Pl. ÚS 16/14 of 27 January 2015

Compulsory Vaccination as Condition for Admission to Kindergarten

Czech Republic
JUDGMENT
of the Constitutional Court
in the Name of the Czech Republic

HEADNOTES

When interpreting the contested Section 50 of the Public Health Protection Act or when assessing the fulfilment of the condition of permanent contraindication for an exception to the obligation to undergo the compulsory vaccination for admitting to a preschool establishment, care must be taken to prevent any inequality among children whose health condition prevent them on a long-term basis from the administration of appropriate vaccines (i.e. substantive aspect), regardless of whether the term "permanent contraindication" is expressly (formally) mentioned in the relevant confirmation of the health care provider. The said constitutionally conforming interpretation does not exclude the wording of the contested provision at all.

Vaccination in general, as a means of immunisation against some infections, has a social benefit requiring the shared responsibility of members of the society, i.e. an act of social solidarity of those who undergo a risk, at present referred to as minimum by the current majority-accepted scientific knowledge, in order to protect the health of the whole society. The vaccination of the sufficient majority of the population prevents the spread of some diseases, providing protection not only to those who have been vaccinated. The higher the proportion of unvaccinated against the vaccinated population the higher the risk of repeated spreading of infection not only among those who have voluntarily refused vaccination but also among those who cannot be vaccinated for serious, especially health reasons. Finally, also the people who have been vaccinated but their vaccination has not achieved the desired effect are threatened by the spread of the disease. In the present case, where the vaccination is a condition for admitting a child to a kindergarten, those persons exposed to the risk of infection are particularly children who may face in case of disease particularly serious consequences.

For these reasons, when a child undergoes the vaccination before his/her admission to a kindergarten, it might be considered as an act of social solidarity, which acquires its importance with the growing number of vaccinated children in groups within preschool establishments. On the other hand, there are cases which could be seen as a social injustice where a certain group of children admitted to a preschool establishment refuse without justifiable reason to undergo vaccination and enjoy the benefits resulting from the success of vaccination, or the willingness of the other children attending the preschool establishment to assume the minimal risks presented by the vaccination (cf. RUBIN, B., Daniel; KASIMOW, Sophie. The Problem of Vaccination Noncompliance: Public Health Goals and the Limitations of Tort Law. Michigan Law Review, Vol. 107, No. 114, 2009).

VERDICT

The Constitutional Court has decided through the Plenum composed of its President of the Constitutional Court Pavel Rychetský and judges Ludvík David, Jaroslav Fenyk (judge-rapporteur), Jan Filip, Vlasta Formánková, Vladimír Kůrka, Tomáš Lichovník, Jan Musil, Vladimír Sládeček, Radovan Suchánek, Kateřina Šimáčková, Vojtěch Šimíček, Milada Tomková, David Uhlíř, and Jiří Zemánek on the petition filed by the minor P. R. acting through his legal guardian B. Z. and legally represented by Mgr. David Zahumenský, lawyer, based at Burešova 6, Brno, seeking the annulment of Section 50 of Act No. 258/2000 Coll., on the public health protection, as amended, and Section 34 (5) of Act No. 561/2004 Coll., on preschool, primary, secondary, vocational, and other education (Education Act), with the participation of the Chamber of Deputies of the Parliament of the Czech Republic and the Senate of the Parliament of the Czech Republic as parties to the proceedings and the Government of the Czech Republic and the Public Defender of Rights as interveners, as follows:

I. The petition seeking the annulment of Section 50 of Act No. 258/2000 Coll., on the protection of public health, concerning the text "the children may only be admitted to preschool establishments if they have undergone the prescribed routine vaccinations, can demonstrate in writing that they are immune against any infection or are unable to undergo vaccination due to permanent contraindication" is dismissed.

II. The remainder of the petition is rejected.

REASONING

I.

Recapitulation of the constitutional complaint of the petitioner and the proceedings before the Constitutional Court

1. The petitioner claims, in its timely constitutional complaint, of 25 June 2013, supplemented by the submission delivered to the Constitutional Court on 11 October 2013, the annulment of the judgment of the Supreme Administrative Court, ref. No. 8 As 20/2012-42, of 29 March 2013, and the judgment of the Regional Court in Brno, ref. No. 29 A 69/2010-36, of 20 October 2011. The proceedings on the constitutional complaint are conducted under file No. I. ÚS 1987/13. Through the petition seeking the annulment of the mentioned judgments, the petitioner also claims the annulment of Section 50 of Act No. 258/2000 Coll., on the protection of public health, as amended, and Section 34 (5) of Act No. 561/2004 Coll., on preschool, primary, secondary, vocational, and other education, as amended (the Education Act), especially for the following reasons:

2. The Supreme Administrative Court decided through its judgment, file No. 8 As 20/2012-42, of 29 March 2013, contested by the constitutional complaint, to dismiss the cassation complaint of the petitioner against the judgment of the Regional Court in Brno, ref. No. 29 A 69/2010-36, of 20 October 2011, dismissing his action against the decision of the Regional Authority of the Vysočina Region, ref. No. KUJI 38442/2010, file No. OSMS 283/2010 Odv, of 20 May 2010, through which the Regional Authority dismissed the appeal of the petitioner against the decision of the Director of the Kindergarten Náměšť nad Oslavou Třebíčská, of 22 April 2010, and the decision of the Director of the Kindergarten Náměšť nad Oslavou Husova, of 30 April 2010, and the Regional Authority upheld both decisions based on which the petitioner was not admitted to the kindergarten due to his failure to comply with the conditions of Section 50 of the Public Health Protection Act, on the grounds that he did not undergo the prescribed routine vaccination.

3. The petitioner in his constitutional complaint argues that the aforementioned decisions of ordinary courts have infringed upon his right to preschool education as part of his right to education under Article 33 (1) of the Charter of Fundamental Rights and Freedoms (hereinafter referred to as the "Charter") since his exclusion from the preschool education was disproportionate. A complete ban on the admission of healthy incompletely vaccinated children to kindergartens is inadequate in view of the petitioner and even fails in the test of rationality. Since the given vaccination condition for admission to a preschool education is disproportionate, an interference with the right to personal integrity is also disproportionate. As for the protection of public health against the spread of infectious diseases in kindergartens, the petitioner deems it necessary to examine whether there are less restrictive measures than the total exclusion from education that can be described as a sanction against those who refuse to submit to the prescribed extent of vaccination.

4. Moreover, in case of denial of the petitioner's right to education, the petitioner did not satisfy the condition enshrined in Article 4 of the Charter, under which the limits of fundamental rights and freedoms may only be regulated by law, as the extent of the vaccination obligation which is a condition for admission to kindergarten is only laid down in a decree. In this context, the petitioner refers to the judgment of the Constitutional Court, file No. Pl. ÚS 35/95, of 10 July 1996 (N 64/5 of the Collection of Judgments of the Constitutional Court 487; 206/1996 Coll.). The petitioner states that the extent of vaccination for access to education is designed without any legal limits only by a decree. In order to respect the constitutional requirements, it would have to be defined by law against which diseases a child should be vaccinated so that he/she is allowed access to education. In this context, the petitioner refers to the judgments of the Constitutional Court, file No. ÚS 36/11, of 20 June 2013 (238/2013 Coll.), file No. Pl. ÚS 23/02, of 30 June 2004 (N 89/33 of the Collection of Judgments of the Constitutional Court 353; 476/2004 Coll.), and file No. Pl. ÚS 45/2000, of 14 February 2001 (N 30/21 of the Collection of Judgments of the Constitutional Court 261; 96/2001 Coll.).

5. In view of the petitioner, the vaccination as a condition for admission to the preschool education also interferes with the child's right to a free and informed consent as protected by the Convention on Human Rights and Biomedicine (hereinafter referred to as the "Convention"). His parents are forced to have their child treated based on an indirect penalty since the exclusion from the preschool education will affect not only the child but the whole family - especially the mother's job options, which excludes the "freedom" of such consent. In view of the petitioner, the vaccination against nine diseases as a condition for admission to the preschool education in the Czech Republic is not in compliance with the requirement of necessity in a democratic society, which is one of

the conditions under which the fundamental right not to be subject to any medical procedure may be limited according to Article 26 of the Convention without his consent or a consent of his legal guardian.

6. The parents of the petitioner decided to have their son vaccinated in subsequent years only against certain diseases which they considered serious and as for which they considered the benefits of vaccination as outweighing the risks according to their beliefs about their child's best interest and beliefs within the meaning of freedom of thought and conscience under Article 15 of the Charter and Article 9 of the European Convention on Human Rights (hereinafter referred to as the "European Convention"). The petitioner points out that the state is failing dramatically in its vaccination policy which is not transparent, while the state has not assumed any liability for any injury to health of a child after vaccination. Under these circumstances, any involuntary vaccination (without the free consent of parents) as a condition for admission to preschool education is in conflict with the "right to health" of the petitioner.

7. In connection with the fact that the petitioner was not admitted to a kindergarten and was not allowed to participate in the preschool education, the family was forced to face the social exclusion of not only the child but also his mother who was forced to stay with her child at home for the next few years, which is inevitably linked to an overall reduction of the family income and its standard of living, whereby the petitioner considers it an infringement upon the right to respect for private life and family life and discrimination on the basis of the beliefs of the family.

8. The petitioner further argues that having regard to the fact that neither the Supreme Administrative Court nor the Regional Court in Brno have failed to deal with his arguments and supported statements regarding the adequacy of the denial of the right of incompletely vaccinated children to preschool education, the right to the reasoning of a decision and the right to a fair trial have been infringed upon in the form of *denegationis iustitiae* (denial of justice).

9. In view of the petitioner, the administrative courts have failed to deal with the fact that the vaccination against the so-called childhood diseases (measles, rubella, and mumps) is not subject to any time limit under the decree on vaccination against infectious diseases and, therefore, the vaccination may not be legally required as a condition for preschool education. The applicable legal regulations do not prescribe that children shall undergo the vaccination before being admitted to a kindergarten. The failure to deal with this fact has also resulted in an infringement upon the right to a fair trial and the right to the justification of a decision.

10. With respect to the above-mentioned, the petitioner applies through his constitutional complaint to the Constitutional Court to render a judgment annulling the judgment of the Supreme Administrative Court, ref. No. 8 As 20/2012-42, of 29 March 2013, and the judgment of the Regional Court in Brno, ref. No. 29 A 69/2010-36, of 20 October 2011, and within the meaning of Section 64 (1) (e) or Section 74 Act No. 182/1993 Coll., on the Constitutional Court, as amended, to render a judgment annulling the provisions of Section 50 of the Public Health Protection Act and Section 34 (5) of the Education Act.

11. Through the resolution, ref. No. I. ÚS 1987/13-1, of 18 June 2014, panel I of the Constitutional Court concluded that the application of Section 34 (5) of the Education Act in connection with Section 50 of the Public Health Protection Act had resulted in the circumstances subject to the constitutional complaint and referred the petitioner's petition seeking the annulment of the contested provisions for decision by the Plenum of the Constitutional Court under Article 87 (1) (a) the Constitution of the Czech Republic.

II.
Statements of the parties to the proceedings

12. In order to assess the case, the Constitutional Court invited the parties to the proceedings to comment on the petition seeking the annulment of the contested provision.

13. The Senate of the Parliament of the Czech Republic (hereinafter referred to as the "Senate") as a party to the proceedings stated that although the Education Act has been amended a number of times since its passage in September 2004, the wording of the contested provision of Section 34 (5) has never been amended, not even once, and has not been subject to any significant criticism in the plenum or other bodies of the Senate, not even during the debate concerning the Education Bill or several dozens of amendments to the Education Act. At this point, it may be noted that the obligation to abide by the conditions as set by the applicable legal regulations (i.e. not only the Public Health Protection Act) when admitting children to the preschool education applies generally and undoubtedly could also be applied in the absence of such provision.

14. As to the Education Bill, the Senate mentions that it received it on 21 July 2004 and the document number 403 has been assigned to it in the Senate records of its 4th term. The statutory curriculum was discussed by the Committee for Education, Science, Culture, Human Rights and Petitions who advised the Senate to return the bill to the Chamber of Deputies with proposed amendments as set out in the Annex to the Committee Resolution No. 227, of 4 August 2004. None of these proposed amendments concerned the area of preschool education, i.e. a part of the second bill. On 5 August 2004, the Senate at the 17th meeting of the 4th term of office held the recommendations of the committee and returned the bill to the Chamber of Deputies with proposed amendments (Resolution No. 517). During the decisive vote (No. 101), 49 senators out of the present 55 voted in favour of and 1 was against the decision. In view of the Senate, it might be concluded that as for the procedure of discussing the Education Act at the upper chamber, the Senate acted within the bounds of constitutionally provided competences and in a constitutionally prescribed manner.

15. The Senate further states in its statement that also the contested Section 50 of the Public Health Protection Act is part of the given act from the very beginning, with the only difference being that with effect from 1 April 2012 and in connection with the passage of the Act on Health Services) the term "nursery" is replaced by the term "establishment providing care for children under 3 years of age in a day mode". The Public Health Protection Bill was submitted to the Senate on 7 June 2000 and was assigned the number 276 in the 2nd term of office. Subsequently, the bill was discussed by the Committee for Health and Social Policy, the Committee for European Integration, and the Committee on Petitions, Human Rights, Science, Education and Culture. The result of all committees' debates was the recommendation to plenum of the Senate to return the bill to the Chamber of Deputies with proposed amendments. However, none of these proposed amendments related to the contested Section 50.

16. The plenum of the Senate discussed the bill at its 20th meeting of the 2nd term held on 30 June 2000. The bill was returned to the Chamber of Deputies with proposed amendments and 39 out of 46 senators present voted in favour of and none against the adoption of the respective resolution No. 420 in voting No. 117. In conclusion, the Senate stated that even as for the procedure of discussing the Public Health Protection Act it acted within the bounds of constitutionally provided competences and in a constitutionally prescribed manner.

17. The Chamber of Deputies of the Parliament of the Czech Republic (hereinafter referred to as the "Chamber of Deputies") as a party to the proceedings only summarised in its statement concerning the petition the legislative process about which it stated that the contested acts were approved in a constitutionally prescribed procedure by both chambers of the Parliament of the Czech Republic and the acts were signed by the appropriate constitutional officials and duly promulgated. Specifically, the Chamber of Deputies stated that the Public Health Protection Bill was submitted by the Government to the Chamber of Deputies on 10 February 2000 (and distributed to the deputies as the Document of the Chamber of Deputies No. 538/0). The bill was discussed by the Chamber of Deputies in the first reading on 23 February 2000 and was assigned to be discussed by the Committee for Social Policy and Health. The Committee for Social Policy and Health discussed the bill on 3 May 2000 and recommended that the Chamber of Deputies pass it in the wording of proposed amendments of the Committee. The Chamber of Deputies discussed the bill in the second reading on 18 May 2000 and in the third reading on 25 May 2000 at its 25th meeting approved the bill as amended by the adopted proposed amendments, while none of which was related to the contested provision. In voting No. 258, out of 165 deputies present, 164 deputies voted in favour of the bill and none of deputies was against. The bill was referred to the Senate on 7 June 2000. The Senate returned the bill to the Chamber of Deputies with proposed amendments which also did not relate to Section 50. The Chamber of Deputies discussed the bill returned by the Senate on 14 July 2000 at its 26th meeting and passed it in the version approved by the Senate. In voting No. 699, out of 155 deputies present, 128 deputies voted for and 13 deputies voted against. Following the adoption of the Act and after it was signed by the competent constitutional officials, the act was promulgated in the Collection of Laws under No. 258/2000 Coll. on 11 August 2000.

18. The Education Bill was submitted by the Government of the Czech Republic (hereinafter referred to as the "Government") to the Chamber of Deputies on 11 March 2004 and it was discussed by the Chamber of Deputies as the Document of the Chamber of Deputies No. 602/0. In the first reading on 1 April 2004 at the 30th meeting, the bill was assigned to be discussed by the Committee for Science, Education, Culture, Youth and Sport. The Committee for Science, Education, Culture, Youth and Sport discussed the bill at the 31st meeting on 3 June 2004 and recommended that the Chamber of Deputies pass it in the wording of proposed amendments of the Committee. The second reading of the bill took place on 22 June 2004 at the 33rd meeting of the Chamber of Deputies. The summary of submitted proposed amendments was drawn up as the Document of the Chamber of Deputies No. 602/2, while any proposed amendment did not relate to the contested provision. In the third

reading, the bill was discussed on 30 June 2004 at the 33rd meeting of the Chamber of Deputies, where it was passed at voting No. 418. Out of 182 deputies present, 92 deputies voted for the bill and 82 deputies voted against. The Chamber of Deputies passed the bill on 21 July 2004 to the Senate that discussed it on 5 August 2004 at the 17th meeting and returned it to the Chamber of Deputies with proposed amendments. The proposed amendments did not concern the contested provision. The Chamber of Deputies discussed the bill returned by the Senate on 24 September 2004 at its 35th meeting and passed it in the wording of proposed amendments of the Senate. In voting No. 98, out of 191 deputies present, 96 deputies voted for the passage of the act and 91 deputies voted against. On 8 October 2004, the Act was delivered to the President who signed it on 22 October 2004. The act passed was delivered to the Prime Minister for signature on 3 November 2004. The act was promulgated in Chapter No. 190 of the Collection of Laws under No. 561/2004 Coll.

III.
Attitude of the Government and the Public Defender of Rights to the petition

19. In accordance with Section 69 (2) and (3) of the Act on the Constitutional Court, the Constitutional Court notified the Government and the Public Defender of Rights through its notification of 3 July 2014 of the ongoing proceedings, specifying in what period of time they may intervene in the proceedings as interveners and comment on the petition, if required.

20. The Government announced that it intervenes in the proceedings through its notification of 30 July 2014. At the beginning of its statement concerning the case, the Government mentioned that it disagrees with the conclusions based on the resolution of the Constitutional Court, ref. No. I. ÚS 1987/14-1, of 18 June 2014 on the need to re-examine the petition seeking the annulment of Section 34 (5) of the Education Act and Section 50 of the Public Health Protection Act. The Government notes in this respect that the Constitutional Court repeatedly dealt with the issue of constitutionality of the legal obligation to undergo a specified kind of vaccination and the related assessment of the alleged violation of the right to education, interferences with the rights guaranteed under the Convention or the alleged unconstitutionality of Decree 537/2006 Coll., on the vaccination against infectious diseases. The Constitutional Court also dealt with the general issue of the degree of autonomy of parents when deciding on medical procedures performed on their children. The Government stated, in its statement concerning the respective petition, that it does not consider it necessary to repeat the conclusions from the previous relevant case-law and focuses especially on the subject-matter justification of the legitimacy and rationality of the contested provisions of the Public Health Protection Act and the Education Act, or the legitimacy of the objective pursued by the legal regulation of compulsory vaccination against infectious diseases - the protection of public health, i.e. the health of the population, including its specific groups, such as preschool children.

21. The Public Health Protection Act lays down the obligation of the person to undergo the routine vaccination; under Section 108 (4) of this Act, when regulating the routine vaccination, the Ministry of Health follows the recommendations of the World Health Organisation. All developed countries are, in line with the recommendations of the World Health Organisation, keen on maintaining a high vaccination coverage against diphtheria, tetanus, pertussis, invasive diseases caused by Haemophilus influenza b, polio, hepatitis B, measles, mumps, and rubella at a level of around 90% of inhabitants. Only with a sufficient vaccination coverage it is possible to induce the so-called herd immunity, i.e. the form of immunity that occurs when a significant number of individuals in the population or a group (e.g. in a kindergarten) are vaccinated against particular infectious diseases. After the herd immunity has been induced, the pathogen does not circulate in the population and, as a result of that, not only the vaccinated individual but also those individuals who are not vaccinated because of permanent contraindication (about 5% of the population) or those who have not developed sufficient immunity after vaccination are protected. Therefore, if an individual is not vaccinated - e.g. a person whose permanent contraindication has been identified for vaccination, then there is no threat to the herd immunity but that person is protected through the herd immunity. If, however, the overall vaccination coverage of the population drops under the protection level, then the herd immunity is compromised. The circulation of the agent in the population may increase and the number of new cases of the disease may grow. Maintaining the herd immunity is therefore essential in terms of preventing the spread of infectious diseases in the population.

22. Though the herd immunity may not affect the pathogenicity of the agent, it may reduce its circulation in the population or eventually lead to the elimination of the agent in the population and, through indirect effects, lead to a decrease in the incidence of the disease also in the unvaccinated population (e.g. persons with impaired immunity, with permanent contraindications for vaccination, etc.). An indirect effect is then measurable by a decrease in the incidence of the disease in unvaccinated individuals. The existence of herd immunity is dependent on two factors: the vaccination coverage rate and the effectiveness of vaccination or the effectiveness

of the vaccine. The herd immunity is however only induced when a certain (i.e. sufficient) vaccination coverage rate is reached. If, on the contrary, the population vaccination coverage drops below its sufficient level, the preservation of the herd immunity is endangered or the herd immunity may be lost for the given disease. In that event, the circulation of pathogens in the population can be increased and lead to the emergence of new cases of the disease - it is confirmed e.g. by the increased incidence of measles in the United Kingdom with the loss of herd immunity due to a declining vaccination coverage rate or the epidemics of pertussis (about 225,000 cases) due to the rejection of vaccination against this disease by certain religious groups in the UK between 1976 and 1982. The vaccination coverage rate may vary with individual diseases and it is not always fixed. However, the herd immunity can be sought for all interhuman communicable diseases, but different vaccination coverage rates are required to achieve it.

23. Regarding the effectiveness of the vaccination with respect to the high effectiveness of currently used vaccines for the blanket vaccination, it can be stated that the key to achieving the herd immunity and reducing the circulation of agents of infectious diseases in the population is the vaccination coverage rate. Failure to create the herd immunity with 100% vaccination coverage of the population would be possible only with vaccines with a very low effectiveness. Such low effectiveness is not shown by any of the approved and registered vaccines for the blanket vaccination. The decrease of serum antibody concentrations in time (the fastest decrease is within 1 year after the vaccination with a relatively slowly decreasing concentration - "plateau" stage) does not mean the loss of immunity. The loss of immunity occurs when the limit drops below protective levels. As for some vaccination, even a decrease in the number of antibodies does not lead to the loss of immunity due to the existence of memory cells (e.g. in the case of vaccination against hepatitis B). As for diseases where there is a risk of disease throughout the childhood or even until the adulthood, the booster is performed in response to a decrease in antibody concentrations. Maintaining the herd immunity is therefore essential in terms of preventing the spread of infectious diseases in the population and clearly prevails over the fundamental rights of individuals.

24. The model of the obligation of an individual to undergo vaccination as set out by law is applied to the vaccination against pertussis (whooping cough), diphtheria, and tetanus in 12 countries (including Italy and France) out of 28 members states of the European Union and polio in 13 of these countries (plus Belgium) out of those 28 member states. It is in the interest of all countries of the world to maintain the vaccination coverage against basic infectious diseases at a high level. In addition, some countries have introduced also restricted access of unvaccinated children to collective institutions, such as in the United States of America, where unvaccinated children may not attend state preschool establishments. Thanks to the routine vaccination and its control, a high vaccination coverage, and a good quality of vaccines in the Czech Republic, we have succeeded in eliminating polio and diphtheria and significantly reducing the incidence of a wide range of infections against which the vaccination is performed, which is documented by diagrams in the analysis of the trends of vaccination as prepared by the National Institute of Public Health as a health institution established to perform tasks within the competence of the Ministry of Health and annexed by the Government to its statement. The Government in its statement further illustrates on selected infectious diseases a link between the vaccination and a persistent decrease in or disappearance of the disease.

25. The purpose of the regulation contained in Section 50 of the Public Health Protection Act contested by the petitioner is according to the Government to protect the health of a group of natural persons enjoying special legal protection - children. Specifically, the children attending the establishments providing care for children under 3 years of age in a day mode or a preschool establishment - therefore, not only children using the public service allowing preschool education through attending kindergartens established under the Education Act.

26. As to the petitioner's objection that the decision on his admission to a kindergarten is a penalty, the Government refers to the explanatory memorandum concerning the concerned act, as well as to the above-mentioned expert arguments and points out that the only penalty allowed to be imposed by the legislation in the case of the petitioner or its legal guardians is a fine for committing an administrative offence in the healthcare sector under Section 29 (1) (f) of Act No. 200/1990 Coll., on administrative offences, as amended.

27. In connection with the above-mentioned, the Government points out that the petitioner's statement that the state does not examine whether also other children in kindergartens are vaccinated. The fulfilment of obligation under Section 50 of the Public Health Protection Act is, as well as fulfilling other obligations under this Act, subject to supervision by health authorities under the inspection plans of regional public health authorities.

28. As to the petitioner's objection that the extent of the vaccination obligation which is a condition for admission to a kindergarten is set by a "mere decree", the Government notes that the Constitutional Court has already dealt with the objection and agreed with the conclusions of the extended panel of the Supreme

Administrative Court, which in its decision of 3 April 2012, ref. No. 8 As 6/2011-120, concluded that: "the general regulation of the obligations of natural persons to undergo vaccination provided for in Section 46 of the Public Health Protection Act and its specification in Decree No. 537/2006 Coll. correspond to the constitutional legal requirements..." (cf. e.g. the resolution file No. II. ÚS 2873/12 or judgment III. ÚS 449/06).

29. As to the above-mentioned, the Government merely adds that the vaccination schedule as embodied in the above-mentioned decree is based on recommendations of the World Health Organization and its objective is to optimise the schemes and intervals of individual vaccinations. However, the Government emphasises that the vaccination schedule is not an unchangeable dogma, which is also evident from successive amendments to the Decree on Vaccination against Infectious Diseases. While the changes are based on recommendations of the World Health Organization, based on the results of epidemiological surveillance, the assessment of the impact of age of vaccinated subjects and the number of doses on the current ability to produce protective antibodies, taking into account that different types of vaccines require different schemes, when some vaccines can be applied simultaneously but some require a certain interval between them. For that reason, it also appears appropriate to maintain the flexibility of responding to changes, which is allowed by the legal regulation issued in the form of a decree.

30. As to the petitioner's objections that the decree in some cases also provides for the vaccine which is to be used for any routine vaccination, the Government points out that the petitioner states in its petition that he has not been vaccinated against measles, rubella, and mumps and he has not been vaccinated against hepatitis B either. It is clear from the fact that the petitioner has not been vaccinated against hepatitis B that he did not undergo a routine vaccination with a hexavalent vaccine as provided for in Section 4 of Decree 537/2006 Coll., but his routine vaccination took place within the meaning of the second sentence of Section 47 (1) of the Public Health Protection Act. The said provision allows registered vaccines other than those whose antigenic composition has been provided for by the Ministry of Health applying the procedure laid down in Section 80 (1) (e) of the same act to be used for any routine vaccination. Thus, the mentioned procedure is provided for in the act and the conduct of the petitioner, or of his legal guardians, would not be contrary to the act if the petitioner had undergone within an individual vaccination schedule the vaccination against hepatitis B, as set out in Section 4 of Decree No. 537/2006 Coll.

31. In connection with the above-mentioned, the Government also notes that it considers redundant the lack of obligation of kindergarten staff to demonstrate their vaccination status alleged by the petitioner because such staff have been through infections preventable by vaccination and are immune against them or have been vaccinated against them. The Government then considers unjustified to comment on non-legal conclusions of the complainant concerning the Ministry of Health and the National Immunisation Committee, because, as stated above, the vaccination of (not only) children is governed by expert scientific knowledge.

32. The Government deems that the petitioner or its legal guardians totally disproportionately place the interests of his own or of their own child interest over the interests of other children and claim to be provided with public services (admission to a kindergarten), without being willing to comply with the legitimate conditions of the provision of such services. The state, however, in this case cannot allow an individual's interests to prevail over the interests of other children. All the children admitted to a kindergarten shall comply with the same requirements as set out in Section 50 of the Public Health Protection Act and, for this reason, the petitioner's requirement that the directors of kindergarten when admitting children to their establishments should assess individually what kinds of vaccinations will be required as a condition for such admission. In addition, it is then necessary to emphasise that parents can choose an alternative route and take care of the child in other ways than using the services of a kindergarten established under the Education Act.

33. At the conclusion of its statement, the Government expresses the belief that the legal regulation contested by the petitioner is constitutionally conforming and that the annulment of the provisions contested by the petitioner would lead to a significant negative breakthrough in the legislation to protect public health, at a time when thanks to the activities of the opponents of vaccination, not only in the Czech Republic but also in the whole world, the vaccination coverage decreases and the incidence of infectious diseases previously effectively controlled by vaccination, such as whooping cough and measles, increases. If the herd immunity is broken, the children who have not been vaccinated for the reasons foreseen by law or who have not developed sufficient immunity after vaccination are not protected which can in turn have a negative consequence of not only the spread of infectious diseases in the population but also the increased costs of the treatment of persons who could have been protected by prevention. The Government also points out that when considering the issue of compulsory vaccination and its legal consequences it is necessary to consider individual rights and freedoms of others - all this while taking into account that there is a group of people who are unable to undergo vaccination

due to permanent contraindication, as well as the fact that any vaccination does not provide 100% immunity to infection, and therefore it cannot be assumed that the unvaccinated children do not pose any risk to the vaccinated children. With respect to the foregoing, the Government considers that the Constitutional Court should reject or completely dismiss the petition under file No. Pl. ÚS 16/14.

34. Through her notification of 11 July 2014, the Public Defender of Rights notified the Constitutional Court that she would exercise her right to intervene in the proceedings. In its statement dated 19 August 2014, she stated that the purpose of kindergartens is not just babysitting and taking care of children, but also their education. It is a component of the right to education, not (only) a social service, which stems directly from the fact that the education in kindergartens is subject to the Education Act, the act which implements the right to education within the meaning of Article 41 (1) of the Charter. An interference by a public authority or a decision which is a formal subject-matter of the constitutional complaint and which is based on the contested provisions of the Act therefore interferes with the complainant's right to education under Article 33 (1) of the Charter, in combination with the fundamental right not to be discriminated against within the meaning of Article 3 (1) of the Charter irrespectively of another position, specifically consisting in health condition. In such circumstances, the constitutional order does not envisage the definition of right enforcement (limitation of right) by the law and any interference with that right must be subject to a rigorous assessment of adequacy.

35. According to the Education Act, the education is based, *inter alia*, on the principle of equal treatment without discrimination because of race, colour, sex, language, belief and religion, nationality, ethnic or social origin, property, birth and health condition or other status.

36. A child who due to his/her health condition cannot be subjected to any routine vaccination should therefore not be excluded from access to education and the provision thereof either. Section 50 of the Public Health Protection Act provides for such circumstances in a way. A child who cannot undergo vaccinations for permanent contraindication should attend an educational establishment assured that his/her health will not be endangered. Therefore, the contested provisions virtually provide a child with permanent contraindications with an equal access to education (in the opposite case, it could be excluded from access to education). It seems, however, that the legal regulation would ensure the protection of these children also because it would also impose the compulsory vaccination upon the staff of education establishments.

37. However, at the same time, Section 50 of the Public Health Protection Act impedes access to education and providing education to children with temporary contraindications because it does not permit without exception their admission to the preschool education. Section 50 thus ultimately interferes with the whole range of the fundamental rights of a child. In addition to interfering with the rights mentioned by the complainant, it also creates an unequal status of children with permanent contraindications and children whose temporary contraindications (sum of such contraindications) have also prevented them from undergoing the compulsory vaccination. Section 50 in connection with Section 46 of the Public Health Protection Act therefore cannot stand the so-called proportionality test, in particular the test of necessity. If the state considers the obligation to undergo vaccination really so important in the interest of public health, it should enforce its fulfilment through designated funds, i.e. primarily (in extreme cases - after fruitless negotiations) by imposing a penalty for an administrative offence.

38. Instead of enforcing obligations actually (with the above-mentioned exceptions), the state virtually abuses the apparently legitimate targets because it attempts at achieving it through other another "penalty" imposed upon the parents, namely the non-admission of their (partially) unvaccinated child to a preschool establishment. The child is thus taken as a hostage by the state as the state eventually punishes the child by denying him/her access to education, without assessing the actual risk to other children in a particular preschool establishment and most importantly without exception - regardless of other reasons preventing the child from undergoing vaccination before entering a preschool establishment (including a combination of temporary contraindications). In this regard, an unequal status of children with permanent contraindications and children whose temporary contraindications (sum of such contraindications) have also prevented them from undergoing the compulsory vaccination might be noted. As an example, the Public Defender of Rights mentions the cases of autistic children suffering from severe complications after vaccination against mumps, measles, and rubella. In practice, there may be various contraindications which correspond materially to permanent contraindications, but they are not identified as such and, therefore, do not constitute an exemption from the compulsory vaccination.

39. The alleged objective of protecting other children in a particular preschool establishment will not stand in the event that all other children are vaccinated (then they cannot be in principle endangered by an unvaccinated child even if infected). The alleged objective cannot be achieved either by vaccination against diseases whose

transmission among children in preschool establishments in the Czech Republic is out of the question (e.g. tetanus, hepatitis B, polio, etc.). The idea that it is in fact another penalty (complication) imposed upon parents is also supported by that the strict conditions required for the admission to a preschool education cease to exist as soon as the child becomes subject to compulsory school attendance.

40. The measure to achieve the declared objective is considered by the Public Defender of Rights as apparently excessive (inadequate and unnecessary) even because the vaccination constitutes purely preventive protection virtually eliminating the very existence of (real) danger to other (unvaccinated) children in a preschool establishment. The excessive nature of the measure (complete exclusion of fully unvaccinated children) stands out in comparison with the preventive measures taken by neighbouring countries. They temporarily restrict access to the sick and unvaccinated children to educational establishments only at the time of occurrence of the disease, for the usual incubation period of the disease. The first objective (the protection of public health by means of a high vaccination coverage rate) is then attained by those states by supporting voluntary blanket vaccination in the form of reimbursement for vaccination from the health insurance system.

41. The results of the test of minimising an interference with the fundamental rights in the form of preserving the essence and the meaning of the limited fundamental rights (optimisation order) arise according to the Public Defender of Rights from the considerations made for the purposes of the test of necessity to a large extent. While the provision under review interferes with the very essence of the right to education (through the exclusion from education without exception), failure to fulfil it cannot virtually affect the rights to health of another directly. To the extent of the so-called weighing formula, the Public Defender of Rights stressed that the application of the provision under review leads not only to an interference with the right to education. Any prioritisation of the right to protect the health of others may also interfere with other fundamental rights of children (in particular his/her right to the inviolability of person, health, and respect for privacy and family life).

42. In agreement with the complainant, the Public Defender of Rights considers that the contested provisions or the provisions of Section 46 of the Public Health Protection Act fails to comply with the requirement for the legal basis for a possible limitation of the fundamental right under Article 4 (2) of the Charter. It is due to the fact that the legislature has failed to define the essential characteristics of compulsory vaccination (the limits of authority) as well and has apparently thus delegated the imposition of primary obligations to the executive power. The secondary legal regulation has then defined the characteristics of compulsory vaccination without any basis in law.

43. In conclusion of her statement and with regard to the foregoing, the Public Defender of Rights mentioned that Section 50 (in connection with Section 46) of the Public Health Protection Act interfering with the right to education under Article 33 (1) of the Charter in conjunction with an interference with the right not to be discriminated against within the meaning of Article 3 (1) of the Charter cannot stand the test of proportionality or comply with the requirement for a legal basis for a possible limitation of a fundamental right under Article 4 (2) of the Charter and proposed that the Constitutional Court should annul Section 50 of the Public Health Protection Act.

44. The Constitutional Court was also delivered on 28 August 2014 an *amicus curiae* brief from Mr MUDr. Jan Vavrečka, Ph.D., President of the civic association Unicampus o.s., which is dedicated to protecting the collective interests and rights of consumers. This statement was mainly addressed to the above-mentioned statement of the Government (not sent to him by the Constitutional Court). The statement mentions that the actual physical separation of unvaccinated children from the groups of children brings no benefit to anyone. The actual separation effects cannot be justified by any medical or health needs of such circumstances. It stands completely against the protection of public health and against the theory of herd immunity to create by the physical separation of unvaccinated children their larger communities or groups in the population.

45. According to the statement, the physical separation of unvaccinated children protects neither the vaccinated children because they do not need such protection at all nor the unvaccinated children because they do not need to be protected against the vaccinated groups. Although it is true that the more individuals in the population is protected the stronger is the herd immunity, the increasing herd immunity, however, serves to the benefit of the ever-shrinking number of individuals. It is therefore irrational to want to achieve the antibody protection of all individuals in order to maximise the herd immunity. If the herd immunity of the population serves an entirely negligible number of individuals, it is in itself quite insignificant, although it is very strong, and a rational objective of protecting the public health is then the “optimum herd immunity”.

46. Another *amicus curiae* brief was delivered to the judge-rapporteur on 1 June 2014 from prof. MUDr. Jan Janda PhD., President of the Vaccination Section of the Czech Paediatric Society, who states that a child unvaccinated against measles, rubella, and mumps who is infected with any of these diseases outside a kindergarten can infect other children in the kindergarten. Any disease of unvaccinated child brought into a group within a kindergarten may result in the transmission of infection to the children whose vaccination has been postponed due to serious medical indication or in the cases where the child has been vaccinated but the expected immunity has not developed for various reasons, albeit rare. Endangering by the adult staff of kindergarten is theoretically possible, though highly unlikely. In the past, the staff were in most cases vaccinated, or revaccinated in childhood, the risk is thus minimal, though it cannot be ruled out. A laboratory testing of the level of protective antibodies against a given disease would have to be done. This is not usually performed.

47. Any unvaccinated child included in a group within a kindergarten is exposed to the risk of infection of measles, rubella or mumps. This infection can be obtained either from another unvaccinated child who has transmitted it to a kindergarten or from a vaccinated child whose predicted immunity has not developed and becomes infected out of a kindergarten and transmits the infection to the kindergarten. Regarding the risk of becoming infected with hepatitis B, paediatricians repeatedly encounter cases where at public places outside the buildings there are found discarded hypodermic needles used by drug addicts (e.g. in sandpits where children play). An injury caused by such needle is associated with a clear risk of becoming infected with hepatitis B. Generally, it is possible to say that the recommendation to vaccinate children in infancy is supported by the fact that the infection with hepatitis B in infancy is associated with a significantly higher risk of serious disease progression compared to infections acquired later in life.

48. By their decision not to vaccinate, the parents may endanger the health and the life of not only their own but also other children. It is the principle of solidarity what is at stake here. In the interest of public health, the belief that the risks of side effects of vaccination are absolutely incomparable with the risk arising from a decrease in the vaccination coverage in the population should outweigh.

IV.
Petitioner's reply

49. In its reply to the statement of the parties to the proceedings and interveners, the petitioner noted in particular that he agrees with the opinion of the Public Defender of Rights on the matter in almost all aspects. On the contrary, he does not agree with the arguments and statements of the Government and, as to them, he mentions that the blanket vaccination, covered and recommended by the state, is in line with the recommendations of the World Health Organization, however, the latter does not recommend compulsory vaccination. He also states that the sufficient vaccination coverage, and therefore also the herd immunity, is ensured in both the system of compulsory vaccination as well as the system of state-paid voluntary vaccination. Although in countries with voluntary individual vaccination the vaccination coverage is a little lower, it is still very high. According to the petitioner, the Government is not able to ensure the fulfilment of the basic prerequisites to make the compulsory vaccination legitimate, i.e. to substantiate its medical necessity by credible studies and to ensure that an authority establishing the vaccination policy acts in a credible and balanced manner, free from conflicts of interest, and in the interests of children.

50. The Government's arguments are according to the petitioner one-sided and manipulative as the Government only mentions the advantages of vaccination and completely conceals the risks of vaccination. Each disease subject to the compulsory vaccination and each disease against which the state recommends and pays for vaccinations should be the subject-matter of a comprehensive analysis to evaluate both benefits and risks as well as possible models of vaccination and their effectiveness and considerateness, implying whether the compulsory vaccination is medically necessary.

51. The petitioner argues that in the case of 100% vaccination coverage of other children in the kindergarten there is no reason to exclude one unvaccinated child because nobody can become infected or threatened otherwise. The state also does not examine whether the kindergarten staff are vaccinated, and even if they were vaccinated in the past, each vaccine has only a limited period of effectiveness. As to the Government's assertion that the legal guardians of the minor put the interests of their children above the interest of other children in a totally disproportionate manner, the petitioner states that for each parent the interest of their own child is priority and even those parents who have their child completely vaccinated in accordance with the official vaccination schedule surely do not so because they put the public interest over the interest of their own child, but because they are convinced that the vaccination made to such extent is in interest of their own child as well.

52. In conclusion of his reply, the petitioner reiterates that he applies to the Constitutional Court to annul Section 50 of the Public Health Protection Act and Section 34 (5) of the Education Act.

V.
Waiver of hearing

53. Upon the summing-up the course of proceedings above, the Constitutional Court has come to conclusion that it is not necessary to hold a hearing in the case, as it would not bring any further clarification of the matter in addition to the written submissions from the petitioner, parties to the proceedings, and interveners. Therefore, with respect to the wording of Section 44 of the Act on the Constitutional Court, the Constitutional Court made its decision without holding a hearing.

VI.
Text of the contested provisions

54. The contested provision of Section 34 (5) of the Education Act reads as follows:

"When admitting children to the preschool education it is necessary to comply with the conditions laid down by special legislation."

55. The contested provision of § 50 of the Public Health Protection Act reads as follows:

"The children may only be admitted to establishments providing care for children under 3 years of age in a day mode or preschool establishments if they have undergone the prescribed routine vaccinations, can demonstrate in writing that they are immune against any infection or are unable to undergo vaccination due to permanent contraindication."

VII.
Assessment of the *locus standi* of the petitioner to file a petition

56. As mentioned above, the petitioner filed a petition seeking the annulment of the cited provisions together with a constitutional complaint pursuant to Section 72 et seq. of the Act on the Constitutional Court. Its *locus standi* is then based on Section 64 (1) (e) and Section 74 of the Act on the Constitutional Court. In accordance with these provisions, the Constitutional Court then had to examine whether the conditions for filing such petition had been fulfilled by the petitioner (complainant).

57. The basic prerequisite for submitting a petition under Section 74 of the Act on the Constitutional Court is the "application" of the contested legal regulation. It means that only the application of the concerned regulation (a resulting legal circumstance) leads to the issue of a decision or measure or any other interference by a public authority subject to a constitutional complaint and having negative effects in a legal sphere of the complainant, i.e. an alleged infringement upon the complainant's constitutionally guaranteed fundamental rights and freedoms has occurred. There must be a close relation between the decision contested by the constitutional complaint or any other interference by a public authority and a provision of legal regulation proposed to be annulled to that extent that if it were not for the contested legal regulation the contested decision or any other act of a public authority would not have been issued or made.

58. In the case under consideration, with regard to the subject-matter of the dispute in which the petitioner seeks the annulment of decisions of the director of the kindergarten on the basis of which the petitioner was not admitted to a kindergarten for failure to comply with the conditions under Section 50 of the Public Health Protection Act, Section 50 of the Public Health Protection Act is applied only partially.

59. In compliance with those conclusions, the Constitutional Court made a review on the merits of that part of the contested provision of Section 50 of the Public Health Protection Act, reading: "the children may only be admitted to preschool establishments if they have undergone the prescribed routine vaccinations, can demonstrate in writing that they are immune against any infection or are unable to undergo the vaccination due to permanent contraindication". Only as for this part of the petition, the *locus standi* of the petitioner is inferred from Section 74 of the Act on the Constitutional Court.

60. On the contrary, in the part where the petitioner, at least formally in the prayer for relief of its petition, rails against the remainder of contested Section 50 of the Public Health Protection Act setting out the cited condition

for admitting a child into an "establishment providing care for children under 3 years of age in a day mode", the petition is rejected as it is filed by a person clearly unauthorised to do so.

61. As for the part of the petition seeking the annulment of Section 34 (5) of the Education Act, the *locus standi* of the petitioner to file it is not fulfilled, not even partially. The contested provision of Section 34 (5) of the Education Act imposes as for the cases of admission of children to preschool education an obligation to comply with the conditions laid down by special legislation and provides thus only a general principle that a law governing a specific subject-matter overrides a law which only governs general matters (*lex specialis derogat legi generali*). This principle implies that if the conditions for the use of a special legal regulation are fulfilled, those rules must be applied and a general legal regulation may not be applied. The assertion of the Senate, contained in its statement, that the mentioned interpretative rule contained in Section 34 (5) of the Education Act could also be applied in the absence of that provision, can be affirmed. The contested decisions not to admit the petitioner to a kindergarten should therefore be issued even in the absence of Section 34 (5) of the Education Act.

62. Therefore, the Constitutional Court concluded that the petitioner in relation to the contested provision of Section 34 (5) of the Education Act is not an authorised petitioner and, therefore, the conditions of its *locus standi* in the proceedings to review the regulations have not been complied with.

VIII.
Constitutional conformity of the legislative process

63. According to Section 68 (2) of the Act on the Constitutional Court - in addition to the assessment of the compliance of the content of the law contested with constitutional laws - whether the act has been passed and promulgated within the bounds of constitutionally provided competences and in a constitutionally prescribed manner.

64. Given that the petitioner did not argue that the legislative process had been defective or that the constitutionally prescribed competences of the legislature had been exceeded, with respect to the principles of procedural economy it is not necessary to examine the issue in detail and it is sufficient, in addition to considering the statements presented by the Chamber of Deputies and the Senate, to verify formally the legislative process from the publicly available information at http://www.psp.cz.

65. Bill No. 258/2000 Coll., on the protection of public health, containing the contested provision of Section 50, was properly approved by the Chamber of Deputies at its meeting held on 25 May 2000 (resolution No. 1020). The Senate returned the bill with proposed amendments to the Chamber of Deputies that passed it at its meeting held on 14 July 2000 (resolution No. 1160). The President signed the act passed on 26 July 2000. The Act was promulgated in the Collection of Laws in Chapter 74 under No. 258/2000 Coll. after being signed by the Prime Minister.

66. The contested provision of Section 50 of the Public Health Protection Act has therefore been passed and promulgated within the bounds of constitutionally provided competences and in a constitutionally prescribed manner.

IX.
Legal assessment by the Constitutional Court

67. The contested provision of Section 50 of the Public Health Protection Act sets out as a condition for admitting a child to a preschool establishment undergoing the prescribed routine vaccinations, unless he/she can demonstrate in writing that he/she is immune against any infection or is unable to undergo the vaccination due to permanent contraindications.

68. The routine vaccination referred to in the contested Section 50 of the Public Health Protection Act in the above-mentioned manner is regulated in Section 46 (1) of the Public Health Protection Act (1) of the Public Health Protection Act, providing that natural persons defined by the provision are obliged to undergo the specified kind of routine vaccinations in the cases and within the time limits under the implementing legal regulation. The concerned implementing regulation is a decree of the Ministry of Health according to Section 108 (1) of the Public Health Protection Act.

69. As to his claims about the unconstitutionality of Section 50 of the Public Health Protection Act, the petitioner states in his petition that his fundamental right to education but also the right to informed consent or inviolability of person and bodily integrity and privacy, the right to express freely his religion or belief, and parental rights are not limited by law, but the extent of the obligation to be vaccinated is defined in a decree, as a result of which the sphere of protection of fundamental rights and freedoms is subject to the authority of the executive power that is not authorised to exercise such powers. A similar objection of non-compliance with the requirement of a legal basis for a possible limitation of fundamental rights is also stated by the Public Defender of Rights in her statement.

70. The Constitutional Court considers it essential that Section 50 of the Public Health Protection Act lays down the condition of submission to established routine vaccinations, however, without setting out the specific content of the condition or regulating the form in which it is to be determined. The above-mentioned is regulated only in Section 46 of the Public Health Protection Act which follows Section 50 of the Public Health Protection Act in the given direction.

71. The Constitutional Court emphasises in its settled case-law the binding nature of the prayer for relief, not of the reasoning of petition, i.e. arguments presented by the petitioner. Therefore, it assesses the petition also in other aspects of the constitutionality than those listed in the reasoning of the petition, but it cannot decide to annul other provisions other than those mentioned in the prayer for relief. The exception to the foregoing is a situation where as a result of the annulment of a particular statutory provision upon the repealing judgment of the Constitutional Court another provision with a different provision with its content dependent on the previous, would not be reasonable, i.e. would lose the merits of its prescriptive existence, which would be a reason for annulling also the latter statutory provision, and without it being an *ultra petitum* measure. The validity of that provision expires in fact based on the principle *cessante ratione legis cessat lex ipsa*, the repeal by the Constitutional Court has therefore only a registration or technical nature [cf. e.g. the judgment, file No. Pl. ÚS 59/2000, of 20 June 2001 (N 90/22 of the Collection of Judgments of the Constitutional Court 249; 278/2001 Coll.)].

72. The petition under consideration, however, does not constitute such case in the light of the above. The provision of Section 46 of the Public Health Protection Act to which the petitioner’s objections are filed in their essence, although associated with the contested provision, is in fact directed, without it being required by the petition, is not a provision which would follow only in legislative and technical aspects the provision the annulment of which is sought. The situation is reversed here to a certain extent because it is precisely the contested Section 50 of the Public Health Protection Act or the condition laid down therein of submission to the set vaccinations for admission to a preschool establishment, the implementation of which could not be required in practice without the existence of Section 46 of the Public Health Protection Act. If, however, the Constitutional Court examines in the light of the petitioner's objections, in connection with the contested provision, also Section 46 of the Public Health Protection Act, it would constitute an *ultra petitum* measure.

73. With respect to the foregoing, namely that the contested Section 50 of the Public Health Protection Act regulates the condition of submission to the prescribed routine vaccinations without regulating the manner of determining the routine vaccinations, the Constitutional Court cannot agree with the objection to a violation of *reservatio legis* in connection with that provision.

74. Referring to the constitutionally conforming interpretation that has priority over the annulment of law or any part thereof, the Constitutional Court, therefore, concludes that Section 50 of the Public Health Protection Act does not breach *reservatio legis* in any manner as based on that section it is not even excluded to prescribe the obligation to undergo routine vaccinations solely through law. The obligation to undergo vaccination only referred to by the content of the contested provision is only regulated by Section 46 of the Public Health Protection Act that in connection with Section 108 (1) of the Public Health Protection Act authorises the Ministry of Health to render a relevant decree. The concerned objection of a violation of *reservatio legis* may therefore have constitutional relevance only in connection with the last cited provisions of the act.

75. In the prayer for relief of his petition binding on the Constitutional Court, however, the petitioner rails only against Section 50 of the Public Health Protection Act in addition to Section 34 (5) of the Education Act for the annulment of which the petitioner does not have the *locus standi*. Therefore, the Constitutional Court, on the basis of the foregoing, has found the petition in the part asserting the alleged violation of *reservatio legis* by Section 50 of the Public Health Protection Act as manifestly unfounded.

76. Beyond the foregoing, the Constitutional Court adds that it has already dealt with the matter of fulfilling the requirement for a legal basis in connection with Section 46 of the Public Health Protection Act, namely in the case file No. Pl. ÚS 19/14, concluding that "the text of Section 46 of the Public Health Protection Act is sufficiently clear and comprehensible and reliably imply basic attributes and limits of the legal regulation of the compulsory vaccination against infectious diseases. The authorisation which is provided to the Implementing Decree to regulate the details associated with the performance of compulsory vaccination is applied by the secondary regulation within the given limits without interfering with the elements contained in the substantial features of law. Therefore, there has been no legislative interference with the guarantees provided to the holders of fundamental rights and freedoms under Article 4 (1) and (2) of the Charter" (judgment of 27 January 2015, file No. Pl. ÚS 19/14).

77. Regarding the objections of the complainant and the Public Defender of Rights, pointing to the fact that the vaccination condition for admitting to preschool education contained in Section 50 of the Public Health Protection Act interferes with the right of the petitioner to education and the right not to be discriminated against and that it does not stand the test of proportionality, the Constitutional Court notes that in accordance with what is stated above (as to the prayer for relief of the petition) the Constitutional Court did not examine the constitutionality of the content of the legal obligation to undergo the set kind of routine vaccinations in the cases and on the dates regulated by the implementing regulation, at the level of law (Section 46 of the Public Health Protection Act) and at the level of secondary legislation (Decree of the Ministry of Health No. 537/2006 Coll., on the vaccination against infectious diseases).

78. In keeping with such defined review the subject of which is only the actual wording of part of Section 50 of the Public Health Protection Act laying down the conditions for admitting children at preschool establishments for the reasons mentioned above, it is necessary to answer the question whether the care in preschool establishments falls under the fundamental right to education protected by the Charter, the violation of which is objected to by the complainant and the Public Defender of Rights.

79. Article 33 of the Charter guaranteeing the right to education does not specify what is the extent of "education" that is covered especially by the first sentence of the first paragraph. The Education Act, which is one of the laws implemented by this provision, defines in Section 1 its subject-matter as follows: "this law regulates preschool, elementary, secondary, vocational, and some other education in schools and educational institutions, lays down the conditions under which the education and training (hereinafter referred to as the "Education") takes place, defines the rights and obligations of natural and legal persons in the Education, and determines the competence of state administration and self-government bodies in the Education."

80. According to the explanatory memorandum on Section 1 of the Education Act, for the purposes of this Act, the term "Education" mentioned in Article 33 of the Charter is understood as "education" within the meaning of the process as well as "qualifications" within the meaning of the result, i.e. the successful completion of the process usually upon reaching a level of education.

81. Section 2 (2) of the Education Act then sets out the general objectives of education, respectively education and upbringing under the cited Section 1 of the Education Act, when one of these goals is, under letter (a), "the development of the human personality equipped with knowledge and social competencies and moral and spiritual values for personal and public life, profession or work, gathering information, and learning throughout life."

82. Section 33 of the Education Act sets out the objectives of preschool education as follows: "The preschool education supports the personal development of children of preschool age and contributes to their healthy emotional, intellectual, and physical development, and to the learning of basic rules of conduct, fundamental life values, and interpersonal relationships. The preschool education creates the basic prerequisites for continuing education. The preschool education helps to remove inequalities in the development among children prior to entering the basic education and provides special educational care to children with special educational needs."

83. In light of the foregoing and taking into account the case-law of the European Court of Human Rights, which declared that Article 2 of the Additional Protocol to the European Convention, which guarantees that no one shall be denied the right to education, applied to all types and levels of education provided within a Contracting State (cf. the judgment of the European Court of Human Rights in the case of Leyla Zahin versus Turkey of 10 November 2005, No. 44774/98, Section 134), the Constitutional Court has concluded that there is no reason to eliminate the preschool education as a process leading to the acquisition of specified skills, attitudes, and knowledge, not only as taking care of children or babysitting, from the scope of the right to education under

Article 33 of the Charter (cf. KATZOVÁ, P. Školský zákon: komentář (Education Act: Commentary). Prague: Wolters Kluwer, 2009).

84. The right to education as laid down in Chapter Four of the Charter is one of so-called social rights. Article 41 (1) of the Charter as well as the very nature of social rights exclude that the methodology of their review could be the same as the methodology used in relation to the "traditional" fundamental rights (in particular, contained in Chapter Two of the Charter), such as a "strict" test of proportionality the application of which consequently severely limits the discretion of the legislature in adopting the legal regulation intended to regulate the area of social relationships under examination. With regard to Article 4 (4) of the Charter, however, the consideration of the legislature is not (and cannot be from a constitutional point of view) completely unlimited even in the regulation of social and economic rights and may be subject to a review by the Constitutional Court.

85. On the basis of the foregoing, the Constitutional Court constructed, in its judgment, file No. Pl. ÚS 54/10, of 24 April 2012, the so-called test of reasonableness as a methodological tool to examine interference by the legislature with the constitutionally guaranteed social rights. This test reflects both the need to respect the relatively vast discretion of the legislature and the need to avoid its possible excesses and consists of the following four steps: (1) Defining the meaning and essence of social justice, i.e. its essential content. (2) An assessment of whether the law does not affect the very existence of social rights or the actual implementation of its essential content. (3) An assessment of whether the legal regulation pursues a legitimate objective; thus, if it is not an arbitrary considerable reduction in the overall standard of fundamental rights. (4) Consideration of whether the legal means used to achieve it is reasonable (rational), though not necessarily the best, wisest, most suitable or most effective.

86. The first step in the review within this test is to define the meaning and essence of social right in the case under consideration of the right to education under Article 33 of the Charter.

87. As mentioned above, the right to education under Article 41 (1) of the Charter may only be exercised within the limits of law. Article 33 of the Charter is thus primarily intended for the legislature to fill it with specific content. The right to education differs from the fundamental rights contained mainly in Chapter Two of the Charter in that it does not exist as *a priori* unlimited fundamental right which would be limited by the legislator for the reasons foreseen in the Charter but it is on the opposite the legislature itself that gives it the appropriate content and extent. Although the legislature has a relatively broad sphere of powers to define the specific content and manner of the implementation of this article, it is bound by the constitutional principles, while the main one in this sense is presented in Article 4 (4) of the Charter (cf. the judgment, file No. Pl. ÚS 38/04, N 125/41 of the Collection of Judgments of the Constitutional Court 551, related to Article 26 of the Charter, or the judgment, file No. Pl. ÚS 35/93, N 7/1 of the Collection of Judgments of the Constitutional Court 51, related to Article 33 (2) of the Charter).

88. However, neither the relative freedom of the legislature arising from Article 41 (1) of the Charter entitles the legislature to breach the essence and meaning of Article 33 of the Charter in the form of law. However, as to the nature of the right to education, the Constitutional Court in its previous case-law noted that "the conceptual character itself is vague because this only generally formulated right is linked to a number of social aspects and purposes, often of various social quality and social impact. The tendency to move any of these aspects and purposes to the level fit for an infringement upon this law would, in the opinion of the Constitutional Court, be capable, as well as in a number of similar cases, of causing a variety of socially dysfunctional and undesirable effects [judgment, file No. Pl. ÚS 32/95, of 3 April 1996 (N 26/5 of the Collection of Judgments of the Constitutional Court 215; 112/1996 Coll.)].

89. An interference with the very core of the right to education is thus something unique and it may only occur in the cases of obvious excesses. This could happen e.g. in a situation when the given regulation has generally unacceptable (e.g. discriminatory) implications and would not meet the requirements generally placed within the rule of law on the legislation (resolution, file No. II. ÚS 2446/10, of 5 January 2011).

90. In the second step of the test, the Constitutional Court assesses whether the contested legal regulation does not deny the very existence, essence or meaning of the constitutionally guaranteed social right. As mentioned above, Article 41 (1) of the Charter with respect to Article 4 (4) of the Charter cannot be itself interpreted as allowing through a legal regulation negating completely constitutional guarantees; otherwise, the constitutional regulation of social rights would be devoid of any practical sense. The unconstitutional interference consisting in a violation of the nature and meaning of the right to education did not occur in the present case.

91. The contested provision of Section 50 of the Public Health Protection Act sets out as a condition for admitting a child to a preschool establishment the fulfilment of the obligation to undergo the prescribed routine vaccinations. The exception when admitting a child to a preschool establishment does not require undergoing the prescribed routine vaccinations is according to the contested provision circumstances where the child can demonstrate in writing that he/she is immune against any infection or is unable to undergo the vaccination due to permanent contraindication.

92. The cited legal regulation constitutes in view of the case-law of the European Court of Human Rights (hereinafter referred to as the "ECHR") a necessary preventive measure to ensure that, in connection with the concerning condition for admitting a child to a preschool establishment, the medical operation in the form of vaccination will not be to the detriment of the child to an extent that would disrupt the balance between his/her bodily integrity and the public interest in protecting the health of the population (see the judgment of the ECHR in the case of Solomachin versus Ukraine, of 15 March 2012, complaint No. 24429/03, paragraph 36, available on the Internet database HUDOC at http://hudoc.echr.coe.int).

93. The Public Defender of Rights in her statement argues that the contested provisions in the mentioned exception to the given condition creates an unequal status of children with permanent contraindications and children whose temporary contraindications also prevented them from undergoing the compulsory vaccination, with reference to the cases of contraindications which correspond materially to the permanent contraindications but they are not so identified and, therefore, do not constitute an exception to the compulsory vaccination which is ultimately discriminatory.

94. Section 46 (2) of the Public Health Protection Act provides for that: "Prior to carrying out routine and extraordinary vaccinations, in the cases specified in an implementation regulation, a natural person shall be obliged to undergo examination of the state of immunity (resistance). The routine and extraordinary vaccinations shall not be carried out if the immunity against infections or if a health condition which prevents administering any vaccine (permanent contraindication) is established. The health care provider shall issue a document confirming such facts to the concerned natural person and shall enter the reason for abandoning vaccination in medical records." It is thus implied by the cited provision that using the legislative abbreviation "permanent contraindication" in the contested provision means any case where a health condition of a child preventing the administration of a vaccine has been established.

95. As to this the Constitutional Court refers to the above cited judgment of 27 January 2015, file No. Pl. ÚS 19/14, according to which the institution of vaccination obligation, as a limitation of a fundamental right, must be accompanied by such legal guarantees which would minimise its abuse and eliminate the medical procedure in the event that there are no conditions for its implementation. In relation to the foregoing, without intending to interfere with the technical aspects of the performance of vaccination, the Constitutional Court notes in the cited judgment that it regards the legal regulation under Section 46 (2) and (3) of the Public Health Protection Act as such guarantee.

96. In this respect, the Constitutional Court points out again that the basic argumentative methods of procedure of the Constitutional Court in the proceedings to review the regulations include the principle of priority of constitutionally conforming interpretation over the repeal, according to which in a situation where a certain legal provision allows two various interpretations, with one being consistent with the constitutional order and the other being contrary to it, there is no reason to annul the provision. When applying the given legislation, it is then the task of all the executors of public power to interpret it in a constitutionally conforming manner. This method is based on the principle of separation of powers and the related principle of restraint, i.e. the principle according to which, if the constitutionality can be achieved through alternative means, the Constitutional Court chooses that which limits the legislative power to the smallest extent (e.g. file No. Pl. ÚS 5/96, Pl. ÚS 19/98, Pl. ÚS 15/98, Pl. ÚS 4/99, Pl. ÚS 10/99, Pl. ÚS 41/02, and Pl. ÚS 92/06)

97. The Constitutional Court therefore finds that when interpreting the contested Section 50 of the Public Health Protection Act or when assessing the fulfilment of the condition of permanent contraindication for an exception to the obligation to undergo the compulsory vaccination for admitting to a preschool establishment, care must be taken to prevent any inequality among children whose health condition prevent them on a long-term basis from the administration of appropriate vaccines (i.e. substantive aspect), regardless of whether the term "permanent contraindication" is expressly (formally) mentioned in the relevant confirmation of the health care provider. The said constitutionally conforming interpretation does not exclude the wording of the contested provision at all.

98. The contested provisions introducing vaccination as a condition for admitting a child to a preschool establishment undoubtedly constitute with regard to the above-mentioned a certain limitation of the right to education but it is not (with regard to an exception to the obligation to comply with this condition as laid down by the Public Health Protection Act) such interference that would prevent all unvaccinated children, without exception, from being admitted to a preschool establishment.

99. In view of the Constitutional Court, the contested provision at the same time pursues a legitimate objective, namely the protection of public health. This is already apparent from the reasoning of the judgment of 3 February 2011, file No. III. US 449/06, which states that: any "compulsory vaccination in general is fully justified also in relation to other fundamental rights of the complainant. The Constitutional Court recalls the opinion of the Committee on Human Rights and Biomedicine of the Government Council for Human Rights of the Czech Republic according to which the vaccination is one of the most effective methods of health prevention in general and it is widely considered, along with the use of antibiotics, as a cause of extreme decrease in morbidity and mortality resulting from infectious diseases and as the greatest benefit and basis of modern medicine. An essential part of the preventive action of vaccination is its wide application and a high vaccination coverage rate, which is about 90% vaccination coverage. The compulsory vaccination is thus in relation to the fundamental right of the complainant to express his religion or belief a permissible limitation of the fundamental right as it is clearly a measure necessary in a democratic society for the protection of public safety, health, and the rights and freedoms of others (Article 16 (4) of the Charter). In its judgment of 27 January 2015, file No. Pl. ÚS 19/14, the Constitutional Court states that: "one of the recognised legitimate objectives is the protection of health, while the purpose of compulsory vaccination is not only in principle the blanket vaccination of persons *ex lege*, but also indirectly the protection of natural persons, who have not been vaccinated for various reasons, against infectious disease".

100. Also, according to the case-law of the ECHR, the compulsory vaccination pursues a legitimate objective of protecting the public health (see the judgement of the ECHR in the case of Solomachin versus Ukraine of 15 March 2012, complaint No. 24429/03, paragraph 35).

101. It remains to be examined whether the contested provisions are rational means to achieve the mentioned objective. According to the Constitutional Court, the limitation of the right to education is capable of passing also the fourth step of the reasonableness test.

102. In view of the Constitutional Court, vaccination in general, as a means of immunisation against some infections, has a social benefit requiring the shared responsibility of members of the society, i.e. an act of social solidarity of those who undergo a risk, at present referred to as minimum by the current majority-accepted scientific knowledge, in order to protect the health of the whole society. The vaccination of the sufficient majority of the population prevents the spread of some diseases, providing protection not only to those who have been vaccinated. The higher the proportion of unvaccinated against the vaccinated population the higher the risk of repeated spreading of infection not only among those who have voluntarily refused vaccination but also among those who cannot be vaccinated for serious, especially health reasons. Finally, also the people who have been vaccinated but their vaccination has not achieved the desired effect are threatened by the spread of the disease. In the present case, where the vaccination is a condition for admitting a child to a kindergarten, those persons exposed to the risk of infection are particularly children who may face in case of disease particularly serious consequences.

103. For these reasons, when a child undergoes the vaccination before his/her admission to a kindergarten, it might be considered as an act of social solidarity, which acquires its importance with the growing number of vaccinated children in groups within preschool establishments. On the other hand, there are cases which could be seen as a social injustice where a certain group of children admitted to a preschool establishment refuse without justifiable reason to undergo vaccination and enjoy the benefits resulting from the success of vaccination, or the willingness of the other children attending the preschool establishment to assume the minimal risks presented by the vaccination (cf. RUBIN, B., Daniel; KASIMOW, Sophie. The Problem of Vaccination Noncompliance: Public Health Goals and the Limitations of Tort Law. Michigan Law Review, Vol. 107, No. 114, 2009).

104. Likewise also the opinion contained in the reasoning of the decision of the European Commission of Human Rights in the case of Acmanne and others against Belgium according to which the human solidarity obliges individuals to submit to the public interest and not to endanger the health of their neighbours even though their life is not in danger (see the decision of the European Commission on Human Rights in the case of Acmanne and others versus Belgium of 10 December 1984, 40 DR, p. 253).

105. The conclusion that the determination of conditions of submission to the prescribed vaccinations to be admitted a preschool establishment is not irrational or even arbitrary is also supported by the fact that this kind of limitation of the right to education can be found for example in France where, pursuant to the Public Health Act, a child may only be admitted to any education establishment (i.e. also a preschool establishment) upon submitting a medical journal or other documents describing the health condition of children with regard to compulsory vaccinations. In their absence, the compulsory vaccinations are performed within three months of their admission to a school (Section R-3111-17 of the Public Health Act).

106. Such approach also corresponds to the content of the recommendations of the Parliamentary Assembly of the Council of Europe 1317 (1997) on vaccination in Europe, as adopted on 19 March 1997, which calls on Member States, *inter alia*, to establish a comprehensive public vaccination schedule as the most effective means of prevention against infectious diseases so as to ensure a high level of immunisation of the population (available at http://www.coe.int).

107. The Constitutional Court therefore concludes that the legal basis of the obligation to undergo vaccination enabling a child to be admitted to a preschool establishment is not an unconstitutional limitation of the right to education as guaranteed by Article 33 of the Charter. The regulation contested has passed the rationality test of reasonableness, as it does not interfere with the core of the right to education, pursues a legitimate objective, and uses rational and not arbitrary means to attain the objective.

108. Based on the reasons outlined above, the Constitutional Court has dismissed the petition seeking the annulment of Section 50 of Act No. 258/2000 Coll., on the protection of public health, concerning the text "the children may only be admitted to preschool establishments if they have undergone the prescribed routine vaccinations, can demonstrate in writing that they are immune against any infection or are unable to undergo vaccination due to permanent contraindication", and rejected the remainder of it on the grounds of the lack of *locus standi* of the petitioner [Section 43 (1) (c) in connection with Section 43 (2) (b) of the Act on the Constitutional Court]. As for the part of the petition seeking the annulment of Section 34 (5) of the Education Act, the petition has also been rejected on the grounds of the lack of *locus standi* of the petitioner.

Appeal: No appeal is permissible against the judgment of the Constitutional Court.

In Brno on 27 January 2015

Pavel Rychetský, m.p.
President of the Constitutional Court

A dissenting opinion of Judge Kateřina Šimáčková on the verdict and reasoning of the judgment, file No. Pl. ÚS 16/14

In consider the obligation to undergo vaccination against nine diseases (diphtheria, tetanus, whooping cough, polio, hepatitis B, diseases caused by Haemophilus influenza type B, measles, rubella, and mumps) as a condition of entry into preschool education, as provided for in Section 50 of the Public Health Protection Act in connection with Decree of the Ministry of Health No. 537/2006 Coll., for the reasons mentioned in Items 2 and subsequent, as unconstitutional. At the same time, I refer to my dissenting opinion on the related judgment of the Plenum, file No. Pl. ÚS 19/14, in which I deal in a detailed manner with both the unconstitutionality of the current legal regulation of the vaccination obligation as such, as well as the circumstances of decision-making on the compulsory vaccination and, more generally, some other medical and legal issues in the Czech Republic, parts of which are also relevant in the context of the present judgment of the Constitutional Court. In the cited dissenting opinion on the judgment file No. Pl. ÚS 19/14 I have explained that I find the current Czech legal regulation of the compulsory vaccination in conflict with the fundamental right to the inviolability of person as the extent of compulsory vaccination is entirely left to the discretion of the Ministry of Health and is not determined by law, as required by Article 7 (1) and Article 4 (2) of the Charter of Fundamental Rights and Freedoms. At the same time, the current legal regulation does not even meet the requirement for adequacy of an interference with fundamental rights since the objective pursued (public health) could be achieved to the same extent using more considerate means in which the choice and dosage of the vaccine are left to the parents' discretion upon consultations with physicians; the current legal regulation does not contain the strict liability of the state for any injury to the health of an individual who has undergone the compulsory vaccination; and finally

the list of diseases which the compulsory vaccination is prescribed against is excessive since the obligation is not sufficiently justified by the protection of public health in case of all of them.

I am aware that a crucial right based on which the legal regulation of vaccination, as a condition of admission to preschool establishments, should be assessed is not the right to bodily integrity. The judgment comes to the conclusion I fully agree with that the preschool education falls within the content of the right to education under Article 33 of the Charter (Item 83) and that the vaccination obligation that is a condition for admission to the preschool education constitutes an interference with the right (see in particular Item 98). Subsequently, the judgment applies to the contested legal regulation the rationality test which is introduced in the case-law of the Constitutional Court for assessing the constitutionality of the legal regulations interfering with the rights enumerated in Article 41 (1) of the Charter, including the right to education. If the core of right is not interfered with, as the judgment establishes, the test prescribes a limited review examining whether the concerned legal regulation is due to the legitimate objective pursued only reasonable, though not necessarily the best, wisest, most suitable or most effective.

The right to education, however, is also enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 2 of Protocol No. 1; hereinafter referred to as the "Convention"). However, the European Court of Human Rights (hereinafter referred to as the "ECHR") does not recognise the rationality test thus formulated and assesses interferences with the right to education by means of comparison test applied to conflicting interests, albeit slightly less stringent in the event of interference with this right as compared to any interference with the right to bodily integrity. It cannot be however unequivocally inferred from the case-law of the ECHR that the ECHR would be as benevolent as the rationality tests applied by this judgment. This aspect of the issue, however, is completely ignored in this judgment that does not address at all a possible violation of the Convention which is part of the constitutional order.

I have come to the conclusion that the current legal regulation of compulsory vaccination as a condition of admission to the preschool education fails for the following reasons the test of rationality and breaches the fundamental rights of the complainant under the Charter of Fundamental Rights and Freedoms, and therefore I do not consider it necessary to comment on any possible violation of the Convention.

Although we cannot ignore the paramount importance of preschool education for some groups of children (for children from excluded communities, with poor command of Czech language or without standard social habits), I recognise that access to the preschool education constitute the core of the right to education, which consists mainly in the primary education. Therefore, I concur with the majority of the Plenum that the legal regulation under consideration does not interfere with the core of the right to education under Article 33 of the Charter. I also agree that the objective pursued by the given legal regulation according to the statement of the Government, namely the protection of public health and protection of the rights of other children by preventing the spread of infectious diseases among children attending preschool establishments, is a legitimate objective. The judgment of the Constitutional Court, however, does not examine sufficiently whether the legal regulation is actually reasonable in relation that objective.

At first, the reasonableness of regulation must be examined for the obligation to undergo vaccination against each of the nine diseases separately. There may be children, as in the case of the present complainant, who are vaccinated only against certain diseases. While the ban to admit to a preschool establishment a child who has not undergone any vaccinations might be theoretically rational, this does not apply to the children who have undergone some vaccination and there is no reasonable relationship of the remainder of vaccinations they have not undergone to the legitimate objective pursued.

One of compulsory vaccinations is the vaccination against tetanus which is not communicable from one child to another at all. To require a tetanus vaccination as a condition of admission to a preschool establishment therefore has no rational relationship to the pursued objective of preventing the spread of infectious diseases in a group of children within a preschool establishment. If the contested Section 50 of the Public Health Protection Act requires submission to all prescribed routine vaccinations, including tetanus, this legislation is not constitutionally conforming for this reason.

By analogy, I believe that it is not reasonable to require vaccination against hepatitis B as a condition of admission to a preschool establishment. The disease is communicable, except for absolute exceptions, only through sexual contact or blood contamination, for example through the use of shared syringes among drug addicts. Its communicability in small children is then very limited and this condition thus cannot attain the pursued objective. Thus, if we compare this rather merely theoretical possibility of attaining the objective of

preventing the spread of the disease among the group of children in a preschool establishment to the seriousness of the interference (the child is completely excluded from the preschool education), the condition of vaccination against hepatitis B does not appear as reasonable.

It is thus significant that the President of the Czech Paediatric Society states, in his *amicus curiae*, that the child unvaccinated against measles, rubella, and mumps infection can endanger other children in a group of kindergarten, but not a child vaccinated against hepatitis B. The appropriateness of vaccination against hepatitis B is supported in the *amicus curiae* by reference to the existing cases of infected infants from used needles found in public areas where children play (Item 47 of the judgment). This argument, however, is not related to the legitimate objective pursued. By analogy, in its statement, the Government justifies the compulsory vaccination against hepatitis B only by that the risk of serious course of the disease is much higher in the case of small children. This argument, however, refers only to the protection of individual health of unvaccinated persons, and not the spread of this disease. In other words, I do not deny that the vaccination against hepatitis B may have benefits for a particular child vaccinated, but this condition of undergoing the vaccination is not reasonable given the pursued objective of protecting the health of other children in a preschool group.

I consider the fact that the vaccination obligation applies to all preschool establishments or providers of child care services in children's groups as a further aspect of the contested legal regulation indicating its irrationality. If the declared objective of protecting other children in a kindergarten who cannot be vaccinated because of contraindications, or those whose vaccination has not been effective, I do not consider it reasonable to impose a vaccination obligation even upon those private preschool establishment which are openly established for children who are not vaccinated and the parents of all the children in such preschool establishments know about it and agree with that. It should be taken into account that such legislation already interferes with family relationships and parental rights (Article 8 of the Convention and Articles 10 and 32 of the Charter). The state claims hereby to know better what is good for children than their parents. The contested legal regulation does not allow these children to have an official alternative of preschool education.

I note with regret that the majority has not mentioned in the judgment any of the above considerations on the rationality of the existing regulation of the vaccination obligation. Even if the rationality test is a very benevolent review test, it is still a review and it must be performed carefully. The majority confines itself in the reasoning (Items 102 to 106) to general proclamations that the vaccination is good for children and individuals must show solidarity. However, it is not clear from the reasoning what is the relationship between these social benefits brought by the vaccination and the objective of the law, namely the protection of public health and the rights of others, which alone can justify such a strict legal obligation. Nevertheless, the argument of protecting the public health and the rights of others does not stand in respect of at least two of the nine diseases. The judgment also ignores even some warnings from the Public Defender of Rights who has also called for the annulment of the contested legislation, for example the criticism that the legal regulation is very strict in relation to the children involved in the preschool education but it does not ensure the protection of children by imposing by analogy the unconditional compulsory vaccination upon the staff of preschool establishments.

The only specific argument given in this respect in the judgment that similar conditions for entry into preschool establishments can also be found in other countries, particularly in France (Item 105), is not convincing. In particular, it ignores the fact that this obligation in France applies only to three diseases (diphtheria, tetanus, and polio), and thus it does not say anything about the rationality of the Czech regulation which requires vaccination against nine diseases. Moreover, in the context of the constitutional complaint of the complainant, this argument sounds particularly inappropriate or even absurd since the complainant has been vaccinated against these three diseases which are subject to the vaccination obligation in France and yet he has been denied admission to a kindergarten.

Overall, the above-mentioned circumstances give the impression that the decision not to admit the child to a preschool establishment is truly one of the penalties for the parents for violating the obligation to have their child vaccinated against all diseases as prescribed, as stated by the complainant and the Public Defender of Rights. Further, I assume that the majority of the Plenum which defends the constitutionality of the contested regulation by the general appropriateness of vaccination (see previous two items) agrees with that reasoning. However, as I have already justified in my dissenting opinion on the judgment, file No. Pl. ÚS 19/14, to which I refer, the current regulation of the vaccination obligation is inconsistent with the constitutional order and, therefore, also penalties for failure to comply with that must be unconstitutional.

In conclusion, therefore, by analogy to my dissenting opinion on the judgment file No. Pl. ÚS 19/14, I have to state that the majority of the Constitutional Court has approached also this petition too tied to the ongoing social

debate about the potential harmful effects of vaccination. The reasons for its decision has been based on the need to affirm the vaccination obligation as such and to emphasise the usefulness of vaccination and solidarity in the protection of public health and, therefore, has failed to assess conclusively whether the reviewed legal obligation in the form as it is now established in the current Czech legislation is rational and constitutionally conforming. I also consider solidarity in protecting the public health as a high social value but I do not think we are contributing to it as constitutional judges by turning a blind eye to the unconstitutionality of the legal regulation and not helping to improve the quality of the legal regulation, while such improvement would increase the legitimacy of the implementation of this important social value. In both vaccination cases, the Constitutional Court was not to answer the question whether the vaccination obligation is to be enshrined in the legal order or not, but how to achieve the constitutional conformity of such legal regulation. The majority has limited itself to expressing a general statement in favour of vaccination obligation without examining sufficiently the quality of all aspects of the legal regulation under consideration.

In Brno on 27 January 2015

Kateřina Šimáčková