



WRITTEN OBSERVATIONS

submitted to the European Court of Human Rights

in the case

Pavel VAVŘIČKA and others v. the Czech Republic
(Application No 47621/13)

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This case is important as it deals with the respect for physical and moral integrity of the persons that is guaranteed, mainly, by the fundamental principles of the primacy of the human being over the sole interest of society or science and by that of the free and informed consent of the person before any intervention in the health field is carried out. These principles are respectively set out in articles 2 and 5 of the 1997 *Convention on Human Rights and Biomedicine* (Oviedo Convention below) for which the European Court is the legitimate interpreter (art. 29).

The development of biotechnological knowledge requires, with particular acuteness, the establishment of principles defining the power of society over the body and health of individuals. In the 20th century, the governments of many countries, even democratic ones, abused their power by making people's bodies an object of their policies, especially their social hygiene and eugenics policies. Cases of compulsory sterilisation of disabled or Roma women regularly brought before the Court illustrate this abuse of power. The case-law principles identified by the Court in these cases can be usefully applied to other imposed medical practices.

In the United-States, a pioneer in this area, legal sterilisation was carried out until 1948 on 50,193 people deemed "unfit."¹ This policy was enabled by the Supreme Court of the United States which, in the case of *Buck v. Bell* (274 U.S 200) in 1927, declared it constitutional as it served the legitimate purpose of ensuring the preservation of public health. The Court then ruled that:

"It is better for all the world if, instead of waiting to execute degenerate offspring for crime or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes..."

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It should be noted that it was on the basis of the acceptance of the mandatory nature of vaccination that compulsory sterilisation was accepted, both of them being preventive health measures intended to serve the purpose of social hygiene. These sterilisation policies still continued in the 1970s, with variable degrees of constraint. Thus, for instance in order to reduce the fertility rate of Tunisia to that of Italy, the World Bank funded a "family planning" programme which set the goal of performing 8,000 abortions and 3,000 sterilisations per year in the region of Bizerte alone, and offered a bonus of 4 dinars and 50kg of semolina² to each woman who agreed to be sterilised. Medical staff also received a bonus of 1 dinar per sterilisation and 0.5 dinar per abortion. Such programmes are still widely carried out.

Therefore, the State may compel a person to undergo an intervention in the health area, or may strongly encourage the person to undergo such an intervention through the promise of a reward or the threat of a sanction. It is within the scope of this last hypothesis - that of the threat of a sanction- that the present cases fall.

¹ See J. SUTTER, « L'eugénique, problèmes, méthode, résultats » *Cahier de l'Institut d'études démographiques*, n° 11, Paris, PUF, 1950.

² Appendix of the « *Note synthétique sur le programme de planning familial dans le gouvernorat de Bizerte, Office National du Planning Familial et de la Population, 1973. Archives Pierre Simon, Bibliothèque universitaire d'Angers, 17 AF 26.* »

In the present case, the parents refused to submit to the legal obligation to vaccinate their children because they considered, in substance, that such a vaccination was against the interest of their children. As a result, they were sanctioned, denied permission to set up a privately run school, and their children were denied enrolment in a public nursery school.

Given that in the present cases no one was forced to undergo a vaccination, the question does not directly concern the legitimacy of compulsory vaccination, but that of the sanction imposed on the applicants. Does this sanction threaten the physical and moral integrity of the applicants, as well as their right to education? The issue must be examined in the light of article 8 and 9 of the Convention and article 2 of the first additional Protocol.

Article 8 certainly offers the simplest way to examine the main issue raised by this case: can the policy of compulsory vaccination legitimately justify sanctioning the people who refuse to submit to it, and are the sanctions appropriate to the intended goal? From the point of view of the ECLJ, the principles identified by the Court in previous cases are well established and deserve to be widely confirmed. The Court and the former Commission have long recognised that the sphere of private life, under article 8 of the Convention, “*covers the physical and moral integrity of the person.*”³ In the case *Salvetti v. Italy*,⁴ and referring to the decision in *Matter v. Slovakia*,⁵ the Court considered that compulsory vaccination as a non-voluntary medical treatment constitutes a violation of the right to respect for private life guaranteed under article 8 § 1. This assessment was confirmed in the judgment of *Solomakhin v. Ukraine* of 15 March 2012 (no 24429/03). The Court based its decision on the general principle that physical integrity concerns one of the most intimate aspects of private life and even a minor compulsory medical intervention constitutes an interference with this right.⁶ In the case of compulsory sterilisation, the Court found that these practices also violate article 3 (*V C v. Slovakia*, no 18968/07).

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Thus, a policy of compulsory vaccination constitutes an interference with the right to respect for private life guaranteed under article 8 § 1. In the present case, there is no serious doubt that this policy is “prescribed by the law” within the meaning of the Convention and that it has a legitimate aim of protecting public health. The question focuses on the necessity of the measures taken by the public authorities concerning the applicants in support of this policy. This will be mentioned further on.

Above all, it is regarding the applicability of article 9 that the ECLJ wishes to enlighten the Court. In terms of article 9, the refusal of a vaccination raises the delicate issue of *conscientious objection*.

We will examine neither the issue of respect for physical integrity of the people nor the right to education.

To our knowledge, only the former European Commission of Human Rights ruled on the applicability of article 9 in a case of refusal of vaccination in *Boffa and others v. Saint-Marin*.

³ *Giuseppina Passannante v. Italia* No 32647/96, Dec. 1st July 1998, and *X and Y v. the Netherlands*, 26 March 1985, series A, no 91, p 11, § 22.

⁴ *Salvetti v Italia*, no 42197/98, 9 July 2002.

⁵ *Matter v. Slovakia*, no 31534/96, 5 July 1999, § 64.

⁶ See also *Pretty v. United-Kingdom*, no 2346/02, §§ 63 and 65; *Glass v. United-Kingdom*, no 61827/00, §§ 82-83; *Jehovah's Witnesses of Moscow v. Russia*, no 302/02, § 135, 10 June 2010; *V C v Slovakia*, no 18968/07, § 105.

It considered that “*compulsory vaccination, if applied to everyone irrespective of their beliefs, does not constitute interference with the exercise of freedoms guaranteed by Article 9 of the Convention.*”⁷ This reasoning is not convincing; it would even be in contradiction with the recognition of the right to conscientious objection facing the equally general compulsory military service. Just because an obligation is general does not mean that it is exempt from infringing on the freedom of conscience. In another case of conscientious objection (*Pichon and Sajous v. France*),⁸ the reasoning of the Court is also unconvincing. It held that a pharmacist’s refusal to sell the abortion pill could be punished without infringing his or her freedom of conscience, considering that he or she retained the right to manifest those beliefs “in many ways outside the professional sphere.” This was a demonstration of a schizophrenic conception of the freedom of conscience.

It is therefore necessary to deepen the understanding of conscientious objection and to identify assessment criteria.

The existence of a conviction within the meaning of article 9

“Convictions” are not to be confused with conscience, as they are judgments which the latter pronounces, they are “*firmly held beliefs or opinions*”, according to the Oxford dictionary, to which the activity of the conscience leads: the person is convinced of the truth of his or her conclusions after discernment, the quality of which depends on the enlightenment and uprightness of reason. To have a conviction is to be convinced, to be “vanquished” by a certainty that imposes itself on one’s intelligence, in other words, by the truth of a particular Good. Judgment is therefore the act by which we recognize ourselves convinced (“convanquished”⁹). Convictions are therefore not arbitrary or fanciful opinions; they are the expression of an imperative internal to the person. The “dictates of the conscience” are convictions about what should be done or should not be done.

The United Nations Commission on Human Rights recognised that conscientious objection “*derives from principles and reasons of conscience, including profound convictions, arising from religious, moral, ethical, humanitarian or similar motives.*”¹⁰ However, it is not always easy to determine whether, in this or that particular case, the motive for the objection is indeed a “conviction” within the meaning of article 9 of the Convention, deserving the protection granted to freedom of conscience and religion, and whether the objection itself is genuine. In this respect, the quality of the conviction, in the name of which the objection is made, and of the objection are distinct from each other. For instance, a conviction related to a cultural dietary dictate is certainly religious and deserves protection. But is the person who claims an objection on that ground really acting for this reason? Or is he or she not guided by some other motive? Several criteria can be identified from the case-law of the European Court and of the conclusions of the United Nations Human Rights Committee for assessing the quality of both the convictions expressed and the objection made, making it possible to separate convictions which “*deserve ... respect in a democratic society*” (free translation)

⁷ European Commission of Human Rights, 15 January 1998, *Boffa and others v. San-Marino*, DR 92/27, 20 August 1993; *B.B. v. Switzerland*, DR 75/223.

⁸ *Pichon and Sajous v. France*, no 49853/99, 2 October 2001.

⁹ Play on words translated from French: In French the word “convaincu”, meaning “convinced”, is made of the term “vaincu” meaning “vanquished” and the prefix “con”. Thus, the term “convaincu” can be translated by the neologism “convanquished” in order to illustrate the link between the etymology of the words “convince”, “vanquish” and “conviction”.

¹⁰ Human Rights Commission: resolution 1998/77, adopted on 22 April 1998, § 10.

from mere “*personal inclination*” (free translation), which is rather within the scope of article 8.

Criteria to assess the quality of convictions

Four criteria to assess the quality of convictions can be identified.

Firstly, the convictions in question must be “*genuinely-held*”¹¹ convictions, according to the United Nations Human Rights Committee, or “*deeply and genuinely held religious or other*”¹² convictions according to the European Court. It may be an “*ethical*”¹³ conviction, in other words, moral or “*religious*.”¹⁴

Secondly, the content of the convictions must be identifiable and substantial.¹⁵ The Court states in this regard that: “*The term “conviction” taken on its own, is not synonymous with the words “opinions” and “ideas”. It denotes views that attain a certain level of cogency, seriousness, cohesion and importance.*”¹⁶ For instance, atheism and pacifism are philosophical convictions.

Thirdly, when the convictions are of religious nature, they must be linked to a “*known religion*,”¹⁷ even if “*the State’s duty of neutrality and impartiality is incompatible with any power on the State’s part to assess the legitimacy of religious beliefs or of the means used to express them.*”¹⁸ Therefore, while the judge may find that a conviction leading to an objection is actually part of the cult precepts of a given religion, he or she cannot, in principle, pass judgment on its legitimacy.

Fourthly, when the convictions are not of religious nature “*the expression “philosophical convictions” in the present context denotes . . . such convictions as are worthy of respect in a “democratic society,” and are not incompatible with human dignity.*”¹⁹ This reference to democracy and human dignity is not only useful, but it shows the link, constituent of human dignity, between personal conscience and common sense of what is just and good.

Criteria to assess the quality of the objection

The European Court distinguishes the objection from its motives, that is, from the conviction invoked in support of it. It is not sufficient for the objection to be based on sincere and serious religious convictions, the objection itself must also have the characteristics of a conviction.

¹¹ Human Rights Committee, *cf. Op. Cit.*, communications, mainly, CCPR/C/88/D/1321-1322/2004, § 8.3.

¹² *Bayatyan v. Armenia*, no 23459/03, GC, 7 July 2011.

¹³ *Chassagnou v. France*, no 25088/94, 28331/95, 28443/95, 29 April 1999, § 114, and *Schneider v Germany*, § 80.

¹⁴ *Eweida and others v. United-Kingdom*, no 48420/10, 36516/10, 51671/10, 59842/10, 15 January 2013, § 108.

¹⁵ Eur.Com DH, 15 May 1980, *T. Mac Feeley v. United-Kingdom*, DR 20/44.

¹⁶ *Folgero and others. v. Norway*, no 15472/02, 29 June 2007, § 84; see also *Valsamis v. Greece*, no 21787/93, 18 December 1996, §§ 25 and 27, and *Campbell and Cosans v. United-Kingdom*, no 7511/76, 7743/76, 25 February 1982, §§ 36-37.

¹⁷ *Valsamis v. Greece*, § 26.

¹⁸ *Manoussakis and others v. Greece*, 26 September 1996, § 47; *Hassan and Tchaouch v. Bulgaria* [GC], no 30985/96, § 78, and *Refah Partisi and others v. Turkey* [GC], nos 41340/98, 41342/98, 41343/98 and 41344/98, § 91.

¹⁹ *Campbell and Cosans v. United-Kingdom*, § 36.

Thus, the European Court held that the objection must itself have the characteristics of a “*conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9.*”²⁰ A person who objected only intermittently or out of opportunism would not deserve the protection provided by this article. This could be the case of a person who objected on the grounds of cult limitations of a religion he or she did not practice assiduously. The person has to be consistent.

The objection has to result from “*a serious and insurmountable conflict*”²¹ between an “*obligation (...) and a person’s conscience or beliefs.*”²² Thus the conflict must meet two criteria, first, that of seriousness and second, that of its insurmountable nature. Regarding the first of these criteria (seriousness), it should be understood as requiring that the matter in question be not minor and have an impact on the conscience. This is not the case for instance, with the obligation to pay taxes.²³ As for the second of those criteria (the insurmountable nature), it means that the objection must be the person’s only possible choice: the person must be forced into refusing, with no other way-out.

Finally, the objection must not be motivated by “*reasons of personal benefit or convenience but on the ground of his genuinely held religious convictions.*”²⁴ This criterion of personal selflessness is enlightening.

Personal positions which do not constitute a conviction within the meaning of article 9 are then mere “opinions” or “personal convenience”²⁵ and therefore, cannot give rise to a genuine conscientious objection. They are not, however, devoid of any conventional protection, since such protection can be obtained on the basis of other rights and freedoms, especially in their negative aspects, in particular article 8 of the Convention.

Considering the present cases, it should be noted that in the case *Nyyssönen v. Finland* (No. 30406/96, Dec., 15 January 1998), the former Commission held that a doctor’s position on alternative medicine constituted coherent philosophical convictions and genuinely fall within the scope of article 9. Similarly, in the cases regarding the denial of blood transfusions for religious reasons (Jehovah’s Witnesses), the Court held that this denial fell within the scope of articles 8 and 9 of the Convention.

In the present case, the applicants do not rely on religious convictions in support of their objection, but on moral grounds relating to the nature of the vaccines in question. Those grounds, in that they relate to an objective reality, do not aim to be an opinion of a personal convenience, but a rationally founded “conviction,” that is, a moral conviction.

The difference between *moral* and *religious* convictions should be emphasised here, reflecting the difference between morality and religion. While religious convictions deserve respect to the extent of freedom of religion, the respect that moral convictions deserve depends more directly on the nature of the conviction at issue, since objections based on a moral conviction calls into question the very justice of the order to which it objects, whereas objections based on a religious conviction call into question only the tolerance of society.

²⁰ *Bayatyan v. Armenia*, § 110. It refers to the judgment *Campbell and Cosans v. United-Kingdom*, § 36, and, in contrast, to the judgment *Pretty v. United-Kingdom*, no 2346/02, § 82.

²¹ *Bayatyan v. Armenia*, § 110.

²² *Idem*.

²³ *C. v. United-Kingdom*, no 10358/83, Dec. From the European Commission of Human Rights, 15 December 1983, DR 37, p. 148.

²⁴ *Bayatyan v. Armenia*, § 124.

²⁵ *Idem*.

Objections based on a moral conviction, because they call into question the very justice of the order objected to, deserve to be examined with great care, for the personal conscience is the ultimate witness of justice in the face of wrongful laws and orders. It should be noted in this regard that the Court has recently recognised the existence of a risk of a difference between morals and positive law, in particular “*that law may diverge from morality.*”²⁶

Such conscientious objections, when recognised as valid by society, guarantee the objector genuine immunity. Indeed, recognition of the objections remove the obligation to perform the reprobated deed conscientiously, but even more so, it prevents any sanction against the objector due to his refusal. Indeed, if society admits that the deed objected to is wrongful, or that it can be considered wrongful, then it would be wrongful to compel a person to carry it out and to punish him or her for this refusal.

Society has in very few cases recognised the legitimacy of such moral objections. These are, in fact, situations in which society tolerates an evil that it considers necessary or unavoidable, such as war, abortion, or prostitution. No one can be forced to collaborate in these practices, even when they are legal, and cannot be sanctioned for such refusal.

Thus, the United Nations Human Rights Committee ruled that: “*repression of the refusal to be drafted for compulsory military service, exercised against persons whose conscience or religion prohibits the use of arms, is incompatible with article 18, paragraph 1, of the Covenant*”²⁷ which guarantees freedom of conscience and religion. When faced with conscientious objection to military service, the state should not punish objectors; at most, “*A State party may, if it wishes, compel the objector to undertake a civilian alternative to military service, outside of the military sphere and not under military command. The alternative service must not be of a punitive nature, but must rather be a real service to the community and compatible with respect for human rights.*”²⁸ As Sir Nigel Rodley points out, it is because of “*the sanctity of human life*” that “*the right to refuse to kill must be accepted completely.*”²⁹ The same approach applies to health personnel.³⁰

Thus, in the case of a genuine conscientious objection of a moral nature, no sanction can be inflicted upon the objector. How can such an objection be recognised?

Criteria for conscientious objection of a moral nature

The fact that an objection is not of a religious nature is not sufficient to guarantee its objective justice. Moreover, to judge whether an objection is truly just or moral might seem out of place in a society which, in the name of relativism and subjectivism, has given up, at least partially,

²⁶ *Annen v. Germany*, no 3690/10, 26 November 2015, § 63.

²⁷ Communications nos 1853/2008 and 1854/2008, *Cenk Atasoy and Arda Sarkut v. Turkey*, views adopted on 29 March 2012, § 10.5. See also Communications nos 1642-1741/2007, *Jeong and consorts v. the Republic of Korea*, views adopted on 24 March 2011.

²⁸ Communication no 1786/2008, *Jong-nam Kim and consorts v. Republic of Korea*, Views adopted on 25 October 2012, § 7.4. See also Communications nos 1853/2008 and 1854/2088, *Atasoy and Sarkut v. Turkey*, views adopted on 29 March 2012, §. 10.4.

²⁹ *Atasoy and Sarkut v. Turkey*, views adopted on 29 March 2012, Appendix 2, Individual opinion of Committee member Sir Nigel Rodley, jointly with Krister Thelin and Mr. Cornelis Flinterman (concurring).

³⁰ See notably, PACE, Resolution 1763 (2010) of 7 October 2010 on « The right to conscientious objection in lawful medical care ».

the conviction that there is an objective good. However, to refuse to make this effort would be to give up the rationality of justice and to resign oneself to arbitrariness.

Four criteria can be identified to determine whether an objection is of a moral nature, and, consequently, whether it is based on a demand for justice.

i - The objection must be aimed at respecting the just and the good

To be “moral” the objection must be aimed at achieving justice and/or good, and therefore must oppose the violation of a fundamental right (for instance, of life or physical integrity) or of an objective good (for instance the natural environment). An objection that does not seek to respect a fundamental right or property would not be “moral.”

ii – The command objected to infringes a fundamental right or principle

This second criterion is linked to the first, since if the objection is aimed to respecting the just or the good, it is because the command infringes upon it. The command, while legal, creates an exception to a principle. The existence of this exception is often observable in positive law or in the history of the norm of which the application is denied. Thus, abortion and destructive research on the embryo were perceived as exemptions from the principle of respect of human life. Euthanasia and war are also exemptions or extenuating facts faced with the prohibition of homicide. In fact, when the command objected to infringes a fundamental right or principle, it refers to an action that is authorised by the law, but which no one could carry out freely without such an authorisation (no one has the freedom to carry out abortion, vaccination, euthanasia or to declare war by oneself.) The *Dictionnaire permanent de bioéthique et de biotechnologies* (“the Permanent Dictionary of Bioethics and Biotechnology”, free translation) describes the scope of conscientious objection in the field of medicine as follows: it “concerns all non-therapeutic medical deed in which there is a risk of infringing the integrity or dignity of the individual or of “reification” of the human person”³¹ (free translation). Indeed, for a medical deed to be lawful – and medical in the strict sense of the term – it must be therapeutic, respecting the principles of dignity and primacy of the human being,³² of integrity and lack of availability of the human body.

iii – The objection can be made universal

Kant’s categorical imperative provides a complementary criterion of rationality and justice: “Act only according to that maxim by which you can at the same time will that it should become a universal law.”³³ The question is therefore, whether society could continue to function in the event that none of its members would agree to perform the deed which is objected. More specifically, would a society be better off without old-age insurance,³⁴ vaccines, abortion, hunting, euthanasia, war, alcohol, and nuclear energy? This criterion of “universality” of the objection makes it possible to observe whether it is directed towards the common good or a particular good. An objection which cannot be universalised would be aimed at a particular good and would therefore not be the expression of a rational moral conviction ordered to justice.

³¹ *Dictionnaire permanent. Bioéthique et biotechnologies*, Paris, éditions législatives.

³² Convention on Human Rights and Biomedicine Article 2 – Primacy of the human being “The interests and welfare of the human being shall prevail over the sole interest of society or science.”

³³ “Act only according to that maxim by which you can at the same time will that it should become a universal law” in *Groundwork for the Metaphysics of Morals*, Immanuel Kant.

³⁴ *V. v. the Netherlands*, no 10678/83, the Commission’s decision of 5 July 1984.

iv – The objection relates to an ethically sensitive issue

As morality undergoes rapid social change, it is difficult to judge, in certain areas in which there is no longer consensus, whether an objection is rational. On such topics under discussion, the Parliamentary Assembly of the Council of Europe give a useful indication by calling on states to “ensure the right to well-defined conscientious objection in relation to morally sensitive matters, such as military service or other services related to health care and education”.³⁵ The Assembly focuses largely on issues of bioethics and religious and sex education. The Assembly’s recommendation is wise: society may disagree on what constitutes a good, but it is clear that some issues are so ethically sensitive that they cause much debate. This is a criterion of great utility.

Regarding the present cases, the denial of vaccination tends indeed towards the respect of a good (the person’s health) and is opposed to the infringement of a fundamental right (the respect of physical integrity). Moreover, a refusal is an expression of the principle of the free and informed consent of the person prior to any health intervention. Nevertheless, if the objection to vaccination were to become general, it would be likely to seriously jeopardise public health, in so far as the vaccines in question prove to be necessary. The vaccination to which it is objected cannot be considered objectively wrongful if the vaccines in question demonstrate a real utility for public health. Beyond this, people who refuse vaccination for themselves nevertheless benefit from the immunity resulting from the vaccination of the rest of the population, which brings about a problem of justice; a problem that is exacerbated when these people invoke the fact that a disease disappeared thanks to a vaccination policy with intent of avoiding this vaccination.

The distance between the object and the reason for the objection

In assessing the legitimacy of an objection, account should be taken of the distance between the object (the deed in question) and the reason (the conviction) for the objection. Being forced to hold a gun is not the same as being forced to use it. Every deed engages the conscience of its originator to varying degrees according to circumstances that must be assessed on a case by case basis.

The European Court expresses the need for a sufficiently close link between the object and the reason of the objection, in clear terms: “*Even where the belief in question attains the required level of cogency and importance, it cannot be said that every act which is in some way inspired, motivated or influenced by it constitutes a “manifestation” of the belief. Thus, for example, acts or omissions which do not directly express the belief concerned or which are only remotely connected to a precept of faith fall outside the protection of Article 9 § 1.*”³⁶ The Court specifies that “*the existence of a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case.*”³⁷ For the objection to be serious, there must thus be a sufficiently “*close and direct*” link between the reason for the objection and its object³⁸ so that the person commits morally through the action. In the present case, the existence of a close and direct link is established.

³⁵ PACE, Resolution 1928 (2013), of 24 April 2013, “Safeguarding human rights in relation to religion and belief, and protecting religious communities from violence”, § 9.10.

³⁶ *Eweida*, § 82. See also *Skugar and others v. Russia* (Dec.), no 40010/04, 3 December 2009, and for example, *Arrowsmith v. United-Kingdom*, no 7050/75, report of the Commission of 12 October 1978, Decisions and reports (DR) 19, p. 5; *C. v. United-Kingdom*, no 10358/83, report of the Commission of 15 December 1983, DR 37, p. 142; *Zaoui v. Switzerland* (Dec.), no 41615/98, 18 January 2001.

³⁷ *Eweida and others. v. United-Kingdom*, § 82.

³⁸ *Borre Arnold Knudsen v. Norway*, Dec. 8 March 1985 on the admissibility (no 11045/84).

Where the refusal in question is motivated by a genuine conviction within the meaning of article 9, it deserves respect within society, but without being recognised as a requirement of justice, the existence of a sanction is not in itself sufficient to bring about a violation of article 9. The examination should then focus on the necessity of the sanction imposed in the present case. This examination is then no different from the one carried out under article 8.

The difference in approach, depending on whether one is within the scope of articles 8 or 9, lies in the fact that article 9 protects personal conscience, which is linked to the perception of the just and the good, whereas article 8 protects only “individual autonomy,” which is independent of it. The conscience of article 9, whether informed by religion or morality, is not autonomous; it is the conscience that links the individual and the entire legal order to justice.

The necessity of the sanction imposed

Regarding the examination of the necessity of the sanction imposed on a conscientious objection, it should be pointed out that both the Court and the Human Rights Committee have developed an approach (which we consider to be a very good one) of asking public authorities to set up a mechanism to reconcile the competing rights and interests, and not merely to put them in contrast. Indeed, the approach of justifying the legitimacy of the sanction only justifies the dominance of community over a person’s rights. On the other hand, a conciliatory approach seeks to respect the freedom of conscience and the autonomy of individuals in a pluralistic society.

Regarding military service, the European Court held that the absence of an alternative civilian service, reconciling the rights and interests of the objectors and of society, constitutes in itself a violation of article 9. Similarly, regarding dietary dictates of religious nature, the Court found that there was a positive obligation on the state to provide a diet compatible with the religion of the detained people.³⁹ Not only can a state not *de facto* compel a prisoner to eat food against his religious beliefs, but it must adjust the diet as best as possible so that the prisoner can feed himself without his religion being a source of unequal treatment. This conciliatory approach aims at seeking compromise⁴⁰ and at applying the principle of pluralism and tolerance⁴¹ which are at the core of the contemporary understanding of freedom of thought, conscience and religion.⁴²

In the present case, it should be noted that a significant proportion of the States party to the Convention do not impose any obligation to vaccinate and even provides for a positive right of conscientious objection. Europe is quite divided over this issue. In the European Union, Austria, Cyprus, Denmark, Spain, Estonia, Finland, Germany, Ireland, Lithuania, Luxembourg, Norway, the Netherlands, Portugal, the United-Kingdom and Sweden have no vaccination requirements.⁴³ The other countries require between one vaccine (Belgium) and twelve for Latvia. As early as 1898, the British Parliament passed the Vaccination Act,⁴⁴ which gave parents the right to withdraw their child from vaccination if they considered it

³⁹ *Vartic v. Romania* (no 2), no 14150/08, 17 December 2013.

⁴⁰ *Leyla Sahin v. Turkey*, GC, no 44774/98, 10 November 2005, § 108.

⁴¹ *United Communist Party of Turkey and others v. Turkey*, no19392/92, 30 January 1998, § 57 and *Serif v. Greece*, no 38178/97, 14 December 1999, § 53.

⁴² *Kokkinakis v. Greece*, no 14307/88, 25 May 1993, § 31; and *Buscarini and others v. San-Marino* [GC], no 24645/94, 18 February 1999, § 34.

⁴³ Mandatory and recommended vaccination in the EU, Iceland and Norway: results of the VENICE 2010 survey on the ways of implementing national vaccination programmes. Euro Surveill. 2012 ; 17(22):pii=20183, p. 3 and 4. Available online: <http://www.eurosurveillance.org/ViewArticle.aspx?ArticleId=20183>

⁴⁴ Bertrand A, Torny D. *Libertés individuelles et santé collective. Une étude socio-historique de l’obligation vaccinale*. Cermes - Rapport au Conseil supérieur d’hygiène publique de France, November 2004, 108 pages.

unnecessary and/or dangerous. This seems to be the first legal recognition of a right of conscientious objection,⁴⁵ even before military service.

Beyond that, it is interesting to note that the utility, and hence the necessity, of the compulsory nature of vaccination is not in fact attested because, as pointed out by the Chairman of the *Comité technique des vaccinations* (the French Technical Vaccination Committee): “Countries that give parents a choice have rates of vaccination coverage roughly similar to ours” (free translation), that is, similar to countries that impose vaccination through constraint.⁴⁶

There is therefore no evidence that constraint is necessary in terms of vaccination policy. What’s more, it can be harmful as vaccines and viruses evolve. François Vié Le Sage, a paediatrician and Infovac⁴⁷ expert points out in this regard: “*The question of whether the obligation should be maintained has been on the table for a few years now. Imposing some vaccines and recommending others establishes a hierarchy which is not necessary. Today, vaccines against whooping cough, pneumococcus or measles are only recommended although these diseases bring about more health problems than polio, diphtheria and tetanus!*”⁴⁸ In the same vein, the French National Academy of Medicine declared on October 27, 2015 regarding the obligation to vaccinate: “*In France, three vaccines are still covered by a compulsory regime: the vaccines against tetanus, diphtheria and poliomyelitis. Over time, this situation became paradoxical since the three diseases subject to compulsory vaccination are no longer at the forefront of the infection risks to which the French population is exposed.*”⁴⁹

Thus, a public health policy aimed at reconciling competing rights and interests, with an emphasis on education and recommendation rather than constraint, and with more flexible procedure, would certainly be more respectful of the moral and physical integrity of people guaranteed under article 8 and 9 of the Convention. It seems that the legitimate aim sought by compulsory vaccination could be achieved through less restrictive measures which would be more respectful of the fundamental rights involved. Interference in the exercise of these rights does not appear to correspond to a “*pressing social need.*”⁵⁰

⁴⁵ “The term “conscientious objector” was coined much later than “conscientious objection”. It seems to have first appeared in the 1890s, when it was applied to those who opposed compulsory vaccination.” See Moskos and Chambers, eds., *The New Conscientious Objection*, p. 11 in, United Nations Human Rights Office of the High Commissioner, “*Conscientious Objection to Military Service*”, HR/PUB/12/1, United Nations, 2012, p. 4.

⁴⁶ Cécile Casciano, « L’arrêt de la vaccination obligatoire est inéluctable », *L’Express*, 20 mars 2015.

⁴⁷ InfoVac-France is a hotline for information and consultation on vaccinations in France.

⁴⁸ *Idem*. Free translation.

⁴⁹ Académie Nationale de Médecine, Communiqué, *À propos du maintien ou de la levée de l’obligation vaccinale*, 27 October 2015, free translation.

⁵⁰ *Sviato-Mykhailivska Parafiya v. Ukraine*, no 77703/01, 14 June 2007, § 116.