

Maciej Macuga

Doctoral School in the Social Sciences, Jagiellonian University, Poland

e-mail: maciej.macuga@doctoral.uj.edu.pl

ORCID: 0009-0002-1916-5123

IS THE IMMUNITY PASSPORT POLICY DISCRIMINATORY?

Abstract

Immunity passports (IPs) were one of the most important policies aiming at public health protection during the COVID-19 pandemic. In the discussion regarding this policy, several ethical, legal, and philosophical objections have been raised that seem to put the legal and moral permissibility of IPs into question. One of those concerns is the main topic of the proposed analysis, namely the one that suggests that IPs have a discriminatory character. The primary purpose of the paper is to investigate, develop, and evaluate intuitions behind the mentioned concern in light of the current philosophical understanding of discrimination. These intuitions have been extracted from the general discussion on the policy in question and classified into three separate arguments: direct discrimination, indirect discrimination, and discrimination in a global perspective. The author will claim that the first argument is *prima facie* sound, with two strategies of counter-argumentation identified; the second argument is sound, although the scope of its application remains partially undetermined; and the third argument is not sound, as it does not involve a threat of discrimination.

KEYWORDS

immunity passports, COVID-19, vaccination, discrimination, ethics

SŁOWA KLUCZOWE

paszporty immunologiczne, COVID-19, szczepienia, dyskryminacja, etyka

1. INTRODUCTION

Immunity passports¹ (IPs) were one of the most important policies aiming at public health protection during the COVID-19 pandemic. Although known before the recent crisis,² their nearly global implementation after the year 2020 has led to a wide philosophical, ethical, and legal debate. Several objections to this policy have been raised that seem to put its legal and moral permissibility into question. Erosion of privacy and social solidarity as well as diminishing of personal freedom are examples of such concerns. Answering the permissibility question is of great significance not just as an ex-post evaluation of our dealing with the COVID-19 pandemic, but most importantly, due to a possibility of using this policy again in the future. This scenario recently became more feasible with the introduction of the Global Digital Health Certification Network by the WHO on 1 July 2023.³ This makes the need for addressing all the problems faced by this policy even more urgent. This paper should be seen as part of an attempt aiming at providing a robust answer to the permissibility question. I focus on contributing to the ethical and legal-philosophical discussion over IPs by investigating one of the most important concerns related to it, namely the problem of discrimination.

In the general discussion over IPs based on vaccination status, several intuitions regarding their potentially discriminatory character have been raised, which can be grouped into three separate concerns:

1) IPs are discriminatory due to limiting people's rights and freedoms on the basis of wrongful, health-related status: vaccination⁴

¹ I am using the term in a broad sense, so regardless of the source of immunity. Nevertheless, all the arguments presented in the analysis apply only to situations in which vaccines are available. Therefore, if one is dedicated to differentiating between immunity and vaccination passports, then the latter term would be suitable for this paper. Immunity certificates, vaccine certificates, COVID passports, and green passes stand for the one policy under investigation.

² Kevin Cope, Ilya Somin, Alexander Stremitzer, *Vaccine passports as a constitutional right*, Arizona State Law Journal 2022, Vol 54, 26.

³ Official website of the European Commission, <https://commission.europa.eu/strategy-and-policy/coronavirus-response/safe-covid-19-vaccines-europeans/eu-digital-covid-certificate_en> accessed 13 October 2023.

⁴ Insa Schmidt, *Immunity-based licenses and the politics of the body*, <<https://blogs.bmj.com/medical-humanities/2020/08/04/immunity-based-licenses-and-the-politics-of-the-body/>> accessed 13 October 2023.

2) IPs are discriminatory because they disadvantage the already disadvantaged in the society⁵

3) implementation of IPs in situations of unequal distribution of vaccines globally discriminates against people from countries deprived of vaccines.⁶

On the one hand, those concerns seem to carry significant moral weight that can potentially influence our attitude towards IPs. On the other hand, they are too general and vague to work as robust objections against the policy. Therefore, the main aim of the paper is to analyse those three concerns in light of the contemporary philosophical understanding of discrimination. Such an analysis can either allow us to express the full strength of the aforementioned claims or diminish them as inaccurate or misleading. Such a scrutiny in this context is called out not only by our need for establishing a robust moral evaluation of IPs, but also due to the fact that discrimination is considered to carry significant moral burden and thus should not be invoked without a solid justification. So, are IPs (truly) discriminatory? And if yes, in what way exactly?

One important remark regarding the philosophical understanding of discrimination should be made before delving into the inquiry. Namely, the current understanding of this concept in the discussion within ethics and political philosophy differs in several aspects from everyday, folk understanding. Perhaps the most far-reaching difference lies in the scope of subjects that can be discriminated against. According to the latter approach, there are no limits when it comes to who can be subjected to discrimination, as the only relevant factor is the arbitrariness of some differential, harmful treatment.⁷ Whereas the former understanding seems to limit discrimination only to unjustified acts that harm members of certain social groups.⁸ The apparent reason for such narrowing down lies in the belief that in cases of such socially visible or vulnerable groups, harmful, differentiating, unjustified acts carry certain additional harm connected to limiting the scope of potential conceptions of a good life, undermining personal integrity and self-respect, etc. This exact additional harm is considered to be a *sine qua non* condition for discrimination.

The three claims listed above will be analysed considering the current philosophical understanding of discrimination. For that purpose, one of the most influential and developed accounts of discrimination will be employed, namely the one

⁵ Alberto Giubilini, Jay Battacharya, *Crosspost: Immunity passports: a debate between Jay Bhattacharya and Alberto Giubilini*, <<http://blog.practicaethics.ox.ac.uk/2021/05/crosspost-immunity-passports-a-debate-between-jay-bhattacharya-and-alberto-giubilini/>> accessed 13 October 2023.

⁶ Khan Sharun and others, *COVID-19 vaccination passport: prospects, scientific feasibility, and ethical concerns*, *Human Vaccines & Immunotherapeutics* 2021, Vol 17, No 11, 4410.

⁷ Deborah Hellman, *When is discrimination wrong?*, Cambridge, 2011, 14–15.

⁸ That is the case for Khaitan's and Lippert-Rasmussen's theories invoked below. See also Sophia Moreau, *Faces of Inequality: A Theory of Wrongful Discrimination*, *Oxford Legal Philosophy* (Oxford, New York: Oxford University Press, 2020), 50–52.

proposed by Khaitan. I believe that it will allow to plausibly express and develop intuitions from the discussion on IPs. It seems that the first and third intuitions listed above qualify as direct discrimination and the second as indirect discrimination. I will analyse them within that framework, one by one.

2. DIRECT DISCRIMINATION BY THE IMMUNITY PASSPORT POLICY

This section of the paper aims at exploring the claim that IPs are directly discriminatory against people unwilling to vaccinate. Intuitions that stand behind that assertion focus on the wrongfulness of the basis of the division of society into the vaccinated and unvaccinated, which leads to the limitation of some significant rights or freedoms of the latter group. Such a view implies that direct discrimination is somehow inherent to the very idea of IPs, as the mentioned limitations are the most prominent means of achieving the purpose of this policy: the protection of public health. The most important concern here is that vaccination status should not be used as a basis for limitations of some fundamental freedoms and rights. This view suggests that IPs are directly discriminatory.

As mentioned earlier, I would like to analyse and develop this intuition in light of an account of discrimination proposed by Khaitan. In order for an act to be seen as wrongfully directly discriminatory in his view, the following conditions must be met:⁹

An action φ by a duty-bearer x is/will be paradigmatically discriminatory if and only if,

- (i) φ has/will have a non-remote adverse effect ε on a set of person(s) V (the adverse effect clause); and*
- (ii) V is/will be constituted entirely or disproportionately by persons who are (or are perceived to be or are closely associated with) members of a protected group P (the group membership clause); and*
- (iii) there is a correlation between a person's membership of V and her (actual or perceived, or her associate's) membership of P (the correlation clause); and*

⁹ According to Khaitan, these conditions are necessary and jointly sufficient. In my view, such a solution is not comprehensive enough. It is useful to distinguish two levels of justification: level of wrongfulness and all-things-considered justification. This would allow to differentiate between instances of unjustified, wrongful, direct discrimination (e.g., not hiring a person because of her gender) and instances of wrongful direct discrimination that is nevertheless all-things-considered justified (e.g., not equipping a building with a ramp for people in wheelchairs due to costs being too high). This is a technical detail that will be relevant later.

(iv) *φ-ing lacks adequate justification (the justification clause).*¹⁰

I will discuss them one by one.

The first condition accounts for harm done by a potentially discriminatory act. In the case of IPs, this issue is not controversial. Limitations of some fundamental rights and freedoms, such as the right to work or the right to education, as well as limitations of access to certain places such as theatres, bars, restaurants, gyms, museums, or public transportation, are indeed harmful in our social reality. We can morally account for it by using, for example, notions of denial of basic goods¹¹ or deprivation of valuable life opportunities. Hence, the first condition for direct discrimination is met.

The second condition aims at grasping the intuition introduced before, namely that only members of certain social groups can be subjected to discrimination (i.e., ‘protected groups’, in Khaitan’s terminology). In this view, members of a protected group¹² are those who are ‘significantly more likely to suffer abiding, pervasive, and substantial disadvantage than the members of at least one other cognate group’.¹³ Cognate and protected groups must share the so-called protected ground (e.g., men – cognate group, women – protected group, gender – ground).¹⁴ That characteristic is needed for comparative reasons – the risk of disadvantage that members of the protected groups face is relative to their cognates. In the case of IPs, the ground of differentiation is the vaccination status: the cognate group consists of vaccinated people and the protected group (in question) consists of people unwilling to take vaccines.¹⁵ Taking this into account, the following question arises: are those people disadvantaged in comparison to the vaccinated? The risk of disadvantage must exist prior to the potential act of discrimination. This allows anti-discriminatory norms to protect those who are in some significant aspects less privileged in the society. This approach could be problematic in cases of acts that are extremely harmful to a group that was not socially vulnerable in the past.¹⁶ However, it is not necessary to pursue this

¹⁰ Tarunabh Khaitan, *A theory of discrimination law*, Oxford 2015, 245.

¹¹ Sophia Morreau, *Faces of inequality: A theory of wrongful discrimination*, New York 2020, 121–131.

¹² The term ‘group’ is not used by Khaitan in a sociological or deeper philosophical sense. Perhaps a more accurate term would be ‘set’ as its members need not to have any bonds with each other or even be aware that they belong to it.

¹³ *ibid*, 31.

¹⁴ *ibid*, 118–119.

¹⁵ This term does not cover people unable to take vaccines for medical reasons as usually they are granted exemptions from vaccination policies, which seems morally justified. An important issue relates to the question of religious beliefs. Unfortunately, I am not able to pursue this subject in detail here. For simplicity’s sake, I am assuming that the term in question covers only non-religious beliefs that lead to refusal of vaccination.

¹⁶ My worry here concerns the following problem. If, according to philosophical conceptions of discrimination, only socially vulnerable groups can be discriminated against, then an act that causes a group to <become> socially vulnerable cannot be regarded as discriminatory.

issue here because it can be plausibly argued that people unwilling to take the vaccine actually can be considered a protected group independently from official, state-governed IP policy. There is one strong reason that supports this claim: the social ostracism and exclusion that vaccine sceptics have been facing in everyday social life, as well as in the media and political debate,^{17,18} including humiliating or even dehumanising expressions, especially during the COVID-19 pandemic. Social ostracism is undoubtedly disadvantageous, as it is capable of limiting life perspectives and undermining self-respect.

There is another important feature of membership in a protected group that should not be omitted here, especially concerning the fact that it relates to significant folk intuitions regarding discrimination that play a role in the discussion over IPs as well. I am referring to the problem of immutability. The current philosophical understanding of discrimination rejects the belief that only grounds that are not a matter of choice can be seen as a basis for discrimination, but such a view is deemed to face some fundamental problems.¹⁹ According to Khaitan, characteristics that constitute a fundamental (subjectively important to the well-being of an individual) choice are suitable for anti-discriminatory protection. However, this issue is rather clear in our case. Remaining unvaccinated became a matter of personal integrity for some people. Those are the ‘people unwilling to take the vaccine’ in the strict sense that interests me in this paragraph. All the above insights make me believe that they indeed constitute a protected group and, in consequence, the second condition for direct discrimination is met.

Additionally, it should be noted that Khaitan’s understanding of groups that can be subjected to discrimination is very strict and narrow. There are other accounts available which would treat vaccine sceptics as suitable for anti-discrimination protection even more straightforwardly. A good example of such an account is another well-established in the current debate, the one proposed by Lippert-Rasmussen. In his view, members of socially salient groups can be subjected to discrimination, and the notion of social saliency indeed covers a greater number of social groups in general. Lippert-Rasmussen claims that ‘a group is socially salient if the perceived membership of it is important to the structure of social interactions across a wide range of social contexts’.²⁰ Presence in political and media debate mentioned earlier along with protests, political and civil membership, and association, amongst other things, make the idea that vaccine

¹⁷ Maja Graso and others, *Blaming the unvaccinated during the COVID-19 pandemic: the roles of political ideology and risk perceptions in the USA*, *Journal of Medical Ethics* 2023, 1–2.

¹⁸ Alexander Bor, Frederik Jørgensen, Michael B Petersen, *Discriminatory attitudes against unvaccinated people during the pandemic*, *Nature* 2023, Vol 613, No 7945, 707–708.

¹⁹ Patrick S Shin, *Is there a unitary concept of discrimination?* in Deborah Hellman, Sophia Moreau (eds), *Philosophical foundations of discrimination law*, Philosophical Foundations of Law, Oxford 2013, 163–181, 168–169.

²⁰ Kasper Lippert-Rasmussen, *Born free and equal? a philosophical inquiry into the nature of discrimination*, Oxford; New York 2014, 30.

sceptics constitute a socially salient group uncontroversial. Lippert-Rasmussen's conception provides a further argument that people unwilling to take the vaccine can be subjected to discrimination in the current philosophical understanding of this concept.

The next condition: the correlation clause aims at grasping the idea that some people get harmed by the potentially discriminatory act due to their membership in a protected group. In the context of IPs, such a correlation is clear. The fact that some of the rights and freedoms of the vaccine sceptics are limited is precisely the point of the policy in question. Those limitations of rights and freedoms of precisely this group are the most prominent means to achieve the goal of IPs – the protection of public health – which meets the third condition for discrimination.

Finally, the justification clause. Wrongful acts of direct discrimination can be all-things-considered justified if good reasons support exercising them. In the context of IPs, a need for the protection of public health (especially in situations of a grave threat to this value, such as the COVID-19 pandemic) provides such a justificatory reason. At first glance, it appears to be a plausible justification; however, I believe that it is not as unproblematic as it seems. There are two basic reasons to be worried about the justification referring to public health benefits.²¹ The first is that vaccines used against COVID-19 failed at reducing transmission of the virus,^{22,23} and this reduction would be perhaps the most plausible means of public health protection by IPs. The second reason concerns the fact that a justification of a discriminatory act cannot be regarded as valid if there are other comparably efficient alternatives for achieving the same end. Recall that during the COVID-19 pandemic, two features correlated with death and severe illness the most: serious health problems such as cancer and, most importantly, age.^{24,25} As a result, health and age can be considered plausible alternatives for vaccination status as a basis for IPs. Exclusion of those statuses from the policy in question by a proponent of relying solely on vaccination status is problematic not only for pragmatic but also for moral reasons, since elderly people and people suffer-

²¹ Those two reasons are extracted from an ongoing paper by Wojciech Ciszewski, where problems with plausible justification of IP policy are elaborated in a much more sophisticated and detailed manner. I will update the reference once the paper is published.

²² Aran Singanayagam and others, *Community transmission and viral load kinetics of the SARS-CoV-2 delta (B.1.617.2) variant in vaccinated and unvaccinated individuals in the UK: a prospective, longitudinal, cohort study*, *The Lancet Infectious Diseases* 2022, Vol 22, No 2, 192–194.

²³ Annelise Wilder-Smith, *What is the vaccine effect on reducing transmission in the context of the SARS-CoV-2 delta variant?*, *The Lancet Infectious Diseases* 2022, Vol 22, No 2, 152–153.

²⁴ John PA Ioannidis, *Infection fatality rate of COVID-19 inferred from seroprevalence data*, *Bulletin of the World Health Organization* 2021, Vol 99, No 1, 24–28.

²⁵ Fang Wang and others, *Epidemiological characteristics of patients with severe COVID-19 infection in Wuhan, China: evidence from a retrospective observational study*, *International Journal of Epidemiology* 2021, Vol 49, No 6, 1947–1950.

ing from serious health problems share the same status within the philosophical framework of discrimination: they are protected (or salient, for that matter) groups. Interestingly, Bardosh and others argued that when it comes to younger people, benefits from booster doses of COVID-19 vaccines are outweighed by health risks that the vaccine poses.²⁶ Those constraints make me believe that it can be quite plausibly argued that IP policy lacks an adequate justification (or at least it lacked that justification during the COVID-19 pandemic), and thus the final condition for discrimination is met.

I have tried to present a way of arguing that in light of at least one strict and important philosophical account of discrimination, IPs can be seen as directly wrongfully discriminatory. However, it should be noted that this statement does not conclude the discussion. There are at least two promising ways of counter-arguing. The first is to point at the inadequacy of the understanding of protected and salient social groups. Reliance on a non-evaluative, subjective notion of fundamental choice (which is assumed by Khaitan's account) leads to serious over-inclusiveness, as it covers groups that we would intuitively deny being a target for anti-discrimination protection. Illegal race drivers are a suitable example of such a group. This strategy, if successful, supports a conclusion that IPs are not directly discriminatory against vaccine sceptics. However, such a counter-argumentation involves engaging in a deep philosophical disagreement with the most established accounts of discrimination, and such a move is far beyond the scope of this analysis. The second strategy rejects the claim regarding the lack of an adequate justification for the IP policy. Perhaps there are moral reasons (other than the status of a socially vulnerable group) to exclude elderly people and people with serious health problems from the basic target of the policy. As a result, vaccination status could be seen as more suitable than alternatives (health, age), and that resolves the issue of lack of a justification. Alternatively, one might point at other (than the protection of health of others by reducing transmission of the virus) ways in which IPs protect public health. Likely, benefits to the vaccinated or to the health care system would be the most promising candidates in this context. However, neither of those is without problems. The former would render IPs paternalistic, and due to that morally controversial.²⁷ The latter seems to be more appealing in a strict situation of risk of overburdening the health care system. Nevertheless, this strategy acknowledges the wrongfulness of direct discrimination by IPs. Consequently, in order to assess the all-things-considered justification, this wrong should be combined with every other valid objection to IPs before giving an ultimate answer to the permissibility question, since considering wrongs caused by IPs individually as outweighed by the same reason (protection of public health)

²⁶ Kevin Bardosh and others, *COVID-19 vaccine boosters for young adults: a risk benefit assessment and ethical analysis of mandate policies at universities*, *Journal of Medical Ethics* 2022, 7–11.

²⁷ Jessica Flanigan, *Public Bioethics*, *Public Health Ethics* 6, No 2, 2013, 170–84.

is sloppy avoidance of the problem, rather than facing it. To be more precise, the ultimate assessment of IPs justification should consist of weighing gains in terms of public health on one scale and ‘costs’ related to interference with rights, freedoms, and other values (such as the right to privacy or autonomy, equality etc.) *combined* on the other.

I leave the issue of counter-argumentation here. For the purposes of this paper, it is enough to state that in light of the current philosophical understanding of discrimination, an argument according to which IPs are wrongfully directly discriminatory can be *prima facie* plausibly raised. What is more, I believe that using the proposed framework to account for the intuitions that accuse IPs of a discriminatory character makes these intuitions more plausible and robust, causing an even more serious challenge for adherents to the policy based on vaccination status. The final verdict on the soundness of the whole argument remains open.

3. INDIRECT DISCRIMINATION BY THE IMMUNITY PASSPORT POLICY

Another serious concern is the possibility of IPs being discriminatory in an indirect sense. Before I go into the details, it is worth disambiguating the idea behind this concept. First and foremost, regarding indirect discrimination as an acknowledgeable moral offense forces us to account for unintended consequences of our acts. It is generally conceived that members of socially vulnerable groups are suitable for protection even in cases of actions that do not target them exclusively. The exact way in which the current philosophical understanding of discrimination allows for that should become clear promptly.

In Khaitan’s account, almost all the above-mentioned conditions remain intact in relation to indirect discrimination. Therefore, also in this context, we should focus on unjustified, harmful acts against members of a protected group. The fundamental difference is that correlation clause is replaced with a condition of ‘disproportionate impact’, which essentially means that members of a protected group must be disproportionately represented among persons harmed by an act in comparison to other relevant social groups.²⁸ This constitutes the essence of indirect discrimination: the harm is not caused due to membership in a protected group, but members of a protected group bear it disproportionately.²⁹

²⁸ Tarunabh Khaitan, *A theory of discrimination law*, *op. cit.*, 156–157.

²⁹ The disproportionality is understood quantitatively here. In a sense that members of a protected group are overrepresented in the group unwilling to vaccinate (and thus suffer from the harms caused by IPs) given the proportion of this group in the society.

There are a few additional remarks that need to be made before getting into analysis of whether IPs are discriminatory in this sense. Firstly, indirect discrimination is considered to carry less moral wrongness in comparison to direct discrimination, and because of that the threshold of justification is lower in this case.³⁰ In other words, it is easier to justify the former than the latter. Secondly, indirect discrimination faces an epistemic problem in regard to determining the relevant scope of people for comparison (in comparison to whom must the impact on a protected group be disproportionate?).³¹ An example analysed by Khaitan in this context might be helpful to understand the concern. He considers a specific situation in a workplace:

Let us say that a company x decides to give a one-off bonus pay to every employee who has worked for it for more than 15 continuous years. There are two criteria for eligibility for the bonus: (i) the person must be an employee of x ; and (ii) he or she should have worked for x for a continuous period of more than 15 years.

The rule that is under challenge as potentially indirectly discriminatory is (ii). Under the Mustill formula, the relevant pool consists of everyone who satisfies (i), ie all the employees of x . Say the total number of employees who work for x are 150, and the total number of women in this group are 40. It is this pool against which those adversely affected need to be compared. Let us assume further that the adversely affected set V , ie employees who have not worked for 15 continuous years with this employer, contains 100 employees, of whom 35 are women. It turns out that the ratio of the number of women adversely affected to the number of women in the relevant pool is 35:40. Compare this to the ratio of men adversely affected to the total number of men in the relevant pool, which is 45:110. It turns out that 87.5 per cent of all women who could have been adversely affected were so affected, whereas the same number for men was 49.1 per cent. Even a rule of thumb analysis will suffice to conclude that women disproportionately constitute the adversely affected group V in this example.³²

As Khaitan suggests, the above case was simple with regard to the determination of a relevant set of people for comparison – only employees were considered. Nonetheless, a slight change in the policy, from internal to external, such as hiring, can easily highlight the problem with such a determination. In the situation of hiring policy, a potential set of people is practically infinite, and because of that, estimating the disproportionality of impact can be problematic. Khaitan suggests that in light of that issue, determination of the disproportionality of impact should work as a rule of thumb rather than an excuse in the absence of strict statistical evidence.³³ This problem will arise in the context of IPs, so I will return to it shortly.

³⁰ *ibid*, 75–76

³¹ *ibid*, 157–159.

³² *ibid*, 157–158.

³³ *ibid*, 159.

An argument according to which IPs are indirectly discriminatory against members of some protected groups can be stated as follows:

P1) In some societies, members of certain protected groups have lower vaccine uptake than the rest of the society.

P2) Implementation of IPs in such societies bears a disproportionate impact on members of those protected groups, as more of them suffer from limitations of rights and freedoms in comparison to the rest of the society.

C1) In cases of such societies, IPs are indirectly discriminatory towards members of those protected groups.

Premise 1 is the core of the concern. It relies on an empirical basis. During the COVID-19 pandemic, several studies indicated that members of certain minority groups (racial, ethnic, etc.) are more reluctant towards vaccination policy than the majority of the society. Adequate examples are Roma people in Europe, especially in countries such as North Macedonia, Slovakia, or Hungary,³⁴ or black people in the UK.³⁵ It is important to highlight that in the case of such groups, lower vaccine uptake is not caused by a simple negative attitude towards vaccination as might be suggested by the stereotype of a vaccine sceptic. Rather, origins of this problem are extremely complex, but two (not exclusionary) categories of causes seem particularly important. The first one is connected to deficient access to health care in general (including vaccination), which makes members of certain protected groups unable to receive vaccines, and the case of Roma people illustrates that mechanism directly.³⁶ The second category of causes concerns the general position of those groups within a given society that involves social exclusion or even systemic racism. Circumstances like those result in a general distrust that members of relevant protected groups have towards States or governments.³⁷ Such a distrust leads to reluctance towards State policies, including vaccination policy. In my opinion, the fact that such minorities constitute protected groups as understood within Khaitan's framework is uncontroversial.

³⁴ Ed Holt, *COVID-19 vaccination among Roma populations in Europe*, *The Lancet Microbe* 2021, Vol 2, No 7, 289.

³⁵ Alexandre de Figueiredo, Heidi J. Larson, Stephen D. Reicher, *The potential impact of vaccine passports on inclination to accept COVID-19 vaccinations in the United Kingdom: Evidence from a large cross-sectional survey and modeling study*, *EclinicalMedicine* 2021, Vol 40, 8–9.

³⁶ Report by Neda Korunovska and Zeljko Jovanovic (Open Society Roma Initiatives Office), *Roma in the Covid-19 crisis*, <<https://reliefweb.int/report/italy/roma-covid-19-crisis-early-warning-six-eu-member-states>> accessed 17 October 2023.

³⁷ Gabriela Arguedas-Ramírez, *Build that wall! Vaccine certificates, passes and passports, the distribution of harms and decolonial global health justice*, *Journal of Global Ethics* 2021, Vol 17, No 3, 382–383.

Premise 2 involves an element of philosophical understanding of indirect discrimination introduced at the beginning of this second paragraph. The key idea behind this premise is that the implementation of IPs in situations of lower (sometimes significantly) vaccine uptake by members of certain protected groups leads to a disproportionate impact of the policy on those people. At this point, the issue regarding determination of a relevant group for diagnostic and comparative purposes arises. As far as I can see, there are at least two strategies for addressing this challenge in the context of IPs.

The first strategy – bottom-up – starts with two categories of causes mentioned in the analysis of the previous premise, in particular, the second one. Generally, the idea here is that in societies in which there are minorities subjected to systemic racism and social exclusion, we can expect distrust, causing a lower vaccine uptake. A trait that is constitutive for a given protected group (race, ethnicity, religion, etc.) provides in that context a basis for determination of a group relevant for comparative purposes. Thus, the cognate group is easily identifiable. Presumably, it would be the majoritarian group within a given society. The bottom-up strategy operates in this context as a rule of thumb for revealing indirect discrimination by IPs, in line with Khaitan's suggestion. Its biggest flaw is typical for every rule of that kind: the probability of making a mistake.

The second strategy – top-down – relies on statistical evidence. As mentioned above, studies from some parts of Europe, the UK, and the US suggest that vaccine uptake is being investigated on racial or ethnic grounds. In case of detection of a disproportion in vaccine uptake between protected groups and the rest of the society, the conclusion of IPs being indirectly discriminatory is valid. The question on its justification is another matter; I will return to it shortly. An important flaw of this strategy concerns a concern that there might be cases of disproportionate impact that would go undetected for contingent reasons, such as State's unwillingness to address the problem. This is why I believe that both strategies should be regarded as complementary.

The final piece of the argument is the conclusion (C1). As I mentioned at the beginning of the second section, indirect discrimination is considered to have a lower threshold of justification, meaning that weaker (in comparison to the direct variant) arguments are sufficient to reject the lack of the justification condition. This suggests that the need for the protection of public health (even if problematic, as I suggested in analysing the case of direct discrimination) all things considered outbalances a moral burden of indirect discrimination towards some protected groups. However, even if that is the case, it does not eliminate the moral wrong done to members of those groups. This is where the differentiation between levels of justification mentioned earlier becomes helpful. I believe that the presented argumentation supports a conclusion that IPs can be wrongfully indirectly discriminatory against members of some protected groups, even if such a discrimination is acceptable, all things considered. If that is the case, then the

whole argument is valid, and indirect discrimination becomes a cost of the IPs that should be added to the scale weighed against the protection of public health. Fortunately, there are promising non-coercive measures that a State can implement in order to cope with the discriminatory effect, such as vaccine ambassadors or motivational interviewing.³⁸

To sum up the argument, IPs (at least in some societies) are wrongfully indirectly discriminatory towards certain protected groups, such as racial or ethnic minorities. That is the case despite (arguably) the policy being all-things-considered justified. That is why I believe that the argument is sound and it certainly carries moral weight that should be taken into consideration in weighing values in the context of the permissibility question.

4. DISCRIMINATION BY THE IMMUNITY PASSPORT POLICY IN A GLOBAL PERSPECTIVE

The two previous arguments considered potential discrimination by IPs as an internal matter of a society. The final concern exceeds State boundaries and focuses on the policy from a global point of view. This issue is strictly connected to a situation that occurred during the COVID-19 pandemic, namely the extremely unequal distribution of vaccination around the world. Generally, countries privileged in terms of wealth and greater political power were able to take over the majority of vaccine doses, depriving the less wealthy populations of supplies.³⁹ As Kazemi and others put it: ‘COVID-19 vaccine allocation, distribution, and deployment are significantly uneven with around 95% of the total doses being administered to only 20% of the global population’.⁴⁰ Despite being unjust, that situation had no rationale regarding achieving global herd immunity – wealthy countries started to vaccinate their entire societies, while critical groups such as health care personnel or high-risk groups in less wealthy countries lacked vaccine

³⁸ Examples of the mentioned and more non-coercive strategies of increasing vaccine uptake can be found on the official website of the Centers for Disease Control and Prevention (US federal agency), <<https://www.cdc.gov/vaccines/covid-19/vaccinate-with-confidence/community.html>> accessed 20 October 2023.

³⁹ Sharifah Sekalala and others, *Decolonising human rights: how intellectual property laws result in unequal access to the COVID-19 vaccine*, *BMJ Global Health* 2021, Vol 6, No 7, 4.

⁴⁰ Mehrdad Kazemi, Nicola L Bragazzi, Jude D Kong, *Assessing inequities in COVID-19 vaccine roll-out strategy programs: a cross-country study using a machine learning approach*, *Vaccines* 2022, Vol 10, No 2, 8.

supplies.^{41,42} One of the causes for this situation in the discussion is called vaccine nationalism, which refers to treating vaccines as a national security asset that is supposed to be gained, no matter the cost.⁴³

Undoubtedly, the problem of unequal distribution of vaccines globally is of great complexity and its full exploration exceeds the scope of this article. For that reason, I am focusing on a single aspect of this issue, namely the potentially discriminatory character of closing borders by wealthy countries for people from countries deprived of vaccines. I propose to introduce this problem in the following manner:

P1) Implementation of IPs often leads to closing borders to non-immune travellers from abroad.

P2) Unequal distribution of vaccines globally results in people from less wealthy countries being deprived of entry to wealthy countries.

P3) Such a deprivation is wrongful.

C1) IPs implemented by ‘vaccinated countries’ are discriminatory against people from countries deprived of vaccines.

Premises 1 and 2 are connected to the situation of unequal global distribution of vaccines that I have discussed at the beginning of the section. There are no significant variables that would require additions to the argumentation presented in the previous parts. The fact that IPs lead to closing borders for non-immune people is almost self-evident, as it was one of the main areas of the application of this policy.⁴⁴

Premise 3 requires elaboration. It is worth underlining that international travels are not only a matter of tourism. Deprivation of the possibility of participating in trips for entertainment purposes would not be harmful enough to carry a discriminatory claim. Precisely for that reason, the analysis narrows down to the people who are deprived of fulfilling more essential needs. A great example of such a group is economic immigrants or seasonal workers for whom travelling abroad is a means of ensuring economic survival for themselves and their families.⁴⁵ People escaping from war-torn areas or under threat of terrorism are

⁴¹ Moosa and others, *COVID-19 vaccine inequality: A global perspective*, Journal of Global Health 2022, Vol 12, 3.

⁴² Håvard T Rydland and others, *The radically unequal distribution of Covid-19 vaccinations: a predictable yet avoidable symptom of the fundamental causes of inequality*, Humanities and Social Sciences Communications 2022, Vol 9, No 1, 3.

⁴³ Binoy Kampmark, Petar Kurečić, *Vaccine nationalism: Competition, EU parochialism, and COVID-19*, Journal of Global Faultlines 2022, Vol 9, No 1, 9–10.

⁴⁴ Binhua Wang, Yuan Ping, *A comparative analysis of COVID-19 vaccination certificates in 12 countries/regions around the world: Rationalising health policies for international travel and domestic social activities during the pandemic*, Health Policy 2022, Vol 126, No 8, 755.

⁴⁵ Els Torreele, Josph J Amon, *Equitable COVID-19 vaccine access*, Health Human Rights, 2021, Vol 23, No 1, 273–288, 284.

another suitable example. To properly set the group in question, I propose two necessary and jointly sufficient conditions that their members must meet in order to be relevant for my analysis:

- a) being from a country that does not provide an opportunity of vaccination,
- b) international travelling being important for meeting their essential needs, such as economic survival or personal safety.

I am aware that both conditions are to some degree underspecified; however, I believe that they are sufficient to plausibly grasp the intuitions behind this concern. For simplicity's sake, I will call this group vulnerable international travellers (VITs). The most important thing is that in their case, the harm done by implementation of IPs is clear. Again, the example of reliance on the denial of basic goods or valuable life opportunities would serve the purpose well.

Now, let us place this argument within Khaitan's discriminatory framework. As argued above, VITs suffer harm as a result of IP policies introduced by high-income countries, and thus the first condition is met. The second condition, the group membership clause, is more problematic. The important question in that context is the following: are VITs a protected group according to Khaitan's conception? Recall the cognate groups and relative disadvantage elements of the definition of a protected group. I believe both cause serious problems for conceiving the case in question as an instance of discrimination. I cannot see any plausible way of extracting a universal ground from VITs. This makes it impossible to define a cognate group that is needed for comparative reasons in the latter condition. As it might seem too artificial, let me try to put this intuition in a more general manner: compared to what other groups must VITs be more socially vulnerable? Other members of the societies that they travel from, or societies that they travel to? Both answers seem highly counterintuitive. Perhaps the only way of escaping those difficulties would be to refer to other, less strict notions of groups that potentially can be discriminated against, such as Lippert-Rasmussen's salient groups. Even though seeing VITs as a group in which the 'perceived membership of it is important to the structure of social interactions across a wide range of social contexts'⁴⁶ is more promising in our context, I can see one final concern about this argument that remains unanswered regardless of which philosophical account of discrimination we apply. I will discuss it briefly.

The main question regarding this variant of the discrimination charge concerns the scope of anti-discriminatory moral duties of a State. To put it more precisely, I believe that it is difficult to implement a State's duty not to discriminate towards the people who are outside of its jurisdiction. Rejection of this claim could lead to extreme overestimation of cases of wrongful discrimination. Probably every social transfer could be seen as indirectly discriminatory against members of protected groups in the rest of the world. Such a move could also lead to

⁴⁶ Kasper Lippert-Rasmussen, *Born free and equal?*, *op. cit.*, 30.

other problems, especially concerning identification of the protected groups. For instance, imagine that in one State X there is a religious minority that meets the conditions of a protected group. However, in the rest of the world, this group is a well-off and privileged majority. In such a case, it seems that a harmful act by X's government directed towards the minority would not be discriminatory as the group would not be a protected group globally speaking. Making the case of closed borders all-things-considered justified is of no help here as it is so counterintuitive to even consider it as a case of discrimination. For these reasons, implementation of IPs that leads to closing borders for non-immune travellers cannot be deemed discriminatory, at least not under the theories of discrimination invoked here. These theories seem to be suitable for conceptualizing discrimination within a given society but not discrimination that exceeds State's borders; discrimination between nation states. C1 does not follow from P1, P2, and P3. However, such a conclusion certainly does not diminish the wrong done by closed borders and unequal distribution of vaccines in general (regardless of the issue of discrimination).

5. SUMMARY

In this article, I have analysed three claims according to which IPs are discriminatory. The main goal was to investigate whether the current philosophical understanding of discrimination is capable of grasping some intuitions behind those claims. Such a goal, despite being set quite modestly, can help to disambiguate important problems in the discussion concerning this policy in general. Firstly, it can strengthen the mentioned intuitions and make them more explicit, which is needed to explore their potential fully. Secondly, it can assure that discriminatory claims are not used recklessly. Thirdly, it allows to precisely locate the loci of disagreement, which is extremely important given the complexity of the discussion over the policy. Finally, I strongly believe that it brings us closer to reaching a robust answer to the permissibility question mentioned at the beginning.

In the first part of the paper, I have analysed a claim according to which IPs are inherently discriminatory towards people unwilling to take the vaccines in light of the philosophical framework of direct discrimination. I have argued that employing Khaitan's account allows to develop those intuitions into a full-fledged argument. *Prima facie*, it seems that the current philosophical understanding of discrimination confirms the discriminatory character of the policy. However, I have identified at least two possible ways of counter-argumentation. The first concerns the problem of over-inclusiveness of the notion of groups that potentially can be discriminated against (protected, salient, and so on), and the

second refers to the level of all-things-considered justification. I believe that both of those strategies are promising and, therefore, the final verdict on the soundness of the argument remains an open question.

The second part of the paper concerned a claim that certain socially vulnerable groups suffer more from the implementation of IPs than the majority of society. I have tried to show that we can make the best sense of this intuition by framing it as a philosophical concept of indirect discrimination. This framing enables us to see, as I have argued, that IPs are indeed indirectly discriminatory towards members of certain protected groups, including racial or ethnic minorities. Therefore, this argument is valid and should bring rigorous moral concern into the consideration of usage of the policy in the future.

In the third part of the paper, I have analysed a claim according to which closing State borders for non-immune people can be seen as an instance of discrimination against people from countries deprived of vaccines. I have argued that the philosophical understanding of discrimination cannot account for it due to the problem with widening the scope of a State's duty not to discriminate against people outside of its jurisdiction. However, it should be clear that this claim certainly should not lead to a conclusion that unequal distribution of vaccines globally is morally irrelevant. Quite the contrary. People from countries deprived of vaccines are wronged. I just tried to demonstrate that the philosophical framework of discrimination is not the proper way of conceptualising that wrong.

To sum up, can IPs be seen as discriminatory? Yes, at least indirectly, and in some societies. Does it make the policy universally morally impermissible? I believe it does not, keeping in mind that there are promising ways of diminishing the discriminatory effect. Nevertheless, discrimination certainly cannot be ignored while weighing concerns in regards to this policy against all the positives that it can bring about. That I am certain of. Hopefully, this brings us just a little bit closer to establishing a thorough answer to the permissibility question.

Funding: National Science Centre Poland: Preludium BIS research Grant Reg. No [2021/43/O/HS5/03274]; Principal Investigator: dr hab. Wojciech Ciszewski.

REFERENCES

- Arguedas-Ramírez G, *Build that wall! Vaccine certificates, passes and passports, the distribution of harms and decolonial global health justice*, Journal of Global Ethics 2021, Vol 17, No 3, 375–387

- Bardosh K and others, *COVID-19 vaccine boosters for young adults: a risk benefit assessment and ethical analysis of mandate policies at universities*, *Journal of Medical Ethics* 2022, 1–13
- Bor A, Jørgensen F, Petersen MB, *Discriminatory attitudes against unvaccinated people during the pandemic*, *Nature* 2023, Vol 613, No 7945, 704–711
- Centers for Disease Control and Prevention (US federal agency), <<https://www.cdc.gov/vaccines/covid-19/vaccinate-with-confidence/community.html>> accessed 20 October 2023
- Cope KL, Somin I, Stremitzer A, *Vaccine passports as a constitutional right*, *Arizona State Law Journal* 2022, Vol 54, 25–102
- De Figueiredo A, Larson HJ, Reicher SD, *The potential impact of vaccine passports on inclination to accept COVID-19 vaccinations in the United Kingdom: Evidence from a large cross-sectional survey and modeling study*, *EClinicalMedicine* 2021, Vol 40, 1–10
- European Commission, <https://commission.europa.eu/strategy-and-policy/coronavirus-response/safe-covid-19-vaccines-europeans/eu-digital-covid-certificate_en> accessed 13 October 2023
- Flanigan J, *Public Bioethics*, *Public Health Ethics* 6, No 2 (1 July 2013), 170–84
- Graso M, Aquino K, Chen FX, Bardosh K, *Blaming the unvaccinated during the COVID-19 pandemic: the roles of political ideology and risk perceptions in the USA*, *Journal of Medical Ethics* 2023, 1–7
- Guibilini A, Battacharya J, *Crosspost: immunity passports: a debate between Jay Bhattacharya and Alberto Giubilini*, <<http://blog.practicaethics.ox.ac.uk/2021/05/crosspost-immunity-passports-a-debate-between-jay-bhattacharya-and-alberto-giubilini/>> accessed 13 October 2023
- Hellman D, *When is discrimination wrong?*, Cambridge 2011
- Holt E, *COVID-19 vaccination among Roma populations in Europe*, *The Lancet Microbe* 2021, Vol 2, No 7, 289
- Ioannidis JPA, *Infection fatality rate of COVID-19 inferred from seroprevalence data*, *Bulletin of the World Health Organization* 2021, Vol 99, No 1, 19–33F
- Kampmark B, Kurečić P, *Vaccine nationalism: Competition, EU parochialism, and COVID-19*, *Journal of Global Faultlines* 2022, Vol 9, No 1, 9–20
- Kazemi M, Bragazzi NL, Kong JD, *Assessing inequities in COVID-19 vaccine roll-out strategy programs: a cross-country study using a machine learning approach*, *Vaccines* 2022, Vol 10, No 2, 1–13
- Khaitan T, *A theory of discrimination law*, Oxford 2015
- Lippert-Rasmussen K, *Born free and equal? a philosophical inquiry into the nature of discrimination*, Oxford; New York 2014
- Moreau S, *Faces of inequality: A theory of wrongful discrimination*, New York 2020
- Report by Korunovska N and Jovanovic Z (Open Society Roma Initiatives Office), *Roma in the Covid-19 crisis*, <<https://reliefweb.int/report/italy/roma-covid-19-crisis-early-warning-six-eu-member-states>> accessed 17 October 2023
- Rydland HT and others, *The radically unequal distribution of Covid-19 vaccinations: a predictable yet avoidable symptom of the fundamental causes of inequality*, *Humanities and Social Sciences Communications* 2022, Vol 9, No 1, 1–6

- Sekalala S and others, *Decolonising human rights: how intellectual property laws result in unequal access to the COVID-19 vaccine*, *BMJ Global Health* 2021, Vol 6, No 7, 1–9
- Sharun K and others, *COVID-19 vaccination passport: prospects, scientific feasibility, and ethical concerns*, *Human Vaccines & Immunotherapeutics* 2021, Vol 17, No 11, 4108–4111
- Shin PS, *Is there a unitary concept of discrimination?* in Hellman D, Moreau S (eds), *Philosophical foundations of discrimination law*, *Philosophical Foundations of Law*, Oxford 2013, 163–181
- Singanayagam A and others, *Community transmission and viral load kinetics of the SARS-CoV-2 delta (B.1.617.2) variant in vaccinated and unvaccinated individuals in the UK: a prospective, longitudinal, cohort study*, *The Lancet Infectious Diseases* 2022, Vol 22, No 2, 183–195
- Schmidt I, *Immunity-based licenses and the politics of the body*, <<https://blogs.bmj.com/medical-humanities/2020/08/04/immunity-based-licenses-and-the-politics-of-the-body/>> accessed 13 October 2023
- Tatar M and others, *COVID-19 vaccine inequality: A global perspective*, *Journal of Global Health* 2022, Vol 12, 1–4
- Torrelee E, Amon JJ, *Equitable COVID-19 vaccine access*, *Health Human Rights*, 2021, Vol 23, No 1, 273–288
- Wang B, Ping Y, *A comparative analysis of COVID-19 vaccination certificates in 12 countries/regions around the world: Rationalising health policies for international travel and domestic social activities during the pandemic*, *Health Policy* 2022, Vol 126, No 8, 755–762
- Wang F and others, *Epidemiological characteristics of patients with severe COVID-19 infection in Wuhan, China: evidence from a retrospective observational study*, *International Journal of Epidemiology* 2021, Vol 49, No 6, 1940–1950
- Wilder-Smith A, *What is the vaccine effect on reducing transmission in the context of the SARS-CoV-2 delta variant?*, *The Lancet Infectious Diseases* 2022, Vol 22, No 2, 152–153