



The Compatibility of Mandatory Vaccination with the European Convention on Human Rights: Implications for a National Vaccination Policy

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Abstract

This contribution examines the compatibility of mandatory vaccination with the European Convention on Human Rights (ECHR) through an analysis of the relevant ECHR rights and related case law of the European Court of Human Rights (ECtHR). By focusing on Article 8 (Right to Private Life), Article 2 (Right to Life) and Article 9 (Freedom of Thought, Conscience and Religion) ECHR, we formulate conditions under which mandatory vaccination legislation is justified. With that, this analysis aims to provide national legislators with guidance on responsible legislative policy. Additionally, this article discusses the legal framework underlying the Dutch vaccination policy,

including developments therein since COVID-19. Furthermore, the role of the European Union in the context of vaccination is briefly discussed. The importance of an extensive societal and parliamentary debate before implementing a mandatory vaccination policy is stressed, as is the need for proportionality in enforcement.

Keywords

ECHR rights – legislation – mandatory vaccination – public health – the Netherlands

1 Introduction

In 2022 the vaccination coverage of the National Immunisation Programme (NIP) in the Netherlands has declined for the second year in a row.¹ More specifically, the vaccination coverage of the NIP, which protects children against 13 infectious diseases such as diphtheria, tetanus and measles, has decreased between 2 to 5%, depending on the type of disease.² As of the time of writing, the vaccination coverage for measles is 89.4%, which confronts the Netherlands with one of the lowest vaccination rates against measles in years. This statistic is especially worrying given that the World Health Organization (WHO) recommends (at least) 95% vaccination coverage against measles to maintain herd immunity and prevent measles outbreaks.³ Moreover, the latest World Health Organization and UNICEF estimates of national immunisation coverage (WUENIC) revealed the largest fall in global routine immunisation coverage in three decades.⁴ Measles cases, for example, increased by 79% worldwide in the first two months of 2022 in comparison with 2021, which led

1 Rijksofficiële rapportage van het Rijksofficiële Instituut voor Volksgezondheid en Milieu, *Vaccination Coverage and annual report national immunisation programme in the Netherlands 2022* (June 2023), available online at www.rivm.nl/bibliotheek/rapporten/2023-0031.pdf (accessed 17 October 2023).

2 Rijksofficiële rapportage van het Rijksofficiële Instituut voor Volksgezondheid en Milieu, *National Immunisation Programme* (25 January 2023), available online at www.rivm.nl/en/national-immunisation-programme (accessed 17 October 2023).

3 Local Burden of Disease Vaccine Coverage Collaborators, 'Mapping routine measles vaccination in low- and middle-income countries', *Nature* 589 (2021) 415–419.

4 World Health Organization, 'COVID-19 pandemic fuels largest continued backslide in vaccinations in three decades' *WHO* (15 July 2022), available online at www.who.int/news/item/15-07-2022-covid-19-pandemic-fuels-largest-continued-backslide-in-vaccinations-in-three-decades (accessed 17 October 2023).

the WHO and UNICEF to warn countries of a ‘perfect storm’ of conditions for measles outbreaks.⁵

Although the Dutch vaccination policy is (traditionally) known for its voluntary character, during the COVID-19 pandemic, the government introduced interventions that were experienced by some as (strong) pressure on being vaccinated against COVID-19.⁶ Whilst COVID-19 presently poses less of a threat to public health than it did in the past few years, the decreasing vaccination coverage of the NIP does raise questions about the current Dutch policy, which assumes voluntariness. In particular, because in April 2021, the European Court of Human Rights (ECtHR) has delivered a key judgement about the consequences of non-compliance with a legal duty to vaccinate children against nine well-known diseases in the case of *Vavříčka and Others v. the Czech Republic*.⁷ The Court did so in the light of the fundamental rights framework as laid down in the European Convention on Human Rights (ECHR). In other words, the Court ruled on the legitimacy of a mandatory vaccination policy.

These developments prompted us to discuss vaccination policies in light of fundamental rights in order to develop a normative framework that provides guidance for mandatory vaccination legislation on a national level. More specifically, using the relevant ECHR rights and ECtHR jurisprudence, we want to address the question if (1) there is room for States — i.e., Contracting Parties to the Convention — to introduce mandatory vaccination policies, and, if so, (2) whether certain circumstances (such as a pandemic) invoke a responsibility for the government to introduce such policies. In doing so, this article aims to outline the constitutional framework regarding the Dutch vaccination policy, in particular with regard to Article 2 ECHR (the right to life), Article 8 ECHR (the right to respect for private and family life) and Article 9 ECHR (the right to freedom of thought, conscience and religion). In Section 2 we will give a brief overview of the Dutch vaccination policy and the relevant related legislation. In section 3 we will discuss the significance of the role of the European Union in the context of (mandatory) vaccination. We will also discuss the developments since COVID-19 in these Sections. Subsequently, in Section 4, 5 and 6 we will elaborate on the scope and significance of Articles 2, 8 and 9 ECHR,

5 World Health Organization, ‘UNICEF and WHO warn of perfect storm of conditions for measles outbreaks, affecting children’, *WHO* (27 April 2022), available online at www.who.int/news/item/27-04-2022-unicef-and-who-warn-of-perfect-storm-of-conditions-for-measles-outbreaks-affecting-children (accessed 17 October 2023).

6 R.C. Simons, M.A.R. Bak, J. Legemaate and M.C. Ploem, ‘Towards a less voluntary vaccination policy in the Netherlands? Findings from an expert interview study’, *Health Policy* 133(104841) (2023) 1–7.

7 ECtHR 8 April 2021, 47621/13 (*Vavříčka and Others v. the Czech Republic*).

combined with an analysis of relevant case law of the ECtHR in this regard. We will end our contribution with a discussion in Section 7, followed by the concluding remarks in Section 8.

Beforehand, it should be noted that in literature the terms ‘mandatory’ and ‘compulsory’ vaccination are often conflated and regarded as synonyms.⁸ However, these terms should be distinguished from each other.⁹ Mandatory vaccination is rarely compulsory (i.e., criminalisation of vaccine refusal), but it does limit people’s freedom to choose whether or not to vaccinate, in the sense that not being vaccinated can make life more difficult.¹⁰ In this article we will use the term mandatory vaccination, with which we refer to the withholding of valuable social goods or services from people who choose not to vaccinate themselves or their children for non-medical reasons, as well as the use of (administrative) fines following vaccine-refusal.¹¹

2 A Brief Overview of the Dutch Vaccination Policy

2.1 *Underlying Constitutional Framework*

The legal basis for governmental measures in the field of public health and prevention — including vaccination — can be found in the Dutch Constitution. Since 1988 Article 22 of the Constitution (‘Grondwet’) stipulates that ‘the authorities shall take steps to promote the health of the population’.¹² Similar provisions can be found in international treaties, such as Article 11 of the European Social Charter (ESC)¹³ and Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹⁴ It follows from parliamentary documents that the phrase ‘to promote the health of the population’ also encompasses the protection of public health.¹⁵ Generally speaking, the term covers all the policies implemented by the government to protect and improve

8 A. Giubilini, ‘An Argument for Compulsory Vaccination: The Taxation Analogy’, *Journal of Applied Philosophy* 37(3) (2020) 446–447.

9 *Ibid.*, 447.

10 World Health Organization, ‘COVID-19 and mandatory vaccination: Ethical considerations’, *WHO* (30 May 2022), available online at <https://iris.who.int/bitstream/handle/10665/354585/WHO-2019-nCoV-Policy-brief-Mandatory-vaccination-2022.1-eng.pdf?sequence=1&isAllowed=y> (accessed 17 October 2023).

11 *Supra* note 8, 447.

12 A.C. Hendriks and P.B.C.D.F. van Sasse van Ysselt, ‘Gezondheidsrechtelijke aspecten van corona’, *Tijdschrift voor Constitutioneel Recht* 11(3) (2020) 262–281, at 263.

13 Article 11(1-3) ESC.

14 Article 12(1) ICESCR.

15 *Kamerstukken* 11 1976/77, 13873, nr. 7, 23.

public health, which includes not only the protection against concrete dangers, such as the outbreak of an infectious disease, but also the promotion of public health without direct threat of danger.¹⁶ The right to health thus includes two dimensions: first, guaranteeing access to (curative) care and second guaranteeing conditions for health, which includes the right to prevention.¹⁷

An important conclusion that follows from the constitutional embedded right to health, is that the government has a multifaceted and far-reaching responsibility in the context of public health. The government should strive to protect and foster public health by all means. Regarding vaccination, however, the key question is: how far may the government go to protect public health (collective interest) through a policy which infringes other fundamental rights, such as the rights to (private) life and freedom of thought, conscience and religion (individual interest)?

2.2 *The Public Health Act*

In 2005, the revised International Health Regulations (IHR), established by the WHO, was implemented in the Netherlands resulting in the Public Health Act.¹⁸ Before the introduction of the Public Health Act, rules regarding infectious disease control and collective prevention were regulated in various laws.¹⁹ However, the Public Health Act brought all rules together in one law.²⁰ Up until the recent revision of the Public Health Act (which will be discussed in Section 2.3), the Public Health Act divided infectious diseases into four categories: A, B1, B2 and C. The classifications determine in which way the disease needs to be reported to the public health service and which measures can be taken. An important element of the Public Health Act are the measures that are aimed at the individual. The most far-reaching measures, such as (forced) isolation, quarantine and medical examination, can be taken for A-diseases. It should be noted in this regard that (mandatory) vaccination is not one of the measures that can be taken on basis of the Public Health Act.

In fact, regarding vaccination, the Public Health Act only encompasses provisions concerning the organisation and structure of a vaccination programme, such as the NIP. For example, Article 6b of the Public Health Act

16 *Ibid.*

17 A.C. Hendriks, J.G. Sijmons and B.C.A. Toebes, 'Gezondheidsbeleid vraagt om een geïntegreerde aanpak', *Nederlands Juristenblad* 688(11) (2022) 825.

18 *Kamerstukken II* 2007/08, 31316, nr. 3, 2-3.

19 Infectious Diseases Act (1998), Quarantine Act (1960) and Collective Prevention Public Health Act (1990).

20 J.C.J. Dute, 'De Wet publieke gezondheid', *Tijdschrift voor Gezondheidsrecht* 32(8) (2008) 576-591.

stipulates that a vaccination programme is set by governmental decree and that the Minister of Health is responsible for the direction and coordination of the implementation, as well as the registration, monitoring and evaluation of a vaccination programme.²¹ Hence, the Public Health Act does not entail specific vaccination provisions that promote or mandate vaccination for the general population, nor do any other Dutch laws; vaccination thus is voluntary in the Netherlands.²²

However, there is one (legal) exception concerning the professional group of military personnel. On the basis of Article 3 of the Military Immunisation Act, military personnel about to be sent abroad, can be mandated to be vaccinated against a range of infectious diseases.²³ Nonetheless, this vaccination requirement is not absolute. A soldier may — if he or she has religious or other kinds of conscientious objections to vaccination — send a reasoned request to the minister to be exempted from the mandate.²⁴ Although mandatory vaccination for other professions, such as healthcare workers or educational personnel, has been (widely) discussed in the past, currently only vaccination for military personnel can be legally enforced.²⁵

It is interesting to note in this regard that the Netherlands has had various laws in the 19th and 20th century — which can be considered as predecessors of the Public Health Act — that did mandate vaccination, mostly against smallpox.²⁶ However, just before the global eradication of smallpox in 1980, the latest Dutch Vaccination Act containing (an attenuated form of) mandatory vaccination was repealed in 1975.²⁷ Since then, outbreaks of infectious diseases, such as measles, have incidentally flared up the debate regarding mandatory vaccination, but have not resulted into legislative change.²⁸

2.3 *Legislative Developments since COVID-19*

Although the legal framework for infectious disease control and prevention is formed by the Public Health Act, the outbreak of COVID-19 demonstrated

21 Article 6b(2) Public Health Act.

22 *Supra* note 6.

23 Article 3(1) Military Immunisation Act.

24 Article 5(1–3) Military Immunisation Act.

25 R.C. Simons and A.C. Hendriks, 'Vaccineren van zorgmedewerkers — gezondheidsrechtelijke en grondrechtelijke aspecten', *Tijdschrift voor Recht en Religie* 2 (2022) 141–142.

26 R.C. Simons, 'Tussen vaccin-verering en vaccin-verschrikking. De rechtshistorische ontwikkelingen van het Nederlandse vaccinatiebeleid', *Pro Memoria* 25(2) (2023) 163–202.

27 J.C.J. Dute, *De wetgeving ter bestrijding van infectieziekten* (Nijmegen: Ars Aequi Libri, 1994) pp. 54–62.

28 R.H.M. Pierik, 'Past een vaccinatieplicht binnen het EVRM-regime?', *Tijdschrift voor Gezondheidsrecht* 43(4) (2019) 8–25.

that Public Health Act was insufficiently prepared for an outbreak of this magnitude.²⁹ A reason for this can be found in the fact that the infectious diseases control measures aimed at the individual are hardly enforceable — if it at all — in case of a large-scale outbreak.³⁰ Moreover, the ‘traditional’ infectious disease control measures as laid down in the Public Health Act were by no means capable of putting an end to the spread of COVID-19.³¹ After a vaccine became available against COVID-19, in June of 2021 the ‘Temporary Act Coronavirus-entrypasses’³² was adopted, on which basis someone’s vaccination, recovery or test status was required before entering certain companies, events and facilities. This legal measure can be considered as a form of pressure towards COVID-19-vaccination, although some considered it as *de facto* mandatory vaccination.³³

Recently, the Public Health Act has been revised. The revisions entered into force in July 2023.³⁴ The purpose of the law change was to be better prepared for future pandemics and to replace the ‘Temporary Act Measures COVID-19’. The new Public Health Act now provides a legal framework that can be ‘activated’ when an infectious disease arises that has *pandemic potential* (new category A1-diseases) and on which basis (mandatory) collective measures can be taken, such as wearing facemasks and keeping safe distance.³⁵ Although, more controversial measures, e.g., the closure of schools and the use of a vaccination entrypass, do not fall within the scope of the collective measures, Article 58d does provide the Minister of Health with an emergency competence to take *other* collective measures than those listed in §8 of the Public Health Act. The scope of this emergency competence has not been defined, which raises the question if measures in the context of (mandatory) vaccination can be introduced under the umbrella of the emergency competence. Although the Minister has explicitly stated that the measure of ‘mandatory vaccination [as such] is ruled out’, he did not rule out ‘vaccination-pressure as side-effect of other collective measures (...) because there is no objective criterion on what can be considered as vaccination-pressure.’³⁶

29 A.J. Wierenga, ‘Noodverordeningen in coronacrisis despotisch van aard’, *THEMIS* 5 (2020) 238–240; *supra* note 6.

30 W.J.A.M. Dijkers, ‘Ebola in Nederland’, *Nederlands Juristenblad* 2001(39) (2014) 2783.

31 *Supra* note 29, 240.

32 *Stb.* 2021, 240.

33 *Supra* note 6.

34 *Stb.* 2023, 184.

35 Article 58a–58za Public Health Act.

36 *Kamerstukken I* 2022/23, 36194, F, 14.

3 The European Union and Vaccination

3.1 *European Union*

The European Union has limited legislative instruments at its disposal in the field of public health (emergencies).³⁷ This follows from the fact that the primary objectives of the EU are based on economic considerations rather than public health considerations, as stated in Article 3 of the Treaty on the European Union (TEU): ‘The Union shall establish an internal market (...) an economic and monetary union’.³⁸

Nonetheless, Article 6 of the Treaty on the Functioning of the European Union (TFEU) stipulates that the EU has competence to carry out actions to *support, coordinate or supplement* the actions of the Member States, amongst others regarding the protection and improvement of public health.³⁹ The provision implicitly accentuates the central for Member States (i.e., subsidiary role for the EU) in the field of public health. In particular, Article 168 TFEU outlines that a high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities, and that Union action — which complements national policies — shall be directed towards, e.g., improving public health and preventing diseases.⁴⁰ Examples of such Union action are fights against major health scourges, as well as monitoring, early warning of and combating serious cross-border threats to health (i.e., pandemics).⁴¹ Consecutive health crises, such as Bird flu and SARS, led to the amendment of Article 168 TFEU in this sense.⁴² On the basis of Article 168(5) TFEU, *incentive measures* may be adopted by the European Parliament and the European Council, designed to protect and improve human health ‘and in particular to combat major cross-border health scourges, measures concerning monitoring, early warning of and combating serious cross-border threats to health’.⁴³ These incentive measures are, however, non-binding for Member States. In fact, the EU is legally prohibited from legislating on public health

37 *Supra* note 25.

38 Article 3(3) TEU.

39 Article 6(1)(a) TFEU.

40 Article 168(1) TFEU.

41 Article 168(1) TFEU.

42 F. Vandenbroucke, F. Nicoli, B. Burgoon, A. De Ruijter and R. Beetsma, ‘EU Solidarity in Fighting COVID-19: State of Play, Obstacles, Citizens’ Attitudes, and Ways Forward’, *VoxEU* (26 March 2020), available online at <https://voxeu.org/article/eu-solidarity-fighting-covid-19> (accessed 17 October 2023).

43 Article 168(5) TFEU.

(Article 168(5) TFEU) and for access to health care (Article 168(7) TFEU).⁴⁴ The same applies for vaccination policies: the EU cannot legally impose mandatory vaccination in Member States.

The competence of the EU regarding vaccination is more pragmatic (or coordinative) in its nature. During the Swine flu epidemic for example, the EU established an ad hoc voluntary public procurement system — which later became generalised by ‘Decision No. 1082/2013/EU on Serious Cross-Border Threats to Health’ — whereby Member States lacking access to vaccines, could obtain these via this procurement system (and with which a stockpile of vaccines was created, using excess capacity of vaccines in Member States).⁴⁵ During the COVID-19 pandemic, a similar system was established by the EU, called the ‘EU Strategy for COVID-19 vaccines’, which provided the legal basis for securing the pre-purchase of vaccines from a central European procurement.⁴⁶

3.2 *Legislative Developments since COVID-19*

As outlined above, the European Union does not have the (formal) legislative competence to make vaccination mandatory in Member States. Nonetheless, Member States can individually decide whether they want to introduce mandatory vaccination policies. During the outbreak of COVID-19, for example, many European countries, such as Italy, Greece, France, Austria and Hungary introduced mandatory vaccination policies after a COVID-19 vaccine became available.⁴⁷

Despite the fact that the EU cannot impose mandatory vaccination in Member States, at one point during the outbreak of COVID-19, European Commission president Von der Leyen called for a debate about mandatory COVID-19 vaccination given how many people remained unvaccinated in the Union.⁴⁸ According to von der Leyen, it was ‘understandable and appropriate to lead this discussion, how we can encourage and potentially think about mandatory vaccination within the EU’.⁴⁹ Although this statement did not have any EU — policy implications, it can be concluded that the EU does have a voice in the debate regarding mandatory vaccination from a normative point of view.

44 A. De Ruijter, ‘EU-gezondheidsrecht en –beleid na COVID-19’, *Tijdschrift voor Gezondheidsrecht* 44(5) (2020) 524–535, at 526.

45 *Supra* note 42.

46 *Supra* note 44, 530.

47 T. Burki, ‘COVID-19 vaccine mandates in Europe’, *The Lancet* 22(1) (2022) 27–28.

48 S. Fleming and G. Chazan, ‘Von der Leyen calls for EU ‘discussion’ on mandatory vaccination’, *The Financial Times* (21 December 2021), available online at <https://www.ft.com/content/3e96d309-0283-4a33-9fco-2bc5de22cb5f> (accessed 21 October 2023).

49 *Ibid.*

4 Article 8 ECHR: The Right to respect for Private and Family Life

Suppose that a State introduces a mandatory vaccination policy for children that entails an imposed fine for parents who do not choose to vaccinate their children, as well as the denial of access to educational institutions for the unvaccinated child. People who object to such a policy, frequently use the right to respect for private and family life ex Article 8 ECHR as their main argument.⁵⁰ Regarding the notion of ‘private life’, people might seek protection of this provision for the simple fact that decisions on whether or not to vaccinate should be considered a private matter. Additionally, regarding the notion of ‘family life’, parents might feel restricted in the upbringing of their children.⁵¹ Taking this into account, combined with the fact that the ECtHR has in the past — and recently in the case of *Vavříčka and Others v. the Czech Republic*⁵² — elaborated on the relationship between (mandatory) vaccination and the right to respect for private and family life ex Article 8 ECHR, we need to further examine the meaning of Article 8 ECHR in the context of mandatory vaccination. We will first elaborate on the scope and significance of Article 8 ECHR in this regard (Section 4.1), after which we will discuss whether mandatory vaccination interferes with Article 8 ECHR (Section 4.2).

Article 8(1) ECHR: “Everyone has the right to respect for his private and family life, his home and his correspondence”⁵³

4.1 Scope and Significance of Article 8 ECHR

Article 8 ECHR distinguishes four categories of protection: private life, family life, home and correspondence, although the scope of Article 8 ECHR is not limited to these four categories.⁵⁴ Case law in the context of private life and family life outweighs case law regarding home and correspondence, yet there is no clear distinction between private and family life (which may occasionally require the Court to assess cases under both regimes).⁵⁵

50 P. Gragl, ‘Kant and Strasbourg on Mandatory Vaccinations’, *European Convention on Human Rights Law Review* 3 (2022) 220–262, at 250.

51 A. Krasser, ‘Compulsory Vaccination in a Fundamental Rights Perspective: Lessons from the ECtHR’, *The Vienna Journal on International Constitutional Law* 15(2) (2021) 207–233, at 215.

52 *Supra* note 7.

53 Article 8(1) ECHR.

54 M.M. Spaander, ‘The European Court of Human Rights and the Emergence of Human Germline Genome Editing’, *European Journal of Health Law* 29 (2022) 458–483, at 466.

55 W.A. Schabas, *The European Convention on Human Rights: A Commentary* (Oxford: Oxford University Press, 2015) pp. 366–367.

Under Article 8 ECHR, both negative obligations (States need to limit the interference with the private life of individuals as much as possible) and positive obligations (States need to adopt laws, public policies and concrete measures to protect the individual against arbitrary interference by public authorities) arise.⁵⁶ Although the distinction between these obligations is not always clear, according to the Court, the applicable principles are nonetheless similar: 'In both contexts regard must be had to the fair balance that has to be struck between the competing interest of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation.'⁵⁷ In 1994, in the case of *Kroon and Others v. the Netherlands*, the Court emphasised that the essential object of Article 8 ECHR 'is to protect the individual against arbitrary interferences by public authorities'.⁵⁸ Although this wording might appear as a (negative) 'right to be left alone', case law regarding Article 8 ECHR mostly focuses on the positive dimension of Article 8 ECHR, which has in fact proven to be one of the richest areas of legal development by the ECtHR, including the sphere of (public) health and medical care.⁵⁹

As outlined above, the notion of 'private life' is a broad one, which is not susceptible to exhaustive definition.⁶⁰ In the case of *X and Y v. the Netherlands* for example, the Court ruled that the term 'private life' also covers the physical and psychological integrity of a person.⁶¹ Moreover — and especially relevant in the context of (mandatory) vaccination — in the landmark case of *Pretty v. the United Kingdom*, the Court emphasised that, although no previous case had established (as such) the right to self-determination as being contained in Article 8 ECHR, 'the notion of personal autonomy is an important principle underlying the interpretation of its guarantees'.⁶² Hence, the right to 'private life' safeguards the right to make autonomous decisions over body and life, which includes health-related decisions as well.⁶³

56 T. Corlăţean, 'How Compatible Is the Statutory Child Vaccination Duty with Article 8 of the European Convention on Human Rights', *Scientia Moralitas Conference Proceedings* 01232 (2021) 13–19.

57 *Supra* note 55, 368.

58 ECtHR 27 October 1994, 18535/91 (*Kroon and Others v. the Netherlands*), para. 31.

59 *Supra* note 55, 366.

60 ECtHR 25 March 1993, 13134/87 (*Costello-Roberts v. the United Kingdom*), para. 36.

61 ECtHR 26 March 1985, 8978/80 (*X and Y v. the Netherlands*), para. 22.

62 ECtHR 29 April 2002, 2346/02 (*Pretty v. the United Kingdom*), para. 61.

63 *Supra* note 51, 216.

4.2 *Does Mandatory Vaccination Interfere with Article 8 ECHR?*

In cases regarding mandatory vaccination, the right to private life is often ‘at the heart of claims’.⁶⁴ Specifically regarding forced administration of vaccinations, this is not surprising, considering the fact that medical interventions affect bodily integrity and personal autonomy, which cannot be carried out without consent of the individual.⁶⁵ However, the vast majority of cases that are presented to the Court are not about forced administration of vaccinations, but instead revolve around the withholding of valuable social goods or services from people who choose not to vaccinate themselves or their children for non-medical reasons or the use of (administrative) fines, following vaccine-refusal — which in fact the *Vavříčka*-case was also about.⁶⁶ Hence, it is particularly interesting to examine whether consequences of vaccine-refusal can be justified on the basis of Article 8(2) ECHR, which stipulates that the right to private life may be restricted if this is necessary in a democratic society, e.g., for the protection of health or for the protection of the rights and freedoms of others.⁶⁷

In 1979, in the case of *X v. Austria*, the European Commission of Human Rights (EComHR) — which was formally replaced by the ECtHR in 1998 — held that ‘a compulsory medical intervention, even minor, constitutes an interference with the right to respect for private life’s.⁶⁸ The EComHR reiterated the stance that even minor medical treatments against the patient’s will must be regarded as an interference with Article 8 ECHR in the case *Acmanne and Others v. Belgium*, adding that the requirement for children to undergo a tuberculin test/chest x-ray for the screening of tuberculosis (with which non-compliance was punishable), may amount to an interference with the right to respect for private life.⁶⁹ However, in this specific case the Commission ruled that the interference was justified ‘to protect both public health and the applicants’ health’.⁷⁰

The EComHR has also ruled in a case concerning mandatory vaccination. In the case of *Boffa and Others v. San Marino*, the applicants complained that their inability to choose whether or not be vaccinated — due to an existing mandatory vaccination law for children against hepatitis B — constituted

64 S. Hungler, ‘Compulsory vaccination and Fundamental Human Rights in the World of Work’, *Studia Iuridica Lublinensia* 31(1) (2022) 63–77, at 65.

65 *Ibid.*

66 *Supra* note 7.

67 Article 8(2) ECHR.

68 EComHR 13 December 1979, 8278/78 (*X v. Austria*) 154.

69 EComHR 10 December 1984, 10435/83 (*Acmanne v. Belgium*) 255.

70 *Ibid.*, 256.

an unjustified infringement of Article 8 ECHR.⁷¹ The EComHR held that a requirement to undergo medical treatment or a vaccination, on pain of a penalty, may amount to interference with Article 8 ECHR (referring to *Acmanne and Others v. Belgium*). However, the Commission ruled that the interference pursued a legitimate aim, namely to protect the health of the public and of the persons concerned.⁷² Moreover, the EComHR concluded that the interference was necessary in a democratic society, because the applicant failed to demonstrate a probability that (in the particular case of his child) the relevant vaccination would cause serious problems, and that the measure did not exceed the margin of appreciation of the State: 'a vaccination campaign which obliges the individual to defer to the general interest and not to endanger the health of others where his own life is not in danger, does not go beyond the margin of appreciation left to the State', stressing the discretionary margin for domestic authorities.⁷³

Similarly, the ECtHR has elaborated on mandatory vaccination in relation to Article 8 ECHR. First, in the case of *Jehova's Witnesses of Moscow v. Russia*, the Court emphasised that the freedom to accept or refuse specific (or an alternative form of) medical treatment, is vital to the principles of self-determination and personal autonomy, thus stressing the importance of individual freedom of choice in the context of medical treatments 'regardless of how irrational, unwise or imprudent such choices may appear to others'.⁷⁴ However, according to the Court, this freedom is not unlimited: 'absent any indication of the need to protect third parties, for example — mandatory vaccination during an epidemic — the State must abstain from interfering with the individual freedom of choice in the sphere of health care, for such interference can only lessen and not enhance the value of life'.⁷⁵ With this reasoning, the Court limits the right to private life in order to protect the lives of others, through which the Court seems to prevail the collective interest of vaccination over its individual interest. Additionally, in the case of *Solomakhin v. Ukraine*, the Court assessed the criteria whether mandatory vaccination was necessary in a democratic society. In Ukraine, the 'Health care and control of diseases Act 1994' stipulated that preventive vaccinations against diseases such as tuberculosis, polio, diphtheria and measles, were mandatory.⁷⁶ Accordingly, the applicant in this case, Mr. Solomakhin, was (involuntary) vaccinated against diphtheria

71 EComHR 15 January 1998, 26536/95 (*Boffa and Others v. San Marino*) 31.

72 *Ibid.*, 34.

73 *Ibid.*, 35.

74 ECtHR 10 June 2010, 302/02 (*Jehovah's Witnesses of Moscow v. Russia*), para. 136.

75 *Ibid.*

76 ECtHR 15 March 2012, 24429/03 (*Solomakhin v. Ukraine*), para. 17.

during hospitalisation, after which he complained that his right to private life had been violated. On the basis of aforementioned jurisprudence, the Court reiterated ‘that a person’s bodily integrity concerns the most intimate aspects of one’s private life, and that compulsory medical intervention, even if it is of a minor importance, constitutes an interference with this right’, adding that mandatory vaccination — as an involuntary medical treatment — amounts to an interference with Article 8(1) ECHR, as it encompasses a person’s physical and psychological integrity.⁷⁷ However, the Court justified this interference with the applicant’s physical integrity by public health considerations and the necessity to control the spreading of infections in the region.⁷⁸ Moreover, the Court stressed the fact that medical staff had checked suitability for vaccination prior to carrying out vaccination, which assured the Court that the necessary precautions had been taken ‘to ensure that the medical intervention would not be to the applicant’s detriment to the extent that would upset the balance of interests between the applicant’s personal integrity and the public interest of protection [*sic*] health of the population.’⁷⁹

As mentioned in the introduction, in the landmark case of *Vavříčka and Others v. the Czech Republic*, the Court has extensively discussed the issue of mandatory vaccination in relation to fundamental rights, particularly concerning Article 8 ECHR.⁸⁰ The Czech Republic has a mandatory vaccination programme for children concerning nine diseases well known to medical science, such as measles, hepatitis B and poliomyelitis. Although mandatory vaccination cannot be enforced physically (i.e., forced administration), parents who fail to comply with the vaccination duty for their children can be fined up to 10 000 Czech Korunas (400 euros) and non-vaccinated children are not accepted to preschool — excluding children who cannot be vaccinated due to medical contraindications.⁸¹ According to the Court, although none of the contested vaccinations were actually performed, the Czech vaccination policy did interfere with the right to private life under Article 8 ECHR, first because the child applicants bore the direct consequences of non-compliance with the vaccination duty (as they were not being admitted to preschool), and second because Mr. Vavříčka (as a father) was personally subject to the duty to have his children vaccinated, and personally borne with the consequences of non-compliance with that vaccination duty (as a fine was imposed on him).⁸²

77 *Ibid.*, para. 33.

78 *Ibid.*, para. 36.

79 *Ibid.*

80 *Supra* note 7.

81 *Ibid.*, paras 11–21.

82 *Ibid.*, paras 263–264.

However, the Court concluded that the interference with Article 8 ECHR could be justified because the vaccination duty was provided by law, pursued a legitimate aim — in protecting public health as well as the protection of the rights and freedoms of others, in particular vulnerable persons who cannot be vaccinated — and was necessary in a democratic society, which mainly depended on the proportionality of the contested measure.⁸³

In this specific case, the Court elaborated — in much more detail than in the *Boffa*-case and the *Solomakhin*-case — on different factors that need be taken into account when assessing the proportionality of mandatory vaccination.⁸⁴ Albeit indirectly, the Court set out a series of (six) different criteria on which basis it concluded that mandatory vaccination was justifiable under Article 8 ECHR. First, the Court noted that the concerned vaccinations were proven to be effective and safe by the scientific community and that the vaccination duty was not absolute, as children with medical contraindications were exempted from the duty. Accordingly, the Court recalled that the Czech legislation provided for exemptions on the basis of a secular objection of conscience.⁸⁵ Second, the Court reiterated that compliance with mandatory vaccination could not be enforced directly (i.e., no forced administration), yet only indirectly through the application of e.g., (administrative) sanctions.⁸⁶ Third, the Court emphasised, that the consequences of non-compliance with mandatory vaccination could be regarded as ‘relatively moderate’; the Court concluded that the amount of the fine (110 euros) could not be considered as ‘unduly harsh or onerous’ and regarded ‘a legal duty intended to safeguard in particular the health of young children as being essentially protective rather than punitive in nature’.⁸⁷ Fourth, the Court stipulated that domestic law provided for procedural safeguards, which enabled applicants to contest (the consequences of non-compliance with) the vaccination duty.⁸⁸ Fifth, the Court stressed that the safety of vaccines was continuously monitored by the competent national authorities, such as the reporting of serious or unexpected side-effects.⁸⁹ Sixth, the Court stressed the importance of the availability of compensation

83 *Ibid.*, paras 196, 272, 310–312.

84 *Ibid.*, paras 209–312; A. Nilsson, ‘Is compulsory childhood vaccination compatible with the right to respect for private life? A comment on *Vavříčka and Others v. the Czech Republic*’, *European Journal of Health Law* 28(3) (2021) 323–340.

85 *Ibid.*, paras 291–292.

86 *Ibid.*, para. 293.

87 *Ibid.*, paras 293–294.

88 *Ibid.*, para. 295.

89 *Ibid.*, para. 301.

for injury to health caused by vaccination.⁹⁰ Although the criteria as presented by the Court in the *Vavrička*-case provide national legislators with guidance on how to rightfully introduce a mandatory vaccination policy, we would like to emphasise that the interpretation of these criteria may vary per specific context (e.g., per type of infectious disease) and require a balanced approach, based on the concept of proportionality, in order to be justified from a human rights perspective.

It should be noted in this regard, that the Court understands that making vaccination a matter of legal duty can raise sensitive moral or ethical issues, and that policy decisions on this are generally preceded by an 'extensive societal and parliamentary debate'.⁹¹ Moreover, the Court states that a vaccination duty should be seen as encompassing the value of *social solidarity*, since its purpose is to protect the health of all members of society, in particular those who are especially vulnerable with respect to certain diseases.⁹² Hence, according to the Court, 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'.⁹³

5 Article 2 ECHR: The Right to Life

One of the best strategies to improve (child) survival and reduce morbidity, through a cost effective and easy intervention, is vaccination.⁹⁴ Yet, it is important to acknowledge the fact that the administration of vaccination is not completely without risks. Vaccines may have side-effects, such as pain, swelling or redness where the injection was given.⁹⁵ Although side-effects of vaccines usually are mild and disappear within several days, rare side-effects resulting in serious health consequences can occur, as well as vaccine-associated deaths.⁹⁶ Commonly, in cases regarding mandatory vaccination, applicants who claim

90 *Ibid.*, para. 302.

91 *Ibid.*, para. 279.

92 *Ibid.*, para. 279.

93 *Ibid.*, para. 306.

94 V.V. Shukla and R.C. Shah, 'Vaccinations in Primary Care', *The Indian Journal of Pediatrics* 85(12) (2018) 1118–1127.

95 *Ibid.*

96 P. Duclos and A. Bentsi-Enchill, 'Current thoughts on the Risks and Benefits of Immunisation', *Drug Safety* 8(6) (1993) 404–413.

to have suffered serious health consequences as a side-effect of administered vaccinations, seek protection of Article 2 ECHR.⁹⁷ In this Section we will reflect on these complaints. First, we will elaborate on the scope and significance of Article 2 ECHR in relation to mandatory vaccination (Section 5.1), then we will discuss whether such vaccination interferes with Article 2 ECHR (Section 5.2).

Article 2(1) ECHR: "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction for a crime for which this penalty is provided by law."⁹⁸

5.1 *Scope and Significance of Article 2 ECHR*

Article 2 ECHR is often linked with the prohibition of torture, inhuman treatment or punishment, and (together with Article 3 ECHR) the provision confronts some of the most dire threats to bodily integrity.⁹⁹ Just like Article 8 ECHR, the obligation of the State regarding Article 2 ECHR, both has negative and positive dimensions.¹⁰⁰

In the case of *L.C.B. v. the United Kingdom*, the Court elaborated on the State's positive obligations following from Article 2 ECHR.¹⁰¹ The Court considered that Article 2(1) ECHR enjoins the State not only to refrain from the intentional and unlawful ending of a life, but also to take all appropriate steps to safeguard the lives of those within its jurisdiction.¹⁰² According to the Court, a State in fact is obliged to do all that could have been required of it to prevent individual lives from avoidably being put at risk.¹⁰³ Importantly, just a few months after the judgment in the case of *L.C.B. v. the United Kingdom*, the Court supplemented its earlier judgment by stating that Article 2 ECHR 'may also imply a positive obligation on states to take preventive operational measures to protect an individual whose life is at risk from acts of another individual', as follows from the case of *Osman v. the United Kingdom*.¹⁰⁴ The Court has recognised that these positive obligations may also have consequences in the sphere of public health and safety.¹⁰⁵ For example, in the case of *Powell and*

97 F. Camilleri, 'Compulsory vaccinations for children: Balancing the competing human rights at stake', *Netherlands Quarterly of Human Rights* 37(3) (2019) 245–267, at 250–251.

98 Article 2(1) ECHR.

99 *Supra* note 55, 118.

100 *Ibid.*, 126.

101 ECtHR 9 June 1998, 14/1997/798/1001 (*L.C.B. v. the United Kingdom*).

102 *Ibid.*, para. 36.

103 *Ibid.*

104 ECtHR, 28 October 1998, 23452/94 (*Osman v. the United Kingdom*), para. 115.

105 *Supra* note 55, 131.

Powell v. the United Kingdom, the Court held that shortcomings in the authorities' health care policies protecting the life of civilians could in certain circumstances be seen as an interference with their positive obligation under Article 2 ECHR.¹⁰⁶ Similar reasoning of the Court can be found in the case of *Calvelli and Ciglio v. Italy*¹⁰⁷ and in the case of *Vo v. France*.¹⁰⁸ More specifically, in the case of *Öneriyildiz v. Turkey*, the Court noted that the positive obligation to take all appropriate steps to safeguard life in light of Article 2 ECHR 'entails above all a primary duty of the State to put in place a legislative and administrative framework to provide effective deterrence against threats to the right to life'.¹⁰⁹ Importantly, the State knew or should have known of the risk regarding the right to life, as follows from *Lopes de Sousa Fernandes v. Portugal*.¹¹⁰

At the moment of writing, there is no jurisprudence of the Court concerning a State's interference with (the positive obligation of) Article 2 ECHR, due to the lack of a mandatory vaccination policy (as a legislative framework to provide against threats to the right of life). Yet, some authors argue that to comply with the obligation to take preventive measures, it is the duty of the State to ensure that everyone is vaccinated who can be vaccinated (i.e., through mandatory vaccination) in order to protect the lives of people who rely on herd immunity for protection against certain infectious diseases.¹¹¹ However, in our view, the duty for States to put in place a legislative and administrative framework to protect against threats to life, could also imply that States have a duty to provide citizens access to (life-saving) vaccines. In the following paragraph we will therefore focus on interferences with the negative obligation under Article 2 ECHR.

5.2 Does Mandatory Vaccination Interfere with Article 2 ECHR?

In the recent case of *Vavříčka and Others v. the Czech Republic*, some applicants also complained of a violation of Article 2 ECHR, however the Court found that these complaints 'did not disclose any appearance of a violation of the right to life ex Article 2 ECHR'.¹¹² Nonetheless, the *Vavříčka*-case was not the first judgement in which the Court elaborated on the possible breach of the right to life in the context of mandatory vaccination.

106 ECtHR 4 May 2000, 45305/99 (*Powell and Powell v. the United Kingdom*), para. 1.

107 ECtHR 17 January 2002, 32967/96 (*Calvelli and Ciglio v. Italy*).

108 ECtHR 8 July 2004, 53924/00 (*Vo v. France*).

109 ECtHR 30 November 2004, 48939/99 (*Öneriyildiz v. Turkey*), para. 89.

110 ECtHR 19 December 2017, 56090/13 (*Lopes de Sousa Fernandes v. Portugal*), para. 201.

111 *Supra* note 97, 251.

112 *Supra* note 7, paras 346–347.

In 1978, the EComHR addressed the relationship between adverse reactions of vaccinations, including vaccine-associated deaths, and the right to life in the case of *Association of Parents v. the United Kingdom*.¹¹³ The association consisted of parents who claimed that their children had suffered severe and lasting damage, or had even died, as a result of vaccinations. Although the vaccination campaigns for the vaccination of babies and young children were not mandatory in this case, the judgment does shed light on how adverse reactions of vaccinations, i.e., vaccine-associated deaths, relate to the right to life. According to the Commission, it cannot be said that — where a small number of fatalities occur in the context of a vaccination scheme whose sole purpose is to protect the health of society by eliminating infectious diseases — there has been an intentional deprivation of life within the meaning of Article 2(1) ECHR, or that the State has not taken adequate and appropriate steps to protect life.¹¹⁴ Moreover, in the earlier mentioned case of *Boffa and Others v. San Marino*, applicants complained about existing mandatory vaccination laws, arguing that the risk of death associated with vaccination was high, thus violated Article 2 ECHR.¹¹⁵ The Commission recalled that Article 2 ECHR primarily provides protection against deprivation of life instead of providing protection against physical injury (although it may be seen as such), therefore an intervention such as vaccination does not in itself amount to an interference prohibited by it.¹¹⁶ Besides, the applicant in this particular case failed to submit any evidence that vaccination would create a serious medical danger to the life of his child.¹¹⁷

Hence, regarding the negative obligation of Article 2 ECHR, the right to life — in the context of vaccination — is only affected when potentially life-threatening circumstances arise in individual cases, for example, when threats are posed by vaccines in the case of allergies or other contraindications on the part of the person concerned.¹¹⁸

113 EComHR 12 July 1978, 7154/75 (*Association of Parents v. the United Kingdom*).

114 *Ibid.*, 32.

115 *Supra* note 71, 30.

116 *Ibid.*, 33.

117 *Ibid.*

118 ECtHR 5 December 2013, 52806/09 (*Vilnes and Others v. Norway*), para. 234; *Supra* note 51, 211.

6 Article 9 ECHR: The Right to Freedom of Thought, Conscience and Religion

Finally, Article 9 ECHR might be of relevance in the context of mandatory vaccination. Ever since the invention of vaccines, there have been religious teachings that reject vaccination, arguing that the human body should be free from unnecessary impurities that instruct the body to behave in specific and pre-determined ways.¹¹⁹ Other religious teachings might not oppose to vaccinations as such, but do reject the use of certain (components of) vaccines that, e.g., contain animal-derived substances.¹²⁰ Outside the scope of religious objections to vaccination, conscientious objections to vaccination might also be based on the incompatibility of vaccines in general, as people might simply reject vaccines.¹²¹ To what extent are these views protected under the guarantees of Article 9 ECHR? We will elaborate on the scope and significance of Article 9 ECHR regarding mandatory vaccination in paragraph 6.1, after which we will discuss whether mandatory vaccination interferes with Article 9 ECHR in paragraph 6.2.

Article 9(1) ECHR: “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.”¹²²

6.1 Scope and Significance of Article 9 ECHR

Article 9(1) ECHR encompasses three components of freedom: (1) the freedom of thought, conscience and religion by itself, (2) the freedom of an individual to change a religion or belief and (3) the freedom to manifest a religion or belief.¹²³ Unlike the former two components, which have an absolute character, the latter one — regarding the manifestation of religion or belief — can be restricted on the basis of Article 9(2) ECHR.¹²⁴ Similar to Article 8(2) ECHR, this provision stipulates that Article 9(1) ECHR may be restricted if this is necessary in a democratic society, for the protection of health or for the

119 I. Trispiotis, ‘Mandatory Vaccinations, Religious Freedom, and Discrimination’, *Oxford Journal of Law and Religion* 11(1) (2022) 145–164.

120 *Supra* note 64, 66.

121 *Supra* note 50, 258.

122 Article 9(1) ECHR.

123 *Supra* note 55, 420.

124 *Ibid.*

protection of the rights and freedoms of others.¹²⁵ In the case of *Kokkinakis v. Greece*, the Court ruled that in its religious dimension, Article 9 ECHR is one of the most vital elements that constitutes the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics and sceptics.¹²⁶ This is relevant in the context of mandatory vaccination given the fact that vaccine refusal is not necessarily religiously inspired.

Despite its heading, Article 9 ECHR distinguishes between the freedom of thought and the freedom of conscience on the one hand, and the freedom of religion and belief(s) on the other hand. ‘Thought’ in the sense of Article 9 ECHR, describes purely internal, intangible processes, (such as making a decision or having an opinion or intention), which are protected by freedom of thought, as long as these processes have not yet manifested in any way.¹²⁷ Meanwhile, ‘conscience’ in the sense of Article 9 ECHR, is more than a mere thought, or in fact ‘a qualified thought’, as Krasser says.¹²⁸ This is why ‘conscience’ is much closer to religion than ‘thought’, because religious ideas might emerge from one’s ‘conscience’.¹²⁹ Conscience can be influenced by religion or philosophy — but does not have to be — and enjoins a person to contemplate what is good or bad and to act accordingly, as follows from the case of *Eweida and Others v. the United Kingdom*.¹³⁰ It is more difficult, however, to determine whether something constitutes to a ‘religion or belief’ in the context of Article 9 ECHR.¹³¹ This is, amongst others, because the word ‘religion’ (or ‘belief’) is not defined by the text of Article 9 ECHR, nor in the case-law of the Court.¹³²

Nevertheless, in the case of *Skugar and Others v. Russia*, the Court reiterated its ‘constant approach’ that Article 9 ECHR primarily protects against the sphere of personal beliefs and religious creeds (the area which is sometimes called the *forum internum*).¹³³ Acts that are intimately related to those beliefs, such as acts worship or devotion which are aspects of the practice of a religion or belief, are also protected.¹³⁴ However, in protecting this personal sphere, Article 9 ECHR does not always guarantee the right to behave in the public

125 Article 9(2) ECHR.

126 ECtHR 25 May 1993, 14307/88 (*Kokkinakis v. Greece*), para. 31

127 *Supra* note 51, 222.

128 *Ibid.*, 223.

129 *Supra* note 55, 423.

130 *Supra* note 50, 258; ECtHR 15 January 2013, 48420/10 (*Eweida and Others v. the United Kingdom*). Joint partly dissenting opinion of judges Vučinić and De Gaetano, para. 2.

131 *Supra* note 55, 425.

132 Council of Europe, ‘A guide to the implementation of Article 9 of the ECHR’ (Council of Europe Publishing, 2022) 8.

133 ECtHR 3 December 2009, 40020/04 (*Skugar and Others v. Russia*), 6.

134 *Ibid.*

sphere in a way which is dictated by such belief; a position held by the Commission since the 1977 case of *Arrowsmith v. the United Kingdom*.¹³⁵ Accordingly, the term ‘practice’ in Article 9(1) ECHR does not cover each act that is motivated or influenced by a religion or a belief: ‘when the actions of individuals do not actually express the belief concerned, they cannot be considered to be as such protect by Article 9 ECHR’.¹³⁶ Regardless, for a conviction to be protected under Article 9 ECHR, it should be of sufficient cogency, seriousness, cohesion and importance, as follows from the case of *Campbell and Cosans v. the United Kingdom*.¹³⁷

6.2 *Does Mandatory Vaccination Interfere with Article 9 ECHR?*

Although the Court has not yet (substantively) addressed the question whether the guarantees of Article 9 ECHR apply to vaccine-refusal, the Court has in the past elaborated on the relevance of Article 9 ECHR in the context of mandatory vaccination.¹³⁸ For example, in the *Boffa*-case, where one applicant complained that mandatory vaccination constituted an interference with his right to freedom of thought and conscience, the EcomHR found no interference with the freedom protected by Article 9 ECHR because ‘the obligation to be vaccination, as laid down in the legislation at issue, applies to everyone, whatever their religion or personal creed’.¹³⁹ This stance was reiterated by the Court in the *Vavříčka*-case, where three of the applicants sought protection of Article 9 ECHR for their ‘critical stance’ towards vaccination (of which the Court concluded that not their religious freedom was potentially at stake, but their freedom of thought and conscience, since their stance was not religiously inspired).¹⁴⁰ The Court also referred to its reasoning in the case of *Bayatyan v. Armenia*,¹⁴¹ — the case in which it considered the applicability of Article 9 ECHR to the conscientious objection of Mr. Bayatyan to military service, based on religious grounds — and reiterated that a conviction or belief must be of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9 ECHR.¹⁴² Lastly, the Court referred to the aforementioned case of *Pretty v. the United Kingdom*,¹⁴³ and emphasised that not all opinions or

135 EComHR 12 October 1978, 7050/77 (*Arrowsmith v. the United Kingdom*), para. 71.

136 *Ibid.*

137 ECtHR 25 February 1982 7511/76 (*Campbell and Cosans v. the United Kingdom*), para. 86.

138 *Supra* note 132, 17.

139 *Supra* note 71, 33.

140 *Supra* note 7, para. 330.

141 ECtHR 7 July 2011, 23459/03 (*Bayatyan v. Armenia*), para. 110.

142 *Supra* note 7, para. 332.

143 *Supra* note 62.

convictions, despite the firmness of the applicant's views, constitute 'beliefs' in the sense protected by Article 9 ECHR'.¹⁴⁴ When addressing Mr. Vavříčka's complaint ex Article 9 ECHR, the Court specifically referred to the first ruling in his case, in which the Czech Constitutional Court held 'that there must be the possibility of an exceptional waiver of the penalty for non-compliance with the vaccination duty where the circumstances call in a *fundamental manner* for respecting the autonomy of the individual'.¹⁴⁵ Even so, the Court ruled that his claim was not sufficiently substantiated or specified and lacked in consistency, as his conscientious objections to vaccination had been put forward in a later stage and he had failed to advance concrete arguments regarding his beliefs.¹⁴⁶ Hence, the Court concluded that the complaints under Article 9 ECHR were inadmissible.¹⁴⁷

However, we can agree with Krasser that the reasoning in the *Vavříčka*-case does not completely rule out the possibility that objections to mandatory vaccination under Article 9 ECHR could hold, because the Court suggests it would have been willing to assess the issue if the claim had been properly substantiated.¹⁴⁸ Nonetheless, as was the case in *Pretty v. the United Kingdom*, the Court will presumably prefer to decide on the basis of Article 8 ECHR instead of Article 9 ECHR in cases regarding (the refusal of) medical treatment, because in such situations, first of all, autonomy and self-determination are potentially infringed.¹⁴⁹

7 Discussion

Using the relevant ECHR rights and ECtHR jurisprudence, our central question was whether (1) there is room for States to introduce mandatory vaccination policies, and, if so, to what extent or under what specific conditions, and (2) certain circumstances (such as a pandemic) lead to a governmental responsibility to introduce such policies. We concluded that States have a wide margin of appreciation on regulating their vaccination policies, and that the EU did not play a significant role in this regard. Furthermore, mandatory vaccination policies can be justified in the general interest of society in protecting

144 *Supra* note 7, para. 333.

145 *Supra* note 7, para. 334.

146 *Ibid.*

147 *Supra* note 7, para. 337.

148 *Supra* note 51, 226.

149 *Supra* note 62, para. 82.

public health as well as the protection of the rights and freedoms of others.¹⁵⁰ Although our analysis of ECtHR jurisprudence helped us identify certain circumstances under which a mandatory vaccination policy can be justified, we have not found case law indicating a direct governmental responsibility to introduce such policies. Nonetheless, it has been argued in literature that such a responsibility can be deduced from some of the positive obligations of the discussed provisions.

What were our main findings based on the examination of the relevant ECHR provisions? Regarding Article 8 ECHR, we concluded that mandatory vaccination likely interferes with the right to private life. However, the exceptions under Article 8(2) ECHR — in particular the protection of public health and the protection of the rights and freedoms of others — might justify these interferences. In the case of *Vavříčka and Others v. the Czech Republic*, the Court referred to both of these interests by stressing that the objective of the relevant mandatory vaccination legislation was to protect against diseases which might pose a serious risk to health, which ‘refers both to those who receive the vaccinations concerned as well as those who cannot be vaccinated and are thus in a state of vulnerability, relying on the attainment of a high level of vaccination within society at large for protection against the contagious diseases in question.’¹⁵¹ Accordingly, the Court ruled that mandatory vaccination encompasses the value of ‘social solidarity’.

On the basis of Article 2 ECHR States have a negative obligation to refrain from intentionally and unlawfully depriving individuals of their life. Mandatory vaccination, however, has the opposite intention.¹⁵² The negative obligation of Article 2 ECHR could be of relevance when potentially life-threatening circumstances arise in individual cases, for example, when threats are posed by vaccines in the case of allergies or other contraindications on the part of the person concerned.¹⁵³ Regarding the positive obligation of Article 2 ECHR, future research should focus on what exactly entails the primary duty of the State to put in place a legislative and administrative framework to provide effective deterrence against threats to the right to life in the context of vaccination. Is enabling citizens to get access to vaccines enough? Or could this positive obligation imply a wider governmental task to protect (vulnerable groups of) people via mandatory vaccination?

150 *Supra* note 7, para. 196.

151 *Supra* note 7, para. 272.

152 *Supra* note 97, 256.

153 *Supra* note 118.

Although the Court has not yet (substantially) discussed whether the guarantees of Article 9 ECHR offer protection against mandatory vaccination, we do know from long-standing case law that a conviction or belief must be of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9 ECHR. However, even if (any form of) vaccine-refusal would qualify as such, it is likely that the Court would 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.¹⁵⁴

Furthermore, we derive from our analysis three considerations for legislative policy on mandatory vaccination.

7.1 *States Are in Charge*

It is clear from ECtHR case law that States have a considerable margin of discretion concerning the adoption of a mandatory vaccination policy. Besides, there is no consensus between States over a single vaccination model, which has as a consequence that 'a spectrum of policies exist ranging from one based wholly on recommendation, through those that make one or more vaccinations compulsory'.¹⁵⁵ As vaccination can be regarded as a fundamental aspect of contemporary public-health policy, and as making vaccination a matter of legal duty can raise sensitive moral or ethical issues, it is appropriate for States to have a wide margin of appreciation in this regard. Yet, as an aside, albeit outside the scope of this paper, we acknowledge that the question can be raised, especially taking into account the developments during the COVID-19 pandemic, whether the lack of uniform vaccination legislation on the European continent is problematic? Future research should explore the need for a more uniform vaccination policy in the case of cross-border health threats, e.g., pandemics.

7.2 *The Necessity of an Extensive Societal and Parliamentary Debate*

We strongly believe that the choice for mandatory vaccination policies should always be the result of a thorough societal and parliamentary debate. In the case of *Vavříčka and Others v. the Czech Republic*, the Court recalled that vaccination in itself does not raise sensitive moral or ethical issues, but that 'making vaccination a matter of legal duty can be regarded as doing so', which necessitates an extensive societal and parliamentary debate before introducing a mandatory policy.¹⁵⁶ In fact, regarding the integrity and transparency of the

154 *Supra* note 51, 226.

155 *Supra* note 7, para. 278.

156 *Supra* note 7, para. 216, 279.

policy-making process in the context of mandatory vaccination, the Court recalled the importance of public discussion and public participation.¹⁵⁷ We concur with the Court's views and strongly believe that an extensive societal and parliamentary debate is of paramount importance. In our view, a *political debate* is, amongst others, important to safeguard the democratic legitimisation of a mandatory vaccination policy and to carefully balance the relevant interests at stake. Accordingly, we stress the importance of embedding mandatory vaccination policies in hard law rather than soft law. A *societal debate* is crucial in gaining public trust in and support to the legislative policies, and in minimising the risks of adverse effectivity of a mandatory vaccination policy.

7.3 *Normative Framework: Tools for the Legislator*

Introduction of mandatory vaccination policies, or attempts thereto, have always caused heated debates, in particular because a person's bodily integrity concerns the most intimate aspects of one's private life, and mandatory vaccination — as an involuntary medical treatment — amounts to an interference with the right to respect for one's private life.¹⁵⁸ However, in the *Vavříčka*-case, the Court has in fact — for the first time — provided legislators concrete guidance under which circumstances mandatory vaccination policies can be justified. Regarding the legitimate aim, the Court has repeatedly recalled that mandatory vaccination policies may be used to protect both the individual, as well as public health in general (i.e., to protect groups of people who cannot be vaccinated). Regarding the proportionality of a mandatory vaccination policy, the Court has presented a set of criteria in the *Vavříčka*-case which can function as a normative framework for national legislators to determine whether a mandatory vaccination policy is necessary in a democratic society: (1) vaccines should be safe and effective, (2) exemptions should be possible from the mandate, (3) consequences with non-compliance may not be unduly harsh, (4) domestic law should provide for procedural safeguards to contest mandatory vaccination measures, (5) the safety of vaccines should be continuously monitored by competent national authorities and (6) compensation should be available for injury to health cause by vaccination. However, as mentioned before, the interpretation of the criteria as presented by the Court in the *Vavříčka*-case may vary per specific context (e.g., per type of infectious disease) and require a balanced approach, based on the concept of proportionality, in order for a mandatory vaccination policy to be justified from a human rights perspective. In line with this, we consider it unfortunate that the Court

157 *Supra* note 7, para. 296–298.

158 *Supra* note 76, para. 33.

has not elaborated on what consequences of non-compliance precisely are ‘unduly harsh’. We know that fines can be accompanied with denial of access to preschool facilities, but what about higher fines and access to essential facilities, such as healthcare, education or public transport? Further research could shed more light on where the boundaries of proportionate mandatory vaccination policies lie. Nonetheless, if mandatory vaccination policies are introduced by States, we believe that the aforementioned balanced approach puts a responsibility on States to constantly evaluate compliance with the criteria as mentioned in the *Vavříčka*-case, which should similarly result in adaptation of such a policy following non-compliance with these criteria.

8 Concluding Remarks

In this contribution we have examined the compatibility of mandatory vaccination with the European Convention on Human Rights. More specifically, on the basis of the relevant ECHR rights and ECtHR jurisprudence, we have tried to illustrate what implications these findings could have for a (future) national vaccination policy. We conclude that mandatory vaccination policies can, under certain conditions, be compatible with Article 2, 8 and 9 ECHR. States have a wide margin of appreciation regarding mandatory vaccination, as making vaccination a matter of legal duty can raise sensitive moral or ethical issues. However, whether a mandatory vaccination is justifiable under the ECHR, depends on specific criteria that follow from ECtHR jurisprudence regarding the legitimate aim and proportionality of a mandatory vaccination policy. Although the European Court has certainly clarified important questions regarding mandatory vaccination, multiple questions remain unanswered, which seem to us eminently relevant for further research. Finally, we would like to emphasise once more the importance of an extensive societal and parliamentary debate before introducing a mandatory vaccination policy, along with the need for proportionate enforcement measures.