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„Проф. др Славко Царић“

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IN TIMES OF PANDEMIC

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WHETHER COMPULSORY COVID-19 VACCINATION WOULD BE COMPATIBLE WITH THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Abstract:

A significant dilemma regarding the pandemic of the new Coronavirus is referring to the issue of compulsory vaccination, especially concerning the enjoyment and protection of fundamental human rights. This fact determines the subject of research in the paper in the context of the analysis of the case-law of the European Court of Human Rights regarding the implication of compulsory vaccination on the enjoyment of rights protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms. Special attention is devoted to the consideration of the judgment of Vavrička and others vs. the Czech Republic, in which the European Court of Human Rights concluded that mandatory vaccination is “necessary in a democratic society”. Within the concluding remarks, the authors emphasize the need regarding establishing an adequate legal framework for regulating compulsory vaccination with full respect for basic human rights and freedoms. The goal of the article is to provide insight regarding mandatory immunization through the prism of the standards of the jurisprudence of the European Court of Human Rights and to identify the main challenges in this regard.

Keywords: COVID-19, compulsory vaccination, human rights, European Court of Human Rights

Introduction

According to the World Health Organisation's estimations, four to five million deaths are prevented every year through vaccination.¹⁾ The international community has supported the importance of immunizations in order to prevent and control a large number of diseases. Despite this fact, compulsory vaccination mandate numerous controversies including interrelated health, ethical and legal open questions.²⁾

1) WHO, 'Immunization', <https://www.who.int/news-room/facts-in-pictures/detail/immunization> (accessed May 21, 2021)

2) Even though within the field of public health a distinction between “mandatory vaccinations” and “compulsory vaccinations” is sometimes made, it will not be used for the purposes of this

Due to the pandemic of the new Coronavirus, the issue of compulsory vaccination imposes a significant dilemma concerning the enjoyment and protection of fundamental human rights and freedoms. The numerous COVID-19 vaccines created over the past months are considered the most effective tools to meet the current pandemic's challenges and achieve public health goals. On the other hand, public opinion regarding immunization is significantly divided. Furthermore, the debate within the framework of the legal doctrine based on the human rights argument tends to be increasing. The question of whether enforcing mandatory vaccination breaches fundamental human rights is debated, not only from a legal but also from an ethical point of view.³⁾

These facts determine the subject of research in the paper in the context of the analysis of the European Court of Human Rights (hereinafter: ECtHR) case-law regarding the implication of compulsory vaccination on the enjoyment of rights protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR). In the light of the fact that compulsory vaccination raises the legal problem of how to strike a fair balance between individual rights and public health, the question thus arises: whether compulsory vaccination policy is compatible with the ECHR? Therefore, this paper takes a normative approach to analyze how the ECtHR achieved a balance between the competing interests in the context of mandatory vaccination. Special attention is devoted to the consideration of the judgment of *Vavrička and others vs. the Czech Republic case* which represents an important reference in the debate regarding mandatory vaccination.

Article first provides the determination of the term compulsory vaccination. In addition, the subject of the research is referring to analyses of the ECtHR's jurisprudence relating to mandatory vaccination, paying particular attention to the *Vavrička case*. Within the concluding remarks, the authors emphasize the need for establishing an adequate legal framework for regulating compulsory vaccination with full respect for basic human rights and freedoms.

The goal of this article is not to provide a position that supports or opposes compulsory COVID-19 vaccination. Rather, it identifies insight regarding mandatory immunization through the prism of the standards of the ECtHR's jurisprudence and the main challenges in this regard. For this purpose, the Article analyses ECtHR case law along with relevant academic literature.

What does “compulsory vaccination” entail?

Vaccination is the process or an act of giving someone a vaccine to stimulate the immune system to develop adaptive immunity to a particular disease.⁴⁾ For the purposes of this article, compulsory vaccination is understood as a vaccination system in which the

article, since in legal terminology the terms “mandatory” and “compulsory” are often used as synonyms.

- 3) Ukkonen, A. (2018). *Different Legal Aspects of Mandatory Vaccination Policies*, Tallinn University of Technology, p.5.
- 4) Cambridge Advanced Learner's Dictionary & Thesaurus, (2013). Cambridge University Press. According to the Oxford Dictionary of Biochemistry and Molecular Biology, vaccine is defined as “any preparation of immunogenic material suitable for the stimulation of active immunity in animals without inducing disease”, that “may be based on dead or attenuated microorganisms; altered toxins (toxoids); or viruses”. Oxford Dictionary of Biochemistry and Molecular

enforcement of a duty to vaccinate is ultimately ensured by the compulsory administration of the vaccine.⁵⁾ Despite its name, compulsory vaccination is not truly compulsory since force or threat of criminal sanction are not used in cases of non-compliance.⁶⁾ Furthermore, compulsory vaccination policies allow a certain number of exemptions that are recognized by legitimate authorities (mostly medical exemptions).⁷⁾

The introduction of a mandatory vaccination policy within the framework of numerous European countries was followed by controversies regarding the balance between competing interests.⁸⁾ There is the interest of the individual concerning the enjoyment of his or her fundamental human rights. On the other hand, there is the interest of the State in the context of the interference with individuals' human rights due to public health protection.⁹⁾ Thus, the question is how to strike a fair balance? The following section will provide the possible solution according to the jurisprudence of the ECtHR.

Mandatory vaccinations in European countries, undocumented information, false news and the impact on vaccination uptake: the position of the Italian pediatric society

Compulsory vaccination and the ECHR

At the moment, the ECtHR jurisprudence does not include standards concerning the COVID-19 vaccine. However, certain guidelines regarding the ECtHR's approach to this issue could be provided according to the previous case law on compulsory vaccination. The ECtHR had considered the issue of mandatory vaccination mostly from the aspect of the right to life and the right to respect for private and family life.

The right to life

The right to life is a basic human right that enables people to enjoy all other rights. According to Article 2 of the ECHR, life of every human being is protected.¹⁰⁾ The protection within the scope of Article 2 extends not just to cases with a fatal conclusion, but also to situations in which life was threatened, even though death did not occur. Situations

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- Biology, (2008). Oxford University Press, <https://www.oxfordreference.com/view/10.1093/acref/9780198529170.001.0001/acref-9780198529170> (accessed May 23, 2021).
- 5) Krasser, A. (2021). Compulsory Vaccination in a Fundamental Rights Perspective: Lessons from the ECtHR, *Graz Law Working Paper* No 04-2021, p.208.
 - 6) COVID-19 and mandatory vaccination: Ethical considerations and caveats, (2021). Health Ethics & Governance, WHO Headquarters, WHO-2019-nCoV-Policy-brief-Mandatory-vaccination-2021.1.
 - 7) *Ibid.*
 - 8) Bozzola E. et al. (2018). Mandatory vaccinations in European countries, undocumented information, false news and the impact on vaccination uptake: the position of the Italian pediatric society, *Italian Journal of Pediatrics*, p.45.
 - 9) Camilleri, F. (2019), Compulsory vaccinations for children: Balancing the competing human rights at stake, *Netherlands Quarterly of Human Rights* 37(3),p.6.
 - 10) The European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), Council of Europe.

just affecting health but not life, on the other hand, are covered by Article 8 of the ECHR rather than Article 2.

Article 2 of the ECHR includes not only the obligation of the states to refrain from intentionally and unlawfully depriving individuals of their life, but it also imposes a comprehensive obligation to take adequate measures to protect the lives of the individuals within their authority. As it stated in the *LCB v. the United Kingdom* judgment positive obligation of the states implies taking all measures “that could have been required to prevent the applicant’s life from being avoidably put at risk”.¹¹⁾ Due to the *Osman v. the United Kingdom* judgment, states are obliged to adopt an adequate legal framework “to deter the commission of offenses against the person” as well as “to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual”.¹²⁾ However, this obligation is not absolute. The extends of the measures that might have been expected to be taken by states is determined by circumstances, whether the state was familiar with the risk or supposed to be familiar based on the available information at the specific moment. Since this issue comes within the state’s “margin of appreciation,” the ECtHR does not specify which concrete measures must be implemented. Thus, a wide range of methods can fulfill the imposed positive obligations.¹³⁾

According to the jurisdiction of the ECtHR, Article 2 represents a common ground regarding the cases with respect to mandatory vaccination. In numerous cases, applicants claimed that states violated their right to life due to the fact that they have experienced serious health problems as a side-effect of the vaccinations. Right to life could be affected due to the vaccination only when potentially life-threatening conditions emerge in the individual case. However, if the possible side effects of vaccinations represent health hazards, but at the same time they do not pose a serious risk to life, the case could not be covered by Article 2 of the ECHR.¹⁴⁾

In *Association of Parents v. the United Kingdom* the European Commission on Human Rights (hereinafter: Commission) considered the obligation of the state to take appropriate measures to safeguard life in the context of vaccination.¹⁵⁾ In this case, the Commission emphasized that unforeseeable isolated fatalities do not constitute an infringement of the right to life if a state maintains a control and monitoring mechanism aimed at minimizing vaccine-related side effects. As a result, an individual evaluation to rule out the existence of contraindications is a requirement for states to ensure compliance with the positive obligation under Article 2. Thus, compulsory vaccination does not mean *per se* an interference with the right to life in its form as a prohibition of intentional killings – as long as adequate preventative measures are in place – even if isolated life-threatening situations or deaths occur.¹⁶⁾

11) *LCB v. the United Kingdom*, ECtHR, Application no 23413/94, Judgment of 9 June 1998, para 36.

12) Akandji-Kombe, J. (2007), *Positive obligations under the European Convention on Human Rights - A guide to the implementation of the European Convention on Human Rights*, Council of Europe, p.21.

13) Korff, D. (2006). *The right to life - A guide to the implementation of Article 2 of the European Convention on Human Rights*, Council of Europe, p.5.

14) Krasser, A. *op.cit.* p. 212.

15) *Association of Parents v. the United Kingdom*, Application. no. 7154/75, Commission decision of 12 July 1978.

16) Krasser, A. *op.cit.* p. 212.

On the other hand, the positive obligation under Article 2 includes the obligation of the states to take preventive measures to protect a person whose life is threatened by the actions of others.¹⁷⁾ Since the uncontrolled spread of infectious diseases can pose a threat to the population, it may be argued that states are obliged to introduce compulsory vaccination in order to protect the lives of those persons who rely on herd immunity for protection against such diseases. Non-vaccinated people jeopardize herd immunity and, as a result, jeopardize others who rely on it, most people belonging to a high-risk group who cannot be vaccinated. Since this risk of interference with the right to life is known to states, they have a duty to appropriate measures due to Article 2. However, the jurisprudence of the ECtHR does not specify which measures are supposed to be taken, thus there are different approaches to this issue among the health care systems of European countries.¹⁸⁾ This was confirmed by the ECtHR in the following manner:

*“Matters of health care policy, in particular as regards general preventive measures, are in principle within the margin of appreciation of the domestic authorities who are best placed to assess priorities, use of resources and social needs”.*¹⁹⁾

In addition, there is no consensus among the state’s parties of the ECHR on how to deal with infectious diseases, which often increases the states’ margin of appreciation. As a result, while there is a need to immunize the population as a whole, this obligation can be accomplished by both mandatory and voluntary vaccination programs. However, there may be circumstances in which only mandatory vaccination can fulfill the obligation to safe life according to Article 2. If established vaccination strategies are shown to be unable to properly protect vulnerable groups due to a lack of herd immunity and non-coercive methods of increasing vaccination coverage have been attempted and failed.²⁰⁾

The right to respect for private and family life

Article 8 of the ECHR provides the protection of the individual’s right to private life, family life, home and correspondence.²¹⁾ The rights guaranteed under Article 8 may be limited if the state’s interference is in accordance with the following criteria: compatible with the law and necessary in a democratic society in the interests of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.²²⁾ In addition to negative obligations, the scope of Article 8 also includes a wide range of positive obligations on the states to ensure respect for private and family life, such as the adoption of the adequate legal framework.²³⁾

According to the jurisprudence of the ECtHR, compulsory vaccination constitutes an interference with article 8 ECHR.²⁴⁾ The segment of the right to private

17) Oneryildiz v Turkey, Application no 48939/99, ECtHR Judgement of 30 November 2004, para 89.

18) Gerards, J. (2019). *General Principles of the European Convention on Human Rights*, Cambridge University Press p.179.

19) *Shelley v. the United Kingdom*, Application no 23800/06, ECtHR Judgement of 4 January 2008.

20) Krasser, A. *op.cit.* p. 215.

21) Article 8, ECHR, *op.cit.*

22) *Ibid.*

23) *Lozovyye v. Russia*, Application no. 4587/09, ECtHR Judgment of 24 April 2018, para 36.

24) *Y.F. v. Turkey*, Application no. 24209/94, ECtHR Judgment of 22 July 2003, para 33

life that is referring to the physical and psychological integrity of a person constitutes a common ground by the applicants in the case-law of the ECtHR involving mandatory vaccination.²⁵⁾ Furthermore, some cases related to compulsory vaccination are covered by the scope of the protection of family life²⁶⁾, while the interferences with the right to respect for one's home or correspondence, equally protected through vaccinations are not to be expected.

The Commission's and the ECtHR's case-law regards any medical intervention against the individual's will to be an interference with Article 8, despite the intensity and type of the intervention. The Commission highlighted already in 1984 that a requirement to undergo medical treatment (or a vaccination), on pain of a penalty, could represent an interference with the right to respect for private life.²⁷⁾ Following that, in the *Boffa and others v. San Marino* decision in 1998, the Commission clarified this idea by stating that the interference arising from the applicants' children's obligatory hepatitis B vaccine was motivated by the legitimate aim specified in Article 8.²⁸⁾ Moreover, the Commission examined whether such interference was also necessary in a democratic society due to the requirements of Article 8. The concept of "requirement in a democratic society", according to the case-law of the ECtHR, demands a pressing social necessity matching the degree of involvement. This intervention, in particular, must be proportionate to the legitimate aim pursued. The degree and scope of such a margin are determined not just by the interference's purpose, but also by its form. First, the Commission noted that the applicant failed to prove that the vaccine would cause serious concerns about his child's individual condition. In addition, the Commission emphasized that the measure taken did not go beyond the State's margin of appreciation and that a similar vaccination campaign had been implemented in most European countries.²⁹⁾

In the *Solomakhin v. Ukraine* case, the ECtHR held that compulsory vaccination was not a violation of Article 8 since its aim was to prevent the spreading of infectious diseases.³⁰⁾ The applicant was involuntarily vaccinated against diphtheria during an outbreak. In accordance with its case law, the ECtHR found that a person's physical integrity was protected by the concept of "private life" in the light of Article 8. With

25) According to the ECtHR case law right to privacy includes situations that are referring to one's identity, integrity, self-determination, personal relationships relevant to the development of one's personality and the protection of personal data. Mladenov, M. (2013). Zaštita prava na privatnost u praksi Evropskog suda za ljudska prava, Zbornik radova Pravnog fakulteta u Novom Sadu, 47(3), pp. 575–593.

26) The right to respect for family life is affected when measures potentially interfere with the special relationships that make up a family, like the one between parents and their children.

27) *Acmanne and others v. Belgium*, Application no 10435/83, Commission decision of 10 December 1984.

28) *Boffa and others v. San Marino*, Application no 26536/95, Commission decision of 15 January 1998.

29) Donati A. et al. (2021) Vaccination Policies in Europe: A Comparative Study Between Selected Countries, MPILux Research Paper Series.

30) *Solomakhin v. Ukraine*, Application no 24429/03, ECtHR Judgement of 15 March 2012.

respect to the compulsory vaccination, the ECtHR noted 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’ and that a ‘compulsory vaccination – as an involuntary medical treatment – amounts to an interference with the right to respect for one’s private life, which includes a person’s physical and psychological integrity, as guaranteed by Article 8(1)”.³¹⁾ The ECtHR then considered whether such interference with an individual’s personal integrity was necessary in a democratic society, as stipulated by Article 8, based on two criteria: public health considerations that necessitate the control of the spreading of infectious diseases; and the assessment of whether necessary precautions had been taken with regard to the suitability of vaccination for the individual case at hand.³²⁾ The ECtHR also emphasized the importance of the fact that the medical staff had checked the applicant’s suitability for vaccination prior to carrying out the vaccination. Therefore, the ECtHR concluded that all precautionary measures were taken to guarantee that the medical intervention would not hurt the applicant’s personal integrity and the public interest of protecting the population’s health.³³⁾

Compulsory medical treatment of children is frequently brought before the ECtHR by the parents as legal representatives within the “respect for family life” according to Article 8. The concept of vaccine rejection is nowadays more recurrent in pediatricians’ practice than ever before.³⁴⁾ In a recent judgment, *Vavříčka and others v the Czech Republic*, the ECtHR clarified its view on compulsory vaccination of children and the consequences of one’s refusal to comply with the national legislation thereon.³⁵⁾ Since *Vavříčka and others v the Czech Republic* represents the latest development of the ECtHR standards in the field of compulsory vaccination, the article will address the most important issues of this case.

Vavříčka and others v. the Czech Republic

On 8 April 2021 ECtHR delivered its judgment in *Vavříčka and others v. the Czech Republic* regarding the fine on parents and children’s exclusion from preschool for refusal to comply with the statutory child vaccination duty. The Grand Chamber found by a clear majority of sixteen votes to one in favor of the Czech government, giving the state a large margin of appreciation in assessing the need for mandatory vaccination of children.

Before the ECtHR, the applicants challenged the vaccination duty imposed on all children residing on the Czech territory. They claimed that sanctions imposed on

31) *Ibid.* para. 33.

32) Katsoni, S. (2020). *Do compulsory vaccinations against COVID-19 violate human rights? An assessment of the measure’s compatibility with the European Convention on Human Rights*, <https://voelkerrechtsblog.org/articles/do-compulsory-vaccinations-against-covid-19-violate-human-rights/> Accessed 7 June 2021.

33) *Ibid.*

34) Ukkonen, A. *op.cit.* p.26.

35) *Vavříčka and others v. the Czech Republic*, Applications no 47621/13, 3867/14, 73094/14 et al., ECtHR Judgment 8 April 2021.

them for failing to comply with the vaccination requirement, such as a fine of up to 400 EUR for parents and the exclusion of unvaccinated children from pre-school education, amounted to a violation of their rights due to Article 8. Compulsory vaccination, as an involuntary medical intervention, was an interference with the right to privacy, according to the ECtHR's case law. Furthermore, the applicants argued that parents have the right to raise their children in line with their beliefs, convictions, and conscience. They invoked the best interests of a child in this context but stressed that it should be determined largely by parents, with state intervention allowed only as a last resort in the most extreme cases.

Despite the applications were based on several ECHR articles, the ECtHR only conducted a thorough substantive analysis under Article 8 (and only in its private life dimension), with only a brief argumentation under Article 9 (freedom of thought, conscience, and religion) and with the conclusion that there is no need to consider the application separately under Article 2 of Protocol No.1. The ECtHR stated that there had been an interference with the applicants' private lives and that it consisted in the consequences of the applicant's refusal to undergo vaccination which was intrinsically connected to the vaccination duty. In addition, the ECtHR concluded that interference had been in accordance with law and pursued the legitimate aim of protecting the health and the rights of others. The decision was based on the need and proportionality assessment. The ECtHR noted that States have a broad margin of appreciation in the area of public health policy since there is no consensus among European countries regarding compulsory vaccination. According to the ECtHR, the state was obliged by its positive obligations under the right to health to ensure appropriate immunization coverage, therefore the mandatory vaccination scheme was established in response to a pressing societal necessity. In addition, due to the advice from the experts who provided advice to the authorities, this aim could only be achieved through a compulsory vaccination program. The interference with the applicants' right was also considered proportionate according to numerous factors such as the vaccinations' safety and efficacy; the legislation allows for exemptions in circumstances of medical contraindications or moral objection; vaccines are never delivered forcibly since the obligation is only enforced indirectly through punishment; fines are not excessive and can only be imposed once; there are administrative and judicial options for challenging sanctions.³⁶⁾

The ECtHR concluded that the measures complained of by the applicants were proportionate to the legitimate aim pursued by the State through the vaccination requirement, which had not exceeded its margin of appreciation. Thus, they could be considered "necessary in a democratic society" and they do not constitute a violation of Article 8. The complaints under Article 9 were rejected as incompatible *ratione materiae* with the ECHR.

36) Ważyńska-Finck, K. (2021), *Anti-vaxxers before the Strasbourg Court: Vavříčka and Others v. the Czech Republic*, Strasbourg Observers, <https://strasbourgobservers.com/2021/06/02/anti-vaxxers-before-the-strasbourg-court-vavricka-and-others-v-the-czech-republic/> (accessed June 23, 2021).

In light of the COVID - 19 related challenges and the ongoing discussions about compulsory vaccination, it is important to emphasize that the ECtHR noted that this case “relates to the standard and routine vaccination of children against diseases that are well known to medical science”.³⁷⁾ The purpose of this statement was most likely to prevent its conclusions from being extrapolated to other scenarios, such as COVID-19 vaccination and the compatibility with the ECHR of any future restrictions imposed on individuals who refuse.

Conclusion

According to the analysis of the ECtHR jurisprudence, the main grounds with respect to mandatory vaccination are included within the scope of Article 2 and Article 8 of the ECHR. The positive obligations arising from the protection of private life in health-related cases largely correspond to those arising from Article 2 ECHR, where it is necessary to distinguish between the two scopes by determining whether there is a danger to life (Article 2 ECHR) or a mere danger to health (Article 8 ECHR). However, Article 2, as well as Article 8 of the ECHR, do not imply that compulsory vaccinations must be implemented. The states are obliged, under certain circumstances, to provide for measures to eradicate diseases, but the ECtHR does not specify which methods must be used. The absence of a legal duty does not, however, preclude the introduction of mandatory vaccination as a method of choice. Compulsory vaccination appears to be compatible with the ECHR if the measures are implemented to achieve a legitimate goal, necessary for a democratic society and appropriate for the individual concerned.

In the context of the COVID-19 pandemic, the *Vavříčka and others v. the Czech Republic* has gained new weight and prominence. Despite the fact that COVID-19 vaccination is not compulsory in Europe, the option of restricting admission to particular places and activities to people who have been vaccinated or expanding vaccination programs to adolescents is being examined. Therefore, the judgment of the ECtHR, in this case, is very important. In determining the necessity and proportionality of vaccines, the ECtHR critically examined some of the most common anti-vax arguments and relied on states’ positive obligations under international law to protect life and health, as well as scientific consensus on vaccine efficacy and safety.

Whether compulsory vaccination is compatible to the ECHR? It is impossible to provide a simple ‘yes’ or ‘no’ answer. Rather, it depends on the facts of the vaccination program in question, particularly the immunizations covered by the obligation, which must be examined on an individual basis. Therefore, compulsory vaccination is conceivable for diseases that are highly contagious and associated with significant dangers if the vaccine provided is safe and efficient.

37) Ibid.

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DA LI BI OBAVEZNA VAKCINACIJA PROTIV COVID-19 BILA KOMPATIBILNA SA EVROPSKOM KONVENCIJOM O LJUDSKIM PRAVIMA

Apstrakt:

Značajna dilema u vezi sa pandemijom novog Korona virusa se odnosi na pitanje obavezne vakcinacije, naročito u pogledu ostvarivanja i zaštite osnovnih ljudskih prava. Navedena činjenica opredeljuje predmet istraživanja u radu u kontekstu analize prakse Evropskog suda za ljudska prava u pogledu uticaja obavezne vakcinacije na uživanje prava zaštićenih Evropskom konvencijom za zaštitu ljudskih prava i osnovnih sloboda. Posebna pažnja posvećena je razmatranju presude Vavrička i drugi protiv Češke u kojoj je Evropski sud za ljudska prava zaključio da je obavezna vakcinacija "neophodna u demokratskom društvu". U okviru zaključnih razmatranja autori ističu potrebu uspostavljanja adekvatnog pravnog okvira regulisanja obavezne vakcinacije uz puno uvažavanje osnovnih ljudskih prava i sloboda. Cilj članka se odnosi na sagledavanje obavezne imunizacije kroz prizmu standarda jurisprudencije Evropskog suda za ljudska prava i identifikovanje glavnih izazova u navedenom smislu.

Ključne reči: *COVID-19, obavezna vakcinacija, ljudska prava, Evropski sud za ljudska prava*

LITERATURE

1. *Acmanne and others v. Belgium*, Application no 10435/83, Commission decision of 10 December 1984.
2. Akandji-Kombe, J. (2007), Positive obligations under the European Convention on Human Rights - A guide to the implementation of the European Convention on Human Rights, Council of Europe.
3. *Association of Parents v. the United Kingdom*, Application. no. 7154/75, Commission decision of 12 July 1978.
4. *Boffa and others v. San Marino*, Application no 26536/95, Commission decision of 15 January 1998.
5. Bozzola E. et al. (2018). Mandatory vaccinations in European countries, undocumented information, false news and the impact on vaccination uptake: the position of the Italian pediatric society, *Italian Journal of Pediatrics*, pp. 44-67.
6. Cambridge Advanced Learner's Dictionary & Thesaurus, (2013). Cambridge University Press.
7. Camilleri, F. (2019), Compulsory vaccinations for children: Balancing the competing human rights at stake, *Netherlands Quarterly of Human Rights* 37(3), pp-1-23.

8. COVID-19 and mandatory vaccination: Ethical considerations and caveats, (2021). Health Ethics & Governance, WHO Headquarters, WHO-2019-nCoV-Policy-brief-Mandatory-vaccination-2021.1.
9. Donati A. et al. (2021) Vaccination Policies in Europe: A Comparative Study Between Selected Countries', MPILux Research Paper Series.
10. European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), Council of Europe.
11. Gerards, J. (2019). General Principles of the European Convention on Human Rights, Cambridge University Press.
12. Katsoni, S. (2020). Do compulsory vaccinations against COVID-19 violate human rights? An assessment of the measure's compatibility with the European Convention on Human Rights', <https://voelkerrechtsblog.org/articles/do-compulsory-vaccinations-against-covid-19-violate-human-rights/> (accessed June 7 2021).
13. Korff, D. (2006). The right to life - A guide to the implementation of Article 2 of the European Convention on Human Rights, Council of Europe.
14. Krasser, A. (2021). Compulsory Vaccination in a Fundamental Rights Perspective: Lessons from the ECtHR, Graz Law Working Paper No 04-2021, pp. 207-233.
15. *LCB v. the United Kingdom*, Application no 23413/94, ECtHR Judgment of 9 June 1998.
16. *Lozovyye v. Russia*, Application no. 4587/09, ECtHR Judgment of 24 April 2018.
17. Mladenov, M. (2013). Zaštita prava na privatnost u praksi Evropskog suda za ljudska prava, Zbornik radova Pravnog fakulteta u Novom Sadu, 47(3), str. 575-593.
18. *Oneryildiz v Turkey*, Application no 48939/99, ECtHR Judgement of 30 November 2004.
19. Oxford Dictionary of Biochemistry and Molecular Biology, (2008). Oxford University Press, <https://www.oxfordreference.com/view/10.1093/acref/9780198529170.001.0001/acref-9780198529170> (accessed May 23, 2021).
20. *Shelley v. the United Kingdom*, Application no 23800/06, ECtHR Judgement of 4 January 2008.
21. *Solomakhin v. Ukraine*, Application no 24429/03, ECtHR Judgement of 15 March 2012.
22. Ukkonen, A. (2018). Different Legal Aspects of Mandatory Vaccination Policies, Tallinn University of Technology.
23. *Vavrička and others v. the Czech Republic*, Applications no 47621/13, 3867/14, 73094/14 et al., ECtHR Judgment of 8 April 2021.
24. Ważyńska-Finck, K. (2021), Anti-vaxxers before the Strasbourg Court: Vavrička and Others v. the Czech Republic, Strasbourg Observers, <https://strasbourgoobservers.com/2021/06/02/anti-vaxxers-before-the-strasbourg-court-vavricka-and-others-v-the-czech-republic/> (accessed June 23, 2021).
25. WHO, 'Immunization', <https://www.who.int/news-room/facts-in-pictures/detail/immunization> (accessed May 21, 2021)
26. *Y.F. v. Turkey*, Application no. 24209/94, ECtHR Judgment of 22 July 2003.

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