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# Implications for COVID-19 vaccination following the European Court of Human Right's decision in *Vavříčka and oths v Czech*<sup>1</sup>

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## Abstract

Mass vaccination in the fight against the global pandemic of COVID-19 brings new questions to the 'old' issue of mandatory vaccination. The intention to restrict access to some spheres of life on the basis of an individual's vaccination status provides fertile soil for potential violations of fundamental subjective rights, such as the right to bodily integrity and the interest not to be subject to medical intervention without consent, the right to a private life, and the right to engage fully within society without unjust discrimination. The potential implications of mandated or necessary vaccination for individual rights have not been fully explored, but the recent decision from the European Court of Human Rights in the case of *Vavříčka and others v. The Czech Republic* (2021) gives us a sense of the Court's approach to the question, given that the hearing (and subsequent decision) took place at the height of the pandemic. In this commentary, the judgement and the dissenting opinion will be analysed and compared from the perspective of the different understanding of the doctrine of proportionality. It will be argued that the approach, wherein the nature of the considered right is becoming the central question, corresponds more adequately with the aims of the Convention. Consequently, it can be suggested that in considering how to regulate vaccination against coronavirus, it is necessary to reframe the analysis in order to ensure that States remain true to the underlying ethos of the Convention to protect individual rights against State interference.

1. 'Vavříčka and Others v. the Czech Republic (Application no. 47621/13)' available at <http://hudoc.echr.coe.int/eng?i=001-209039>.

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Human rights, vaccination, Covid-19, European Court of Human Rights, bodily integrity

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The question of mandatory mass vaccination has come to the fore in the fight against the global pandemic of COVID-19. Traditionally linked to childhood immunization against common and potentially deadly childhood diseases,<sup>2</sup> the debate now centres on the consequences of requiring adults to be vaccinated in order to participate fully in everyday life – from access to international travel, participation in public sporting and entertainment events, to employment.<sup>3</sup> The potential implications of mandated or necessary vaccination for individual rights have not been fully explored, but it is possible to gain some insight into how we should go about this by examining existing case law from the European Court of Human Rights. Interestingly, a recent decision from the Grand Chamber of the Court at the height of the vaccination rush against COVID-19 may help to shed some light on the sorts of questions we should be addressing.<sup>4</sup> Although the case of *Vavříčka and others v. The Czech Republic* originated in applications against the Czech Republic by six Czech nationals between 23 July 2013 and 31 August 2015 and concerned the issue of the statutory duty of vaccination for children, it is possible to

2. See as an example: Francesca Camilleri, ‘Compulsory Vaccinations for Children: Balancing the Competing Human Rights at Stake’, *Netherlands Quarterly of Human Rights* 37(3) (2019), p. 245–267; Jonathan Herring, ‘An Injection of Sense’, (2013) available at <https://www.newlaw-journal.co.uk/content/injection-sense>; Sheather J, ‘Should Childhood MMR Vaccination be Compulsory? Rights, Duties and the Public Interest’, *Human Vaccines & Immunotherapeutics* 9(6) (2013), pp. 1389–1391; Jessica Flanigan, ‘A Defence of Compulsory Vaccination’, *HEC Forum* 26 (2014), p. 5–25; Krantz, Ingela, et al. ‘Ethics and Vaccination’, *Scandinavian Journal of Public Health* 32(3) (2004), pp. 172–178; Meppelink CS, Smit EG, Franssen ML, Diviani N, “‘I was Right about Vaccination’”: Confirmation Bias and Health Literacy in *Online Health Information Seeking*, *Journal of Health Communication* 24(2) (2019), pp. 129–140; Kennedy J ‘Should Childhood Vaccinations be Mandatory?’, *Perspectives in Public Health* 140(1) (2020), pp. 23–24; Emhoff IA, Fugate E, Eyal N, ‘Is There a Moral Right to Nonmedical Vaccine Exemption?’ *American Journal of Law & Medicine* 42(2–3) (2016), pp. 598–620; Emma Cave, ‘Voluntary Vaccination: The Pandemic Effect’, *Legal Studies* 37(2) (2017), pp. 279–304.
3. See as an example: ‘Debate on an e-Petition Relating to Covid-19 Vaccine Passports’ available at <https://commonslibrary.parliament.uk/research-briefings/cdp-2021-0038/>; ‘Demonstrating Your COVID-19 Vaccination Status When Travelling Abroad (Guidance)’ available at <https://www.gov.uk/guidance/demonstrating-your-covid-19-vaccination-status-when-travelling-abroad#demonstrating-your-covid-19-vaccination-status-what-it-is>; ‘Staff in Care Homes with Older Adult Residents in England may be Required to Have a COVID-19 Vaccine to Protect Residents from the Virus’ available at <https://www.gov.uk/government/news/consultation-launched-on-staff-covid-19-vaccines-in-care-homes-with-older-adult-residents>; ‘The Government is to Trial a Series of Measures in England, including Covid Passports, to Allow the Safe Return of Sports Matches, Events and Nightclubs’ available at <https://www.bbc.co.uk/news/uk-56625307>; ‘Covid-19: Vaccine Passports ‘unethical’, Church Leaders Warn’ available at <https://www.bbc.co.uk/news/uk-56781724>.
4. ‘Vavříčka and Others v. the Czech Republic (Application no. 47621/13)’ available at <http://hudoc.echr.coe.int/eng?i=001-209039>.

suggest that the judgement reveals the Court's attitude to the question of vaccination more generally, which is highly relevant to the Covid-19 pandemic. Considering that the hearing took place in the middle of the global pandemic (on 1 July 2020, with the decision dated 8 April 2021), it seems inevitable that the European Court of Human Rights had in its mind the question of vaccination against the virus.

In this commentary, I first analyse the judgement and the dissenting opinion and compare them from the perspective of the different understanding of the doctrine of proportionality. It will be argued that the approach, wherein the nature of the considered right is becoming the central question, corresponds more adequately with the aims of the Convention. Also, it will be demonstrated that refusing the orthodox understanding of proportionality can help to decrease the level of underenforcing Convention rights. I will then draw out the potential implications of the ruling on the question of vaccination against COVID-19. Consequently, it can be suggested that in considering how to regulate vaccination against coronavirus, it is necessary to reframe the analysis in order to ensure that States remain true to the underlying ethos of the Convention to protect individual rights against State interference.<sup>5</sup>

## Facts of the case

According to the Czech Public Health Protection Act (*Zákon o ochraně veřejného zdraví*), all permanent residents and all foreigners authorized to reside in the country on a long-term basis must undergo a set of routine vaccinations. Failure to do so results in exclusion from certain State-run institutions, such as nursery care for young children. In the case of *Vavříčka and others v. The Czech Republic*, the applicants alleged that the various consequences for non-compliance with the statutory duty of vaccination had been incompatible with their right to respect for their private life under Article 8 of the Convention.<sup>6</sup> Even though the applicants formulated their Article 8 complaints principally regarding the consequences of non-compliance with the vaccination duty, the Strasbourg Court stated that the consequences borne by the applicants could not be meaningfully dissociated from the underlying duty.<sup>7</sup> Therefore, the Court concluded that

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5. The Convention for the Protection of Human Rights and Fundamental Freedoms was the first instrument to give effect to certain of the rights stated in the Universal Declaration of Human Rights and make them binding available at <https://www.echr.coe.int/Pages/home.aspx?p=basictexts&c>.

According to preamble of the Convention, one of the methods by which the achievement of greater unity between Members of the Council of Europe is to be pursued is the maintenance and further realisation of Human Rights and Fundamental Freedoms available at <https://www.jus.uio.no/lm/coe.convention.on.human.rights.1950.and.protocols.to.1966.consoloidated/preamble.html>

6. The applicants also complained that the fine imposed on one of them (Mr Vavříčka) and the non-admission of others (Ms Novotná and Mr Hornych) to nursery school was contrary to their rights under Article 9 of the Convention: Vavříčka at para [313]. The child applicants further complained that the refusal of admission to nursery school was contrary to their rights under Article 2 of Protocol No. 1: Vavříčka at para [339]. However, this commentary focuses on the Article 8 element.

7. Vavříčka at para [259].

the subject matter of the applicants' complaints was the duty to vaccinate their children and the consequences for them of non-compliance with it.<sup>8</sup>

The European Court of Human Rights pointed out that in its existing case law, compulsory vaccination, as an involuntary medical intervention, represents an interference with the meaning of Article 8 of the Convention.<sup>9</sup> However, the majority of the Court concluded that the Czech authorities did not exceed their margin of appreciation, and the impugned measures could be regarded as being necessary in a democratic society as provided for under Article 8(2). Therefore, it was held that there has been no violation of Article 8 of the Convention. However, we should note the analysis of the dissenting opinion by Judge Wojtyczek, who suggested an alternative way of framing the issue. Although he agreed with the general view that the Convention does not exclude the introduction of an obligation to vaccinate in respect of certain diseases, he held that the specific arguments adopted by the majority are not sufficient to justify interference with a fundamental right.

### *The decision: what is the central question?*

The difference between the majority and dissenting approaches is demonstrated by considering what each took to be the central question to be addressed. The judgement gives the impression that an answer to the question 'Is compulsory vaccination lawful under the Convention?' is assumed to be positive. The majority built the decision around the justification of the compulsory vaccination by invoking a wide margin of appreciation for individual contracting States because of the absence of consensus over the vaccination. The Court stated that the issue to be determined is not whether a different, less prescriptive policy might have been adopted, but it is whether, in striking the particular balance that they did, the Czech authorities remained within their wide margin of appreciation in this area. It assumed that compulsory vaccination falls within the ambit of Article 8, but that a defence under article 8(2) is made out.

In his dissenting opinion, Judge Wojtyczek, emphasized the significance of the interest being considered. He believed that the question to be answered is whether the added value brought by the obligation to undergo vaccination justifies the restriction on freedom of choice. According to him, it is necessary to show that the benefits for society as a whole and its members outweigh the individual and social costs and justify taking the risk of suffering the side-effects of vaccination. He stressed that '[G]iven the weight of the values at stake, such an assessment requires extremely precise and comprehensive scientific data about the diseases and vaccines under consideration. Without such data the whole exercise becomes irrational'.<sup>10</sup>

Such formulations of the question set the tone for both the majority and the dissenting opinion. The majority considered the issue about vaccination and its effectiveness as

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8. Vavříčka at para [260].

9. The Court referred to *Solomakhin v. Ukraine* (no. 24429/03, § 33, 15 March 2012: Vavříčka at para [263].

10. Vavříčka, dissenting judgment at para [6].

self-evident. More precisely, the Court used the argument about the general consensus over the effectiveness of vaccination:

[A]s for the effectiveness of vaccination, the Court refers once again to the general consensus over the vital importance of this means of protecting populations against diseases that may have severe effects on individual health, and that, in the case of serious outbreaks, may cause disruption to society (see paragraph 135 above).<sup>11</sup>

It can be noticed that paragraph 135 is the quote from the WHO ‘Global Vaccine Action Plan’ published in 2013<sup>12</sup> which recommended attaining a national coverage rate of at least 90% in relation to all vaccines that form part of national immunization programmes.<sup>13</sup>

Judge Wojtyczek, on the other hand, stressed that ‘[A] rational assessment of whether the obligation to vaccinate complies with the Convention requires that the case be examined separately for each disease, proceeding on a disease-by-disease basis’. He is loath to accept a blanket approach to all vaccinations being treated in the same way irrespective of their particular characteristics (nature of the disease; data of effectiveness and long-term safety, etc.).<sup>14</sup>

### *Proportionality*

It is possible to notice that the majority and Judge Wojtyczek apply different approaches to the case. To better understand the nature of this difference, it would be helpful to consider the judgement and the dissenting opinion from the perspective of the doctrine of proportionality.

Isra Black asserts that the ECtHR employs a two-limb test to assess whether interference with a fundamental freedom in pursuit of a legitimate aim is lawful.<sup>15</sup> According to the scholar, the first limb, ‘necessity’ *stricto sensu*, does very little work in the Court’s jurisprudence; the second one is proportionality. Considering proportionality, Black refers to George Letsas and proposes that Letsas’s explanatory account of proportionality is also applicable *ex ante* to the question of what domestic courts or the ECtHR ought to do when asked to decide cases that bear on the content of Convention rights.<sup>16</sup>

George Letsas believes that in Europe and other parts of the world, courts use the doctrine of proportionality as a test in order to determine whether someone’s human rights have been violated.<sup>17</sup> The scholar stresses that:

11. Vavříčka at para [300].

12. Available at <https://www.who.int/teams/immunization-vaccines-and-biologicals/strategies/global-vaccine-action-plan>.

13. Vavříčka at para [135].

14. Vavříčka, dissenting judgment at para [9].

15. Isra Black, ‘Refusing Life-Prolonging Medical Treatment and the ECHR’ (2018) Vol. 38 N 2 Oxford Journal of Legal Studies 306.

16. *Op. cit.*, p. 308.

17. George Letsas, ‘Rescuing Proportionality’ in Rowan Cruft, S Matthew Liao and Massimo Renzo, eds, *Philosophical Foundations of Human Rights* (Oxford: OUP, 2015), p. 316.

According to the orthodox understanding of this legal doctrine, state interference with non-absolute human rights (such as privacy, freedom of religion or expression) is lawful, if it is proportionate to a legitimate aim in pursuit of which the state acted'.<sup>18</sup>

Letsas argues that on the first stage of the orthodox test, courts will decide whether there has been an interference with a liberty or interest that falls within the scope of a right protected in the relevant convention or constitution (the scope or definitional stage). The second stage, according to him, is about the conditions under which these rights can be limited, the court will ask whether that interference was justified or 'necessary in a democratic society' (the justification or limitation stage).<sup>19</sup> Letsas considers the orthodox understanding of proportionality as a human rights doctrine as vacuous.<sup>20</sup> He asserts that the best reconstruction of what courts actually do under the heading of proportionality must begin with normative assumptions about the nature of rights, made at the level of moral theory; according to the scholar, reason-blocking theory of rights seems to capture better the nature of human rights as rights against the state.<sup>21</sup> The scholar believes that: 'Proportionality as the right to equal respect and concern captures the moral rights we have correlative to that stringent duty'.<sup>22</sup>

If we go back to the approaches applied by the majority and Judge Wojtyczek in the case of *Vavříčka* and consider them from the perspective of Letsas's division of proportionality's understanding, it is possible to suggest that the majority used the orthodox test. In the dissenting opinion, opposite, the nature of the considered right is becoming the main question. Below, we will consider how applying the different approaches influences the decision and the dissenting opinion, and what approach better corresponds with the aim of protection of human rights in Contracting Parties under the Convention.

It can be noticed that the Strasbourg Court very quickly goes on the second stage of the orthodox test in *Vavříčka*. The Court agreed with the applicants that it is well established that a person's physical integrity forms part of their 'private life' within the meaning of this provision of the Convention.<sup>23</sup> Once it recognised that the interest in question falls under Article 8, the Court mainly examined whether the interference was 'necessary in a democratic society' and focused on the issue of the margin of appreciation.

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18. Op. cit., p. 316.

19. Op. cit., pp. 316–317.

20. Op. cit., p. 340.

21. Op. cit.

22. Op. cit.

23. The majority referred to *Paradiso and Campanelli v. Italy* [GC], no. 25358/12, § 159, 24 January 2017, *Boffa and Others v. San Marino* (no. 26536/95, Commission decision of 15 January 1998, Decisions and Reports (DR) no. 92-B, p. 27), and *Baytüre and Others v. Turkey* (dec.), no. 3270/09, 12 March 2013): *Vavříčka* at para [261]. The Court established that '[I]n its case-law that compulsory vaccination, as an involuntary medical intervention, represents an interference with the right to respect for private life within the meaning of Article 8 of the Convention' and referred to *Solomakhin v. Ukraine* (no. 24429/03, § 33, 15 March 2012: *Vavříčka* at para [263].



One can argue that considering a margin of appreciation includes the stage of examining the nature of the Convention right in issue. According to the Court's statement in *S. and Marper v. the United Kingdom*:

A margin of appreciation must be left to the competent national authorities in this assessment. The breadth of this margin varies and depends on a number of factors, including the nature of the Convention right in issue, its importance for the individual, the nature of the interference and the object pursued by the interference. The margin will tend to be narrower where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights (see *Connors v. the United Kingdom*, no. 66746/01, § 82, 27 May 2004, with further references). Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted (see *Evans v. the United Kingdom* [GC], no. 6339/05, § 77, ECHR 2007I). Where, however, there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to how best to protect it, the margin will be wider (see *Dickson v. the United Kingdom* [GC], no. 44362/04, § 78, ECHR 2007-V).<sup>24</sup>

It can be argued that the nature of the right at stake should be considered first, even if there is no consensus within the Member States as the reason for the margin will be wider. The opposite, focusing on the justification of a wide margin of appreciation through the absence of the consensus, can be a reason for missing the crucial factor for the margin of appreciation to be recognised narrower – the right at stake belongs to intimate or key rights.

In the case of *Vavříčka*, the Court pointed out that the weight of the consideration related to the interference is lessened because no vaccinations were administered against the will of the applicants, nor could they have been. It can be noticed that the majority emphasis on the nature of interference, but not on the nature of the right in issue. The reference to the fact of not being physically forced to be vaccinated does not exclude the potential for interests under Article 8 to be violated. Consequently, we might question whether the Strasbourg Court is giving (unjustified) priority to the protection of an individual's physical integrity over consideration of potential non-physical violations resulting in, for example, discrimination or obstacles in realizing other rights? Unfortunately, the Court did not answer this question directly, apart from repeating its statement slightly differently: '[W]hile vaccination is a legal duty in the respondent State its compliance cannot be directly imposed, in the sense that there is no provision allowing for vaccination to be forcibly administered'.<sup>25</sup>

In contrast, in his dissenting opinion, Judge Wojtyczek analysed the case from the perspective of the interest at stake and their value. The judge referred to the Court's earlier case law, wherein the Strasbourg Court has emphasized that a person's bodily integrity concerns the most intimate aspects of one's private life.<sup>26</sup> Judge Wojtyczek stressed

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24. *S. and Marper v. the United Kingdom* [GC] - 30562/04 and 30566/04 Judgment 4.12.2008 [GC] at para 102.

25. *Vavříčka* at para [293].

26. Wojtyczek referred to *Y.F. v. Turkey*, no. 24209/94, § 33, ECHR 2003-IX: *Vavříčka*, dissenting judgment at para [7].

that under the existing case-law the freedom to dispose of one's own body is a fundamental value that is protected by the Convention.<sup>27</sup> It is possible to suggest that Judge Wojtyczek's approach corresponds more adequately with the aims of the Convention.

Indeed, it is important to remember that the Convention is primarily the instrument for individuals (persons, nongovernmental organization or group of individuals) to protect their rights from a violation by one of the Contracting Parties.<sup>28</sup> With all respect to the Strasbourg Court and the necessity to find a balance with protecting the interests of society in general, as well as for individuals, it seems that in the case of *Vavříčka*, the Court did not attend to the first priority – the analysis of the nature of the right in question, and the significance and consequences of the decision for individuals who are faced with a similar situation of interference with their rights.

### *The margin of appreciation as an underenforcement doctrine*

The role of the Strasbourg Court in the implementation of the Convention and its partnership with national authorities in achieving the Convention's aims, raises another problem related to the margin of appreciation: understanding the margin of appreciation doctrine as an underenforcement doctrine. As noted by Dimitrios Tsarapatsanis: 'By invoking MoA, the Court appears to underenforce Convention rights. It typically lowers the intensity of its review, accepts States' conceptions of ECHR rights, ritualistically states that Member States 'are better placed than the Court itself' to decide on the merits of cases and ultimately declines to draw on an optimal understanding of Convention right'.<sup>29</sup> It is not the aim of this commentary to examine this complex issue. However, it seems important to demonstrate how the Court applies the margin of appreciation as an underenforcement doctrine in the case of *Vavříčka*. This will be shown below. Also, the counterarguments by Judge Wojtyczek allow us to see how refusing the orthodox understanding of proportionality and considering the nature of rights can help to decrease the level of underenforcing Convention rights.

Concerning the margin of appreciation, the majority based its position on the following arguments. First, the Court stated that matters of healthcare policy are in principle within the margin of appreciation of the domestic authorities, who are best placed to assess priorities, use of resources and social needs.<sup>30</sup>

As the counterargument to this statement, Judge Wojtyczek underlined that the case under consideration is neither about access to health services, nor the manner in which they are organized (positive rights). Rather, he claimed, it is about the freedom to dispose of one's own body and freedom from medical intervention being carried out without the

27. Wojtyczek referred to *Pretty v. the United Kingdom*, no. 2346/02, § 66, ECHR 2002-III, and *K.A. and A.D. v. Belgium*, nos. 42758/98 and 45558/99, § 83, 17 February 2005: *Vavříčka*, dissenting judgment at para [7].

28. Article 34 of the Convention available at [https://www.echr.coe.int/Documents/Convention\\_ENG.pdf](https://www.echr.coe.int/Documents/Convention_ENG.pdf).

29. Dimitrios Tsarapatsanis, 'The Margin of Appreciation Doctrine: A Low Level Institutional View', *Legal Studies* 35(4) (2015), pp. 675–676.

30. The majority referred to *Hristozov and Others v. Bulgaria*: *Vavříčka* at para [274].

individual's consent (negative rights). Judge Wojtyczek stated that the issue at stake is crucial to the individual's effective enjoyment of the most intimate rights. He underlined that restrictions on the freedom to make choices about one's own body, imposed outside the context of a direct conflict between two or more rights, require strong justification. According to him:

[I]n this domain, the margin of appreciation should be narrow and the threshold to justify the interference very high. The approach adopted may give the impression that without a low standard of scrutiny the finding of no violation would not have been possible.<sup>31</sup>

The next argument related to the margin of appreciation made by the majority is the States' positive obligations to take appropriate measures to protect the life and health of those within their jurisdiction. According to the majority's position, the respondent State's margin of appreciation will usually be wide when required to strike a balance between competing private and public interests or Convention rights. The Strasbourg Court found that the duty imposed by the Czech Republic on individuals to be vaccinated represents a response by the domestic authorities to the pressing social need to protect individual and public health against the diseases in question.<sup>32</sup> It underlined that concerns about risks associated with a decrease in vaccine coverage have been raised at European and international levels.<sup>33</sup>

With respect to the existence of a consensus, the Court indicated that there is no doubt about the relative importance of the State's interest to achieve the highest possible level of vaccination among its population since vaccination is recognised among the

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31. Vavříčka, dissenting judgment at para [8].

32. Vavříčka at para [284].

33. UN Committee on Economic, Social and Cultural Rights (CESCR), *Consideration of reports submitted by States parties under articles 16 and 17 of the Covenant : concluding observations of the Committee on Economic, Social and Cultural Rights : Kazakhstan*, 7 June 2010, E/C.12/KAZ/CO/1, available at: <https://www.refworld.org/docid/4c1734da2.html>; UN Committee on Economic, Social and Cultural Rights (CESCR), *Concluding observations on the combined second to fourth periodic reports of Egypt*, 13 December 2013, E/C.12/EGY/CO/2-4, available at: <https://www.refworld.org/docid/52d5399a4.html>; UN Committee on Economic, Social and Cultural Rights (CESCR), *Concluding observations on the sixth periodic report of Ukraine*, 13 June 2014, E/C.12/UKR/CO/6, available at: <https://www.refworld.org/docid/53c78ad94.html>; UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations: Czech Republic*, 18 March 2003, CRC/C/15/Add.201, available at: <https://www.refworld.org/docid/3f25962b4.html>; Recommendation 1317 (1997) of the Parliamentary Assembly of the Council of Europe (PACE), available at: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=15351&>; European Parliament resolution of 19 April 2018 on vaccine hesitancy and the drop in vaccination rates in Europe (2017/2951(RSP)), available at: [https://www.europarl.europa.eu/doceo/document/TA-8-2018-04-19\\_EN.html#sdocta15](https://www.europarl.europa.eu/doceo/document/TA-8-2018-04-19_EN.html#sdocta15); The 2018 report by the European Commission on the state of vaccine confidence in the EU, available at: [https://ec.europa.eu/health/sites/default/files/vaccination/docs/2018\\_vaccine\\_confidence\\_en.pdf](https://ec.europa.eu/health/sites/default/files/vaccination/docs/2018_vaccine_confidence_en.pdf).

Contracting Parties as one of the most successful and cost-effective health interventions.<sup>34</sup> It noted that there is no consensus over a single model about the best means of protecting the interest at stake and recognised that the margin of appreciation in the considered case should be a wide one.

Contrary to the majority view, Judge Wojtyczek noted that in many States, public health objectives can apparently be achieved without introducing an obligation to vaccinate. He strongly argued that because less restrictive means are indeed available, the impugned interference is not necessary in a democratic society. With respect to the margin of appreciation, the judge referred to the Court's position that where the principle of personal autonomy is invoked, it is usually recognised that even in the absence of European consensus, only a narrow margin of appreciation is recognised.<sup>35</sup> Further, he cited the Strasbourg Court's own statement in *Dubská and Krejzová v. the Czech Republic*<sup>36</sup> that 'the margin will tend to be relatively narrow where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights'.

### *Consequences of the Vavříčka decision*

After considering the main arguments adopted by the majority and Judge Wojtyczek in his dissent, it is possible to make the following initial conclusions. First, it is clear that from the beginning, the majority of the Strasbourg Court took a stance that justifies the policy of statutory vaccination in the Czech Republic. This is particularly visible in contrast to the dissenting opinion by Judge Wojtyczek. Although Judge Wojtyczek also recognised that there are strong objective arguments in favour of finding a non-violation of the Convention rights, he found that the respondent Government failed to adduce sufficient reasons capable of justifying the interference complained of by the applicants in this case.

The question that logically follows from the majority is why instead of focusing on the factual circumstances of the case, the Strasbourg Court built its position upon general arguments about the effectiveness of vaccination and the general consensus on the vital importance of mass vaccination, notwithstanding a recent change of policy in several other Contracting Parties towards a more prescriptive approach.<sup>37</sup> It can be noticed that vaccines offered through the national immunization programme in the United Kingdom are not mandatory.<sup>38</sup> Although the dissenting opinion demonstrated the possibility of an alternative approach (even though it would arrive at the same conclusion about the absence of a violation of Convention rights), it is possible to suggest that the majority of the European Court of Human Rights has indicated a likely direction of future travel based upon effectiveness of vaccines.

Second, as stated above, the Strasbourg Court did not attend to the nature of the interest in question. Recognising that the interest falls within the ambit of Article 8 is not

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34. Vavříčka at para [277].

35. *A.P., Garçon and Nicot v. France*, nos. 79885/12 and 2 others, §§ 121-123, available at: <http://hudoc.echr.coe.int/eng?i=001-172913>.

36. Available at <http://hudoc.echr.coe.int/eng?i=001-168066>.

37. See paragraphs 135, 277, 278 300 of the decision.

38. Available at <https://commonslibrary.parliament.uk/research-briefings/cbp-9076/>.

enough. According to the Court's case law, many different interests belong to the sphere of private life.<sup>39</sup> Does it mean that all of them need the same approaches in their protection? Restrictions in the name of 'democratic society' sound justified if we talk, for example, about having one's image in a public place by CCTV for security reasons. However, the same justification will not withstand scrutiny where the nature of the right differs, for example when it concerns restricting what a person can *do* with *their* own body. It can be argued that the right to make an independent decision about one's own body is the intimate key right.

This puts the issue of State interference in a person's life at its highest peak since the sphere of making decisions about one's own body is a completely different level of intimacy. It is not denied by anyone that the sphere of personal life is the area wherein State should have very limited powers to regulate. When we talk about private information, our communication with others, it feels natural that in most cases we should be free to decide by ourselves. The situation with the global pandemic of COVID-19 did show us that in such uncertain and quite dangerous conditions as the pandemic State intervention in our personal communications can be felt as justified enough. Since it can bring all of us to a better tomorrow and give us hope to live as we used to live before all restrictions that the pandemic has made us follow. However, how far are people ready to go in following States rules in the purpose of public interest? If State interferes in the sphere of relationship with a person's own body by asking to do the vaccination, is it possible to refuse it? Can we say 'no' to State if it would be asserted that we should follow the rules for public good? Let's go further: we should bear in mind that society consists of many individuals. Therefore, legal rules should be suited for many of these individuals for being accepted, at the end of the day, by majority and serve the public good. So, the main issue is not even personal choice versus the public good, but how to construct impersonal common legal rules as something providing a personalized approach and reaching an individual's needs in such an extremely intimate sphere as making decisions about one's own body.

Therefore, the approach to take in any one case should depend on the nature of the violated interest. We must recognise that just because different interests all fall within the sphere of private life, it does not mean that these interests all have the same nature. Different interests may require different protection, and restrictions of diverse interests may be based upon different justifications. Without a doubt, in the case of vaccination, the interest belongs to the most intimate aspects of private life, and any limitations upon it demand a very strong justification.

This logically leads us to the third conclusion that relates to the issue of the margin of appreciation. It is possible to say that by not examining the interest to be free from medical intervention without consent, the Court was easily able to adopt a wide margin of appreciation in this case. It can be suggested that if the European Court of Human Rights had considered the nature of the legally protected interest, then it may have come to a

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39. See as an example: *R.R. v. Poland*, no 27617/04, available at <http://hudoc.echr.coe.int/eng?i=001-104911>; *Pretty v. the United Kingdom*, no. 2346/02, available at <http://hudoc.echr.coe.int/eng?i=001-60448>; *Evans v. the United Kingdom* [GC], no. 6339/05, available at <http://hudoc.echr.coe.int/eng?i=001-80046>; *L. v Lithuania*, no 27527/03, available at <http://hudoc.echr.coe.int/eng-press?i=003-2081500-2204459>.

different conclusion since the interest so considered relates to the most intimate sphere of personal life and belongs to fundamental human rights.

### *Implications for COVID vaccination regulation?*

It is possible to suggest that the decision in the case of *Vavříčka and others v. The Czech Republic* could reveal the position the Strasbourg Court might take in cases related to the Covid-19 vaccination. However, we should note that there are features of the coronavirus vaccinations which would make reliance upon the main reference to the general consensus about the effectiveness of vaccination more difficult, especially in the light of the speed in which the various vaccines have been developed and the limited data on their effects, both short and long-term.<sup>40</sup>

Indeed, in the commented case, the question was about vaccines that have been in use for many years.<sup>41</sup> In the dissenting opinion, Judge Wojtyczek stated that the Convention does not exclude the introduction of an obligation to vaccinate in respect of *certain diseases*. It seems logical that the approach for vaccines that have been used for decades should be different from the approach for vaccines which have only been developed recently and at speed. It would not be fair to brush aside possible arguments about the safety of the vaccines, especially in the light of some problems reported about specific vaccines.<sup>42</sup> However, it can be noticed that the mainstream scientific literature available at the moment still supports the new vaccines against coronavirus and their use when compared statistically with the risks of not being vaccinated. Nevertheless, any judgement would need to engage in this procedural weighing up of risks and benefits for each vaccine and could not feasibly fall back on the assumption that the benefits of mass vaccination for the public good outweigh any individual risks

40. See some information about Covid-19 vaccines available at [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(21\)00306-8/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(21)00306-8/fulltext); <https://www.health.harvard.edu/covid-19/covid-19-vaccines>; <https://www.who.int/news-room/feature-stories/detail/side-effects-of-covid-19-vaccines>; <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/different-vaccines.html>; <https://www.health.harvard.edu/blog/covid-19-vaccines-safety-side-effects-and-coincidence-2021020821906>.

41. An inactivated (killed) polio vaccine first used in 1955, and a live attenuated (weakened) oral polio vaccine first used in 1961 (<https://www.who.int/teams/health-product-and-policy-standards/standards-and-specifications/vaccines-quality/poliomyelitis>). The first recombinant vaccine against hepatitis B was licensed in 1986 ([https://www.historyofvaccines.org/timeline#EVT\\_100832](https://www.historyofvaccines.org/timeline#EVT_100832)). The vaccine against tetanus was introduced in 1961 (<https://vk.ovg.ox.ac.uk/vk/tetanus>). The MMR vaccine was licensed for use in USA in 1971; stand-alone measles, mumps and rubella vaccines had been previously licensed in 1963, 1967, and 1969, respectively ([https://en.wikipedia.org/wiki/MMR\\_vaccine](https://en.wikipedia.org/wiki/MMR_vaccine)). The vaccine against tuberculosis has been in use since 1921 (<https://www.historyofvaccines.org/content/articles/tuberculosis>).

42. See as an example: Available at <https://www.bmj.com/content/372/bmj.n149>; <https://www.bmj.com/content/372/bmj.n699>; <https://science.sciencemag.org/content/371/6536/1294>; <https://www.ema.europa.eu/en/news/covid-19-vaccine-janssen-ema-finds-possible-link-very-rare-cases-unusual-blood-clots-low-blood>; <https://www.theverge.com/2021/4/7/22371665/covid-vaccine-side-effects-moderna-pfizer>.



(as the majority did in *Vavříčka*). The obvious difficulty with this would be the fact that the judges, who do not possess scientific expertise, inevitably defer to the mainstream scientific recommendations in the domestic State. Although UK courts would critically engage with the evidence to ensure that it is both reasonable and responsible,<sup>43</sup> it is likely that the current majority view that the benefits of vaccination against coronavirus outweigh any risks in the general population, would carry considerable weight in the court's appreciation.

Furthermore, it can be assumed that the main problem in the case of coronavirus vaccination will relate to the consequences of vaccine hesitancy or refusal. The intention to restrict access to some spheres of life on the basis of an individual's vaccination status can provide fertile soil for potential violations of the right to bodily integrity and the interest not to be subject to medical intervention without consent. Although the UK government have stated that they are not considering compulsory vaccination,<sup>44</sup> it is likely that some restrictions based upon a person's vaccination status will be adopted. Consequently, although not forcibly administered, vaccination becomes mandatory to participate fully in day-to-day life.

From this perspective, the Court's reliance in *Vavříčka* upon the fact that Czech law did not provide for vaccination to be forcibly administered is alarming. If the Strasbourg Court accepts that vaccination can be obligatory for certain activities without violating any rights in the Convention, will the Court take a similar approach to States who require individuals to be vaccinated in order to access employment, foreign travel or leisure activities, so long as there is no mandatory imposition of (forcibly administered) vaccination? Is it possible to talk about coerced consent in the case when vaccination status is becoming a 'pass' to some spheres of life? The question is: should potential violations of one's interest related to their vaccination status be considered as an attempt to make them act in a certain way? If so, this relates to their interest not to be subject to medical intervention without consent? Or will these violations be considered as simply related to separate independent interests directly connected with the different activities to which restrictions may be applied, such as the right to work, or free movement? The approach we adopt, and the corresponding protection, will depend on the answer to this question. It seems justified to restrict one's interest to access foreign travel because of others' interest in health. Indeed, we may even identify the emergence of a consensus in the plan of the European Commission to create a Digital Green Certificate 'to facilitate the safe free movement of citizens within the EU during the COVID-19 pandemic'.<sup>45</sup>

But the same may not be said if we talk about one's interest not to be subject to medical intervention without consent. Restrictions on one of the most intimate and fundamental

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43. So called 'hard-look' Bolam: *Bolitho v. City and Hackney Health Authority*: <https://publications.parliament.uk/pa/ld199798/ldjudgmt/jd971113/boli01.htm>; *Re B (a child)* [2003] EWCA Civ 1148.

44. Available at <https://www.chemistanddruggist.co.uk/news/uk-governments-covid-19-vax-not-mandatory-individuals>.

45. Available at [https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/safe-covid-19-vaccines-europeans/covid-19-digital-green-certificates\\_en](https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/safe-covid-19-vaccines-europeans/covid-19-digital-green-certificates_en).

interests to decide what to do with one's body demand very serious justification. This takes us back to the necessity to consider the nature of the interest in question.

It is also important to note that the coronavirus vaccination is (at the time of writing) directed to adults, not children. This not only means that a completely independent subject decides to be vaccinated, but that there are additional considerations and pressures which are in play for adults which do not exist in the context of childhood vaccination programmes. For example, adults are reliant upon employment to provide for themselves and their families. If access to employment is restricted based on a person's vaccination status, this may impose additional obstacles to what should be the free choice to undergo vaccination or not. This argument is applied in the cases where a possibility to choose another profession which does not require vaccination is restricted, for example, by the individual's lack of qualifications or skills to obtain alternative employment.

It is of course accepted that State interference in a person's life is sometimes necessary for the protection of public interest and the well-being of society. At first sight, it seems logical that the pandemic is a serious reason for such intervention in people's lives. At the same time, how important can the public interest be when compared with an individual's perception of the risk of injury to their health, or even life, especially in the context of a new vaccine with as yet unknown and undocumented potential long-term effects? I would argue that it is necessary to take into account the nature of the interest and the consequences for an individual whose life and choice about their own health and body, is in the question. Undoubtedly, the European Court of Human Rights should consider the problem from the perspective of finding a balance between a person's rights on the one hand, and public interest and protection of interests of other members of society, on the other. In the context of vaccination against coronavirus, the court may find itself obliged to consider in more depth the nature of the interests and rights at stake, and go beyond its response in *Vavříčka*. It will also inevitably need to navigate the stormy waters of scientific and medical data. As Judge Wojtyczek noted:

[T]he persons affected by the obligation to vaccinate are entitled to know not only the precise risk for each and every disease, but also how this risk was calculated and assessed by those who took the decision to introduce the obligation to vaccinate. Their legitimate queries in this respect remain without a satisfactory answer.<sup>46</sup>

I might add that the nature of the individual interests under Article 8 also needs to be addressed. Indeed, the Court must not lose sight of its original aim to protect the rights of individuals from a violation by one of the Contracting Parties.

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46. Vavříčka, dissenting judgment at para [16].



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