RIGA GRADUATE SCHOOL OF LAW

Compulsory medical intervention and the right to respect for private life

BACHELOR THESIS

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DECLARATION OF HONOUR:

I declare that this thesis is my own work, and that all references to, or quotations from, the work of others are fully and correctly cited.

(Signed) .....

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ABSTRACT

The permissibility of compulsory and involuntary medical interventions in connection to body autonomy and the right to respect for private life has been brought to spotlight in the recent years as a result of the COVID-19 pandemic, in response to which states took various measures, including mandatory vaccination or recovery certificates. However, the importance of body autonomy and balancing the right to respect for private life under Article 8 of the European Convention on Human Rights with public interest – such as public health and the rights and freedoms of other persons – has always had relevance in jurisprudence. To address this issue, the author analyses judgments from the European Court of Human Rights and Latvian courts regarding medical interventions such as vaccines, blood and DNA tests, and forced sterilisation procedures.

Keywords: medical intervention, private life, body autonomy, bodily integrity, European Convention on Human Rights

SUMMARY

Compulsory medical intervention is a topical issue that falls under the scope of the right to respect for private life, a human right that is covered by Article 8 of the European Convention of Human Rights (ECHR). Exceptions where certain restrictions may be imposed on the right to respect for private life are listed in the second paragraph of this Article and include interests such as protection of health, prevention of disorder and crime, and the protection of the rights and freedoms of others, as long as these restrictions are in accordance with the law and necessary in a democratic society. When such a restriction is invoked, careful balancing must be done between the interests of the person in question on whom medical intervention is carried out and the public interests or the interests of the other persons that may be affected. While the topic of compulsory medical intervention has gained traction in the recent years as a result of various measures imposed by governments in order to contain the COVID-19 pandemic such as lockdowns and mandatory COVID-19 vaccination or recovery certificates for certain groups of people, in practice, the European Court of Human Rights (ECtHR) in the recent decades has examined numerous cases related to a wide scope of medical interventions. In this bachelor thesis examined are compulsory vaccines for children, blood tests, genetic material (DNA) tests, drug tests in prison, and non-consensual sterilisation during childbirth.

In addition, the ECtHR has examined cases regarding circumstances where medical intervention could have been carried out in practice in some situations yet was denied for the applicant (medical non-intervention), such as refusal to allow an applicant who is suffering from a lethal degenerative disease access to assisted suicide or refusal to perform an abortion on the applicant. The legal framework for the examination of such cases related to medical non-intervention is similar to that of medical intervention, though the ECtHR does not explicitly recognise the right to receive medical intervention to the same extent that it recognises the right to refuse medical intervention, even if such medical intervention is widely available and recognised in the CoE countries and consensus exists that it may be performed in a larger range of cases than merely as a last resort life-saving measure.

The case law of Latvia, which has ratified the ECHR and codified the provisions of the ECHR in its constitution, provides a valuable national perspective on the application of human rights principles such as the right to respect for private life to medical interventions. Latvian Constitutional Court case law on collection of DNA samples does not go into detail regarding the right to bodily integrity, yet, in ruling that DNA samples may be collected from suspects in criminal proceedings the Latvian Constitutional Court addressed the aim of ensuring public security, which the ECtHR does not reference in its case law that the author examined within this bachelor thesis. Moreover, Latvian Supreme Court case law addresses the notion of bodily integrity in relation to deceased persons and the rights of persons to ask for the destruction of tissue samples obtained from their deceased relatives. The fact that Latvia ratified the ECHR later than other, Western European, countries and underwent a transition from a totalitarian regime to democracy in the 1990s can partially explain the fact that Latvia does not have extensive jurisprudence regarding medical intervention and the right to respect for private life; however, the ongoing COVID-19 pandemic has led to the establishment of new case law.

TABLE OF CONTENTS

LIST OF ABBREVIATIONS

ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
UDHR	Universal Declaration of Human Rights
Oviedo Convention	Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine
COVID-19	Coronavirus disease 2019 (SARS-CoV-2)
CEE	Central and Eastern European
CoE	Council of Europe
DNA	Deoxyribonucleic acid

INTRODUCTION

Medical intervention exists in a variety of forms, for example in the form of vaccination, DNA, blood and other body fluid and genetic material tests, medical treatment, as well as surgical procedures. The legality of enforcing such medical intervention as a compulsory procedure, whether in practice through the actions of medical personnel and law enforcement (with or without legal authority) or through legislation that prescribes compulsory medical intervention, has been widely debated among legal scholars. In particular, such medical interventions have been brought to the global spotlight in recent years, in the context of the COVID-19 pandemic as well as in the context of various developments in the medical and health technology sphere. Thus, the right to refuse medical intervention is a vital issue to analyse within this context, in connection with personal autonomy and bodily integrity, and it is important to balance this right with other interests, for example, the rights and freedoms of other persons or public health.

The right to respect for private life – which, as will be further analysed in this bachelor thesis, from the various human rights codified in international human rights instruments has the most straightforward application to the right to body autonomy and the right to refuse medical intervention – has been codified within Article 8 of the ECHR and it is within the context of the ECHR that this right will be analysed. Accordingly, this bachelor thesis analyses the legality of compulsory medical intervention from the viewpoint of the right to respect for private life, in order to answer the research question: In what circumstances does compulsory medical interference constitute a violation of Article 8 of the ECHR? Since complaints filed under the ECHR, invoking one or several rights or freedoms provided therein, are reviewed by the ECtHR, within this bachelor thesis the right to respect for private life is examined within the context of the case law of the ECtHR. The author analyses limitations on the right to respect for private life within the context of compulsory medical interventions which have occurred (or are claimed to have occurred by the person whose right to respect for private life is allegedly infringed) under one or several of the legitimate aims provided within Article 8(2) of the ECHR which may justify a restriction on the aforementioned rights, as well as interferences where the existence of a legitimate aim was not proven which therefore fall outside the scope of this legal provision and constitute an impermissible violation of Article 8 of the ECHR.

Furthermore, complementary to compulsory medical intervention, compulsory non-intervention – defined by the author as situations in which a medical intervention was prohibited or denied contrary to the wishes of the person in question – is examined in a separate subchapter to investigate whether the prohibition of medical intervention has a similar legal framework to that of compulsory interventions and whether the same judicial principles can be applied. Within the context of this bachelor thesis, "compulsory" medical intervention is interpreted as one that is mandatory and required by law or, whether mandated by law or not, coercive, carried out with the use of persuasion, intimidation tactics or similarly restrictive tactics, particularly by medical professionals or persons otherwise possessing authority, control or ability to influence the person who was subjected to the medical intervention (for example, law enforcement officers if the person is detained).

Throughout the doctrinal legal research process, the grammatical, teleological, historical and systematic legal interpretation methods are used. For example, the historical interpretation method is used in the analysis of the historical context that led to the drafting of the ECHR, as well as the developments that have occurred since: after the collapse of the Soviet Union and the consequent disappearance of the West and East divide, after which a number of

CEE countries have become State Parties of the ECHR, including Latvia, thus making the ECtHR as a judicial forum available for a larger number of individuals than ever to protect their human rights and resulting in ever-evolving case law. In addition, comparative analysis is used when the author compares and contrasts different judgments from the ECtHR and to other ECHR judgments or the relevant domestic law that is mentioned and referenced in the ECHR or Latvian court judgments. The interdisciplinarity – intersection of a legal and political perspective – of this bachelor thesis is demonstrated through an examination of the purpose behind the enforcement of compulsory medical interventions from a political point of view, namely, how different states may impose policies of medical interventions or seek to limit persons' body autonomy in certain areas of private life in order to further state interests.

Notably, the legality of compulsory medical interventions is a relevant topic at the time because of the ongoing COVID-19 pandemic. In the second half of 2021, as vaccines were developed and become available to the general public, multiple countries mandated or considered mandating COVID-19 vaccines universally or for specific groups of people based on occupation (for example, for healthcare or nursing home workers, public servants) or age (for example, for the whole adult population, thus excluding children) and imposed restrictions on people who by choice had not obtained vaccination such as limiting their ability to work or imposing a lockdown for unvaccinated individuals.[1] However, the legality and permissibility of such policies under human rights law remain debatable. In regards to the various measures taken by states in response to the COVID-19 pandemic in order to protect public health, there is not a general consensus among legal experts and the balance between the rights of the people whose right to respect for private life was affected and the interest of public health need to be balanced on a case-by-case basis.

This bachelor thesis consists of three chapters. Within the first chapter – "Framework for the right to respect for private life and compulsory medical interventions" – the author analyses what constitutes medical intervention and what characteristics make such medical intervention compulsory within the context of legal dictionaries, human rights law and medical law. Furthermore, the author analyses the legal framework for the right to respect for private life as such within the scope of Article 8 of the ECHR and the historical and political background for the drafting process of the ECHR. Within the second chapter – "Compulsory medical interventions and the right to respect for private life within the case law of the ECtHR" – case law from the ECtHR is analysed in order to determine the legal framework for adjudication of cases relating to compulsory medical interventions within the context of the right to respect for private life. The third chapter – "Latvian case law regarding medical intervention and the right to respect for private life" – provides an analysis of a national perspective, meaning, how the right to respect for private life is applied at a national level by State Parties of the ECHR.

[1] Belinda Bennett, Ian Freckelton, and Gabrielle Wolf, *COVID-19, Law, and Regulation: Rights, Freedoms, and Obligations in a Pandemic* (Oxford: Oxford University Press, 2023),. pp. 167-170.

CHAPTER 1: FRAMEWORK FOR THE RIGHT TO RESPECT FOR PRIVATE LIFE AND COMPULSORY MEDICAL INTERVENTIONS

1.1. What constitutes compulsory medical intervention?

In order to analyse instances in which compulsory medical intervention has occurred, it is important to establish a legal definition for this term. Since the term "compulsory medical intervention" does not have a singular broadly accepted definition, firstly the terms "compulsory" and "medical intervention" will be examined separately. In dictionaries the English-language term "compulsory" is commonly defined as "something that [must be done] because it is the law or because someone in authority orders you to do so."[2] Thus, compulsory medical intervention could be either stipulated by law or ordered by an authority; the latter within the context of this thesis will be interpreted broadly as either a legal authority – law enforcement (for example, the police) or judicial authorities (for example, courts) – or other persons or institutions that can be considered as authorities, for example, in the sense that a doctor can be considered a medical authority by their patient who places certain trust in the opinion of the said doctor. Notably, this definition does not state whether a person must give their informed consent to an action for it to be considered compulsory; thus, the presence of consent will not be a factor used to determine whether medical intervention is compulsory or not; nonetheless, consent remains an important aspect to consider in each individual case.

There is not a single, straightforward, all-encompassing definition for the term "medical intervention." For example, the Latvian Medical Treatment Law defines medical treatment as "professional and individual prophylaxis, diagnosis and medical treatment of diseases, medical rehabilitation and care of patients," yet this definition does not *per se* include medical interventions that are not carried out in order to cure a disease, for rehabilitation purposes or as part of care for patients (for example, vaccines, sterilisation, abortions).[3] However, within the context of this bachelor thesis (and as will be reflected in the legal materials referenced throughout the thesis and within the context of the case studies analysed in the following chapters), "medical intervention" will be defined as any medical procedure or treatment that is intended and carried out to improve or maintain a person's health, well-being or quality life or provided in the relevant law for other purposes (for example, for public interests such as criminal investigation or determining the paternity of a person). Such medical interventions include surgical procedures, administration of medication, medical treatment, vaccination, and body fluid and genetic material tests. Accordingly, the two components must exist simulatenously – medical intervention was carried out or prescribed for a person and this medical intervention was compulsory.

Two different aspects of compulsory medical intervention can be distinguished. Firstly, this concept deals with medical intervention that is covered by the relevant law – for example, compulsory vaccinations for children which are essential in order for the child to be admitted to nursery school and the purpose of which is to ensure the protection of the health of the persons who get vaccinated as well as those who could not themselves be vaccinated (for

[2] Longman Corpus Network, *Longman Dictionary of Contemporary English (3rd edition)* (London: Longman Dictionaries, 1995), p. 274.
[3] Latvijas Republikas Saeima (The Parliament of the Republic of Latvia), *Medical Treatment Law (Ārstniecības likums)*, 1 October 1997, available on: https://likumi.lv/ta/en/en/id/44108-medical-treatment-law. Accessed May 8, 2023.

example, for health reasons) or for whom immunisation had been ineffective.[4] Secondly, whether the relevant legislation explicitly provides for this obligation or not (or this obligation is left, for example, at the discretion of hospital or prison staff for their respective patients or prisoners), this concept deals with cases where a person (for example, a patient) has been subjected to medical intervention against their wishes such as body fluid testing (for example, for drug testing), force-feeding an unwilling patient, non-consensual sterilisation procedure, or others.

It is important to note that compulsory medical interventions are relevant to other law fields besides human rights such as medical law. There are several medical law principles that are relevant to compulsory medical interventions and the right to respect for private life. Namely, the consent of the patient is a fundamental principle of medical law and ethics, derogations from this principle can only be permissible in extreme and specific cases[5] (in certain cases including the legitimate aims provided in Article 8(2) of the ECHR). Similarly, the principle of body autonomy is fundamental and must be respected by medical professionals in their interactions with patients.[6] Particularly when the patient cannot consent or in complex situations where the patient's capacity to consent is uncertain or where the advantages and disadvantages of the medical intervention have almost equal merit, other aspects that need to be taken into account are the least restrictive alternative, the patient's liberty, dignity, freedom from unfair discrimination and taking into account the views of the patient even if by law the patient does not have the capacity to consent.[7]

Within the scope of medical law, the Oviedo Convention is a binding international legal instrument that was drafted by the CoE, just like the ECHR, and the first such human rights instrument in the field of biomedics, which has currently been ratified by 29 countries of the CoE.[8] For example, its Article 5 provides that health-related intervention may be carried out solely with the free and informed consent of the person involved, while its Article 2 states that "the interests and welfare of the human being shall prevail over the sole interest of society or science,"[9] thus, unlike Article 8(2) of the ECHR, giving prevalence to the interests of the person over those of society or science. Nevertheless, Article 26 of the Oviedo Convention provides that restrictions on the rights provided for within the Oviedo Convention, listing the same legitimate aims as Article 8(2) of the ECHR, though notably excluding national security, the economic well-being of the country, the prevention of disorder, and the protection of morals. Since the wording is similar between these two provisions, both are instruments of the same international organisation, and the preamble of the Oviedo Convention references the ECHR, it may be considered that the Oviedo Convention shows an evolved approach. As the analysis below will show, none of the exceptions that the Oviedo Convention excludes have been invoked in practice in the case law of the ECtHR, except for the protection of morals, which

[4] *Vavřička and Others* v. *the Czech Republic* [GC], nos. 47621/13 and 5 others, 8 April 2021, para. 196.
[5] Jonathan Herring, *Medical law and ethics (6th edition)* (Oxford: Oxford University Press, 2016), p. 155.
[6] *Ibid.*, p. 207.
[7] British Medical Association, *Medical Ethics Today: The BMA's Handbook of Ethics and Law* (Chichester: John Wiley & Sons, 2012), pp. 97-98.
[8] Council of Europe, *Chart of signatures and ratifications of Treaty 164 - Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (ETS No. 164) (Status as of 08/05/2023)*. Available on: https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=164. Accessed May 5, 2023.
[9] Council of Europe, *Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine*, 4 April 1997. Available on: https://rm.coe.int/168007cf98. Accessed May 8, 2023.

the ECtHR has been criticised for – when a strong European consensus exists on an issue, giving prevalence to strong morals of a specific State Party that lead to a different approach in the medical field may set a precedent that endangers the paramount character of human rights such as body autonomy and the right to respect for private life.[10]

While within the context of ECHR, the principles of bodily integrity, personal autonomy and consent in relation to medical interventions have the most straightforward application in practice in regards to the right to respect for private life under Article 8, which is examplified by the amount of case law where focus is placed on Article 8, other rights provided within the ECHR may be invoked in this context as well, based on the circumstances of the case. For example, Article 9 provides for freedom of thought, conscience and religion, which is relevant in relation to, for example, Jehovah's Witnesses who refuse blood transfusions on religious grounds[11] and whose right to refuse blood transfusions has been examined by the ECtHR. In this regard, the ECtHR has noted that for the right to refuse medical treatment to have bearing in practice,

> patients must have the right to make choices that accord with their own views and values, regardless of how irrational, unwise or imprudent such choices may appear to others.[12]

Furthermore, in specific cases Article 3 of the ECHR may be invoked as well; for example, compelling a patient to consent to sterilisation while she is in a vulnerable mental state and in pain from labour may constitute degrading treatment.[13] Thus, different rights protected by the ECHR are interconnected and other rights besides the right to respect for private life may be relevant for the human rights framework on medical intervention, yet, as the case law analysed in chapter two will show, in relation to compulsory medical intervention Article 8 is invoked the most often.

1.2. The right to respect for private life within the scope of Art. 8 of the ECHR and the historical background of the ECHR

To examine the framework of the right to respect for private life within the scope of Article 8 of the ECHR, it is important to examine the historical and political background for the ECHR itself. It has to be noted that in general a political aspect is inherent in international legal instruments relating to human rights, and the ECHR is not an exception. Thus, the time period when it was drafted and the geopolitical character of the members of the then-newly formed CoE – the international organisation that drafted the ECHR – are important. Notably, the ECHR was drafted in the year 1950, just five years after the end of World War II in a Europe that was still in the process of recovering from the disastrous consequences of World War II, including major human rights violations, and in the beginning stages of the increased tension between the United States, supported by the Western Bloc, and the USSR, supported by the Eastern Bloc. Politically, the aim of the ECHR was preserving democracy as the dominant and sole system of government in Europe that Western Europe recognised and supported, while the threat of

[10] Joint partly dissenting opinion of Judges Rozakis, Tulkens, Fura, Hirvelä, Malinverni and Poalelungi in the case *A, B and C* v. *Ireland*, no. 25579/05, 16 December 2010, para. 7-9.
[11] Elizabeth Wicks, "The Right to Refuse Medical Treatment under the European Convention on Human Rights," *Medical Law Review* 9, no. 1 (Spring 2001), pp. 30-33.
[12] *Jehovah's Witnesses of Moscow and others* v. *Russia,* no. 302/02, 10 June 2010, para. 136.
[13] *V.C.* v. *Slovakia*, no. 18968/07, 8 November 2011, para. 116-120.

communism in Eastern Europe remained as a pressing concern in the background for Western Europe during the Cold War.[14] The set of rights and freedoms encompassed within the ECHR such as the right to respect for private and family life, freedom of expression and others are part of the right of individual self-determination – the ability to freely determine how to live one's own life. The right to determination is an important aspect of democracy and therefore had to be reflected in international human rights treaties that the democratic countries agreed to ratify. This notion is reflected in Article 8(2) of the ECHR where it is noted that any restriction on the right to respect for private life has to constitute a necessity in a democratic society. Yet, at the time of drafting the ECHR it was acknowledged (and reflected, for example, in Article 8(2) of the ECHR) that some limits exist to this right to self-determination, namely the interests of the society at large such as public health and safety or, more dubiously within legal research, the sanctity of life as an ethical and moral principle.[15]

The ECHR has a clear influence from the the UDHR, which the General Assembly of the United Nations had procclaimed in 1948, and the UDHR is referenced within the text of the ECHR. The preamble of the ECHR states that the ECHR seeks "to take the first steps for the collective enforcement of certain of the rights" enshrined in the UDHR, meaning, to enforce some rights guaranteed under the UDHR within the scope of the CoE. For the scope of Article 8 of the ECHR, the closest provision from the UDHR is its Article 12, which prohibits "arbitrary interference" with a person's privacy and confers a right to legal protection from such interference.[16]

The right to respect for private and family life that is enshrined in Article 8 of the ECHR refers to an individual's right to live their life free from unwanted intrusion or interference from others, including the government. This includes a range of rights, including the right to privacy in personal and family life, the right to control information about oneself, and, most importantly within the scope of this bachelor thesis, the right to make decisions about one's own body and health. The right to respect for private life may also encompass and overlap with other related rights, such as the right to freedom of thought, conscience, and religion, the right to freedom of expression, and the right to freedom from discrimination.

Article 8 of the ECHR entails a set of obligations, both positive and negative, for the State Parties of the ECHR. Within the set of negative obligations, each State Party has the obligation to abstain from interference with the right to respect for private life of all persons who are within its jurisdiction (no matter the residence or nationality of these persons), with the only derogations where state interference may be permissible being those provided in Article 8(2). Namely, the interference from a public authority nonetheless has to be in accordance with the law and necessary in a democratic society for one of the public interests listed - national security, public safety, the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals, the protection of the rights and freedoms of others.[17] In regards to positive obligations, the state must adopt laws, policies and measures to protect its individuals from arbitrary interference in their private life and to guarantee effective respect

[14] Wicks, *supra* note 11, pp. 17-19.

[15] Wicks, *supra* note 11, pp. 17-19.

[16] United Nations General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available on: https://www.un.org/en/about-us/universal-declaration-of-human-rights. Accessed April 20, 2023.

[17] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5.

of private life.[18] The state has two duties: firstly, a duty to protect persons within its jurisdiction from interference from other private parties; secondly, to ensure a certain standard of living that effectively respects the right to private life of these persons.[19] For example, the ECtHR case *V.C.* v. *Slovakia* (2012) highlighted that the state has a responsibility to guarantee effective respect and protection of the right to respect for private life for minorities which are in reality subjected to prejudices and differential treatment by medical staff in the state.[20]

Originally two bodies were established to ensure adherence to the ECHR – the European Commission of Human Rights and the ECtHR;[21] cases could be brought before the ECtHR only after being declared admissible by the former.[22] However, the system was revised in the 1990s after the collapse of the USSR and consequently the obsolescence of the Western Bloc and Eastern Bloc divide, after which a number of newly independent CEE countries ratified the ECHR and became State Parties. The post-Soviet countries that joined the CoE and the ECHR in the 1990s faced specific challenges in the process of transitioning to a democratic regime, challenges that varied greatly among the CEE countries, yet compensation of the past victims, removing former communist-aligned persons from positions of power within the political system, privatisation and returning properties to their rightful owners were practical issues that were of importance.[23] The constitutional courts of these countries had an important role in the transitional justice process,[24] and within the scope of human rights and the ECHR certain derogations from the existing human rights protection standards were recognised when necessary for the transition process to ensure that the political system does not revert to authoritarianism or totalitarianism.[25] With a significantly increased number of countries that had ratified the ECHR, the number of persons who could (and did in fact) file a complaint substantially increased and ultimately reforms were necessary. In result, in 1998 after the entry into force of Protocol No. 11 of the ECHR, the ECtHR in its new form became the judicial institute reviewing complaints under the ECHR, meanwhile the European Commission of Human Rights was dissolved. With another revision its procedure was streamlined with Protocol No. 14 of the ECHR which entered into force in 2010, and the ECtHR remains the institution with the sole and compulsory jurisdiction to review complaints under the ECHR.[26] Thus, the ECtHR remains the judicial body in charge of enforcing the rights provided within the ECHR, therefore to examine the application of Article 8 of the ECHR in practice, case law from the ECtHR has to be analysed.

[18] Titus Corlățean, "How Compatible Is the Statutory Child Vaccination Duty with Article 8 of the European Convention on Human Rights?" *Scientia Moralitas Conference Proceedings* (2021), pp. 14-15, available on: https://scientiamoralitas.education/wp-content/uploads/2021/05/01232.pdf. Accessed April 21, 2023.
[19] Pieter van Dijk, Fried van Hoof, Arjen van Rijn, Leo Zwaak, *Theory and Practice of the European Convention on Human Rights* (Fifth edition) (Cambridge, Antwerpen, Portland: Intersentia, 2018), p. 669.
[20] *V.C.* v. *Slovakia* case, *supra* note 13, para. 126-129.
[21] van Dijk *et al.*, *supra* note 19, p. 30.
[22] van Dijk *et al.*, *supra* note 19, p. 32.
[23] Katarína Šipulová and Hubert Smekal, "Between Human Rights and Transitional Justice: The Dilemma of Constitutional Courts in Post-Communist Central Europe." Europe-Asia Studies, 73:1, pp. 101-102. doi: 10.1080/09668136.2020.1841739
[24] *Ibid.*, p. 102.
[25] *Ibid.*, p. 105.
[26] van Dijk *et al.*, *supra* note 19, pp. 33-34.

CHAPTER 2: COMPULSORY MEDICAL INTERVENTIONS AND THE RIGHT TO RESPECT FOR PRIVATE LIFE WITHIN THE CASE LAW OF THE ECtHR

2.1. Compulsory vaccination

One of the types of compulsory medical intervention that are worthwhile to examine within the scope of the right to respect for private life under Article 8 of the ECHR is compulsory vaccination, which the ECtHR has provided an extensive legal framework on within its case law. Vaccination policies at a national level against contagious diseases such as measles, whooping cough, and diphtheria, as well as against non-contagious infectious diseases such as tetanus, have existed for decades. It is widely recognised that vaccination policies are successful at safeguarding public health by preventing millions of deaths annually and that vaccination policies are one of the simplest and most cost-effective such tools. [27] Furthermore, in the present day over 1 million deaths that could have been prevented by vaccination still occur each year, particularly among children.[28] In some cases, vaccination can be made mandatory for all individuals or a specific subgroup of individuals. For example, vaccination can be mandated for young children in order to enter preschool or primary school. Possible setbacks in the case of non-compliance with an obligation to obtain vaccination vary between different jurisdictions and different vaccination policies from financial penalties, non-acceptance in educational institutions (such as in the case of the aforementioned childhood vaccination policies), to potential loss of parental rights.[29]

One of the most recent cases adjudicated by the ECtHR regarding compulsory vaccination is the case *Vavřička and Others* v. *the Czech Republic* (2021) where the ECtHR examined the legality of compulsory routine vaccinations for children against nine well-known diseases in the Czech Republic and balanced the right to refuse vaccination with the interest of public health. The *Vavrička* case is notable as one of the few cases where the ECtHR has explicitly stated that the subject matter of the case deals with "compulsory medical intervention,"[30] though the ECtHR does not provide a definition for what types of medical procedures are covered by this term. Due to its subject matter dealing with compulsory vaccines, the *Vavrička* case may have future implications for litigation regarding the national regulation for COVID-19 vaccines, which included vaccination mandates of varying restrictiveness and for different groups of persons in different countries. In the *Vavrička* case, the six applicants invoked Article 8 of the ECHR, arguing that "the various consequences for them," namely non-admittance to nursery school or preschool for the five child applicants and a monetary fine for the adult applicant who was the father of an unvaccinated child, resulting from failure to obtain the required vaccination in particular had breached their right to respect for private life under Article 8 of the ECHR.[31]

As standard for cases relating to the right to respect for private life, the assessment of the ECtHR regarding whether there was a breach of this right was two-fold: firstly, the ECtHR sought to determine whether there had been an interference with the right to respect for private

[27] Katie Gravagna, Andy Becker, Robert Valeris-Chacin, Inari Mohammed, Sailee Tambe, Fareed A. Awan, Traci L. Toomey, and Nicole E. Basta, "Global assessment of national mandatory vaccination policies and consequences of non-compliance," *Vaccine* 38, no. 49 (2020), p. 7865.
[28] *Ibid.*
[29] *Ibid*., p. 7866.
[30] *Vavřička and Others* v. *the Czech Republic* case, *supra* note 4, para. 276.
[31] *Ibid.*, para. 3.

life; secondly (if the answer for the first part of the assessment is affirmative), whether there was a legitimate aim to justify the interference under Article 8(2) of the ECHR. In the first aspect, the ECtHR was brief in its assessment; it referred to its existing case law where vaccination "as an involuntary medical intervention" had been determined to be an interference with the right to respect for private life within the scope of Article 8 of the ECHR. Accordingly, the ECtHR found that in this case the conclusion is the same – state interference was present and even though the children in question had not undergone the relevant compulsory medical intervention, their non-compliance with this obligation resulted in a tangible interference: refusal to admit them to preschool.[32] Since interference with the rights covered by Article 8 was found, for the second part of its assessment the ECtHR analysed in turn each aspect codified in Article 8(2) of the ECHR: whether this interference was in accordance with the domestic law of the Czech Republic, whether it pursued "a legitimate aim" that was specified within the domestic law and that matched one of the legitimate aims listed in Article 8(2) of the ECHR, and whether there was the necessity for this interference in a democratic society.

The ECtHR recognised that two legitimate aims from Article 8(2) of the ECHR were applicable, namely, the protection of health and the protection of the rights of others. The ECtHR considered that in the light of this assessment, there was no need to determine whether any of the other legitimate aims specified in Article 8(2) of the ECHR were present. Notably, the ECtHR provided a list of some but not all of the other aims from Article 8(2) as the possible additional aims, namely, the interests of public safety, the economic well‑being of the country, or the prevention of disorder,[33] thus implicitly excluding national security, the prevention of crime, the protection of morals, and the protection of the freedoms (not rights) of others. It may be worthwhile to consider the reasoning of the ECtHR for opting to list some but not all of the potential legitimate aims, since alternative arguments may have merit in future case law, particularly where the balance is less in favour of specific public interests than in regards to mandatory childhood vaccination for well-known diseases, or when the legal framework may provide for the possibility of bodily integrity restrictions related to, for example, national security or morality, on which ECtHR case law remains sparse or non-existent.

When analysing the "necessity in a democratic society" of the vaccines imposed by the Czech law, the ECtHR examined five different aspects to support the argument that in this case vaccines were indeed necessary in a democratic society: general principles and margin of appreciation, the margin of appreciation in the present case, pressing social need, relevant and sufficient reasons, and proportionality. The ECtHR found that the Czech Republic enjoyed a wide margin of appreciation for its health care policy, including vaccination,[34] and determined that the risks associated with a decrease in vaccination rates if vaccination became merely recommended were sufficient to establish a social need.[35] As mentioned in the beginning of this chapter, vaccination against diseases such as measles, whooping cough, and diphtheria has been recognised as an efficient measure that prevents millions of deaths each year, while vaccine-preventable diseases still cause over a million deaths globally each year.[36] Thus, the importance of vaccine mandates as a tool for the protection of public health cannot be underestimated. The

[32] *Vavřička and Others* v. *the Czech Republic* case, *supra* note 4, para. 263-264.
[33] *Ibid.*, para. 272.
[34] *Ibid.*, para. 280.
[35] *Ibid.*, para. 282.
[36] Gravagna *et al.*, *supra* note 27, p. 7865.

aforementioned facts of the case contributed to the finding of the ECtHR that the measures were proportional to the aim pursued.[37]

It has to be highlighted that, as mentioned above, out of the six applicants five were children who had not obtained the mandatory vaccination – for four of them the claimed interference with the right to respect for private life arose at the stage of admittance to nursery school (at approximately three years of age), while for one the initial decision to admit the applicant to nursery school was revoked when the child was five and a half years old. Only one applicant was an adult – parent of a child who had failed to get his two children vaccinated against three of the diseases for which vaccines were mandatory and who was imposed a fine of 110 euros as a result.[38] Parents and legal guardians have the right to submit an application to the ECtHR on their behalf[39] and the capacity of parents and legal guardians to act on behalf of the children in their care is widely recognised by national and international legal standards. Within the scope of biomedicine and human rights, for example, Article 6, paragraph 1 of the Oviedo Convention states that when a minor lacks the capacity to consent to medical intervention, such intervention may be carried out only when authorised by "[a] representative or an authority or a person or body provided for by law."[40] In the *Vavrička* case, the ECtHR implicitly recognised that the parents of the children had the right to act on behalf of their children, including in regards to the duty under Czech law to vaccinate their children.[41]

Consequently, the choice to submit the applications in the name of the children, rather than their parents or legal guardians, is dubious given the young age of the children involved at the time that the decision not to undergo vaccination was taken. Particularly important in this context is the fact that the subject matter of the case was a direct result of the action (or inaction) of the parents; since concerns regarding the health or wellbeing of the children, if they were to obtain the vaccination, were not used in the argumentation of the parents (for example, contraindications), it is possible that the argumentation of the parents is biased and related to their own belief system where the best interests of the children regarding this specific medical intervention are secondary.

It is unlikely that the five children were aware of (or that at their age they should have been aware of) either the consequences and risks associated with non-admittance to nursery school (for example, from an education and social development point of view) or the increased health risk that may arise due to failure to obtain this vaccination (for example, the risk of contracting the illnesses in question). Nor could the children have reasonably understood any potential effects on their health from obtaining this childhood vaccination such as health complications that may arise as a result of allergies or side effects of the vaccination. Thus, these applications may be, in fact, aimed at protecting the thoughts and beliefs of their parents or legal guardians rather than serving the interests of the children themselves, even though the children themselves are listed as the applicants. In this case, medical law and human rights law intersect with children's rights and family law (parental rights) and it is necessary to examine this case from the viewpoint of this intersectionality, a notion that was acknowledged by the

[37] *Vavřička and Others* v. *the Czech Republic* case, *supra* note 4, para. 290-309.
[38] *Ibid.*, para. 23.
[39] The European Court of Human Rights, "Article 8 Representation of the child before the ECHR," *ECHR Knowledge Sharing*, available on: https://ks.echr.coe.int/documents/d/echr-ks/representation-of-the-child-before-the-echr. Accessed May 9, 2023.
[40] The Oviedo Convention, *supra* note 9.
[41] *Vavřička and Others* v. *the Czech Republic* case, *supra* note 4, para. 278.

ECtHR in this judgment[42] but not extended upon in detail, particularly since the ECtHR acknowledged that some of the applicants had referenced the right to family life (also provided for within Article 8 of the ECHR) but merely stated that it "does not consider it necessary to examine their Article 8 complaints from this additional perspective" without elaborating further.[43]

Thus, the relevance of submissions from the child applicants (to the extent that these submissions are supposedly made by the children themselves) such as arguments that

> the best interests of a child were to be primarily assessed and protected by his or her parents, any State intervention being permitted only as a last resort in the most extreme circumstances[44]

can be up for dispute, keeping in mind that the child applicants were still underage at the time of the submission (and in that regard preschool age or infants) when the relevant assessment and protection of their interests was made by their parents – thus, they were under the direct influence of their caregivers. For example, the parents of one of the child applicants had created an individual vaccination plan for him, which included abstaining from multiple of the mandatory childhood vaccines and resulted in the child applicant not being admitted to nursery school when he was two years old.[45] It is far-fetched to consider that at the age of two the child was aware of the immunological implications of these vaccines or refraining from them or the impact of failure to get admitted to nursery school on his educational and social development. Young children, such as the child applicants at the time when their parents refused the mandatory childhood vaccinations on their behalf, are not capable of consenting and making autonomous choices. Moreover, as indicated in the dissenting opinion of Judge Wojtyczek, small children typically resist vaccination by default,[46] therefore, even if a young child may be presumed to be able to consent to specific actions and their ability to have individual autonomy is recognised,[47] vaccination – necessary for the health of the child but an uncomfortable process – is likely to be an exception.

The dissenting opinion of Judge Wojtyczek brought to the forefront the question of the best interests of children as a collective group of people and the best interests of each individual child. He stated that in this case the central question was not the vaccination policy of the Czech Republic and the extent to which it acts in the best interests of Czech children as a whole but rather

> how to assess in respect of each and every specific child of the applicant parents, with the child's specific health background, whether the different benefits from vaccination will indeed be greater than the specific risk inherent in it.

He argued that parents as the caregivers can, for example, identify individual risk factors for their children that other persons that are less involved in the life of the child may not perceive.[48] This argument is important to note, since parents indeed have a special role in their children's lives and may, for example, when determining the child's best interests be able to take into

[42] *Vavřička and Others* v. *the Czech Republic* case, *supra* note 4, para. 286.
[43] *Ibid.*, para. 262.
[44] *Ibid.*, para. 173.
[45] *Ibid.*, para. 56.
[46] Dissenting opinion of Judge Wojtyczek in the case *Vavřička and Others* v. *the Czech Republic* [GC], nos. 47621/13 and 5 others, 8 April 2021, para. 12.
[47] David Archard, Joe Brierley and Emma Cave, "Compulsory childhood vaccination: human rights, solidarity, and best interests," *Medical Law Review*, Vol. 29, No. 4 (2021), p 722. doi:10.1093/medlaw/fwab024
[48] Wojtyczek, *supra* note 46, para. 13.

account the child's wishes more efficiently, since their presence in the life of the child is larger than that of other people and therefore they may have higher awarness regarding the wishes of the child.[49] Judge Wojtyczek addressed the fact that small children tend to resist to vaccination, thus the relevance of their consent or opinion on the vaccination is limited, and stated that, since states cannot use coercion against children and forcibly administer vaccination, sanctions are imposed on parents who then either convince their children to cooperate or force them to undergo vaccination.[50] He also noted a distinction between contagious diseases such as poliomyelitis and hepatitis B and ones that are not contagious such as tetanus; the arguments used by the ECtHR about the principle of social solidarity through creating a herd immunity within the population that ultimately serves to protect public health are not applicable for the latter disease.[51]

The aforementioned principle of social solidarity itself is noteworthy, as the ECtHR referenced the submissions from the Czech government and supported its argument that vaccination may be an appropriate measure in the name of social solidarity.[52] Social solidarity is not a separate possible restriction on the right to respect for private life within Article 8 of the ECHR but rather based on morality ("the right thing to do") and connected to a "legal duty," as well as a principle that aids in safeguarding public health within the sphere of contagious disease; thus, the ECtHR applied this principle in its assessment of the proportionality of the mandatory childhood vaccines.[53] However, as noted by Judge Wojtyczek, the ECtHR did not define what exactly this principle entails,[54] therefore it remains a rather vague notion.

While, given the context of the COVID-19 pandemic, the *Vavřička* judgment generated publicity and public concern that mandatory vaccine policies could eventually get adopted at a European level, this case only sets a precedent and establishes case law based on the *res judicata* principle in specific circumstances. Firstly, this judgment may be referenced as case law in the area of routine children's vaccination – thus, for well-known diseases that are generally contained due to a relatively high level of vaccination (thus, not, for example, diseases that are so widespread that there is an ongoing epidemic or pandemic), and only for a specific group of people – in this case, young children who are about to enter the public education system (thus, the subjects of such restriction are not all persons within a specific jurisdiction). Secondly, this judgment will become relevant only for similar complaints against countries that have a system of mandatory childhood vaccination in place; the text of the judgment is not aimed at compelling countries to develop mandatory vaccination policies.[55] Furthermore, this judgment balances the vaccination requirement with public health; thus, the framework for balancing in cases where the legitimate restriction is based on, for example, the rights and freedoms of other persons, would be different. When the subject matter of the case deals with vaccination for children specifically, the best interests of the child must be determined and balanced with the statutory requirement for vaccination. This balancing must be done both in the context of children as such, for whose development education and socialisation with peers are necessary, as well as the best interests of the specific child in each case since the best interests of different children may vary to some extent.

[49] Archard, *supra* note 47, p. 722.
[50] Wojtyczek, *supra* note 46, para. 12.
[51] Wojtyczek, *supra* note 46, para. 15.
[52] *Vavřička and Others* v. *the Czech Republic* case, *supra* note 4, para. 279.
[53] *Ibid.*, para. 306.
[54] Wojtyczek, *supra* note 46, para. 15.
[55] Corlățean, *supra* note 18, p. 18.

2.2. Reproductive rights – forced sterilisation

Reproductive rights have been recognised as protected under Article 8 of the ECHR in regards to both the right to respect for private life, as well as the respect for family life.[56] It is important to review cases where medical intervention was not compulsory in the sense that it was not mandatory for all people or a specific group of people under the national law but rather the medical intervention was performed on the patient in practice without meeting the requirement for the informed consent of the patient that generally recognised human rights and medical law standards require. Noteworthy are medical procedures involving a patient's reproductive health and status, such as forced sterilisations, which the ECtHR has significant case law on.

In the case *V.C.* v. *Slovakia* (2012), the ECtHR stated that in accordance with generally recognised standards medical procedures, including sterilisation, "may be carried out only with the prior informed consent of the person concerned."[57] The only exception to this rule is emergency situations in which medical treatment has to be administered imminently and "the appropriate consent from the patient cannot be obtained.[58] However, the ECtHR noted that in general sterilisation as such "is not considered as life-saving surgery."[59] The ECtHR found no indication that the circumstances in this case were different from the general rule, especially since the doctor who had performed the surgery himself noted that there had been no special circumstances and that the surgery had not been life-saving for the patient.[60] Thus, the ECtHR did not exclude that under different, very specific circumstances the ECtHR may arrive at a different conclusion regarding sterilisation as an emergency, life-saving surgery. In this case where sterilisation could not have been an emergency procedure, however, the informed consent from the patient – who was a mentally competent adult – was a prerequisite for performing the procedure.[61] In regards to a violation of Article 8 of the ECHR, which the ECtHR found to be present, the aforementioned lack of informed consent and the fact that sterilisation as such affects a person's reproductive health status and has consequences for various aspects of a person's private and family life, the ECtHR found a clear violation of Article 8 without going in depth.[62] However, despite this conclusion the ECtHR found it important to examine whether Slovakia had

> complied with its positive obligation under Article 8 to secure through its legal system the rights guaranteed by that Article, by putting in place effective legal safeguards to protect the reproductive health of women of Roma origin in particular.[63]

The applicant was of Roma origin and various reports had shown that the Roma minority in Slovakia faced various prejudices in Slovakia, including differential treatment by medical professionals; this differential treatment had materialised in this case, since medical professionals had included in the patient's medical history record the fact that she was of Roma origin without any other additional information, a reference that the government of Slovakia viewed as reasonable due to the generalised view that "Roma patients frequently neglected social and health care and therefore required special attention."[64] The Slovak regulations

[56] van Dijk *et al.*, *supra* note 19, p. 697.
[57] *V.C.* v. *Slovakia* case, *supra* note 13, para. 108.
[58] *Ibid.*, para. 108.
[59] *Ibid.*, para. 110.
[60] *Ibid.*, para. 110.
[61] *Ibid.*, para. 110.
[62] *Ibid.*, para. 143.
[63] *Ibid.*, para. 145.
[64] *Ibid.*, para. 151.

regarding sterilisation at the time did not provide the appropriate safeguards for requiring the patients' informed consent; notably, the ECtHR found that the informed consent requirements set out by international standards such as the Oviedo Convention were not met. Only later did the Slovak legislation introduce a provision that a sterilisation procedure can be carried out only 30 days after informed consent is given by the patient.[65] Thus, Slovakia had failed to comply with its positive obligation to guarantee the necessary safeguards for the applicant to enjoy her rights guaranteed by Article 8 of the ECHR.[66]

Additionally, in the *V.C.* v. *Slovakia* case the ECtHR found that there had been a violation of Article 3 of the ECHR, resulting from the aforementioned lack of informed consent: the applicant was asked to sign a note stating that she requested sterilisation while she was in pain from labour, without understanding what the term "sterilisation" entails[67] and after being told that in the event of a future pregnancy either she or the baby would die.[68] Thus, in the view of the ECtHR the situation could have reasonably led to her feelings of "fear, anguish and inferiority" and led to long-lasting suffering, in particular since, according to the applicant, her infertility had led to her divorce and she suffered medical and psychological after-effects from the procedure; furthermore, her inability to have children led to her being ostracised within her community.[69] Consequenly, the ECtHR held that the medical personnel of the hospital had "displayed gross disregard for her right to autonomy and choice as a patient" and therefore the severity of the treatment to which the applicant had been subjected reached the threshold to rule that there had been a violation of Article 3 of the ECHR.[70] It is evident that in this case the ECtHR acknowledged a broad range of arguments from the applicant, varying from impact on her emotional well-being, to her marital life and her social life within her community as ones contributing to her suffering, which in conjunction reached the threshold for her non-consensual sterilisation to be classifed as a violation of Article 3.

A more recent case regarding forced sterilisations is the *Y.P.* v. *Russia* case (2022) where some of the findings from the *V.C.* v. *Slovakia* case are applied. The applicant was sterilised in a public hospital during an emergency delivery by Caesarean section. The doctors found a rupture of her uterus and, while initially they discussed proceeding with surgery without removing the uterus, it was decided that after two surgical interventions on the uterus there was a risk that the uterus would rupture in a future pregnancy.[71] Consequently, the doctors decided to suture up the rupture and to sterilise the applicant in order to prevent her from getting pregnant in the future, since they believed that another pregnancy could put her life at risk.[72] The ECtHR noted that the applicant had signed a consent form prior to her surgery that explicitly excluded sterilisation. Similarly to the *V.C.* v. *Slovakia* case, the ECtHR noted that, although performing a medical procedure on a patient without the patient's informed consent may be considered in an emergency situation, generally sterilisation cannot be considered a life-saving medical intervention and no emergency was established in the case, as a threat to the applicant's health or life could only materialise in the future, thus it was not imminent.[73] The ECtHR also noted that other, less intrusive means were possible, though it did not specify

[65] *V.C.* v. *Slovakia* case, *supra* note 13, para. 152-154.
[66] *Ibid.*, para. 154.
[67] *Ibid.*, para. 15.
[68] *Ibid.*, para. 117.
[69] *Ibid.*, para. 118.
[70] *Ibid.*, para. 119-120.
[71] *Y.P.* v. *Russia*, no. 43399/13, 20 September 2022, para. 11.
[72] *Ibid.*, para. 52.
[73] *Ibid.*, para. 53-55.

what these methods are (yet, it is clear that, for example, if the applicant did not become pregnant in the future, any reproductive risk to her health would not materialise). Therefore,

> the applicant's informed consent could not be dispensed with on the basis of an assumption on the part of the hospital staff that she would act in an irresponsible manner with regard to her health in the future.[74]

With this passage the ECtHR cited the aforementioned *V.C.* v. *Slovakia* case where no decisive weight was attached to the Slovakian government's argument that the applicant's pregnancy history, including her failure to undergo regular natal checkups, could pose a threat to her life in the future if she were to go through another pregnancy.[75]

Thus, the ECtHR has established a clear framework for cases relating to forced sterilisation, which interferes with a person's reproductive rights and thus the possibility of choosing to have (genetically related) children.[76] Moreover, it is established that the right to respect for private life includes positive obligations for the State Parties in the reproductive sphere such as the obligation to ensure that the pregnant woman is "adequately informed about and involved in decisions regarding medical treatment in the reproductive sphere."[77] A mentally competent adult person's medical history and speculation that the patient may behave irresponsibly and carelessly towards their health cannot be used as an argument in support of non-consensual medical intervention (however, the analysed case law does not provide insight into whether the legal analysis would be different in situations where the patient is not a mentally competent adult), nor can preventitive medical intervention aimed at averting a future health risk be carried out without the informed consent of the person.

2.3. Compulsory body fluid and genetic material testing (blood, DNA, urine sample testing)

Within the framework of this bachelor thesis, compulsory medical intervention includes testing procedures during which body fluid or genetic material is obtained from the person in question. Even when such procedures do not leave an impact on the person's health or medical status, body fluid and genetic material testing procedures interfere with a person's bodily integrity and are subject to certain medical standards. Thus, within the context of compulsory medical interventions and the right to respect for private life it is necessary to examine in which circumstances is an obligation imposed on a person to undergo body fluid testing (e.g. blood, urine, saliva) and other genetic material testing (e.g. hair follicle) permissible under Article 8 of the ECHR.

The viewpoint in favour of covering testing under medical intervention is supported by the case *Peters* v. *the Netherlands* (1994), in which the ECtHR noted that "a compulsory medical intervention, even if it is of minor importance, must be considered an interference." Accordingly, in this case the ECtHR ruled that compulsory urine testing – which was ordered for the applicant by the authorities of the prison where he was imprisoned at the time in order to test prisoners for drugs – constitutes an interference with the right to respect for the

[74] *Y.P.* v. *Russia* case, *supra* note 71, para. 55.
[75] *V.C.* v. *Slovakia* case, *supra* note 13, para. 113.
[76] van Dijk *et al.*, *supra* note 19, p. 697.
[77] van Dijk *et al.*, *supr*a note 19, pp. 697-698.

applicant's private life.[78] The ECtHR ultimately ruled that there was necessity under Article 8(2) of the ECHR for such mandatory urine testing, "having regard to the ordinary and reasonable requirements of imprisonment." The ECtHR cited the prevention of disorder or crime as the legitimate aim from Article 8(2) of the ECHR which may justify using more severe interferences for prisoners.[79] However, the ECtHR did not establish strong arguments regarding the applicability of this aim, nor did it balance it with the interests of the applicant. Since the applicant was imprisoned at the time, the likelihood of him having access to drugs or the interference with his body autonomy having a strong impact on the prevention of crime and disorder (as he was already located in a secured, guarded prison) would have to be analysed in greater detail. The ECtHR reached the same conclusion in the case *Galloway* v. *the United Kingdom* (1996), also related to urine testing in a prison, where it noted that access to drugs in prison was a noteworthy problem and that random testing for drugs in the prisoners' system was a valid tool for the authorities to use to tackle this problem.[80]

In the *Mifsud* v. *Malta* case (2019) the ECtHR examined whether an obligation imposed on the applicant to undergo a DNA test (a buccal swab) in order to determine the paternity of a woman, X, was in accordance with the right to respect for private life. The ECtHR found an interference with the right to respect for private life, referring to its previous rulings where it had found that

> the taking of cellular material and its retention and the determination and retention of DNA profiles extracted from cellular samples constitute an interference with the right to respect for private life.[81]

In this regard, the ECtHR emphasised the importance of the fact that the order or the testing itself were carried out despite objections from the person in question; to contrast this argument, the ECtHR referenced the *Cakicisoy and Others* v. *Cyprus* case where the applicants had consented to submitting their genetic material samples for testing and therefore a violation of Article 8 was not found. However, in this case the ECtHR found that there was a legitimate interest under Article 8(2), namely, the interests of X whose paternity was to be determined and who was attempting to establish that the applicant was her biological father.[82] In this regard the ECtHR noted that the right to respect for private life under Article 8 of the ECHR entails that

> everyone should be able to establish details of one's identity as an individual human being and that an individual's entitlement to such information is of importance because of its formative implications for his or her personality.[83]

This right, the ECtHR noted, includes the right to discover the identity of one's parents, as it has implications for the person's own identity.[84] Furthermore, focusing on the fact that the applicant's main arguments revolving around the equality-of-arms principle, namely, claiming that his rights were not respected to the same extent as those of X,[85] the ECtHR found that in this specific case the interests of the applicant had been balanced with those of X, particularly since the applicant's defence rights were respected during the judicial proceedings at the

[78] *Peters* v. *the Netherlands* case, no. 21132/93, 6 April 1993.
[79] *Ibid.*
[80] *Galloway* v. *the United Kingdom* case, no. 34199/96, 9 September 1998.
[81] *Mifsud* v. *Malta*, no. 62257/15, 29 January 2019, para. 54
[82] *Ibid.*, para. 65.
[83] *Ibid.*, para. 65.
[84] *Ibid.*
[85] *Ibid.*, para. 68.

national level to the same extent as those of X[86] and his objections heard by the courts before ordering the test to be carried out.[87]

2.4. Medical non-intervention (refusal of medical intervention)

In relation to compulsory medical interventions, it is worthwhile to examine the legal framework for medical non-interventions under Article 8 of the ECHR. Within this context and the scope of this bachelor thesis, medical non-intervention means situations where medical intervention was possible in theory (for example, the relevant medication or medical procedure was available in the state where the person was located, such as legislation providing for the possibility to carry out assisted suicide in Switzerland or abortion which is (was) permitted in most European countries) but was either prohibited by law or disallowed for the person in question, for example, by the doctor under whose care the person was (or both). In this regard, particular importance can be drawn to the right to decide how and when to die (a right that the ECtHR recognises, as will become evident in the case law analysed below),[88] in which case the legal framework may be similar in both medical intervention (the person being offered or compelled to consent to life-prolonging treatment, even if the quality of life attained through such intervention is relatively low) or medical non-intervention (the person being refused assisted suicide, euthanasia or other medical intervention which may result in the person's death). The author considers that a similar framework as that for compulsory medical interventions exists for medical non-interventions in regards to the right to respect for private life, particularly since Article 8 of the ECHR provides that the State Parties have certain positive obligations in the forms of adopting appropriate legislation to protect the persons within their jurisdiction from arbitrary interference in their private life and to guarantee effective respect of private life.[89]

The case *Pretty* v. *the United Kingdom* (2002) sets an important precedent regarding the right to a dignified death and assisted suicide. The applicant was suffering from motor neurone disease (MND), an incurable degenerative disease that had left her paralysed from the neck down and that usually leads to respiratory failure and pneumonia and, ultimately, death.[90] Her life expectancy at the time was a few weeks or months (notably, the applicant died shortly after the judgment at the ECtHR).[91] The applicant wished to commit suicide with the help of her husband as she was afraid of the last stages of her disease and wished to avoid the "suffering and indignity" associated with this. Suicide as such was not prohibited by English law at the time; however, assisting another person to commit suicide was, and the applicant herself due to her medical condition was physically unable to commit suicide herself. For this reason, she wanted assistance from her husband, as well as safeguards to ensure that her husband would not be prosecuted later for this assistance.[92]

[86] *Mifsud* v. *Malta*, *supra* note 81, para. 77.
[87] *Ibid.*, para. 74.
[88] Isra Black, "Refusing Life-Prolonging Medical Treatment and the ECHR," *Oxford Journal of Legal Studies*, Volume 38, Issue 2 (Summer 2018), p. 300.
[89] Corlățean, *supra* note 18, pp. 14-15.
[90] *Pretty* v. *the United Kingdom*, no. 2346/02, ECHR 2002-III, para. 7.
[91] *Ibid.*, para. 8.
[92] *Ibid*., para. 8-10.

The ECtHR found that there had been a violation of Article 8 of the ECHR in the refusal to allow the applicant assisted suicide. The ECtHR noted that, although refusal to accept medical treatment may have a fatal outcome, nonetheless imposing medical treatment on a person who is a mentally competent adult interferes with this person's physical integrity, thus interfering with the person's right to exercise its rights under Article 8(1) of the ECHR, and whether the person intended for its refusal of medical treatment to result in death is not a decisive factor. [93] Although in this case the issue is not related to medical treatment which may prolong the person's life, the ECtHR, referring to English case law related to exercising the choice to die by refusing life-prolonging treatment, found a similar right for the applicant in this case. Thus, the ECtHR supported the notion of a similar framework existing in cases of medical intervention and medical non-intervention. The ECtHR noted that human dignity and human freedom (which the applicant used to support her argumentation, particularly since she invoked both Article 3 and 8), as well as the principle of sanctity of life, is protected under the ECtHR but nonetheless "it is under Article 8 that notions of the quality of life take on significance." In this regard, the ECtHR referred to a case from the Supreme Court of Canada with similar facts where the appellant was prohibited from carrying out assisted suicide and where the Supreme Court found a violation of the appellant's personal autonomy. Consequently, the ECtHR found that there had been a violation of Article 8 of the ECHR in the prohibition for the applicant to avoid, in the applicant's opinion, "an undignified and distressing end to her life." It can be noted that its wording in this regard is subtle: it is stated that the ECtHR "is not prepared to exclude that this constitutes an interference with [the applicant's] right to respect for private life."

However, in the second part of its two-fold examination the ECtHR found that the interference was justified under Article 8(2) of the ECHR under the exception for the protection of the rights of others. The ECtHR held that, although in this case the applicant, based on the facts of the case, could not be regarded as vulnerable and requiring protection,[94] the ability to take informed decisions (such as ones related to ending life or assistance to end life) among terminally ill patients varies, therefore many such patients will be considered vulnerable and there is a risk of abuse if a precedent was created or regulations regarding assisted suicide relaxed.[95] Accordingly, the ECtHR found the English legal framework proportionate: namely, a blanket ban on assisted suicide but flexibility for each individual case when it came to the penalties imposed on the persons who had provided assistance for the suicide (who would be the applicant's husband in this case), as well as refusal to give a guarantee in advance that the applicant's husband would not be prosecuted for the assistance in her suicide. The ECtHR's argumentation in this regard is flawed and considering that a judgment regarding a mentally competent adult person's entitlement to a dignified death would lead to abuse of this right is merely correlation, not causation. While the impact of singular case law on systemic issues cannot be excluded fully, this argument does not reach the same threshold for justifying an interference as the case law examined in the previous subchapters.

In contrast to the *Pretty* case, the ECtHR did not find a violation of Article 8 of the ECHR in the case *Haas* v. *Switzerland* (2011) where the applicant was suffering from serious mental illness (bipolar affective disorder) and wished to obtain a lethal prescription substance to end his life, but was unable to obtain this prescription.[96] The ECtHR did not find an

[93] *Pretty* v. *the United Kingdom* case, *supra* note 90, para. 63.
[94] *Ibid*.,, para. 73.
[95] *Ibid*.,, para. 74.
[96] *Haas* v. *Switzerland*, no. 31322/07, 20 January 2011, para. 7.

infringement of the applicant's right to respect for private life and, referring to the *Pretty* case, made the distinction that the Pretty case concerns "the freedom to die" while the *Haas* case deals with the question of whether the state must ensure that the applicant can obtain a lethal substance without a prescription in order to commit suicide "painlessly and without risk of failure."[97] While the fact that the applicant in this case was not experiencing physical suffering cannot be understated, nonetheless, it is clear from the facts of the case that he was suffering mentally and suicide to the contrary, meaning potentially painful and with risk of failure would entail more suffering. Since the ECtHR has already stated that the choice to die and the circumstances in which to die are a matter of the right to respect for private life, including in the *Pretty* case where an interference was found, the reasoning behind not finding an interference remains unclear. If such interference was found, an examination of the Swiss law regulating assisted suicide and the margin of appreciation would still remain to be analysed, in which case a legitimate aim for such restriction could have been found (including a legitimate aim for the policy which provides that lethal substances cannot be provided without a medical prescription). Thus, it is not excluded that the ECtHR may have arrived at the same conclusion but nonetheless giving more recognition and respect for the applicant's rights, such as his personal autonomy, bodily integrity and dignity in the choice of how and when to die.

Another situation where refusal of medical intervention may violate a person's right to respect for private life is within the reproductive sphere, namely relating to abortion. In the case *A, B and C* v. *Ireland* (2010) the three applicants who resided in Ireland had abortions in the United Kingdom because abortion in Ireland was unlawful at the time. The ECtHR acknowledged that there is a consensus among CoE member countries that abortion may be allowed on broader grounds than merely for the pregnant woman's health (with Ireland being the only CoE country that allowed abortions only in very specific cases related to critical health complications for the woman)[98] and found an interference with the applicants' right to respect for private life.[99] Nonetheless, the ECtHR noted that Ireland has a broad margin of appreciation in regulating abortion[100] and that this margin of appreciation is not narrowed down by the aforementioned general consensus among the CoE countries.[101] The ECtHR found that the restriction on abortions pursued the legitimate aim within the scope of Article 8(2) of the ECHR of protection of morals, which in Ireland included the protection of "the life of the unborn."[102] As one of the reasonings for why Ireland retained a broad margin of appreciation regarding its abortion ban was also noted that women could travel abroad to get abortions and obtain information regarding abortions abroad, as well as receive medical care pre- or post-abortion.[103] For applicant C, however, the ECtHR found a violation of her right to respect for private life, as legislation did not provide for a procedure in which she could establish whether she qualified for lawful abortion in Ireland for health reasons:[104] she had cancer which was in remission and which may or may not return during pregnancy and undergoing chemotherapy during pregnancy would be dangerous for the foetus.[105]

[97] *Haas* v. *Switzerland* case, *supra* note 96, para. 52.
[98] *A, B and C* v. *Ireland*, no. 25579/05, 16 December 2010, para. 235.
[99] *Ibid.*, para. 216, 246.
[100] *Ibid.*, para. 233.
[101] *Ibid.*, para. 234-236.
[102] *Ibid.*, para. 227.
[103] *Ibid.*, para. 239.
[104] *Ibid.*, para. 267.
[105] *Ibid.*, para. 23-24.

However, the argument that, given the supposed strong pushback from the Irish people against legalising abortion, information regarding abortions in Ireland is freely provided nonetheless is faulty, as in practice this regulation merely hinders women's ability to receive an abortion without fulfiling a substantial purpose. Travelling abroad is not a simple solution if the women in question do not have the financial means to travel abroad or are otherwise at a socioeconomic disadvantage and therefore vulnerable, as was argued by one of the applicants who had to borrow money at a high interest rate to travel abroad. Nor does the ECtHR generally recognise "travelling abroad" as an appropriate tool for ensuring respect for applicants' human rights if this respect is not met at the responding state in question. Furthermore, broadening the margin of appreciation due to a broader conception of the right to life (as Irish law essentially recognises the right to life for foetuses) sets a dangerous precedent due to the effect that this has on another person's fundamental human rights. The argument regarding the moral standards of the Irish people was based on public polls and opinions, which cannot be deemed an appropriate way to determine whether an individual person's right to bodily integrity is permissible. Valuing public interest over the right to respect for private life and body autonomy of an individual, particularly a public interest that does not impact other persons besides the individual on whom the abortion would be performed, sets a dangerous precedent where an individual's rights may not be respected to their fullest extent that they deserve.

The joint partly dissenting opinion of six judges disagreed with the finding of the ECtHR that there was no violation of Article 8 for the first two applicants. These judges argued that the question was not that of "when life begins" but rather that of balancing the right to life of the foetus against that of the woman, as well as the woman's right to personal autonomy. In this regard, a consensus in Europe exists that the foetus' rights may weigh less than the woman's.[106] In its proportionality test the ECtHR should have analysed two elements: first, whether there was a European consensus; second, the sanctions under Irish law if abortion is carried out in Ireland.[107] Because of the strong European consensus the ECtHR could not award Ireland a wide margin of appreciation,[108] and by stating that the applicants could get abortion abroad the ECtHR had shifted away from the core issue – balancing the rights of the foetus and the rights of the woman. The argument that there was the option to travel abroad, which, the partly dissenting judges recognised was a financially and practically arduous option, did not suffice to justify the interference with the applicants' rights.[109] The "profound views" regarding "the nature of life" of the Irish people overriding the European consensus and thus allowing Ireland to have a wide margin of appreciation is a departure from the ECtHR's case law, as, the judges noted, the ECtHR had never before disregarded a strong European consensus on the basis of "profound moral views."[110]

Consequently, a conclusion regarding medical non-intervention can be drawn that the ECtHR generally does not recognise the right to receive medical intervention as such, whether related to assisted suicide or abortion (the latter of which is arguably life-altering and therefore an issue that interferes with the most personal and private aspects of a person's private and family life). However, given the positive rights that State Parties have towards people within their jurisdiction to ensure their human rights, it is important to establish a legal framework that

[106] Joint partly dissenting opinion of Judges Rozakis, Tulkens, Fura, Hirvelä, Malinverni and Poalelungi in the case *A, B and C* v. *Ireland*, no. 25579/05, 16 December 2010, para. 2.
[107] *Ibid.*, para. 3
[108] *Ibid.*, para. 6
[109] *Ibid.*, para. 7-8.
[110] *Ibid.*, para. 9

provides for such rights or more thoroughly establishes why such a framework is not feasible, particularly nowadays when medical advancements are made every day and increasingly more medical procedures are becoming available that may drastically alter a person's life. Moreover, these medical procedures are constantly improved so that, for example, assisted suicide may be carried out in the most painless and dignified way for the person in question, while abortions have relatively rare side effects, as long as these procedures are carried out by medical professionals rather than sought out through unlawful means, since persons in such vulnerable positions may go through with the procedures nonetheless but without the safety and dignity provided by medical professionals or the appropriate legal safeguards. Since cases relating to reproductive rights and abortion were examined above, it has to be noted that the ECtHR has afforded the State Parties a similarly wide margin of appreciation in the cases of assisted reproduction in determining under what circumstances and what type of technology may be offered to people who wish to use assisted reproduction techniques such as IVF.[111] Thus, in general the ECtHR maintains a fairly neutral viewpoint regarding both the right to receive an abortion and the right to assisted reproduction, though giving stronger support to the former.

[111] van Dijk *et al.*, *supra* note 19, pp. 698-699.

CHAPTER 3: LATVIAN CASE LAW REGARDING MEDICAL INTERVENTION AND THE RIGHT TO RESPECT FOR PRIVATE LIFE

3.1. Latvian case law

An analysis of national case law regarding the right to respect for private life and medical interventions provides an additional perspective regarding how this right is protected at a national level by a State Party of the CoE. Since, in the author's view, analysis of case law in the original language and the author's familiarity with the legal and political background of a country gives legal analysis additional nuance, the author focuses on Latvian case law as the national case law example in this chapter. Latvia joined the CoE on 10 February 1995 and signed the ECHR on the same date; it ratified the legal instrument on 27 June 1997,[112] thus becoming bound by its provisions. Consequently, on 15 October 1998 Latvia adopted amendments to its Constitution that entered into force on 6 November 1998, including a chapter on fundamental human rights that was based on the text of the ECHR and enshrines the rights provided in the ECHR (the right to life, prohibition of discrimination, and others) within the Latvian Constitution. This amendment includes Article 96 which succinctly provides that "[e]veryone has the right to inviolability of his or her private life, home and correspondence." Meanwhile, Article 116 of the Latvian Constitution provides that some of the constitutional rights provided therein

> may be subject to restrictions in circumstances provided for by law in order to protect the rights of other people, the democratic structure of the State, and public safety, welfare and morals.[113]

While the Latvian Constitution was adopted on 15 February 1922, only twelve years later – in 1934 – an authoritarian regime was established in Latvia, which, though less strict and detrimental to fundamental human rights than the communist regime that followed during the Soviet Occupation and not characterised by policies aimed at restricting body autonomy specifically or regulation in the medical sphere, affected political rights and minority rights.[114] 1939 marked the beginning of the first Soviet occupation, in 1941 Latvia was occupied by Nazi Germany, and from 1945 Latvia until regaining its independence Latvia was under Soviet rule. During these occupations many human rights standards were violated, thus, this historical context did not contribute to the establishment of a legal framework for human rights in Latvia after regaining independence.

As of the time that this bachelor thesis was written the Constitutional Court of Latvia and the Supreme Court of Latvia have not examined a large number of cases regarding medical intervention and the right to respect for private life. This can be explained by the fact that Latvia ratified the ECHR recently compared to the countries that founded the CoE and a number of Western European countries that ratified the ECHR in the early 1950s, as well as the historical background of Latvia having been under Soviet occupation from 1945 until 1991, during which the totalitarian regime did not allow for progress within the constitutionalisation of human

[112] Council of Europe, *Chart of signatures and ratifications of Treaty 005 - Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 005) (Status as of 22/04/2023)*, available on: https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=005. Accessed April 22, 2023.

[113] Latvijas Republikas Satversme (The Constitution of the Republic of Latvia) (15 February 1922), available on: http://www.saeima.lv/en/legislation/constitution/. Accessed April 22, 2023.

[114] Ineta Ziemele, *Cilvēktiesības pasaulē un Latvijā (Inetas Ziemeles zinātniskā redakcijā, Otrais papildinātais izdevums)* (Rīga: Tiesu nama aģentūra, 2021), pp. 348-350.

rights. Moreover, Latvia ratified the Oviedo Convention, thus taking the significant step of recognising human integrity and human rights explicitly in the sphere of biomedicine, only in 2010, compared to a range of countries that ratified the Oviedo Convention in late 1990 or early 2000s.

Nonetheless, Latvian case law gives a noteworthy national perspective regarding medical intervention and the right to respect for private life. One case that falls within the scope of this bachelor thesis is the Latvian Constitutional Court case No. 2015-14-0103. Namely, the applicant – who at the time was a suspect in criminal proceedings – refused to submit his biological material (DNA sample) for profiling and storing his DNA in the national DNA database.[115] The subject matter of the case was examined through the lens of personal data and specific aspects of the criminal procedure, rather than the procedure in which DNA is obtained (from a medical and human rights point of view) or the applicant's right to body autonomy in this regard which were the predominant issues in the ECtHR case law that was examined in the previous chapter. Nonetheless, it is noteworthy that the Constitutional Court found that the right to respect for private life within Article 96 of the Latvian Constitution includes the protection of personal data, which extends to the collection of biological material (DNA). Notably, such data require special protection due to their sensitive nature.[116] Furthermore, the Constitutional Court found a violation of the applicant's fundamental rights, namely, the right to respect for private life.[117]

Ultimately, the Constitutional Court held that there was a legitimate aim that justified the collection of the applicant's DNA – the protection of public safety and the rights of others, as the collection of DNA was carried out for establishing a DNA database that helps with crime prevention and detection.[118] Though the Constitutional Court did not refer to Article 8(2) of the ECHR directly, it referred to ECtHR case law and the text of the Latvian Constitution (its section on fundamental rights), which is adopted from the ECHR. However, in the author's view, the proportionality test used by the Constitutional Court to balance the interests of the applicant against those of the protection of public safety and the rights of others is insufficient. The applicant considered that collecting the DNA of suspects in criminal proceedings is contrary to the principle of presumption of innocence.[119] To this argument the Constitutional Court's only counterargument is that DNA profiling of suspects is an appropriate tool in criminal investigation without delving deeper into how this DNA profiling may affect the interests of the applicant specifically or suspects in criminal proceedings in general (as suspects may turn out to be innocent). An examination of how a restriction on bodily integrity affects the person in question, not only health-wise but also, for example, socially, has been widely done in ECtHR case law, as analysed in the previous chapter (for example, the ECtHR had noted the impact of interference with a person's reproductive health on the said person's social life).

The insufficient character of the Constitutional Court's reasoning is also noted in the individual opinion of Judge Aldis Laviņš, namely, that the Court did not examine whether there were less restrictive means to achieve the aforementioned legitimate aim and that the inclusion

[115] The Constitutional Court of the Republic of Latvia (*Latvijas Republikas Satversmes tiesa*), judgment in the case No. 2015-14-0103, 12 May 2016, para. 2, available on: https://www.satv.tiesa.gov.lv/wp-content/uploads/2015/06/2015-14-0103_Spriedums.pdf. Accessed April 18, 2023.
[116] *Ibid.*, para. 15.1.-15.3.
[117] *Ibid.*, para. 16.3.
[118] *Ibid.*, para. 22.
[119] *Ibid.*, para. 23.1.

in the national DNA database of persons who are not known to have committed or to intent to commit a criminal offence (such as suspects in criminal proceedings, as in the applicant's situation) does not contribute to the protection of public security and the rights of others, thus there is no direct link between the number of entries in the national DNA database and the level at which the legitimate aim is ensured, as the Constitutional Court had argued.[120] Furthermore, Judge Laviņš referred to CoE Recommendation No. R (92) 1 of the Committee of Ministers to the Member States on the use of analysis of deoxyribonucleic acid (DNA) within the framework of the criminal justice system, section 4(2), where it is stated that DNA samples from a suspect, if the national law permits for DNA samples to be obtained without the suspect's consent, should only be collected "if the circumstances of the case warrant such action,"[121] as well as the principle of data minimisation within the context of data protection.[122] The circumstances of the criminal proceedings were not addressed in the Constitutional Court's judgment at all, nor did the Court explain how the DNA of persons who have not been found guilty in criminal proceedings contributes to the legitimate aim.

The Supreme Court of Latvia has contributed to establishing case law that is relevant to medical intervention and biomedicine within the scope of the right to respect for private life. In the case SKA-166/2020 the Supreme Court examined the right of the relative (daughter) of a deceased person to request that a blood sample that had been collected from the deceased person for forensic medical examination in criminal proceedings be destroyed. The collection of blood samples constitutes a medical intervention under the definition for medical interventions used within this bachelor thesis. In this judgment, the Supreme Court for the first time explicitly recognised that the right to respect for private life within the scope of Article 96 of the Latvian Constitution and with regard to Article 8 of the ECHR, includes the tissue samples of a person, as part of the human body, and the right to control how these samples are handled, including the procedure in which these samples are stored (and disposed of when necessary).[123] Accordingly, the Supreme Court noted that there exists a constitutional requirement to treat the human body with respect after the person's death, as established in its previous case law, and this right is applicable also to parts of the body, including tissue samples. Since disrespectful treatment of a deceased person's body may cause moral suffering and emotional distress to its closest relatives, the Supreme Court in this judgment recognised that the relatives of a deceased person have the subjective right to demand respectful treatment of the body of their deceased relative.[124]

In the case of tissue samples, particular attention has to be paid to the fact that analysis of tissue samples may reveal information regarding the relatives of the deceased person, namely, hereditary genetic diseases or predisposition to certain diseases, lineage, ethnic origin and other aspects, which contributes to the establishment of the subjective rights of relatives,

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[120] Satversmes tiesas tiesneša Alda Laviņa atsevišķās domas lietā Nr.2015-14-010 (Separate opinion of Aldis Laviņš, Judge of the Constitutional Court, in the case No. 2015-14-010), 26 May 2016, p. 14. Available on https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2015/06/2015-14-0103_Atseviskas_domas_Aldis_Lavins.pdf. Accessed April 22, 2023.

[121] Council of Europe. *Recommendation No. R (92) 1 of the Committee of Ministers to the Member States on the use of analysis of deoxyribonucleic acid (DNA) within the framework of the criminal justice system* (1998). Available on: https://rm.coe.int/09000016804e54f7. Accessed April 22, 2023.

[122] Laviņš, *supra* note 120, pp. 14-15.

[123] Department of Administrative Cases of the Senate of the Republic of Latvia (Latvijas Republikas Senāta Administratīvo lietu departaments), judgment in the case SKA-166/2020 (case no. A420260716), 30 September 2020, para. 8.3.

[124] *Ibid.*, para. 9.4.

in particular their right to respect for private life.[125] However, the latter argument is relevant only for relatives who are biologically related to the deceased person in question, thus, for example, spouses, adopted children or other persons who shared a close personal relationship cannot claim such personal interest in the genetic material; nonetheless, the former argument regarding potential emotional distress for a person whose deceased relative and their body does not receive dignified treatment does not exclude persons who are not genetically related to the deceased individual. The case primarily deals with the rights of relatives, rather than the rights of the person in question. Though the right to dignified posthumous treatment of a person's body as a right of the deceased person itself was briefly touched upon, the impact of this judgment on legal analysis of the full scope of the posthumous rights of a person remains limited.

In light of the legislative and human rights issues surrounding the COVID-19 pandemic, certain developments have already occurred in the case law of the Supreme Court and the Constitutional Court of Latvia that may lead to more extensive case law on body autonomy in regards to an obligation to obtained vaccination during a pandemic. In late 2021 the Cabinet of Ministers issued an order which included the provision that employees who perform their work duties on site must present a COVID-19 vaccination or recovery certificate as of 15 December 2021,[126] an order which is no longer in force as of 1 March 2022.[127] The Supreme Court in its decision in the case SKA-605/2022 established that all workers who at the time were performing their work duties on site have the subjective right to bring a claim to court regarding the obligations and restrictions that were imposed on them based on this order from the Cabinet of Ministers, including claims regarding the duty to show a valid COVID-19 vaccination or recovery certificate.[128]

As of the time that this bachelor thesis was written, in the proceedings remains a case in the Constitutional Court of Latvia regarding a law that imposed an obligation on members of the Parliament of Latvia (*Saeima*) to present a COVID-19 vaccination or recovery certificate or, alternatively, a specialist opinion on the necessity to postpone vaccination for a definite period of time along with a negative test result.[129] Furthermore, a member of the *Saeima* who had not obtained the aforementioned certification was not entitled to participate in the work of the *Saeima* and receive their salary for the time period that the necessary certification was not presented.[130] One such member of the *Saeima* who had not obtained the certificate and therefore was prohibited from working and did not receive her salary initiated proceedings in the Constitutional Court, invoking Article 96 of the Latvian Constitution in regards to the right to respect for private life.[131] Notably, the *Saeima* has argued that the choice of the member of the *Saeima* not to obtain the necessary certificate creates a burden on the society, potential risks

[125] SKA-166/2020, *supra* note 123, para. 10-11.
[126] Department of Administrative Cases of the Senate of the Republic of Latvia (*Latvijas Republikas Senāta Administratīvo lietu departaments*), decision in the case SKA-605/2022 (case no. 680102821), 8 February 2022, para. 7.3.
[127] Latvijas Republikas Ministru kabinets (The Cabinet of Ministers of the Republic of Latvia), Order No. 720, (9 October 2021), available on: https://likumi.lv/ta/en/en/id/326729-regarding-declaration-of-the-emergency-situation. Accessed March 8, 2023.
[128] SKA-605/2022, *supra* note 126, para. 8.
[129] Second Panel of the Constitutional Court of the Republic of Latvia (Latvijas Republikas Satversmes tiesas kolēģija), decision to initiate proceedings in the case No. 2022-20-01, 7 June 2022, para. 2.1, available on: https://www.satv.tiesa.gov.lv/wp-content/uploads/2022/06/2022-20-01_lemums_par_ierosinasanu-1.pdf. Accessed November 28, 2022.
[130] *Ibid.*, para. 2.2.
[131] *Ibid.*, para. 1.1.

and harm to others, as well as costs for the State and for health care institutions; additionally, the *Saeima* argued that the other measures implemented beforehand had not been effective in containing the spread of COVID-19, therefore such more restrictive measures were necessary. Depending on the outcome of this case, it may offer valuable case law regarding the balancing of the right to respect for private life (as well as body autonomy in this regard) and the obligation to get vaccinated, either in the interests of the protection of public health, as could be argued due to the highly infectious nature of COVID-19 and other contagious viruses, particularly airborne viruses.

3.2. CONCLUSIONS REGARDING LATVIAN CASE LAW

The fact that Latvia ratified the ECHR only in 1997 after officially regaining its independence on 21 August 1991, compared to numerous Western European countries which had ratified the ECHR as early as the 1950s may contribute to Latvia's limited case law relating to human rights codified in the ECHR. Furthermore, Latvia's limited case law regarding human rights within the biomedical sphere may be partially attributed to the fact that Latvia ratified the Oviedo Convention in 2010, while some countries ratified it in the late 1990s or early 2000s and some of the founders of the CoE as of 2023 still have not ratified the Convention, namely, Italy, Ireland, the United Kingdom, Sweden, Luxembourg, and Belgium.[132] Thus, unlike with the ECHR, there does not exist a consistent approach regarding the protection of human rights in the biomedical sphere under binding international legal instruments in Europe.

During the 1990s and 2000s, Latvia faced many of the same issues related to transitional justice and transitioning to democracy that other CEE countries did. For example, there was the lack of a rule of law, ensuring the competence and independence of the judiciary took time, lack of trust in the judiciary from the general Latvian population, based on previous experiences under the rule of a totalitarian regime, remained a problematic aspect.[133] This mistrust may have contributed negatively to the number of applications made to judicial institutions by persons who may have believed their human rights to be infringed and thus impeding the speed at which case law was established. Furthermore, Latvia has encountered a range of issues related to the social and political rights of the minorities in Latvia (such as citizenship rights), particularly in relation to the ethnic Russian minority as the transition was made from two official state languages – Latvian and Russian – to Latvian as the only language; this ethnic and language-related division was only highlighted when Latvia applied for membership in the CoE.[134] Thus, Latvia has undergone a transition period, however, the existing range of case law displays a trend towards development in the Latvian jurisprudence on medical intervention, bodily integrity and the right to respect for private life.

[132] Council of Europe, *supra* note 8.
[133] Inga Švarca, "Transitional Justice Mechanisms Applied by Latvia in Its Transition from Communist Regime," *Hitotsubashi Journal of Law and Politics* 40 (2012), p. 64.
[134] *Ibid.*, p. 65.

CONCLUSION

In conclusion, informed consent and body autonomy are essential requirements in order to perform medical intervention under human rights law and biomedical law. Compulsory medical interventions may be permissible under Article 8 of the ECHR if these interventions satisfy the requirements listed in Article 8(2) of the ECHR. In practice, from the possible legitimate aims that may justifify interference with the right to respect for private life within the context of medical interventions, the aims of the protection of health, the prevention of crime and disorder and the protection of the rights and freedoms of others are invoked in practice in ECtHR case law. Namely, the aim of safeguarding public health is invoked and has been recognised justifiable in the context of, for example, mandatory vaccination policies for children against well-known diseases. Meanwhile, the protection of the right to determine one's paternity may justify compulsory DNA tests. In addition, from the range of case law that was examined in this bachelor thesis, the protection of morals has been invoked once in regard to medical non-intervention, namely denial of an abortion procedure for the applicants, and the right to respect for private life. However, this approach of justifying interference with a person's right to respect for private life due to strong moral views within the relevant state has been criticised by separate judges in light of a strong consensus among the CoE countries on the issue, meaning that there is a wider range of situations where abortions may be permissible than merely in life-threatening circumstances. Thus, in practice some of the legitimate aims listed in Article 8(2) have more bearing in regard to medical interventions while others either have less relevance and some, such as national security, as of now, have not been referred to at all in the available case law.

Medical non-intervention has a similar framework and there may be the necessity for a similar balancing between refusal to perform medical intervention on a fully informed, consenting adult person when such medical intervention is in practice possible to carry out in the given country and medical institution. In regards to refusal to perform medical intervention, morality – in particular, the sanctity of life and the life of the unborn – is given higher weight than in regards to compulsory medical intervention, though in both situations there may be urgency or the medical intervention may be life-altering for the person involved and the compulsory performance or the prohibition of the performance of the medical intervention that the person desperately wants may likewise cause certain distress for the person. However, it has to be noted that within this bachelor thesis medical non-intervention was only examined on specific, highly sensitive and contentious issues. Thus, the analysis contained in this bachelor thesis does not exclude that it may prove more difficult to find a legal basis for a human right to receive medical intervention in less sensitive cases or for interventions that have more minor consequences, particularly medical procedures that are not essential for safeguarding the person's health or life – meaning, medical interventions that are not medical treatment for a specific illness as typically provided for patients in a hospital setting, nor interventions carried out in life-threatening circumstances.

Latvian case law on medical intervention and the right to respect for private life gives insight into the application of Article 8 of the ECHR in practice (this provision is codified in Article 96 of the Latvian Constitution) at a national level in a CoE member country, though the available Latvian case law remains limited. This can be partially explained by the fact that Latvia became a member of the CoE and ratified the ECHR only in the mid-to-late 1990s while simultaneously going through a transition from a totalitarian regime to democracy. This transition period in Latvia was marked by limited trust from the general public in the independence and competence of the judiciary, doubts regarding the efficiency of safeguarding

human rights in light of the human rights violations that had occurred during the Soviet occupation, and the lingering prominence of certain human rights issues such as those related to the ethnic minorities living in Latvia. Thus, Latvia has had less time to develop a substantial body of case law regarding medical intervention and the right to respect for private life.

The still ongoing COVID-19 pandemic and constant biomedical advancements may lead to more litigation regarding restrictions on personal freedoms in the medical sphere and involuntary medical interventions, contributing to both case law of the ECtHR as well as the case law of national courts such as the Latvian Constitutional Court and Supreme Court. Yet, likewise it cannot be excluded that there will be more situations where such restrictions and medical interventions occur in practice unless a clear legal framework is established and adhered to in order to balance these personal rights and freedoms with public interest such as public health.

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