

Cezary Pachnik

Jacob of Paradies University, Poland

c.pachnik@hotmail.com

The Right of the Child to Be Vaccinated as Derived from the Right to Life: The Perspective of Polish Public Law

Abstract: This article examines the debate surrounding the right to vaccination in the context of increasing vaccine hesitancy. The study posits that children's right to vaccination results from their fundamental right to life. The first section explores the normative expansion of human rights and the implications of recognizing children's vaccination as a right. The second section assesses the potential consequences of the recognition of the child's right to be vaccinated as being derived from the right to life. The final section analyses Polish legislation on mandatory vaccinations for children, evaluating its effectiveness in protecting the right. The paper concludes that the recognition of children's right to be vaccinated requires legal protections comparable to those for the right to life, highlighting vaccination's critical role in safeguarding individual and public health, and that Polish law needs to be more effective in protecting the child's right to be vaccinated.

Keywords: children's rights, right to health, right to life, peremptory norms, vaccine hesitancy

Introduction

The rights regarding healthcare seem to be one of the most controversial issues in legal scholarship. An example that can be noted is the controversy over the content of the right to health; in American scholarship some legal scholars question just the existence of this right (Goodman, 2004). On the contrary, in Europe, the existence of this right and the existence of rights derived from this right do not rise doubts (Nygren-Krug, 2013). At the same time, for many researchers in public health, vaccine hesitancy seems to be one of the most dangerous issues. Year after year, there is an increasing number of parents who do not vaccinate their children, which is linked to the resurgence of several infectious diseases. For instance, in 2024, the number of cases of whooping cough in Poland rises.

Presently, legal scholarship is debating mandatory vaccination, especially in the context of the case law of the European Court of Human Rights (ECtHR) (Krasser, 2021), the SARS-COV-2 pandemic (King et al., 2022) and individual autonomy (Ignowska, 2023). Nevertheless, it seems that the ongoing studies do not pay enough attention to the detailed realization of human rights in domestic law, or they omit the fact that the SARS-COV-2 pandemic was a unique event that has mostly ended. It also seems that they forget that in the case of children, the problem of individual autonomy does not play a role. In fact, the ambiguous legal position of children regarding the vaccination issue is because of their inability to give valid consent when their life or health, along with society's well-being, is dependent on the vaccination. In legal scholarship, Bagan-Kurluta and Drozdowska (2015) have indicated that this position is shared in British and Polish legislation.

In the first part of this study, I present children's right to be vaccinated as being derived from the fundamental right to life. In the second part, I will present the implications resulting from the connection between those rights. In the third part, I will analyse Polish law regarding mandatory children's vaccinations in the context of the children's right postulated in this paper. As a result, I will ask a question about the realization of the child's right to be vaccinated under Polish law.

1. The right to be vaccinated as a right of children resulting from the right to life

1.1. Normative expansion of human rights

To begin, it is necessary to explain that the right to be vaccinated is clearly not a right that is explicitly expressed in binding international human rights law. It brings us to the necessity of explaining the terms 'normative expansion' or 'proliferation' of human rights. In the simplest sense, the term 'proliferation of human rights' is understood as the multiplication of existing and recognized rights. The recognition can be made by international legal instruments, by UN bodies in non-binding instruments, or also just by the legal scholarship or case law of international courts. However, this kind of proliferation has been criticized by international legal scholars, who refer to it as 'human rights inflation', and as a result, it is often rejected (Van Poecke et al., 2020).

On the other hand, legal scholars also offer a different approach to 'human rights proliferation', and these jurists rather tend to use the term 'normative expansion', such as, according to Marks (2016), the normative expansion of the right to health resulting from non-binding interpretative instruments, especially from UN General Comments. In his view, the derivation of the new right should not be confused with the derivation of a right derived from a foundational right.

The 'normative expansion' approach has a long tradition in human rights scholarship. As early as 1969, Bleicher described the 'para-binding' influence of United Nations General Assembly (UNGA) resolutions. According to him, UNGA resolutions are not binding by themselves, but their legal power comes from their role as the source of authoritative interpretation of binding law, specifically the United Nations Charter and human rights pacts. Additionally, Bleicher asserts that interpretation from UNGA resolutions is binding for the states which voted for them due to the doctrine of legitimate expectations, while this is not so clear in the case of states which voted against or abstained.

Finally, the general idea of foundational and derivative rights is commonly shared by scholars from the border between law and ethics. A notable example of this issue being explored in the field of ethics is the work of Steiner (2007), who claims that 'a foundational right is one that is not inferable from any other right and from which other rights – derivative ones – are inferable'. Steiner notes that there are two modes of how the derivative right can result from the basic ('foundational') right: the inference mode (right X is an 'instance' of right Y) and the instrumental mode (right X is the instrument to seize right Y). The first mode refers to the general view presented by some natural law scholars, who ascertain that human rights can be inferred from human needs (O'Connell, 2011). This highly speculative view is hard to apply to international law, which is more closely linked with positive law. The second mode, on the contrary, is reminiscent of the classic argument *a fortiori* and is applicable in international law reasoning.

The above reasoning shows us the methodology for how we can find out that a human right is not only a suggested and advocated human right, but really exists in international law. Firstly, this right should result from an authoritative interpretation of human rights law; the best sources are UN General Comments and UNGA resolutions. Additionally, this right should be the instrument to seize a right which is explicitly expressed in human rights law. Finally, the authoritative interpretation of a binding norm should have relatively universal support among states.

1.2. The right of children to be vaccinated and the right to life

Children as the subject of law can be viewed from different perspectives. Firstly, general documents on universal rights are also addressed to the rights of children as human beings. Secondly, there are instruments of international law which are specifically dedicated to children's rights, particularly the Convention on the Rights of the Child (CRC). Children can also be viewed as members of other specific groups with special protection in international law, for example as persons with disabilities.

To start with, it is noteworthy that consideration of the right to life as foundational for the right to be vaccinated arises from simple observation of reality. There is no doubt that childhood vaccines reduce child mortality (McCullers & Dunn, 2008) and that vaccination can prolong the life of every vaccinated child. Evidence-based

medicine offers vaccines for many diseases which in their full form create a high or medium risk of death for infants and children up to 15 years old. This can be analysed more deeply in the context of specific diseases:

- A child vaccinated against pertussis (whooping cough) is not at risk of experiencing a severe version of the disease. In this case, vaccination effectively eliminates the possibility of severe illness (Cherry, 1999).
- Vaccination for diphtheria reduces the risk of the child's death by 95% (Truelove et al., 2020).
- Bacillus Calmette–Guérin (BCG) vaccination reduces the risk of TB infection by 76% (Carter et al., 2012). While the exact reduction in the risk of death is not always specified, we know that the risk of severe disease is reduced by approximately 80%. Therefore, it is undeniable that the reduction in the risk of death is significant.
- The smallpox vaccine reduces the risk of severe disease by 64% (Liu et al., 2024). Consequently, we can estimate that the reduction in the risk of death is even greater.

On the other hand, it is important to remember that not all diseases pose a direct risk of death, and not all vaccinations significantly reduce the risk of death resulting from infection. It is crucial to emphasize the relationship between an individual child's vaccination and the reduction of their risk of death. If vaccination against diphtheria reduces the risk of death by 95%, this means that for the overwhelming majority of children, survival is directly linked to vaccination. Nevertheless, as noted above, not all vaccinations reduce the risk of death. In the next section of this paper, I will discuss the distinction between life-saving and non-life-saving vaccines and, in connection with this distinction, the boundary between the right to health and the right to life.

The particular duty of the state which seems to be relevant is its duty to protect life. According to the International Covenant on Civil and Political Rights (ICCPR), '[e]very human being has the inherent right to life. This right shall be protected by law.' The General Comment on this article elucidates that these words mean that the state is obligated 'to adopt any appropriate laws or other measures in order to protect life from all reasonably foreseeable threat' (UN Human Rights Committee, 2009). Infectious diseases are clearly a 'reasonably foreseeable threat', so it is hard to argue that access to vaccines for children is not an 'other measure'. This protection should be viewed as the protection of every individual life. It can also be seen as more general protection of life because of the herd immunity built by vaccines (Bertoldi et al., 2022), but it needs to be underlined that Article 6 of the ICCPR is rather about the first sense of protection.

In the CRC we can find a similar regulation: it states that 'States Parties shall ensure to the maximum extent possible the survival and development of the child'.

This principle is interpreted broadly in legal scholarship. For instance, Loyd (2001) argues that this regulation imposes an obligation on the state to prevent child sexual exploitation. On the other hand, at the regional level, we can find confirmation that the protection of the right to life relates to child vaccination. A remarkably interesting example is the case law of the ECtHR. One of the most popular arguments from the point of view of vaccine hesitancy is the claim that mandatory vaccination breaks the right to life. The ECtHR has repeated many times that mandatory vaccination does not breach this right and has suggested that the protection of the right to life could imply the positive obligation of the state to promote vaccination (Simons et al., 2024).

Finally, we can find a similar regulation in the Convention on the Rights of Persons with Disabilities (CRPD) and in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). It is noteworthy that the CRPD repeats the term 'all necessary measures', while the UNDRIP references the even broader category of 'life protection'. Additionally, in the case of the CRPD, the jurisprudence of the Committee on the Rights of Persons with Disabilities suggests that the denial of adequate medical care is a breach of the right to life.¹ During the SARS-COV-2 pandemic, the regulation resulting from the UNDRIP was noted by legal scholarship as an argument for the obligation of the state to secure vaccination against COVID among Indigenous peoples (Fukurai et al., 2023). Reference to the CRPD and UNDRIP does not imply that all children should be treated as persons with disabilities or as Indigenous peoples. However, it serves as evidence of the general view of the right to life in international jurisprudence. This perception suggests a broad understanding of the right to life, not only as the right not to be killed but also as the right to the protection of life in a broad sense.

1.3. The right to health as foundational for the right of children to be vaccinated

The second right which can be considered as foundational for children's right to be vaccinated is the right to health. As I argued in the previous section, some vaccines serve as a means of protecting life, while others do not. Life-saving vaccines should be seen as connected with the right to life, whereas vaccines that primarily protect health should be regarded as connected with the right to health.

The right to health is often considered controversial, with its scope and content remaining unclear for some scholars. A minority position, found particularly among American legal scholars, argues that the right to health merely obligates the state to

1 The first case which began this line of jurisprudence is the case of *H. M. v. Sweden* (Committee on the Rights of Persons with Disabilities, Communication no. 3/2011, 21 May 2012); it is repeated in the recent case of *al-Hawali Alghamdi v. Saudi Arabia* (Committee on the Rights of Persons with Disabilities, Views adopted by the Committee under Article 5 of the Optional Protocol, concerning communication no. 84/2020*****, 29 July 2024).

‘not prevent’ access to healthcare and does not impose a positive duty on the state (Marks, 2016). However, the more widely accepted position holds that the right to health is a hybrid right; it encompasses social rights, which can be understood as the right to healthcare, as well as the ‘right to health in the strict sense’, which include aspects such as personal inviolability (Tabaszewski, 2016).

Nevertheless, for this paper, the most important aspect of the right to health is the state’s obligation to prevent disease and malnutrition. As described by Tobin (2012), this obligation provides a useful framework, to which I will return later. According to Tobin, the state’s duty to prevent disease and malnutrition includes implementing various measures, such as vaccination programmes, but also extends to promoting practices like handwashing. Generally speaking, it is not controversial that the right to preventive medicine results from the right to health, not the right to life.

On the other hand, we need to scrutinize the real nature of what preventive medicine is. According to the *Oxford Dictionary of Epidemiology*, preventive medicine is ‘the application of preventive measures by clinical practitioners. It is a specialized field of medical practice composed of distinct disciplines that utilize skills focusing on the health of defined populations in order to promote and maintain health and well-being and prevent disease, disability, and premature death’ (Porta, 2016, 225). This definition highlights the key aspect of preventive medicine: its primary focus is on the interest of the population rather than the interest of an individual. This prevention paradox is a well-recognized concept in epidemiology, based on the idea that preventive measures tend to provide significant benefits to the population as a whole but relatively little benefit to each individual (Porta, 2016). As a result, the ‘statistical person’ – as a member of society – becomes the primary focus of epidemiology and public health policy, rather than any actual individual (Parmet, 2013). As I noted in the previous section, according to evidence-based medicine, this paradox does not apply to many vaccines. The vaccines mentioned above provide significant benefits to individual children, which constitutes a legally relevant distinction between them and other preventive medicine measures. The difference between standard prophylaxis and vaccination is also reflected in the International Health Regulation, in which we can see that the WHO distinguishes between vaccinations and prophylaxis (WHO, 2005).

Pierik and Verweij (2024), in their analysis of immunization, compare it to blood transfusion. However, they argue that this analogy is not perfect, as herd immunity may prevent some children from ever being exposed to infectious diseases. On the other hand, they acknowledge that in certain cases, the analogy to blood transfusion is complete, for instance in the case of post-exposure vaccination following contact with hepatitis B. Their observations highlight the dual nature of vaccination: some vaccines are life-saving, while others primarily serve as measures of disease prevention, as suggested by the medical definition of prevention. The key question is the scope of life-saving vaccinations. Pierik and Verweij, with an overly optimistic

perspective, assume that children may never encounter tuberculosis or other life-threatening bacteria and viruses.

A more fitting analogy might be that of a shooter randomly firing from a rooftop. In such a situation, it would be clear that the state should either stop the shooter or ensure that people can protect themselves, for example by wearing bulletproof vests. Due to their right to self-determination, adults can legally refuse protection. However, the state remains obligated to protect groups without self-determination, the most common of which is children. Expanding on this analogy, in the case of infectious diseases, stopping the 'shooting' is not an option, and there is more than one 'shooter'. For some threats, we have highly effective 'bulletproof vests' (vaccines), while for others, the protection is less effective. Additionally, some 'bullets' (diseases) may not be fatal.

This dual nature of vaccination allows for a crucial distinction regarding the source of the right to vaccination. The key indicator appears to be the level of benefit for the individual child. If a vaccine provides significant life-saving benefits to an individual, it is not merely preventive, and its legal foundation is the right to life rather than the right to health. Conversely, if a vaccine primarily serves a preventive function, with greater benefits for the population than for the individual, its justification lies in the right to health.

Another important distinction in vaccination policy is whether immunization should be mandatory or optional. The source of the right to vaccination could serve as a guideline for determining which vaccines should be mandatory for children and which should remain optional. From another perspective, the extent to which a vaccine reduces the risk of death also helps determine which legal interest is being protected and, consequently, which fundamental right forms the basis for the right to that vaccination.

2. Consequences of the recognition of the right of children to be vaccinated resulting from the right to life

2.1. The right to life as a potentially peremptory norm

It seems that the consequences of recognizing children's right to be vaccinated as resulting from the right to life should begin with the statement that the right to life is relatively often noted by legal scholarship as a peremptory norm of international law. Within this paper it is impossible to determine the peremptory status of the right to life, so I rather want to focus solely on the consequences of the assumption that the right to life is a peremptory norm. However, it is necessary to outline the discussion about this.

The most important point for legal scholarship is that the right to life as a peremptory norm is indicated in Article 4 of the ICCPR, which says that Article 6

of the ICCPR is the norm that cannot be derogated. Nevertheless, Shelton (2014) suggests that the list included in Article 4 is only related to, not the same as, the list of the peremptory norm. This seems correct in the light of the Centre for Civil and Political Rights' General Comment on Derogations during a State of Emergency (UN Human Rights Committee, 2001). Casey-Maslen recently offered a detailed analysis of the status of the right to life as a peremptory norm, but his argumentation seems problematic. For instance, he argues that the status of the right to life as a peremptory norm resulted from the *Nuclear Weapon* case of the International Court of Justice, but it is hard to tell why he thinks that. Other legal scholars who assert that the right to life is a peremptory norm are Kolb (2015) and Orakhelashvili (2008).

The other trouble with the identity of the peremptory status of the right to life with the peremptory status of the right of children to be vaccinated is the fact that international law scholarship recognizes something like 'partially' peremptory status. In the context of the right to self-determination, many legal scholars argue that even if the political self-determination of colonized peoples is the peremptory norm, the other aspects of this right are not part of *jus cogens*.

If we assume that the right to life is the peremptory norm and that all rights to life are peremptory (unlike the right to self-determination), the consequence of this link is crucial. According to Article 53 of the Vienna Convention on the Law of Treaties, a treaty (or other acts of international law) inconsistent with the peremptory norm is void. The International Law Commission (2019) elaborated on this problem and stated that peremptory norms are the source of interpretation of the entirety of international law and determine how to apply every other norm or instrument of international law.

Most interesting from the point of view of this paper, though, is the role of the peremptory norm in domestic law. As the source of the duty of the state (Orakhelashvili, 2008), peremptory norms should be viewed as the source of interpretation of international law as well as of domestic norms. It seems that is inexplicable why the court could disregard the duty of state, when the state obligated to follow the peremptory norm and the court is the part of the state in the view of international law (especially when we have in mind that they are just a few of the fundamental norms of international law, which include, for example, prohibitions on apartheid, genocide and executing juveniles) (Mik, 2013). In the context of the right to be vaccinated, it is also clear that the result of the peremptory status of the discussed norm is that it would surely 'overcome' other norms often raised by anti-vaxxer parents, such as their parental custody, the right to privacy, the right to family life and others.

2.2. The right to life as an 'ordinary' norm of international law

Regardless of the above, the peremptory status of the right to life, while interesting, is not crucial for understanding the consequences of perceiving the right of children to

be vaccinated as an aspect of the right to life. If the right to be vaccinated is part of the right to life, it needs to be protected exactly like the latter. According to the ICCPR the right to life 'must be protected by law'. By analogy it can be said that children's right to be vaccinated must be protected by law. This observation is straightforward, but it leads to the question of how exactly the law should protect this right.

Firstly, regardless of the peremptory or non-peremptory status of the right to life, Article 4 of the ICCPR suggests some form of hierarchy of the rights included in an instrument of international law. Commonly, we have a group of rights which are claimed by vaccine-sceptical parents; here can be noted rights like the right to privacy and family life (Simons et al., 2024), certain social and economic rights, particularly the right to education (in the English-speaking world in particular, the mandatory vaccination is carried out in schools) (Eichelbaum, 2019), the right to life per se by the use of medical exemptions (Eichelbaum, 2019), and freedom of religion or conscience (Tucak & Berdica, 2024). In fact, all these arguments have been rejected by domestic and international courts, except for medical exemptions. This fact alone illustrates that even a non-peremptory right of children to be vaccinated has priority over the aforementioned rights.

It should be noted that protection of the right to life needs to fulfil some requirements; it should meet the principle of proportionality and should not breach norms which are clearly peremptory, like freedom from torture and degrading treatment or the prohibition of genocide. It is hypothetical, but we can imagine that mandatory vaccinations that are too intrusive could breach the right to freedom from torture and degrading treatment. On the other hand, the protection of children's right to be vaccinated needs to be effective, by which I mean that even mandatory vaccination may be just a law in a book if in reality anti-vaccine parents are able at the end of the day to keep their children unvaccinated and in consequence leave them vulnerable to infectious diseases.

Before the discussion of Polish law, it must be noted that the law of many European states does not know the concept of mandatory vaccination at all (Bozzola et al., 2018). This seems not to fulfil the ICCPR requirement of the 'protection of the right to life by law' and it is completely incomprehensible. To sum up, it seems that the most important requirement for domestic law resulting from international human rights is the effectiveness of the protection of the right of children to be vaccinated. In consequence, in the next paragraph I want to focus on the effectiveness of Polish law concerning the mandatory vaccination of children.

3. The realization of the right of children to be vaccinated in Polish public law

An analysis of Polish public law should begin with an examination of the norms derived from the Polish Constitution, which contains two norms that are particularly relevant to this paper: the right to life and the right to health. It seems that Polish courts and legal scholars face difficulties in drawing a clear boundary between the right to life and the right to health in the context of healthcare. In Polish legal scholarship it is popular to cite the judgment of the Polish Constitutional Tribunal (PCT) of 7 January 2004, which noted that 'Article 38 [the right to life] is extremely strongly, even inextricably, linked with Article 68 [...] The right to healthcare is primarily the right to preserve life and defend it when it is threatened.' It should be noted that in the same judgment, the PCT also affirmed the principle *in dubio pro vita humana*, as well as concluding that protection of life means the protection of the biological existence of a person (Judgment of the Polish Constitutional Tribunal, 2004). In Polish legal scholarship there is no doubt that the subject of protection of the right to health is 'health', and the centre of gravity of considerations regarding the right to health resulting from the Polish Constitution is access to healthcare, preventive healthcare, the system of public healthcare and similar areas (Tabaszewski, 2016). It is not controversial to state that the vaccinations that eliminate the risk of death are measures to protect the biological existence of a person.

The practice of Polish administrative courts suggests that vaccination obligation is connected by the courts with the right to health if they highlight the benefits for society resulting from protective vaccinations (e.g. Judgments of the Supreme Administrative Court, 2 March 2023 and 30 March 2023); when Polish administrative courts allude to the interest of a child, they do not refer to the right to health but to the other provisions of the Polish Constitution (Judgment of the Provincial Administrative Court in Szczecin, 2024). It is noteworthy that even in judgments where the courts see the benefits from the vaccination for the individual, the emphasis finally falls on the benefits for society and the realization by the state of the right to health through that (Judgment of the Supreme Administrative Court, February 2023). It seems that when Polish administrative courts have to connect the benefits of vaccination for individuals to specific norms of the Polish Constitution, they are somewhat confused. The answer to this confusion likely lies in the right to life.

The major legal act concerning the vaccination of children is the Act of 5 December 2008 on Prevention and Control of Infections and Infectious Diseases in Humans. Article 17 of this act states mandatory vaccination determined by a regulation of the Minister of Health. The vaccination shall be preceded by a qualifying examination conducted by a doctor. According to this Act, protective vaccination is the 'administration of a vaccine against an infectious disease in order to artificially immunize against the disease'. It is noteworthy that the sole legal definition of

vaccination seems to emphasize the interests of the vaccinated person rather than society. Additionally, this definition does not directly address the question of whether it pertains to the protection of life or health; instead, the protection of life or health within this definition depends on medical facts. It is important to underline that mandatory vaccination in the light of this Act does not mean that this is compulsory vaccination. The compulsory administration of the drug is the exception; the Act does not include vaccination of children as a situation when the use of coercion is lawful (Bagińska, 2021).

It can be argued that if, according to the Act of 27 August 2004 on healthcare services financed from public funds, the vaccination can be seen as a healthcare service (Mełgieś et al., 2018), this service can be connected only with the right to health. This type of argumentation is not in accordance with the principle of the primacy of international and constitutional law. Secondly, it fails to recognize that it is uncontroversial that some healthcare services are connected with the protection of the right to health. The term 'health service' alone does not determine which human rights are being realized (Kocaj, 2015).

As noted by Drozdowska (2022), Polish law, generally speaking, places the greatest emphasis on the interests of the individual, especially in the case of mandatory vaccination for children. At the same time, the protection of a child's interests is expressed through respect for parental autonomy. According to Drozdowska, Polish law assumes that parents are the best guardians of their child's interests. This assumption holds some truth, but it is also necessary to acknowledge that the very concept of mandatory vaccination reflects state interference in the autonomy of families and the state's lack of confidence in parental guardianship.

In Polish legal scholarship, a significant issue is the question of patient consent for mandatory vaccination. Some legal scholars argue that a doctor cannot administer a mandatory vaccination without the consent of the juvenile's parents, while others contend that the mandatory nature of vaccination eliminates the need for consent (Mełgieś et al., 2018). It seems that perceiving certain mandatory vaccinations as protecting the life of the individual child based on the right to life strengthens the argument that consent is not necessary. In practice, this means that the consent of both parents may not be required (Boratyńska, 2012).

For assessment of the effectiveness of the child's right to vaccination, what is crucial is what happens if the parent does not vaccinate their child. In Polish law and practice, we can see three consequences resulting from non-performance of the child's mandatory vaccination: enforcement proceedings, criminal proceedings, and the limitation of access to a kindergarten. Enforcement proceedings mean that local health inspectors find out the reasons for the non-performance of the child's mandatory vaccination and impose an administrative fine on the parents for pressuring (Czechowicz, 2021). Criminal proceedings are connected with the fact that according to the Polish Code of Offences (*Kodeks Wykroczeń*), the non-

performance is also an offence, punished with a fine up to PLN 1500 (about EUR 350) or with a formal reprimand (Daniel, 2014). Finally, limitation of access to a kindergarten means that Polish local governments state that the vaccination of a child is a criterion in the recruitment of children to kindergartens (Doroszewski, 2022). The effectiveness of the first and the second consequences can be analysed together, because according to the Polish Code of Offences, one of the hallmarks of an offence is the prior ineffective use of administrative enforcement measures to compel the offender to submit the minor to mandatory immunization.

Analysis of the case law of the Polish administrative courts suggests that if anti-vaxxer parents do not want to vaccinate their child, enforcement proceedings take a lot of time. In 2024 Polish administrative courts heard cases which had been sent by health inspectors in 2021 (Judgment of the Provincial Administrative Court in Łódź, 2024) and 2017 (Judgment of the Provincial Administrative Court in Poznań, 2024). This means that the health inspectors knew about the lack of vaccination of the children who were the subjects of these cases, but the enforcement proceedings took so much time that these children's lives were not protected by the vaccinations for many years.

In fact, according to the Act of 27 August 2004 on Healthcare Services Financed from Public Funds, the patient has the right but no obligation to receive healthcare paid for from public funds. On the other hand, the initiation of enforcement proceedings brings about complications. According to the medical community, a change in the interpretation of the rules regarding the choice of a child's doctor undermines supervision of mandatory vaccinations. Previously, parents could not simply opt out of public healthcare, but now it is allowed (Mieczkowska & Pieniążek-Osińska, 2024): according to the Act of 27 August 2004, patients have the right but not the obligation to receive healthcare financed by public funds.

The flaws of the kindergarten requirements in the Polish model are quite obvious: they regard only public kindergartens, when there are many private kindergartens in Poland that even get subsidies from the public budget (Miłek & Abliński, 2021). These rules are only on the local level, so if the parents do not want to vaccinate their child, they can just send their child to the public kindergarten in the neighbouring municipality. Nevertheless, local governments establish similar rules regarding access to public nurseries (Judgment of the Provincial Administrative Court in Poznań, 2024). As in the case of kindergartens, the basic flaw of these rules is their local character. Finally, according to the Polish Ministry of Education, a public school can deny participation in foreign trips – although in the case of a national trip, schools and teachers do not have the right to deny the participation of a non-vaccinated child (Polish Ministry of National Education, 2017).

Conclusions

It can be stated that the child's right to be vaccinated seems to be a derived right from the right to life. The text of the ICCPR especially suggests this link, but so do the texts of the other instruments of international law as well as legal scholarship regarding the right to life. As a consequence, the law should protect the right to be vaccinated in a comparable way to the right to life, because vaccinations save lives. Although it seems that the ICCPR is not the only instrument of international law confirming the derived character of the right of children to be vaccinated, the legal text of the Convention on the Rights of the Child supports this fact as well. Nevertheless, the strongest and most unexpected support for this notion originates from the jurisprudence of the Committee on the Rights of Persons with Disabilities.

The analysis of Polish practice regarding this issue is disheartening. In fact, in Polish legal practice, children can go for many years without necessary immunizations. This paper only outlines the problem in Poland, and further research is needed to determine how to better protect children's right to vaccination. However, from this study we can draw more general conclusions regarding the form of legal protection for children's right to be vaccinated. There is no reason to completely distinguish between immunization and other medical procedures aimed at saving lives. Theoretically, it can be argued that the refusal of blood transfusions by Jehovah's Witnesses poses a direct danger to a child's life, which is a reason for a court to intervene in parental decisions. Conversely, the danger posed by hepatitis C can be equally direct, though less visible.

As recommendations, firstly I would suggest that further studies are needed to analyse the connection between vaccination and the right to life in the case of adults. While this study focuses on children, examining the vaccination rights of adults could lead to interesting conclusions, especially regarding optional and paid-for vaccinations for pertussis in adults. Secondly, it seems that if the source of children's vaccination rights in the case of many diseases is the right to life, then Poland, as well as other states, are obligated to maintain strong supervision of children's vaccinations in their best interests. Specifically, it appears necessary to establish a duty for parents to utilize public healthcare, as recommended by the medical community. Thirdly, if the right to vaccination is a children's right, it is logical that the state should establish mandatory vaccinations for children as a way to protect their interests, not merely as a tool for achieving herd immunity. Lastly, in the context of access to kindergartens, it is clear that the issue of access to public kindergartens and nurseries should be resolved at the national level, in the spirit of protecting children's lives.

REFERENCES

- Bagan-Kurluta, K., & Drozdowska, U. (2015). A comparative assessment of minors' competence to consent to treatment in Polish and English law. *Progress in Health Sciences*, 5(2), 149–159.
- Bagińska, E. (Ed.). (2021). *System Prawa Medycznego: Odpowiedzialność prywatnoprawna*. C.H. Beck.
- Bertoldi Franco, J., Lecussan Gutierrez, P., Cabar, F.R., & An Lin, C. (2022). The right to vaccination and the individual duty in collective health during a pandemic. *Clinics*, 77. <https://doi.org/10.1016/j.clinsp.2022.100035>
- Bleicher, S.A. (1969). The legal significance of re-citation of general assembly resolutions. *The American Journal of International Law*, 63(3), 444–478.
- Boratyńska, M. (2012). *Wolny wybór: gwarancje i granice prawa pacjenta do samodecydowania*. Instytut Problemów Ochrony Zdrowia.
- Bozzola, E., Spina, G., Russo, R., Bozzola, M., Corsello, G., & Villani, A. (2018). Mandatory vaccinations in European countries, undocumented information, false news and the impact on vaccination uptake: The position of the Italian pediatric society. *Italian Journal of Pediatrics*, 44(1), 67–71.
- Carter, S. P., Chambers, M.A., Rushton, S.P., Shirley, M.D.F., Schuchert, P., Pietravalle, S., Murray A., Rogers F., Gettinby G., Smith G.C., Delahay R.J., Hewinson R.G., McDonald R.A. BCG vaccination reduces risk of tuberculosis infection in vaccinated badgers and unvaccinated badger cubs. *PLoS ONE*, 7(12), e49833.
- Casey-Maslen, S. (Ed.). (2021). *The right to life under international law: An interpretative manual* Cambridge University Press.
- Cherry, J.D. (1999). Pertussis in the preantibiotic and prevaccine era, with emphasis on adult pertussis. *Clinical Infectious Diseases: An Official Publication of the Infectious Diseases Society of America*, 28, 107–111.
- Czechowicz, S. (2021). Problem wielości sankcji represyjnych za nieszczepienie dziecka z perspektywy skutecznego wykonania obowiązku szczepień. *Ruch Prawniczy, Ekonomiczny I Socjologiczny*, 83(1), 37–46.
- Daniel, P. (2014). Egzekucja obowiązku poddania małoletniego dziecka szczepieniu ochronnemu w orzecznictwie sądów administracyjnych. *Przegląd Prawa Publicznego*, 4, 45–55.
- Doroszewski, P.A. (2022). Podstawa prawna kryterium uprzedniego poddania dziecka obowiązkowym szczepieniom ochronnym w rekrutacji do publicznego przedszkola. *Samorząd Terytorialny*, 9, 63–73.
- Drozdowska, U. (2022). Ustawowa konstrukcja obowiązku szczepień ochronnych u dzieci na tle prawa polskiego: uwagi de lege lata i de lege ferenda. *Białostockie Studia Prawnicze*, 27(3), 119–139.
- Eichelbaum, K. (2019). Is mandatory vaccination an unjustified limit on human rights? *Auckland University Law Review*, 25, 105–128.
- European Centre for Disease Prevention and Control. (2024, 8 May). *Increase of pertussis cases in the EU/EEA – rapid risk assessment*. <https://www.ecdc.europa.eu/en/publications-data/increase-pertussis-cases-eueea>
- Fukurai, H., Gabriel, R., & Liang, X. (2023). The COVID-19 crisis, herd immunity, and 'vaccine apartheid' in the age of anthropocene. *Asian Journal of Law and Society*, 10(1), 1–10.

- Goodman, T. (2005). Is there a right to health? *Journal of Medicine and Philosophy*, 30(6), 643–662.
- Ignovska, E. (2023). Mandatory vaccination against COVID-19 in Europe: Public health versus ‘saved by the bell’ individual autonomy. In O.J. Gstrein, M. Fröhlich, C. van den Berg, & T. Giegerich (Eds.), *Modernising European legal education (MELE)* (pp. 283–303). Springer.
- International Law Commission (ILC). (2019, 29 April–7 June and 8 July–9 August). *Report of the International Law Commission 71st session*. UN doc A/74/10.
- Judgment of the Polish Constitutional Tribunal of 7 January 2004 on the case of non-conformity of act of 23 January 2003 on Universal Healthcare in National Health Fund, K 14/03.
- Judgment of the Polish Supreme Court of 8 January 2016 on the case of B.K, V KK 306/15.
- Judgment of the Provincial Administrative Court in Łódź of 31 January 2024 on the case of K.S. v. Regional State Sanitary Inspectorate in Łódź, III SA/Łd 747/23.
- Judgment of the Provincial Administrative Court in Poznań of 24 October 2019 on the case of Voivode v City Council, IV SA/Po 572/19.
- Judgment of the Provincial Administrative Court in Poznań of 21 February 2024 on the case of B.M. v. Sanitary Inspectorate, II SA/Po 659/23.
- Judgment of the Provincial Administrative Court in Szczecin of 1 August 2024 on the case of N.K. v. West Pomeranian State Regional Sanitary Inspectorate, II SA/Sz 271/24.
- Judgment of the Supreme Administrative Court of 8 February 2023 on the case of K.L. v. Ministry of Health of the Republic of Poland, II OSK 500/20.
- Judgment of the Supreme Administrative Court of 2 March 2023 on the case of S.Z. v. Ministry of Health of the Republic of Poland, II OSK 1704/20.
- Judgment of the Supreme Administrative Court of 30 March 2023 on the case of M.K. Ministry of Health of the Republic of Poland, II OSK 803/20.
- King, J., Ferraz, O.L.M., & Jones, A. (2022). Mandatory COVID-19 vaccination and human rights. *The Lancet*, 399(10321), 220–222.
- Kocaj, O. (2015). Prawnokarne granice ochrony życia człowieka w związku z działaniami medycznymi. *Prokuratura i Prawo*, 7–8, 111–126.
- Kolb, R. (2015). *Peremptory international law jus cogens: A general inventory*. Oxford University Press.
- Krasser, A. (2021). Compulsory vaccination in a fundamental rights perspective: Lessons from the ECtHR. *ICL Journal*, 15(2), 207–233.
- Liu, H., Wenjing, W., Yang, Z., Fuchun, W., Junyi, D., Tao, H., Xiaojie, H., & Tong, Z. (2024). Global perspectives on smallpox vaccine against monkeypox: A comprehensive meta-analysis and systematic review of effectiveness, protection, safety and cross-immunogenicity. *Emerging Microbes & Infections*, 13(1). <https://doi.org/10.1080/22221751.2024.2387442>.
- Loyd, G. S. (2001). Child sexual exploitation in Costa Rica. *Indiana International & Comparative Law Review*, 12(1), 157–182.
- Marks, S.P. (2016). Normative expansion of the right to health and the proliferation of human rights. *George Washington International Law Review*, 49(1), 97–144.
- McCullers, J.A., & Dunn, J. D. (2008). Advances in vaccine technology and their impact on managed care. *P & T: A Peer-Reviewed Journal for Formulary Management*, 33(1), 35–41.

- Melgieś, K., Miaskowska-Daszkievicz K., & Pacian, J. (2018). *Administracyjnoprawna ochrona dziecka*. Dom Organizatora.
- Mieczkowska, K., & Pieniążek-Osińska B.. (2024). *Wiceprezes PZ alarmuje: możliwość rezygnacji z lekarza POZ bez wybierania nowego, to zagrożenie dla bezpieczeństwa dzieci*. Rynek Zdrowia. <https://www.rynekzdrowia.pl/Finanse-i-zarzadzanie/Wiceprezes-PZ-alarmuje-mozliwosc-rezygnacji-z-lekarza-POZ-bez-wybie-rania-nowego-to-zagrozenie-dla-bezpieczenstwa-dzieci,266359,1.html>
- Mik, C. (2013). Jus cogens in contemporary international law. *Polish Yearbook of International Law*, 33, 27–93.
- Milek K. & Albiński T., (2024). Przedszkola publiczne a niepubliczne w Polsce, *Kultura i Wychowanie*, 20(2), 131–145.
- Nygren-Krug, H. (2013). The right to health: From concept to practice. In W.J.M. Zuniga, S.P. Marks, & L.O. Gostin (Eds.), *Advancing the human right to health* (pp. 39–54). Oxford University Press.
- O'Connell, M.E. (2011). Jus cogens: International law's higher ethical norms. In D.E. Childress III (Ed.), *The role of ethics in international law* (pp. 78–98). Cambridge University Press.
- Orakhelashvili, A. (2008). *Peremptory norms in international law*. Oxford University Press.
- Parment, W.E. (2013). Valuing the unidentified: The potential of public health law. *Jurimetrics*, 53(3), 255–278.
- Pierik, R., & Verweij, M. (2024). *Inducing immunity? Justifying immunization policies in times of vaccine hesitancy*. The MIT Press.
- Polish Ministry of National Education. (2017). *Stanowisko Ministerstwa Edukacji Narodowej z dnia 23 sierpnia 2017 r. Szczepienia ochronne uczestników wypoczynku (Protective vaccinations of participants of leisure activities)*. <https://www.prawo.vulcan.edu.pl/przegdok.asp?qdatprz=akt&qplikid=1345>
- Porta, M. (2016). *A dictionary of epidemiology*. Oxford University Press.
- Shelton, D.L. (2020). *Advanced introduction to international human rights law*. Edward Elgar.
- Simons, R.C., Ploem, M.C., & Legemaate, J. (2024). The compatibility of mandatory vaccination with the European Convention on Human Rights: Implications for a national vaccination policy. *European Journal of Health Law*, 31(3), 285–311.
- Steiner, H. (2007). Moral rights. In D. Copp (Ed.), *The Oxford handbook of ethical theory* (pp. 459–479). Oxford University Press.
- Tabaszewski, R. (2016). *Prawo do zdrowia w systemach ochrony praw człowieka*. Wydawnictwo KUL.
- Truelove, S.A., Keegan, L.T., Moss, W.J., Chaisson, L.H., Macher, E., Azman, A.S., & Lessler, J. (2020). Clinical and epidemiological aspects of diphtheria: A systematic review and pooled analysis. *Clinical Infectious Diseases: An Official Publication of the Infectious Diseases Society of America*, 71(1), 89–97.
- Tobin J. (2012). *The Right to Health in International Law*. Oxford University Press
- Tucak, I., & Berdica, J. (2024). Rethinking conscientious objection to mandatory vaccination. *Review of European and Comparative Law*, 57, 269–292.

- UN Human Rights Committee. (2001, 31 August). *CCPR General Comment no. 29: Article 4. Derogations during a state of emergency*. <https://www.refworld.org/legal/general/hrc/2001/en/30676>
- UN Human Rights Committee. (2009, 3 October). *CCPR General Comment no. 36: Article 6 (right to life)*. <https://www.refworld.org/legal/general/hrc/2019/en/123145>
- Van Poecke, T., Bourguignon, M., Wouters, J., & Lemmens, K. (2020). *Can We Still Afford Human Rights?* Springer.
- World Health Organization. (2005). *International Health Regulation, World Health Organization*.