

LEGAL DILEMMAS ABOUT MANDATORY CHILDHOOD VACCINATION IN EUROPE

Accepted
13. 10. 2022

Revised
5. 1. 2023

Published
26. 4. 2023

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Abstract Compulsory childhood and adolescent vaccination are a controversial issue in the public arena. They also pose a challenge on the ground of legal sciences. This article is devoted to a dogmatic-legal analysis of the type of legally protected goods that are restricted in connection with mandatory vaccination (among others: the right to respect for private and family life, personal freedom, the right to self-determination) and those values that vaccination is in principle supposed to protect (public health, life, and health of children). The article analyses in detail the ruling of the European Court of Human Rights, which seems to be a breakthrough. On the one hand, it ends the dispute pending before the Court and, on the other, it opens the field for further discussion on the essence of mandatory vaccinations. The research has been carried out by using the dogmatic-legal method, the method of analysis and criticism of literature, the method of analysis of case law and the statistical method. In the presented research results, reports and statistical data of international bodies concerning the level of vaccination among children and adolescents in Europe were used.

Keywords
child,
countering the spread of
communicable diseases,
European Court of
Human Rights,
fundamental rights,
public health

1 Intrudaction

Infectious diseases have repeatedly decimated the populations of many countries throughout history. The cause was not only poor sanitary conditions but above all a lack of immunization against biological pathogens causing infectious diseases. This peculiar and, what is important, permanent attack by an invisible enemy necessitated research both in medical and in legal science. Questions have begun to be asked about the possibilities and methods of protecting human health and life, as well as about the protection of public health expressed in normative regulations, both national and supranational.

The need for prophylactic measures was already recognized in antiquity. Due to the dearth of medical knowledge, including the etiology of infectious diseases, the recommended measures were usually aimed at performing specific hygienic and sanitary procedures, which were sometimes given a ritual character and protected by religious sanctions. Such injunctions were provided for, among others, in the Talmud. Prophylactic health measures included recommendations concerning proper nutrition and hygienic and ritual procedures such as circumcision. In the case of infectious diseases, the infected were isolated, their clothes were burnt and the utensils they used were sterilized by heating them in the fire. The first attempts at immunization against infectious diseases were made in ancient China. The so-called variolation was performed, which involved the introduction of prepared purulent secretions from smallpox vesicles into the nostrils. This procedure can be regarded as the prototype of modern vaccinations (Marcinkowski, 1988). Anti-epidemic measures were also taken in the Middle Ages. However, due to the early development of medicine, rather cruel measures were used, for example, locking people in houses for quarantine and burning them with all their belongings.

Gradually, legal regulations began to be issued, setting out rules for dealing with people infected or suspected of being infected. Failure to comply with these regulations was severely punished. For example, in Königsberg at the end of the 17th century, the failure to comply with anti-epidemic bans could result in death by hanging (Kracik, 1991). However, it was not until the 18th and 19th centuries that the scientific foundations were laid in the fight against infectious diseases. Breakthroughs in the field of immunization techniques came with the work of Edward Jenner who developed a vaccine against smallpox, Louis Pasteur the creator of the scientific concept of protective vaccination with attenuated organisms, and Robert Koch the discoverer of the comma shaped cholera bacillus, among other

things (Seyda, 1973). Specialized medical facilities were also established to perform laboratory tests on viruses and bacteria. These activities were accompanied by appropriate legislative work. At the turn of the 19th and 20th centuries, modern anti-epidemic legislation began to be introduced, based on the principles of public health protection, and including sanctions for failure to undergo mandatory vaccinations. For example, current Polish law stipulates mandatory vaccination against 14 infectious diseases, including diphtheria, measles, poliomyelitis, and hepatitis B. A person who does not undergo vaccinations may be subject to administrative fines; moreover, such behavior constitutes a criminal offence. It is, therefore, possible to use so-called indirect coercion to force vaccinations. In the legislation of France and Italy, since 2018, changes are evident in the direction of tightening repressive sanctions against parents who evade having their children vaccinated. Bans on admitting children to nurseries and kindergartens, financial penalties and imprisonment have been introduced. Not only were the existing regulations amended, but also the catalogue of obligatory vaccinations was expanded (Rezza, 2019; Partouche, et al., 2019).

Today, advances in medical science have led to the invention of many effective vaccines against known infectious diseases with a high level of safety (Chen, Hibbs, 1998). The literature emphasizes that vaccinations are the most effective form of preventing the spread of infectious diseases, and their widespread use can foster the elimination of epidemic outbreaks of infectious diseases from society on a global scale (Doherty et al., 2016). The invention of vaccination resulted in the acquisition of secondary immunization by vaccinated persons, which effectively reduced the risk of epidemics of various infectious diseases (for example, measles, tuberculosis, smallpox). Vaccinations aim to protect against a biological pathogen causing a specific infectious disease. They have the effect of protecting the health of the vaccinated individual (acquired immunity) as well as that of society (herd immunity).

Although vaccination is currently the most proven and effective method of preventing the spread of infectious diseases (Wilson & Marcuse, 2001) since their widespread use, they have aroused much controversy. They have gained both supporters and opponents. The most common information by far relates to the positive impact of vaccination, particularly on the health of children (Gravagna et al., 2020). This is exemplified by many World Health Organization documents. Vaccination is recognized as one of the most effective health interventions in history, protecting children and subsequently the population from infectious diseases and their consequences. Importantly, under these acts, immunization is considered a

human right and a key element in ensuring health and equity.¹ The Centers for Disease Control and Prevention also stress the importance of vaccinating children to protect their lives and health against infectious diseases. They also emphasize the high effectiveness and safety of vaccines that are administered to children.² For example, the widespread use of pertussis and measles vaccines has resulted in a rapid reduction in child mortality (Madhi et al., 2008). It is also correct that the introduction of new vaccines has many benefits at a societal level, affecting not only patients but also parents, employers, and the economy (Doherty et al., 2016).

Child and adolescent immunization are organized in countries in the form of either voluntary or mandatory vaccination together with recommended vaccinations (Vaz et al., 2020; Lopalco et al., 2009). Compulsory vaccination is protected by repressive sanctions for non-compliance. The use of state coercion in countries where childhood vaccination is mandatory causes opposition to universal vaccination. Although routine vaccination programmes have significantly reduced the incidence of known infectious diseases in several countries, many parents question this success and an increasing percentage even refuse to vaccinate their children (Attwell & Navin, 2019). Sociological studies carried out indicate that the main reasons behind the aversion to vaccinations include fear of adverse reactions to vaccines, doubts about the composition and quality of vaccines and lack of faith in their effectiveness (Rogalska et al., 2010; Harmsen et al., 2013).

Child and adolescent vaccination pose a global social challenge for nations and the international community. The WHO stresses the need for universal access to vaccination against already known diseases. All EU countries have established childhood vaccination programmes to reduce the spread of many known infectious diseases. However, in recent years there has been a sharp resurgence of vaccine-preventable diseases due to declining vaccination rates. An example is measles. As indicated by the Organization for Economic Co-operation and Development (OECD), the occurrence of epidemic outbreaks of measles since 2018, occurring in France, Romania, Italy and Poland, among others, should be considered as

¹ WHO (2015). *Social Benefits of immunization*. Retrieved from: https://www.euro.who.int/__data/assets/pdf_file/0009/339624/Sociatal-benefits.pdf (March 15, 2022).

² Five Important Reasons to Vaccinate Your Child. Retrieved from <https://www.cdc.gov/measles/downloads/matte-reasons-vaccinate.pdf> (March 15, 2022).

worrying.³ OECD identifies declining vaccination rates as the cause of the problem.⁴ This negative trend is also affecting other countries. In 2019, the WHO announced that the Czech Republic, Greece, Albania, and the UK have lost their measles elimination status.⁵

Compulsory vaccination is also a complex legal issue that is being considered in various branches of law. Under debate is whether vaccination should be compulsory or whether a voluntary model of vaccination should be chosen, and what consequences this might have at the national and European level (Cave, 2017). The issue of mandatory or voluntary immunization is considered by doctrine representatives mainly from the perspective of national legislation and internal social contexts (Czechowicz, 2021). Such an approach is justified from the point of view of the individual approach of national legislators to the issue of vaccination. It is difficult to discern in the current body of legal doctrine a discussion of certain fundamental issues that touch upon common values of a transnational nature such as public health and fundamental rights. This void constitutes an obvious research gap that needs to be filled. These goods are common to all nations, thus providing a basis for a general scientific discussion on the operation of immunization in a broader (for example, European) perspective. Key in this area may be this year's ruling of the European Court of Human Rights in the case *Vavříčka and others vs. the Czech Republic*, which stressed the importance of the general social value of vaccination.⁶ This judgment should therefore be regarded as, on the one hand, bringing the dispute before the Court to a close and, on the other, opening a certain debate on the legal nature of vaccinations in Europe.

³ See more: OECD. *Childhood vaccinations*. Retrieved from <https://www.oecd-ilibrary.org/sites/b12f9db2-en/index.html?itemId=/content/component/b12f9db2-en> (March 15, 2022).

⁴ European Centre for Disease Prevention and Control (2019). *Monitoring the responses to hepatitis B and C epidemics in the EU/EEA Member States*. Retrieved from <https://www.ecdc.europa.eu/en/publications-data/monitoring-responses-hepatitis-b-and-c-epidemics-eueea-member-states-2019> (March 15, 2022).

⁵ WHO (2017). *Global Hepatitis Report*. Retrieved from <https://apps.who.int/iris/bitstream/handle/10665/255016/9789241565455-eng.pdf?sequence=1&isAllowed=y> (March 15, 2022).

⁶ Judgment of Grand Chamber of European Court of Human Rights from April 8, 2021, signature 47621/13 and 5 others.

2 Legally protected rights in the implementation of compulsory childhood vaccination

2.1 Identification of conflicts of laws

World statistics substantiate the positive effects of vaccinations. Of course, the obligation to vaccinate should be treated as a legal obligation of a specific nature, in terms of protecting the public health of society as well as of individual citizens. It can even be seen as an expression of social solidarity. The issue at stake, however, is how to protect legal goods in the event they conflict with other goods and individual freedoms restricted by the introduction of universal mandatory vaccination.

The implementation of vaccinations affects the protection of many legal assets. These can be divided into two groups. The first group consists of the legal goods of the individual. They include the life and health of the person to be vaccinated. The second group includes the legal goods of the public, which can be further subdivided into the local public health (the immediate environment of the person to be vaccinated, local, regional community) and the wider public health (national, supranational community). These goods constitute a universal value.

From the perspective of the individual, the protection of life and health against infectious diseases is essential for functioning well in society. And from the perspective of society at large, maintaining a high level of public health against the spread of infectious diseases is necessary for the proper functioning of society, the economy and state institutions.

2.2 Human life and health as legal goods protected by vaccination

Human life and health are intrinsic qualities of every human being. They are regarded as fundamental rights which, by virtue of their dignity, belong to the human person. Because of their importance, they are subject to special legal protection. Therefore, many national and international legal acts have been devoted to this issue. In this of constitutional rank, for example, in Polish law, this issue is regulated by Article 38 of the Constitution of the Republic of Poland, which provides every human being with the legal protection of life. The development of such provisions can be found in lower-level acts, for example, criminal provisions, which criminalize acts detrimental to human life or health. In the legal order of the Czech Republic, the Charter of Fundamental Rights and Freedoms guaranteeing respect for fundamental

rights (including life and health) was introduced into the constitutional order by the Resolution of the Presidium of the Czech National Council of 16.12.1992.

The latter include the Constitution of the World Health Organization. The very preamble of this act emphasizes that health is a state of complete physical, mental, and social well-being and not merely the absence of disease or infirmity. The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political opinion, economic or social conditions. It is further submitted that the health of all peoples is fundamental to the attainment of peace and security and depends on the fullest cooperation of individuals and states. Moreover, Under Article 12 of International Covenant on Economic, Social and Cultural Rights and European Social Charter, States Parties are obliged to recognize the right of everyone to the enjoyment of the highest attainable standard of protection of physical and mental health. To realize this obligation, States Parties are to take steps aimed, *inter alia*, at preventing, treating, and combating epidemic, endemic, occupational, and other diseases.

The duty to protect life derives from the principles of a democratic state under the rule of law, which bases its system on respect for human dignity. It is assumed that the obligations of the state in this respect are implemented on two levels: negative and positive. In the former sense, the obligation of legal protection of life is expressed in the prohibition to introduce such legal regulations that prevent the intentional deprivation of human life. In the positive sense, on the other hand, the obligation in question consists in the adoption and enforcement of such legal solutions whose aim is to eliminate or at least minimize the arising threats to life and health, as well as in taking preventive measures when these dangers materialize. This aspect, therefore, also includes preventive actions, preventing infectious diseases, and therefore also vaccinations. This right therefore has an extremely broad material scope (Yorke, 2010).

The right to life can be considered both strictly speaking and through the prism of the right to a quality of life in an environment that is not excessively polluted. The right to the protection of life is closely linked to the right to the protection of health. It is expressed first and foremost in the right to preserve life when it is at risk (and thus both the prevention and treatment of illness). It should be stressed that this right is one of the most essential human rights, to which people are entitled regardless of their nationality, gender or age. It derives from the very essence of humanity. As with the right to life, the right to health has many facets and can be

considered, for example, in the context of physical and mental health (Ruger, 2006). Naturally, the state authorities are not able to ensure full health for all. Instead, it is their task to introduce such legal solutions and the mechanisms for applying them that will enable citizens to benefit from a health system that is functionally oriented towards preventing and combating diseases, and thus also through the introduction of vaccinations.

It can therefore be deduced from these considerations that the protection of human life and health against the spread of infectious diseases is the responsibility of both state governments and supranational organizations working in the field of public health. These obligations are universal and apply to all people. However, the literature indicates that international legislation specifically protects the rights of minors, as they require special care due to their physical and mental immaturity (Klimek, 2011). This thesis is confirmed by numerous legal acts which treat children's rights affirmatively, including their rights to health care. These issues are most strongly emphasized in the Convention on the Rights of the Child. The Preamble to the Convention stresses that "the child, by reason of his physical and mental immaturity, needs special care and attention, including appropriate legal protection". This principle is further developed in Article 24, which in paragraph 1 obliges States Parties to ensure "the highest standard of health and facilities for the treatment of disease and for the rehabilitation of health". States Parties are also to seek to ensure "that no child is deprived of the right of access to such health care".

The goods of the individual, such as life and health, and their effective protection should constitute an essential aspect of state policy. Legal regulations protecting these basic human qualities should result in the fullest possible protection being afforded to every individual. Further, it is up to the national governments that legislate in such a way as to ensure that vaccinations are carried out effectively. The forms of their implementation (recommended, voluntary, mandatory) should result from the current situation in the country and the health policy of the region or global recommendations concerning vaccination against specific infectious diseases. Thus, only ensuring high vaccination rates can guarantee the implementation of the obligation of institutional protection of human life and health against known infectious diseases.

The question is whether universal voluntary vaccination against all infectious diseases will be conducive to this goal. Analyzing statistical data both at the international level as well as in selected European countries, one can conclude that

shaping the model of vaccination as a legal obligation does not necessarily influence high vaccination rates among children and adolescents. Poland can be cited as an example, where, despite the existence of an obligation to vaccinate children and adolescents, there has been an increase in the percentage of non-vaccinators for several years. In 2010, there were nearly 3,500 evasions, in 2015 - 16,689 and in 2020 - 50,088 evasions.⁷

Despite this, legislative changes are being observed in the legislation of European countries in this direction. They are motivated by the protection of the life and health of children and the public health of the public at the national level. For example, in Italy and France, since 2018, in the face of the global problem of the increase in child vaccination evasion, legislative changes have been introduced regarding repressive sanctions for evasion of compulsory childhood vaccinations. A ban on the admission of children to nurseries and kindergartens has been introduced, as well as financial sanctions imposed on the parents of children. Recently, there has been an improvement in child vaccination rates.

Indeed, specific guarantees for the protection of human life and health against the spread of infectious diseases should remain the responsibility of national legislation. However, since biological pathogens do not respect national borders, a Europe-wide debate is needed on the unification of policies around shaping legal regulations creating a model for carrying out vaccinations. Guided by the need to protect the values, it is desirable to introduce regulations in individual European countries which permit the use of obligatory vaccinations against specific infectious diseases. Current health policy trends in European countries indicate that this course should be maintained. This does not end the discussion on the effectiveness of national legal regulations in this area. The issue of developing and introducing a unified model of the functioning of vaccinations in the European region and, consequently, at least similar legal repressions for failure to carry out vaccinations, should also be addressed. A uniform list of obligatory vaccinations should also be developed. The current situation concerning the COVID-19 pandemic has revealed the need for ongoing monitoring of the level of vaccination against specific infectious diseases and for proof of having been vaccinated. Consideration should be given to the introduction of e-passports or e-certificates attesting to vaccination against certain communicable diseases.

⁷ More data can be found on: Szczepienia. *Jaka jest liczba uchyleń dotyczących szczepień obowiązkowych?* Retrieved from <https://szczepienia.pzh.gov.pl/faq/jaka-jest-liczba-uchylen-szczepien-obowiazkowych/> (March 20, 2022).

Because of the increase in activity and demands of the anti-vaccine movement, it should be stressed that a significant reduction in the incidence of infectious diseases, and some cases their complete elimination, is due to the maintenance of high vaccination rates in the population. The biological pathogens causing certain infectious diseases continue to exist but do not become active due to the acquired immunity of the vaccinated population. By protecting the health of individuals from harm caused by infectious diseases, the protection of human life is simultaneously affected. Given this, the assertions that the application of state compulsion in the operation of the system of compulsory immunization in each country even endangers the life and health of individuals must be considered irrelevant and groundless.

2.3 Protection of public health during vaccination

Public health is very difficult to define due to the broad scope of the concept. It refers to the health of the general population (local, regional, and even global), which is studied in various contexts. Opinions on the role of the state in the protection of the population's health, realized, among others, by organizing appropriate hygienic conditions, appeared already at the end of the 18th century. The precursor of this trend is Johann Peter Frank (1745-1821), who believed that the task of medicine is not only to cure diseases but also to prevent them by introducing appropriate legal regulations and using sanitary facilities. He saw the function of the state in the organization of health care, which would protect society against the threat of outbreaks and the spread of epidemics. He saw in preventive action in this sphere the flourishing of the state, whose citizens would not be exposed to the dangers in question, and thus could contribute to economic development, improve their material situation, which would, in turn, make it possible to avoid social unrest (Marcinkowski, 1988).

Today, public health is perceived according to the type of threat. It is possible to speak of public health in terms of the environmental dimension in view of the threats arising from the environment and its degradation, as well as public health in terms of improving the quality of public health against the spread of infectious diseases. The tasks of the state in this sphere must therefore be directed, among others, at the recognition and combating of epidemic diseases, which constitute the most serious threat to the health of the community and, as a result, to the public good. Achieving this goal, however, requires appropriate pro-health attitudes and behaviors of individuals, who should cooperate for the common good. If they do not do so, it is

possible to apply specific mechanisms which can induce these individuals to behave as expected. Such an approach, stemming from the state's obligation to protect public health, thus allows for the introduction of legal regulations limiting certain freedoms and rights of individuals, including the right to self-determination and protection of bodily integrity. These findings are important from the perspective of the title issue, i.e., the protection of public health against the spread of infectious diseases, i.e., the protection of the health of society on a transnational scale against epidemic factors. The literature emphasizes that the epidemiology of infectious diseases is an important basis for public health research in the addressed context (Schneider & Schneider, 2021). Importantly, ongoing public health surveillance is needed to eliminate epidemic risk factors, above all, for diseases that are already known. Timeliness and ongoing risk assessment are extremely important in this respect (Jajosky & Groseclose, 2004). Public health protection against the spread of infectious diseases is carried out primarily in the form of immunization programmes. National immunization programmes are monitored by WHO and ECDC. Holistic public health surveillance is necessary due to widespread globalization and the ease of population movement, which can lead to the rapid development of outbreaks (Fidler, 1997).

The introduction of mandatory vaccination is justified by the serious adverse public health consequences of low vaccination rates. A high vaccination rate is also particularly important for protecting those who have been unable to be vaccinated for medical reasons. It is therefore worth endorsing the position presented in the doctrine that vaccination has made a very high contribution to the prevention and control of infectious diseases. They are widely regarded as one of the successes of medicine and the foundation of public health. Vaccinations have led to the eradication of smallpox and are bringing the global eradication of poliomyelitis, measles, and rubella closer. They have prevented countless deaths from many other diseases, such as whooping cough and diphtheria (Ammonn & Monne, 2018).

As a result, vaccinations play an extremely important role in shaping public health. They reduce the social consequences of health complications related to infectious diseases, including in economic terms (for example, about costs of necessary treatment and rehabilitation of the recovered persons). The system of obligatory vaccination thus makes it possible to effectively prevent the spread of dangerous infectious diseases, striking a balance between fulfilling the state's obligations towards its citizens to ensure the highest possible level of public health for as many people as possible and effectively protecting the right to life and health of both the

vaccinated individual and society. It should be added, however, that the eventual elimination of specific biological pathogens is not permanent. Vaccination of the population on a transnational scale should be always maintained at the highest possible level. Because of the increasing activity of the anti-vaccination movement and the phenomenon of children and young people avoiding vaccination, this problem seems to be noticeable in European statistics, which are kept, for example, by the ECDC.⁸

3 Legal rights restricted in the implementation of compulsory childhood vaccination

3.1 Identification of restricted goods

As mentioned, the implementation of compulsory vaccination affects the restriction of rights and freedoms. From the perspective of the subject under consideration, it is necessary to distinguish between the right to liberty and self-determination and the right to protection of private and family life as regards the freedom to bring up a child following one's views. Because the ECHR rules on the subject, another aspect should be highlighted, namely the restriction of the right to education expressed in the refusal to admit unvaccinated children to nurseries and kindergartens. The restriction of these freedoms and rights is rightly motivated by the protection of public health (Malone & Hinman, 2007). This good is placed above the interests of individuals, such as bringing up a child under one's convictions and the right to self-determination. We should consider how these rights are restricted.

3.2 Right to liberty and self-determination and vaccination of children and adolescents

The right to personal freedom and self-determination (including the right to undergo medical procedures) is one of the cornerstones of a democratic state of law and has been guaranteed in numerous international and national instruments (for example, in the former area, this right derives, inter alia, from Article 8 ECHR). Despite the affirmative treatment of this right, it is not absolute. Indeed, its limitation is allowed, but only exceptionally. For example, following Article 8(2) of the ECHR, this may take place when it is necessary for reasons of national security, public safety, and the

⁸ European Centre for Disease Prevention and Control. *Vaccine hesitancy*. Retrieved from <https://www.ecdc.europa.eu/en/immunisation-vaccines/vaccine-hesitancy> (March 26, 2022).

protection of the health and freedoms of others. Furthermore, such solutions require a statutory form. Interference in the sphere of the right to self-determination must therefore be strongly justified by the protection of other important values and may take place if the application of other possible measures is not sufficient to achieve the desired state. An example of such measures is the use of imprisonment. By analogy, this issue may be referred to as the imposition of legal obligations on citizens, the fulfilment of which results in encroachment into the sphere of the values in question. Such obligations undoubtedly include the obligation to vaccinate. It touches upon the concept of freedom both in the sphere of human rights and that of the patient.

Not vaccinating children and adolescents is motivated by personal freedom and the right to self-determination. In the face of a legal obligation, invoking these rights to avoid vaccination is, in effect, an act against the legal order. Thus, declarations of will refusing to vaccinate a child must be considered legally ineffective.

At the same time, the implementation of compulsory vaccination of children and adolescents restricts the right to self-determination and therefore the right to personal freedom, which are closely linked. However, neither freedom nor the right to self-determination is absolute rights. Both can be restricted if they do not otherwise achieve the desired objective. In the case of vaccination, the goal is to maintain high vaccination rates, which guarantee the elimination of outbreaks of certain infectious diseases in the population. The introduction and enforcement of legal regulations permitting an intrusion into the sphere of freedom in such a case are therefore permissible. This is because they serve to protect other values, i.e., the public good, which consists of the right to protect the health of others and their freedom. This is particularly evident in the case of vaccinations, which not only serve to protect the health of the person who undergoes them but also of others. These include those who, due to contraindications, cannot be vaccinated. The use of universal vaccination protects them from the risk of contracting infectious diseases, which can sometimes even be fatal. The introduction of instruments authorizing compulsory vaccination is, therefore, a permissible exception to the right to privacy, freedom, and individual self-determination.

3.3 The right to bring up a child according to one's own convictions in the light of compulsory vaccination

The right to bring up a child following one's convictions refers to the relative freedom to bring up one's offspring. This has to do with the creation of ideas and values in the child's life that guide the parents. Upbringing is therefore about inculcating and strengthening in children a particular world view, beliefs, system of values, moral and ethical principles through the conscious activity of parents. The right to upbringing has both an individual dimension, relating to the relationship between parents and children, and a general social dimension. In the latter sense, parents should strive to instill attitudes in their children that will enable them to function properly in society, with respect for common values and principles of coexistence. Although parents have such powers, they cannot exercise them with absolute freedom. They must exercise them for the good of the child on the one hand and the good of society on the other. In the first aspect, therefore, they are obliged to provide the child with appropriate conditions for development, also in terms of health. This includes subjecting the child to preventive medical procedures, and therefore also to vaccinations. They should also shape the child's pro-health attitudes, both in terms of a healthy lifestyle, physical activity, proper nutrition, as well as around disease prevention, especially infectious diseases. Using current medical knowledge, they should therefore instill in them the need, and indeed the social obligation, to undergo vaccinations. The opposite attitude, often expressed in an ostentatious refusal to have their child vaccinated, can be demoralizing. Parents who oppose mandatory immunization and invoke the right to educate their child to effectively and legally evade their child's obligation to undergo mandatory immunization thus misunderstand its material scope. As has been explained, the right to bring up one's child following one's convictions cannot legitimize evasion of the obligation to have one's child vaccinated in countries where that obligation exists.

3.4 Banning unvaccinated children from nurseries and kindergartens as a restriction of the right to education

A ban on the admission of unvaccinated children to kindergartens and nurseries is observed in some European countries (for example, Italy, France, Czech Republic). These bans are imposed to protect other children from possible infection with infectious diseases. In effect, it is a repressive sanction indirectly affecting the parents of children. Tying vaccination to the possibility of a child being admitted to an

educational establishment is also an interference with the right to education. Access to education is therefore regulated by making it conditional on the presentation of a vaccination card. Here, too, it must be considered whether such a solution can, in principle, be regarded as acceptable. Since it is the national legislature that creates legal regulations in each country in an unfettered, but not arbitrary, manner, limiting access to educational institutions in connection with the non-vaccination of a child seems to be adequate.

4 The value of the judgment of the European Court of Human Rights in the case of Vavříčka

4.1 Introductory remarks

Several complaints have been referred to the European Court of Human Rights (ECtHR) over the controversy concerning the compulsory vaccination of children and the consequent restrictions on constitutional freedoms and rights. The case concerned the legislation of the Czech Republic, but it should be considered as an example of a country with obligatory vaccination of children like some European countries. Moreover, the values of the ECtHR's decision in *Vavříčka* have universal value, as will be shown during the following analysis.

4.2 Background to the actions in the combined proceedings

Between 2013 and 2015, the ECtHR received several complaints against the Czech Republic.⁹ The applicants invoked an unjustified restriction of the right to respect for private and family life (Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms), as well as the right to liberty. Moreover, all the children (acting through their legal representatives) also complained about the national regulations under Article 2 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, which provides for respect for the right to education.

The first application was filed on 23 July 2013, by Pavel Vavříčka (signature: 47621/13). He refused to vaccinate his children because of his beliefs. He argued that the compulsory vaccination regime constituted an unacceptable

⁹ Signatures: 47621/13, 3867/14, 73094/14, 19298/15, 19306/15 and 43883/15.

experimentation on human health. He further pointed out the actual and potential side effects of vaccines. He also argued that, in his case, the refusal to vaccinate did not cause any risk to public health because the last occurrence of poliomyelitis dated back to 1960, hepatitis B only affected high-risk groups and tetanus was not transmitted between people. He was fined for refusing to submit his two children to compulsory vaccination. The national courts of the Czech Republic dismissed the applicant's appeals. He, therefore, lodged a cassation appeal with the Supreme Administrative Court, which also dismissed the complaint. As a result of further proceedings before the Czech Constitutional Court, the applicant's appeal against the judgment of the Supreme Administrative Court was dismissed as manifestly unfounded.

A further complaint against the Czech Republic was received on 9 January 2014.¹⁰ In this case, the facts were more complicated. Although the applicant had been vaccinated against infectious diseases, her parents refused to vaccinate her with the MMR vaccine. This led, in effect, to her being refused admission to the kindergarten (after the admission procedure had been reopened and a refusal issued). Authorities at all levels did not accept the applicant's arguments, and the Constitutional Court issued its final decision on 9 July 2013. Importantly, the national courts of the Czech Republic pointed to the principle of proportionality when protecting public health. Namely, the applicant's continued attendance at the kindergarten could have endangered the health of others, and the right to health protection takes precedence. At the same time, the Court left open whether attending a kindergarten fell within the scope of the right to education.

The third action against the Czech Republic was brought on 16 November 2014, by Pavel Hornych.¹¹ The applicant alleged the minor child was not vaccinated due to preexisting health problems. Due to the lack of vaccinations performed, the child was not admitted to the kindergarten. Appeals against this decision were unsuccessful. The applicant therefore referred the complaint to the Czech Constitutional Court, which on 7 May 2014, rejected it as manifestly unfounded, noting that the lower courts had duly examined all the relevant elements of the case.

Further complaints against the Czech Republic were filed on 16 April 2015, by Adam Brožík and Radomír Dubský.¹² These complaints were based on the religious beliefs

¹⁰ Signature: 3867/14.

¹¹ Signature: 73094/14.

¹² Signatures: 19306/15 i 19298/15.

and convictions of the parents of unvaccinated children. They claimed that they were refusing to subject their children to compulsory vaccination because of their right to respect for the right to family life and their right to bring up their children as they deemed appropriate. As a result, admission to kindergarten for these children was refused. The lower court rejected the application, holding that the compulsory vaccination scheme constituted a permissible restriction on the right to freedom of manifestation of religion or belief since it was a measure necessary for the protection of public health and the rights and freedoms of others. The applicants challenged this judgment by way of a constitutional complaint. On 23 October 2014, the Constitutional Court dismissed the applicants' constitutional complaint as manifestly unfounded.

The last action was brought by the applicant Prokop Roleček.¹³ An individual vaccination plan was established for the applicant, according to which he was vaccinated against some diseases later than required by the regulations and against others he was not vaccinated at all. In 2010, the directors of two kindergartens refused to admit the applicant on the grounds that the conditions for vaccination against certain infectious diseases¹⁴ had not been met. The applicant challenged that decision, but his appeal was dismissed. In his subsequent unsuccessful appeals at the administrative level and before the courts, including the Constitutional Court, the applicant alleged, *inter alia*, a violation of the right to respect for private and family life, the right to education and the right not to be discriminated against. The Constitutional Court found that the conclusions of the lower courts in the proceedings brought by the applicant had an adequate basis in the findings of fact and were supported by convincing reasoning. Accordingly, there was no violation of the applicant's fundamental rights.

4.3 Selected national legislation of the Czech Republic challenged in complaints to the European Court of Human Rights

Having given an overview of the facts referred to, it is necessary to outline the national legislation in force in the Czech Republic, the introduction of which gave rise to the referral of the above-mentioned complaints to the ECtHR. Under Article 46(1) and (4) of the Act on Protection of Public Health,¹⁵ all permanent residents and all foreigners entitled to long-term residence in the country are obliged to

¹³ Signature: 43883/15.

¹⁴ Law No. 258/2000.

¹⁵ 2000/258 as amended.

undergo vaccinations following the detailed conditions laid down in the implementing acts to this law. In the case of children under the age of fifteen, their legal representatives are responsible for compliance with this obligation. At the same time, in the Public Health Act and the Education Act¹⁶ regulations were introduced stipulating that children had to be vaccinated before being admitted to kindergarten (it was necessary to present a certificate of vaccination or a certificate of immunity or a certificate stating that a child could not be vaccinated for justified health reasons). Implementing regulations for the administration of obligatory vaccinations were introduced by the Ministry of Health in the form of a decree on vaccination against infectious diseases.¹⁷

Pursuant to the law on minor offences,¹⁸ the offence of violating a prohibition or failure to comply with an obligation provided for by law or imposed for the prevention of infectious diseases was stipulated. Thus, criminal liability was introduced for legal representatives evading the compulsory immunization of a child. Referring to the title of the Act, this act was considered a minor offence punishable by a fine of up to CZK 10,000. These regulations in force in the Czech Republic led to a situation where parents of unvaccinated children were deprived of the possibility to place them in kindergartens. In the applicants' opinion, this legal state violated their rights to respect for private and family life, the right to freedom and the right to education.

4.4 Universal nature of the European Court of Human Rights judgment

At the outset, it should be stressed that the complaints concerned primarily the fines imposed on the applicants for failure to vaccinate their children and refusal to admit these children to kindergartens. However, as rightly pointed out in the reasoning of the ECtHR judgment in question, the complaints referred *de facto* to the consequences of the non-fulfilment of the obligation to vaccinate. As a result, the ECtHR considered that the subject of the applicants' complaints was, in general, the obligation to vaccinate and the repercussions that arise for those who evade it.

The value of the ECtHR judgment, in this case, is universal. It stresses the need to protect public health, as well as the health and life of individuals in connection with epidemic threats. This position, perhaps predictable, is an extremely important

¹⁶ 2004/561 as amended.

¹⁷ 2006/537.

¹⁸ 1990/200.

signpost for national legislators facing similar problems in the area of implementing mandatory vaccinations.

The ECtHR judgment touches on two very important issues. The first is the need for a holistic understanding of the objectives of vaccination, both from the perspective of individuals and of the supranational community. The second aspect concerns the correct application of the principle of proportionality in understanding the nature of mandatory vaccination. The conclusion can be drawn from the so-called proportionality test carried out that the use of vaccinations (both mandatory and recommended) is necessary to maintain a high level of public health and to protect the life and health of individuals and therefore justifies a restriction on other freedoms, including in the sphere of medical autonomy.

Finally, it is worth noting the peculiar dissonance noted by the ECtHR about the implementation of vaccination. On the one hand, governments and specialized international bodies recognize the need for vaccination and support ongoing efforts to achieve the highest possible vaccination rates among their populations. On the other hand, there are heterogeneous policies to achieve this goal. The Court pointed to "the existence of a spectrum of policies on the vaccination of children". This thesis is justified, as states' policies range from voluntary vaccination to mandatory vaccination protected by repressive sanctions.

4.5 Main points of the European Court of Human Rights judgment

4.5.1 Protection of public health as an overriding value to be protected in the implementation of vaccination

The Court pointed out that vaccination aims to eliminate infectious diseases from society, with the effect of protecting the health and rights of others. The Court also observed that a State which is obliged to carry out vaccinations takes measures to protect itself against serious disturbances in society caused by a serious disease. Vaccine schemes thus protect public safety and the economic well-being of the country and prevent disorder. The solutions introduced in national regulations regarding the model of vaccination (recommended, mandatory, mixed) are adapted to the epidemic risks prevailing in these countries. Underlying this policy choice are important public health considerations, regarding the effectiveness and safety of childhood vaccination. The ECtHR also found that there is a consensus that it is the goal of each State to achieve the highest possible vaccination coverage.

The Court highlighted the effectiveness of vaccination in combating epidemic threats, referring to the consensus on the fundamental importance of this measure to protect the population against diseases that can have serious effects on the health of individuals and, in the case of severe epidemics, can cause disruption to the functioning of society. The ECtHR also pointed out that it is undisputed that although vaccination is perfectly safe for most recipients, in rare cases it may prove harmful to the individual, causing severe and permanent damage to his or her health.

In the ECtHR's view, childhood vaccination is a fundamental condition of contemporary public health policy and does not in itself raise sensitive ethical questions. It also agreed with the assessment of the Government of the Czech Republic that vaccination is an example of social solidarity aimed at protecting the health of all members of society, especially those who are particularly vulnerable to certain diseases and for whose benefit the other members of society should act. This is a very important acknowledgement of the role of vaccination in ensuring effective anti-epidemic protection. The Court rightly affirmed the overriding value of public health and the need to ensure it at the highest possible level.

4.5.2 Consideration of the best interests of the child in the proportionality test between protected and restricted goods

The ECtHR judgment raises another important issue. Namely, to be guided by the best interests of the child. The best interest of the child was referred to as the protection of the child's health against infectious diseases. The "best interests of the child" determines, of course, the protection of the already mentioned legal goods, which are the health and life of the individual. Thus, the best interests of the child will be served by ensuring the conditions for the child to attain the highest level of health. The level of health in the context of the discussed issue should be understood as obtaining the highest possible level of child resistance to known infectious diseases. Therefore, the aim of legislation and public health policy created by the state authorities should be that every child is protected from serious infectious diseases. In many cases, this is achieved by children receiving the full vaccination schedule in the first years of life.

The Court took this opportunity to highlight the need to achieve an adequate level of vaccination. It, therefore, referred to the correlation between the maintenance of children's health and public health. Some children, because of contraindications to vaccination, should be protected by having the other children vaccinated, thus

achieving the so-called "collective immunity". In the ECtHR's view, if a voluntary vaccination policy is not sufficient to achieve and maintain such immunity, the national authorities may (justifiably) introduce compulsory vaccination to achieve a sufficient level of protection against serious diseases.

4.5.3 Nature of the principle of proportionality and its correct application

Finally, the judgment under review raised the issue of the proper application of the principle of proportionality in the context of the implementation of compulsory childhood vaccination. State interference in the rights and freedoms of individuals can only be justified if it is a necessary means to achieve a legitimate aim, and if it responds to a "pressing social need". Therefore, the question must be answered whether the formation of a system of vaccinations, as a legal obligation, is necessary to ensure a high level of public health and to prevent epidemic threats.

First of all, it must be emphasized that the creation of a model for the use of immunization in a given form is a matter for the State authorities. The Court pointed out that, generally, individual States must be able to determine the means which they consider to be best suited to attaining the objective of reconciling those interests: on the one hand, maintaining high vaccination rates in the population and, on the other hand, applying legal measures proportionate to attaining that objective. In the Czech legal system, the failure to vaccinate a child resulted in a fine and inability to enrol the child in kindergarten. This emphasized the primacy of public health and the interests of the child over the parents' opinions on vaccination, which, in their view, could justify their refusal to vaccinate and their decision-making in the context of their right to bring their children up following their convictions and their right to respect for their private and family life. The Court concluded that the measures applied (fine, non-admission of the child to kindergarten) were not disproportionate to the objects of protection, which were public health and the health of the child. The possibility for children who cannot be vaccinated for medical reasons to attend kindergarten depends on a very high vaccination rate of other children against infectious diseases. The Court pointed out that State action requiring vaccination of persons for whom vaccination poses only a remote health risk does not constitute disproportionate action. This universally applicable protective measure must be accepted, as part of a legal obligation and in the name of social solidarity. According to the Court, the national legislature was therefore entitled to choose such a measure as was necessary to ensure the protection of the population's health.

It follows from the ECtHR's statements that the use of obligatory vaccination does not unlawfully infringe upon the subjective rights of certain groups, but at the same time it meets the conditions for a positive assessment of the proportionality test. Putting public health and the life and health of a child on the scales, as well as the right to bring up a child following one's convictions and the right to respect for private and family life, one can come to a clear conclusion that the former is more important than the latter. The Court reached the same conclusion, which held that the contested measures can be considered "necessary in a democratic society".

5 Conclusion

In modern democratic states, human rights, including the right to freedom, privacy and the right to self-determination derived therefrom, are treated affirmatively, regarding undergoing medical procedures. Hence, the voluntariness of treatment is stipulated, and the performance of a procedure without the patient's consent delegitimizes the medical procedure and may even lead to the criminal liability of medical professionals. However, these values are not absolute. Sometimes they come into conflict with other socially important goods, such as the health and freedom of others and, more generally, with the public good. It is then necessary to resolve this conflict by indicating which good may be sacrificed. Naturally, balancing these values and planning in this respect is difficult and requires a broader discussion, considering the axiological system prevailing in each community. These issues are well illustrated by the example of vaccination.

Based on current medical knowledge, vaccinations are indisputably an important means of preventing often dangerous and fatal diseases. Their use should therefore be taken for granted. However, some people continue to question the need for vaccinations and even point to their apocalyptic consequences. As a result, an increasing number of people are refusing to undergo these procedures and are not allowing them to be carried out on their children. The consequence of such behavior is the return of dangerous infectious diseases, which would seem to have been finally eradicated. In the interests of public health, individual countries are therefore introducing mechanisms to increase vaccination campaigns, sometimes using coercive or repressive measures. Such actions are met with even greater resistance from those opposed to vaccination, who use various legal instruments to effectively evade the procedure. This phenomenon is currently transnational and occurs in numerous countries, including those in Europe. Since infectious diseases know no borders and, because of the high mobility of the population, and because diseases

can spread easily in many countries, it is desirable to adopt a common anti-epidemic policy with a supranational aspect.

The ECtHR judgment presented here fits into this trend, clearly indicating the primacy of common values - public health - over individual rights: the freedom and right of parents to raise their children following their beliefs. Restrictions on these rights are justified and acceptable, and anti-vaccination attitudes may be considered undesirable and even dangerous. The question arises, however, as to the model of vaccination: compulsory or voluntary. It appears that compulsion may be counterproductive. It is, therefore, preferable to educate the public, to combat post-truths and fake news about vaccination and to use incentives for those who have been vaccinated. It seems that the discussion on this topic is currently very important concerning the current COVID-19 pandemic. Perhaps the occurrence of this disease and the introduction of certain restrictions on civil liberties by individual countries will contribute to the development of a common position of a more general nature - i.e., regarding the model of vaccination also against other infectious diseases. The ECtHR judgment presented here may be a contribution to the debate on this topic and a possible guideline for the planned solutions.

The challenges for public health law and policies are many. Consideration should be given to harmonizing the law on childhood immunization based on the universal legal values advocated by the ECtHR. Consideration needs to be given to structuring immunization in such a way that it supports the maintenance of collective immunity in Europe. Above all, this is related to the protection of children's health, as they are the most vulnerable to infections.

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Judgment

Judgment of Grand Chamber of European Court of Human Rights from April 8, 2021, signature 47621/13 and 5 others.

Povzetek v slovenskem jeziku

Obvezno cepljenje otrok in mladostnikov je v javnosti sporno vprašanje. Prav tako predstavlja izziv na področju pravnih znanosti. Članek je posvečen dogmatično-pravni analizi vrste pravno varovanih dobrin, ki so v zvezi z obveznim cepljenjem omejene (med drugim: pravica do spoštovanja zasebnega in družinskega življenja, osebna svoboda, pravica do samoodločanja), in tistih vrednot, ki naj bi jih cepljenje načeloma varovalo (javno zdravje, življenje in zdravje otrok). V članku je podrobno analizirana sodba Evropskega sodišča za človekove pravice, ki se zdi prelomna. Po eni strani zaključuje spor, ki je potekal pred Sodiščem, po drugi strani pa odpira polje za nadaljnjo razpravo o bistvu obveznega cepljenja. Raziskava je bila opravljena z uporabo dogmatično-pravne metode, metode analize in kritike literature, metode analize sodne prakse in statistične metode. Pri predstavljenih rezultatih raziskave so bila uporabljena poročila in statistični podatki mednarodnih organov o stopnji cepljenja otrok in mladostnikov v Evropi.

