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## COMPULSORY ANTI-COVID VACCINATION AND HEALTH PASSES IN THE LIGHT OF THE INTERNATIONAL HUMAN RIGHTS LAW PRACTICE, WITH SPECIFIC REFERENCE TO THE EUROPEAN COURT OF HUMAN RIGHTS

SUMMARY: 1. Introductory remarks. – 2. Vaccines as a global public good in international practice and politics.  
– 3. Legal and ethical concerns of compulsory vaccination and the use of health/vaccine passes under  
the European Convention on Human Rights (ECHR). – 4. Concluding remarks.

*A wise man should consider that health is the greatest of human blessings,  
and learn how by his own thought to derive benefit from his illnesses*  
- HIPPOCRATES (c. 460-370 B.C.)

### 1. *Introductory remarks*

Since its emergence, in late 2019, the recent increase of its spreading pace, and the new and virulent variations around the world, the COVID-19 pandemic has created and continues to provoke serious challenges both at national and international levels. States, International Organizations/Institutions, international judicial and other mechanisms faced an unprecedented situation, challenging essentially the core of the human rights protection system, and in particular social rights.<sup>1</sup>

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<sup>1</sup> For this, see B. STANFORD, S. FOSTER, Human rights in times of emergency. COVID-19 taking the United Kingdom into uncharted territory, in B. STANFORD, S. FOSTER, C. ESPALIÚ BERDUD (eds), *Global pandemic, security and human rights: comparative explorations of COVID-19 and the Law*, London/New York, 2021, p. 35 ss; A. BREDIMAS, *The World Health Organization and The Fight Against Epidemics/Pandemics. With A Special Reference To The Coronavirus Crisis (COVID 19)*, Athens/Thessaloniki, 2020 (in Greek).

In order to halt the spread of the novel virus, in view of the initial lack of medical treatment and/or effective vaccination, Governments responded in a differentiated way, by limiting some human rights (such as freedom of movement, freedom of assembly, freedom of religion and belief), aiming especially at the protection of vulnerable persons/groups of persons<sup>2</sup>; some based such limitations on derogation clauses enshrined in various International Human Rights Conventions of an international or regional stance<sup>3</sup>; an assessment of the existing legal framework has also been made by national judicial instances, when relevant cases were eventually brought before them.<sup>4</sup>

At an international context, the UN and the World Health Organization (WHO) primarily, as well as other international institutions, such as the EU, the Council of Europe (CoE) *etc.*, together with policy-makers and experts, admitting a serious deficit in fully implementing the universally guaranteed human right to health, rapidly responded to the challenges, mainly through Statements, policy and informative campaigns. As specific examples of positive response one could identify the Report of the International Law Institute<sup>5</sup>, as well as the “Athens Declaration by the Committee of Ministers Chairmanship on “Effectively responding to a public health crisis in full respect for human rights, democracy and the rule of law”, adopted during the 130<sup>th</sup> Session of the CoE Committee of Ministers, on 4 November 2020, along with all instruments (declarations, resolutions, statements, other legal and political documents *etc.*) of various specialized international bodies. Also, decisions/judgments adopted by regional judicial human rights instances, such as the European Court of Human Rights (ECtHR), or the two bodies of the American Convention of Human Rights.<sup>6</sup>

<sup>2</sup> See S. PERRAKIS, *La protection internationale au profit des personnes vulnérables en Droit International des Droits de l'Homme*, Recueil des Cours de l'Académie de Droit International de la Haye, Tome 420, Boston/Leiden, 2021; M. SAEZ, *Pandemics and the Disproportionate Impact on Vulnerable Groups*, in *Am.Un.Int.Law Rev.*, Vol. 36, Iss. 5, 2021, pp. 1097-1104. From a European perspective, see F. IPPOLITO, S.I. SÁNCHEZ, *Introduction*, in F. IPPOLITO, S.I. SÁNCHEZ (eds), *Protecting vulnerable groups. The European Human rights framework*, US/Canada, 2015, pp. 1-20.

<sup>3</sup> See S. MURASE, S. ZHOU (eds), *Epidemics and International Law*, Boston/Leiden, 2021; S. JOSEPH, M. CASTAN, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, Oxford, 2013, pp. 910-923. Specifically, on COVID-19, see B. STANFORD, S. FOSTER, *cit.*, note 1; A. DONALD, P. LEACH, *Human Rights – The Essential Frame of Reference in Response to the COVID-19 Pandemic*, in J. GROGAN, A. DONALD (eds), *Routledge Handbook of Law and the COVID-19 Pandemic*, London/New York, 2022, pp. 101-116.

<sup>4</sup> For instance, on 25 September 2020, the Paderborn Regional Court (Germany), in its *Judgment 3 O 261/20*, recognized the COVID-19 pandemic as a force majeure factor. Similarly, on 27 May 2022, the Greek Council of State, at its Plenary Session, published its *1147/2022 Judgment* (in Greek), in which the applicants challenged the compatibility of a Joint Ministerial Decision imposing emergency administrative measures (limitations to the freedom of movement and mandatory use of protective masks) with the national, European and international frameworks. The Greek Higher Administrative Court decided that all measures were in full compliance with the State's obligations to protect citizens' health, as prescribed by the Greek Constitution, the ECHR and the Council of Europe Oviedo Convention on Human Rights and Biomedicine, along with guidelines/regulations of International Organizations/Mechanisms (*e.g.* WHO, EU, European Centre for Disease Prevention and Control/ECDC *etc.*). See also, P. BERGER, *Proportionality, Evidence and the COVID-19-Jurisprudence in Germany*, *Eur.Jour.Sec.Res.*, 2022.

<sup>5</sup> Institut de Droit International, 12<sup>ème</sup> Commission, “Epidemics and International Law/Les épidémies et le droit international”, Rapporteur : Shinya Murase, 2021. See also C. GROSSMAN, *Epidemics and International Law: The Need for International Regulation*, *29 Univ. Miami Int.Comp.L.Rev.* 206, Spring 2022.

<sup>6</sup> For an approach see R. VALUTYTÉ ET AL., *Legality of Human Rights Restrictions During the COVID-19 Pandemic Under the European Convention on Human Rights*, *Tilburg Law Rev.* 26(1), 2021, pp. 1-15. ECtHR, Factsheet on “COVID-19 health crisis”, October 2022. Also, within the Organization of American States, the Inter-American Commission (IACoMHR) and the Inter-American Court of Human Rights have done much work: see indicatively, in the cases of IACoMHR, *Miembros de los Pueblos Indígenas Yanomami y Ye'kwana respecto de Brasil*

Similarly, the existing EU health policy<sup>7</sup> was further promoted and specified through targeted policies, political and legislative measures, adopted mostly at an *ad hoc* basis, in order to tackle the current pandemic. These regulatory instruments include -among other things- Regulation (EU) 2020/1043 on the conduct of clinical trials with and supply of medicinal products for human use containing or consisting of genetically modified organisms intended to treat or prevent coronavirus disease, the EU Commission’s “Strategy for COVID-19 vaccines”<sup>8</sup> and “Preparedness for COVID-19 vaccination strategies and vaccine deployment”<sup>9</sup>, as well as Council’s Recommendations (*i.e.* the one establishing common criteria and a common framework on travel measures in response to the pandemic, adopted on 13 October 2020)<sup>10</sup>. In view of creating the long-desired and proclaimed European Health Union<sup>11</sup>, on June 2022, the primary EU legislative bodies reached in a provisional agreement on a draft Regulation that will focus on serious cross-border threats to health, promoting «preparedness, surveillance, risk assessment, early warning and responses» at all levels (both EU and national ones).

With the elaboration and gradual mass production of effective anti-COVID vaccines, a new series of questions and concerns has been raised. Would States fully comply with their international human rights obligations while deploying their (national) immunization plan(s)? Does eventual compulsory vaccination against the virus comply with the internationally recognized and acceptable human rights standards, especially in view of the -quite often reported- unwillingness of a considerable number of persons to be (re-)vaccinated? How

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(Resolution 35/2020, 17 July 2020); IAComHR, *Northwest Detention Center regarding the USA* (Resolution 41/2020, 27 July 2020); IAComHR, *Miembros del Pueblo Indígena Mundurucu respecto de Brasil* (Resolution 94/2020, 11 December 2020).

<sup>7</sup> Even without a clear legal basis on health matters at first, the EU involvement in health issues can be traced back in 1965 with the very first legislative initiatives related to medicines, while in 1978 the first health research programs were adopted, and member States agreed upon a mutual assistance to combat major diseases. The first explicit legal basis in the 1992 Maastricht Treaty, and subsequently in the 1997 Amsterdam Treaty, acknowledged that the primary competence on health issues falls upon States, while the EU has only shared and concurrent competence in respect. The EU legal basis on health has been gradually enhanced (e.g. arts 168.1, 114, 153 TFEU, art. 25 of the EU Charter on Fundamental Rights, various environmental and food policies). Upon this basis, many initiatives, such as the European Medicines Agency/EMA (1994) and the European Centre for Disease Prevention and Control/ECDC (2004), were adopted, and various health programs were further promoted (the most recent one being the EU4Health programme 2021-2017, pursuant Regulation 2021/522). For an overview, see European Parliament, *Fact Sheet on the European Union*; European Parliamentary Research Service, *Briefing on the Legal issues surrounding compulsory Covid-19 vaccination*, March 2022. See also, S. GREER, *Health, federalism and the European Union: lessons from comparative federalism about the European Union, Health Economics, Politics and Law* 16(1), 2020, pp. 90-103. E. BROOKS, R. GEYER, *The development of EU health policy and the Covid-19 pandemic: trends and implications*, *Jour.Eur.Int.* 42:8, 2020, pp. 1057-1076.

<sup>8</sup> See more in M. SEYCHELL, B. HACKBART, *The EU Health Strategy – Investing in Health*, *Public Health Reviews*, Vol. 35, No. 1, pp. 1-26.

<sup>9</sup> See, also, C(2021) 6712 final, Commission Decision of 16.9.2021 establishing the Health Emergency Preparedness and Response Authority, Brussels, 16.9.2021.

<sup>10</sup> See, also, a communication on additional response measures, adopted on 28 October 2020, focusing *i.a.* on the effective vaccination of persons residing in the EU; Recommendations on COVID-19 testing strategies (28 October 2020) and the use of rapid antigen tests (18 November 2020).

<sup>11</sup> For an overview, see A. ALEMANNI, *Towards a European Health Union: Time to Level Up*, *European Journal of Risk Regulation*, Vol. 11:4, 2020, pp. 721-725. M. GUY, *Towards a European Health Union: What Role for the Member States?*, *Eur.Jour.Risk Reg.*, Vol. 11:4, 2020, pp. 757-765. A. SIPCZKI, K. LANNON, *The EU Health Union in Search of a Definition and an Open Discussion*, *Intereconomics* 56, 2021, pp. 150-152.

should vaccines be distributed, both among States and their citizens as well? These questions will be further examined in the present article.

## 2. *Vaccines as a global public good in international practice and politics*

On international level providing relevant provisions, and more specifically regarding the implementation of the International Covenant of Economic, Social and Cultural Rights (ICESCR), each Contracting State undertakes the obligation to assure «the prevention, treatment and control of epidemic, endemic, occupational and other diseases» (art. 12.2c). Such an obligation is further elaborated in the ICESCR Committee's General Comment No 14 (2000) on the right to the highest attainable standard of health.<sup>12</sup> Also, in a Statement of March 2021, the Committee itself has underlined the importance of equal access to vaccines against COVID-19, and has stressed out the necessity of international cooperation in respect (para 3)<sup>13</sup>.

Other International Human Rights Conventions, such as the Convention of the Rights of the Child (CRC) and the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), also foresee the right to health (arts 24 and 12 respectively). These provisions are authoritatively interpreted by the respective Committees through General Recommendations, which specify the subsequent obligations of the High Contracting States, including either explicitly or implicitly, vaccines as well<sup>14</sup>.

On the same direction, instruments and activities of the WHO, as the -par excellence- competent International Organization on health issues, are of utmost importance. In fact, a few of them aim at achieving the maximum level of immunization of the population; such as the Global Vaccine Action Plan 2011-2020, as well as the various regional Vaccine Action Plans, each one of the latter responding to the epidemiological conditions prevailing in the regions concerned.

All these instruments can be considered an important first step and, in fact, they set some standards for the States to implement.<sup>15</sup> Furthermore, the Statement made by a number

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<sup>12</sup> «The control of diseases refers to States' individual and joint efforts to, inter alia, make available relevant technologies, using and improving epidemiological surveillance and data collection on a disaggregated basis, the implementation or enhancement of immunization programmes and other strategies of infectious disease control.»: E/C.12/2000/4, 11 August 2000, para 16 *in fine*.

<sup>13</sup> CESCR, Statement on universal affordable vaccination for COVID-19, international cooperation and intellectual property, Advance Unedited Version, E/C.12/2021/1, 12 March 2021.

<sup>14</sup> See indicatively CRC, General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24), CRC/C/GC/15, 17 April 2013: especially regarding the provisions of Article 24.2c, f on the State-Party's obligations to treat diseases, as well as to strengthen the primary health sector. CEDAW, General Recommendation No. 24: Article 12 of the Convention (women and health), 1999: while the Committee focuses primarily on women's special needs, when it comes to gender equality in relation to one's right to access the health systems, both the prevention and the treatment phases should be probably included. As a result, these standards can be applied by analogy in the case of the COVID-19 pandemic.

<sup>15</sup> For a short overview of some useful UN tools on the pandemic recovery, see also D. FATOUROS, Pandemics and the UN. Towards a global fresh start, *Cahiers de Droit International et de Politique Internationale 1/2021*, pp. 101-109 (in Greek); S. JOSEPH, *International Human Rights Law and the Response to the COVID-19 Pandemic*, *Jour.Int.Hum.Leg.St.* 12, 2020, pp. 249-269.

of UN Human Rights Experts<sup>16</sup>, in November 2020, as well as by the UN Secretary General that vaccines shall be considered «a global public good»<sup>17</sup>, are in full alignment with, reiterate and do confirm all the aforementioned political and legal tools.

Following this pace, the UN Human Rights Council (HRC), in March 2021, adopted Resolution A/HRC/RES/46/14 on “Ensuring equitable, affordable, timely and universal access for all countries to vaccines in response to the coronavirus disease (COVID-19) pandemic”. Reiterating that the ongoing pandemic requires a solid, unified, global response, in order to eliminate any form(s) of discrimination among individuals, and among States as well, while accessing to all available medical supplience, including anti-COVID vaccines, and that the latter shall be considered «a global public good for health in preventing, containing and stopping transmission, and in bringing the pandemic to an end» (para 5), the Council called upon all stakeholders (whether States, International Organizations, and others) to enhance and to intensify their cooperation, as well as to adopt all necessary measures to ensure «fair, transparent, equitable, efficient, universal and timely access and distribution of safe, quality, efficacious, effective, accessible and affordable COVID-19 vaccines» (para 2)<sup>18</sup>, and to mitigate any intersectional and multidimensional human rights implications of the current pandemic. In addition, cooperation for the promotion of research initiatives and towards an equitable access to scientific data, know-how and technical assistance, together with the funding of all relevant (co-competent) supranational mechanisms (see, for instance, the COVID-19 Vaccine Global Access (COVAX) Facility), remain crucial.<sup>19</sup> The HRC reiterated the topic in its 49th Regular Session and, on 13 April 2022, adopted the homonymous Resolution A/HRC/RES/49/25.

On a European level, within the legal space of the CoE, according to art. 11 of the (Revised) European Social Charter, while guaranteeing the right to health, States Parties, along and in cooperation with public and/or private organizations and entities, shall also adopt measures in order «3. to prevent as far as possible epidemic, endemic and other diseases, as well as accidents» (a wording recalling the aforementioned ICESCR provision), as part of their immunization and vaccine research programmes. This assertion was also buttressed by the European Committee of Social Rights in a Statement, interpreting said article<sup>20</sup>.

In the light of the above observations, the CoE Parliamentary Assembly (PACE) adopted, in January 2021, its Resolution 2361/2021 regarding ethical, legal and practical considerations related to the vaccines against COVID-19, emphasizing on the need of equal

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<sup>16</sup> The Statement is signed by the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the Special Rapporteur on extreme poverty and human rights, members of the Working Group on the issue of human rights and transnational corporations and other business enterprises, the Independent Expert on human rights and international solidarity, and the Special Rapporteur on the right to development. Statement by UN Human Rights Experts Universal access to vaccines is essential for prevention and containment of COVID-19 around the world, 9 November 2020.

<sup>17</sup> COVID-19 Vaccines Must Be Global Public Good, Secretary-General Says, Announcing ‘Only Together’ Campaign to Encourage Sharing of Technology, Doses, SG/SM/20620, 11 March 2021.

<sup>18</sup> Such a wording strongly reminds the relevant commitment of States under Goal 10 of the 2030 Agenda for Sustainable Development to “Reduce inequality within and among countries”.

<sup>19</sup> A/HRC/RES/46/14, Ensuring equitable, affordable, timely and universal access for all countries to vaccines in response to the coronavirus disease (COVID-19) pandemic, 29 March 2021.

<sup>20</sup> European Committee of Social Rights, Statement of interpretation on the right to protection of health in times of pandemic, adopted by the Committee on 21 April 2020.

distribution of vaccines<sup>21</sup>, in order to maximize their efficiency. To this end, States' cooperation, both at bilateral and multilateral levels, as well as in the context of International Organizations<sup>22</sup>, remains high in the international agenda, together with the constant efforts of eliminating any forms of discrimination and the so-called "vaccine nationalism".<sup>23</sup>

### 3. *Legal and ethical concerns of compulsory vaccination and the use of health/vaccine passes under the European Convention on Human Rights (ECHR)*

While the right to health is explicitly guaranteed under the (Revised) European Social Charter rather than the ECHR, the Strasbourg Court has done a lot while examining art. 8 ECHR and offers a significant case-law in respect.

In most cases on health issues and challenged human rights before the ECHR protection system, one can identify the constant attempt to maintain a balance between the right to one's personal autonomy and the (indirectly guaranteed) right to health. In its early case law, the Court focused more on compulsory traditional medical treatments, such as in the *Acmanne and others v. Belgium case*, in which it resulted in that child compulsory screening for tuberculosis was legitimate and fully compatible with the right to private and family life, or the *Peters v. The Netherlands case*, when it declared the inadmissibility of the then imprisoned applicant's request against its mandatory urine sampling.<sup>24</sup>

The Strasbourg Court seems reiterating the long-standing CoE stance even in similar health (vaccination) cases as previously expressed by the former European Commission of Human Rights (EComHR); as, for instance, the *Boffa and others v San Marino case*, in which the Commission acknowledged that the *prima facie* interference arising from the compulsory vaccination against hepatitis B of the applicants' children was justified by one of the legitimate aims of art. 8 para 2, *i.e.* the protection of public health, rejecting thus the alleged violation of art. 8<sup>25</sup>.

<sup>21</sup> PACE, Resolution 2361 (2021), Covid-19 vaccines: ethical, legal and practical considerations, 27 January 2021: «6 Member States must already now prepare their immunization strategies to allocate doses in an ethical and equitable way, including deciding on which population groups to prioritize in the initial stages when supply is short, and how to expand vaccination as availability of one or more Covid-19 vaccines improves.»

<sup>22</sup> In para 5 of PACE Resolution 2361 (2021) is highlighted that: «5. [...] The COVAX Facility is the leading initiative for global vaccine allocation and access. Co-led by the World Health Organization (WHO), the Vaccine Alliance (Gavi) and the Coalition for Epidemic Preparedness Innovations (CEPI), COVAX uses funding from subscribing countries to support the research, development and manufacture of a wide range of Covid-19 vaccines and negotiate their pricing. Adequate vaccine management and supply chain logistics, which require international co-operation and preparation by member States [...]». More information on this institutional framework/action and international cooperation, see A. BREDIMAS, *cit.*, note 1, pp. 177-185. See also Y. BEIGBEDER, *The World Health Organization: Achievements and Failures*, London, New York, 2020; M. CUETO, T. BROWN, E. FEE, *The World Health Organization. A History*, Cambridge, 2019; A. BREDIMAS, *Du droit à la santé à la protection des droits du malade. L'interaction entre les Nations Unies et l'Organisation Mondiale de la Santé*, *Ann. int. droits hom.* - IX, vol. 9, 2018, pp. 457-476.

<sup>23</sup> D. FIDLER, *To Fight a New Coronavirus: The COVID-19 Pandemic, Political Herd Immunity, and Global Health Jurisprudence*, *Chin.Jour.Int.Law*, 2020, pp. 207-213.

<sup>24</sup> S.R. VINCETI, *COVID-19 Compulsory Vaccination and the European Court of Human Rights*, *Acta Biomed*, Vol. 92, Supplement 6, 2021, pp. 1-7.

<sup>25</sup> EComHR, First Chamber, Application no 26536/95, Decision, 15 January 1998.

This was also explicitly cited in an *obiter dictum* by the ECtHR in the *Jehova's Witnesses of Moscow and others v. Russia case*, especially when the rights of third parties are at stake.<sup>26</sup> Later on, in 2012, the Court, in the *Solomakhin v. Ukraine case*, acknowledged that there was no violation of art. 8, as the compulsory vaccination of the applicant against diphtheria (an uncontested interference to his personal autonomy) was justified as a «public health consideration[s] and necessity to control the spreading of infectious diseases in the [Donetsk] region».<sup>27</sup>

More recently, on 8 April 2021, in the *Vavříčka and others v. the Czech Republic case*<sup>28</sup>, once again the ECtHR dealt with some aspects of the compulsory vaccination of minors. The applicants challenged the compatibility of national legislation with the ECHR. According to the Czech legislation, in order for a minor to be enrolled in nursery and preschool institutions, he/she shall be vaccinated. The latter obligation falls upon the minor's parents/guardians. Otherwise, children would be excluded from such educational institutions and their parents would be subjected to administrative fines. The Czech national legislation recognizes two cases in which children could be excluded from compulsory vaccination, covering children, whose parents duly certify their immunization, and those unable to be vaccinated due to health reasons.

In its judgment, the Court, after having reiterated and thoroughly presented all the long-standing existing international and European legal framework governing the right to health and the vaccine dimension as its inextricable component, together with the relevant practice of International Organizations (most of them being extensively treated above), resulted in that there was no violation of art. 8 para 2 ECHR. The Strasbourg Court stressed that according to the national legislation, vaccines are only indirectly considered as compulsory and do not constitute a direct interference to one's health, leading to the «objectification» of the individual. The Court also considered that the required legitimate interest in art. 8 para 2 ECHR (*i.e.* the protection of public health, para 272) is present, while the principles of legality (paras 266, 269, 271) and proportionality (para 309) are not jeopardized. In any case, it recognized a certain margin of discretion of the national authorities on the necessity of resorting to such a measure (paras 274, 280, 285 *in fine*) and reminded that the best interests of the child shall always be protected (paras 287-289).

Allegations on potential violations of art. 9 ECHR were discarded, while the question whether and to what extent the provision of art. 2 of the first ECHR Protocol was at stake, was not finally examined.<sup>29</sup>

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<sup>26</sup> ECtHR, *Jehova's Witnesses of Moscow and others v. Russia*, Application no. 302/02, Judgment, First Section, 10 June 2010, para 136.

<sup>27</sup> ECtHR, *Solomakhin v. Ukraine*, Application no. 24429/03, Judgment, First Section, 15 March 2012, paras 33-39.

<sup>28</sup> ECtHR, *Case of Vavříčka and Others v. the Czech Republic (application nos 47621/13 and 5 others)*, Judgment, 8 April 2021.

<sup>29</sup> In any case, to the extent that the applicants under 18 years old are the direct victims of the non-fulfillment of their parents' obligation to have them vaccinated and, therefore, they do not have access to preschool facilities, it might be considered as a form of intervention in their private life. See para 263: «[...] However, having regard to the subject matter of this case as established above (see paragraph 260), and also to the fact that the child applicants bore the direct consequences of non-compliance with the vaccination duty in that they were not admitted to preschool, the Court is satisfied that, in their regard, there has been an interference with their right to respect for private life.» See also K. PISIMISI, *Pandemics and Human Rights: challenges and solutions on the basis of International Law*, *Cahiers de Droit International et de Politique Internationale* 1/2021, pp. 101-109 (in Greek).

Although not primarily relevant to the ongoing pandemic, it would be not an exaggeration to characterize this judgment as a critical point in the ECtHR's jurisprudence, especially due to most citizens' concerns and reactions in many CoE member States, related to the compulsory vaccination against COVID-19, resulting to their unwillingness to be eventually (re-) vaccinated. Such a tendency is becoming more evident nowadays, especially due to the recently increased spreading rate of the virus in China and the new and highly contagious variations in the USA.

Indeed, the Strasbourg Court accepts a steady increasing number of individual applications, challenging the (in-) compatibility with the ECHR of a series of national measures aiming at preventing and halting the spread of the pandemic, but explicitly with regard to the compulsory vaccination.

In fact, on 24 August 2021, 672 French fire-fighters brought an application against France (*Abgrall et 671 autres c. France*) and jointly submitted a demand on provisional measures, claiming that Law 2021-1040 of 5 August 2021 on the handling of the ongoing sanitary crisis, is not compatible with Articles 2 and 8 ECHR, as long as it requires their compulsory vaccination and sets their potential redundancy as a punitive measure. The ECtHR observed that there was no risk that the applicants would suffer «real and irreparable harm» (a precondition for granting interim measures). For this reason, Article 39 of the Court's Rule did not apply in the case<sup>30</sup> and dismissed their demand for provisional measures.

On 10 September 2021, one of the applicants of the aforementioned case, individually brought a case against France (see *Thevenon v. France, Application no. 46061/21*), challenging the same law, *i.e.* Law 2021-1040, and claimed that his rights stemming from Articles 8 and 14 ECHR (taken individually and in conjunction), and Article 1 para 1 of the First ECHR Protocol, as his denial to be vaccinated (although this was a requirement explicitly set by law for his profession) led to his suspension later, on 15 September 2021. The case is currently pending before the ECtHR.<sup>31</sup>

In the similar cases, *Kakaletri and Others v. Greece (Application no. 43375/21)* and *Theofanopoulou and Others v. Greece (Application no. 43910/21)*, health sector professionals working in the public or private sector(s), also filed applications against Greece. The applicants challenged the compatibility with a series of ECHR provisions of Law No 4820/2021, which sets compulsory vaccination against COVID-19 as a prerequisite for the continuation of their work status. They also asked for the indication of provisional measures pursuant to Article 39 of the ECtHR Rules. The Court, on 7 September 2021, dismissed such a request, as they fell beyond the scope of application of Article 39. The cases are still being pending before the Court.<sup>32</sup>

Strong human rights concerns also arise while discussing the issue of vaccine/health passes/passports, as their wide use in (mostly) interior places could imply the compulsory vaccination of citizens.<sup>33</sup> At this point, the Guidelines of the CoE Secretary General<sup>34</sup> is of high importance. Establishing the need for a horizontal vaccination on the existing CoE legal

<sup>30</sup> ECtHR, Communiqué de Presse, CEDH 243 (2021), 25 août 2021.

<sup>31</sup> ECtHR, Press Release, ECHR 294 (2021), 07.10.2021.

<sup>32</sup> ECtHR, Press Release, ECHR 266 (2021), 09.09.2021.

<sup>33</sup> Various national Courts and Tribunals have sporadically acknowledged the compatibility of health/vaccine passes with national legislation. See, for instance, 'Top court rules France's Covid-19 'health pass' complies with constitution', France24, 5 August 2021.

<sup>34</sup> CoE Secretary General, Protection of human rights and the "vaccine pass", SG/Inf(2021)11, 31 March 2021, last visited on 14 May 2022.



bases for the protection of human life (art. 2 ECHR) and of health (arts 8 ECHR and 11 ESC), as well as the equal access to the health systems (art. 3 of the CoE Oviedo Convention<sup>35</sup>), the CoE Secretary General reminded all member States that the use of vaccine passes for mere medical purposes is not a novelty in International Law, rather than a necessity dictated by the (previous and) current pandemic(s). Conversely, a potential unlimited and unlawful use of such passes for other irrelevant purposes, sets serious questions on human rights protection, *i.e.* unauthorized use, misuse, and abuse of personal data, discrimination as to the enjoyment of certain rights/freedoms (*e.g.* movement, respect of private and family life, freedom of assembly, freedom of religion and belief *etc.*), that could lead even to the stigmatization of persons.<sup>36</sup>

The ECtHR has not recently dealt with cases on the compatibility (or not) with the ECHR of the use of health passes. The Court would have the chance to respond to such a question, if the *Zambrano v. France case (Application no. 41994/21)*<sup>37</sup> was not dismissed as inadmissible. In that case, the applicant -Professor of Private Law at the University of Montpellier- G. Zambrano, challenged -among other things- the establishment by law of a health pass for travelers from and to France, as well as its use in internal places. This urgent measure for the containment of the virus (see Laws 2021-689/May 2021, and its extension and broadening by Law 2021-1040/August 2021, mentioned above), created a counter-reaction against this practice.

More specifically, in a website of his, he was encouraging people to fill an application-like form, which would be further submitted to the ECtHR, “explaining” that it would serve as a sort of collective application before the Court and, in any case, in this way a great workload for the Strasbourg Court would be created, paralyzing the Institution itself (see paras 9-11). The applicant believes that the provisions on compulsory vaccination and use of health passes of the French legislation, violate arts 3 (degrading and inhumane treatment), 8 (protection of private and family life) and 14 (non-discrimination) of the ECHR. The Court, having examined the case, observed that, although that “movement” caused a series of public protests in France against the measures adopted, there was no reference to an eventual violation of arts 10 (freedom of expression) and 11 (freedom of assembly) ECHR (para 18). In addition, the Court noted (in paras 19-20) that the total sum of applications received since Zambrano’s ambiguous initiative, significantly exceeds the number initially written on the initial “application” form («Recours au nom de 7.934 requérants. Liste ci-jointe. [...]»). The Court dismissed all applications (art. 47 para 5.1. of the ECtHR Rules), as they all lacked the requirements set in art. 47 paras 1 and 3 of the ECtHR Rules (mainly because they did not contain detailed personal information of the applicants, nor they were signed by each and every one of them). In any case, the ECtHR asked Zambrano to submit

<sup>35</sup> CoE, Convention on Human Rights and Biomedicine, ETS No. 164.

<sup>36</sup> CoE Secretary General, Protection of human rights and the “vaccine pass”, SG/Inf(2021)11, 31 March 2021. See also the Statement of the CoE of the Bioethics Committee, COVID-19 and vaccines: Ensuring equitable access to vaccination during the current and future pandemics, 22 January 2021, as well as its Statement “Statement on human rights considerations relevant to “vaccine pass” and similar documents, 4 May 2021. At an EU level, the EU Regulations 2021/953 and 2021/954 of the Parliament and the Council (14 June 2021) for persons from third countries residing lawfully in in EU member States unify the existing EU framework towards the data protection while using and controlling all kinds of documents related to the COVID-19. See indicatively, N. FOROOZANFAR, *Justification of Governments for Mandatory Use of Covid-19 Vaccination Digital Certificates under the European Convention on Human Rights*, *Peace Human Rights Governance* 6(1), 39-66, 2022.

<sup>37</sup> ECtHR, *Zambrano v. France (application no 41994/21)*, 5th Section, 7 October 2021.

any additional documents, in order to complete his application, in a strict deadline (art. 47 para 5.2 of the Rules).

The Strasbourg Court, finally, rejected the application as inadmissible, due to:

a. the applicant's non-compliance with the rule on the non-exhaustion of all available national remedies (paras 23-30),

b. the application lodged was manifestly an abuse of the right to file an individual application pursuant to art. 35 para 3(a) (paras 33-36), and art. 17 ECHR, in the sense that the Court's efficiency and the victims' possibility to recourse to the Court, are seriously challenged (para 37), and

c. the lack of victim status, as no potential specific and individual violation of the ECHR by the national legislation was ever claimed (paras 42-47), while with regard to art. 1 of ECHR Protocol No 12 (general prohibition of discrimination, setting in para 1 that «The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as [...] or other status»), the ECtHR reminded that France has not yet adhered to it, and therefore is not bounded by it.

#### 4. *Concluding remarks*

As presented above, although there is nowadays a considerable and steady enhanced legal framework, which serves as the basis for the protection and safeguard of the right to health, its full implementation is quite deficient, making a series of subsequent issues and challenges arise, while the emergence of new and virulent COVID variations in various parts of the world keeps these issues high on the international agenda.

While, at first, all relevant stakeholders -whether States, International Organizations, Institutions, and/or even citizens- were focusing primarily to the establishment of emergency (both preventive and/or suppressive) measures for the containment of the pandemic -always in conformity with internationally and regionally recognized and accepted standards<sup>38</sup>- now they all focus on eventual human rights challenges, stemming from new practical needs, such as the (compulsory) vaccination, the potential use of vaccine/health passes/passports etc.

With respect to the former, International Organizations/Mechanisms/Institutions followed an almost uniform path: States do have a certain margin of appreciation while limiting or even restricting human rights provisions, but under the specific circumstances required and in conformity with International Law. Whether lawful human rights limitations (as of arts 8-11 para 2 ECHR) or derogations (as of art. 15 ECHR) are enabled, all emergency measures shall comply with the principles of legality, proportionality and necessity (as established, either explicitly or even implied, in those provisions). In fact, in late 2021 and beginning of 2022, the ECtHR published a few COVID-related cases<sup>39</sup>, most of them being

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<sup>38</sup> S. JOSEPH, M. CASTAN, cit., note 3. See also, W.A. SCHABAS, *Oxford commentaries on international law: a commentary*, Oxford, 2016, pp. 587-605.

<sup>39</sup> See for instance: ECtHR, *Fenech v. Malta* (application no. 19090/20), First Section, Judgment, 1 March 2022; ECtHR, *Ibrahim Bab v. the Netherlands* (application no. 35751/20), Fourth Section, Decision, 22 June 2021.

rejected as inadmissible, few of them being examined in the merits, while only in one case<sup>40</sup> it actually acknowledged a breach of the ECHR (of art. 11 specifically).<sup>41</sup>

In the light of the previous considerations, the most challenging part of the case remains for one to examine how the international community is handling (and will continue to address) the practical dimensions (*e.g.* vaccines, health passes *etc.*) that the pandemic has set, as well as if and to what extent the European standards, that were seriously challenged by the COVID-19 pandemic, are finally being met and fully implemented. And even if the legal/normative aspect is widely known and largely interpreted, the jurisprudential one - specifically related with the current pandemic- has not yet much to demonstrate. All competent judicial institutions (whether national or international ones) will need time in order to better assess the new circumstances and accordingly adjust the applicable rules.

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<sup>40</sup> ECtHR, *Communauté genevoise d'action syndicale (CGAS) v. Switzerland* (application no 21881/20), 15 March 2022.

<sup>41</sup> For a critique of the judgment see S. SMET, *First violations in a COVID-19 case: Communauté genevoise d'action syndicale (CGAS) v. Switzerland*, *Strasbourg Observers*, 9 May 2022, last visited on 14 May 2022.