

Mandatory Vaccinations, Religious Freedom, and Discrimination

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ABSTRACT

This article responds to the prevailing normative and doctrinal uncertainty over the compatibility of mandatory vaccination schemes with the right to freedom of religion or belief and the prohibition of discrimination on the grounds of religion or belief under the ECHR. The article develops an analytical framework that engages with the purpose of religious freedom and religious anti-discrimination; the scope of public health as a legitimate aim for state interference with those rights; the procedural fairness of mandatory vaccination schemes; and the empirical evidence underpinning those schemes. This multiprong analysis has important implications for any form of wide-ranging state restrictions on religious freedom and religious anti-discrimination, for reasons of public health, and more broadly.

1. INTRODUCTION

Consider a hypothetical scenario. A Member State in the Council of Europe passes a new national law according to which everyone who works in public or private health-care facilities must get vaccinated against—what according to incontrovertible scientific evidence is—a new, deadly, and highly transmissible disease. Healthcare employees who remain unvaccinated three months from the enactment of the law will be immediately excluded from the workplace. They will also be subject to a series of rapidly escalating administrative sanctions ranging from severe pay deductions in the first instance to permanent suspension shortly afterward. Only one group is exempted: those under a real risk of serious health damage by the vaccine.¹ Early data show that the exempted are set to be reasonably rare cases.

The legislation gives individuals a choice between two vaccines. Both vaccines use mRNA technology, ie they use a fragment of messenger RNA to teach cells how to produce a protein that triggers an effective immune response tailored to the disease. Both vaccines have undergone lengthy and rigorous testing. The results, published in

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1 At the time of writing, all mandatory vaccination schemes for COVID-19 across the Council of Europe include exemptions for persons with contraindications. However, only two of the existing mandatory vaccination schemes provide space for conscientious exemptions. See nn 3 and 64 below.

elite peer-reviewed international journals and backed up by reliable statistical evidence from the state's public hospitals, show that both vaccines are safe and that both lead to a dramatic decrease in deaths and hospital admissions resulting from the virus. Importantly, tests also show that both vaccines cut the transmissibility rate of the virus between individuals very significantly.

Maria, an Orthodox Christian paediatrician in a public hospital, refuses to get vaccinated on the grounds of her religion. She believes that the mRNA technology of the vaccine, which instructs the human body to behave in specific and predetermined ways, violates one of the most fundamental tenets of her Christian faith: that our bodies ought to be clear of unnecessary impurities because they belong to God.² Maria's interpretation is incongruous with the official position of the synod of her Church, which is in favour of vaccinations, and which holds a prominent socio-historical position in her country. Nevertheless, her belief is sincere. It is also far from special or unique. Other healthcare employees have asserted conscientious objections to the country's mandatory vaccination scheme. In fact, the available data do not reveal any statistically significant differences between religious or philosophical objections. Data show that religious beliefs are used almost as often as philosophical beliefs, such as libertarian beliefs favouring minimal state intervention in healthcare, as a ground for the conscientious objections put forward by healthcare staff; in many cases the two are hard to disentangle. Maria fails to convince the hospital's senior management team that her health is at risk from the vaccine, so she ends up getting dismissed.

This eerily familiar scenario raises pressing questions about the role of state neutrality and the scope of the rights to religious freedom and religious anti-discrimination in the context of a health crisis. Are mandatory vaccination schemes—a common response among Member States of the Council of Europe to the Covid-19 pandemic³—compatible with human rights and discrimination law? Should the state grant exemptions to citizens with protected religious and non-religious beliefs against the vaccines? Do the right to freedom of religion or belief and the prohibition of discrimination on the grounds of religion or belief require such exemptions?

Despite their evidently topical nature, those legal questions remain almost completely unexplored in human rights scholarship. Proceeding from the prevailing theoretical and doctrinal uncertainty over the compatibility of mandatory vaccinations with specific human rights, this article develops an analytical framework that tracks

2 Maria's view reflects 1 Corinthians 6:19: 'Do you know that your bodies are temples of the Holy Spirit, who is in you, whom you have received from God? You are not your own.'

3 Since the beginning of the COVID-19 pandemic in December 2019, 12 out of the 46 Council of Europe Member States have at some point implemented a variation of a mandatory vaccination scheme. This group of countries includes, among others, Austria, Belgium, the Czech Republic, France, Greece, Switzerland, and the UK. Out of the 12 countries to introduce mandatory vaccinations, only the policy of Austria was applicable to all citizens over the age of 18. In contrast, all the other policies were aimed at identified high-risk groups; this includes citizens over the age of 50 in the case of Italy, and all workplace employees in the case of Azerbaijan. Alongside the 12 states to implement mandatory COVID vaccinations, there are 6 further states operating the '3G Scheme', which requires vaccination, recovery, or testing, particularly within the workplace and the sector of healthcare. Armenia and Finland are among the countries to enact such a policy; however, it has been argued that their interpretation of the scheme amounts to an 'indirect' vaccination mandate as the employees themselves must bear the costs incurred through testing. At the time of writing, only Austria, the Czech Republic, and the UK have suspended or revoked any COVID-19-related mandatory vaccines.

the meaning and role of the values underlying the right to freedom of religion and the prohibition of religious discrimination in this context. It is argued that whether mandatory vaccination schemes are compatible with this area of human rights law depends on a multipronged contextual analysis that takes into account the purpose of religious freedom and religious anti-discrimination; the scope of public health as a legitimate aim for state interference with those rights; the procedural fairness of the restriction in question; and the empirical evidence underpinning it.

Maria is the protagonist throughout. However, although her case is front and centre, the main argument of the article is not contingent on it. The article's account—and especially its analysis of neutrality and its exploration of the relationship of public health with the rights to religious freedom and religious anti-discrimination—is free-standing. Therefore, it can apply to any form of wide-ranging state restrictions on religious freedom and religious anti-discrimination, for reasons of public health, and more broadly.

The discussion unfolds in four substantive sections. Because of the emphasis that European courts place on the principle of neutrality in cases involving state restrictions on freedom of religion or belief, the first section starts by considering whether the hypothetical law in question is neutral. Three different conceptions of neutrality are analysed, and then it is argued that even the most plausible interpretations of neutrality offer limited guidance on whether mandatory vaccination schemes are compatible with the rights to religious freedom and religious anti-discrimination. As a result, the second and third sections of the article analyse the reasons and ways that mandatory vaccination schemes interfere with specific rights. More specifically, the second substantive section of the article examines whether Maria's belief is protected by law and whether her suffered disadvantage falls within the scope of religious freedom and religious anti-discrimination. The third substantive section focuses on the scope of the legitimate aim of public health and on the circumstances under which it might justify state interference with individual rights through mandatory vaccination schemes. The final substantive section engages with the normative considerations underlying the rights to religious freedom and religious anti-discrimination, the relationship between the two rights, and their protective scope in this context.

2. THE ROLE OF STATE NEUTRALITY

Is the law underpinning this article's hypothetical scenario neutral? It is important to start with this question, given the key role that the principle of neutrality plays in the jurisprudence of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) in cases involving restrictions on the right to freedom of religion or belief.⁴ The purpose of this section is not, however, to analyse the contested role of neutrality before the European courts, but to show that even some of the most plausible interpretations of neutrality can offer limited guidance on the compatibility of mandatory vaccination schemes with specific human rights.

4 The important (and contested) role that neutrality plays in this area is well-documented. See eg M Hunter-Henin, 'Religious Neutrality at Europe's Highest Courts: Shifting Strategies' (2022) *Oxford Journal of Law and Religion* <<https://doi.org/10.1093/ojlr/rwac012>>; S Smet, 'The Impossibility of Neutrality? How Courts Engage with the Neutrality Argument' (2022) *Oxford Journal of Law and Religion* <<https://doi.org/10.1093/ojlr/rwac010>>.

If the neutrality of a law depends on its justification, then the law mandating vaccinations in this article's scenario seems to be neutral. Its aim is to protect public health; its evidence basis is well-founded on a plurality of scientific sources and data. The law does not advance a particular conception of the good nor is it justified by any claims about the superior value or truth of any particular conceptions of the good. But the answer changes if the neutrality of the law depends on its outcomes rather than its justification. In that case, the law is not neutral because it disadvantages people like Maria holding protected beliefs that are incompatible with mandatory vaccination, without also adopting any policies that offset that disadvantage;⁵ without exempting them from its application, for instance.

Later parts of this article will come back to whether Maria's belief is protected. For now, however, it is important to sketch what neutrality means in this context. For reasons familiar in political theory, both neutrality of justification and neutrality of outcomes suffer from significant problems.⁶ Those problems can only be crudely summarized here because, as I will explain in a bit, they are somewhat peripheral to the main normative questions underlying the problem at hand. On the one hand, neutrality of justification is over-inclusive: it counts as neutral state policies that are, at least intuitively, clearly non-neutral. Consider a state that establishes a particular religion not because that religion is true or more valuable than others, but because its establishment comes with valuable social benefits like political stability. Since political stability is a neutral justification, ie it does not involve a judgment about the truth or value of a particular conception of the good, this example of religious establishment would not be regarded as a departure from neutrality. However, official state preference for one religion is one of the most obvious and paradigmatic examples of non-neutral state policy, so any plausible conception of neutrality has to capture it.

On the other hand, neutrality of outcomes would depend on the impact of state laws or policies on the success of a particular conception of the good, relative to an appropriate baseline. So, a non-neutral policy would be the one that leads a conception of the good to be more or less successful, ie easier or harder to pursue and realize,⁷ than one of its rivals. Neutrality of outcomes could help explain, therefore, why religious establishment is non-neutral. However, that comes at the significant cost of under-inclusiveness: almost every law or policy, even the most uncontroversial, could be rejected as non-neutral when we focus on outcomes. Since every law or policy leads some conceptions of the good to be more or less successful than others, political agents could not pursue any policies while remaining neutral on this account.⁸ Consider human rights law. Freedom of religion protects the right of individuals to

5 The distinction between neutrality of justification and neutrality of outcomes is familiar in liberal theory. See eg G Sher, *Beyond Neutrality* (Cambridge University Press 1997) 4; RJ Arneson, 'Neutrality and Utility' (1990) 20(2) *Canadian Journal of Philosophy* 215, 217–20; W Kymlicka, 'Liberal Individualism and Liberal Neutrality' (1989) 99 *Ethics* 883; J Raz, *The Morality of Freedom* (Oxford University Press 1986) 112–17.

6 See eg A Patten, *Equal Recognition: The Moral Foundations of Minority Rights* (Princeton University Press 2014) 112–13.

7 Raz (n 5) 114–15.

8 Kymlicka (n 5) 884.

pursue and teach their beliefs and ways of life, and form groups and associations. Freedom of religion, freedom of association, and freedom of expression also protect the right of individuals to change their religion, or exit a group.⁹ So, respect for freedom of religion or belief, as is the case with most rights, will inevitably lead to non-neutral outcomes because, under conditions of freedom, some religions will have difficulty attracting or maintaining adherents. That is not, however, a reason for the state to intervene. Intervening here would be paradigmatically non-neutral. The state using communal resources to help a particular religion to maintain its adherents would sit uneasily with fairness, liberty, and equality.

Problems like those have led to interpretations of neutrality that focus on equalizing the input instead of the output of a rule.¹⁰ For instance, according to Alan Patten's 'neutrality of treatment', neutrality ought to be understood not on the basis of the justification or the outcomes of a rule but on the basis of how accommodating that rule is towards rival conceptions of the good.¹¹ If a state pursues a policy that is more accommodating of one conception of the good, neutrality of treatment requires the adoption of an equivalent policy for rival conceptions of the good. However, deciding whether a rule is equally accommodating does not depend on its effects. That would reduce neutrality of treatment to neutrality of outcomes. Rather, it depends on the inputs to the policy process. It depends on an assessment of whether a rule is equally accommodating of different conceptions of the good relative to an appropriate baseline, regardless of whether the rule ends up having different impacts on the desirability or the realizability of different conceptions of the good.¹²

I mentioned earlier that neutrality—even its most plausible interpretations like neutrality of treatment—is *somewhat* peripheral to this article's analysis of the compatibility of mandatory vaccination schemes with the right to freedom of religion or belief and the prohibition of discrimination on the grounds of religion or belief. It is not entirely peripheral to our question because neutrality is incompatible with policies that show *animus* towards a particular set of beliefs or that appeal to the truth or superior value of one religion over others. Neutrality of justification, although implausible as a complete account of neutrality for the reasons sketched earlier, is in itself a robust liberal constraint on the design and pursuit of state policies. That conception of neutrality as neutrality of justification is familiar in the case-law of the ECtHR, where it has been repeatedly held that the duty of neutrality is incompatible with any attempts of the state to assess the legitimacy of religious beliefs or the ways in which those are expressed,¹³ interpret religious questions,¹⁴ or weigh in historical debates on the foundations of a given religion.¹⁵

9 L Green, 'Rights of Exit' (1998) 4(2) *Legal Theory* 165.

10 On the argument that neutrality requires fair treatment see B Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Harvard University Press 2001) 24–40.

11 Patten (n 6) 115–19.

12 *ibid* 116–17.

13 See eg *Eweida and Others v UK* App no 48420/10 (15 January 2013) para 81.

14 *De Wilde v The Netherlands* App no 9476/19 (9 November 2021) para 50; *Izzettin Doğan and Others v Turkey* App no 62649/10 (26 April 2016) para 69; *Gatis Kovaļkovs v Latvia* App no 35021/05 (31 January 2012) para 60.

15 *Ancient Baltic Religious Association Romuna v Lithuania* App no 48329/19 (8 June 2021) paras 117–119.

However, with the exception of those types of objectionable policies, neutrality plays a peripheral role in our question for two main reasons. First, neutrality is a *pro tanto* reason that can be defeated by substantive liberal values. Conceptions of the good that are incompatible with those values have no claim to neutrality of treatment. Second, neutrality of treatment is inconclusive: it says little on its own as to what equal consideration for religious or non-religious objections to mandatory vaccinations means in practice. Those two points will be analysed in turn.

First, neutrality operates as a *pro tanto* constraint on state policy rather than a strict prohibition. Neutrality of treatment relies on the substantive liberal idea that people ought to be free to form, revise, and pursue their own conception of the good over the course of their lives. That idea is familiar in liberal political theory, and is reflected among others in the concepts of personal autonomy,¹⁶ ethical independence,¹⁷ ethical integrity,¹⁸ moral sovereignty,¹⁹ and self-determination.²⁰ For convenience, I will use personal autonomy for the rest of this argument but it is important to note that there are overlaps and differences between those concepts which I do not wish to downplay.²¹ However, discussing those differences and overlaps is not necessary for the purposes of this argument.

So, because of the fundamental importance of personal autonomy, the state has a *pro tanto* reason to provide fair background conditions for the pursuit of different and often conflicting plans of life. Those fair background conditions include the rights to freedom of religion or belief, freedom of expression, privacy and association, as well as robust protections from wrongful discrimination, fair distribution of resources, equality of opportunity, and neutrality of treatment. The obligation of the state is to establish those fair background conditions. It is not to fully promote people's right to form their own conception of the good. Nor is it to leave people equal in the degree to which they achieve realization of their conception of the good. Rather, at work here is a social division of responsibility, between the state and individual citizens, best known from Rawls's work: that is, if the state establishes fair background conditions—including maintaining equal basic liberties, fair equality of opportunity, and fair distribution of resources—then individuals are responsible to interpret and adjust their conception of the good to fit within the parameters of those fair background conditions.²² So, if within those fair background conditions an individual finds that they cannot fully realize their conception of the good, that would be considered their own responsibility rather than an instance of unfair treatment on behalf of the state.

Several important qualifications could be added to the idea of a social division of responsibility but further discussion of that is not necessary for our present purposes.

16 Raz (n 5) 369.

17 R Dworkin, *Religion Without God* (Harvard University Press 2013) 110–24.

18 C Laborde, *Liberalism's Religion* (Harvard University Press 2017) 197–217.

19 S Meckled-Garcia, 'On the Scope and Object of Neutrality' in C Laborde and A Bardon (eds), *Religion in Liberal Political Philosophy* (Oxford University Press 2017) 148–61.

20 Patten (n 6) Ch 4.

21 I discuss those differences in I Trispiotis, 'Religious Freedom and Religious Antidiscrimination' (2019) 82(5) *Modern Law Review* 864, 871–8.

22 J Rawls, *Political Liberalism* (Columbia University Press 2005) 187–90.

Even if we accept that the idea of a social division of responsibility faces difficulties in certain cases,²³ for our purposes the important point to note is that neutrality of treatment is not a foundational value. As we saw, the state's *pro tanto* reason to provide neutrality of treatment is part of the state obligation to ensure fair background conditions for fundamental values such as personal autonomy. That is why neutrality of treatment is—what Patten calls—a *downstream* value²⁴: it is the commitment to a set of non-neutral fundamental values, such as personal autonomy, that requires the state to adopt a stance of neutrality in specific areas. It follows that since neutrality of treatment is justified by the abstract right to personal autonomy, it can also be outweighed by that right—or by weighty legitimate public interests, such as public health, which are essential for that right. The state has no reason to extend neutral treatment to conceptions of the good that deny personal autonomy, eg conceptions that subordinate some people by denying them the liberty to form and pursue their own ethical commitments. Extending neutral treatment to such a conception would be incompatible with securing a fair opportunity for personal autonomy for everyone.

That does not mean that neutrality of treatment can be easily outweighed. On the contrary, as Patten argues, neutrality of treatment applies more robustly to 'aspects of conceptions of the good that involve religion and conscience, culture, family, sexuality, artistic endeavour, and other goods that are likely to seem non-negotiable to the individual'.²⁵ Given how central those interests are to personal autonomy, it is not hard to see why state neutrality applies more robustly here. However, even in cases that involve such particularly salient commitments, neutrality of treatment remains a *pro tanto* reason. Even then, there might be sufficiently weighty considerations that would compel the state to depart from neutrality. So, the argument that neutrality requires that states should either refrain from mandatory vaccination schemes, or that they should at least introduce conscientious exemptions to them, is incomplete without else: there is no conclusory reason to be neutral. The answer to our question depends on a host of normative and empirical considerations, outlined below, which are unrelated to neutrality. That is the first reason why neutrality of treatment plays a peripheral role here.

The second reason is that neutrality of treatment is inconclusive in at least three ways. First, neutrality of treatment makes no reference to the criteria or metrics on which we can decide what treatment is neutral.²⁶ So, when we have to balance individual or collective interests against each other, it can provide little guidance. Second, neutrality cannot tell us by itself whether Maria's belief against the vaccine is protected, and therefore has considerable weight as such. Most of the normative work here would be done by the reasons why certain beliefs count as ethically salient

23 See eg K Lippert-Rasmussen, 'Immigrants, Multiculturalism, and Expensive Cultural Tastes' (2011) 6(2) Ethics Forum 176; GA Cohen, 'Expensive Tastes and Multiculturalism' in R Bhargava, AK Bagchi and R Sudarshan (eds), *Multiculturalism, Liberalism, and Democracy* (Oxford University Press 2001) 80–100.

24 Patten (n 6) 108–9. Also J Waldron, 'Legislation and Moral Neutrality' in R Goodin and A Reeves (eds), *Liberal Neutrality* (Routledge 1989) 61–83, 65.

25 Patten (n 6) 135–6.

26 N Martin, 'Conceptions of the Good, Rivalry, and Liberal Neutrality' (2017) 20(2) *Critical Review of International Social and Political Philosophy* 143.

and therefore deserve heightened protection under human rights law. Third, neutrality seems more helpful in cases involving balancing between similar interests, eg how different religious beliefs should be accommodated or how the state should respond to competing religious communities.²⁷ But its role whenever there is a rivalry between religious and non-religious interests, eg between public health and religious freedom like in our hypothetical example, is limited because the interests at stake ‘cannot be measured up against a simple baseline of equal treatment’.²⁸ In such cases, neutrality can tell us very little about what it means to treat religious and non-religious interests equally.

For those reasons, the closer we get to the problem of mandatory vaccinations, the more ‘evanescent’²⁹ or ‘Janus-like’³⁰ neutrality becomes. Neutrality of treatment provides limited guidance on the compatibility of a law mandating vaccinations with the right to freedom of religion or belief and the prohibition of discrimination on grounds of religion or belief. Answering that question depends on the values underlying the right to freedom of religion and the prohibition of religious discrimination, as well as the protection of public health. Specifically, it depends on which beliefs underlying vaccine hesitancy are protected, the circumstances in which the protection of public health can justify state coercion, and the procedural fairness of the legal measures in question. We need to appeal to those substantive values to address the legal problems arising from mandatory vaccination schemes. This is what the following pages will attempt to do.

3. LOCATING DISADVANTAGE

Let us return to our hypothetical scenario and start unpicking the main legal questions it poses. First of all, the disadvantage suffered by Maria, ie her dismissal from work because of her refusal to get vaccinated for religious reasons, *seems* to amount to an interference with her right to freedom of religion or belief under Article 9 ECHR.³¹ The rule also *seems to* discriminate against Maria. The law seems to be discriminatory because it imposes a particular disadvantage on Maria compared to others who do not share her religious convictions against the vaccine, some among whom might be religious, or even Orthodox Christians, but others will not be. If Maria is to abide by her sincere convictions, she has no option other than to refuse to get vaccinated and suffer the consequences. Would her disadvantageous treatment amount to direct or to indirect religious discrimination? Direct religious discrimination occurs where one person is, has been, or would be treated less favourably than another on the grounds of religion or belief. Indirect religious discrimination occurs where people having a particular religion or belief are, or would be, at a particular disadvantage compared with other persons.³² Those definitions point towards indirect religious discrimination in Maria’s case. This is because the law in question is

27 See eg *Serif v Greece* App no 38178/97 (14 December 1999) paras 52–3.

28 C Laborde, ‘The Evanescence of Neutrality’ (2018) 46(1) *Political Theory* 99, 102.

29 *ibid* 104.

30 JHH Weiler, ‘Je Suis Achbita!’ (2017) 15(4) *ICON* 879, 893.

31 See eg *Ebrahimian v France* App no 64846/11 (26 February 2016) [47].

32 See arts 2(2)(a) and 2(2)(b) of Directive 2000/78. Direct and indirect religious discrimination are defined in similar terms in the ECHR and the UK Equality Act 2010.

facially neutral; it does not ostensibly discriminate against those whose religious convictions are in opposition to the vaccines. The law leaves no space for *any* form of conscientious objection, religious, or otherwise. So, the law does not target any particular set of beliefs. Moreover, arguably the law does not even disadvantage *all* Orthodox Christian believers. Many would have decided to get vaccinated, especially given that the synod of the country's Orthodox Christian Church has decided to support vaccinations.

I wrote that the rule *seems to* amount to an interference with Maria's right to freedom of religion, and *seems to* amount to an instance of indirect religious discrimination against her that needs justification, because we have yet to clarify whether her refusal to get vaccinated constitutes a protected belief, ie a belief within the protective scope of the rights to religious freedom and religious anti-discrimination. Not all opinions or convictions constitute beliefs protected under human rights and discrimination law.³³ Here, the prohibition of religious discrimination draws on the right to freedom of religion, from which it derives the standards that determine which kinds of beliefs are protected, ie beliefs of 'sufficient cogency, seriousness, cohesion and importance'.³⁴ Before the courts, Maria has an important role to play at this stage of her complaint. She has to use specific arguments to substantiate the sincerity of her belief, draw the links between her refusal to get vaccinated and Christian doctrine, and so on.

Before moving on, an important clarification needs to be added. Recall that Maria's belief might not be widely shared among her country's Orthodox Christian believers; after all, the synod of her Church has supported vaccinations. We can also presume that her refusal to get vaccinated is not a duty mandated by her religion. However, none of those issues is decisive. The legal rights to freedom of religion and religious anti-discrimination cover all acts within a 'sufficiently close and direct nexus' with a protected belief—even those acts that are not mandated by the protected belief in question.³⁵ Nor should it matter that Maria's belief is not endorsed by the synod of her Church. As discussed earlier, non-traditional and minority beliefs are protected under the ECHR, and state authorities are under a neutrality-related duty to steer clear from assessing the theological or dogmatic legitimacy of individual beliefs.³⁶ So, the lack of endorsement by the synod does not affect Maria's protection under the rights to freedom of religion and religious anti-discrimination. With regards to the right to freedom of religion, even if Maria's belief was not shared by *any* other Orthodox Christian in her country, her belief would still fall within the protective scope of religious freedom.³⁷ However, the matter is a bit more complex under indirect religious discrimination, as I will explain now.

33 See eg *Pretty v United Kingdom* App no 2346/02 (29 April 2002) [82]. On the circumstances under which vaccine-hesitant beliefs could fall outside the protective scope of art 9 ECHR see I Leigh, 'Vaccination, Conscientious Objection and Human Rights' (2022) *Legal Studies* <<https://doi.org/10.1017/lst.2022.27>>.

34 See eg *Bayatyan v Armenia* App no 23459/03 (Grand Chamber, 7 July 2011) para 110.

35 See eg *Eweida* (n 13) para 82. Also *Cha'are Shalom Ve Tsedek v France* App no 27417/95 (Grand Chamber, 27 June 2000) paras 73–74.

36 See n 14.

37 S Lægaard, 'Discrimination and Religion' in K Lippert-Rasmussen (ed), *The Routledge Handbook on the Ethics of Discrimination* (Routledge 2018) 207–18, 211.

The legal rights to freedom of religion and religious anti-discrimination function somewhat differently with regards to group membership. The normative reasons for that difference flow from the different emphasis of the two rights which, although they share their main normative foundation, are not synonymous—a point I return to in the last substantive section of this article.³⁸ On the one hand, as we saw, Maria's complaint would fall within the scope of the right to freedom of religion or belief just because she believes, subjectively yet sincerely, that her religion requires her not to get vaccinated. Whether others share that belief or she is the only one in the country that follows that interpretation is neither here nor there in the context of religious freedom. It is factually irrelevant.

On the other hand, familiar from most definitions of indirect religious discrimination is the requirement that a facially neutral rule, like the law in our hypothetical scenario, has a disproportionate disadvantageous impact on a protected group. Defining protected 'groups' for the purposes of discrimination law is complex and falls outside the purview of this article. It can only be posited here, without a full argument, that religion and culture are better understood, socially and ethically, as operating on a continuum of foundational interests, rather than as distinct categories. That is why similar liberal principles of fairness and equality are used to justify cultural and religious accommodation.³⁹ An account of discrimination law that includes only cohesive, 'socially salient' groups⁴⁰ within its protective scope is bound to leave unexplained all those cases where the ECtHR has recognized that convictions like opposition to abortion,⁴¹ atheism,⁴² and a doctor's medical beliefs in alternative medicine⁴³ are protected. It is arguable that any requirement for a cohesive group would also have trouble capturing many protected political or philosophical beliefs under discrimination law.⁴⁴ To avoid that, we need to imbue the prohibition of discrimination on the grounds of religion or belief with a much looser conception of what constitutes a 'group'. This inquiry cannot be pursued in any detail here. What should be said though is that a looser definition of a group is not—and should not be—solely subjective: it would still require a sociological connection between the members of a group, identifiable from an external point of view. That sociological connection might at times not tally with the subjective point of view of the members of the group or of the group itself as a whole, ie it would cover individuals who consider themselves members of a group when the group does not, and vice versa.⁴⁵

38 Trispiotis (n 21).

39 See eg Patten (n 6); Laborde (n 18); Dworkin (n 17).

40 K Lippert-Rasmussen, *Born Free and Equal? A Philosophical Inquiry into the Nature of Discrimination* (Oxford University Press 2014) 30–6.

41 *Van Schindel and Others v the Netherlands* App no 30936/96 (10 September 1997); *Knudsen v Norway* App no 11045/84 (8 March 1985).

42 In the landmark *Kokkinakis* case, the ECtHR first set out one of the seminal principles of its jurisprudence under art 9 ECHR, namely that 'freedom of thought, conscience and religion is . . . a precious asset for atheists, agnostics, sceptics and the unconcerned'. See *Kokkinakis v Greece* App no 14307/88 (25 May 1993) para 31.

43 *Nyssönen v Finland* App no 30406/96 (15 January 1998).

44 B Eidelson, *Discrimination and Disrespect* (Oxford University Press 2015) 24–30.

45 T Khaitan and J Calderwood Norton, 'The Right to Freedom of Religion and the Right against Religious Discrimination: Theoretical Distinctions' (2019) 17(4) *ICON* 1125, 1134; R Ysseldyk and others,

In our case there seems to be convergence between Maria's Orthodox Christian beliefs and her membership in the Orthodox Christian community of her country. Not only that but, for reasons that will become clear in a bit, in parallel with her membership in the Orthodox Christian community she is also a member in the broader Christian community of her country, as well as, even more broadly, a religious adherent. She would therefore satisfy discrimination law's requirement for group membership in the looser interpretation of the term identified earlier. Moving on, unlike her claim under her right to freedom of religion, Maria will also have to prove *prima facie* indirect discrimination. In other words, she will have to convince the courts that the group of people that is disadvantaged by the law that makes vaccinations mandatory includes a disproportionate number of Orthodox Christians; or Christians; or religious people. Proving *prima facie* indirect discrimination requires that at least one of the three groups that Maria belongs to will have to be shown to be disproportionately affected by the legislation in question.⁴⁶ Here, Maria might face some difficulty: if most Orthodox Christians followed the endorsement of the synod and got vaccinated, it is unlikely that that group would have been disproportionately affected by the law. Maria would have to show instead that either Christians or religious adherents in general are disproportionately disadvantaged by the law. The answer will depend on her evidence on the degree of prevalence of non-vaccination among the relevant groups.

For those briefly mentioned reasons, Maria's case would certainly fall within the protective scope of the right to freedom of religion and is also likely, on the conditions set above, to fall within the scope of the prohibition of indirect discrimination on the grounds of religion or belief. This is only the beginning of the argument though because an interference with freedom of religion or belief under Article 9 ECHR can be justified if it pursues a legitimate aim and is necessary in a democratic society. Moreover, as both Article 14 ECHR and Article 2(2)(b)(i) of Directive 2000/78 set out, an indirectly discriminatory rule may be permitted if it is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. The legitimacy and proportionality of laws compelling vaccinations raise another set of thorny issues many of which, once again, relate to the relationship of such laws with the purpose and the scope of the right to freedom of religion or belief and the prohibition of indirect discrimination on the grounds of religion or belief. The next substantive section of this article will focus on public health as the main legitimate aim behind the law in question, whereas the last substantive section of this article will investigate whether that interference is proportionate.

'Religiosity as Identity: Toward an Understanding of Religion from a Social Identity Perspective' (2010) 14 *Personality and Social Psychology Review* 60, 60.

46 In the UK, and in most European jurisdictions, Maria would not have to rely on statistical evidence, which is not a requirement anymore due to significant burden they posed to claimants. See *Homer v Chief Constable of West Yorkshire Police* (2012) UKSC 15. See also J Ringelheim, 'The Burden of Proof in Anti-Discrimination Proceedings. A Focus on Belgium, France and Ireland' (2019) 2 *European Equality Law Review* 49.

4. PUBLIC HEALTH AND PROPORTIONALITY

I will focus on public health as one of the main aims pursued by the scenario's legislation. Both EU law and the ECHR recognize the protection of public health as a legitimate aim which may justify limitations on the prohibition of indirect discrimination.⁴⁷ In the case of mandatory vaccinations, the law's aim to protect public health is two-fold. First, and most directly, by protecting individuals against a life-threatening and highly transmissible disease. Second, given the evidence that the vaccines cut the transmissibility of the virus, by protecting clinically vulnerable individuals, who cannot get vaccinated, from contracting the virus; in our scenario, by reducing the chances that they will catch it from a staff member in a healthcare facility. Both those dimensions of the aim reflect the well-established principle in international human rights law that states are under a positive 'framework' obligation to take appropriate measures to protect the life and health of those within their jurisdiction.⁴⁸ The second dimension, however, is additionally linked to another aim: the protection of the rights of others through social solidarity.

As the ECtHR held in *Vavricka*, social solidarity may require those for whom vaccination does not pose health risks to accept this protective measure as a matter of legal duty, in order to protect those clinically vulnerable individuals who are unable to benefit from vaccination.⁴⁹ The ECtHR has highlighted the importance of social solidarity also in *Spînu*, a case involving a prisoner who was not allowed to leave prison to attend the religious services of the Adventist Church due to the precautionary measures during the COVID-19 pandemic. In *Spînu*, it was held that the prison authorities were justified to place particular emphasis on social solidarity, and more specifically on the risks of contamination if they allowed the applicant to join a group activity outside the prison at the time of a health crisis.⁵⁰ Social solidarity reflects familiar principles from the jurisprudence of the ECtHR. Time and again, the ECtHR has held that the values of solidarity and mutual respect are central to liberal democracy, and outline the scope of various rights, including freedom of religion or belief.⁵¹ Although this point cannot be fully analysed here, it is arguable that social solidarity plays a significant role for the functioning of healthcare services, which must be kept as accessible and safe as possible for everyone.⁵²

Since the aim of public health is legitimate, the next step is to determine whether imposing a legal duty on healthcare staff to get vaccinated is a proportionate means

47 According to art 2(5) of the Directive 2000/78, the protection of public health is a legitimate aim which can justify indirect discrimination, provided that the indirectly discriminatory rule or practice is necessary. The same applies to the ECHR; see eg *Vavricka* (n 1) para 272.

48 Those positive obligations are 'framework' rather than 'operational' obligations; see eg *LCB v UK* App no 23413/94 (9 June 1998) para 36. Such positive obligations to protect life and health are well-established in international human rights law and appear in the UN ICESCR, the UN CRC and the ESC.

49 *Vavricka* (n 1) para 279; also Partly Concurring and Partly Dissenting Opinion of Judge Lemmens in *Vavricka* para 2. See also Resolution 1845 (2011) of PACE of 25 November 2011 on fundamental rights and responsibilities.

50 *Constantin-Lucian Spînu v Romania* App no 29443/20 (11 October 2022) (only in French) para 68.

51 I Trispiotis, 'Two Interpretations of "Living Together" in European Human Rights Law' (2016) 75(3) Cambridge Law Journal 580, 590–8.

52 On solidarity in the context of public health see D Archard, J Brierley and E Cave, 'Compulsory Childhood Vaccination: Human Rights, Solidarity, and Best Interests' (2021) 29(4) Medical Law Review 716, 720–1.

to achieve that aim. The relevant cases from the CJEU and the ECtHR adopt a broadly similar understanding of the requirements of proportionality: any restrictive measures must not cause disadvantages that are disproportionate to the aims pursued, even if those measures are appropriate and necessary.⁵³

Drawing on the recent decision of the Grand Chamber of the ECtHR in *Vavricka*, mandatory vaccinations will be considered necessary if they respond to a ‘pressing social need’ and if the reasons behind their mandatory nature are ‘relevant and sufficient’.⁵⁴ A ‘pressing social need’ depends on whether there is credible scientific evidence showing that securing a high rate of vaccinations is key to protect public health. In *Vavricka*, the ECtHR was satisfied by the ‘clear’ and ‘firm’ position taken by the medical authorities of the Czech Republic, which showed that if the vaccination of children turned from a legal duty to a recommended procedure that would lead to a decline in vaccinations, which could compromise the immunization of children as well as public health as a whole.⁵⁵ As for the reasons behind mandatory vaccinations of children, in *Vavricka* the ECtHR found them both relevant and sufficient. The Grand Chamber noted four points in particular: first, that the protection of public health is a weighty rationale underlying the legal duty to get vaccinated;⁵⁶ second, that in the context of the case there was scientific consensus, as well as incontrovertible medical evidence, in support of the need to achieve the highest possible degree of vaccine coverage for children;⁵⁷ third, that significant weight must be placed on the best interests of the child, which states are under a legal obligation to protect, eg under the UN CRC; and, finally, that adopting a system of mandatory vaccinations is a matter of national healthcare policy, which falls within the wide margin of appreciation that the ECtHR accords to the respondent states in this area.

Since the Grand Chamber held that the reasons behind mandatory vaccinations were appropriate and necessary, the final question to consider was whether the restrictive measure was also proportionate to the legitimate aim sought (ie the protection of public health). The assessment of the proportionality of the legal duty in *Vavricka* spanned four main themes: first, the scope of the duty; second, its evidence basis; third, its procedural fairness; and, finally, its interference with the rights to privacy and freedom of religion. I will briefly discuss those four themes before linking them to this article’s hypothetical scenario.

In terms of the scope of the duty, according to the majority in *Vavricka* it was critical that the legal duty to get vaccinated was not absolute. The duty was mitigated in two ways: first, it could not be forcibly administered⁵⁸; and, second, children with

53 See eg the opinion of AG Kokkott in C-499/08 *Ingeniorforeningen i Danmark* EU:C:2010:248, 68.

54 *Vavricka* (n 1) para 273.

55 *ibid* paras 283 and 284. Several intervening governments agreed with the position of the Czech Republic on this point. In fact, mandatory vaccinations of children exist in a proportion of Council of Europe Member States. At the time of writing, 26 of the 46 states require the vaccination of children against diseases such as measles, mumps, rubella, and others. However, of the 26 states to require the vaccination of children, 4 of the policies only require vaccination upon school entry, eg Germany, whereas the legislation of the other states dictates that the vaccinations are mandatory for all children.

56 *Vavricka* (n 1) para 285.

57 *ibid*

58 *ibid* para 293.

contraindications could be exempted from vaccination.⁵⁹ With regards to the evidence basis of the duty, as discussed earlier, the Court was satisfied with the extensive scientific evidence in support of the safety of the vaccines in question⁶⁰; and in support of their critical role for individual and public health.⁶¹ As for the procedural fairness of the duty, the sanctions for non-compliance were found to be ‘relatively moderate’,⁶² and their character was protective rather than punitive.⁶³ Domestic law provided safeguards, such as administrative appeals, through which individuals could contest the consequences of their non-compliance.⁶⁴ The Court also held that the policy-making process was appropriate, transparent and left adequate space for public participation.⁶⁵

Finally, the Court accepted that the exclusion of unvaccinated children from preschool led to the loss of an important pedagogical and social experience for them.⁶⁶ However, that loss was the result of their parents’ choice to refuse to vaccinate them.⁶⁷ Furthermore, it was crucial for the Court that ‘the possibility of attendance at preschool of children who cannot get vaccinated for medical reasons depends on a very high rate of vaccination among other children against contagious diseases.’⁶⁸ Therefore, in that specific context, it was not disproportionate to require those for whom vaccination was only a remote risk to get vaccinated, as a matter of legal duty, in order to protect those who for medical reasons cannot benefit from vaccination.⁶⁹ For those reasons the Court concluded that the particular balance struck by the Czech authorities remained within their margin of appreciation and that there was no violation of Article 8 ECHR as a result.⁷⁰

Apart from their right to respect for family life, the applicants in *Vavricka* also claimed that mandatory vaccinations violated their right to freedom of thought, conscience and religion. However, the complaint under Article 9 was unsuccessful because the applicants did little to substantiate the claim that the vaccination duty interfered with their religious or philosophical beliefs. The applicants did not offer specific arguments showing that their critical stance towards mandatory vaccinations was not just a matter of opinion but constituted—or at least was sufficiently closely linked to⁷¹—a protected conviction or belief.⁷² Or else, to put it in the Court’s terms, the applicants failed to show that their views were of sufficient ‘cogency, seriousness, cohesion and importance’ to fall within the protective scope of Article 9.⁷³

59 *ibid* para 291.

60 *ibid* para 301.

61 *ibid* para 300.

62 *ibid* para 293.

63 *ibid* para 294.

64 *ibid* para 295. At the time of writing, out of the 26 countries of the Council of Europe that mandate vaccination of children, all allow for medical exemptions. However, conscientious exemptions are allowed only under the legislation of the Czech Republic and Latvia.

65 *ibid* paras 297 and 298.

66 *ibid* para 306.

67 *ibid*.

68 *ibid*.

69 *ibid*.

70 *ibid* para 310.

71 *Eweida* (n 13) para 82.

72 *Vavricka* (n 1) para 334.

73 *ibid* para 335.

Their claim was further weakened by the fact that before the domestic courts one of the applicants did not bring up his complaint under Article 9 until late in the proceedings, whereas the other two applicants did not bring it up at all.⁷⁴ As a result, the ECtHR found their complaint to be incompatible *ratione materiae* with Article 9 ECHR.

Two important points emerge from the approach of the ECtHR in *Vavricka* on the relationship between mandatory vaccinations and freedom of religion or belief. First, the ECtHR did not preclude that the applicants' view against mandatory vaccinations *might* fall within the protective scope of Article 9. However, what the applicants had to do was convince the Court about this—which they did not do. This is a subtle confirmation of the departure of the ECtHR from earlier decisions, such as *Boffa*, which suggested that general public health regulations that apply to everyone regardless of religion or belief could not interfere with Article 9.⁷⁵ This departure is in some ways aligned with similar developments in cases involving the manifestation of religion in employment, where in more recent cases the ECtHR has accepted that general workplace rules can indeed interfere with freedom of religion or belief.⁷⁶

Second, if an applicant convinced the Court that their negative stance towards the mandatory vaccination scheme *does* fall within the scope of Article 9, should in that case be *possible* to be granted an exemption for reasons of conscience? The reasoning of the Grand Chamber in *Vavricka*, as well as its references to its landmark decision in *Bayatyan*, suggest that state authorities are under a duty to carefully consider any individual requests for exemptions on the grounds of conscience—this is *a fortiori* whenever there is evidence of a 'serious and insurmountable' conflict between individual conscience and a general legal obligation.⁷⁷ Of course, careful state consideration should not take the form of an inquiry into the theological or normative validity of the belief in question, which the courts lack competence to determine.⁷⁸ It should only be limited to determining, among others, whether the belief meets the fairly general standards of cogency, seriousness, cohesion and importance that outline the scope of Article 9, and whether the belief is sincere, or it is only used as a pretext for differential treatment.⁷⁹ That is a highly contextual exercise which, as *Vavricka* confirms, leaves adequate space for the believer to use their subjective experience in support of their claim.

Arguing that individual conscientious objections merit careful consideration, however, hardly guarantees that an exemption from the general rule will be granted. Even if the belief were to fall within the scope of Article 9, the conscientious objection would still be defeasible rather than a trump card. As the ECtHR held in the recent case of *Spīnu*, if a restriction on the right to manifest religion was due to an ongoing

74 *ibid* paras 334–336.

75 *Boffa and Others v San Marino* App no 25536/95, Commission decision of 15 January 1998, 33–4. A similar point is made in the submission of the French Government in *Vavricka* (n 1) para 325.

76 *Trispiotis* (n 21) 876–8.

77 See *Bayatyan* (n 34) para 110.

78 See eg Case C-414/16 *Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV* EU:C:2018:257 paras 63–64. The UK Courts follow a similar approach, see eg A McColgan, 'Class Wars? Religion and (In)equality in the Workplace' (2009) 38 *Industrial Law Journal* 1.

79 See eg *Kosteski v the Former Yugoslav Republic of Macedonia* App no 55170/00 (13 April 2006) para 39.

health crisis, the assessment of the necessity of that restriction *can* place significant emphasis on the particular characteristics of that health crisis.⁸⁰ Specifically on vaccinations, *Vavricka* is a good example: it involves a general rule that pursues the legitimate aim of public health, alongside a wealth of reliable evidence showing that that aim would not be met unless a very high degree of compliance is ensured. In that context, it is unlikely that freedom of religion or belief would provide a stronger basis for an exemption compared to another right, such as the right to respect for private and family life. In the specific context of *Vavricka*, where the legal duty to get children vaccinated was found to be carefully scoped and proportionate vis-à-vis Article 8 ECHR, the religious freedom complaint, even if it fell *ratione materiae* within Article 9, would not fare better than Article 8: it too would have been outweighed by public health.

5. RELIGIOUS FREEDOM AND RELIGIOUS ANTIDISCRIMINATION

How does the discussion above apply to this article's hypothetical scenario? The scenario's mandatory vaccinations pursue the legitimate aim of public health across the individual and collective dimensions discussed earlier, ie the law aims to protect individuals from the disease as well as to reduce the risk that those who—because of medical reasons—cannot get vaccinated will catch the virus whenever they access healthcare facilities. Are mandatory vaccinations appropriate and necessary to achieve that aim? Important factors in the hypothetical scenario are that vaccinations cannot be forcibly administered; and that persons with contraindications could be exempted. If there is credible scientific evidence showing that a very high degree of vaccination among healthcare staff can reduce the spread of the deadly virus within hospitals, then it is likely that the requirement for a 'pressing social need' in the proportionality test would be fulfilled. Questions of procedural fairness—such as the transparency and openness of the decision-making process that led to the law, the intensity and character of the sanctions, and whether any imposed sanctions could be challenged—form another important part of the proportionality test, which deserves more discussion that cannot take place here.

Even if the scope, evidence basis and procedural fairness of mandatory vaccinations are found to be appropriate and necessary to protect public health, the scheme could still amount to a disproportionate interference with the right to freedom of religion or belief in individual cases. In other words, in certain cases the protection of public health might be outweighed by the values of ethical independence, toleration, and pluralism that are embedded and reflected in the protection of freedom of religion or belief.⁸¹

Now, in our case, let us accept *arguendo* that Maria convinces the Courts that her refusal to get vaccinated constitutes a protected belief under Article 9. Would the fact that the law allows no conscientious exemptions violate her right to freedom of religion? The answer depends on whether, in the specific context of the case, the legitimate aim of the law could be served were there room for accommodating conscientious objections. Two points are relevant here. The first point is that Maria, as a

80 See *Spinu* (n 50) para 67.

81 See eg *Eweida* (n 13) para 94.

paediatrician, has to examine children in person. She also has to come into contact with their parents or grandparents or carers. That is a constitutive part of the job of a paediatrician at a hospital. It would be reasonable therefore for the hospital to argue that Maria can perform her duties only in a people-facing post, and that she cannot be working from home for the foreseeable future. If that is the case, and if there is indeed plenty reliable evidence showing that vaccinations cut the transmissibility of the virus significantly, then it is likely that not accommodating Maria's objection would not violate her right to freedom of religion. No other way of balancing between public health and freedom of religion seems plausible in this context. Of course, as in *Vavricka*, that conclusion rests on a highly contextual analysis. The outcome would be different for other staff in healthcare facilities, eg staff working on logistics or human resources, who might indeed be able to work from home. A law that leaves no space for *their* exemption on the grounds of a protected belief would likely amount to a disproportionate interference with their rights under Article 9 ECHR.

The second point is that if Maria's religious objection was accommodated, then the door would be open for the accommodation of non-religious conscientious objections to mandatory vaccinations.⁸² Novak, a nurse in the same hospital, is a politicized libertarian who rejects state coercion in individual healthcare and refuses to get vaccinated for that reason. All other things being equal, if Novak convinces the courts that his belief is cogent, serious, cohesive, and important, he would also fall within the protective scope of Article 9 ECHR. In that case, Maria's religious objection would be hard to distinguish from Novak's philosophical objection: their protected convictions would deserve equal regard by policymakers and the courts. Non-religious conceptions of the good life are as much protected by the right to freedom of religion or belief as religious ones. So, as a matter of principle, a national healthcare policy on mandatory vaccinations should leave space either for all protected types of conscientious objection, or for none. In the latter case, however, as we have seen, state authorities would have to lift a very considerable evidentiary weight—not insurmountable though—to justify instances of healthcare policy that offer no space whatsoever for accommodation of protected conscientious objections.

So far, the discussion focused on Maria's right to freedom of religion or belief. But would Maria's complaint fare better if it was grounded on the prohibition of religious discrimination instead of the right to freedom of religion? As I have argued elsewhere, religious freedom and religious anti-discrimination share their main normative ground on a general moral right to ethical independence.⁸³ Nevertheless, the legal rights to religious freedom and religious anti-discrimination are not synonymous. Religious freedom has a *vertical* emphasis on our personal responsibility to define value and live in accordance with our ethical commitments. Religious anti-discrimination has a *horizontal* emphasis on ensuring that individuals can access important goods and opportunities—goods and opportunities that have little to do with the manifestation of belief—without unfair disadvantage on grounds of their (supposed) religion or belief. Because of the horizontal emphasis of discrimination law on distributive justice, the prohibition of religious discrimination works

82 Religious and non-religious beliefs enjoy equal protection under art 9 ECHR.

83 Trispiotis (n 21).

differently in response to group disadvantage in the ways identified earlier,⁸⁴ and can provide more protection than the right to freedom of religion. One paradigmatic occasion of this difference arises from cases involving direct discrimination on the grounds of religion or belief. Examples of direct religious discrimination would be cases where a rule making a distinction based on religion or belief is a pretext for targeting a specific group,⁸⁵ or cases where a facially neutral rule disadvantages *all* members of a protected group.⁸⁶ In such cases, the prohibition of direct religious discrimination under the ECHR and EU law protects individuals more robustly compared to the right to freedom of religion because it invites a stricter standard of justification.⁸⁷ Another occasion when the prohibition of religious discrimination can offer more protection than the right to freedom of religion arises when the disadvantage in question occurs intersectionally, ie through the interaction between different protected grounds, such as gender, racial and ethnic origin, and religion.⁸⁸ In those cases, which often reflect systemic inequalities, the justification test under religious discrimination can track the more robust levels of judicial scrutiny adopted under sex or racial discrimination, for instance, because religious inequality is interlaced with gender or racial inequalities.⁸⁹ So, cases of direct religious discrimination and cases of intersectional discrimination that involve religion or belief are examples where religious anti-discrimination can provide more protection to individual claimants, and can elicit an overall more nuanced judicial approach, than an approach based on the right to freedom of religion.

However, our hypothetical scenario involves a case where religious discrimination does not seem to be direct or intersectional. The disadvantage suffered by Maria seems to be distributed relatively evenly between different belief groups, genders, and ethnicities. There is also no evidence that those healthcare employees who object to mandatory vaccinations for reasons of conscience, religious or otherwise, form a group that has been socially disadvantaged in the past. Of course, none of this can *ipso facto* invalidate Maria's complaint under indirect religious discrimination. Maria could be successful in establishing a *prima facie* case of discrimination by showing, among others, a correlation between her membership in a protected group, understood in the broad sense outlined earlier, and being disproportionately disadvantaged by the legal obligation to get vaccinated. The question is whether, in cases like Maria's, where the suffered disadvantage seems to be predominantly individual rather than correlated with the socio-economic disadvantage or stigma suffered by a particular protected group, religious anti-discrimination should be expected to offer more protection than religious freedom.

84 See the second substantive section of this article.

85 See eg Case C-83/14 *CHEZ Razpredelenie Bulgaria AD v Komisia sa Zashitita ot Diskriminatsia* ECLI:EU:C:2015:480 para 76.

86 Those cases are considered as direct discrimination under UK law. See eg *James v Eastleigh Borough Council* (1990) 2 AC (HL) 751.

87 See eg *Vojnity v Hungary* App no 29617/07 (12 February 2013) para 36.

88 See S Atrey, 'Structural Racism and Race Discrimination' (2021) 74 *Current Legal Problems* 1.

89 I Tripsiotis, 'Gender Equality and the Scope of Religious Freedom' in R Cook (ed), *Frontiers of Gender Equality* (University of Pennsylvania Press 2023) 416–40. Also L Vickers, 'Achbita and Bougnaoui: One Step Forward and Two Steps Back for Religious Diversity in the Workplace' (2017) 8(3) *European Labour Law Journal* 232.

The answer to that question depends on what we take to be the main normative considerations underlying the prohibition of indirect religious discrimination. Although a full discussion of that is not possible within my space constraints, two plausible alternatives can be sketched. If we assume that the normative grounds of religious freedom and religious anti-discrimination overlap, as I briefly argued earlier, then the prohibition of indirect discrimination would cover differential effects on members of specific belief groups *as well as* on holders of specific beliefs. In that case, Maria would fall within the normative scope of religious anti-discrimination. But given that hers seems a case of isolated contextual disadvantage flowing from the practice of her beliefs, rather than a case of group disadvantage, it is not clear why the standard of justification under her religious discrimination complaint should be higher compared to the standard under freedom of religion,⁹⁰ which already invites a high standard of review in the context of this case, as we saw.

We could assume though that religious freedom and religious anti-discrimination serve different purposes. Khaitan and Norton have argued, for instance, that the aim of the prohibition of indirect religious discrimination is to protect (actual or perceived) members of groups from being saddled by undeserved and unfair burdens on their membership, whereas the right to freedom of religion protects our interest in decisional autonomy in relation to religious adherence.⁹¹ But that interpretation would not help Maria either, for the same reasons mentioned a moment ago. Hers seems a case of disadvantage flowing from the practice of her belief rather than a case of being saddled unfairly by her Orthodox Christian membership. So, under a theory that tracks the normative justification of religious anti-discrimination on group disadvantage, Maria's case would likely fall outside the normative scope of religious anti-discrimination. Even if her complaint falls within the doctrinal scope of religious anti-discrimination—which is possible if she shows that her membership in a protected group is correlated with her suffered disadvantage—that would not be enough to invite a tighter standard of justification compared to her right to religious freedom. Under a theory that tracks the normative justification for religious anti-discrimination on group disadvantage, the reason for a tighter justification test (compared to freedom of religion) is that group disadvantage can compromise the ability of individuals to access key liberties and opportunities.⁹² That reason does not seem to hold in Maria's case. It does not seem to hold in any case involving isolated disadvantage on holders of specific beliefs.

Therefore, none of those briefly discussed normative positions provide a good reason for tightening the standard of justification for indirect discrimination compared to the threshold for state interference with the right to freedom of religion in our case. Maria would not have better chances to succeed in the final outcome through the indirect discrimination route compared to the religious freedom one. In other words, the reasons underlying the decision of the courts to find no violation of freedom of religion under the ECHR (ie that the interference was legitimate and

90 See GL Neuman, 'Questions of Indirect Discrimination on the Basis of Religion' (2021) 34 *Harvard Human Rights Journal* 177, 189–91.

91 Khaitan and Norton (n 45).

92 T Khaitan, 'Two Facets of Religion' (2021) 34 *Harvard Human Rights Journal* 231, 243.

proportionate) would be taken to be equivalent to the reasons that could justify indirect religious discrimination (ie that there is an objective and reasonable justification for the difference in treatment, and that that is also proportionate). If in the specific hypothetical scenario of this article public health turned out to outweigh Maria's right to freedom of religion then, by the same token, indirect religious discrimination would have been justified, too.

6. CONCLUSION

This article took as its starting point the theoretical and doctrinal uncertainty over the compatibility of mandatory vaccination schemes—which are common among the Member States of the Council of Europe—with the right to freedom of religion or belief and the prohibition of discrimination on the grounds of religion or belief. The article argued that the compatibility of mandatory vaccinations with those two legal rights depends on a rigorous engagement with the values underlying public health as well as the values underlying religious freedom and religious anti-discrimination. Compliance with human rights law also depends on the procedural fairness of mandatory vaccinations and on the empirical evidence underlying the need for them. It was also argued that the concept of neutrality—despite the important role it plays before European courts in this area of human rights law—offers limited guidance in this context because of its *pro tanto* nature and its inherent inconclusiveness.

The main argument of this article does not categorically resolve questions about the scope or type of exemptions for religion or belief that could be claimed from mandatory vaccination schemes, let alone from other state interventions for reasons of public health. Nevertheless, the proposed account of religious freedom and religious anti-discrimination as a nexus of legal rights, a nexus that protects the background conditions necessary for people to pursue their ethical and religious commitments, outlines the framework within which debates about the accommodation of protected beliefs can arise. This article's framework bears therefore wider significance—for actual (and hypothetical) Marias across Europe, and for controversies about the just place of religion in the state more broadly.