account.¹⁶⁹ Conversely, the higher the complication and death rate of the disease, especially in direct comparison to the complication and death rate of the vaccination offered, the greater the weight of the state's interest in protecting health. In this context, reference must also be made to the probability of an infection with the disease in the absence of immunization, as the more contagious a disease is, the more weight is to be attached to its containment through a vaccination, for each infected person

¹⁶⁵ See *ibid* para 288.

¹⁶⁶ See Anja Krasser, 'Zur grundrechtlichen Zulässigkeit einer Impfpflicht' (n 1) 141; similarly *Vavricka v Czech Republic* (n 2) DISSENTING OPINION OF JUDGE WOJTYCZEK para 9.

¹⁶⁷ Geschäftsstelle der Bioethikkommission, 'Vaccination - Ethical Aspects: Opinion of the Austrian Bioethics Commission' (Wien, 1 June 2015) 38.

¹⁶⁸ *Ibid*.

¹⁶⁹ See *Boffa et al v San Marino* (n 11) 35 and *Solomakhin v Ukraine* (n 30) para 36.

then contaminates several others.¹⁷⁰ Another important factor is the benefit to society¹⁷¹ achieved by the intervention and the effectiveness of the vaccine. This is because the public interest in making vaccination compulsory weighs more heavily the more clearly the incidence of the disease can be reduced or if it could even be completely eradicated by vaccination. Finally, it is essential whether the disease is transmissible from person to person, for then there is a health risk that goes beyond the individual and can thus justify an interference with the right to self-determination on behalf of the protection of the community's health.¹⁷² Yet, compulsory vaccination for diseases that are not transmissible from person to person may be justifiable with regard to relieving the burden of hospitals in a health crisis. However, in order to actually endanger the health of the population through the avoidable burden on hospital capacities, these diseases would have to occur in very large numbers and require a stay in hospital with a high probability.

Accordingly, the question of proportionality is strongly dependent on the vaccinations that are to be included in this duty. Simplified, the order of compulsory vaccination would thus be proportionate if, on the one hand, the risk of side effects and consequential damage from vaccination is low and the vaccine is safe and effective, but, on the other hand, the risk of infection, complications and death in the course of the disease is high.

5 Conclusion

In conclusion, Article 2 ECHR does not prevent the introduction of compulsory vaccination, provided that measures are taken to prevent life-threatening risks. But if the vulnerable are only inadequately protected by voluntary vaccination schemes, it is conceivable that the positive obligation to protect the lives of those under the state's jurisdiction may oblige the state to introduce compulsory vaccination and a failure to comply with said obligation would constitute a violation. Regarding Article 8 ECHR, compulsory vaccination as well as the negative consequences arising from the duty constitute an interference with its scope, in particular with the protection of one's bodily integrity and self-determination. Further interferences with Article 8 ECHR are possible but depend

170 See eg Elon Kohlberg and Abraham Neyman, 'Demystifying the Math of the Coronavirus' Harvard Business School Working Paper, No 20–112 <https://www.hbs.edu/ris/Publication%20Files/20-112_4278525d-ccf2-4f8a-b564-2e95d0e7ca5b.pdf> accessed 24 February 2021.

171 Geschäftsstelle der Bioethikkommission (n 167) 38. See also *Boffa et al v San Marino* (n 11) 35.

172 Christian Kopetzki, *Unterbringungsrecht: 1: Historische Entwicklung und verfassungsrechtliche Grundlagen* (Springer 1995) 416.

on the details of the specific act introducing compulsory vaccination. According to the case law of the Commission and the Court, there are no interferences with the scope of Article 9 ECHR when introducing compulsory vaccination. While this may have been primarily due to the reasoning in these precedents, it is nevertheless unlikely that the Court will consider a separate issue under Article 9 ECHR in the near future.

Interferences with the scope of Article 8 ECHR, however, can be justified, provided that the benefit for the community outweighs the burden on the individual. This weighing is influenced by a multitude of factors which make it impossible to break down the answer to the question of whether compulsory vaccination is permissible or not to a simple ‘yes’ or ‘no’. Rather, it depends on the specifics of the vaccination scheme in question, in particular, the vaccinations covered by the duty, which must be assessed individually. Compulsory vaccination is hence conceivable for diseases that are particularly contagious and associated with considerable risks while the vaccine offered is safe and effective.