

BOFAXE

Do Compulsory Vaccinations Against Covid-19 Violate Human Rights?

An Assessment of the Measure's Compatibility with the European Convention on Human Rights (Part 1)

As soon as the announcement of a vaccine against the coronavirus hit the news, discussions on the permissibility of compulsory vaccination multiplied. As anti-vaccination campaigns flourish and fake news spread in a flash, vivid public debates on mandatory vaccinations are close at hand. Against that background, this piece scrutinizes the relevant case-law of the European Court of Human Rights (ECtHR) – and the earlier European Commission on Human Rights (EComHR) – to convincingly address those asking: Is compulsory vaccination compatible with the European Convention on Human Rights (ECHR)?

Compulsory vaccination and the interference with the right to respect for private life

Although the Grand Chamber has yet to issue its widely-anticipated decision on Vavříčka and others v the Czech Republic, which will essentially clarify the landscape as to the ECtHR's view on mandatory vaccination and the consequences of one's refusal to comply with the national legislation thereon, earlier relevant jurisprudence does not leave much room for assumptions. In fact, the previous case-law of both the ECtHR and the EComHR, which addressed the compatibility of mandatory vaccination with the ECHR in its later years, provides some clear guidelines on the matter. As early as 1984, the EComHR had already underlined that 'a requirement to undergo medical treatment or a vaccination, on pain of a penalty, may amount to interference with the right to respect for private life' (Acmanne and others v. Belgium, pp 251, 255). This vaguely phrased assumption was later affirmed by ECtHR, which held that '[c]ompulsory vaccination – as an involuntary medical treatment – amounts to an interference with the right to respect for one's private life, which includes a person's physical and psychological integrity, as guaranteed by Article 8(1)' (Solomakhin v Ukraine, para 33). What remains to be examined is whether such an interference can be justified under Article 8(2).

The legitimate aim pursued

In the case of Boffa and others v San Marino, the EComHR acknowledged that the interference arising from the compulsory vaccination of the applicants' children against hepatitis B was indeed inspired by one of the legitimate aims enlisted in ECHR Article 8(2), namely the need to protect the health of the public and of the persons concerned (p 34). In this sense, the Commission acknowledged the interference as justifiable, and moved further to examine whether it was also 'necessary in a democratic society'. Similarly, in the case of Jehovah's Witnesses of Moscow v. Russia, which referred to mandatory vaccination during an epidemic, the ECtHR emphasized that 'free choice and self-determination were themselves fundamental constituents of life and that, absent any indication of the need to protect third parties, the State must abstain from interfering with the individual freedom of choice in the sphere of health care, for such interference can only lessen and not enhance the value of life' (para 136). Doing so, the Court indicated that the right to private life could in principle be limited for the protection of third parties. For the purposes of the present analysis, there is no reason to doubt that a potentially compulsory Covid-19 vaccination would pursue a legitimate aim. Assuming that the measure was introduced through an accessible and foreseeable legal provision (Silver and others v the United Kingdom, para 87), the assessment of its necessity in a democratic society would be of much more interest and importance.

Criteria for the assessment of necessity in a democratic society

The ECtHR has reiterated in its established case-law that the notion of 'necessity in a democratic society' implies a pressing social need to which the interference at stake corresponds and, in particular, that this interference is proportionate to the legitimate aim pursued (Dudgeon v. the United Kingdom, paras 51-53). In the specific case of Solomakhin v Ukraine, where the applicant was involuntarily vaccinated against diphtheria during an epidemic, the Court has been deemed to have suggested two criteria to assess the necessity of such interference in a democratic society: 1) public health considerations that necessitate the control of the spreading of infectious diseases; and 2) the assessment of whether necessary precautions had been taken with regard to the suitability of vaccination for the individual case at hand.

To be continued in Part 2...

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Continuation of Part 1...

In a similar fashion, the EComHR in Boffa and others v San Marino underlined that the domestic authorities enjoy a certain margin of appreciation, the extent of which depends not only on the aim of the interference, but also on its form (p 35). The Commission stated, first, that the applicant did not demonstrate a probability the relevant vaccine would cause serious problems in the particular case of his child. It explained secondly, that the measure taken did not go beyond the margin of appreciation enjoyed by the State, since a similar vaccination campaign, obliging individuals not to endanger the health of others where their own life is not at risk, existed in most countries (p 35). The aforementioned criteria (i.e. the existence of a public health necessity and the suitability of the individual for vaccination) recently elaborated by the Court, therefore seem to have been already envisaged by the Commission, which simply further assessed the existence of consensus in the attitude of States on the matter at that time.

To further flesh out this certain margin of appreciation regarding compulsory vaccination and for the purposes of the present analysis, reference should be had to more recent developments in state practice. In its written observations submitted to the Court on the case of Vavříčka and others v the Czech Republic, the European Centre for Law and Justice underlined that Europe is quite divided on this subject. As it further noted, a significant number of European States has not established mandatory vaccination, while some States have even acknowledged the right of individuals to conscientious objection. This lack of consensus on the matter seems to indicate that States enjoy a rather wide margin of appreciation (X, Y and Z v the United Kingdom, para 44). And although drawing conclusions on the States' margin of appreciation in cases of a pandemic on the basis of the lack of consensus on mandatory vaccination against any infectious disease does not seem very persuasive, the intensity of the coronavirus pandemic and its degree of unexpectedness seem to verify the existence of a wider margin of appreciation enjoyed by States under these circumstances. Despite their prerogative, States should try to strike a fair balance between the right to private life on one hand and the protection of public health on the other. Against this background, the following section assesses, whether the criteria would be met in case of compulsory vaccination against COVID-19.

Application of the established criteria to the case in question

Initially, the unprecedented circumstances that the breakout of the pandemic brought about could be qualified as a 'pressing social need' or as 'public health considerations that necessitate the control of the spreading of infectious diseases'. Most of all, since the margin of appreciation enjoyed by the States in dealing with pandemics was during the assessment above found to be rather wide, a putative interference with the right to private life, introduced through the measure of compulsory vaccination, should not *per se* be seen as a failure in the balancing exercise to be performed by States with regard to the competing interests. However, scrutinizing whether the legitimate aim could be reached through less intrusive means is an essential parameter of any balancing exercise. In this sense, if the legitimate aim pursued could be met via the compulsory vaccination of a specific age group, the horizontal imposition of compulsory vaccination would tilt the scale to the side of unlawful interference. In cases where an alleged violation of Article 8 was at stake and the State was found to be enjoying a wide margin of appreciation, however, national authorities did not need to provide "sufficient" reasons, implying the practical lack of less grievous means by which the legitimate aim could be reached (Buckley v the United Kingdom). Indeed, in such situations the local authorities are deemed as being in a better position to assess the efficiency of less coercive measures (see here p 77).

Additionally, as the above analysis evinces, the assurance of suitability of vaccinations for each individual is an essential prerequisite for the compatibility of mandatory vaccinations with the ECHR. The latter prerequisite is to be assessed on an *ad hoc* basis, while the burden of proof on the demonstration of why in the specific case mandatory vaccination is unsuitable lies with the individual at issue, who will have to demonstrate a probability that the vaccine will cause *serious* problems to her/his health (Boffa and others v San Marino p 35). In this sense, the level of severity that needs to be reached for such an allegation to render the measure arbitrary is relatively high.

Conclusively, the measure of compulsory vaccination is compatible with the ECHR, save if the requirement of a prior assessment of suitability of vaccination for the individual at issue isn't met.