

Rethinking Conscientious Objection to Mandatory Vaccination

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Keywords:

justice,
conscience,
European Court
of Human Rights,
the Convention
for the Protection
of Human Rights
and Fundamental
Freedom,
conscientious
objection

Abstract: Among the member states of the Council of Europe, there is a consensus on the importance of vaccination as a successful and effective preventive health intervention. Every state aims to achieve herd immunity, i.e., a high vaccination rate of the population that will prevent the circulation of contagious diseases in the population and thus protect those who cannot be vaccinated due to age or poor health. However, despite the general recognition of the importance of vaccination, there is no consensus on a “single model” of how best to achieve the goals of mass immunization. Countries have different public health policies, so while the vaccination policy of some members of the Council of Europe is limited to a recommendation, others have made vaccination compulsory. Today, there are many opponents of vaccination and those who are hesitant. This paper will focus on those who refuse to be vaccinated based on a moral understanding of how to act in certain circumstances. The paper will explore whether countries imposing mandatory vaccination, with financial or other sanctions imposed in the case of non-compliance, should recognize the right to conscientious objection. This includes the right of adults to refuse vaccination, and respecting the religious and philosophical beliefs of parents

who refuse to vaccinate their children. The article consists of two main parts. The first part will explore the legal-theoretical and legal-philosophical dimensions of the relationship between justice and conscience, with special emphasis on the interpretation of this relationship provided by the American political philosopher John Rawls. The second part of the paper will examine the issue of compulsory vaccination and conscientious objection through the prism of the rights provided for in the Convention for the Protection of Human Rights and Fundamental Freedoms.

1. Introduction

Among the member states of the Council of Europe, there is a consensus on the importance of vaccination, as “one of the most successful and cost-effective health interventions.”¹ Vaccination as a medical practice is evidence-based and represents “a safe, effective way to achieve individual immunity from serious diseases, and prevents very significant morbidity and mortality.”² Therefore, it seems understandable that “each State should aim to achieve the highest possible level of vaccination among its population.”³ The policy of mass vaccination should achieve herd immunity, i.e. a high vaccination rate in the population that will prevent the circulation of diseases in the population and thereby protect those who cannot be vaccinated due to age or poor health.⁴ It can be said that vaccination also represents a positive obligation of the state “to take appropriate measures to protect the life and health” of its population (Articles 2 and 8 of the European Convention on Human Rights, hereinafter ECHR or Convention; similar obligations exist in other international human rights instruments).⁵ However, despite the general recognition of the importance of vaccination, there is

¹ ECtHR Judgment of 8 April 2021, Case Vavříčka and Others v. The Czech Republic, application no. 47621/13, hudoc.int. § 277.

² Steve Clarke, Alberto Giubilini, and Mary Jean Walker, “Conscientious Objection to Vaccination,” *Bioethics* 31, no. 3 (Mar 2017): 156.

³ Vavříčka and Others v. The Czech Republic, § 277.

⁴ Clarke, Giubilini, and Walker, “Conscientious Objection to Vaccination,” 156.

⁵ Vavříčka and Others v. The Czech Republic § 282.

no consensus on a “single model” of how best to achieve the goals of mass immunization.⁶

Each individual member state has discretion in choosing which health-care policy model to adopt.⁷ The European Court of Human Rights (hereinafter ECtHR or the Court) believes that domestic authorities are best positioned to balance “competing private and public interests or Convention rights.”⁸ At the same time, as the ECtHR points out, they have a wide margin of appreciation.⁹ Countries have varying public health policies, so while the vaccination policy of some members of the Council of Europe is limited to a recommendation, others have made vaccination compulsory.¹⁰ In the latter case, failure to vaccinate is usually followed by financial sanctions representing “direct penalties for failure to vaccinate.”¹¹

There are, however, other possibilities. States can set vaccination as a legal or factual prerequisite for employment or for undertaking certain activities.¹² The latter “conditional approach” was prevalent in many countries during the COVID-19 pandemic, when countries limited freedom of movement, international travel, and even domestic travel by making them conditional on having “vaccine passes.” These documents were also required for entering public buildings, such as courts, potentially affecting the right to a fair trial (Article 6 of the ECHR). Additionally, vaccine passes were necessary for visits to places such as restaurants, cafes, museums, cinemas, and theatres.¹³

Although there is no single model for achieving a high vaccination rate, it is important to point out that no European country currently has

⁶ Ibid., § 278.

⁷ Ibid., § 285.

⁸ Ibid., § 275.

⁹ Ibid., § 285.

¹⁰ Ibid., § 278; Ian Leigh, “Vaccination, Conscientious Objection and Human Rights,” *Legal Studies* 43, no. 2 (2023): 203.

¹¹ Ibid.

¹² Ibid.

¹³ Ibid.

a forcible vaccination regime.¹⁴ Forcible vaccination is a model according to which vaccines are “administered against the will of the applicants.”¹⁵

This is partly because, despite the consensus that exists in medicine, not everyone is convinced of the benefits of vaccination. There are many opponents of vaccination today, as well as those who are hesitant (“hesitant vaccine refusers”).¹⁶ The category of those who avoid vaccination is very diverse. Some do not vaccinate themselves or do not vaccinate their children because of doubts about medical science and its claims about the nature of the disease. In other words, they have doubts about the effectiveness and safety of vaccines. Another group are free riders who want to spare themselves even the “minimum risk” of rare health complications entailed in vaccination, but want to benefit from the herd immunity provided by others who have been vaccinated. They act out of self-interested motives, disregarding the value of social solidarity.¹⁷ Whatever the reason, refusing to vaccinate undermines the possibility of achieving herd immunity.

Although there are various reasons for refusing vaccination, this paper will focus on those based on conscience.¹⁸ More precisely, on a moral understanding of how to act in certain circumstances.¹⁹ It will explore whether countries imposing mandatory vaccination, with financial or other sanctions imposed in the case of non-compliance, should recognize the right to conscientious objection. This includes the right of adults to refuse vaccination, and respecting the religious and philosophical beliefs of parents who refuse to vaccinate their children.

The article consists of two main parts. The first part will explore the legal-theoretical and legal-philosophical dimensions of the relationship between justice and conscience, with special emphasis on the interpretation of this relationship provided by the American political philosopher John Rawls. The second part of the article will examine the issue of compulsory

¹⁴ Vavříčka and Others v. The Czech Republic § 278; Leigh, “Vaccination, Conscientious Objection and Human Rights,” 203.

¹⁵ Vavříčka and Others v. The Czech Republic § 276.

¹⁶ Leigh, “Vaccination, Conscientious Objection and Human Rights,” 205.

¹⁷ *Ibid.*, 220; Clarke, Giubilini, and Walker, “Conscientious Objection to Vaccination,” 155; Vavříčka and Others v. The Czech Republic § 279.

¹⁸ Clarke, Giubilini, and Walker, “Conscientious Objection to Vaccination,” 155.

¹⁹ Leigh, “Vaccination, Conscientious Objection and Human Rights,” 205.

vaccination and conscientious objection through the prism of the rights provided for in the Convention for the Protection of Human Rights and Fundamental Freedoms.

2. Justice and Conscience

Decisions regarding the pandemic should in some way be connected to ethical discourse. Some previous experiences from similar pandemics (such as the one in 2009 and bird flu H1N1) have shown the importance of the distributive justice principle, particularly in the context of vulnerable social groups. Social justice here comes into focus again as a crucial virtue of institutions within the framework of liberal constitutional democracies whose responsibility is to help the underprivileged.

One can think about justice from a legal perspective, which happens to be the most common approach to the subject. Legal professionals (expectedly) consider it to be a “decision-making principle aimed at tempering the rigidity of the civil law norm.”²⁰ The logic of things leads one to conclude that form (the law) is above content (justice). Similar objections will be made to democracy as a political arrangement based on form without content. In such a political system, content comes second and form comes first. Suffice it to quote German liberal socialist Franz Oppenheimer and his famous statement that laws were “forced by a victorious group of men on a defeated group” in order to protect themselves.²¹

Returning to contemporary thought, one could ask another important question: Where does an individual’s sense of justice come from? There is substantial cross-cultural research²² suggesting that one’s inner sense of justice, although quantitatively modified by cultural norms, is part of one’s evolutionary heritage. Authors claim that behavioral biology, particularly the theory of evolution, leads to the conclusion that “moral traditions are cultural expressions of underlying cognitive and emotional

²⁰ Vladimir Pezo, ed., *Pravni leksikon* (Zagreb: Leksikografski zavod Miroslav Krleža, 2007), 1189. This is also discussed in: Josip Berdica, *Pravednost i mišljenje kao prve vrline* (Zagreb: Jesenski i Turk, 2024), 214.

²¹ Franz Oppenheimer, *The State: Its History and Development viewed Sociologically* (New York: Vanguard Press, 1926), 15.

²² Owen D. Jones and Timothy H. Goldsmith, “Law and Behavioral Biology,” *Columbia Law Review* 105, no. 2 (March 2005): 441.

pre-dispositions that are the products of evolutionary processes.”²³ This ultimately means that “the power of culture to shape human behavior, while impressive, is limited – and in fact . . . there is good evidence to support the claim that the human ability to create culture is itself a result of evolved mental tools.”²⁴

These tools were created and developed because they helped man “survive and reproduce” successfully.²⁵ To quote historian Harari,²⁶ “humans have created imagined orders and devised scripts,” which helped them organize into mass-cooperation networks. Perhaps it is in this sense that one could interpret Berdiaev’s thought that all cultural accomplishments – including imaginary (legal) orders – “are symbolic rather than realistic.”²⁷

At this point, another issue to be considered is the question of law as a tool to achieve justice in organized societies. Society uses law as a tool to encourage its members to behave differently than they would in its absence while justice defines the fundamental purpose that law should serve. Expectedly, this “fundamental purpose” (often cited as “fundamental principle”) “makes law highly dependent on sound understandings of the multiple causes of human behavior. The better those understandings, the better law can achieve social goals with legal tools.”²⁸ Nevertheless, one should always take into account the warning given by Seneca the Elder: “Some laws, though unwritten, are more firmly established than all written laws.”

One of the most important political philosophers, John. B. Rawls (1921–2002), brought social justice, justice in political institutions of “reasonably just societies,” and problems of function and purpose of these institutions into the forefront of political, but also legal theory. Justice is “the first virtue of social institutions, as truth is of systems of thought,” states Rawls at the beginning of his *A Theory of Justice* (1971), adding that unjust laws and institutions ought to be reformed or abolished. For Rawls, the

²³ John Teehan, *In the Name of God: The Evolutionary Origins of Religious Ethics and Violence* (Chichester: Wiley-Blackwell), 4.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Yuval N. Harari, *Sapiens: A Brief History of Humankind* (London: Vintage Books, 2014), 149.

²⁷ Nicolas Berdiaev, *The Meaning of the Creative Act* (New York: Collier Books, 1962), 298. For additional in-depth information on this topic, see: Berdica, *Pravednost i mišljenje kao prve vrline*, 216–20.

²⁸ Jones and Goldsmith, “Law and Behavioral Biology,” 405.

belief that justice is as important for living together as humans as truth is for understanding the world, is part of everyday intuition, deeply embedded within reason.²⁹

However, as Italian liberal-socialist philosopher of law Norberto Bobbio rightfully points out, “the alpha and omega of political theory is the problem of government.”³⁰ This is because, as he explains, political theory and philosophy revolve around questions of gaining, holding, losing, exercising, and defending power. This concerns the relationship between those in power and their subjects (in democracies these are political citizens assembled under liberal constitutional democracies). The entire history of political thought can be summarized as an emphasis on “duty of obedience” versus “right to resistance.”³¹ This leaves one with an open question: is there room for resistance to a government that imposes, for example, an obligation to be vaccinated during a pandemic? Can such resistance be legitimized? And, finally, can such resistance remain in the private sphere or should it also be taken to a public forum? Such questions only serve to guide this discussion: by addressing the topic of resistance, the right to resistance based on conscientious objection will be discussed.

As far as John Rawls is concerned, his philosophy explores ways in which people of different beliefs and goals may live together safely, fairly and well. In a society such as ours, a significant role is played by various institutions which are part of everyday dealings and interactions of its members. Speaking of duties and obligations of political citizens in liberal constitutional democracies, Rawls points out that a conscientious refusal is an act of “noncompliance with a more or less direct legal injunction or administrative order.”³²

²⁹ John Rawls, *A Theory of Justice: Revised Edition* (Cambridge: The Belknap Press of Harvard University Press, 1999), 3–4. For more about this important issue see: Berdica, *Pravednost i mišljenje kao prve vrline*, 83–106.

³⁰ Norberto Bobbio, *Doba prava: Dvanaest eseja o ljudskim pravima* (Beograd: Službeni glasnik, 2008), 113. This topic in the context of civil disobedience is particularly emphasized in: Berdica, *Pravednost i mišljenje kao prve vrline*, 165–99.

³¹ Bobbio, *Doba prava: Dvanaest eseja o ljudskim pravima*, 113.

³² Rawls, *A Theory of Justice: Revised Edition*, 323.

Because the order is directed at the citizen, the government is (institutions are, to be exact) aware they are disobeying it.³³ If this were not the case, i.e. if citizens tried to hide their disobedience, this would better be termed “avoidance based on conscientious objection” than disobedience. In the case of the former, this can be described as passive inaction, while in the second case, the political person is a subject actively refusing to perform some legally binding act based on their own understanding of the principle of fairness. This is an important distinction when taking into account the level of moral responsibility for passive inaction as opposed to active refusal.

Conscientious refusal entails some key elements:

- (1) It is not addressing the “sense of justice of the majority of the community,” i.e. it is not “defined as a public act,” which is why
- (2) “Motivating principles of conscientious refusal need not be political” (they might, for example, be religious);
- (3) “Motivating principles may not be shared with other members of the community – though they might be”;
- (4) “A principled omission need not be part of an effort to achieve reform” (of a law or other legal act).³⁴

In summary, conscientious refusal is an individual’s non-compliance with a legitimate legal order based on political, religious or other principles, which need not be shared by other members of the political community, without an end goal to achieve reform or abolish the legal act which the disputed order stems from, and without a desire to influence other members of the community by this act.³⁵

There are four key requirements such a conception of conscientious objection should meet, with some variation, to be justified:

- (a) efforts should be made to achieve satisfaction through standard means;
- (b) the object of refusal must be an actual violation of the principle of justice;

³³ This is discussed in more detail in a slightly different context in: Berdica, *Pravednost i mišljenje kao prve vrline*, 157–63.

³⁴ David Lyons, “Conscientious Refusal,” in *The Cambridge Rawls Lexicon*, eds. Jon Mandle and David A. Reidy (Cambridge: Cambridge University Press, 2015), 139.

³⁵ See: Berdica, *Pravednost i mišljenje kao prve vrline*, 158.

- (c) the refuser must voluntarily express their stance that anyone else, should they be subjected to injustice in a similar way, has the right to protest in a similar way; and
- (d) the act of disobedience must be rationally and thoughtfully planned in order to achieve the refuser's goals.³⁶

When discussing Rawls, one needs to keep in mind his understanding of the political concept of a person and their relationship to freedom, because it forms the actual background of this conception of conscientious refusal. Only a political citizen rooted in their own understanding of good in a well-organized society of a constitutional democracy may use this instrument to uphold their personal understanding of good, i.e. justice. This instrument is, in essence, a realization of the principle of freedom of political citizens. Along with civil disobedience, it is one of the fundamental correctives of democratic institutions, notably laws, and, ultimately, law itself. Accordingly, Rawls says that citizens are understood as those who consider themselves free in three respects:

- (1) "Citizens are free in that they conceive of themselves and of one another as having the moral power to have a conception of the good";
- (2) Citizens "regard themselves as being entitled to make claims on their institutions so as to advance their conceptions of the good (provided these conceptions fall within the range permitted by the public conception of justice)";
- (3) Citizens consider themselves "capable of taking responsibility for their ends and this affects how their various claims are assessed."³⁷

It should be pointed out that a fundamental principle of liberal constitutional democracies and well-organized societies is the concept of freedom of conscience, i.e. the right to shape and develop thoughts in a way one feels most familiar, to choose a course of action and act in accordance to this conviction.³⁸ A political person understands themselves as not only inevitably bound to follow a certain concept of good, which they affirm at every moment, but also as capable of revising and altering this concept on

³⁶ Dragan Vukadin, "Pravo prigovora savjesti," *Filozofska istraživanja* 23, no. 2 (2003): 426.

³⁷ John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996), 29–34.

³⁸ See: Arsen Bačić, *Leksikon Ustava Republike Hrvatske* (Split: Pravni fakultet u Splitu, 2000), 339. Berdica, *Pravednost i mišljenje kao prve vrline*, 160.

reasonable and rational grounds, if they wish to do so. In other words, one has a “moral power to form, to revise and rationally to pursue a certain conception of the good.”³⁹ This is especially evident when it comes to the moral identity of a political person. Citizens can have not only political, but also apolitical goals and loyalties. The latter serve to promote other values in their non-political lives and to promote the goals of organizations they belong to. “These two aspects of moral identity” (political and apolitical), says Rawls, “citizens must adjust and reconcile.”⁴⁰ He continues that citizens are often unable to see themselves separately from certain religious, philosophical, and moral convictions, or certain long-standing preferences or loyalty to some concept of good. Still, in a well-organized society, citizens’ political values and (apolitical) loyalties, as part of their non-institutional or moral identity, are approximately the same.

And what if they are not? What if one has no choice but to publicly advocate for one thing, while keeping in one’s back pocket “quite a few other, potentially opposing values that may, or may not, prevail in case of conflict”?⁴¹ When speaking of conscientious refusal, one needs to address the question of what should prevail in cases when personal conscience conflicts with legitimately imposed obligation. This was, of course, a particularly important issue in the recent crisis caused by the COVID-19 pandemic. The obligation to vaccinate was imposed on the members of society, which, according to some, violated the fundamental right to freely decide what is good for themselves and what is not. However, it is justified to ask the question: when should an individual’s freedom give way to the freedom of others (to protect themselves from illness)? Which takes precedence – that individual’s own concept of good or the principle of justice (inherent in a legitimately imposed obligation)? Rawls claims that life in a just society nourishes a sense of justice and hopes that today’s liberal democracies will use their basic institutions in ways that promote a desire to cooperate (to bring together a personal concept of good and the principle of justice), and

³⁹ Rawls, *Political Liberalism*, 72.

⁴⁰ *Ibid.*, 31.

⁴¹ Zoran Kurelić, “Pretpostavlja li Rawlsova koncepcija preklapajućega konsenzusa individualnu shizofreniju?” *Politička misao* 40, no. 1 (2003): 44.

strengthen a feeling of reciprocity and awareness of belonging to a wider community.⁴²

It is fairly evident that (political or public) law(s) cannot always align with the dictates of conscience. However, the legal order aims to “realize the principle of equal liberty” for all potentially “opposing moral conceptions,” which have an “equal place within a just system of liberty.”⁴³ “In a free society,” says Rawls, “no one may be compelled” to do something that would violate equal liberty or comply with “inherently evil commands.”⁴⁴ Nevertheless, religious or moral principles that the conscientious objector invokes cannot be fully realized if their full realization would ultimately disrupt the principle of equal freedom of others. Rawls aptly concludes that it is a “difficult matter to find the right course when some men appeal to religious principles in refusing to do actions which, it seems, are required by principles of political justice.”⁴⁵

“In the little world in which children have their existence,” says Pip in Charles Dickens’s *Great Expectations*, “there is nothing so finely perceived and so finely felt, as injustice.” What spurs action is not the realization that the world falls short of being completely just but that there are clearly remediable injustices around which one wants to eliminate.⁴⁶ Summarizing the role of conscientious refusal in modern democratic society, Rawls points out that such instances may, in a way, suggest that principles of justice are altogether guaranteed. What is more, conscientious refusal, when based on principles of justice among people, can also prevent the government from making unjust decisions. Thus, this refusal has a two-fold effect: explaining citizens’ views (“the search for truth in the market of ideas”) and controlling an unjust government (“the perception of participation was created in order to legitimise democratic political government”).⁴⁷

⁴² Kurelić, “Pretpostavlja li Rawlsova koncepcija preklapajućega konsenzusa individualnu shizofreniju?” 45; see also: Berdica, *Pravednost i mišljenje kao prve vrline*, 161.

⁴³ Rawls, *A Theory of Justice*, 325.

⁴⁴ *Ibid.*, 326.

⁴⁵ *Ibid.*, 325.; see also: Berdica, *Pravednost i mišljenje kao prve vrline*, 161–2.

⁴⁶ Amartya Sen, *The Idea of Justice* (Cambridge: Belknap Press, 2009), vii; see also: Berdica, *Pravednost i mišljenje kao prve vrline*, 213.

⁴⁷ Bačić, *Leksikon Ustava Republike Hrvatske*, 329–30.

3. Compulsory Vaccination and Convention Rights

The introduction of compulsory vaccination as “an involuntary medical intervention”⁴⁸ and as a way of restricting the right to respect for private and family life is, under the original meaning of Article 8 of the ECHR in the sense of originalist jurisprudence, present in American legal science.⁴⁹ The protection of private and family life, which is explicitly stated in the ECHR, could be restricted “for the protection of health or morals, or the protection of the rights and freedoms of others” (Article 8, Paragraph 2). In drafting this provision, the creators of the ECHR were inspired by Article 29 of the Universal Declaration of Human Rights.⁵⁰ However, any interference by public authorities with the exercise of this right must be “in accordance with the law” and “necessary in a democratic society” (Article 8, Paragraph 2). It is worth noting that although the ECtHR itself is not bound by the original meanings of the Convention, it has adopted “evolutionary interpretation” as its primary method of interpretation.⁵¹ In other words, the Court views the ECHR as a “living instrument.”⁵²

The key difference between Articles 8 and 9 of the ECHR (Freedom of thought, conscience, and religion)⁵³ regarding the obligation to vaccinate is that Article 8 protects the autonomy of the individual, who is entitled to accept or refuse a medical intervention without the obligation to justify their decision.⁵⁴

This understanding of autonomy does not distinguish between ethical and pragmatic reasons for refusing vaccination.⁵⁵ For example, following

⁴⁸ Vavříčka and Others v. The Czech Republic § 263.

⁴⁹ Silvio Roberto Vinceti, “COVID-19 Compulsory Vaccination and the European Court of Human Rights,” *Acta Biomedica: Atenei Parmensis* 92, no. 6 (2021): e2021472. <https://doi.org/10.23750/abm.v92iS6.12333>: 1–2.

⁵⁰ “1. Everyone has duties to the community in which alone the free and full development of his personality is possible. 2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.” *Ibid.*, 2.

⁵¹ *Ibid.*, 3.

⁵² *Ibid.*, 1.

⁵³ Leigh, “Vaccination, Conscientious Objection and Human Rights,” 209.

⁵⁴ *Ibid.*, 207.

⁵⁵ *Ibid.*

the principles of alternative medicine is considered an exercise of autonomy.⁵⁶ Some individuals oppose vaccination because they do not trust modern medical science, believe that vaccination causes health problems, that vaccines are not effective in protecting against infectious diseases, that they are not produced following relevant standards, etc.⁵⁷

ECtHR in the case of *Solomakhin v. Ukraine*,⁵⁸ which concerns the vaccination of an adult, determined that compulsory vaccination as an interference with the right to the protection of private life according to Article 8 ECHR, must be “in accordance with the law,” pursue “one or more of the legitimate aims” (protection of health and rights of others recognized by Paragraph 2 of Article 8) and be “necessary in a democratic society.”⁵⁹ The ECtHR Judgment of 8 April 2021, *Case Vavříčka and Others v. The Czech Republic* (hereinafter *Vavříčka and Others v. The Czech Republic*), which concerned the vaccination of children, also determined that there was no violation of Article 8 of the Convention.

Vaccine refusal on ethical grounds is of a different nature than that which is based on an individual’s autonomy. It assumes freedom of conscience and moral integrity, and, as such, deserves stronger recognition than the exercise of autonomy when balanced against the protection of public health.⁶⁰ An opponent of vaccination appealing to conscience may consider it a matter of duty, where he or she is “compelled to act (or abstain) by his or her convictions,” which have a binding nature for him or her⁶¹ “even if it is to his or her own detriment.”⁶² Thus, individuals find themselves in a gap between legal and moral duties.

3.1. Conscientious Objection to Vaccination

While liberal democracies typically do not allow individuals exemption from legal obligations,⁶³ the constitutions of many countries permit conscientious

⁵⁶ *Ibid.*, 209.

⁵⁷ Clarke, Giubilini, and Walker, “Conscientious Objection to Vaccination,” 155.

⁵⁸ The ECtHR Judgment of 15 March 2012, *Case Solomakhin v. Ukraine*, application No. 24429/03, hudoc.int.

⁵⁹ *Vavříčka and Others v. The Czech Republic* § 265.

⁶⁰ Leigh, “Vaccination, Conscientious Objection and Human Rights,” 209.

⁶¹ *Ibid.*, 208.

⁶² *Ibid.*

⁶³ *Ibid.*, 217.

objection. This includes cases of exemption from the obligation of military service⁶⁴ due to the existence of “deep moral disagreements” or for “pragmatic” reasons, and cases of medical professionals exercising the right to conscientious objection regarding their professional obligation to perform abortions.⁶⁵ The problem with these exemptions arises when their number becomes significant, for example, if all doctors in a city or region refuse to perform abortions due to conscientious objection.

While conscientious objection is most often mentioned today in the context of the obligation of military service and the right of medical professionals not to perform abortions, it is interesting to note that this modern mechanism for protecting the moral convictions of individuals, found in numerous constitutions worldwide, actually first appeared in the context of vaccination.⁶⁶ Historically, the exercise of conscientious objection to compulsory vaccination of children first appeared in Great Britain, in the Vaccination Act of 1898. This was a response to the strong resistance to vaccination already present at the time. Resistance to vaccination decreased after the introduction of conscientious objection, and the vaccination rate of children increased. Based on this experience, Great Britain abandoned compulsory vaccination in 1946.⁶⁷ Respecting individuals’ beliefs, as seen in this example, affects their perception of medical risks and alleviates their fears of harmful consequences.⁶⁸

Conscientious objection can be based on religious or secular reasons, more precisely moral or philosophical ones.⁶⁹ In terms of religious beliefs, most religions follow the lines of medical science when it comes to

⁶⁴ Clarke, Giubilini, and Walker, “Conscientious Objection to Vaccination,” 155.

⁶⁵ Leigh, “Vaccination, Conscientious Objection and Human Rights,” 217; Clarke, Giubilini, and Walker, “Conscientious Objection to Vaccination,” 156–7.

⁶⁶ Daniel A. Salmon et al., “Compulsory Vaccination and Conscientious or Philosophical Exemptions: Past, Present and Future,” *Lancet* 367 (2006): 440; Judith Rowbotham, “Legislating for Your Own Good: Criminalising Moral Choice, The Modern Echoes of the Victorian Vaccination Acts,” *The Liverpool Law Review* 30 (2009): 32; Ivana Tucak, “Obvezno cijepljenje djece: za i protiv,” in *Suvremeno obiteljsko pravo i postupak*, ed. Branka Rešetar et al. (Osijek: Pravni fakultet Osijek, 2017), 140.

⁶⁷ Salmon, Teret, MacIntyre, Salisbury, Burgess, and Halsey, “Compulsory Vaccination,” 438; Tucak, “Obvezno cijepljenje djece,” 140.

⁶⁸ Rowbotham, “Legislating for Your Own Good”; Salmon, Teret, MacIntyre, Salisbury, Burgess, and Halsey, “Compulsory Vaccination,” 436; Tucak “Obvezno cijepljenje djece,” 159.

⁶⁹ Clarke, Giubilini, and Walker, “Conscientious Objection to Vaccination,” 155.

vaccination. However, with regard to specific vaccines, there is resistance among members of some religions, and in this context, the question of recognizing conscientious objection may arise.⁷⁰ For Catholics, this is the case with “material indirectly derived from aborted human fetuses in the development of certain vaccines,” while Hindus, Jews and Muslims object to vaccines that contain animal products, the consumption of which is forbidden by their religious laws.⁷¹

The issue of conscientious objection to compulsory vaccination touches on state neutrality, the right to religious freedom, and discrimination against individuals based on their beliefs.⁷² The neutrality of the law depends on its justification or its outcomes.⁷³ If one were to justify laws that introduce mandatory vaccination, their goal seems neutral – to protect public health based on medical sources and data.⁷⁴ Such laws do not favor a specific conception of good nor do they assume the superiority of certain values over others.⁷⁵ As for the outcomes of such laws, one must distinguish between direct and indirect religious discrimination.⁷⁶ Direct religious discrimination occurs in cases where a person is treated less favorably than another based on their religion or belief, while indirect religious discrimination exists where people of a certain religion or belief find themselves at a disadvantage compared to others.⁷⁷

Today, a compulsory vaccination regime is not an obstacle for some countries to allow conscientious objection.⁷⁸ The option to invoke conscientious objection based on parents’ religious or philosophical beliefs

⁷⁰ Leigh, “Vaccination, Conscientious Objection and Human Rights,” 206–7.

⁷¹ *Ibid.*

⁷² Ilias Trispiotis, “Mandatory Vaccinations, Religious Freedom, and Discrimination,” *Oxford Journal of Law and Religion* 11 (2022): 146.

⁷³ *Ibid.*, 148.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*, 152.

⁷⁷ *Ibid.*

⁷⁸ Clarke, Giubilini, and Walker, “Conscientious Objection to Vaccination,” 155–6.

when vaccinating children exists today, for example, in most federal units of the United States of America,⁷⁹ Australia, and the Czech Republic.⁸⁰

Nevertheless, in other countries that have a compulsory vaccination regime, this institution is considered unacceptable. A case from Croatia will be presented here as an example. The Croatian Constitutional Court, in its decision on the constitutionality of legal regulations prescribing the obligation to vaccinate, took a rather stringent stance on the possibility of introducing conscientious objection. Vaccination is defined as a professional medical issue where conscientious objection is not allowed:

Finally, the Constitutional Court considers it necessary to emphasise that in this particular case, it is a professional (medical) question, and not a question of realising the guarantee of freedom of conscience, belief, opinion, and religion in the sense of Article 40 of the Constitution and Article 9 of the Convention [ECHR – author’s note].⁸¹

Interestingly, in the case of *Vavříčka and Others v. The Czech Republic*, which was brought before the ECtHR and which will be discussed at the end of this article, France, as the third-party intervener, pointed out to the ECtHR that the introduction of a legal obligation to vaccinate is a neutral provision that applies equally to everyone regardless of “their thought,

⁷⁹ Currently, in the United States, 45 states and Washington, D.C. allow religious exemptions from vaccination, and 15 states allow philosophical exemptions. “States With Religious and Philosophical Exemptions From School Immunization Requirements,” National Conference of State Legislatures, accessed February 1, 2024, <https://www.ncsl.org/health/states-with-religious-and-philosophical-exemptions-from-school-immunization-requirements#:~:text=Currently%2C%2015%20states%20allow%20philosophical,Advisory%20Committee%20on%20Immunization%20Practices.>

⁸⁰ According to Miluše Kindlová and Ondřej Preuss, “The conscientious objection judgment I. ÚS 1253/14 defined the applicable test as: ‘(1) constitutional relevance of justifications of conscientious objection, (2) urgency of justifications provided by the individual appealing to conscientious objection, (3) consistency and cogency of these justifications (4) societal impact of a secular (or religious) conscientious objection recognised in the individual case.’” Miluše Kindlová and Ondřej Preuss, “Conscientious Objection to Compulsory Vaccination? Lessons from the Case-Law of the European Court of Human Rights and a Test Employed by the Czech Constitutional Court,” *ICL Journal* 16, no. 4 (2022): 460. See also: Leigh, “Vaccination, Conscientious Objection and Human Rights,” 217; Clarke, Giubilini, and Walker, “Conscientious Objection to Vaccination,” 155.

⁸¹ Constitutional Court of the Republic of Croatia, U-I-5418/2008 U-I-4386/2011 U-I-4631/2011, 30 January 2014 § 6.5.1; Tucak, “Obvezno cijepljenje djece,” 158.

conscience or religion” and therefore cannot affect the rights protected by Article 9 of the ECHR.⁸²

3.2. Practice of the European Court of Human Rights

The ECHR does not specifically mention the right to conscientious objection. Convention jurisprudence initially interpreted the protection of expression of religion and belief provided for in Article 9 very restrictively.⁸³ In the case of *Boffa and 13 Others v. San Marino*,⁸⁴ the Commission indicated that public health regulations on compulsory vaccination are neutral with regard to the religious affiliation or belief of an individual and thus do not represent interference with the freedom protected by Article 9 of the ECHR.⁸⁵ In its decision:

(...) the Commission held that, in protecting the sphere of personal beliefs, Article 9 did not always guarantee the right to behave in the public sphere in a way which was dictated by such beliefs and noted that the term “practice” did not cover each and every act which was motivated or influenced by a belief.⁸⁶

A major turning point in the recognition that Article 9 encompasses conscientious objection was the *Bayatyan v. Armenia* case. It was the first time that the Court determined that Article 9 ECHR applies to conscientious objectors.⁸⁷

In this respect, the Court notes that Article 9 does not explicitly refer to a right to conscientious objection. However, it considers that opposition to military service, where it is motivated by a serious and insurmountable conflict between the obligation to serve in the army and a person’s conscience or his deeply and genuinely held religious or other beliefs, constitutes a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9.⁸⁸

⁸² *Vavříčka and Others v. The Czech Republic* § 325.

⁸³ Leigh, “Vaccination, Conscientious Objection and Human Rights,” 210.

⁸⁴ ECommHR Decision of 15 January 1998, Case *Boffa and 13 Others v. San Marino*, dec., Nos. 26536/95 and others.

⁸⁵ Trispiotis, “Mandatory Vaccinations,” 159; *Vavříčka and Others v. The Czech Republic* § 331.

⁸⁶ *Vavříčka and Others v. The Czech Republic* § 331.

⁸⁷ Leigh, “Vaccination, Conscientious Objection and Human Rights,” 210, 220.

⁸⁸ ECtHR Judgment of 7 July 2011, Case *Bayatyan v. Armenia*, application No. 23459/03 §110, hudoc.int.

The ECtHR ruled that the assessment of whether the expressed objection falls under Article 9 depends on the particular circumstances of each case.⁸⁹ In this case, the ECtHR viewed the ECHR as a living instrument, and the recognition of the right to conscientious objection to military service was based on developing a common approach to this issue among the member states of the Council of Europe.⁹⁰ However, in this judgment, the ECtHR says nothing about the possibility of using the right to conscientious objection outside the context of military service.⁹¹

The ECtHR has yet to facilitate a debate on the merits of, i.e. a comprehensive argumentation on the possibility of expressing a conscientious objection to performing an abortion.⁹² In 2020, it declared inadmissible the application of two Swedish midwives who were denied employment because they were unwilling to participate in abortions due to their religious beliefs: *Grimmark v. Sweden* and *Steen v. Sweden*.⁹³

3.3. *Vavříčka and Others v. Czech Republic*

Before *Vavříčka and Others v. The Czech Republic*, the ECtHR never questioned the applicability of Article 9 of the ECHR to the possibility of conscientious objection to vaccination.⁹⁴ The six applicants, Czech nationals, submitted ECtHR complaints against the Czech Republic claiming that the consequences of their non-compliance with the legal obligation to vaccinate according to Article 46(1) and (4) of the Public Health Protection Act⁹⁵ led to, among other things, a violation of their right to respect for private life under Article 8 of the Convention. Three of them, Mr. Vavříčka, Ms. Novotná and Mr. Hornych, also complained that the fine imposed for

⁸⁹ *Ibid.*, § 332.

⁹⁰ Wojciech Brzozowski, “The Midwife’s Tale: Conscientious Objection to Abortion after *Grimmark* and *Steen*,” *Oxford Journal of Law and Religion* 10, no. 2 (2021): 306.

⁹¹ *Ibid.*

⁹² *Ibid.*, 302.

⁹³ ECtHR Judgment of 11 February 2020, Case *Ellinor Grimmark v. Sweden*, application No. 43726/17, hudoc.int; ECtHR Judgment of 11 February 2020, *Linda Steen v. Sweden*, application no. 62309/17, hudoc.int; Brzozowski, “The Midwife’s Tale,” 298–316.

⁹⁴ *Vavříčka and Others v. The Czech Republic* § 331.

⁹⁵ Zákon o právněho veřejného zdraví (Law No. 258/2000 Coll.).

non-vaccination or non-admission of their children to kindergarten violate their right under Article 9 ECHR.⁹⁶

The controversial provisions of the Public Health Protection Act oblige all permanent residents of the Czech Republic, including foreigners, to be vaccinated against the diseases listed in it. This involves diseases that are well-known to medical science,⁹⁷ and the detailed conditions related to vaccination are prescribed by secondary legislation.⁹⁸

In the case of children under the age of 15, their legal representatives are responsible for compliance with these obligations.⁹⁹ The consequence of not vaccinating is the impossibility of enrolling children in preschool facilities.¹⁰⁰ However, it is important to emphasize that, in this regard, an exception to vaccination is provided for children who cannot be vaccinated due to medical reasons.¹⁰¹ Persons who violate the obligation to vaccinate commit “a minor offence punishable by a fine of up to 10,000 Czech korunas (CZK) (currently equivalent to nearly 400 euro (EUR)).”¹⁰²

It is interesting that the applicant, Mr. Vavříčka, refused to vaccinate his children against only a few of the prescribed diseases: poliomyelitis, hepatitis B and tetanus. He pointed out in his application that in these cases there is no danger to public health. The last case of poliomyelitis in the Czech Republic was in 1960, hepatitis B is not transmitted through normal contact between people but is characteristic only of “high-risk groups,” and tetanus cannot be transmitted between people at all.¹⁰³ In the last-mentioned case, herd immunity is not even necessary.¹⁰⁴

⁹⁶ Vavříčka and Others v. The Czech Republic § 313.

⁹⁷ Ibid., § 158.

⁹⁸ Decree on Vaccination against Infectious Diseases No. 439/2000 Coll. “defines the scope of compulsory vaccination as comprising vaccination against diphtheria, tetanus, whooping cough (pertussis), Haemophilus influenza type b infections, poliomyelitis, hepatitis B, measles, mumps, rubella and – for children with specified health conditions – pneumococcal infections (sections 4, 5 and 6)”. Vavříčka and Others v. The Czech Republic §158.

⁹⁹ Ibid., § 11.

¹⁰⁰ Ibid., § 15.

¹⁰¹ Ibid.

¹⁰² Ibid., § 17: “Under section 29(1)(f) and (2) of the Minor Offences Act (Zákon o přestupcích) (Law no. 200/1990 Coll.)”

¹⁰³ Ibid., § 24, § 180.

¹⁰⁴ Ibid., § 288.

Evidently, he did not question the importance of vaccination against diseases that can be transmitted through normal human contact.

According to the Czech Constitutional Court, the criterion of consistency of beliefs was not met in the case of Mr. Vavříčka. Mr. Vavříčka only pointed out his reasons for opposing the vaccination of his children at a late stage of the proceedings, which were primarily related to his concern for the children's health, while his philosophical or religious reasons were only secondary.¹⁰⁵

The Czech Government considered the submitted complaints about the violation of the rights from Article 9 to be essentially a reiteration of the complaints that were raised regarding the violation of Article 8 of the ECHR.¹⁰⁶

Personal views on compulsory vaccination based on wholly subjective assumptions about its necessity and suitability did not constitute a "belief" within the meaning of Article 9 of the Convention.¹⁰⁷

At the same time, it is important to emphasize that in such cases the courts must not engage in examining the "theological or normative" foundations of individual beliefs.¹⁰⁸

In its assessment, the ECtHR pointed out that the three applicants sought protection for "their critical stance towards vaccination" by referring to Article 9. However, their objections were not motivated by their religious freedom, but by their freedom of thought and conscience.¹⁰⁹ The ECtHR referred to its reasoning in the case of *Bayatyan v. Armenia*¹¹⁰ but also to its reasoning in the case of *Pretty v. the United Kingdom*, in which it pointed out that despite the firmness of someone's beliefs, "not all opinions or convictions constitute beliefs in the sense protected by Article 9."¹¹¹ As far as Mr. Vavříčka is concerned,

¹⁰⁵ Ibid., § 29.

¹⁰⁶ Ibid., § 314.

¹⁰⁷ Ibid., § 315.

¹⁰⁸ Trispiotis, "Mandatory Vaccinations," 159.

¹⁰⁹ *Vavříčka and Others v. The Czech Republic* § 330.

¹¹⁰ Ibid., § 332.

¹¹¹ ECtHR Judgment of 29 April 2002, Case *Pretty v. the United Kingdom*, application No. 47621/13, hudoc.int; *Vavříčka and Others v. The Czech Republic* § 333.

(...) Having regard to the conclusions reached by the domestic Courts (Supreme Administrative Court, Constitutional Court – author’s note) in this regard, and considering that this applicant has not further specified or substantiated his complaint under Article 9 in the present proceedings, the Court finds that his critical opinion on vaccination is not such as to constitute a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9.¹¹²

The lack of “the consistency and credibility of the person’s claims” applies even more to Ms. Novotná and Mr. Hornych, who did not even use these arguments before the domestic courts.¹¹³

The Court therefore agreed with the Czech government that the complaints filed claiming a violation of the rights from Article 9 are “incompatible *ratione materiae*” with that provision.¹¹⁴

4. Concluding Remarks

Unquestionably, individuals are being “morally harmed” when forced to act contrary to the beliefs that constitute their identity.¹¹⁵ However, the issue of whether there should be a legal right to exemption from legal duty is still controversial.¹¹⁶ It has been shown that Rawls insists that as political persons, people understand themselves as not only inevitably bound to follow a certain concept of good, which they affirm at every moment, but also capable of revising and altering this concept on reasonable and rational grounds. Even, they rather have a “moral power to form, to revise and rationally to pursue a certain conception of the good.”¹¹⁷ When talking about the obligation to vaccinate during the recent pandemic, one of the fundamental questions related precisely to an individual’s freedom to decide, but also to society’s obligation to take care of the general health of the population.

This is especially so in the case of compulsory vaccination, where the effects of this preventive medical measure cannot be realized unless a high degree of vaccination is achieved. The demands of those who oppose

¹¹² Ibid., § 335.

¹¹³ Ibid., § 336.

¹¹⁴ Ibid., § 337.

¹¹⁵ Leigh, “Vaccination, Conscientious Objection and Human Rights,” 218.

¹¹⁶ Kindlová and Preuss, “Conscientious Objection to Compulsory Vaccination,” 450.

¹¹⁷ Rawls, *Political Liberalism*, 72.

vaccination based on their conscience can only be balanced with public health arguments if there are reasonably few of them in society.¹¹⁸ In such cases, the “values of ethical independence, tolerance, and pluralism” may override the value of protecting public health.¹¹⁹ Rawls is right when he claims that life in a just society nourishes a sense of justice and hopes that today’s liberal democracies will use their basic institutions in ways that promote a desire to cooperate, and strengthen a feeling of reciprocity and awareness of belonging to a wider community. Life within the framework of political liberalism presupposes not only our sense of political justice but also our responsibility for it.

The ECtHR has yet to give its explicit answer to the question of whether conscientious objection to compulsory vaccination is entailed in Article 9 of the Convention.¹²⁰ This paper was in the first place an attempt to present an overview of the current practice of this Court concerning conscientious objection, as well as a critical analysis of that practice by legal scholars. The Bayatyan case, which dealt with the issue of exemption from military service, was a turning point in Convention jurisprudence on conscientious objection, being the first case in which it was explicitly said that Article 9 of the ECHR includes this right.¹²¹ However, the Court, interestingly, never decided on the merits of the issue of whether health professionals have the right to conscientious objection to abortion.

Ilias Trispiotis rightly noted that in the *Vavříčka and Others v. The Czech Republic*, the ECtHR did not rule out the possibility that Article 9 includes conscientious objection to compulsory vaccination.¹²² It can only be concluded that the applicants have not convinced the Court that this instrument could be applied in their case.¹²³ When there are “serious and insurmountable” conflicts of an individual’s conscience with their legal obligations, member states are obliged to explore them.¹²⁴

¹¹⁸ Leigh, “Vaccination, Conscientious Objection and Human Rights,” 220.

¹¹⁹ Trispiotis, “Mandatory Vaccinations,” 160.

¹²⁰ Kindlová and Preuss, “Conscientious Objection to Compulsory Vaccination,” 447.

¹²¹ Brzozowski, “The Midwife’s Tale,” 305.

¹²² Trispiotis, “Mandatory Vaccinations,” 159.

¹²³ *Ibid.*, 159.

¹²⁴ *Ibid.*

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