Case Commentary

Is Compulsory Childhood Vaccination Compatible with the Right to Respect for Private Life? A Comment on *Vavříčka and Others v. the Czech Republic*

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1 Introduction

On 8 April 2021, the Grand Chamber of the European Court of Human Rights (the ECtHR or the Court) delivered its much-awaited judgement on compulsory childhood vaccination. In *Vavříčka and Others v. the Czech Republic*, the Court examined for the first time the compatibility with the European Convention on Human Rights (ECHR or the Convention) of domestic systems requiring parents to vaccinate their children and imposing sanctions on those who fail to comply with this duty.¹ In this judgement, the Court affirmed

¹ The Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, CETS No. 5.

that compulsory vaccination, like any other involuntary medical intervention, interferes with the right to respect for private life within the meaning of Article 8 of the ECHR.² In addition, the Court clarified that there might be a violation of the Convention even if no vaccination was administrated against the person's will, or, indeed, administrated at all. The mere duty to vaccinate in combination with sanctions for non-compliance constitutes an interference with the right to respect for private life.³ There is, however, no doubt about the Court's positive attitude towards vaccination. In what might be one of the most cited parts of the judgment, the Court holds that there is a general consensus among European states that "vaccination is one of the most successful and cost-effective health interventions" and that each state "should aim to achieve the highest possible level of vaccination among its population".⁴ To achieve this end, states enjoy – as we shall see – a (very) wide margin of appreciation.

The judgement comes at a time when questions about vaccination are highly topical. From the moment we learned that researchers had managed to develop vaccines against COVID-19, discussions on the permissibility of compulsory vaccination became topical. Vaccination promises a way out of lockdowns and social distancing towards some form of normality in which we may meet our friends, relatives, and colleagues again without putting their and our own health at risk. At the same time, many Europeans are sceptical towards vaccines in general, and the discussion about the pros and cons of vaccines is polarised in many countries.⁵ The unprecedented rapid development and approval of the vaccines against COVID-19 seem to have led larger groups to hesitate. Recent studies indicate that in Italy, Russia, Poland, and France, for example, the COVID-19 vaccination acceptance rates range between 50–60%, which may not be sufficient to achieve the level of population immunity (or 'herd immunity') that would enable governments in these countries to open up their societies again.⁶

In this comment, I provide an analysis of significant legal aspects of *Vavříčka and Others* and engage in a critical discussion with the Court's reasoning on the

2 *Vavříčka and Others v. the Czech Republic* [GC], App. nos. 47621/13 and 5 others, 8 April 2021, para 263.

3 *Ibid.*, para. 264.

4 *Ibid.*, para. 277.

5 C. Lin, P. Tu and L.M. Beitsch, 'Confidence and Receptivity for COVID-19 Vaccines: A Rapid Systematic Review', *Vaccines* 9(1) (2021) 16, section 3.4, DOI: 10.3390/vaccines9010016.

6 E.g., M. Sallam, 'COVID-19 Vaccine Hesitancy Worldwide: A Concise Systematic Review of Vaccine Acceptance Rates', *Vaccines* 9(2) (2021) 160, DOI: 10.3390/vaccines9020160. The percentage needed to achieve population immunity remains unclear, but experts estimate a range of 55–85% of the population.

merits. Like some other scholars, I do not find the arguments put forward by the Court to be entirely convincing.⁷ More specifically, I will discuss the Court's choice to not assess whether the aim of the Czech vaccination policy could have been achieved by less restrictive means (Section 4.1) and its application of the consensus doctrine (Section 4.2). This commentary ends, in Section 5, with a few remarks on the implications of this judgement on domestic policies concerning vaccination against COVID-19.

2 A Brief Overview of the Facts

In the Czech Republic, permanent residents and all foreigners authorised to reside in the country on a long-term basis are required to undergo a set of routine vaccinations.⁸ The duty to vaccinate includes vaccination against nine diseases: diphtheria, tetanus, whooping cough, *Haemophilus influenzae* type b, poliomyelitis, hepatitis B, measles, mumps, rubella, and, for those with specified health indications, vaccination against pneumococcal infections.⁹ Vaccination is typically administered during the child's first year of life. Children with medical contraindications are exempted from the duty to vaccinate. Non-compliance with this duty constitutes a minor offence punishable by a fine up to EUR 400.¹⁰ In addition, vaccination is a precondition to attending preschool unless the child in question has acquired immunity by other means or is unable to undergo vaccination on health grounds.¹¹

The applicants before the ECtHR were five children and a father. The father, Mr Vavříčka, was fined approximately EUR 110 for failure to vaccinate his two children against poliomyelitis, hepatitis B, and tetanus.¹² The other five applicants were children who had been excluded from preschool as a result of

7 For other critical voices, see Z. Vikarská, 'Is Compulsory Vaccination Compulsory?' *VerfBlog* (12 April 2021), available online at <https://verfassungsblog.de/is-compulsory-vaccination-compulsory/> DOI: 10.17176/20210412-221156-0; D. Utrilla, 'Op-Ed: "It's about Proportionality! Strasbourg Clarifies Human Rights Standards for Compulsory Vaccination Programmes', *EU Law Live*, available online at <https://eulawlive.com/op-ed-its-about-proportionality-strasbourg-clarifies-human-rights-standards-for-compulsory-vaccination-programmes-by-dolores-utrilla/> (accessed 15 May 2021).

8 *Vavříčka and Others*, *supra* note 2, para. 11.

9 *Ibid.*, para. 76.

10 *Ibid.*, para. 17.

11 *Ibid.*, paras 15 and 73.

12 *Ibid.*, para. 23.

their parents' choice to reject some or all of the obligatory vaccinations.¹³ Mr Vavříčka and the child applicants' parents had unsuccessfully challenged the sanctions at the administrative level, before domestic courts, and ultimately before the Czech Constitutional Court.

3 The Law

3.1 *The Interference with Private Life*

The ECHR contains no specific provisions concerning vaccination. Article 8 of the Convention, however, protects the right to private life, which has been interpreted to include a range of more specific rights connected to bodily integrity, self-determination, and personal development. Besides, Article 2 of Protocol No. 1 to the Convention includes a right to education and Article 9 protects the right to freedom of thought, conscience, and religion. The latter has relieved conscientious objectors from the obligation to serve in the army under certain circumstances.¹⁴ In *Vavříčka and Others*, the Court discussed for the first time its scope and content in relation to vaccine hesitancy.¹⁵

The focus of the Court's analysis is on Article 8. The exclusion of the children from preschool is not subject to a separate analysis under Article 2 of Protocol No. 1, but part of the Court's examination under Article 8.¹⁶ With regard to Article 9 and the freedom of conscience, the Court noted that not all personal opinions constitute convictions in a sense protected by Article 9.¹⁷ Drawing on its jurisprudence on conscientious objectors, the Court established that a conviction must be of sufficient cogency, seriousness, cohesion, and importance to attract the guarantees of Article 9. The applicants' objections to vaccination, which were primarily related to a fear of harmful side effects, did not meet this standard.¹⁸

Both parties and the Court, however, agreed that the sanctions interfered with the applicants "private life" within the meaning given to this concept in

13 Mr. Roleček was not vaccinated against tuberculosis, poliomyelitis or hepatitis B, and did not receive the MMR (measles, mumps and rubella) vaccine. Ms. Novotná had not received the MMR vaccine, Mr. Hornych, Mr. Brožík and Mr. Dubský had not received any of the childhood vaccines. *Ibid.*, paras 33, 41, 48 and 56.

14 *Bayatyan v. Armenia* [GC], App. no. 23459/03, 7 July 2011, paras 110 and 124–128.

15 The matter has been briefly discussed by the Commission in 1998. See *Boffa and Others v. San Marino* (no. 26536/95, Commission decision of 15 January 1998, Decisions and Reports (DR) no. 92-B, p. 27.

16 *Vavříčka and Others*, *supra* note 2, para. 345.

17 *Ibid.*, paras 331–333.

18 *Ibid.*, paras 332 and 335–336.

the Court's jurisprudence.¹⁹ The Court reaffirmed that private life includes a right to respect for physical integrity and that vaccination without free and informed consent, like any other involuntary medical intervention, interfere with Article 8. The same applies to sanctions imposed on those who refuse to vaccinate.²⁰ Interferences with Article 8 may, however, be justified. Policies that are based on domestic law, pursue one or more legitimate aims, and "necessary in a democratic society" are lawful under the ECHR.²¹ The next section outlines the parties and the Court's argumentation on this matter.

3.2 *The Justification*

The Court noted that the duty to vaccinate as well as the sanctions for non-compliance with this duty were prescribed by Czech law why the first criterion of the justification test was met.²² The Court also recognised that the Czech vaccination policy served a legitimate purpose, namely to protect the health of those who receive the vaccine as well as others, in particular those who cannot vaccinate for medical reasons but who benefit from the protection provided by the maintenance of a sufficient level of vaccination within the society at large.²³ The policy thus complied with the second criterion of the justification test. The last criterion, that is, whether the policy could be said to be necessary for a democratic society, was more complex to assess and take up the lion's share of the Court's legal analysis.

The applicants' main objections concerned the necessity and reasonableness of the vaccination policy. More specifically, they questioned the integrity of the policy-making process behind the system and its institutional arrangements. There had been no proper public debate about these matters, and the authorities and expert bodies involved in the process were sponsored by pharmaceutical corporations.²⁴ In addition, the applicants challenged the effectiveness of the system. They disputed the effectiveness of some of the prescribed vaccines and that non-vaccination had a very negative impact on public health.²⁵ They also held that a voluntary vaccination model would be *more* efficient than the current compulsory system.²⁶ This claim gained support from the third-party intervention by Rozalio, a Czech organisation made up

19 *Ibid.*, paras 192 and 261.

20 *Ibid.*, paras 263–264.

21 Article 8(2), ECHR.

22 *Vavříčka and Others*, *supra* note 2, paras 267 and 271.

23 *Ibid.*, para. 272.

24 *Ibid.*, paras 175 and 177.

25 *Ibid.*, para. 177. See also paras 152–153.

26 *Ibid.*, para. 185.

of parents advocating free choice to vaccination. According to Rozalio, there was empirical data showing that repressive measures are counterproductive, leading to increased levels of mistrust and decreased vaccination rates.²⁷ Moreover, the applicants held that there are less intrusive means to protect preschool children who cannot vaccinate for health-related reasons. For example, unvaccinated children could be permitted to attend preschool under ordinary circumstances and excluded from such establishments in the event of a threatened or actual outbreak of a serious contagious disease.²⁸ Their complaint also pointed to the magnitude of the harms brought about by the Czech system. Vaccination entails a real risk of adverse effects on health, including long term effects.²⁹ Requiring parents to take such risks with their children's health constituted a serious interference with their right to care for their children. Furthermore, the exclusion of the children from preschool had not only put them at a significant disadvantage in their subsequent education, but it had also affected their families both socially and financially as they had had to provide childcare by their own means.³⁰

The respondent government rejected the applicants' criticism that the vaccination scheme suffered from undue influences from pharmaceutical companies and was not based on scientific data. The scope of the vaccination duty was determined by the government on the basis of serological surveys and after recommendations from its advisory board of epidemiologists and the National Immunisation Commission (NIC).³¹ Expert meetings within the NIC begin with each of its members declaring any conflicts of interests. Regarding the safety and effectiveness of the system, the government maintained that experience showed that the policy under review had been successful and underscored that all relevant Czech expert societies were in favour of preserving it.³² Vaccine hesitancy has become a serious problem. Making vaccination compulsory was a natural response, which had improved vaccination rates.³³ Regarding the risks and burdens attached to the vaccination duty, the government sustained that they are reasonable. Vaccination takes place after a check-up for medical contraindications and is free of charge. Parents retain a certain leeway in selecting the vaccines to be used and the relevant

²⁷ *Ibid.*, para. 241.

²⁸ *Ibid.*, para. 184.

²⁹ *Ibid.*, paras 177 and 299.

³⁰ *Ibid.*, para. 178.

³¹ *Ibid.*, para. 200.

³² *Ibid.*, para. 203.

³³ *Ibid.*, para. 197.

dates within a defined period for vaccination.³⁴ In addition, the sanctions for non-compliance with the duty were limited to an administrative fine that could only be imposed once and the exclusion from preschool.³⁵ The risk of serious side-effects following vaccination was very low. Out of approximately 100,000 children vaccinated annually, no more than six incidents of life-long health consequences were reported per year.³⁶

The ECtHR divided its assessment into three sub-questions: (1) does the policy answer to a “pressing social need”?; (2) is it “relevant and sufficient” in view of its aim?; and (3) is it proportionate to its aim?³⁷ Before engaging with these questions, the Court asserted that it is for the national authorities to make the initial assessment of these matters and that, in this case, the Czech authorities enjoyed a wide margin of appreciation when making these assessments.³⁸ Such deference was motivated by the subsidiary role of the Convention system. National authorities have democratic legitimation and direct knowledge of local circumstances, traditions, and legal cultures; they are thus ‘better placed’ to initially assess the merits of the policy under review.³⁹ Granting domestic authorities a wide margin of appreciation was further justified by the fact that none of the applicants had been vaccinated against their will, which implied a less-serious interference with Article 8.⁴⁰ In addition, there was a general consensus among states parties about the importance of maintaining a high level of vaccination among its population, but no agreement over the best means to facilitate such widespread vaccination.⁴¹

The Court was confident that the Czech policy answered a pressing social need and put forward two main reasons to support its conclusion. First, the Court acknowledged that states are under a positive obligation, by virtue of Articles 2 and 8 of the Convention, to take appropriate measures to protect

34 *Ibid.*, paras 202–203. Only the standard vaccines are, however, free of charge; the cost of other products rests with the parents. See paras 16 and 77.

35 *Ibid.*, paras 193 and 199.

36 *Ibid.*, para. 207.

37 *Ibid.*, para. 273.

38 *Ibid.*, para. 280.

39 *Ibid.*, para. 273.

40 *Ibid.*, para. 276. As pointed out by the dissenting judge Wojtyczek, the system most likely accepts parents to use physical force to hold their small children in case they resist the needle. A discussion of why such use of force by a parent constitutes a less serious interference with the bodily integrity of the child would have been clarifying. Dissenting opinion of Judge Wojtyczek, para. 12.

41 *Vavříčka and Others*, *supra* note 2, paras 277–278. I discuss the Court's application of its consensus doctrine further in section 4.2.

the life and health of those within their jurisdiction.⁴² Second, the Court pointed to the agreement among domestic expert authorities that childhood vaccination should remain a legal duty.⁴³ The Court then proceeded to consider whether the use of compulsion was supported by relevant and sufficient reasons. Here, the Court focused on whether the Czech policy complied with the principle of the best interests of the child. When it comes to immunisation, the Court argued, the aim should be to protect every child against serious diseases.⁴⁴ Because some children are dependent on population immunity for their protection, the Court held, states may reasonably – “in the name of social solidarity” – introduce compulsory vaccination systems in situations in which voluntary systems are not sufficient to achieve and maintain such immunity. Without further argument, the Court extended this conclusion and held that the sanctions attached to the vaccination duty were supported by relevant and sufficient reasons.⁴⁵

The last prong of the Court’s assessment consisted of a proportionality test, in which the reasons in favour of and against the policy under review are balanced against each other. A number of factors were taken into account, including the scope of the vaccination duty, the safety and effectiveness of the vaccine, the severity of the sanctions, access to procedural safeguards, the integrity of the system and the political process behind it. Starting with the scope of the vaccination duty, the Court noted that the duty concerned nine diseases against which vaccination is considered effective and safe by the scientific community.⁴⁶ It recognised that in rare cases, vaccination causes serious and lasting damage to the health of the person concerned, which calls for individual examinations for contraindications before vaccination and for general monitoring of adverse effects. The Court saw, however, no reason to question the adequacy of the domestic system on these matters.⁴⁷

Regarding the sanctions, the Court considered them to be relatively moderate. Mr Vavříčka had been fined approximately EUR 110 for his failure to vaccinate his two children. The amount was towards the lower end of the domestic

42 *Ibid.*, para. 282.

43 *Ibid.*, para. 283.

44 *Ibid.*, para. 288. To support this conclusion, the Court referred to General comment No. 15 by the United Nations Committee on the Rights of the Child recommending states to ensure that vaccination against the common childhood diseases is universally available. General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (Article 24), 17 April 2013 (CRC/C/GC/15), para. 41.

45 *Ibid.*, para. 289.

46 *Ibid.*, para. 291.

47 *Ibid.*, paras 300–301. It should be noted that none of the applicants argued that they had contraindications, which is why Court does not go into details concerning the medical check-ups preceding vaccination. See para. 291.

scale and could only be imposed once. According to the Court, such a sanction cannot be considered as unduly harsh or onerous.⁴⁸ The Court accepted that the exclusion of the child applicants from preschool had deprived them of an important opportunity to develop their personality and acquire important social and learning skills in a pedagogical environment.⁴⁹ Their loss was, however, a direct consequence of their parents' choices and the children were not deprived of all possibilities of personal development. The parents may still, at their own expense, provide a good learning environment for their children. In addition, the sanction concerned preschool and did not apply to primary school. What is more, children who cannot be vaccinated for medical reasons would be deprived of their opportunity to go to preschool if the vaccination rate among the other preschool children drops. Against this background, the Court concludes that it cannot be regarded as disproportionate for a state to compel those for whom vaccination represents a little risk to health to accept this duty.⁵⁰

Concerning procedural safeguards, the Court noted that the sanctions have been subject to administrative and judicial review, including constitutional review by the Czech Constitutional Court.⁵¹ The Court found no reason to doubt the quality of these proceedings. Neither did the Court find sufficient reason to criticise the Czech system for lack of transparency, professionalism, or political legitimacy.⁵² Ultimately, the Court concluded that there had been no violation of Article 8.⁵³

4 Two critical comments

4.1 *Proportionality and the Least Restrictive Means Rule*

The most interesting part of the *Vavříčka* judgement is certainly the Court's proportionality assessment (paras 290–309). There are several ways to structure such assessments, and the Court has used slightly different versions in its jurisprudence.⁵⁴ Occasionally, the assessment has included a "least restrictive

48 *Ibid.*, paras 293 and 304.

49 *Ibid.*, para. 306–307.

50 *Ibid.*, para. 306.

51 *Ibid.*, para. 295.

52 *Ibid.*, paras 296–298.

53 *Ibid.*, para. 311.

54 Janneke Gerards provides a good overview of the Court's different 'tests' in *General Principles of European Convention on Human Rights* (Cambridge: Cambridge University Press, 2019), pp. 229–257.

means” criterion.⁵⁵ In a case concerning tax implications of failure to perform mandatory military service, for example, the Court held that “in order for a measure to be considered proportionate [...] there must be no other means of achieving the same end that would interfere less seriously with the fundamental right concerned”.⁵⁶ In *Vavříčka and Others*, the Court chose not to apply the least restrictive means criterion. This despite the fact that one of the applicants’ main objections against the Czech system was that a voluntary vaccination model would be just as efficient, if not more efficient, to maintain population immunity and that there are less intrusive means to protect the preschool children who cannot vaccinate for health-related reasons than to exclude children like the applicants from preschool altogether.⁵⁷ The exclusion of unvaccinated children from nurseries could have been restricted to situations of real risk or actual outbreaks of serious contagious diseases. The Court rejected these arguments without much consideration. Discussing the proportionality of excluding the child applicants from preschool, the Court held that “the notional availability of less intrusive means” does not detract the Court from its finding that exclusion from preschool was proportionate.⁵⁸ Moreover, at the end of its proportionality assessment, the Court made the following clarification:

The Court would clarify that, ultimately, the issue to be determined is not whether a different, less prescriptive policy might have been adopted, as has been done in some other European States. Rather, it is whether, in striking the particular balance that they did, the Czech authorities remained within their wide margin of appreciation in this area.⁵⁹

Although similar reasoning is to be found elsewhere in the Court’s jurisprudence, I find this argument hard to accept.⁶⁰ The least restrictive means criterion excludes interferences with human rights that go *beyond* what is required

55 For an in-depth discussion of this criterion, see E. Brems and L. Lawrysen, ‘Don’t Use a Sledgehammer to Crack a Nut’: Less Restrictive Means in the Case Law of the European Court of Human Rights’, *Human Rights Law Review* 15 (2015) 139–168, DOI: 10.1093/hrlr/ngu040.

56 *Glor v. Switzerland*, App. no. 13444/04, 30 April 2009, para. 94. See also *Nada v. Switzerland*, [GC], App. no. 10593/08, 12 September 2012, para. 183; and *Biblical Centre of the Chuvash Republic v. Russia*, App. no. 33203/08, 12 June 2014, para. 58.

57 *Supra*, Section 3.2.

58 *Vavříčka and Others*, *supra* note 2, para. 206.

59 *Ibid.*, para. 306.

60 For an example of similar argumentation, see *Animal Defenders International v. the United Kingdom* [GC], App. no. 48876/08, 22 April 2013, para. 110.

to achieve the aim behind the policy. If this aim can be achieved by two or more equally effective means, then the policy that interferes the least with a rights norm must be chosen.⁶¹ The rule has an intuitive appeal. Interferences with human rights norms require justification; if a public interest can be protected without interfering with the norm in question, then what reasons do we have to accept an infringement? Moreover, a least restrictive means rule, such as the one outlined here, is part and parcel of public health ethics about vaccination.⁶² Respect for autonomy and protection of public health are not only human rights norms; they are also principles of biomedical ethics. In situations of conflict, these principles are to be balanced against each other, and when making such balances in the context of vaccination, decision-makers should adopt the policy that guarantees population immunity and, at the same time, interferes the least with personal autonomy and liberty.⁶³ Respect for autonomy thus serves as a tie-breaker between alternative vaccination policies with the same expected utility.

What constitutes the least restrictive alternative will, of course, depend on the purpose of a vaccination policy. Typically, such policies aim to achieve and maintain population immunity. It is, however, conceivable that a vaccination policy does not only seek to achieve immunity but also to ensure a fair distribution of the burdens of vaccination. In *Vavříčka and Others*, the Czech government contented that vaccination is “a social benefit calling for shared responsibility” and that solidarity requires each individual to assume a minimum risk in order to protect public health.⁶⁴ As outlined above, the Court accepted this line of reasoning.⁶⁵ If we posit that the Czech policy also aimed for a fair distribution of burdens of vaccination, then the argument could be made that the least restrictive policy that would achieve both population immunity and a fair distribution of the burdens involved is compulsory vaccination, in the same way as compulsory taxation is the least restrictive policy that can ensure that everybody makes a fair economic contribution to public goods and services.⁶⁶ The solidarity argument, of course, only applies in

61 R. Alexy, *A Theory of Constitutional Rights* (translated by J. Rivers) (Oxford University Press, 2010), pp. 67–68 and 397–398.

62 J.F. Childress, R.R. Faden, R.D. Gaare, L.O. Gostin, J. Kahn, R.J. Bonnie, N.E. Kass, A.C. Mastroianni, J.D. Moreno and P. Nieburg, ‘Public Health Ethics: Mapping the Terrain’, *The Journal of Law, Medicine & Ethics* 30(2) (2002) 170–178, 173; A. Giubilini, *The Ethics of Vaccination* (Basingstoke: Palgrave Macmillan, 2019) p. 60.

63 *Ibid.*

64 *Vavříčka and Others*, *supra* note 2, paras 209 and 279.

65 *Supra*, Section 3.2. See also *Vavříčka and Others*, *supra* note 2, para. 306.

66 Giubilini, *supra* note 62, p. 108.

relation to contagious diseases. In *Vavříčka and Others*, most but not all vaccines covered by the vaccination duty were such that they spread directly from one person to another.⁶⁷ A justification of compulsory child vaccination against non-communicable diseases, such as for example tetanus (lockjaw), has to draw on paternalistic arguments about the child's best interest. In the bioethical debate, Giubilini and Savulescu have compared compulsory vaccination to mandatory seat belt use in motor vehicles and argued that compulsory vaccination is ethically justified for the same reasons why seat belt laws are ethically justified.⁶⁸ Seat belts reduce the risk of death significantly if you are involved in a car accident. Seat belts also cause injuries to the neck, chest, and stomach, and in rare cases, such injuries require surgery. Seat belts may even increase the risk of death following a car accident if, for example, the car caught on fire or is sinking in the sea. Still, the chances of benefitting from seat belts greatly outweigh these risks, which is why most countries require parents to buckle up their children in their cars and, in the case of very young children, to use specific car equipment that is suitable for small children. To comply with the least restrictive means criterion, compulsory vaccination that aims to protect the child who receives the vaccine, states would have to show that there are no less intrusive ways to provide the same kind of protection afforded by the vaccine to the children covered by the duty to vaccinate. My discussion here serves to illustrate that an application of the least restrictive means criterion would not necessarily have led to a different outcome in the *Vavříčka* case, but it would have contributed to a more convincing justification of the Court's conclusion.

4.2 *Consensus and Discretion*

In *Vavříčka and Others*, the Court grants the Czech government a wide margin of appreciation to strike a balance between the rights and interests at stake. The absence of a consensus among states about the best way to ensure population immunity is one important reason behind this deference.⁶⁹ Much criticism has been levelled at the Court's consensus-doctrine, including critique about the lack of a clear definition of "consensus" and of the Court's application of the doctrine.⁷⁰ Whilst such criticism is relevant for the *Vavříčka* case, I want to discuss the relationship between consensus arguments, state

67 Dissenting opinion of Judge Wojtyczek, para. 15.

68 A. Giubilini and J. Savulescu, 'Vaccination, Risks, and Freedom: The Seat Belt Analogy', *Public Health Ethics* 12(3) (2019) 237–249, DOI: 10.1093/phe/phz014

69 *Supra*, Section 3.2.

70 E.g., L. Wildhaber, A. Hjartarson, and S. Donnelly, 'No Consensus on Consensus – The Practice of the European Court of Human Rights' *Human Rights Law Journal* 33 (2013)

discretion and the fact that our knowledge of how well a policy serves its aim(s) is often uncertain.

In Section 4.1, I argued that the Court should have applied the least restrictive means criterion. If we accept this position, then the Court should have discussed the effectiveness of the system, considered alternative ways to achieve its aim(s), and compared their utility. The very fact that there is no consensus among states about the most effective way to ensure population immunity would not release the Court from this task. More interesting would have been to consider whether there was any consensus within the scientific community on this matter. Suppose that there would be a large agreement among vaccination experts about the limited effectiveness of compulsory vaccination to overcome vaccination hesitancy based on mistrust against the government. Under such conditions, states could hardly be permitted to ignore such information and maintain ineffective policies that interfere with human rights norms. If, on the other hand, we assume that knowledge about whether compulsory vaccination outperforms voluntary approaches is uncertain, then it makes sense to grant states discretion to choose the policy they believe fits their context. The Court has, on occasion, reasoned along these lines, but not in *Vavříčka and Others*.⁷¹

The government may certainly be correct when stating that compulsory vaccination has improved vaccination coverage in the country.⁷² But the judgement does not inform us of any evidence supporting this proposition, apart from a document in which Czech expert bodies expressed their support for a mandatory system.⁷³ The third-party intervener Rozalio contested the government's position and held that verifiable data showed that repressive policies trigger mistrust and correspond to decreasing vaccination rates.⁷⁴

248–263; K. Dzehtsiarou, 'Comparative Law in the Reasoning of the European Court of Human Rights', *University College Dublin Law Review* 10 (2010), 109–140, 128–131.

71 See, for example, the Court's reasoning about the utility of travel and residence restrictions on persons living with HIV to prevent the spread of the disease in *Kiyutin v. Russia*. Having noted that the World Health Organization and several other expert bodies had rejected such policies as ineffective, the Court noted that the respondent government, had not put forward any expert opinions or empirical data capable of gainsaying the unanimous view of the international experts. This in combination with the harmful effects of the policy in question led the Court to reject it as unlawful under the Convention. See *Kiyutin v. Russia*, App. no. 2700/10, 10 March 2011, paras 67–68, 71 and 74. For an example of a case in which the Court grants state discretion because the consequences of different policy choices are uncertain, see *Frette v. France*, App. no. 36515/97, 26 February 2002, paras 42–43.

72 *Vavříčka and Others*, *supra* note 2, para. 197.

73 *Ibid.*, paras 152–153.

74 *Ibid.*, paras 241

Unfortunately, the ruling does not provide any details about this data either. If we look beyond the judgement, there are studies from other countries demonstrating that the introduction of compulsory vaccination has a positive impact on vaccination rates.⁷⁵ The reliability of these studies is, however, rather weak, and most studies concern high-income states in the USA, so their relevance for the Czech context could be discussed.⁷⁶ Moreover, compulsory systems do not seem to convince resolute vaccine objectors but rather give rise to resentment and mistrust.⁷⁷

Studies of why parents reject certain vaccines or decline vaccination altogether show that several factors influence parents' decisions.⁷⁸ Though safety concerns seem to be a key factor affecting parents' choices in relation to all childhood vaccines, the precise impact of various factors differs between vaccines and domestic contexts. The MMR (measles, mumps, and rubella) vaccine has, for example, been particularly controversial, perhaps because of Wakefield and colleagues now-discredited study linking the MMR vaccine to autism.⁷⁹ The fact that many factors influence vaccine hesitancy points to the importance of understanding the main drivers behind vaccine rejections in the specific domestic context in order to tailor the response. I find it unfortunate that the Court did not discuss these issues in more detail in judgement or, at least, explained why such a discussion is unnecessary to determine the case. An appreciation of the added value of compelling people to vaccinate their children in terms of its impact on vaccination rates and the prospect of securing population immunity is not only important to determine whether the least restrictive means criterion has been met. It is also relevant to the proportionality assessment in which the additional health protection brought about by the

75 E.g., C. Jarrett, R. Wilson, M. O'Leary, E. Eckersberger, H.J. Larson and SAGE Working Group on Vaccine Hesitancy, 'Strategies for Addressing Vaccine Hesitancy – A Systematic Review', *Vaccine* 33 (2015) 4180–4190, 4184, DOI: 10.1016/j.vaccine.2015.04.040; N.E. MacDonald, S. Harmon, E. Dube, A. Steenbeek, N. Crowcroft, D.J. Opel, D. Faour, J. Leask and R. Butler, 'Mandatory Infant & Childhood Immunization: Rationales, Issues and Knowledge Gaps', *Vaccine* 36(39) (2018) 5811–5818, DOI: 10.1016/j.vaccine.2018.08.042

76 MacDonald et al., *supra* note 75, 5814–5816.

77 *Ibid.*, 5816; J. Leask and M. Danchin, 'Imposing Penalties for Vaccine Rejection Requires Strong Scrutiny', *Journal of Paediatrics and Child Health* 53 (2017) 439–444, DOI: 10.1111/jpc.13472

78 V. Haroune and L. King, Factors Contributing to Parental 'Vaccine Hesitancy' for Childhood Immunisations', *Nursing Children and Young People* 32(4) (2020) 20–25, DOI: 10.7748/ncyp.2020.e1269; E. Karafillakis and H.J. Larson, 'The Benefit of the Doubt or Doubts over Benefits? A Systematic Literature Review of Perceived Risks of Vaccines in European Populations' *Vaccine* 35 (2017) 4840–4850, DOI:10.1016/j.vaccine.2017.07.061.

79 B. Deer, 'How the Case Against the MMR Vaccine was Fixed', *The British Medical Journal* 342:c5347 (2011), DOI: 10.1136/bmj.c5347.

duty to vaccinate is balanced against its interference with respect for bodily integrity and freedom of choice.

5 The Implications of this Judgement on Vaccination Against COVID-19

In the very first sentence of its reasoning on the merits, the Court made clear that we should not interpret the *Vavříčka* case as a precedent for compulsory vaccination against COVID-19. This case, the Court held, “relates to the standard and routine vaccination of children against diseases that are well known to medical science”.⁸⁰ Whilst this precautionary statement is appropriate, the judgement’s relevance for vaccination against COVID-19 cannot be ignored. As noted in the introduction of this commentary, this case adds to previous jurisprudence on vaccination by clarifying that the imposition of fines on those who fail to comply with a duty to vaccinate as well as the exclusion of unvaccinated children from nursery schools constitutes an interference with Article 8 on its own.⁸¹ This is obviously of interest to European governments considering different strategies to encourage people to have the jab that includes sanctions. The Italian ‘No Jab-No Job’ policy, prescribing COVID-19 vaccination (free of charge) for a broad range of health care workers, is one example.⁸² Health care staff with medical contraindications are exempted from the obligation. For others, non-compliance entails removal from healthcare activities or, when this is not possible, suspension from work. It is easy to see the similarities with the policy under review in *Vavříčka and Others*. Both serve to protect the health of others, and they include a duty to vaccinate coupled with sanctions for non-compliance. Individuals with contraindications are exempted from the duty but no others. But there are also important differences. As noted above, the *Vavříčka* case concerned vaccines that have been used for many years and have well-established safety profiles. Even if many vaccines against COVID-19 are considered to be safe and have now been given to millions of people, we are still learning about rare but significant effects. The few cases of unusual blood clots with low blood platelets following vaccination with Vaxzevria (formerly COVID-19 Vaccine AstraZeneca) is a case in point.⁸³

80 *Vavříčka and Others*, *supra* note 2, para. 158.

81 *Ibid.*, paras 263–264.

82 Decree-law no. 44 of 2021 (issued 1 April 2021), Article 4.

83 European Medicines Agency, ‘AstraZeneca’s COVID-19 Vaccine: EMA Finds Possible Link to Very Rare Cases of Unusual Blood Clots with Low Blood Platelets’, 7 April 2021, available

Another difference between the Czech policy under review in *Vavříčka and Others* and current initiatives to boost vaccination against COVID-19 is that the Czech policy concerned vaccination of *children*, whereas adults are currently the main target group for vaccination against COVID-19. In the former case, the conflict of rights and interests at stake is that between the parents' right to make decisions on behalf of their children and the state's interest to protect public health, including the health of these children. The situation of an adult declining vaccination is slightly different, at least if he or she has been adequately informed of the risks and consequences and possess the capacity to make a voluntary decision in light of such information. This is a clear-cut example of a conflict between the right to personal self-determination and the protection of public health. Whether, and if so, how, this distinction ought to affect our argumentation under Article 8 remains to be seen. The matter is not addressed in the *Vavříčka* case.

In *Vavříčka and Others*, the Court discussed the different factors that need to be taken into account when assessing the proportionality of compulsory vaccination in much more detail than it has done in its previous jurisprudence on vaccination.⁸⁴ To comply with the ECHR, compulsory vaccination policies must, first of all, benefit those who are to be vaccinated and only cover vaccines that are considered effective and safe by the scientific community. At present, this excludes compulsory vaccination of children against COVID-19 as currently available vaccines against this disease are only considered to be safe for adults. A vaccine for children and adolescents is, however, getting closer.⁸⁵ If it becomes available, due consideration must be given to the fact that children infected with COVID-19 typically experience mild symptoms and death rates are very low.⁸⁶ Our knowledge about the long-term effects of COVID, i.e., persistent fatigue, headache, cognitive impairment, gastrointestinal problems, to name some such effects, is still in its infancy, though.⁸⁷ Nevertheless, the *Vavříčka* case

online at <https://www.ema.europa.eu/en/news/astrazenecas-covid-19-vaccine-ema-finds-possible-link-very-rare-cases-unusual-blood-clots-low-blood> (accessed 15 May 2021).

84 Section 3.2. Compare with the Court's reasoning in *Solomakhin v. Ukraine*, App. no. 24429/03, 15 March 2012, paras 30–39, and the Commission's arguments in *Boffa and 13 others v. San Marino*, *supra* note 15.

85 J. Couzin-Frankel, 'Vaccine Trials Ramp Up in Children and Adolescents', *Science* 371(6532) 874–875, DOI: 10.1126/science.371.6532.874

86 J.F. Ludvigsson, 'Systematic Review of COVID-19 in Children Shows Milder Cases and a Better Prognosis than Adults' *Acta Paediatrica* 109(6) (2020) 1088–1095, DOI: 10.1111/apa.15270.

87 J.F. Ludvigsson, 'Case Report and Systematic Review Suggest that Children may Experience similar Long-term Effects to Adults after Clinical COVID-19' *Acta Paediatrica* 110(3) (2020) 914–921, DOI: 10.1111/apa.15673

concerned vaccination against viruses that children are clearly at increased risk of getting infected by and becoming seriously ill from, like measles and poliomyelitis. As pointed out by the dissenting judge Wojtyczek, communicable diseases differ from each other in various respects, so that a proportionality assessment of a vaccination duty must be conducted on a 'disease-by-disease basis'.⁸⁸

Second, the ECHR requires that vaccination is not administered with force, that persons with medical contraindications are exempted from the duty to vaccinate, and that each vaccination is preceded by a medical check-up for fitness. As noted above, the Court did not go into detail regarding the latter in *Vavříčka and Others*, despite arguments from the applicant that the system was flawed and notwithstanding the fact that the government could not produce one example where a child had been exempted from the duty to vaccinate for health-related reasons.⁸⁹ In view of the importance of such safety measures, I find this unfortunate. Third, there must be a system in place to follow-up and monitor adverse effects. Meticulous monitoring of the safety of the vaccines in use is arguably even more important in relation to vaccination against COVID-19 as all the vaccines are new. Transparency about new adverse effects and how such information affects vaccination policies will be important to build up confidence in the vaccines and domestic authorities. Of greatest concern to those wary of one, several, or all of the vaccines against COVID-19 is fear of side effects.⁹⁰ Distrust is more common among ethnic minorities and marginalised groups, which may have a good reason, at least from a historical perspective, to doubt public authorities and the healthcare system. Additionally, the unprecedented rapid development and approval of the vaccine seem to have led larger groups to hesitate.⁹¹

Fourth, the sanctions for non-compliance with the vaccination duty must not be too burdensome. The *Vavříčka* case informs us that a fine of 110 Euros is moderate in the Czech context and that exclusion from preschool can be reasonable.⁹² What constitutes acceptable sanctions and how they are to be distinguished from excessive ones is not discussed in general terms by the Court. The fifth factor to consider is whether the domestic system provides compensation for health injuries caused by vaccination, though this issue was not given any decisive significance in the *Vavříčka* case.⁹³ Preferably, compensation should be available on a no-fault or strict liability basis. Last but not

88 Dissenting opinion of Judge Wojtyczek, para. 9.

89 *Supra* note 47; *Vavříčka and Others*, *supra* note 2, paras 177, 233, 291.

90 Lin et al., *supra* note 5.

91 *Ibid.*

92 *Supra* note 48.

93 *Vavříčka and Others*, *supra* note 2, para. 302.

least, states must ensure the domestic system is accompanied by procedural safeguards to minimise the risk of abuse and to enable individuals to appeal any sanctions imposed on them for non-compliance with the duty to vaccinate.

As the discussion above illustrates, the lawfulness of vaccination strategies that interfere with Article 8 of the ECHR will, in many cases, hinge on a contextual balancing of the rights and interests at stake. In *Vavříčka and Others*, the Court certainly did not give the go-ahead to compulsory vaccination against COVID-19, but neither did it close the door to such policies.