

COVID-19 Compulsory Vaccination and the European Court of Human Rights

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Abstract. Between August and September 2021, the European Court of Human Rights rejected three requests for interim measures against France and Greece's compulsory vaccination statutes against COVID-19. Due to the procedural nature of the interim measures, however, the status of vaccine mandates against SARS-CoV-2 under the European Convention of Human Rights has not been addressed. The paper argues that COVID-19 compulsory vaccination is consistent with both the text and the original understanding of Article 8 of the Convention. Moreover, considering pertinent case law on medical mandatory treatments, COVID-19 vaccine mandates should also square with the European Court of Human Rights' "living instrument" doctrine. For this reason, it is expected that the European Court of Human Rights will uphold COVID-19 vaccination programs. At the same time, it would be beneficial if more Council of Europe member states triggered Article 15 derogation mechanism in order to make an even stronger case for fast-track developed vaccines and contrast vaccine hesitancy.

Key words: European Court of Human Rights, COVID-19, compulsory vaccination, human rights, originalism

Introduction

Between August and September 2021, the European Court of Human Rights (ECtHR) has rejected three requests for interim measures against COVID-19 compulsory vaccination legislation in France and Greece (1,2). Since they are granted in "exceptional cases" to prevent the risk of "serious, irreversible harm" during the pending of the trial and without prejudice on the merits (3), a refusal to concede the interim measures does not speak directly to COVID-19 compulsory vaccination's status under the European Convention on Human Rights (ECHR). However, supplementary evidence points to the fact that the ECtHR will eventually find COVID-19 vaccine mandates to be consistent with the ECHR.

This commentary revolves around three key issues. First, it argues that COVID-19 compulsory vaccination is consistent with the text and the original meaning

of Article 8 of the ECHR. Second, it claims that vaccine mandates against SARS-CoV-2 conform to the ECtHR's "evolutive interpretation" (4) of the ECHR, with case law clearly indicating that COVID-19 vaccine mandates are legitimate also under the ECtHR's understanding of the ECHR as a "living instrument" (5). Lastly, this commentary advocates the activation of the ECHR's derogation mechanism to enhance the procedural fairness of COVID-19 compulsory vaccination programs and thus help contrasting vaccine hesitancy.

Methods

ECtHR's case law and relevant commentaries on the interpretation of the ECHR were the primary sources for this research. The keywords "mandatory," "compulsory," "vaccine," "vaccination," "confinement"

were inserted in the HUDOC database (6) to single out ECtHR's precedents pertinent to the case of COVID-19 compulsory vaccination. Results were then confronted with contemporary scholarship bearing on the ECtHR's approach to legal interpretation. As to the original understanding of Article 8, reference is both to the original intent and to the original meaning versions of originalist jurisprudence as debated in the American scholarship (7).

Results

On August 19, 2021, the ECtHR received an application from 672 French firefighters against the COVID-19 vaccination requirement imposed by the French government with the Law no. 1040–2021 of August 5, 2021 (1). On September 2, 2021, the ECtHR received two very similar applications from 30 Greek healthcare workers who disputed the legitimacy of Greece's government's decision to impose their compulsory vaccination against COVID-19 with the Law no. 4820–2021 (2). Both laws demand that public employees vaccinate in order for them to continue working (8). On August 24 and September 7 respectively, the ECtHR declared that the French and Greek applications fell without the scope of interim measures as conceived by Rule of Court no. 39 (1,2). In fact, interim measures are temporary injunctions intended to prevent harm during the pendency of litigation (3). In practice, they are generally granted in cases concerning deportation and extradition, fatal risk to private or family life, or grave instances of inhumane treatments (e.g., torture) (9).

To the extent that the French and Greek statutes established suspension from work as the most severe consequence for vaccine refusal, the denial of interim measures is unsurprising. What is more important and controversial, however, is the future on the merits. The petitioners hold that subjecting professional practice to COVID-19 vaccination violates multiple ECHR's provisions, ranging from Article 2's "right to life" and Article 5's "right to liberty and security," to Article 4's "prohibition of slavery and forced labour." However, the central case against COVID-19 compulsory vaccination is based on Article 8's "right to respect for

private and family life," which has long been interpreted as ensuring "freedom from interference with physical and psychological integrity" (10).

As it happens, however, vaccine mandates against SARS-CoV-2 seem to cohere both with the text of ECHR and its interpretation by the ECtHR. As to the plain text of the Convention, Article 8 of the ECHR states that "[e]veryone has the right to respect for his private and family life, his home and his correspondence." At the same time, the provision explicitly mentions two conditions—a procedural one and two substantive ones—under which public authorities can interfere "with the exercise of [such] right." First, the right to "respect for private and family life" can be limited only "in accordance with the law." Second, there needs to be a legitimate aim that justifies the interference with Article 8 rights. Third, the interference must be "necessary in a democratic society."

From a textual point of view, it is easy to make the case for France and Greece's COVID-19 vaccine mandates. Both governments established compulsory vaccination through domestic statutes which seem to satisfy the procedural requirement that limitations be "in accordance with the law." In particular, statutes were "accessible" and "formulated in such a way that a person can foresee, to a degree that is reasonable in the circumstance, the consequences which a given action will entail" (10). As to the legitimate aim of the limitation, Article 8 explicitly mentions "protection of health" as a legitimate rationale for the interference (10). In this respect, it would be bizarre to contend that SARS-CoV-2 does not pose an "unprecedented global threat" to public health (11). As a matter of fact, "vaccination during an epidemic" was considered a typical example in drafting Article 8's public health limitations (12). As to the requirement that restrictions to individual privacy be "necessary in a democratic society," it is clearly a debatable question whether public health concerns should trump medical self-determination. In this respect, as we will, the Court has generally deferred to member states' appreciation of the necessity of the interference—the so-called "test of proportionality" (10).

Furthermore, Article 8 of the ECHR explicitly summons the "rights and freedoms of others" as a counterbalance to the right to respect for private and

family life. This reference separates the ECHR from other fundamental texts, such as, for example, the Italian Constitution, where the sole requirement for statute-enforced compulsory medical treatments is that they do not violate “the limits imposed by respect for the human person” (13), although extensively interpreted by the Italian Constitutional Court (14). In this respect, COVID-19 vaccines are necessary to immunize individuals otherwise unamenable to effective vaccination because of underlying medical conditions, such as immunocompromised people (15,16). Under Article 8 of the ECHR, there is at least a good textual argument in favor of general compulsory vaccination on the grounds of other people’s rights to health.

Moreover, and in spite of the ECtHR’s longstanding aversion for originalist-like interpretation (17), the legitimacy of COVID-19 compulsory vaccination further agrees with the original understanding of Article 8, either within an original intent or original meaning methodological framework (7). To put it succinctly, the adopters of Article 8 aimed at recalling Article 29 of the Universal Declaration of Human Rights (UDHR) which explicitly admitted limitations to the “free and full development of [individual] personality” in light of “just requirements of morality, public order and the general welfare”(18). With the drafters of Article 29 historically referring to the collective needs of the population (19), it seems clear that both the UDHR’s and ECHR’s lawgivers maintained that public health reasons could trump individual rights at certain conditions.

With regard to the original meaning of the provision, it bears noting that vaccine mandates were an entrenched practice in all Council of Europe (CoE) member states at the time of the ECHR’s adoption (20–22). Absent a specific debate at the time, it is unclear how one could argue that there could be something to Article 8 that would make vaccines a human rights violation in light of the original meaning of the provision. If arguably not directly relevant to the ECtHR’s ensuing adjudication, the fact that COVID-19 compulsory vaccination agrees with the original understanding of the clause is important to the legitimacy of the ECtHR’s decision-making, which is sometimes criticized for being creative and anti-democratic (4).

However, to the extent that the ECtHR has long embraced an “evolutive interpretation” of the ECHR and dismissed strict textualism as well as other originalist-like approaches, an inquiry into case law is ultimately decisive, insofar as what the Court decided in the past is expected to be indicative, if not controlling, of how it is going to deal with future cases. In this respect, the Court’s precedents bode well for the legitimacy of COVID-19 vaccine mandates.

First, there is the longstanding practice of upholding mental illness compulsory confinement (23). Forced psychiatric treatments may resemble vaccine mandates in that in both cases medical self-determination yields to public health concerns (11–13). Nevertheless, the analogy appears problematic to the extent that mentally ill individuals are considered at least partly incapable of self-determination (27). By contrast, vaccine hesitancy is not generally described as a mental health issue, although it can be subjected to psychological inquiry (28–30). The disanalogy between the two instances reflects in the fact that mental health compulsory cases are generally treated within Article 5’s right to liberty and security framework (10), whereas vaccine mandates are almost exclusively scrutinized under Article 8 (31).

Case law concerning non-psychiatric, mandatory medical treatments appears thus more fitting to COVID-19 vaccine mandates. Under such precedents, however, COVID-19 compulsory vaccination fares equally well. In the 1979 case *X and others v. Austria*, the ECtHR found that the public interest in determining paternity justified the applicant’s compulsory blood testing (32). In the 1983 case *Acmanne and others v. Belgium*, the ECtHR found that child compulsory screening for tuberculosis was a legitimate interference with the right to respect for private and family life under Article 8 (33). In 1994, the Court declared inadmissible a prisoner’s application against its mandatory urine sampling in *Peters v. The Netherlands* (34). In the 1998 case *Boffa and others v. San Marino*, the ECtHR upheld a San Marino’s statute enforcing childhood compulsory vaccination because of “the need to protect the health of the public and of the persons concerned” (35). And again in *Solomakhin v. Ukraine* of 2012, the Court reiterated that compulsory vaccination is a legitimate interference with Article 8 of the ECHR insofar

as it is enforced by law, pursues “the legitimate aim of the protection of health,” and is “necessary in a democratic society” (36).

However, the most influential case for compulsory vaccination’s status has been decided this very year, amid the COVID-19 pandemic. On April 8, 2021, the ECtHR offered an overarching analysis of compulsory vaccination policies under Article 8 of the ECHR in *Vavříčka and others v. the Czech Republic* (37). The case concerned a childhood compulsory vaccination program adopted by the Czech government in the year 2000. In maintaining the program’s legitimacy under Article 8, the ECtHR resorted to its well-known three-step test that demands that compulsory vaccination be “in accordance with the law,” pursue a legitimate aim and be necessary “in a democratic society.” The Court also noted that, while there is yet no clear European consensus on the necessity of compulsory vaccination programs, CoE member states have a wide margin of appreciation in choosing the means by which “to attain the highest possible degree of vaccine coverage” (37).

Having considered the text of Article 8, the original understanding, and ECtHR’s relevant precedents, the case in favor of COVID-19 compulsory vaccination seems a strong one. However, the theoretical possibility of an ECtHR’s overruling of its past pronouncements cannot be ruled out, perhaps on the grounds of the fast-track development of COVID-19 vaccine development (38–41). In fact, some scholars argue that under the ECHR the question of compulsory vaccination is not amenable to “a simple ‘yes’ or ‘no’” answer, but “depends on the specifics of the vaccination scheme in question” (31). In this regard, the accelerated review procedures of COVID-19 vaccines may set them apart from case law relating to vaccines developed under standard procedural conditions (42). In Italy, for example, this would make irrelevant to the case of COVID-19 vaccine mandates the precedent of the Italian Constitutional Court’s decision of 2018 (43) regarding the constitutionality of the Law no. 119 of 2017 on childhood compulsory vaccination (44–46).

Despite this significant aspect, the ECtHR would hardly change its stance on compulsory vaccination in this instance. On the one hand, it bears emphasizing that *Vavříčka* has been decided amid the COVID-19

pandemic and it is not unreasonable to think that considerations regarding foreseeable litigation against COVID-19 vaccines played a role in the decision. As it happens, the COVID-19 epidemic is explicitly cited in the decision, albeit without a decisive role (37). On the other hand, claiming that COVID-19 compulsory vaccination should be treated differently because of the fast-track development fails to consider a crucial aspect. In almost all cases, it was the very same scientific authority that prescribed former mandatory vaccines programs that validated the fast-track development of COVID-19 vaccines. In this respect, there is at least a consistency problem for those who criticize vaccine mandates against SARS-CoV-2 while upholding the legitimacy of other mandatory vaccination programs.

Discussion

Considering the plain text of Article 8, its original understanding, ECtHR case law on medical mandatory treatments, and the Court’s recent ruling in *Vavříčka*, it is hard to conjure up a scenario in which COVID-19 compulsory vaccination would be considered a breach of human rights under the ECHR. CoE member states should thus not hesitate in resorting to compulsion if they consider it necessary to contrast vaccine hesitancy and get a hold on the COVID-19 pandemic.

However, it bears recalling that Article 15 of the ECHR explicitly contemplates derogation from some ECHR provisions “[i]n time of war or other public emergency threatening the life of the nation,” with Article 8 being one of the provisions that can be derogated. To date, only a thin number of CoE member states have activated the emergency mechanism set forth in Article 15 (47). As other authors have suggested (48), states should consider triggering it, since the COVID-19 pandemic seems to exemplify the very definition of a “public emergency threatening the life of the nation.”

This, in turn, should also enhance vaccine acceptance. Notwithstanding the broad political discretion the ECtHR is likely to grant to CoE member states in light of the COVID-19 pandemic’s unprecedented

nature (49), it should not be missed the point in intensifying the “frame of legality” that surrounds limitations to fundamental human values such as medical self-determination or freedom of movement. As social psychologists have long emphasized, in every contentious issue in which highly technical aspects play a crucial part—this arguably being the case with vaccination—procedural aspects of legislation play an even more important role in securing compliance with the law (50).

By emphasizing the emergency conditions and thus the legality of their decision-making, national governments may both strengthen the legal case for compulsory vaccination and build trust in governmental choices. To the extent that people tend to “defer to rules primarily because of their judgments about how those rules are made, not their evaluations of their content” (51), the procedural fairness of vaccination policies is instrumental to fight vaccine hesitancy. Therefore, albeit not legally necessary, it could be beneficial if more states triggered Article 15’s mechanism to emphasize the emergency conditions in which fast-tracked vaccines are imposed. This convergence between the procedural aspects of compulsory vaccination and vaccine acceptance may further confirm the importance of an “alliance” between public health experts and legal area professionals (52).

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