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Compulsory Vaccination and Fundamental Human Rights

Izvirni znanstveni članek / original scientific article

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Abstract

There is no persuasive reason to object to the position of medical science (and the belief of the majority of the world's population) that vaccines against particularly difficult and communicable infectious diseases are one of the major and most important achievements of humanity and the development of medicine. Nevertheless, the fact that the number of people who perceive and experience vaccines with discomfort, doubt, mistrust, or fear cannot be ignored. The number of these people is increasing rapidly and significantly. It should not be overlooked that the legal policy on vaccines and compulsory vaccination, as an interference with the physical and moral integrity of the individual, must be convincingly justified, legally regulated and, above all, harmonized with the basic rules and principles of constitutionality. Author focuses on this last issue. He pays particular attention to the current case, regarding compulsory vaccination, which is to be decided by the Grand Chamber of the ECtHR in a short period of time, *Vavříčka and Others v. The Czech Republic*. In doing so, the author connects parallel political, social and legal elements of the title topic, by exposing the ever-threatening danger of discrimination, stigmatization and social isolation of those people who express concerns about vaccines. Author explains his expectation regarding the forthcoming decision of the ECtHR on this issue and highlights the challenges and problems that the EU Member States will face in the short term, regarding fundamental human rights to privacy, freedom of movement and liberty interest.

Keywords: Compulsory (Mandatory) Vaccination; Fundamental Human Rights and Freedoms; Positive Obligations of the State Doctrine; A Case of *Vavříčka and Others v. The Czech Republic*; Constitutional Court Decision on Compulsory Vaccination; Public Controversy Regarding Compulsory Vaccination.

Obvezno cepljenje in temeljne človekove pravice

Povzetek

Stališču medicinske znanosti (in prepričanju večine svetovnega prebivalstva), da so cepiva proti posebno težkim in nalezljivim (prenosljivim) boleznim eden od največjih in najpomembnejših dosežkov človeštva in razvoja medicine, ne gre nasprotovati. Kljub temu pa se ne sme prezreti dejstva, da veliko ljudi cepiva in obvezno cepljenje doživlja z nelagodjem, dvomom, nezaupanjem ali strahom. In da se njihovo število hitro in znatno povečuje. Kot ne gre spregledati pravne odgovornosti, da mora biti pravna politika cepiv in obveznega cepljenja, ki pomeni poseg v telesno in moralno integriteto posameznika, prepričljivo utemeljena, zakonsko ustrezno urejena in predvsem usklajena z osnovnimi pravili in načeli ustavnosti. Avtor se osredotoča na to zadnje. Posebno pozornost nameni trenutnemu primeru glede obveznega cepljenja, o katerem naj bi v kratkem času odločil Veliki senat ESČP, v primeru *Vavrička in drugi proti Češki Republiki*. Pri tem avtor poveže vzporedne politične, družbene in pravne elemente naslovne teme, s poudarkom vselej prisotne nevarnosti diskriminacije, stigmatizacije in socialne izolacije tistih ljudi, ki izražajo zaskrbljenost odpor glede cepiv. Avtor pojasni svoje pričakovanje glede odločitve ESČP o tem vprašanju in izpostavi izzive in težave, s katerimi se bodo kratkoročno spoprijele države članice EU, predvsem kar zadeva temeljne človekove pravice do zasebnosti, svobode gibanja, splošne svobode ravnanja in svobodnega odločanja posameznika o posegih v njegovo telesno in duševno celovitost.

Ključne besede: obvezno (predpisano) cepljenje; temeljne človekove pravice in svoboščine; doktrina o pozitivnih obveznostih državne; Evropsko sodišče za človekove pravice; primer *Vavrička in drugi proti Češki Republiki*; odločba Ustavnega sodišča RS o obveznem cepljenju; kontroverze glede obveznega cepljenja.

1. Introduction

In this article, focused on (less typical) constitutional aspects of a very important and obviously quite controversial social topic, I will first outline the situation in which public controversies are taking place regarding the mandatory vaccination of children in Slovenia. Or in other words, I will explain why there is actually no real, constructive and productive public discussion on this controversial topic. In the following, I will present the legal aspect of the title topic and essential

conclusions of the Constitutional Court of the Republic of Slovenia (2004) regarding compulsory vaccination and criticize the lack of implementation and inconsistent observance of this decision in legal policies and social practice.

The ever-lasting danger of stigmatization, social isolation and discrimination of those people who express distrust regarding the vaccines and object the compulsory vaccination will be specially addressed. Common European commitment for the protection and prosperity of the “Welfare State,” which is one of the essential political commitments and constitutional principles in the EU Member States, also a cornerstone for establishing the EU and fundamental element of its legal order, will be emphasized. I will additionally argue against the idea (explicitly or implicitly floating around the public sphere) of privatizing healthcare system.

I will recall the ECtHR decision in the case of *Solomakhin v. Ukraine* (2012) which deals with the issue of compulsory vaccination and which provides a common European starting point for ensuring minimum standards for the protection of the fundamental rights of persons, in particular children, who are required to be vaccinated. In the following I will shortly describe the factual basis of the latest case of *Vavříčka and Others v. The Czech Republic* which will be decided by Grand Chamber of the ECtHR and introduce my firm expectations regarding the final decision in this case which is supposed to be (and should be) publicly introduced before the end of this year (2020).

I will conclude the article by reflecting on what awaits, by my opinion, EU Member States in the short term future, especially in connection with the possible completion of the COVID-19 vaccine and with regard to the fundamental human *right to privacy, freedom of movement and liberty interest*.

2. Methods

The content of the article is based on research-study and legal, but above all specific constitutional analysis of the scientific, professional and other publicly available material. As a constitutional scholar and legal philosopher, I offer my understanding of the studied material. In doing so, I focus on the most important but at the same time most problematic constitutional dimensions of the title theme, which I place in a broader political and social context. In doing so, I connect the medical, political, social and legal aspects of the topic into a complete whole. In conclusion, I explain my expectation regarding the ECtHR's decision on the issue of compulsory vaccination, which is due to be adopted before the end of this year (2020). I substantiate it with my knowledge in the field of constitutional law and legal theory. Adding my assessment of the short-term challenges and problems as announced in the paragraph above.

3. Starting Points for Discussion

I don't want to be (as it has happened before) misunderstood or misinterpreted. Certainly vaccines *per se* are among the greatest medical achievements of mankind (Kraigher, 2003, pgs. 127-128; Olpinski, 2012, pgs. 381-385; Likar, 2004, p. 17; comp. Balding, 2006). And there is no persuasive reason to dispute the medical sciences that vaccines are predominantly decisive in ensuring the

health of all people, the entire population. To protect people against dangerous and communicable diseases.

According to publicly available data for Slovenia, for EU Member States and for the USA, it can be concluded that the level of the “*population vaccination*” incursions (Bozzola et al., 2018, pgs. 1-4; comp. *Slovensko zdravniško društvo*, 2017). According to medical experts, vaccines are even supposed to become a kind of “victim of their success” (Yaqub et al., 2014, pgs. 1-11; Janko, 2012). I do not make judgments about this, because this is not my scientific field. That is why I am focusing on the legal and, above all, constitutional aspects of this increasingly controversial topic. These aspects may not be the most important, or decisive, but they are certainly not unimportant. It is obvious that they concern some very important constitutional and internationally recognized fundamental rights and freedoms.

During the COVID-19 Coronavirus pandemic, I have written a few articles about the problem of *fear* (Teršek, 2020a).¹ But fear is also discussed and written about by representatives of other sciences, from philosophers to medical scientists. Even though there are not as many scientific articles on the subject as one might expect. At least the impression, based on my research through the Internet and COBISS system, is such (and maybe - in good faith - it’s wrong?) (Černič, 2014; Baumgaertner et al., 2018). However, I note a common point in this context: it seems quite obvious that the former fear of infectious diseases has been replaced by fear of the side effects of vaccination and vaccines (Grignolio, 2018; *Scientific American*, 2020).

It is to be observed, quite expectedly, two poles when it comes to the attitude towards vaccination. On the one hand, there are representatives of medical science AND the pharmaceutical industry who justify and advocate vaccination as a way to provide the s.c. “collective immunity” and “societal health.” By adding that it is a “safe” way to achieve this legitimate and compelling urgent goal.² On the other hand, there are either opponents of compulsory (mandatory) vaccination³ or people who doubt vaccines and do not trust them unconditionally. More and more people are actually “afraid” of vaccines (*Center za nalezljive bolezni*, 2019). It is true that in this second group there are people, especially parents of small children, who do not have a formal medical education and do not practice a profession in one of the segments of the medical profession. But representatives of the medical profession can also be found in this second group (Lydall, 2014; Conniff, 2019).

There is no doubt that the statutory prescribed compulsory vaccination is an interference with a

¹ At the time of the official Coronavirus pandemic 2020, when emergency measures and general restrictions on the freedom of movement were in place, *de facto* extraordinary state of “quarantine”, the question what kind of world will we enter after the official end of the pandemic was quickly raised. Will we be “awakened,” I argued, or perhaps “even more dreamy” after a pandemic (which was fairly quickly and publicly marked as “only the first wave”)? As individuals, Nations and global society? The problem of fear intensified during pandemic. Obviously. This is not only a social problem but also a legal one, I wrote. Namely people have a fundamental human right to “*protection against fear*.” The absolute short-term priorities of public administration in Slovenia and in all EU Member States will have to be, by my opinion, focused on ensuring that fear and anxiety do not become *a new epidemic*.

² Černič (2014, pg. 339) describes the position of medicine that collective immunity protects the population from epidemics of infectious diseases as a “*medical dogma*.”

³ See Zakon o nalezljivih boleznih (ZNB) (»*Communicable Diseases Act*«). Uradni list RS (“*Official Gazette of the Republic of Slovenia*”), No. 33/06, 49/20. Relevant diseases are listed in Art. 22.

person's physical and moral integrity, and thus with his or her fundamental rights. Slovenian Constitutional Court and the ECtHR case-law confirms this claim (as will be explained in detail below). Therefore, the fundamental constitutional issue consists of four parts, which I highlight as the most important: (1) when does compulsory vaccination mean excessive interference with the fundamental rights of the individual?; (2) how compulsory vaccination must be regulated and implemented in practice so as not to violate fundamental human rights?; (3) what kind and in which way legally prescribed mechanisms must be available to people so that they do not suffer damage to health as a result of vaccination, which they oppose for constitutionally legitimate reasons (especially for health reasons)?; (4) what kind and in which way systemically and legally regulated mechanisms must be available to the people in order to effectively enforce the state's liability for damages if they suffer damage to health as a result of vaccination? These are also the central themes of this article.

At the same time, I place these constitutional elements of the title topic in a broader political and social context.

4. The Nature and Characteristics of the Compulsory Vaccination Controversy

Over the last three to four years, such is my research-impression, the highly heated public discussions (especially in *Internet forums* and on *Facebook* websites or/and personal profiles)⁴ have increased dramatically. In the media, there have been several heated debates between the general public, especially young parents of small children, and pediatricians. These were not polite, calm and productive discussions. The parents attacked the pediatricians because they were "too arrogant, too selfish and too superficial" towards the children and the question of the side effects of the vaccination, and above all because they sublimely avoided giving a detailed analysis of the possible side effects and other information on a matter that the parents asked for. On the other hand, some of the pediatricians literally accused these parents of neglecting their children and putting them at serious risk if they did not allow the vaccination. Even a few reports to the centers for social work for child neglect were submitted by pediatricians who were angry about the parents' accusations at the expense of their unprofessional work and their arrogant attitude towards the parents.⁵

⁴ I have been monitoring the Internet forums and FCB discussions and posts for almost two years.

⁵ Parents objecting the compulsory vaccination of their children are in minority. The vast majority of doctors and other medical professionals strongly argue in favour of compulsory vaccination. See, for example; Salmon et al., 2006, pgs. 436-442, stating in the overview conclusion: "*Compulsory vaccination has contributed to the success of immunisation programmes in the USA and Australia, yet the benefits from compulsory vaccination are not universally recognized. Some people—experts and the public alike—believe that the benefits of compulsory vaccination are outweighed by the associated ethical problems. A review of vaccination legislation in the UK, Australia, and the USA raises four main points. First, compulsory vaccination may be effective in preventing disease outbreaks, reaching and sustaining high immunization coverage rates, and expediting the introduction of new vaccines. Second, to be effective, compulsory programs must have a reliable supply of safe and effective vaccines and most people must be willing to be vaccinated. Third, allowance of exemptions to compulsory vaccination may limit public backlash. Finally, compulsory vaccination may increase the burden on governments to ensure the safety of vaccines. Nevertheless, although compulsory immunization can be very effective, it might not be acceptable in some countries where high coverage has been achieved through other approaches or efforts, such as in Sweden, Norway, Denmark, the Netherlands, and the UK. These factors should be considered when compulsory vaccinations are being introduced or immunization laws redefined. Lessons learned from compulsory vaccination could be useful to other public-health programs.*"

I have personally participated in such a case as a legal advisor. Pediatricians required two young parents to take growth hormones for their child who is autistic. After a few doses, the child's behavior and state of health deteriorated considerably. The parents gave the pediatricians a detailed description of what happened to the child, politely asked for additional analyzes and detailed answers, but without success. Their personal pediatrician and *University Medical Center Ljubljana* in Ljubljana responded to their questions and the request to initiate a formal procedure - not by answering their questions and providing detailed explanations, but - by submitting an application to the *Social Work Centre*; accusing them of “neglecting” their child (which is also a criminal offense under the Slovenian Criminal Code). The procedure has not yet been completed and it is at second reading at the *University Medical Center Ljubljana*, on the table of its *Special Commission for the Treatment of Patients' Complaints*. The procedure is expected to continue in court (Teršek, 2019; Teršek, 2020b).

There is no real - by "real" I mean constructive, calm, without accusations, based only on scientific findings of doctors and verifiable personal experiences of people/parents - social discussion about possible, probable or already proven negative consequences of vaccination in Slovenia. (While searching the internet I came to the conclusion that it is similar in most of the other EU Member States). In other words, there is no such public debate on cases where the negative consequences for a person's health have been analytically proven or are at least obvious.

Doctors themselves avoid even an extensive public debate about possible and most likely adverse effects caused by vaccination. It may be that there are really only a few such cases. But there are such cases nonetheless. The concern is therefore justified. However, there has also been no lenient social debate about the reasons why certain people - even or if they act in good faith as parents - do not want to be vaccinated or do not want their children to be vaccinated. In Slovenia, I maintain, there has been no real and bona fide public debate on the real reasons, on the content of the real reasons for refusing to vaccinate with compulsory vaccines, and no such debate on the real link between these reasons and the post-vaccination health problems (side effects) of the vaccinated. And some of them provided quite convincing evidence for such a claim.

When debates on this issue take place, they are usually in small circles, at round tables without media coverage, between doctors and politicians... But the results and findings clearly do not reach the general public. At least not in a way and to an extent that the public would be lenient, optimally reassured, reassured and convinced. Those who are against compulsory vaccination - and usually do so in fear, confusion or distrust - are more likely to be stigmatized. Especially young parents, who are very and sincerely concerned about the side effects of their children's compulsory vaccination.

5. Legal Aspect

Making public statements on this issue does not mean categorically rejecting vaccination or "fanning out" general resistance to vaccination. Absolutely not. It also does not mean a sign of distrust towards the medical profession. The latter at least. It means asking questions on the subject - in good faith. And this topic represents a very important aspect of the right to health and health as a value. These questions are legitimate, and it is a legitimate issue that must be raised and

discussed publicly (comp. Okkonen, 2018). Looking through the cross-section of the public health system as a whole and through the operation (the business!) of insurance companies, many events and processes too often create well-founded doubts, mistrust, but also fear among people that all the time things are not as they should be. And people have the right to clear and convincing answers to these questions. They also have the right to the ongoing responsibility of public health as a system that maintains people's trust and, in particular, protects people from fear.⁶

Slovenian daily politics, or at least it seems to be so, has long wanted to react to the growing number of those who reject compulsory vaccination because of a lack of confidence and fear, with a simplified and quick, purely technical and excessively bureaucratic, even unethical proposal that there should no longer be any general and all-encompassing insurance rights for these people. The day-to-day policy of the ruling coalition proposed that these people should pay for the medical treatment of their illnesses if, according to the doctor's medical assessment, their illness or health problem is assessed as a result of refusing compulsory vaccination. I have publicly opposed such a political position.

The Slovenian *Ministry of Health* has recently introduced the proposal of the *Health Insurance and Health Care Act* that excludes the right to general, available and unpaid health care assistance for those who refuse compulsory vaccination (*The Republic of Slovenia. Gov.si. Ministry of Health*, 2020). In such cases, the health insurance of such persons would not cover the costs of health care and assistance if the doctors assess that the health problem is a consequence of the lack of compulsory vaccination.

I claim this idea, such proposition to be unconstitutional and legally unacceptable intrusion into the physical and mental integrity of an individual and encroachment of the right to privacy and liberty interest.⁷

6. Special Constitutional Aspect

It should be noted that in 2004 (yes, sixteen years ago!) Slovenian Constitutional Court reviewed the constitutionality of certain provisions of the *Infectious Diseases Act*⁸ and decided (decision no.

⁶ The *Right to be protected from fear* IS a FUNDAMENTAL human right. Let me just remind ourselves of the *Universal Declaration of Human Rights*, the *Atlantic Charter* and the *Philadelphia Declaration*, which marked the end of the II. world war and announced a new world social order. And in particular of the *European Social Charter*. All these international legal documents address this right – as a fundamental human right. On Tuesday, 7th of July, at a press conference, a spokesman for the Slovenian Institute of Public Health described Slovenia as a "*dangerous country*" due to COVID-19 virus. From the beginning of the official pandemic, however, to the present day, I have been drawing attention to this more than just important aspect of "fear" and "scaring people." And the (by no means accidental, but deliberate and deliberate) absence of public information about the wider medical context of people entered in the records for COVID-19 as sick, hospitalized, quarantined or dead: how old are/were they or have they had before another disease, which disease, whether they suffer/ed from chronic diseases, whether they have been terminally ill before, or have previously waited for the rapidly approaching end of their life ... And the public in Slovenia still does not receive this information. (<https://www.zurnal24.si/slovenija/epidemiolog-fafangel-prakticno-nismo-vec-varna-drzava-349744>) (7.7.2020)

⁷ *Liberty interest* is a part of constitutional and international fundamental human right to act by free will, to make deliberations and choices about life freely, to make free choices regarding one's own physical and mental (ethical and moral) integrity etc. The Constitution of the Republic of Slovenia protects such "general freedom of deeds" in Article 35 (protection of privacy and personal rights). See Avbelj et al., 2019, pgs. 339-349.

⁸ Note: this Act has also been the direct legal foundation for the restriction of constitutional rights and freedoms during the Coronavirus pandemic 2020 in Slovenia. The Constitutional Court of the Republic of Slovenia still didn't decide

U-I-127/01) that vaccination against infectious diseases is in itself a preventive health measure serving the legitimate objective of protecting the right to health of others and the health of the Community as a whole. According to the Court, it is therefore in the best public interest and such measures taken by the State serve a legitimate objective. The Court agreed with the State's argument that such a measure contributes to the maintenance of the health of the individual while protecting the health of the population as a whole. Therefore, since compulsory vaccination is understood as a collective protection of the population against infectious diseases, it is not possible, simply by invoking one's constitutional right to health and the right to refuse treatment, to take a flat-rate basis to refuse vaccination or to claim that other people are effectively ensuring their protection against the spread of infectious diseases by having themselves vaccinated. Of course, the Constitutional Court rejected such an argument. Constitutional Court also decided that the benefits of compulsory vaccination for the health of the individual and the population as a whole outweigh the possibility and severity of possible negative consequences (the s.c. *side effects*) for the individual resulting from this interference with his or her constitutional right to health.

The Constitutional Court took a stand that the decision as to which infectious diseases pose such a threat to individual and public health that they can justify compulsory vaccination should be left to the medical profession or epidemiologists, but (and this is a strong and indispensable BUT one) on a case-by-case basis if compulsory vaccination is rejected. The doubt and rejection of compulsory vaccination cannot therefore be denied a priori, generally, categorically and absolutely as a legitimate interest in freedom as such. From the point of view of constitutionality and on careful reading of the Constitutional Court decision, the effective procedures for medical assessment of whether there are valid medical reasons for refusing compulsory vaccination in a particular case must also be made available. And, what is also very important, it is also necessary for the State to provide systematically regulated procedures for the legal protection of the rights of people who suffer damage to their health due to a demonstrable causal link between the damage caused and compulsory vaccination. In other words, it is necessary to provide systematically effective and objective legal procedures for an accurate and convincing assessment of whether the reason for the subsequent damage to a person's health is due to compulsory vaccination.

This part of the Constitutional Court decisions has been neglected too often. And, this is my firm assessment, the State still didn't respond to this *positive constitutional obligation*⁹ and still did not provide such properly and effectively institutionalised medical and legal procedures. To be more precise, there are statutory regulated formal procedures to object the compulsory vaccination and to claim health damages as a result (side effect) of the compulsory vaccination. But such procedures are not undoubtedly *objective*, so they are not efficient as a legal remedy (even though the right to an efficient legal remedy is a constitutional right). Not in *substance*. In short: a patient objects the vaccination, the doctors demand it; a patient claims the damage to his health, the doctors

on the constitutionality of the restrictions of constitutional rights and freedoms. But my colleagues and myself did, implicitly, but highly understandable. See Teršek & Dragan, 2020.

⁹ According to this constitutional doctrine, it is not enough for the state not to interfere with fundamental rights and freedoms (the s.c. *negative aspect / nature of rights*). The state must also do everything that can be reasonably expected of it AND demanded that these rights be effectively protected and exercised in practice (the s.c. *positive aspect / nature of rights*). See Mowbray, 2004. In the Slovenian Constitution, the normative basis for this doctrine is Article 5, its first sentence: "*The state protects human rights and fundamental freedoms on its territory.*" Namely, in combination with the first sentence of Article 15: "*Human rights and fundamental freedoms are exercised directly on the basis of the Constitution.*" See Avbelj et al., 2019; Teršek, 2014, pgs. 312-322.

(most usually the same ones) deny the causal link (causality); a patient files a complaint, the doctors (the closest colleagues of the first ones) reject it as unfounded; a patient files a lawsuit, the court calls the expert witness, usually the same doctors or their colleagues – who don't want to harm their professional colleagues. Case closed.¹⁰

7. The Doctrine of “Welfare State:” a *Value* and Common European Commitment

The Welfare State, or as it was written in our Constitution – “the principle of Social State,” must not deprive such an individual of the possibility of equal and unrestricted access to medical care by requiring him to pay the costs of treatment in full and this way actually punish him for not wanting to be vaccinated in good faith and thus not wanting to take the risk that he or she may suffer damage to his or her own health as a result of vaccination. This is, after all, a constitutional right, which as such must also be properly regulated by law (Teršek, 2019, pgs. 32-45). Approximately. With such, above described “pure cost & profit logic” and a one-sided health policy of “saving the public money.” State does not protect either the fundamental value of health nor the health of the entire public nor the human right to health.

However, a constructive *the Experts - the Public* discussion may be initiated as to the extent to which such an individual may be charged additional costs for additional treatment because he or she has not been vaccinated – as a medically determined result of non-vaccination. However, the medical profession must determine the precise, persuasive and “beyond a reasonable doubt” strong medical criteria, by which it can be firmly concluded that the individual did not decide to refuse vaccination for reasons that can be legally and medically described as valid and justified reasons - be it health reasons, fear, ethics (philosophy of life) or religious reasons.

With the (several months ago) proposed and above explained measures of the state, something completely different would happen: there would even be a possibility that the individual would be fined in this way every time he made an autonomous decision or took his own risk, which has financial consequences for the State. It is common knowledge that this is already being done in practice. Not only with the legal requirement that car drivers must be wearing a seat belt. This is already well known policy of the insurance companies, looking for profit. However, the public health system must not work like this – seeking profit (comp. Rosenthal, 2017).

After all, such a measure could also lead to the beginning of a similar tightening of health policy regarding the set of a “basket of all rights” from compulsory public health insurance. There seems to be a concern that a serious debate could arise if alcoholics would be made equally (payable) difficult to treat alcoholism in the same way, or smokers for cancer, or pregnant women for abortion, or those injured in fights or athletes for injuries in sports or fast drivers in traffic accidents or careless people due to a cold and the flu, or hospital visitors during an epidemic due to a visit, or writers and computer scientists due to sitting in front of a computer or mountaineers due to walking on slopes and rocks, etc.? I most strongly argue against ideas of such nature and substance (comp. *WHO. Vaccination: European Commission and World Health Organization join forces to promote the benefits of vaccines*, 2019; Paul & Loer, 2019).

¹⁰ I am not allowed to explain the factual and legal basis of this case in more detail since it is still a *pending* legal matter.

8. Opposing the Idea of Privatizing Healthcare Systems in the EU Member States

Does this mean that financial goals (higher costs for medical assistance and insurance and for profit) will seek to take away our common responsibility and solidarity of every individual for every individual? As a whole? And for all the health risks in his or her life? And that people will be financially punished in the form of paying for medical treatment whenever they can be “accused” of being too careless, of taking risks, and so on? The start of the final step towards a desire that has long accumulated from the coexistence between the too many members of the medical community, multinationals, banking institutions and a certain section of the daily political elite, the privatization of healthcare, might be the reason? Because privatization would mean exactly that: the transfer of all risks and burdens to the individual as-a-thing, embedded in an instrumental and dehumanized, market orientated only, cost-saving and profit-gaining healthcare system.¹¹

Individuals have the right to make autonomous decisions about their health – hopefully in good faith and with the best intentions for them, their children and for the Other. Sometimes these decisions are also risky. This freedom is guaranteed to them by the Constitution. And by the international law. If an individual makes a mistake or a wrong decision in this regard or an unwanted coincidence occurs the “Social State” (under the Constitution, under the International Law, under the EU Legal System) that officially protects the people’s freedom, fundamental rights and the right to health may neither impose disproportionate costs on individual as a form of fine for his autonomous decision-making. Nor may the State leave the costs for medical assistance to himself only because thoughtfully or less thoughtfully one has merely exercised the rights which one legally has. Such important issues should be resolved systematically, but in a different, completely different way.

9. The Danger of Social Isolation and Stigmatization

As a constitutional scholar and as a citizen and as a human being I appeal to those responsible and competent in healthcare system and to the political parties *not to let something like this happen*. A compromise systemic solution needs to be found on the issue of vaccination, I agree. But the fact is that we, the citizens of the EU Member States, live in social constitutional democracies. Therefore, the EU should be firmly committed to protect the social rights and social dignity of every individual (as it is written in the legal documents, social programs and political resolutions). Right to health is an important and complex right, and risk is often an integral part of life. All these facts must be taken into account. In the field of health care, these facts must be considered as an integral part of human freedom and human rights. EU Member States and EU as a supranational organization must not be turned into a pure profit seeking organization, which turns its back on the politics, doctrines and practices of the Welfare State. It must remain in the service of the people and their common good, thus putting more burdens on the individual and opening the doors for individual’s social isolation and stigmatization even more as it has already been done.

¹¹ This idea, even though it is suggested and addressed »between the lines« or in an »indirect« way, implicitly, most of the time it is, however, quite obvious very present Slovenia; in connection to certain political parties and party-leaders. It would take too much space in this essay to point to the data and evidence, explicit or implicit, confirming such statement. Let me be allowed to take a personal risk and claim the idea exists in a part of the political realm.

I most strongly consider this kind of discrimination, stigmatization and social isolation as described above to be unconstitutional legal policy and social practice. And in contrary to the protection of fundamental human rights listed in the ECHR and protected by this Convention.

10. The Issue of Discrimination

The statutory measure proposed some time ago by the Slovenian *Ministry of Health*¹² is, also in view of the decision of the Constitutional Court, inappropriate, if not constitutionally inadmissible. Namely, it was again proposed to deny individuals who have not opted for vaccination the equal enjoyment of the same services and benefits of public health as are provided to vaccinated individuals. And this solely on the basis of the bare argument - that they did not opt for vaccination. Not only for compulsory vaccination, but also for recommended vaccination! Such a legal solution seems to me to be obviously constitutionally unacceptable. It should not be legally permissible to “punish” an individual in such a way simply because he or she has not been vaccinated; in good faith or in fear or because of distrust of vaccination. One can easily recognize the double intrusion into liberty interest: first, requiring an individual to take the full risk of vaccination, second, deny an individual the exercise of the rights covered by his health insurance if his/her illness or health problem is medically evaluated as a result of not being vaccinated.

The story goes even further. Some part of the daily politics suggests that children who were not vaccinated because their parents decided not to vaccinate them be “forbidden to attend kindergartens and schools.” Even – this is no joke – most of the parents, according to the media and discussions on the internet forums, support this idea. Some of them even demand it to be written in statutes. This would be, by my strong constitutional-law conviction, really obvious discrimination, not just stigmatization.

11. ECtHR Case-Law

The central (constitutional) legal issue in all these cases is primarily the question of whether the state convincingly justified compulsory vaccination in a specific case. I emphasize, not in general, but in each specific case individually; with case-by-case-balancing.

The issue of compulsory vaccination has already been decided by the ECtHR in case of *Solomakhin vs. Ukraine*.¹³ Although the court did not find in the present case that the applicant State had infringed the applicant's Convention rights, that decision is nevertheless very important. Namely, from the findings of this Court in the case mentioned below it is possible to deduce a clear message of this Court, what are the necessary conditions that must be verifiably and predictably met in order for the state to justify such interference with an individual's personal integrity, decision-making autonomy and right to health. In other words, if the facts of a particular case were different from those found in the case presented below, ECtHR could quite easily decide that interference with the fundamental human rights of the individual due to compulsory vaccination was unjustified.

It is therefore worth refreshing the Court's main arguments - as a reminder to Council of Europe

¹² On the day (13.7.2020) I wasn't able to find that particular document on the Slovenian *Ministry of Health* web page.

¹³ ECtHR. Application no. 24429/03, dating 15th of March 2012.

Member States which conditions must be demonstrably and convincingly met in order for the ECtHR to endorse the State's argument that an interference with an individual's physical integrity and decision-making autonomy was justified.

First the Court addressed the question of “physical integrity” as covered by the Convention due to the “right to privacy”.

“1. The Court reiterates that according to its case-law, the physical integrity of a person is covered by the concept of “private life” protected by Article 8 of the Convention (see *X and Y v. the Netherlands*, 26 March 1985, § 22, Series A no. 91). The Court has emphasised 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 (see *Y.F. v. Turkey*, no. 24209/94, § 33, ECHR 2003-IX, with further references). 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 (see *Salvetti v. Italy* (dec.), no. 42197/98, 9 July 2002, and *Matter v. Slovakia*, no. 31534/96, § 64, 5 July 1999).

2. The Court notes that in the instant case, as was uncontested by the parties, there has been an interference with the applicant’s private life.

Court noted (in paragraph 35) “such interference was clearly provided by law and pursued the legitimate aim of the protection of health. It remains to be examined whether this interference was necessary in a democratic society.” Then the Court evaluated the criteria of “necessity”:

3. In the Court’s opinion the interference with the applicant’s physical integrity could be said to be justified by the public health considerations and necessity to control the spreading of infectious diseases in the region. Furthermore, according to the domestic court’s findings, the medical staff had checked his suitability for vaccination prior to carrying out the vaccination, which suggest that 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 health of the population.

Court emphasized the lack of objection to the vaccination from the applicant in this particular case as an important element of the case at hand:

4. Furthermore, the applicant himself failed to explain what had prevented him from objecting to the vaccination, when previously he had objected on several occasions. There is no evidence before the Court to prove that the vaccination in question had actually harmed the applicant’s health.

Then came the Courts’ final conclusion:

5. The Court also notes that the applicant’s allegations were thoroughly examined by the domestic courts and found unsubstantiated. The domestic courts found only one insignificant irregularity in the vaccination procedure, namely, making the vaccination outside the special vaccination room. This, they found, did not in any way affect the applicant’s health. They also established that none of the known side-effects of the vaccination were manifested by the applicant. They did so on the basis of several medical expert reports. The findings of the domestic courts were based on a large amount of medical data collected upon the motion of the applicant and of the courts. These findings appear to be grounded on a sufficient evidential basis and their conclusions are not arbitrary or manifestly unreasonable. The applicant did not submit any evidence to challenge the findings of the domestic authorities.

6. In view of the above considerations, the Court finds no violation of Article 8 of the Convention in the present case.”

A strange, unusual example, it really is. So strange and unusual that the judgment in this case provides virtually no basis for deciding when, if at all, this same court could rule that compulsory vaccination was an excessive interference with an individual’s fundamental human right.

It should be noted: if the facts established by the ECtHR were any different so could easily be its final decision. And maybe it will be due to “the referral of the present case of *Vavříčka and Others v. The Czech Republic* to the Grand Chamber will lead the Court to rule precisely on this question and could lead it to a change in its position. This eagerly awaited judgment will then set a precedent in the 47 member states of the Council of Europe. The ECJ intervened in this case and submitted its observations to the Court in 2016« (Puppinck, 2020).

12. Vavříčka and Others v. Czech Republic

As noted above, this question may soon receive a more concrete answer from Strasbourg. The Grand Chamber of the ECtHR will consider the case of *Vavříčka and Others v. The Czech Republic*.¹⁴ In this case, however, the facts are quite different and the decision of the Court may also be different (I intentionally write this word with a capital letter). This decision will be a legally binding judicial precedent for all Member States of the Council of Europe (with the s.c. *erga omnes* legal effect). As it should be and it is finally time for the ECtHR to not only “say” something substantial on the issue but do DECIDE on this highly important question regarding one of the fundamental human rights, possibly the most fragile one according to daily political, legal and social practices and from the short-term future standpoint.

This lawsuit was prompted by the fact that some parents refused to vaccinate the child for religious reasons, other parents refused only certain vaccines because they doubted their effectiveness, and third parents wanted to vaccinate the child later than required by law. In other cases, however, the parents refused to vaccinate the child because of his major health problems. One parent was fined. The other five parents were forbidden to enroll their children in kindergarten. However, they rejected the vaccine against tuberculosis, polio (I admit I don't know that, maybe the editor explains in a note?), Hepatitis B, measles, mumps and rubella (Puppinck, 2020).

13. On What Can Be Expected

In my view, the ECtHR will simply have to examine, above all, the general nature of the obligation to vaccinate as such. In particular, and above all (the above-mentioned, already written in the decision of the Slovenian Constitutional Court) the problem of the absence of effective LEGAL mechanism that would enable and allow parents to oppose vaccination of their children, and also other people who refuse to be vaccinated. Not only for religious or worldview reasons but especially for health reasons.

The final decision of the ECtHR will not be able to avoid the fact that many of the European

¹⁴ ECtHR. Application no. 47621/13 and 5 other applications (nos. 3867/14, 73094/14, 19306/15, 19298/15 and 43883/15).

countries do not have compulsory vaccination prescribed by law. Mandatory, compulsory vaccination can't be considered to be a matter of "self-evidentness" as it is not a matter of madness of the people opposing vaccination and rejecting to be vaccinated.¹⁵ There is no such legal obligation in to Slovenia neighboring Austria, or in Cyprus, Denmark, Spain, Estonia and Finland, nor in Germany, Ireland, Lithuania, Luxembourg, Norway, or in the Netherlands and Portugal, nor in the United Kingdom and Sweden (*WHO. Regional office for Europe. The organization and delivery of vaccination services in the European Union, 2018; European Centre for Disease Prevention and Control, 2020; European Commission. ROADMAP ON VACCINATION, 2020*).

Puppink (2020) refers to the words of Daniel Floret, President of the Technical Committee for Vaccination (CTV) of the High Council for Public Health that in these countries the level of immunity is about similar as it is in countries that have mandatory vaccination required by law. From this (of course with the accuracy of the data) follows the logical conclusion that compulsory vaccination not only has no direct, but also no statistically "greater" effect on immunity and disease conditions than in countries where vaccination is not legally prescribed as mandatory (*National Institute of Health, 2020*).

I will allow myself a prediction, albeit a risky one, and go a step further than the aforementioned author. If these data are accurate, I expect the following decision of the ECtHR: the goal of vaccination, which is to prevent the spread of infectious diseases and protect the health of the entire population, is in itself a legitimate and (constitutionally, legally) acceptable goal. HOWEVER, this goal MUST be achieved through more lenient measures that respect the fundamental rights and freedoms of parents and other people who refuse vaccination. If these lenient measures are not available, if legal mechanisms to refuse vaccination are not available or are not effective, and if people and parents who refuse vaccination are simply punished, treated as criminals and their children are banned from enrolling and entering kindergartens and / or schools, then this represents MORE than OBVIOUS a gross violation of fundamental human rights.¹⁶

A different decision of the ECtHR will be a big surprise for me.

14. Conclusion: What (Most Probably) Awaits the Citizens of the EU Member States?

¹⁵ Just a brief insight into Internet forum discussions shows too many people consider those who are scared of vaccinations, question them and reject to be vaccinated, themselves or their children, are labelled and marked to be »mad« and to represent »irresponsible danger to the society as a whole«. Most usually harsh, insulting and vulgar words are being used by the vast majority of the general public when addressing them.

¹⁶ Especially from the viewpoint of the (above mentioned) doctrine of the positive obligations of the state regarding the quality and effectiveness of the SYSTEMIC legal protection of fundamental human rights and freedom. ECtHR first developed this doctrine in direct connection with the right to privacy (Article 8 of the ECHR). See ECtHR Final Judgement in a case *Airey v. Ireland* (9th of October 1979): »However, although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect to private or family life ... Effective respect for private or family life obliges Ireland (or any other Council of Europe Member State; op. A.T.), to make this means of protection effectively accessible, when appropriate, to anyone... However, it was not effectively accessible to the applicant: not having been put in a position in which she could apply to the High Court ... she was unable to seek recognition in law... She has therefore been the victim of a violation of Article 8.« See also ECtHR Final Decision in an *Artico Case* (13th of May 1980).

After the 2020 Coronavirus pandemic (first wave?!) the European public is already alerted about the vaccine against this virus. And undecided on the subject: some people can hardly wait for the vaccine, others are already very afraid of it. And last but not least, the daily politics has already made clear its intention to classify people (legally, by Acts or Statues) into different “risk groups,” according to their previous and chronic illnesses. On the one hand, with the intention of adjusting to the (higher) level of insurance premiums that people will have to pay according to their "risk for the health of others." And on the other hand, with the intention that the State will legally allow itself control over the fundamental human and constitutional *right to privacy* and over the fundamental human and constitutional *right to freedom of movement*;¹⁷ again - according to the determination of such “risk.”

The ECtHR decision in a case of *Vavříčka and Others v. The Czech Republic* will play a big part. Hopefully not too big to handle for the ECtHR; in the sense of “politically” avoiding a determined and concrete “legal decision.”

It has already become clear that the fundamental rights already acquired, even the s. c. “*Strasbourg minimal standards*,”¹⁸ will have to be fought for again.¹⁹ Hard times and challenges lie ahead.

¹⁷ At this point, I would like to reiterate that the *doctrine of positive obligations of the state* may be under “*political pressure*” in particular. In terms of a possible reduction of the s.c. “*reasonable and legitimate legal expectations*” towards the state. In the sense what the state “must”, not only “should” do to ensure that the level of protection of fundamental rights and freedoms already achieved, meaning the *quality* and *effectiveness* of their legal protection, is not reduced. My professional and public work so far has been defined primarily by an active commitment to this goal: that this level should not be lowered, but at most strengthened and raised.

¹⁸ This concept was already explained above.

¹⁹ Exactly today, when I am concluding this article (June 29, 2020), the Slovenian media published two important news: first, that a new European legal policy is being adopted regarding the question of WHO will be allowed to enter EU Member States (from which non-EU countries) and second, in Slovenia, the law will soon prescribe mandatory tracking of people who tested positive for COVID-19 via a special application on a mobile phone.

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