

ONE FOR ALL, ALL FOR ONE? SUPPOSING THE ECTHR'S POSITION ON COVID-19 VACCINES



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Abstract

At the time of writing, COVID-19 no longer constitutes a public health emergency of international concern. However, the compatibility of coronavirus vaccines with the interests of the European Court of Human Rights (ECtHR) is still worth mentioning. In 2020 and 2021, while humanity struggled with the pandemic, the long list of fundamental rights dilemmas expanded – with the issue of human rights certainly generating the most relevant public resonance. Alongside curfews and less stringent restrictions on the freedom of movement was the compulsory vaccination against COVID-19. Therefore, the decision of the ECtHR in *Vavříčka et al. v. the Czech Republic* could hardly be more timely in helping us to take stock of the conditions under which compulsory coronavirus vaccination may be compatible with human rights law. Therefore, this paper seeks to provide a focused case analysis on the only decision of the court related to compulsory vaccines – and uses analogy to make conclusions on the compatibility of coronavirus vaccines with the European Convention on Human Rights (ECHR).

Keywords: compulsory vaccination, COVID-19, ECHR, ECtHR, right to private life

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1. Introduction: COVID-19 vaccines and the ECHR

The coronavirus was not the first time the international community had responded to a pandemic, but COVID-19 was certainly the most challenging health crisis humanity had faced in the last hundred years. According to recent World Health Organization statistics,¹ at the time of writing² 772,166,517 cases were confirmed; 6,981,263 deaths were reported; and 13,534,602,932 vaccine doses were administered so far. The numbers speak for themselves: the pandemic had a significant impact on multiple areas of our lives – and human rights were no exception. The compatibility of compulsory vaccination with contemporary human rights law was undoubtedly at the heart of heated public debates on the pandemic, besides the curfews and other restrictions of our freedom of movement, which served as an inspiration for this paper.

As far as the ECtHR is concerned, two aspects were touched upon by the pandemic. On the one hand was Art. 15 of the ECHR, concerning derogation in public emergency. In March 2020, ten contracting parties notified the Secretary-General of the Council of Europe of their decision to enact Art. 15. These were Latvia, Romania, Armenia, the Republic of Moldova, Estonia, Georgia, Albania, North Macedonia, Serbia, and San Marino.³ Thanks to the leeway offered by the inherent limitations under the ECHR system – and probably to the relatively short period of time with derogations in effect – no decision was made by the court related to Art. 15. On the other hand, pandemic-adjacent applications reached the court concerning mostly the right to life (Art. 2), the prohibition of torture (Art. 3), the right to liberty and security (Art. 5), the right to a fair trial (Art. 6), and the right to respect for private and family life (Art. 8). Some applications related to compulsory vaccinations and COVID-19 certificates also reached the court, however no decisions were delivered in these cases since they were closed with admissibility decisions.

One of the applications related to COVID-19 was *Thevenon v. France*,⁴ in which a firefighter refused to comply with the vaccination requirement imposed on certain workers by the French Public Health Emergency Act.⁵ When Mr Thevenon refused vaccination without claiming a medical exemption, he was suspended from both his professional and volunteer duties. He referred to violations of Art. 8 (right to respect for private life) and Art. 14 (prohibition of discrimination) of the ECHR, as well as Art. 1 of Protocol No. 1 (protection of property). The court rejected his application

1 As of 23 November 2023.

2 WHO Coronavirus (COVID-19) Dashboard [Online]. Available at: <https://covid19.who.int>.

3 Council of Europe, Informal Chronology of Derogations under Article 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS. No. 5) by Country between 1 January 2000 and 6 March 2022 [Online]. Available at: <https://rm.coe.int/echr-table-derogations-2000-2022-06-03-2022/1680a5bd43>.

4 *Thevenon v. France*, ECtHR, 22 October 2022, no. 46061/21.

5 LOI n° 2021-1040 du 5 août 2021 relative à la gestion de la crise sanitaire (1) [Online]. Available at: <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000043909676>.

as inadmissible, for failure by the applicant to exhaust his domestic remedies before applying. The other application was *Zambrano v. France*,⁶ in which a university lecturer complained about the 'health pass' introduced in France in 2021, and founded an online movement to protest against it. The court noted that Mr Zambrano's application was inadmissible for several reasons, specifically the failure to exhaust domestic remedies – as well as abuse of the right of application within the meaning of Art. 35 paras. 1 and 3 (admissibility criteria) of the convention. Therefore, applications relating to COVID-19 vaccinations reached the ECtHR, but no decision on the merits was delivered.

However, on 8 April 2021 the case law of the ECtHR reached a milestone, with the first Strasbourg decision on compulsory childhood vaccinations. The ECtHR's Grand Chamber ruled by 16-1 that compulsory childhood vaccinations did not violate Art. 8 of the ECHR, i.e., the right to respect for private life.⁷ Although the case of *Vavříčka et al. v. the Czech Republic*⁸ had nothing to do with the coronavirus pandemic, due to the timing it is possible to conclude what position the court would have taken on compulsory vaccinations against COVID-19. In this vein, this paper seeks to provide a focused case analysis on the only decision of the court related to compulsory vaccines – and uses analogy with a detailed examination of the criteria in the *Vavříčka* decision to conclude on the compatibility of coronavirus vaccinations with the ECHR.

2. The relevant facts of the Vavříčka case

Before presenting the facts of the case, for the sake of methodological clarity it is necessary to highlight three essential features of the *Vavříčka* case in order to avoid distortion of its comparison with the COVID-19 vaccines. First of all, the *Vavříčka* case focused on vaccines that protect against well-known diseases. Second, the compulsory nature of the vaccines at issue in the *Vavříčka* case was reflected in the fact that parents who fail to comply with the legal requirements were subject to administrative fines, and that unvaccinated children were not allowed to attend kindergarten. There was therefore no question of forced vaccination, i.e., administering the vaccine against parental wishes, nor of a minor who had not been vaccinated

6 *Zambrano v. France*, ECtHR, 7 October 2022, no. 41994/21.

7 Neither Art. 8 of the ECHR, nor any other article of the convention explicitly mention the right to health. However, according to case law of the ECtHR, the protection of health is implicitly covered by the right to respect for private life.

8 *Vavříčka et al. v. Czech Republic*, ECtHR, 8 April 2021, no. 47621/13 (*Vavříčka v. the Czech Republic*, no. 47621/13; *Novotná v. the Czech Republic*, no. 3867/14; *Horných v. the Czech Republic*, no. 73094/14; *Brožík v. the Czech Republic*, no. 19306/15; *Dubský v. the Czech Republic*, no. 19298/15; *Roleček v. the Czech Republic*, no. 43883/15)

being prevented from starting primary school upon reaching compulsory school age. The third essential feature was that the Vavříčka case related to childhood vaccinations, and therefore the applicants in the proceedings were the parents (legal representatives) of minors, and further striking questions arose as to the right of privacy of the parents and their freedom to bring up their children.

In Vavříčka, the applicants complained to the court about the consequences of their failure to comply with childhood vaccine requirements. In the Czech Republic, the Act on the Protection of Public Health⁹ and the Decree of the Minister of Health on vaccination against communicable diseases¹⁰ provide for compulsory vaccination of permanent and long-term residents according to a fixed schedule.¹¹ In the case of minors, parents are responsible for ensuring compliance with the legal requirements, and failure to vaccinate is considered a minor offence. In addition, nurseries and kindergartens can only accept children who have received the required vaccinations, or who have been certified as otherwise immunised, or who cannot be vaccinated for health reasons. In the background to the Vavříčka case, it should be highlighted that the Czech vaccination schedule only includes the administration of vaccines against well-understood childhood diseases, such as diphtheria, tetanus, whooping cough, Haemophilus influenzae B infections, poliomyelitis, hepatitis B, measles, mumps, rubella and, in certain special health indications, pneumococcal infections.

In Vavříčka, the applicant was a father who had failed to vaccinate his 13 and 14-year-old children against tetanus, polio and hepatitis B, and was fined for committing an offence. In addition, there were also five other ‘child applicants’ on the plaintiff’s side who were not enrolled in kindergarten or had their previous enrolment withdrawn because they had not been vaccinated. According to one complaint, the applicant’s parents had concerns about the safety of measles, mumps and rubella (MMR) vaccinations, while other parents lacked the possibility of an individualised vaccination series for their child with health issues. Others refused to vaccinate their child on grounds of thought and conscience, while the sixth applicant’s parents, who were biologists, gave their child a vaccination series determined by themselves, omitting several vaccines required by the Act on the Protection of Public Health. The applicants invoked Art. 2 (right to life), Art. 6 (right to a fair trial), Art. 8 (right to respect for private and family life), Art. 9 (freedom of thought, conscience and religion), Art. 13 (right to an effective remedy) and Art. 14 (prohibition

9 Zákon č. 258/2000 Sb., Zákon o ochraně veřejného zdraví a o změně některých souvisejících zákonů [Online]. Available at: <https://www.epi.sk/zzcr/2000-258>.

10 Vyhláška č. 439/2000 Sb., Vyhláška Ministerstva zdravotnictví o očkování proti infekčním nemocem [Online]. <https://www.zakonyprolidi.cz/cs/2000-439>.

11 The decree of the Ministry of Health referred to in the facts of the case is no longer in force, and the decree on vaccination against communicable diseases applies instead. See: Vyhláška č. 537/2006 Sb., Vyhláška o očkování proti infekčním nemocem [Online]. Available at: <https://www.epi.sk/zzcr/2006-537>.

of discrimination) of the ECHR.¹² Art. 14 (prohibition of discrimination) and Art. 2 (right to education) of the Protocol for failure to provide compulsory vaccinations. However, the ECtHR declared the applications inadmissible as regards the right to life, the right to a fair trial, freedom of thought, conscience and religion, the right to an effective remedy and the prohibition of discrimination,¹³ and thus based its decision on the right to private life alone. In the light of the analysis carried out under Art. 8, the court also considered it unnecessary to examine the complaints separately in the context of the right to education.¹⁴

3. The findings of the ECtHR

When examining the ECtHR's conclusions, it shall be considered first (I) whether there was an interference with the right to private life, then (II) what was the legitimate aim pursued by the interference, and whether the interference was lawful in the light of the legitimate aim pursued. After that, it shall also be considered (III) whether the interference was necessary in a democratic society, and finally (IV) whether the interference was proportionate in the light of the legitimate aim pursued.¹⁵

a) Do compulsory vaccinations constitute an interference with the right to private life?

12 Although the court declared the relevant applications (*Brožík v. the Czech Republic*, no. 19306/15; *Dubský v. the Czech Republic*, no. 19298/15) inadmissible as regards freedom of thought, conscience and religion, it is worth considering the arguments put forward here. In examining the applicants' claims under Art. 9 of the ECHR, the court recalled that not all opinions or beliefs are protected ideas under the convention, and noted that the philosophical or religious underpinnings of the applicants' objections to vaccination were not consistent in the domestic proceedings. The court concluded that the applicants had failed to demonstrate that their critical views on the vaccine were sufficiently serious, well-founded, coherent and important to be protected under Art. 9 of the ECHR. (It should be noted that this latter approach represents a shift from the case law of the court so far, which could even open the door to the recognition of compulsory vaccination as an interference with Art. 9.) The ECtHR also stressed that Czech law allows, in exceptional cases, for an unvaccinated individual to be exempted from paying an administrative fine on grounds of conscience. Likewise, Judge Wojtyczek also pointed out in his dissenting opinion that this exception clause was a "very important argument" for the compatibility of the measure with the convention (Judge Wojtyczek's dissenting opinion, para. 17). These case law additions point to the fact that the court no longer upholds the findings in *Boffa et al. v. San Marino*, in which the European Commission of Human Rights found that the obligation to vaccinate everyone, irrespective of religion or personal beliefs, is compatible with Art. 9 of the convention. The decision in *Vavříčka*, on the other hand, suggests that there may be a well-founded, serious, coherent and important core of thought which provides a possibility for exemption from the vaccination requirement. See Katsoni, 2021.

13 *Vavříčka et al. v. the Czech Republic*, paras. 338 and 347.

14 *Vavříčka et al. v. the Czech Republic*, para. 345.

15 Nugraha et al., 2022, pp. 579–585.

First of all, it should be expressed that in the *Vavříčka* case the ECtHR established that compulsory vaccination, as an involuntary medical intervention, constitutes a fundamental interference with the right to private life, and in the present case such an involuntary medical intervention was also made – even though the vaccines were not in fact administered under duress.¹⁶ Although the contours of the right to private life cannot be precisely defined, it is quite clear that the scope of this human right is sufficiently broad to apply to a wide range of life situations and encompass the right to individual self-determination. Since medical interventions necessarily affect bodily integrity, the right of individual self-determination in this area is also brought into focus, anticipating that medical interventions could only be lawfully carried out with the informed consent of the individual.¹⁷ If this is not done, the right to bodily integrity is violated. The patient therefore has, in principle, the right to refuse consent to a medical intervention.¹⁸ However, as the right to private life is not absolute, there may be cases where an intervention, such as vaccination, may be required in the absence of consent.

b) Is the aim of compulsory vaccination legitimate?

In relation to the legitimate aim of the intervention, it should be noted that immunisation and compulsory vaccination should be aimed at protecting all children against serious communicable diseases. In most cases, this can be achieved by ensuring that children receive the full range of vaccinations at an early age, while children who cannot receive such an intervention, e.g., for health reasons, are indirectly protected against serious communicable diseases as long as the necessary level of vaccination is maintained in their community (i.e., their protection is derived from the so-called ‘herd immunity’).¹⁹ This approach to public health policy is based on medically sound arguments, and as such is in the best interests of the child.²⁰ In this light, the ECtHR accepted the respondent government’s argument that the Czech legislature’s decision to make vaccination compulsory was supported by relevant and sufficient reasons, and found that the vaccination requirements served a legitimate aim – namely the protection of public health and the rights of others.²¹ The court found that the obligations laid down in the Act on the Protection of Public

16 *Vavříčka et al. v. the Czech Republic*, para 263.

17 Hungler, 2022, p. 65.

18 Sulyok, 2021, p. 191.

19 *Vavříčka et al. v. the Czech Republic*, para. 272.

20 The requirement to take the best interests of the child into account is inherent in the 1989 UN Convention on the Rights of the Child (promulgated in Hungary by Act LXIV of 1991), Article 3 para. 1 of which states that “in all decisions concerning children, public and private institutions of social protection, courts, administrative authorities and legislative bodies shall take into account the best interests of the child as a primary consideration.”

21 *Vavříčka et al. v. the Czech Republic*, para. 272.

Health and in the Decree of the Minister for Health on vaccination against communicable diseases were in accordance with Czech constitutional requirements, and that the restrictions imposed were derived from well-known and foreseeable legal provisions.²²

c) *Are compulsory vaccinations necessary in a democratic society?*

The ECtHR has already developed a number of criteria for assessing the need for compulsory vaccination in its case law. For example, in *Solomakhin v. Ukraine*,²³ where the applicant was vaccinated against diphtheria against his will during an epidemic, the court took into account whether public health considerations made it necessary to control the spread of communicable diseases, and whether in that particular case the national authorities had taken the necessary precautions to ensure that vaccination was appropriate.²⁴ The same criteria were also taken into account by the European Commission of Human Rights in the case of *Boffa and Others v. San Marino*,²⁵ emphasising the margin of appreciation of contracting parties.²⁶ These criteria were further developed and refined by the ECtHR in the *Vavříčka* decision, which assessed the necessity of compulsory vaccination in a democratic society by carefully weighing (I) the margin of appreciation of the contracting parties,²⁷ (II) the existence of an overriding public interest and the existence of substantial and sufficient reasons for the intervention,²⁸ and (III) the proportionality of the intervention to the legitimate aim pursued.²⁹ The criterion of necessity is analysed in this light.

According to ECtHR case law, public health policy issues are a matter for the margin of appreciation of national authorities, and in the *Vavříčka* case – which specifically concerned the mandatory nature of childhood vaccinations – this margin is explicitly wide.³⁰ Since the present case did not involve a voluntary medical intervention, the obligation to vaccinate was in principle linked to the effective exercise of the individual's “intimate or key rights”. The most intimate rights in general narrow the margin of appreciation of the state, although in bioethical matters this margin is usually wide – as it is in the case of compulsory childhood vaccination.³¹ However, in the case analysed the latter was diminished by the fact that the vaccines

22 *Vavříčka et al. v. the Czech Republic*, paras. 266–271.

23 *Solomakhin v. Ukraine*, ECtHR, 15 March 2012, no. 24429/03.

24 *Solomakhin v. Ukraine*, para. 36.

25 *Boffa v. San Marino*, EComHR, 15 January 1998, no. 26536/95. In this case, the applicants brought an action before the court concerning the compulsory vaccination of their children against Hepatitis B and the possible penalty of imprisonment in the event of failure to vaccinate.

26 *Boffa v. San Marino*, para. 35.

27 *Vavříčka et al. v. the Czech Republic*, paras. 276–280.

28 *Vavříčka et al. v. the Czech Republic*, paras. 281–289.

29 *Vavříčka et al. v. the Czech Republic*, paras. 290–309.

30 *Vavříčka et al. v. the Czech Republic*, para. 280.

31 *Vavříčka et al. v. the Czech Republic*, paras. 273, 276 and 280.

were not actually administered against the will of the applicants, and that no such obligation, i.e., compulsory vaccination, was provided for under Czech national law. The court also noted that there is a general agreement that vaccination is one of the most successful and cost-effective health interventions, and that each contracting party must endeavour to achieve the highest possible level of vaccination coverage among its population.

However, as far as the most appropriate means to achieve the highest possible level of vaccination coverage are concerned, there is no consensus among contracting parties at the European level, but rather a wide range of vaccination policies for children.³² The position of the Czech Republic is at the end of this range, which is a more prescriptive one – i.e., it contains obligations for legal subjects. The court also noted that several other contracting parties have recently changed their vaccination policy by adopting an approach similar to that of the Czech Republic – i.e., a shift from voluntary vaccination on the basis of recommendations to prescriptive provisions in order to maintain vaccination coverage and herd immunity.³³ While it is accepted that making vaccination compulsory raises sensitive issues, this is not done to pressure those who disagree with the vaccination obligation, but in the interests of social solidarity, with a view to protecting the health of the society as a whole. Consequently, the ECtHR found that the margin of appreciation of the contracting party in the present case must be a wide one.

The court also underlined that there are important public health reasons for making vaccines compulsory, and that there is a consensus on the effectiveness and safety of childhood vaccination and on achieving the highest possible vaccination coverage. The continuation of vaccination policy is supported by data provided by national and international experts. While compulsory vaccination is neither the only nor even the most widespread vaccination model in Europe, the court reiterated that public health policy is a matter for national authorities – and that the contracting parties should therefore be given a wide margin of appreciation in this respect. Furthermore, ECtHR case law has established that the best interests of the child are paramount in all decisions affecting minors.³⁴ It follows that the state has an obligation to place the best interests of the child as an individual and of the child as a group at the centre of all decisions affecting their health and development.

Art. 8 imposes a positive obligation on contracting parties to the ECHR, i.e., to take appropriate measures to protect the health of persons within their jurisdiction. In the course of the proceedings, the defendant government emphasised the position of the competent Czech health authorities³⁵ that the legal obligation to vaccinate children should be maintained, highlighting the individual and public health

32 European Centre for Disease Prevention and Control: Vaccine Scheduler [Online]. Available at: <https://vaccine-schedule.ecdc.europa.eu>.

33 Nugraha et al., 2022, 277.

34 Archard et al. 2021.

35 *Vavříčka et al. v. the Czech Republic*, paras. 197–203.

risks that would result from a reduction in vaccination coverage following the repeal of the provisions. In the Czech Republic, the vaccination obligation is therefore a response by the national authorities to the overriding social interest in protecting public health and the individual against disease, and in preventing a decline in the vaccination rate among children.³⁶

d) Are compulsory vaccinations proportionate to the aim to be pursued?

The Grand Chamber assessed the measures challenged by the applicants in the context of the national legal system, and found that they were reasonably proportionate to the legitimate aim pursued by the Czech legislature in imposing the vaccination obligation – and concluded that the national authorities had not exceeded the wide margin of discretion which they enjoyed in this area.³⁷

Vaccines are mandatory in the Czech Republic for nine diseases for which vaccination is considered effective and safe, as well as for a tenth vaccine administered to children with special health conditions. Although the Czech model advocates compulsory vaccination, this is not an absolute obligation: exemptions may be granted, in particular for children for whom vaccination is contraindicated on a long-term basis.

It is undisputed that, although vaccines are completely safe for the vast majority of vaccinated people, in rare cases they can be harmful to the individual and cause serious or permanent damage to health. In the case, the defendant submitted that in the Czech Republic, of the ca. 100,000 children vaccinated each year (representing a total of 300,000 vaccinations), ca. five to six cases of serious and potentially life-long damage to health occur. In view of this sporadic but very serious health risk, the court stressed the importance of taking the necessary precautions before administering vaccines, consisting of checking in each case for possible contraindications and monitoring the safety of the vaccines used.³⁸ However, the ECtHR saw no reason to question the adequacy of the Czech national system in this respect.

As regards sanctions, it should be noted that their use is an indirect means of enforcing the vaccination obligation. In the Czech Republic, the sanction can be considered relatively moderate, as it consists of a one-off infringement fine, against which a full range of remedies is available. Moreover, in the case of Mr Vavříčka, the amount of the fine was at the lower end of the range of possible fines and can therefore in no way be considered unduly severe or burdensome. As for the ‘child applicants’, by denying them access to nursery school they were deprived of an important opportunity to develop their personalities. However, this was a consequence of their parents’ decision not to comply with a general legal requirement, which was particularly concerned with the protection of the health of young children and was

36 *Vavříčka et al. v. the Czech Republic*, paras. 282–284.

37 *Vavříčka et al. v. the Czech Republic*, paras. 290–309.

38 Krasser 2021, pp. 207–233.

essentially protective rather than punitive. According to the court, it cannot be regarded as disproportionate for a state – in fulfilment of its positive obligation under the convention and in the interests of social solidarity – to oblige individuals for whom vaccination poses only a remote health risk to accept this generally applied protective measure for the benefit of the small number of children at risk who cannot benefit from vaccination. The ECtHR concluded that the latter option is legitimately open to the Czech legislator and is fully in line with the logic of protecting the health of the population. The sanctions for non-vaccination were only temporary in their effects on ‘child applicants’, as when minors reached the age of compulsory schooling their vaccination status did not affect their admission to primary school.

With regard to forced vaccination, it is worth pointing out the parallel between the positions of the ECtHR and the Constitutional Court of Hungary (Hun. *Alkotmánybíróság*, hereafter: AB), which was explicitly highlighted by the Grand Chamber in the *Vavříčka* decision.³⁹ Decision no. 39/2007. (VI.20.) of the AB examined a petition brought by a couple who had refused to vaccinate their child and challenged the constitutionality of the relevant provision of Act CLIV of 1997 on Health Care⁴⁰ (1997. évi CLIV. törvény az egészségügyről, hereafter: Eütv.). The main problem in the Hungarian case was that the failure to comply with the obligation entailed the adoption of a directly enforceable administrative decision requiring vaccination, the direct enforceability of which was not affected by the appeal against it. In this connection, the AB found an unconstitutionality of omission and annulled the relevant provision of the Eütv. on the ground that the legislator had not ensured the right to an effective remedy against the refusal to exempt from the compulsory vaccination. The important point already mentioned at the beginning of this study – namely that compulsory vaccination constitutes a more serious form of interference with fundamental rights than the imposition of a fine for failure to vaccinate – is thus once again highlighted by decision no. 39/2007. (VI.20.) of the AB. The latter is particularly true when the coercive nature is reinforced by the absence of an effective legal remedy.

Side notes to the Vavříčka decision

The final decision of the ECtHR’s Grand Chamber in relation to the enforcement of the rights of ‘child applicants’ has been heavily criticised by scholars. Despite the fact that the court emphasised the best interests of the child at more than one point in the decision, it failed to analyse the interference with the rights of minors in the light of the refusal or withdrawal of admission to kindergarten.⁴¹ Other authors see the procedural representation of children by their parents as problematic in this case, as a conflict of interest can be identified between the pre-school child bearing

39 *Vavříčka et al. v. the Czech Republic*, paras. 98–100.

40 1997. évi CLIV. törvény az egészségügyről [online]. Available at: <https://net.jogtar.hu/jogszabaly?docid=99700154.tv>.

41 Ważyńska-Finck, 2021; Vikarská, 2021.

the consequences of their parents' decision and the decision-making parents in the ECtHR proceedings. However, this aspect of the case, namely the fact that the consequences of the parents' decision are borne by the children and that the minors' right to health and education may be affected, was not addressed by the court at all.⁴² Nor did the ECtHR explain what the situation is with regard to the parents' right to private life, i.e., how compulsory vaccination relates to the parents' freedom to bring up their children. It would have been useful for the subsequent application of the law if the court had also made a comparison of these aspects of the case. A related anomaly is the failure of the ECtHR to ask and answer the question: who is entitled to decide on the best interests of the child? Is it for the state or the parents to decide? And where is the line drawn between the decision-making powers of the state and of the parent?⁴³

The Vavříčka decision has not only been criticised in relation to 'child applicants', as there is also an opinion that criticises the Grand Chamber for failing to examine the least restrictive measures (as a means to achieve a legitimate aim), saying that their examination could have provided more convincing arguments in the proportionality assessment.⁴⁴

This author further observes in line with para. 2 of Judge Lemmens' dissenting opinion that although the ECtHR referred several times in the Vavříčka decision to 'social solidarity' in order to support the necessity of vaccines, the decision does not elaborate on this concept in any meaningful way. Similarly, the lack of an analysis of the best interests of the child is also lacking in the reasoning of the decision.

4. Conclusions

Although in the Vavříčka decision the ECtHR did not leave much room for generalisations, pointing out that its findings relate to "the standard and routine vaccination of children against diseases that are well known to medical science",⁴⁵ and that "in the present case, which specifically concerns the compulsory nature of child vaccination, that margin should be a wide one",⁴⁶ the court's analysis is in several places replete with a detailed elaboration of the criteria already established for assessing the need for compulsory vaccination in democratic societies and, at the same time, the scope of the compatibility of compulsory vaccination against coronavirus with the convention.

⁴² Láposy et al., 2022, p. 22.

⁴³ *M.A.K. and R.K. v. the United Kingdom*, ECtHR, 23 March 2010, no. 45901/05, no. 40146/06.

⁴⁴ Nilsson, 2021, pp. 331–334.

⁴⁵ *Vavříčka et al. v. the Czech Republic*, para. 158.

⁴⁶ *Vavříčka et al. v. the Czech Republic*, para. 280.

Relevant among the court's conclusions on the margin of appreciation in the *Vavříčka* case is that there is consensus between states and the World Health Organization⁴⁷ on the effectiveness of COVID-19 vaccines,⁴⁸ but there is no inter-state treaty on the mandatory use of coronavirus vaccines.⁴⁹ These considerations, together with the ECtHR's statement that "in matters of health-care policy, it is the domestic authorities who are best placed to assess priorities, the use of resources and social needs"⁵⁰ lead us to conclude that the introduction of mandatory coronavirus vaccination is a matter for the margin of appreciation of contracting parties. The Grand Chamber also pointed out in its decision that in states with a vaccination policy favouring voluntary vaccination, the decline in vaccination uptake and thus in the vaccination coverage of the population is considered to be in the overriding social interest⁵¹ and in cases where the nature of the disease does not allow for herd immunity, compulsory vaccination may be reasonably used to maintain an adequate level of protection.⁵² Applying the same logic to the coronavirus vaccines, we can therefore arrive at the conclusion that where the number of voluntary vaccinators is not high enough and herd immunity is not relevant due to the nature of the virus, the imposition of compulsory vaccination is a reasonable response to COVID-19 and constitutes an overriding social interest. Furthermore, the *Vavříčka* decision is a case in point regarding the need for vaccinations: in a democratic society, the less prescriptive vaccination policies of other states based on recommendations are not a decisive factor in determining the need for mandatory vaccines.⁵³ As regards proportionality, the possibility of exceptions⁵⁴ in the case of medical contraindications or reasons of conscience,⁵⁵ individualised assessment of the suitability of vaccination⁵⁶ and the availability of a legal provision for compensation in the case of vaccine-induced harm are essential factors to be assessed.⁵⁷

47 World Health Organization, Coronavirus disease (COVID-19): Vaccines safety [Online]. Available at: [https://www.who.int/news-room/questions-and-answers/item/coronavirus-disease-\(covid-19\)-vaccines-safety](https://www.who.int/news-room/questions-and-answers/item/coronavirus-disease-(covid-19)-vaccines-safety).

48 Although this consensus may be tempered by the rapid pace of coronavirus vaccine development and the lack of medical knowledge about the medium-term and long-term effects of vaccination.

49 *Vavříčka et al. v. the Czech Republic*, paras. 277–278.

50 *Vavříčka et al. v. the Czech Republic*, para. 285.

51 *Vavříčka et al. v. the Czech Republic*, paras. 283–284.

52 *Vavříčka et al. v. the Czech Republic*, para. 288.

53 *Vavříčka et al. v. the Czech Republic*, para. 310.

54 In the context of conscientious objection, it is worth reflecting once again on the provisions of the 39/2007 (VI.20.) AB decision, where the Hungarian Constitutional Court pointed out that although the protection of children's health justifies mandatory vaccination at a certain age, and accepted the legislator's position based on scientific knowledge that the benefits of the vaccine are both for the individual and for the child, outweigh the potential harm to the individual and society from adverse reactions, the AB also recognised that the system of compulsory vaccination may cause greater harm to parents who, for reasons of religious belief or conscience, do not agree with the intervention.

55 *Vavříčka et al. v. the Czech Republic*, para. 292.

56 *Vavříčka et al. v. the Czech Republic*, para. 301.

57 *Vavříčka et al. v. the Czech Republic*, para. 302.

In conclusion, the contours of the *Vavříčka* case suggest that making vaccination against COVID-19 compulsory is in line with the convention⁵⁸ if the vaccine is considered safe⁵⁹ by the scientific community, administered only indirectly by the state, health authorities take the necessary precautions – which are reflected in particular in the individualised assessment of the suitability of the vaccine – and the legislator also provides for the possibility of claiming compensation in the event of damage to health caused by the vaccine.⁶⁰

58 That conclusion is in line with the decisions of the Austrian, German and Hungarian constitutional courts regarding the compatibility of COVID-19 vaccines with national constitutions. See Horváth 2022, 37.

59 Challenging the safety of COVID-19 vaccines was one of the key issues of the decisions of the Italian constitutional court as well. Horváth, Ungvári, 2023, pp. 11–12.

60 Vinceti, 2021.

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