

## A Comparative Survey on Vaccination

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**Abstract.** Vaccination is considered the most effective way of ending the COVID-19 pandemic that has been raging since March 2020. As with other issues during the pandemic, vaccination has generated important litigation involving the balancing of fundamental rights. This article surveys four key areas in vaccination litigation around the world from a comparative perspective. First, the article analyzes the issue of compulsory vaccination and links it to the government measures that potentially discriminate citizens based on their vaccination status. The second issue relates to prioritization, which is also subject to extensive litigation because some categories of people believe they should be prioritized for vaccination. The third issue deals with the processing of vaccination data, in particular the extent to which authorities can collect and process citizens' health data linked to vaccination. Finally, the fourth issue is institutional, as it concerns litigation regarding which level of government is competent to lead vaccination campaigns. Overall, the survey shows the important role that courts have been playing in balancing fundamental rights in the context of ongoing vaccination campaigns worldwide.

**Keywords:** COVID-19, Pandemic, Litigation, Vaccination, Fundamental rights, Vaccine mandates, Personal health data

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### 1. Introduction

Since the World Health Organization (WHO) declared the pandemic a public health emergency of international concern in March 2020,<sup>2</sup> the COVID-19 outbreak has become one of the most challenging issues for governments around the world. To alleviate the pressure on their respective health systems and save lives, public authorities have adopted measures restricting their citizens' fundamental freedoms. These measures virtually affected all areas of social, economic, and political life. As a result, individuals, firms, associations and, to a lesser extent, public authorities, have challenged government decisions, both in terms of competence to adopt them and on the substance. Courts have had to strike a balance between the fundamental right to health and a myriad of other fundamental rights and freedoms, including the

freedom of movement, the freedom of association, the freedom to conduct a business, the right to education and the right to privacy.

In 2021, governments also focused on vaccination to curb the infection rate, especially among the most vulnerable, and to reach herd immunity as soon as possible. While the vaccination campaigns have had a slow start in the European Union, countries such as Israel, Chile, the United Kingdom and the United States have rapidly reached high vaccination levels. By mid-May, Israel had fully vaccinated 56% of its population, while Chile, the United Kingdom, the United Arab Emirates, Bahrain, and the United States almost 40% of their populations.<sup>3</sup> However, by mid-July, the share of people who received at least one jab became greater in the European Union than in the United States.<sup>4</sup> Overall, by the end of November 2021, around 54% of the global population had

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<sup>2</sup> 'WHO Director-General's Opening Remarks at the Media Briefing on COVID-19' (*World Health Organization*, 11 March 2020) <<https://www.who.int/director-general/speeches/detail/who-director-general-s-opening>

-remarks-at-the-media-briefing-on-covid-19---11-march-2020> accessed 6 October 2021.

<sup>3</sup> 'Understanding Vaccination Progress' (*John Hopkins University Coronavirus Resource Center*) <<https://coronavirus.jhu.edu/vaccines/international>> accessed 19 May 2021; 'Coronavirus (COVID-19) in the UK: Vaccinations' (*UK Government*) <<https://coronavirus.data.gov.uk/details/vaccinations>> accessed 19 May 2021.

<sup>4</sup> Ritchie H and others, 'Coronavirus (COVID-19) Vaccinations - Statistics and Research' (*Our World in*

received at least one dose, and 43% was fully vaccinated.<sup>5</sup> Nevertheless, high vaccination rates in high-income countries sharply contrast with the situation in low-income ones, where only about 6% of the population received at least one dose by the end of November.<sup>6</sup>

Just like other government measures during the pandemic, decisions related to vaccination are being litigated at a large scale. In an attempt to shield itself from critiques about the implementation of its vaccination campaign, the European Commission had initiated proceedings against AstraZeneca before a judge of the Brussels Tribunal of First Instance. The Commission was claiming that the pharmaceutical company had not fulfilled its obligations under the Advanced Purchase Agreement,<sup>7</sup> signed in August 2020. In particular, the Commission asserted that the company only delivered a fourth of the doses it promised to deliver during the first trimester of 2021, and that deliveries for the second trimester would also be lower than expected.<sup>8</sup> The Commission asked the judge to order that the company deliver the promised doses. The parties orally exposed their claims in summary proceedings on 26 May 2021. In the meantime, the Commission had initiated another action against the Anglo-Swedish company at the beginning of May 2021 to obtain economic compensation for breach of contract.<sup>9</sup>

Both parties ultimately reached an agreement in September 2021 and settled the pending suits before the Brussels tribunal.<sup>10</sup>

This study will survey four key areas in vaccination litigation around the world, in a comparative perspective. The report will first analyze the issue of compulsory vaccination and link it to the government measures that potentially

discriminate citizens based on their vaccination status. The second issue relates to prioritization, which is subject to extensive litigation because some categories of people believe they should be prioritized for vaccination.

The third issue deals with the processing of vaccination data, in particular to what extent can authorities collect, and process citizens' health data linked to vaccination. Finally, the fourth issue is institutional, as it concerns litigation about which level of government is competent to lead vaccination campaigns.

## 2. Compulsory Vaccination and Restrictions Linked to the Failure to Vaccinate

The issue of compulsory vaccination becomes all the more important when vaccination campaigns reach a level at which the most vulnerable groups have been vaccinated and some countries might experience difficulties in reaching herd immunity because of vaccine hesitancy. For instance, the EU's objective to vaccinate 70% of the adult population with at least one dose by the summer was reached in July 2021,<sup>11</sup> but some Member States have found it difficult to convince reluctant citizens to take the jab due to vaccine skepticism.<sup>12</sup> In fact, the WHO had already identified vaccine hesitancy as one of the ten threats to global health in 2019, before the pandemic.<sup>13</sup>

Governments might therefore decide to make COVID-19 vaccination compulsory, instead of nudging citizens into vaccinating by imposing the holding of health passes to enter certain public places.

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Data) <<https://ourworldindata.org/covid-vaccinations>> accessed 30 November 2021.

<sup>5</sup> *Ibidem*.

<sup>6</sup> *Ibidem*.

<sup>7</sup> 'Vaccines: contract between European Commission and AstraZeneca now published' (*European Commission*, 29 January 2021) <[https://ec.europa.eu/commission/presscorner/detail/en/IP\\_21\\_302](https://ec.europa.eu/commission/presscorner/detail/en/IP_21_302)> accessed 5 October 2021.

<sup>8</sup> Jorge Liboreiro, 'EU's legal action against AstraZeneca: Why now? How will it play out? When will there be a ruling?' (*Euronews*, 28 April 2021) <<https://www.euronews.com/2021/04/26/eu-s-legal-action-against-astrazeneca-why-now-how-will-it-play-out-when-will-there-be-a-ruling>> accessed 5 October 2021.

<sup>9</sup> Guillermo Abril, 'La UE abre la vía judicial para pedir daños y perjuicios contra AstraZeneca por el retraso de las vacunas' (*El País*, Brussels, 11 May 2021) <<https://elpais.com/sociedad/2021-05-11/la-ue-abre-la-via-judicial-para-pedir-danos-y-perjuicios-a-astrazene-ca-por-el-retraso-de-las-vacunas.html>> accessed 5 October 2021.

<sup>10</sup> 'Coronavirus: The EU and AstraZeneca agree on COVID-19 vaccine supply and on ending litigation' (*European Commission*, 3 September 2021) <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_21\\_4561](https://ec.europa.eu/commission/presscorner/detail/en/ip_21_4561)> accessed 5 October 2021.

<sup>11</sup> 'Communication from the Commission to the European Parliament, the European Council and the Council: A united front to beat COVID-19' COM/2021/35 final; 'Statement by President von der Leyen on a new milestone in the EU Vaccines Strategy' (*European Commission*, 27 July 2021) <[https://ec.europa.eu/commission/presscorner/detail/en/statement\\_21\\_3921](https://ec.europa.eu/commission/presscorner/detail/en/statement_21_3921)> accessed 5 October 2021.

<sup>12</sup> 'Why is Europe so riddled with vaccine skepticism?' (*The Economist*, 10 December 2020) <<https://www.economist.com/europe/2020/12/12/why-is-europe-so-riddled-with-vaccine-scepticism>> accessed 5 October 2021.

<sup>13</sup> 'Ten threats to global health in 2019' (*World Health Organization*) <<https://www.who.int/news-room/spotlight/ten-threats-to-global-health-in-2019>> accessed 5 October 2021.

That is the case of Indonesia, whose government mandated vaccination in February 2021,<sup>14</sup> and Austria, who will most likely become the first European country to impose vaccination as of February 2022.<sup>15</sup> In France, the debate over compulsory vaccination is also underway, with socialist parliamentarians supporting such mandate instead of extending the use of a “COVID pass” to access public spaces.<sup>16</sup> However, political events such as the upcoming French presidential elections in April 2022 might make government think twice about adopting such unpopular measures.

## 2.1. The Possibility of Vaccine Mandates

Still, most countries today do not provide for general COVID-19 vaccination mandates. Instead, many governments are progressively imposing vaccination requirements for health workers, civil servants, large companies, or as a travel requirement. In September 2021, the President of the United States announced plans for federal vaccine mandates that would affect around a third of the population,<sup>17</sup> including for federal employees through an executive order.<sup>18</sup> He later limited the entry by air of all noncitizen nonimmigrants to those vaccinated.<sup>19</sup>

But federal courts suspended the application of both the federal mandate concerning companies

with at least 100 workers,<sup>20</sup> and the one concerning healthcare workers in facilities receiving federal funding,<sup>21</sup> pending trial on the merits. Other federal courts have rejected challenged to federal or state mandates.

However, the global trend for mandating vaccination against infectious diseases in general hints that most countries might ultimately decide to impose one for COVID-19 as well. A comprehensive global review of mandatory vaccination policies recently found that 105 out of 193 countries (54%) made at least one form of vaccine mandatory at national level, as of December 2018.<sup>22</sup> Among those, 62 (59%) countries impose at least one type of penalty in case of non-compliance with the mandate, while 34 (32%) impose no penalties and 9 (9%) of them lack sufficient information about penalties.

Countries that impose such mandates include Algeria, Argentina, Australia, Belgium, Brazil, Chile, China, Colombia, the Czech Republic, Egypt, France, Germany, Indonesia, Iran, Italy, Mexico, Morocco, Poland, South Korea, and Tunisia. But with regards to COVID-19 vaccination, courts have had to rule on a wide variety of regimes, as explained below.

## 2.2. Indirect Compulsory Vaccination

In Brazil, the Federal Supreme Court found that there was sufficient legal basis for indirect

<sup>14</sup> Ardila Syakriah, ‘Get vaccinated or lose your social aid, Indonesian government says’ (*Jakarta Post*, 15 February 2021) <<https://www.thejakartapost.com/news/2021/02/15/get-vaccinated-or-lose-your-social-aid-indonesian-government-says.html>> accessed 30 November 2021.

<sup>15</sup> Philipp Oltermann, ‘Germany’s chancellor-to-be Olaf Scholz ‘backs mandatory Covid jabs’ (*The Guardian*, 30 November 2021) <<https://www.theguardian.com/world/2021/nov/30/austria-pushes-on-with-plan-for-mandatory-covid-vaccines>> accessed 30 November 2021.

<sup>16</sup> Sandra Cerqueira, ‘Les parlementaires socialistes favorables à la vaccination obligatoire plutôt qu’à l’extension du passe sanitaire’ (*Public Sénat*, 19 July 2021) <<https://www.publicsenat.fr/article/parlementaire/jugent-le-passe-sanitaire-inapplicable-les-parlementaires-socialistes-lui>> accessed 5 October 2021.

<sup>17</sup> Zeke Miller, ‘Sweeping new vaccine mandates for 100 million Americans’ (*Associated Press*, 10 September 2021) <<https://apnews.com/article/joe-biden-business-health-coronavirus-pandemic-executive-branch-18fb12993f05be13bf760946a6fb89be>> accessed 5 October 2021.

<sup>18</sup> US President Joe Biden, ‘Executive Order on Requiring Coronavirus Disease 2019 Vaccination for Federal Employees’ (*White House*, 9 September 2021) <<https://www.whitehouse.gov/briefing-room/presidential-actions/2021/09/09/executive-order-requiring-coronavirus-disease-2019-vaccination-for-federal-employees/>> accessed 30 November 2021.

<sup>19</sup> US President Joe Biden, ‘A Proclamation on Advancing the Safe Resumption of Global Travel During the COVID-19 Pandemic’ (*White House*, 25 October 2021) <<https://www.whitehouse.gov/briefing-room/presidential-actions/2021/10/25/a-proclamation-on-advancing-the-safe-resumption-of-global-travel-during-the-covid-19-pandemic/>> accessed 30 November 2021.

<sup>20</sup> U.S. Court of Appeals for the Fifth Circuit, 12 November 2021, *B. e.a. v Occupational Safety and Health Administration*, No. 21-60845.

<sup>21</sup> The mandate was first suspended in Alaska, Arkansas, Iowa, Kansas, Missouri, Nebraska, New Hampshire, North Dakota, South Dakota, and Wyoming (U.S. District Court, Eastern District of Missouri, Eastern Division, 29 November 2021, *State of Missouri et al. v Joseph R. Biden*, No. 4:21-cv-01329-MTS), and then extended to the whole nation (U.S. District Court, Western District of Louisiana, Monroe Division, 30 November 2021, *State of Louisiana et al. v Xavier Becerra et al.*, No. 3:21-cv-03970-TAD-KDM).

<sup>22</sup> Katie Gravagna and others, ‘Global assessment of national mandatory vaccination policies and consequences of non-compliance’ Vol. 38, Issue 49, p. 7865, (*ELSEVIER*, 17 November 2020) <<https://www.sciencedirect.com/science/article/pii/S0264410X20312342?via%3Dihub>> accessed 5 October 2021.

compulsory vaccination and provided guidelines on how to implement measures that would incentivize citizens to vaccinate.<sup>23</sup> The Court expressly refers to this possibility as ‘compulsory vaccination’ (*obrigatoriedade da vacinação*) to distinguish it from ‘forced vaccination’ (*vacinação forçada*), because vaccination would always require the patient’s consent to be administered and the authorities cannot force patients to take the jab. This ruling is in sharp contrast with Bolsonaro’s skepticism about the harmfulness of the virus and the need to vaccinate,<sup>24</sup> especially as it recalls the importance of vaccination to achieve collective protection, in particular for the sake of the most vulnerable. Although it refers to ‘compulsory vaccination,’ the Court essentially provides the possibility for the authorities to impose indirect measures aimed at inciting vaccination, such as restricting the exercise of certain activities or the entry into some public places. The Court specified that, for such measures to be implemented, appropriate legislation must be adopted, which should be (i) based on scientific evidence; (ii) accompanied by extensive information on the effectiveness, safety, and contraindications of immunizers; (iii) respectful of human dignity and fundamental rights; (iv) reasonable and proportionate; and (v) geared toward ensuring that the vaccines are distributed universally and free of charge. At any rate, the Brazilian court did not make vaccination compulsory as such but provided these rather general guidelines for public authorities to adopt indirect measures to incentivize citizens to vaccinate.

Relying on that landmark judgment’s interpretation of the relevant legislation, the Brazilian Labor Public Ministry has stated that workers who refuse to take the vaccine without proper medical justification can be dismissed for just cause. In an interview, the Brazilian Attorney General stated that the vaccine was a collective

protection, not an individual one.<sup>25</sup> However, the Social Liberal Party (*Partido Social Liberal*), Bolsonaro’s former party, introduced a bill proposal that would ban such dismissals for refusing to vaccinate.<sup>26</sup> This proposal is still in the legislative pipeline, but shows how politically sensitive the issue of (even indirectly) mandating vaccination is.

In the current absence of many general compulsory regimes, governments in other jurisdictions are also using indirect restrictive measures for the non-vaccinated as an incentive for the population to vaccinate. After rapidly reaching high vaccination rates, Israel has been one of the first countries to impose such restrictions. Although the country had no legal mandate to vaccinate, the government decided to make leisure activities accessible only to vaccinated people, who need to show their vaccination certificate to enter places such as gyms, cultural events, sports games, restaurants, hotels and swimming pools – making such rules “both a carrot and a stick.”<sup>27</sup> However, the Israeli Supreme Court ruled that, despite a successful vaccination campaign, there are limits to how authorities can differentiate between vaccinated and non-vaccinated citizens in the context of air travel. In March 2021, the Court ruled that it was unconstitutional for the authorities to request pre-departure approval for outbound air passengers who are not vaccinated or recovering from the disease, and to impose a quota of 3,000 incoming air passengers per day.<sup>28</sup> The Court found that, despite high vaccination rates, the threat of COVID-19 and its new strains will not disappear in the foreseeable future. Therefore, authorities must strike a balance between the damage that may be caused by the intrusion of a new strain of the virus and the restriction of citizen’s basic rights, including their freedom of movement, which is a pre-condition for the exercise of several other fundamental rights.<sup>29</sup>

<sup>23</sup> ‘Direct Action of Unconstitutionality n°6.586’ (*Federal Supreme Court*, Brazil, 17 December 2020) <<http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/ADI6586vacinaobrigatoriedade.pdf>> accessed 5 October 2021.

<sup>24</sup> ‘Brazil’s Bolsonaro warns virus vaccine can turn people into crocodiles’ (*France 24*, 18 December 2020) <<https://www.france24.com/en/live-news/20201218-brazil-s-bolsonaro-warns-virus-vaccine-can-turn-people-into-crocodiles>> accessed 5 October 2021.

<sup>25</sup> ‘Trabalhador que negar vacina pode ser demitido por justa causa, diz MP’ (*Migalhas*, 9 February 2021) <<https://www.migalhas.com.br/quentes/340071/trabalhador-que-negar-vacina-pode-ser-demitido-por-justa-causa-diz-mp>> accessed 5 October 2021.

<sup>26</sup> Lara Haje, ‘Projeto proíbe dispensa por justa causa para empregado que não se vacinar contra Covid-19’ (*Câmara dos Deputados*, 22 February 2021)

<<https://www.camara.leg.br/noticias/728418-projeto-proibe-dispensa-por-justa-causa-para-empregado-que-nao-se-vacinar-contracovid19/#:~:text=Previdência%20Assistência-,Projeto%20pro%C3%ADbe%20dispensa%20por%20justa%20causa%20para%20empregado,se%20vacinar%20contra%20Covid%2D19&text=0%20Projeto%20de%20Lei%20149,vacinado%20contra%20o%20novo%20coronav%C3%ADrus>> accessed 5 October 2021.

<sup>27</sup> Isabel Kershner, ‘As Israel Reopens, ‘Whoever Does Not Get Vaccinated Will Be Left Behind’ (*New York Times*, 18 February 2021) <<https://www.nytimes.com/2021/02/18/world/middleeast/israel-covid-vaccine-reopen.html>> accessed 5 October 2021.

<sup>28</sup> Israel, Supreme Court, 17 March 2021, *Oren Shemesh v Prime Minister*, HCJ 1107/21.

<sup>29</sup> *Ibidem*, para 18.

With regards to restrictions linked to people's vaccination status, the Brazilian and Israeli Supreme Courts thus appear to have adopted different approaches. While the Brazilian court allows authorities to use such restrictions as an incentive for the population to get vaccinated, the Israeli court limits such restrictions, which it considered disproportionate, especially because the government did not rely on relevant data on the number of citizens abroad seeking to return to Israel and gave no explanation as to why the daily passenger quota was set at 3,000. The different outcomes appear to be commensurate with the very different situation of both countries in terms of infection and vaccination rates. Indeed, when the need to incentivize people to vaccinate is weaker (as in Israel, which achieved high vaccination rates), fundamental rights other than the fundamental right to health become more relevant. In contrast, it appears that the judicial focus in Brazil remains on safeguarding the fundamental right to health, in a context where vaccines for even priority groups have been crucially lacking.<sup>30</sup>

Of course, vaccine mandates have been so controversial because individuals have had different political beliefs over their opportunity. For instance, claimants have already argued that requiring proof of vaccination to access events and businesses constituted discrimination based on political beliefs. But that claim was dismissed by the Human Rights Tribunal of the Canadian province of British Columbia.<sup>31</sup> The Tribunal found that, while the claimant indeed had the right to hold a negative view of vaccination policies, but that protection from discrimination based on political belief did not exempt people from obeying those policies and was insufficient to challenge a public health measure.

However, claimants have challenged such mandates even when exemptions for religious and medical reasons exist. For instance, students at Indiana University (United States) argued that the university requirement to vaccinate unless they had religious or medical reasons not to do so (in which case they had to wear masks and test twice a week), violated the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. The United States Court of Appeals for the Seventh

Circuit rejected that claim, finding that the university had foreseen exceptions, that students had ample educational opportunities if they wished to study at another university, and that imposing a measure that would help all students to remain healthy was no greater problem than the imposition of readings for learning, even though students would prefer not to read such pieces.<sup>32</sup>

Beyond political beliefs, claimants have also challenged the scientific justifications behind COVID-19 vaccines mandates. For instance, an employee of the New Zealand Customs Service was fired for not complying with the vaccine mandate in place for specific employment positions. While the claimant argued that the vaccine should be considered medical experimentation and that the mandate was "irrational", the High Court of New Zealand rejected that view, holding that it could not question the merits of the executive's decision that was based on scientific information showing that vaccines were indeed effective and the best solution to curb the pandemic.<sup>33</sup> Similarly, the Civil and Administrative Tribunal of New South Wales (Australia) dismissed claims made by a nurse who refused to comply with an order for health workers to vaccinate, thus risking to be suspended and ultimately fired.<sup>34</sup> The Tribunal relied on scientific information proving the efficacy and safety of the vaccines, also based on data from other countries.

Overall, the Tribunal held that the public interest of protecting health (especially of colleagues and patients) trumped the potential prejudice suffered by the applicant. Likewise, the Indian Supreme Court rejected a doctor's claim that vaccines have not undergone sufficient trials for safety and efficacy, holding instead that clinical trials had been approved by the country's highest technical advisory body for immunization.<sup>35</sup>

At the European Union level, the Parliament and the Council adopted a regulation establishing an EU Digital COVID Certificate, which entered into force on 1 July 2021.<sup>36</sup> The European Commission has argued that the certificate would facilitate the free movement of people across the Union, guaranteeing one of the EU's core principles. However, scholars have questioned the public health motives behind its adoption, warned that it could fragment the

<sup>30</sup> 'Brazil struggles with Covid-19 vaccine rollout as death toll spirals' (*France 24*, 16 May 2021) <<https://www.france24.com/en/americas/20210516-brazil-struggles-with-covid-19-vaccine-rollout-as-death-toll-spirals>> accessed 5 October 2021.

<sup>31</sup> Canada, British Columbia Human Rights Tribunal, 9 September 2021, *Complainant obo Class of Persons v. John Horgan*, 2021 BCHRT 120.

<sup>32</sup> United States, U.S. Court of Appeals for the Seventh Circuit, 2 August 2021, *K. v. Trustees of Indiana University*, No. 21-2326, 2021 WL 3281209.

<sup>33</sup> New Zealand, High Court, 24 September 2021, *GF v Minister of Covid-19 Response* 2021 NZHC 2526.

<sup>34</sup> Australia, New South Wales Civil and Administrative Tribunal, 8 October 2021, *D. v Minister for Health* 2021 NSWCATAD 293.

<sup>35</sup> India, Supreme Court, 14 October 2021, *Dr. J.P. v. Union of India*, Writ Petition (Civil) No. 607/2021.

<sup>36</sup> 'EU clears way for the EU Digital COVID Certificate' (*European Commission*, 14 June 2021) <[https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT\\_21\\_2965](https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_21_2965)> accessed 5 October 2021.

internal market, as well as create disproportionate discriminations in reopening economies and restoring free movement.<sup>37</sup> Paradoxically, the authorities' desire to lift restrictions and therefore restore a number of fundamental freedoms comes up against a host of new fundamental rights issues, making the return to normality as challenging as the confinement of the disease, if not more.

The introduction of health passes based or not on the EU Digital COVID Certificate already prompted important litigation, including from within EU institutions. Indeed, some elected Members of the European Parliament challenged before the President of the EU's General Court the Parliament's decision to impose the presentation of that certificate for anyone accessing its premises. However, the President rejected their request for interim measures in November 2021, mainly because (i) that measure has neither the object nor the effect of calling into question the exercise of the MEP's mandates as elected members of Parliament, but instead was meant to protect public health; (ii) the applicants did not show how that measure would affect their power of representation or their capacity to work usefully and efficiently; (iii) they do not demonstrate that their fundamental right to data protection was affected;<sup>38</sup> and (iv) they failed to explain why undergoing regular testing would seriously affect their health, especially because they can choose the type of test, the Parliament bears the testing costs and provides facilities to test, and there are exemptions for medical reasons.<sup>39</sup>

In France, President Emmanuel Macron's announcement in July 2021 that people should hold a 'health pass' to be allowed in bars, restaurants, shops, some trains, and flights (to encourage a population more prone to vaccine hesitancy) prompted almost a million people rushing to get vaccinated the next day,<sup>40</sup> demonstrating the effectiveness of indirect measures.

A few weeks later, the French Constitutional Council confirmed the validity of the provisions of the law on health crisis management that imposed the 'health pass'.<sup>41</sup> The Constitutional Council motivated its decision by the fact that (i) the legislature pursued the constitutional objective of the protecting health; (ii) the measure would apply temporarily, until 15 November 2021,<sup>42</sup> during which the legislature considered there was a significant risk of the epidemic spreading through new virus variants; (iii) the pass would only be required in places where the activities carried out present a particular risk of spreading the virus; (iv) the obligations imposed on the public may be fulfilled by the presentation of proof of vaccination status, the negative result of a virological screening test, or a certificate of recovery from contamination, thus not imposing vaccination; and (v) the presentation of these documents is carried out in a form that does not allow the "nature of the document held" to be ascertained, and ID checks can only be carried out by law enforcement officials. Thus, the Constitutional Council held that the contested measure achieved an appropriate balance between the right to health and the freedom of movement, the right to respect for private life and the right to collective expression of ideas and opinions.

However, it held that, by providing that the failure to present a "health pass" constitutes a reason for terminating only fixed-term or assignment contracts (and not permanent contracts), the legislator has instituted a difference of treatment between employees according to the nature of their employment contract, which is unrelated to the objective of protecting health. Indeed, employees under fixed-term contracts and those under permanent contracts are exposed to the same risk of contamination or transmission of the virus. Interestingly, the Italian Council of State

<sup>37</sup> Dimitry Vladimirovich Kochenov and Jacquelyn Dietrich Veraldi, 'The Commission against the Internal Market and European Union Citizens' Rights: Trying to Shoot Down Sputnik with the 'Digital Green Certificate'?' (*European Journal of Risk Regulation*, 19 July 2021) <<https://www.cambridge.org/core/journals/european-journal-of-risk-regulation/article/commission-against-the-internal-market-and-european-union-citizens-rights-trying-to-shoot-down-sputnik-with-the-digital-green-certificate/E7B59DDEE86D55F2FF1EAE8EF09C876C>> accessed 5 October 2021. See also Alberto Alemanno and Luiza Bialasiewicz, 'Certifying Health: The Unequal Legal Geographies of COVID-19 Certificates' (*European Journal of Risk Regulation*, 21 July 2021) <<https://www.cambridge.org/core/journals/european-journal-of-risk-regulation/article/certifying-health-the-unequal-legal-geographies-of-covid19-certificates/3008E47448F01B2266E3FDF3B81B5495>> accessed 5 October 2021.

<sup>38</sup> See below, section 4.

<sup>39</sup> European Union, Order of the President of the General Court, 30 November 2021, *Roos e.a. v Parliament*, T-710/21 R.

<sup>40</sup> 'Why vaccine-shy French are suddenly rushing to get jabbed' (*The Economist*, 14 July 2021) <<https://www.economist.com/graphic-detail/2021/07/14/why-vaccine-shy-french-are-suddenly-rushing-to-get-jabbed>> accessed 5 October 2021.

<sup>41</sup> France, Constitutional Council, 5 August 2021, No. 2021-824 DC, ECLI:FR:CC:2021:2021.824.DC.

<sup>42</sup> Note that a new law extended the possibility for the government to impose the health pass until 31 July 2022 (loi No. 2021-1465 du 10 novembre 2021 portant diverses dispositions de vigilance sanitaire, JORF No. 0263 du 11 novembre 2021).

refers to this French case in a recent decision on mandatory vaccination for healthcare workers.<sup>43</sup>

In Spain, governments in several Autonomous Communities have tried to pass regulation limiting the access of some public places to those people showing their EU Digital COVID Certificate. To pass such measures limiting fundamental rights in the context of the pandemic, the respective governments need to obtain judicial ratification.<sup>44</sup> Courts have suspended government measures imposing health passes to access a number of public places in the Canary Islands<sup>45</sup> and Cantabria.<sup>46</sup> But cases in which the governments of Andalusia and Galicia imposed similar measures reached the Spanish Supreme Court. While the court confirmed the suspension of the Andalusian measures because it disproportionately restricted access to nightlife venues to those holding an EU Digital COVID Certificate,<sup>47</sup> it upheld the Galician measure requiring a health pass to enter restaurants, bars, hotels, and nightlife venues.<sup>48</sup> The principle of proportionality is the key distinguishing feature between both cases. The Andalusian measure was disproportionate because it was indefinite in time and applicable to the entire territory, without linking the measure to the incidence of cases or the health situation and its evolution.

In contrast, the Galician measure is proportionate because it is limited in time, applicable only to those territories with a more severe health situation and its application might evolve over time.

### **2.3. A European Perspective on Vaccine Mandates**

At any rate, a recent ruling of the European Court of Human Rights might inspire European countries to mandate COVID-19 vaccination, or at least would make it more difficult for applicants to judicially challenge such mandates, should they be adopted.<sup>49</sup>

The case concerned the compulsory nature of standard and routine vaccination of children in the Czech Republic against nine diseases that are well known to the medical community. While the case did not concern COVID-19 vaccination, the Court, sitting in Grand Chamber, did find that states have a

wide margin of appreciation to impose compulsory vaccination on children. Despite recognizing that compulsory vaccination was an interference with the right to respect for private life, the objective of the state was to protect against diseases that cause a serious threat to health. The Court considered this objective legitimate because it aimed at guaranteeing the protection of health and the protection of the rights of others, as guaranteed by Article 8 of the European Convention on Human Rights. Like the Brazilian Supreme Court making a distinction between ‘compulsory’ and ‘forced’ vaccination,<sup>50</sup> the Czech law did not foresee the forced administration of the contested vaccines. However, it did foresee sanctions such as (limited) administrative fines or the non-admission to preschool.

The Court found that Contracting Parties to the Convention could choose between a spectrum of policies regarding compulsory vaccination because they had a wide margin of appreciation. In any case, the Court also stated that the Convention imposes a positive obligation on the Contracting Parties to protect the life and health of their citizens, and that international and national medical experts had recommended to maintain such a duty for children vaccination.

Finally, the Court found the Czech policy proportionate to its objectives because (i) an exemption was permitted based on a “secular objection of conscience;” (ii) no provisions allowed for ‘forced’ vaccination; (iii) one-off administrative fines were relatively moderate; (iv) non-admission to preschool was a protective rather than punitive sanction, and the loss of an opportunity to develop the children’s personalities is direct result of their parents’ decline to comply with a legal duty; and (v) national law established appropriate procedural safeguards.

Therefore, the Court considered the Czech policy as being “necessary in a democratic society.”

Ultimately, a key aspect of the Court’s findings is the one of social solidarity: “The Court considers that it cannot be regarded as disproportionate for a State to require those for whom vaccination represents a remote risk to health to accept this universally practiced protective measure, as a

<sup>43</sup> Italy, Council of State, 14 October 2021, No. 08340/2021. See below, section 2.3.

<sup>44</sup> Pursuant to Article 10(8) of Ley 29/1998, de 13 de julio, reguladora de la Jurisdicción Contencioso-administrativa, «BOE» No. 167, de 14/07/1998, as last modified by Disposición final 2.2 de la Ley 3/2020, de 18 de septiembre de medidas procesales y organizativas para hacer frente al COVID-19 en el ámbito de la Administración de Justicia, «BOE» No. 250, de 19/09/2020.

<sup>45</sup> Spain, High Court of Justice of the Canary Islands, 29 July 2021, No. 11/2021, ECLI: ES:TSJICAN:2021:11A;

High Court of Justice of the Canary Islands, 29 July 2021, No. 12/2021, ECLI:ES:TSJICAN:2021:12A.

<sup>46</sup> Spain, High Court of Justice of Cantabria, 6 August 2021, No. 25/2021, ECLI:ES:TSJCANT:2021:25A.

<sup>47</sup> Spain, Supreme Court, 18 August 2021, No. 3260/2021, ECLI:ES:TS:2021:3260.

<sup>48</sup> Spain, Supreme Court, 14 September 2021, No. 3298/2021 - ECLI:ES:TS:2021:3298.

<sup>49</sup> *Vavříčka and Others v. the Czech Republic* [GC], No. 47621/13 and 5 others, European Court of Human Rights, 8 April 2021, ECLI:CE:ECHR:2021:0408JUD004762113.

<sup>50</sup> See above, section 2.2.

matter of legal duty and in the name of social solidarity, for the sake of the small number of vulnerable children who are unable to benefit from vaccination.”<sup>51</sup>

This could play in favor of European countries mandating COVID-19 vaccination. However, the Strasbourg court also reached these conclusions regarding “diseases well-known to medical science,” which arguably is not the case of COVID-19, the medical community having trouble reaching a consensus about many of its characteristics.<sup>52</sup>

Still, the issue of mandating COVID-19 vaccination for children is already the object of ethical debates<sup>53</sup> and will become more relevant as vaccination progresses worldwide.<sup>54</sup>

While no European country has yet imposed compulsory COVID-19 vaccination for the general population (except for Austria as of February 2022), this ruling could be relied on by national authorities to impose vaccination duties in their endeavor to protect their population from a disease that poses a “serious risk to health,” and to protect society at large, especially the most vulnerable. In fact, Italy is the first European country to have made COVID-19 vaccine compulsory for health workers, who risk being suspended if they refuse the jab.<sup>55</sup>

Prior to the adoption of a Decree-Law on 1 April 2021,<sup>56</sup> which introduced that measure, the Labor Tribunal of Belluno had found that employers could suspend the effects of an employment contract of a healthcare employee who refuses vaccination, in

order to ensure health safety conditions in the workplace, which is an enforceable duty of the employer.

According to the Italian tribunal, guaranteeing a healthy workplace in the context of the COVID-19 pandemic prevails over the worker’s self-determination to get vaccinated and over its freedom to plan year leave, since the worker should be asked to enjoy year leave before being suspended. In a very detailed and scientifically backed decision, the Italian Council of State confirmed the validity of the Decree-Law in a case involving healthcare workers refusing to vaccinate.<sup>57</sup>

The country’s highest administrative court motivates its decision based on a thorough scientific analysis of the safety and efficacy of the vaccines in the context of their conditional marketing authorization in the EU, rebuffing claims that vaccines are merely “experimental.” It also heavily relies on the principle of solidarity to justify the selective mandate, especially based on the European Court of Human Right’s decision in *Vavřička* described above, which already shows its influence in the COVID-19 context. The Council of State also explains that the doctors’ duty of care imposes an obligation to protect themselves and others, especially because of the trust that patients vest in them, leaving no legitimate space for vaccine hesitancy in a democratic society during such a health emergency.

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<sup>51</sup> *Ibidem*, para 306.

<sup>52</sup> Frédérique Berrod and Pierrick Bruyas, ‘La Cour européenne des droits de l’homme et la vaccination obligatoire: le contexte Covid’ (*The Conversation*, 2 May 2021) <<https://theconversation.com/la-cour-europeenne-des-droits-de-lhomme-et-la-vaccination-obligatoire-le-contexte-covid-159384>> accessed 5 October 2021.

<sup>53</sup> Anthony Skelton and Lisa Forsberg, ‘3 reasons for making COVID-19 vaccination mandatory for children’ (*The Conversation*, 13 May 2021) <<https://theconversation.com/3-reasons-for-making-covid-19-vaccination-mandatory-for-children-160589>> accessed 5 October 2021. In France, the National Consultative Ethics Committee for health and life sciences recently issues an opinion on the ethical issues related to COVID-19 vaccination of children and adolescents. One of the questions it tried to answer was the following: “Knowing that a significant number of adults, including people with comorbidities, will not vaccinate, is it ethical to make minors bear the responsibility, in terms of collective benefit, for the refusal of a part of the adult population to vaccinate?” (Unofficial translation). The question is framed with reference to the collective dimension of vaccination and does an implied reference to the principle of solidarity. The Ethics Committee concluded that, so far, vaccination of children under 12 years of age did not seem ethically and scientifically acceptable, largely because there are no studies

evaluating the safety of COVID-19 vaccines in this population (‘Avis du CCNE: Enjeux éthiques relatifs à la vaccination contre la Covid-19 des enfants et des adolescents’ (*Comité consultative national d’éthique pour les sciences de la vie et de la santé*, 9 June 2021) <<https://www.ccne-ethique.fr/fr/actualites/enjeux-ethiques-relatifs-la-vaccination-contre-la-covid-19-des-enfants-et-des-adolescents>> accessed 5 October 2021.

<sup>54</sup> The debate has been topical in the United States, where vaccination levels are relatively high compared to lower income countries. See Yoree Koh, ‘Can Schools Mandate Covid-19 Vaccines for Children? What We Know’ (*Wall Street Journal*, 11 June 2021) <<https://www.wsj.com/articles/can-schools-mandate-covid-19-vaccines-for-children-what-we-know-11623412802>> accessed 5 October 2021.

<sup>55</sup> Silvia Sciorilli Borrelli, ‘Italy first in Europe to make jabs mandatory for health workers’ (*Financial Times*, 1 April 2021) <<https://www.ft.com/content/18791bdf-ad1a-4f5e-b99a-28aee18fe9f7>> accessed 5 October 2021.

<sup>56</sup> Decreto-Legge 1 aprile 2021, No. 44. Misure urgenti per il contenimento dell’epidemia da COVID-19, in materia di vaccinazioni anti SARS-CoV-2, di giustizia e di concorsi pubblici. (21G00056) (GU Serie Generale No. 79 del 01 April 2021).

<sup>57</sup> Council of State, Third Section, 20 October 2021, No. 7045, ECLI:IT:CDS:2021:7045SENB.



Similarly, the Greek Council of State found that the obligation for fire department personnel to vaccinate within a short timeframe of less than a month – on pain of being transferred to another unit where they would lose their special allowance – did not violate the principles of proportionality and equality.<sup>58</sup> The Council of State considered that it did not amount to forced vaccination because the workers had the possibility to be transferred to another unit, which was necessary because the personnel in the affected department had to be available at all times for reasons of public interest.

#### **2.4. Forced Vaccination Already a Reality**

Still, even in a context of (mostly) voluntary vaccination, individuals have already faced imposed vaccination in a number of jurisdictions, as this survey shows. In Spain, courts have mandated vaccination for residents of retirement homes who had refused the jab either themselves<sup>59</sup> or through their legal representatives.<sup>60</sup> The retirement homes had sued their residents who had refused the vaccine, to protect the elderly with limited capacity, as well as the other residents and the residence workers. In all cases, the judges found that the benefits of the vaccine to protect vulnerable residents belonging to a risk group outweigh the risks of possible secondary effects, in line with recommendations from the European Medicines Agency. Similarly, in the United Kingdom, the Court of Protection of England and Wales reversed the decision of the legal representative of an elderly person suffering from dementia and schizophrenia and who had declined the vaccine in her name, after her children contested that decision.<sup>61</sup> In both countries, the courts considered the elderly's best interest and concluded that the COVID-19 vaccine would dramatically reduce the risk of contracting the virus. While the judge in the English case focused on the individual protection of the resident, the judges in the Spanish cases also applied the principle of solidarity (although not expressly mentioning it) by highlighting the need to protect the other residents of the retirement homes and their workers.

At the same time, efforts to anticipate mandatory or forced vaccination already resulted in judicial decisions. In Argentina, for instance, the Federal Court of Appeals of Bahía Blanca upheld a

first instance judgment that dismissed a claim of a group of individuals requesting it to prevent them from being forced to take the vaccine.<sup>62</sup> The Court found that these individuals could not prove that they had suffered a harmful situation, because the COVID-19 vaccine had not been included in the national vaccination schedule.

As vaccination campaigns progress in many jurisdictions, authorities are increasingly facing the issue of compulsory vaccination to reach their public health objectives. In jurisdictions without legislation expressly mandating vaccination, courts might continue to rely on general principles to rule on cases involving indirect restrictive measures.

That was the case both in the Brazilian and Israeli cases, where courts referred to the general principles of proportionality and reasonableness as guiding principles for the adoption of restrictive measures aimed at incentivizing citizens to vaccinate. The principle of solidarity, which might itself be a basis for adopting legislation on compulsory COVID-19 vaccination, is already used by courts to justify mandatory vaccination for children (as the European Court of Human Rights), for deciding to vaccinate vulnerable people under legal protection (in Spain, for example), and to reject challenges of vaccine mandates (as the Italian Council of State).

However, a more frequent issue in slow-starting vaccination campaigns is prioritization, as the next section explains.

### **3. Prioritization**

In a context of vaccine scarcity for many jurisdictions, authorities have decided to prioritize certain groups of people considered more vulnerable to the disease caused by COVID-19. Here, the issue is opposite to that of mandatory vaccination, because instead of vaccine hesitancy, claimants have argued before courts that they should be prioritized for vaccination. That specific context prompted three German courts to deny the request for the prioritization of individuals suffering severe health issues.

In all three cases from February 2021 described below, the courts ultimately held that a fair healthcare management in the vaccination campaign outweighed the applicants' personal rights, despite their apparently acute health issues.

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<sup>58</sup> Greece, Council of State, 29 June 2021, No. 133/2021.

<sup>59</sup> Spain, Court of First Instance of Santiago de Compostela, 20 January 2021, No. 60/2021, ECLI:ES:JPI:2021:1A.

<sup>60</sup> Spain, Court of First Instance of Seville, 15 January 2021, No. 47/2021, ECLI:ES:JPI:2021:18A; Court of First

Instance of Santiago de Compostela, 19 January 2021, No. 55/2021, ECLI:ES:JPI:2021:21A.

<sup>61</sup> England and Wales, Court of Protection Decisions, 20 January 2021, No. 13434332 2021 EWCOP 7 <<https://www.bailii.org/ew/cases/EWCOP/2021/7.html>> accessed 5 October 2021.

<sup>62</sup> Argentina, Federal Court of Appeals of Bahía Blanca, 2 March 2021, exp. No. FBB 11133/2020/CA1.

First, the Administrative Court of Frankfurt am Main (Germany) denied an 8-year-old girl's request to be included in the second-tier prioritization group, rather than the third-tier group, as defined by the federal Corona Vaccination Ordinance (*CoronaImpfV*).<sup>63</sup> She suffered from severe health issues and mental impairment. The Court recognized that this ordinance could not have foreseen all health conditions for the purpose of prioritization, so individual cases should be considered. However, the Court denied the application for two reasons. Firstly, the prioritization put in place by the ordinance was suitable, necessary, and proportionate, given the state's duty to protect public health and to guarantee a fair healthcare system, in a context of vaccine scarcity. Thus, the contested measure did not infringe the applicant's fundamental right to health and bodily integrity. Secondly, including the applicant in the third-tier group was reasonable enough, as she did suffer from severe health issues and could be administered the vaccine despite her young age, under an "off-label" exemption for vulnerable people.

Second, the Administrative Court of Gelsenkirchen denied the reclassification of a person suffering severe diseases from the second-tier group to the first-tier, highest priority group.<sup>64</sup> Although the applicant claimed that this classification was infringing his fundamental rights to life, health and bodily integrity, the Court emphasized on the importance to stick to the prioritization established by the federal ordinance to guarantee a fair vaccination campaign. Only absolutely necessary exemptions could be granted in exceptional cases – but the applicant had failed to sufficiently demonstrate the severe health conditions that would have justified an exemption from the established vaccination order. In particular, the Court pointed out that the federal Corona Vaccination Ordinance indeed foresaw that the relevant authorities could grant exemptions on a case-by-case basis. But the Court found that the applicant was not in a situation that warranted such exemption. According to the Court, relying on a recommendation of the Permanent Vaccination Commission, these exemptions could for example apply to people with rare, serious pre-existing diseases or severe disabilities, for whom there is

not yet sufficient scientific evidence regarding the contraction of the COVID-19 disease, but for whom a significantly increased risk must be assumed. The exemption would also apply to people who could no longer be vaccinated effectively at a later date, for instance because of imminent chemotherapy.

Third, the Administrative Court of Schleswig-Holstein held that, even though an individual suffered severe health issues, it could not be included in another higher priority group because he failed to demonstrate that he risked suffering from a severe or fatal form of COVID-19.<sup>65</sup> The fact that his wife was a nurse, thus included in the highest priority group, was irrelevant, since the federal ordinance had not foreseen that possibility but had done so for close contacts of individuals included in the second-tier priority groups. Relying on the principle of proportionality, the Court considered that the need to have a fair vaccination campaign for the whole population trumped the applicant's individual rights.

In contrast, a woman obtained a judgment from a Mexican federal court that she be vaccinated before her turn according to the government's prioritization schedule. She indeed suffered from comorbidities which entailed a high risk of suffering from a severe form of COVID-19.<sup>66</sup> Similarly, a Paraguayan claimant suffering an incurable disease with comorbidities successfully obtained the Court of First Instance of Asunción to order the health ministry to administer her the vaccine, because the prioritization schedule at the time excluded her from vaccination, then reserved to those over 60.<sup>67</sup> However, these decisions seem at odds with the German cases where courts were keen on respecting the prioritization established by law, especially given that the applicant had apparently contracted COVID-19 when the judge ruled on the case.

In other cases, judges have also had to rule in situations where the authorities adapted prioritization rules when individuals had already received a first dose of the vaccine without respecting the prioritization defined by competent authorities. For instance, the Regional Administrative Tribunal of Catania (Italy) ruled in February 2021 that the Sicilian authorities were indeed competent to suspend the second dose for individuals that had only received the first one

<sup>63</sup> Germany, Administrative Court of Frankfurt am Main, 12 February 2021, No. 5 L 219/21.F, ECLI:DE:VGFFM:2021:0212.5L219.21.F.00.

<sup>64</sup> Germany, Administrative Court of Gelsenkirchen, 18 February 2021, No. 20 L 182/21, ECLI:DE:VGGE:2021:0218.20L182.21.00.

<sup>65</sup> Germany, Administrative Court of Schleswig-Holstein, 17 February 2021, No. 1 B 12/21, ECLI:DE:VGSH:2021:0217.1B12.21.00.

<sup>66</sup> Manuel González Vargas, 'Una mujer demandó para obtener vacuna contra COVID-19 y juez le dio la razón' (*Infobae*, 11 January 2021) <<https://perma.cc/BDX5-KBBJ>> accessed 28 February 2021.

<sup>67</sup> Paraguay, 6<sup>th</sup> Civil and Commercial Court of First Instance of Asunción, 1 July 2021, *A. L., Nò S. v. Ministry of Public Health and Social Welfare s/Amparo*.

despite not being included in a priority group.<sup>68</sup> That suspension occurred less than a month after the applicants received the first jab. In line with the German courts' reasoning, the Italian tribunal highlighted the importance of continuing the vaccination campaign of those entitled to receive the vaccine because of their health conditions, in a context of vaccine scarcity. It rejected the applicants' claims that receiving only the first dose would be detrimental to their health, as they failed to scientifically demonstrate that it was the case.

Changing prioritization rules during an ongoing vaccination campaign happened in other jurisdictions as well, with arguably more harmful consequences in terms of fundamental rights. Amid Israel's successful vaccination campaign, the Minister of Public Security ordered the Israel Prison Service to delay the immunization of prisoners until all prison workers had been vaccinated. That order was contrary to the Ministry of Health guidelines, which prioritized prison staff and prisoners alike, especially the most vulnerable. However, a few days after an association filed a complaint with the Supreme Court, the executive reversed its decision and started vaccinating all prisoners that wanted to be immunized. Although the Court removed the petition, it criticized the Minister of Public Security's decision, stating that it had acted beyond its authority, the health minister having the authority alone.<sup>69</sup>

The justices also stressed the importance of protecting the fundamental rights of the inmate population.

Similarly, the French Council of State considered that prisoners were not discriminated against for being vaccinated according to the same prioritization schedule as the general population.<sup>70</sup> The Council of State did not consider it necessary to prioritize prisoners' vaccination, as the risk of developing a serious form of COVID-19 did not appear to be higher for prisoners than for the

average population. The fact that prisoners had access to the vaccine based on the same criteria of age and state of health than for the whole population did not reveal any discrimination. While the attempt to change the prioritization order for a specific group came from the government in Israel, it was initiated by an association defending prisoners' rights in France.

Finally, prioritization has not only been litigated by individuals but also by whole categories of people. In India, claimants have successfully obtained a High Court to order the authorities of the State of Arunachal Pradesh to prioritize people with disabilities in the administration of the vaccine.<sup>71</sup> Similarly, members of the legal profession in India have been seeking priority for to obtain the vaccine – less successfully. Several lawsuits were introduced before the Delhi High Court, and the Supreme Court of India joined all the matters but has since stayed proceedings.<sup>72</sup> Likewise, the High Court of Justice of Catalonia (Spain) granted the request of national police trade unions to order the Catalan authorities to consider them essential public service for the purpose of the vaccination schedule, to avoid discrimination with the regional and local police forces in Catalonia that had been considered as such.<sup>73</sup> In Brazil, several judges authorized unions to directly purchase vaccines from pharmaceutical companies and proceed to the vaccination of their members.<sup>74</sup> However, these judicial decisions have little practical effects because the country has been experiencing vaccine shortages, in a context of political skepticism towards both the virus and the immunizers.

However, due to the constantly evolving situation regarding vaccination, some cases involving prioritization rapidly became moot. That was the case of a plaintiff in Idaho (United States) who challenged the state's vaccination schedule that prioritized healthcare workers and elderly residents of long-term care facilities over ordinary

<sup>68</sup> Italy, Regional Administrative Tribunal of Catania (Section 4), 13 February 2021, No. 102, ECLI:IT:TARCT:2021:102SENT.

<sup>69</sup> Israel, Supreme Court, 31 January 2021, *Physicians for Human Rights v Minister of Public Security* (HC 158/21).

<sup>70</sup> France, Council of State, 5 February 2021, No. 449081, ECLI:FR:CEORD:2021:449081.20210205.

<sup>71</sup> India, High Court of Assam, Nagaland, Mizoram and Arunachal Pradesh, 28 June 2021, Case No. PIL 11/2021.

<sup>72</sup> India, Supreme Court, 18 March 2021, *Bharat Biotech International v Union of India*, Special Leave to Appeal, No. 4327/2021.

<sup>73</sup> Spain, High Court of Justice of Catalonia, 27 April 2021, recurso especial de protección jurisdiccional de los derechos fundamentales, SALA TSJ 1.298/2021 y Sección No. 162/2021.

<sup>74</sup> André Richter, 'Juiz autoriza mais entidades privadas a importar vacinas contra covid' (*Agência Brasil*, 30 March 2021) <<https://agenciabrasil.ebc.com.br/justica/noticia/2021-03/juiz-autoriza-mais-entidades-privadas-importar-vacinas-contracovid>> accessed 5 October 2021; Daniel Adjuto, 'Justiça autoriza sindicato de Campinas a comprar vacinas para funcionários' (*CNN Brasil*, 6 April 2021) <<https://www.cnnbrasil.com.br/nacional/2021/04/06/tribunal-autoriza-sindicato-de-campinas-a-comprar-vacinas-para-funcionarios>> accessed 5 October 2021; Ana Maria Campos, 'Justiça autoriza Sindicato dos Médicos a comprar vacina contra covid-19' (*Correio Braziliense*, 30 March 2021) <<https://blogs.correiobraziliense.com.br/cbpoder/justica-autoriza-sindicato-dos-medicos-a-comprar-vacina-contracovid-19/>> accessed 5 October 2021.

people of at least 65 years old.<sup>75</sup> In this case, the U.S. District Court dismissed the claim in parts because the plaintiff had been vaccinated in the meantime.

All in all, despite the Latin American exceptions, courts appear to have prioritized the general interest over individual rights. However, courts have applied different general principles, based on their respective legal traditions. In particular, the German courts relied on the principle of proportionality to justify its refusal to prioritize individuals, while the French Council of State applied the principle of non-discrimination to refuse the prioritization of prisoners in the vaccination campaign.

#### 4. Collection and Processing of Vaccination Data

Beyond the issues of mandatory vaccination and prioritization, important litigation has been defining to what extent authorities can collect and process citizen health data linked to vaccination. During the pandemic, the collection and processing of health data has been a controversial topic. In April 2021, Apple and Google suspended an updated version of the United Kingdom's NHS COVID app, over concerns that the update would compromise users' location data.<sup>76</sup> The issues of data transfer and surveillance have been the object of two important cases in France and Israel.

In France, the Council of State held that French authorities could lawfully partner with a company that subcontracts the hosting of personal data for appointments to get vaccinated to a US company.<sup>77</sup> Associations and trade unions had asked the Council of State to suspend the partnership between the Ministry of Health and a company providing online medical appointment services, arguing that the firm used the Luxembourgish subsidiary of Amazon Web Services (a company incorporated in the United States) to host its appointment data, entailing risks with regards to access requests by US authorities, in the context of surveillance programs. Nevertheless, the interim relief judge of the Council of State dismissed the request, noting (i) that the data collected in the context of the vaccination appointments did not include health data on the possible medical reasons for eligibility for vaccination, but rather personal identification data and data relating to appointments; (ii) that guarantees had been put in

place to deal with a possible request for access by US authorities; and (iii) that the data was protected by sufficient security safeguards, for instance encryption procedures based on a trusted third party located in France. Therefore, the Council of State found that the level of protection of the data relating to appointments made in the context of the vaccination campaign was not manifestly inadequate considering the risk of infringement of the EU's General Data Protection Regulation, as further defined by the Court of Justice of the European Union in a Grand Chamber judgment of 16 July 2020 in *Data Protection Commissioner v Facebook Ireland and Maximilian Schrems (Schrems II)*.<sup>78</sup> In other words, the Council of State focused on applying the Court of Justice's *Schrems II* ruling to evaluate whether the processing of personal data for vaccination appointments entailed a risk of data transfer to the US in violation of EU law.

In Israel, the Supreme Court held that it was unconstitutional for the government to allow the Israel Security Agency (ISA) to track individuals who had tested positive to the virus, in a sweeping manner.<sup>79</sup> The Court found that such data access disproportionately and unreasonably violated the fundamental right to privacy, as tracing through ISA technology should only be regarded as a complementary mean to fight the pandemic. Nevertheless, the Court also ruled that surveillance could be warranted in limited cases where people do not cooperate with human epidemiological investigations, as opposed to technological surveillance. With regards to vaccines, it is worthwhile noting that the Court believed that the successful vaccination campaign, coupled with the expansion of the human epidemiological investigations, would change the government's use of the tracing tool.

While the focus of the French Council of State was to ensure that personal data would not be made available to US intelligence in the first place, the Israeli focus was to undo an ongoing surveillance scheme, applying the principle of proportionality to declare the sweeping surveillance tool used by intelligence services unconstitutional. The purpose and scope of personal data collection and processing was different in both cases, as the French authorities collected personal data (but not health data) for organizing the vaccination appointments, while the Israeli authorities were

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<sup>75</sup> United States, U.S. District Court for the District of Idaho, 18 May 2021, *Byrd v. Little*, Case No. 1:21-cv-00001-DCN, 2021 WL 1990642.

<sup>76</sup> Alex Hern, 'Apple and Google block NHS Covid app update over privacy breaches' (*The Guardian*, 12 April 2021) <<https://www.theguardian.com/world/2021/apr/12/apple-and-google-block-nhs-covid-app-update-over-privacy-breaches>> accessed 5 October 2021.

<sup>77</sup> France, Council of State, 12 March 2021, No. 450163, ECLI:FR:CEORD:2021:450163.20210312.

<sup>78</sup> Court of Justice of the European Union, judgment of 16 July 2020, *Data Protection Commissioner v Facebook Ireland Limited and Maximilian Schrems*, C-311/18, ECLI:EU:C:2020:559.

<sup>79</sup> Israel, Supreme Court, 1 March 2021, *Association for Civil Rights in Israel v Knesset* (HCJ 6732/20).

tracking individuals who tested positive to COVID-19 (thus including health and location data).

Finally, the issue of data protection arose in the abovementioned case in which Members of the European Parliament challenged the imposition of a certificate to access the institution's premises.<sup>80</sup>

The claimants argued that this system involved risks for their personal health data. However, the President of the EU's General Court rejected their claims because (i) to minimize data, only the validity of the certificate and the full name of the individuals would appear on the screens used by security agents when controlling access to the buildings; (ii) personal data would not be processed for any other means, and security agents are subject to strict obligations of professional secrecy; and (iii) the impact assessment for the protection of personal data made by the Parliament considered the risk of vulnerability of the application used by security agents to be low.

## 5. Level of Competence to Regulate Vaccination

Finally, litigation also arose related to the more institutional issue of which level of government is competent to regulate vaccination. The issue can become very relevant in jurisdictions where different levels of government have different views as to the conduct of health policies related to the pandemic in general, and vaccination campaigns in particular.

This issue is sometimes political, as the case of Brazil shows, especially considering the presidential skepticism around the virus in general and the vaccine to fight it, more specifically. The Brazilian case is interesting because the issue of vaccine regulation happens at two levels: (i) market regulation (to what extent are private entities allowed to import vaccines?); and (ii) institutional regulation (to what extent can municipalities administer the vaccination campaign or impose proof of vaccination to access public spaces?). At the first level of market regulation, both public (individual Brazilian municipalities)<sup>81</sup> and private entities (companies and associations) are seeking to import vaccines directly, to bypass the federal

government. However, the ability for private entities to import COVID vaccines is limited by a federal law which conditions import authorizations to the donation of these vaccines to the public health system, to be used within the scope of the National Immunization Program.<sup>82</sup>

Even so, a Federal court of Brasília held, in a case brought by a trade union, that this mandatory donation was unconstitutional and constituted an illegal infringement of private property by the State.<sup>83</sup>

At the second, institutional level, it was the Democratic Labor Party (*Partido Democrático Trabalhista*) which filed the aforementioned case before the Supreme Court in which it claimed that the states and municipalities should determine if vaccination was compulsory or not, in opposition to Bolsonaro's health policies. The Supreme Court ultimately held that states and municipalities could each decide to impose both penalties and indirect measures aimed at encouraging vaccination, thereby circumventing the federal Health Ministry.

For instance, the Supreme Court held that the municipality of Rio de Janeiro could impose proof of vaccination for access to sports facilities, reversing a lower court's decision to suspend that measure.<sup>84</sup>

Nevertheless, such possibility may had little practical effects in some localities given the vaccine shortages experienced in Brazil.

Similarly, private individuals in Taiwan brought a case before Taipei's High Administrative Court requesting the authorities to import WHO-certified vaccines, in a context of vaccine scarcity.<sup>85</sup> The claimants based their arguments on the principle of equal protection and the people's rights to health.

But the court rejected the claim because there was no legal basis for individuals to request the competent authorities to act.

In contrast, the Italian Constitutional Court suspended the regional law<sup>86</sup> of Valle d'Aosta –an autonomous region in northwest Italy– aimed at legislating to fight the pandemic.<sup>87</sup> The Court held that health policies directed at fighting the pandemic, including the vaccination campaign, should be let at national level. In particular, the Court explained that, in the event of highly

<sup>80</sup> See section 2.2.

<sup>81</sup> Several cases are pending before federal lower and appellate courts.

<sup>82</sup> Art. 2, Lei No. 14.125 de 10 de março de 2021, Dispõe sobre a responsabilidade civil relativa a eventos adversos pós-vacinação contra a Covid-19 e sobre a aquisição e distribuição de vacinas por pessoas jurídicas de direito privado, D.O.U 10 March 2021, p. 3.

<sup>83</sup> Brazil, Federal Civil Court of the Federal District (21<sup>st</sup> chamber), 5 May 2021, Case No. 1020384-49.2021.4.01.3400.

<sup>84</sup> Brazil, Federal Supreme Court, 30 September 2021, Medida Cautelar na Suspensão de Tutela Provisória 824 Rio de Janeiro, Min. Presidente L. F.

<sup>85</sup> Taiwan, Taipei High Administrative Court, 30 June 2021, Administrative Verdict 2021 No. 623.

<sup>86</sup> Legge della Regione autonoma Valle d'Aosta/Vallée d'Aoste 9 dicembre 2020, No. 11 (Misure di contenimento della diffusione del virus SARS-COV-2 nelle attività sociali ed economiche della Regione autonoma Valle d'Aosta in relazione allo stato d'emergenza).

<sup>87</sup> Italy, Constitutional Court, ordinance No. 4 of 14 January 2021 (ECLI:IT:COST:2021:4) and judgment No. 37 of 12 March 2021 (ECLI:IT:COST:2021:37).

contagious diseases capable of spreading globally, logical and legal reasons call for a national discipline, to preserve the equality of citizens in the exercise of the fundamental right to health and to protect the collective interest.

The Court highlighted the fact that the failure to contain the virus at regional level would have serious consequences at national and, potentially, international levels. This reasoning applied not only to quarantines and other restrictive measures applicable to daily activities, but also to contagion tracing, methods of collecting and processing health data and the supply of drugs and vaccines. The same holds true for vaccination campaigns, which should be carried out according to national criteria defined by the State legislature, the Court held.

In the same vein, the Spanish government challenged the constitutionality of a modification to the Health Law of the autonomous community of Galicia which intended to allow the Galician authorities to mandate vaccination on their territory.<sup>88</sup> The Spanish Constitutional Court unanimously maintained the suspension of the Galician law because compulsory vaccination was not a preventive measure expressly contemplated in the Spanish Organic Law 3/1986, on special measures in matters of public health.<sup>89</sup>

In the United States, some states have also successfully obtained federal courts to suspend the application of federal vaccine mandates for healthcare workers and in companies of 100 workers or more.

The courts in these cases based their decisions in parts on the balance between federal and state powers,<sup>90</sup> and the separation of powers between the executive and legislative branches.<sup>91</sup>

The results in the Italian and Brazilian cases sharply diverge. While the Italian Constitutional Court stresses the importance of national cohesion in adopting public health policies to curb the spread of COVID-19, the Brazilian Supreme Court allows federated and local entities to adopt restrictions aimed at inciting individuals to vaccinate. Of course, the situation of both countries is also very different: national unity in Italy is required because of its limited size and denser population, compared to Brazil's vast territory, which warrants differentiated policies. Nevertheless, the outcomes

in all cases also highlight the political divergences that can arise in the context of an unprecedented pandemic.

## 6. Conclusion

This survey shows how vaccination worldwide has raised important fundamental rights issues in several aspects. Cases related to mandatory vaccination show that the fundamental right to health is not limited to an individual dimension but also includes a collective one. Courts appear to agree that vaccination is not only a matter of individual choice but also one of solidarity with the most vulnerable groups. Still, the implementation of health passes intended to reopen economies and restore freedom of movement have been highly controversial and intensely litigated, highlighting the key role of public trust in the deployment of vaccination campaigns globally.

Moreover, courts have usually upheld prioritization decisions made by the authorities. While this issue will progressively disappear nationally, in countries with high vaccination rates, it will continue to be a hot topic internationally, considering the vaccination gap between higher and lower income nations. In fact, the debate about lifting patent protection for COVID vaccines<sup>92</sup> has been an expression of the concerns that some countries do not have sufficient access to the jabs or do not have sufficient resources for appropriate supplies, although it might also hide issues of vaccine nationalism.

If privacy and data protection concerns were already topical pre-COVID, the pandemic exacerbated them because it forced individuals and organizations to shift many aspects of their lives online, including with regards to vaccination. However, this survey shows that courts have been called upon to establish fundamental rights safeguards in this space too, as the important cases in France and Israel show.

Finally, differences over public policies in the field of vaccination resulted in litigation over the appropriate level of government to conduct vaccination campaigns. These cases showed how political the issue is, but also how the constitutional framework and the specific characteristics of each

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<sup>88</sup> Ley 8/2021, de 25 de febrero, de modificación de la Ley 8/2008, de 10 de julio, de salud de Galicia, DOG No. 39, 26 de febrero de 2021, p. 11984.

<sup>89</sup> Spanish Constitutional Court, 20 July 2021, No. 74/2021, ECLI:ES:TC:2021:74A.

<sup>90</sup> U.S. Court of Appeals for the Fifth Circuit, 12 November 2021, *B. e.a. v Occupational Safety and Health Administration*, No. 21-60845; U.S. District Court, Eastern District of Missouri, Eastern Division, 29 November 2021, *State of Missouri et al. v Joseph R. Biden*, No. 4:21-cv-01329-MTS.

<sup>91</sup> U.S. District Court, Western District of Louisiana, Monroe Division, 30 November 2021, *State of Louisiana et al. v Xavier Becerra et al.*, No. 3:21-cv-03970-TAD-KDM.

<sup>92</sup> 'America wants to waive patent protection for vaccines' (*The Economist*, 8 May 2021) <<https://www.economist.com/business/2021/05/08/america-wants-to-waive-patent-protection-for-vaccines>> accessed 5 October 2021.

country are shaping the vaccination campaigns themselves.

### Table of Cases<sup>93</sup>

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<sup>93</sup> Please note that citations have been harmonized for the sake of uniformity in this article, but do not reflect proper referencing in their respective jurisdictions.

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