

# MANDATORY VACCINATION OF MEDICAL PERSONNEL AGAINST COVID-19: EUROPEAN STANDARDS OF ITS INTRODUCTION

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## INTRODUCTION

In the context of COVID-19 pandemic, when the implementation of voluntary vaccination policies hardly leads to achievement and maintenance of collective immunity, Member States of the European Council one after another have launched mandatory vaccination of medical personnel against COVID-19 (Austria, Greece, Italy, Latvia, France, Ukraine, etc.). They apply varied spectrum of measures for stimulation of it through the way, for instance, of banning a healthcare specialist from his/her medical activities, let us say, dismissal from workplace, fines imposed, etc. It happens, particularly in cases, when refusing from vaccination without any medical contraindications. This issue has become one of the most debatable and controversial, since it has created a conflict between two social interests: public interest that is in for saving life or health of medical employee, and the private interest, which essence is in controlling his/her own life.

Thus, on one hand, international human rights instruments guarantee everyone the right to respect for his private life [1]. Vaccination becomes one of the procedures of interference into this right, in particular within physical and psychological inviolability of people, including medical personnel. According to the first principle of the Nuremberg Code as well as some other International human rights acts, medical interference requires voluntary consent of a person only, and the refusal should not lead to negative consequences for him/her [2–6]. On the other hand, the right to respect for private life is not absolute and it can be limited by the state. International human rights acts impose positive obligation on states to take up appropriate measures for protection of life and health of people being under the jurisdiction of states [7–9], in particular through the introduction of compulsory vaccination among certain occupations (professions) representatives. Mandatory vaccination of medical employees against COVID-19 is challenged to meet important public interest, which is protection of the population from infectious diseases, because medical personnel in their professional activities, face daily contact with COVID-19 (diagnosed) patients or those who

can be potentially ill for COVID-19. Healthcare personnel professional activities can lead to contamination of the medical employee himself and/or spreading COVID-19 disease by.

At the same time, mandatory vaccination of healthcare system employees against COVID-19 is not the same as violent vaccination. Public interest also requires from the state to take measures on prevention from state abuse when introducing mandatory vaccination for healthcare personnel from COVID-19, ensuring respect for the physical inviolability of the medical employee, human dignity, ensuring the principles of self-determination and personal autonomy of the every medical worker.

Thus, after the introduction of mandatory vaccination of medical personnel against COVID-19 by Greece in regards of the condition on their admission to professional activities, public hospitals healthcare employees of private and state form of ownership in Greece (30 people) requested the imposition of interim measures by the European Court of Human Rights (ECHR). They claimed that Greece's actions on implementation of mandatory vaccination of healthcare staff from COVID-19 violate their rights guaranteed by Article 8 of the Convention on Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the Convention) [10] and that they face a real risk of irreparable harm for themselves.

Taking into account the above mentioned, it should be noted that the identification of European standards on the introduction of mandatory vaccination of medical personnel against COVID-19 is relevant, being theoretically and practically ripe.

**Objective** of this article is to identify the standards of the ECHR on the introduction of mandatory vaccination of medical personnel from COVID-19 in conditions of pandemic.

The analysis has been carried out on the decisions of the ECHR as for vaccination matters, which formed the legal position of the Court on its implementation by the state. These decisions were divided into groups according to the conditions in which the European Council launched mandatory vaccination: the situation, which is being ordinary, one (standard vaccination against diseases well known to medical science,

where vaccines have been tested and investigated thoroughly). Another one is extraordinary situation within society and state, as well as in the world, for example, COVID-19 pandemic.

## POSITIONS OF THE ECHR ON VACCINATION

The ECHR has developed general principles for mandatory vaccination of persons when out of pandemic. The legal positions of the ECHR have just being launched to formulate in regards with the European Council healthcare employees vaccination introduction in conditions of pandemic, in particular, mandatory vaccination against COVID-19, as well as the application of sanctions like the dismissal of a medical worker from his professional activities in case of refusal to be vaccinated without medical contraindications.

Following Greece's healthcare employees mandatory vaccination from COVID-19 as necessary condition for their professional admission, Greek medical personnel applied to the ECHR against Greece for interim measures and the ECHR refused to impose these temporary measures in order to ensure that the compulsory vaccination of medical personnel in Greece against COVID-19 [11, 12] is of practical importance for the Member States of the European Council. Thus, legal position of the ECHR in its decisions, meaning cases on vaccination in standard conditions can be used in pandemic situation. And if it is possible, ones among them can be applied.

The role of the ECHR decisions is that they "set European Standards" for the introduction of mandatory vaccination of medical personnel under regular or pandemic conditions. Its decisions affect the healthcare policy of all Member States of the European Council with regard to such a vaccination, keeping in mind that:

1) the decision of the ECHR is a source of the law in all Member States of the European Council [13, 14];

2) the decision of the ECHR is the act of interpretation of the Convention, which means that the legislation of a Member State of the European Council and the practice of its application must be compatible with the Convention and the decisions of the ECHR being the Convention norms explanations [15, 16];

3) the decision of the ECHR must be executed by the state against which it is rendered [17, 18] (the state takes not only individual, but also general measures to implement it, also amending the legislation and practice of its application).

It follows that the legal positions on vaccination formulated by the ECHR within the regular period of a lifetime also can be applied during the pandemic/pandemics period.

At the same time, as the ECHR has repeatedly pointed out, the Convention is a "living organism" [19, 20]. Its rules are interpreted in the light of modern conditions [21, 22], and therefore the ECHR is not bound by its previous decisions.

In accordance with paragraph 7.3.2 of Parliamentary Assembly of the Council of Europe (PACE) Resolution, dated 27.01.2021 No. 2361 (2021), the Assembly calls on the Member States and the European Union to ensure that no one is discriminated because of not having been vaccinated, or of possible health risks, or just through simple reluctance to be vaccinated [23]. According to Article 5 of the Convention on Human Rights and Biomedicine, dated 04.04.1997, any intervention into the field

of healthcare can be carried out only after the voluntary and conscious consent of the person concerned [24]. This very person is to be provided with relevant information on the purpose [25] and nature of the intervention in advance [26], as well as its consequences and risks [27].

In the case of "Jehovah's Witnesses of Moscow vs Russia" the ECHR stated that the very essence of the Convention consists of respect for human dignity and freedom [28]. The interpretation basis of guarantees for their observance is grounded on the concepts of self-determination [29] and personal autonomy [30]. It follows from this decision, that in case of medical employee's refusal from being vaccinated against COVID-19, without having any medical contraindications, even with the jeopardy of fatal, mandatory vaccination against COVID-19 of this medical employee is considered as interference into his right of personal-patient inviolability, of course, without granting the consent for that. This is also considered as an encroachment onto his rights guaranteed by the Article 8 of the Convention. Medical employee has the right to make vaccination decisions according to his or her own views and values, no matter how irrational, unreasonable, or shortsighted they may be minding opinion of the state and other people.

The ECHR noted for the case on "Solomakhin vs Ukraine" [31]: firstly, that the physical inviolability of a person is covered by the concept of privacy, which is protected by the Article 8 of the Convention. Secondly, the inviolability of the human body concerns the most intimate areas of private life, and mandatory medical interference, even minor, is an invasion into the right to privacy. Third, compulsory vaccination as the procedure is an interference into the right to respect for a person's private life, i. e. physical and psychological inviolability, which are guaranteed by the Article 8 of the Convention. Such an intervention from the side of the State cannot be arbitrary. The ECHR position is well established, according to which medical intervention, including compulsory vaccination, must be provided by the state law, pursue legitimate aim, as well as being quite necessary for the democratic society.

In the case of "Vavříčka and others vs the Czech Republic" [32] the ECHR has focused its attention on changing policies of Member States of the Europe Council on vaccination – the introduction of mandatory vaccination instead of voluntary vaccination due to reduced collective immunity. It follows that medical interference; including the government's medical personnel mandatory vaccination against COVID-19 may be justified by the need to control the spread of infectious diseases. The state's requirement for mandatory vaccination of medical personnel against COVID-19 as for the need to protect public health, as well as health of those concerned, is justified. In this case, the principle of public interests importance prevails over personal ones, but only if the medical personnel mandatory vaccination against COVID-19 has objective grounds, that is, when such medical intervention is justified.

It also follows from the decision of the ECHR in the case of "Vavříčka and others vs the Czech Republic", that the introduction of medical personnel mandatory vaccination against COVID-19 must be accompanied by the following conditions:

**1. Legality.** State law is to establish the process of vaccination for medical personnel against COVID-19, its procedure, types, and compensation for damage or any harm that may be imposed to life and health of medical personnel as a result of vaccination from COVID-19. At the same time, the ECHR under the “Law of the State” means both laws passed by the State Parliament and bylaws as the epithet of the word “legitimate”. The ECHR uses the word “formal” instead [33]. Therefore, the obligation to vaccinate should be provided by laws or regulations of the State.

However, concerning the case of “Dink vs Turkey”, the ECHR, although recalling that the expression “prescribed by law”, means that such a measure must be based on domestic law. But nevertheless, the Court emphasizes on that there is also the question of quality law: it must be accessible to the person concerned, who in its turn is to be able to foresee its consequences for himself, and be compatible with the rule of the Law [34]. According to the established case law practice of the ECHR, the provision of law is “predictable”, if it is worded with sufficient precision in order to allow a person to seek for qualified advice, if necessary for his behavior regulations (the case of “RTBF vs Belgium” [35], etc.). It follows from the decision of the ECHR as for “Ahmet Yıldırım vs Turkey” case [36] that the above-mentioned requirement has not been met and the provisions of the Articles of the Law are too vague.

Thus, the expression “required by law” means that the introduction by the state of such a measure like mandatory vaccination of medical personnel against COVID-19 must have been based on legal grounds, and the law is designed to meet the following quality criteria: be accessible; norms of law must be predictable; be compatible with the Supremacy of the Law.

**2. Legitimate goal.** In the case of “Vavříčka and others vs the Czech Republic” the ECHR has expressed its legal position that the purpose of immunization is to protect individuals from serious diseases, especially including measures through the formation of collective immunity, i. e. overall immunization. Those for whom this kind of treatment (immunization) is contraindicated become indirectly protected against diseases, because the necessary level of immunization was observed within communities, i. e. they are protected as a result of the existence of obtained collective immunity availability [32]. Therefore, if the COVID-19 voluntary vaccination policy is not sufficient to achieve or maintain collective immunity, the COVID-19 mandatory vaccination policy for healthcare professionals may be implemented in order to achieve adequate protection level for COVID-19.

Taking into account the above stated, we conclude that the state policy of mandatory vaccination of medical personnel against COVID-19 can be considered to be the best to meet healthcare professionals’ interests for it is designed to protect him/her from the disease that poses serious jeopardy – COVID-19. It goes without saying, that there are both healthcare professionals who are eligible for vaccination and medical personnel who cannot be vaccinated against COVID-19 due to their health status.

**3. Necessity for democratic society.** Introducing mandatory vaccination of medical personnel against COVID-19, the state is bound to demonstrate whether such vaccination measures are proportionate to the legitimate aim, or whether they are justified and whether such vaccination meets urgent public needs.

Within the framework of this criterion, the ECHR in its decisions draws attention to the breadth of the state’s discretion on this issue [37–40]. Therefore, it goes about that this freedom and independence on addressing the issue of mandatory vaccination of medical personnel against COVID-19 in the framework of interference into their right guaranteed by the Article 8 of the Convention belongs to the State. This discretion may be broad, since there is a worldwide debate over the COVID-19 vaccination and there is no consensus accepted, or even narrowly, if the interference in with medical employee personal rights is much more obvious. Right in this context, the ECHR notes that there is no unanimity in the world to ensure the formation of collective immunity [41]. Therefore, some states use either mandatory vaccination approach against COVID-19, and if medical employee refuses it without medical contraindications, sanctions are imposed on the individual concerned; or there is another approach, that is the voluntary vaccination policy against COVID-19.

As for the decision “Vavříčka and others vs the Czech Republic”, the ECHR focused on the concept of social solidarity, the essence of which is to impose minimum risk from mandatory vaccination on persons in order to ensure well-being of society, especially regarding vulnerable groups of the population, that cannot be vaccinated because they have medical contraindications. Also, regarding the urgent public need, the ECHR pointed out that professional healthcare organizations, as well as governments that provided comments and assessments on vaccination, argue that there is a jeopardy of disease level spreading in the way of decrease through overall vaccination, and also if it has been done exclusively on voluntary basis [32]. It follows that, firstly, the state, in determining the type of vaccination (voluntary or mandatory) must be guided by the highest interests of any person, one of which is the protection of his health. Secondly, since the most effective protection against COVID-19 is the formation of collective immunity and non-vaccination of medical personnel against COVID-19 can lead to outbreaks of COVID-19. Government’s actions to introduce mandatory vaccination of medical personnel against COVID-19 meet urgent social needs. Taking into account the above mentioned and the limits of State discretion, the introduction of mandatory vaccination of medical personnel against COVID-19 and sanctions for refusing from this vaccination are justified.

**4. Proportionality between the established restrictions and the consequences.** Proportionality requires the implementation of balance between the public interest and the protection of the medical personnel rights, as well as the real risk assessment for the professional group (medical personnel) and the population, which should be reduced or eliminated by mandatory vaccination of medical personnel against COVID-19. In this context, it has to be noted that the medical personnel dismissal from their professional activities due to refusal to be vaccinated against COVID-19 without medical contraindications, means decrease in number of personnel who can provide medical care to patients, and potential possibility leading to the loss of professional skills by medical specialist caused by such a suspension. However, the noted above is the direct consequence of the medical personnel’ deliberate refusal to vaccinate against

COVID-19, which is aimed at health care, including relevant occupational (professional) group. In particular, it goes about the possibility of carrying out medical activities by healthcare professionals who cannot be vaccinated due to medical contraindications. Their health depends on the level of vaccination among other medical professionals and the population in general.

Thus, the introduction of mandatory vaccination of medical personnel against COVID-19 by the state is not a disproportionate measure. In addition, medical personnel excluded from medical activities by the cause of their refusal to be vaccinated against COVID-19 without medical contraindications are not limited in their ability to achieve social, professional, and intellectual development. To get access to them they need to make extra efforts. However, the corresponding consequences are limited in time because the vaccination of medical staff from COVID-19 does not affect their further medical activities after the pandemic is over, or to take up provision of such vaccinations on voluntary basis.

## CONCLUSIONS

The ECHR standards for the introduction of mandatory vaccination of medical personnel against COVID-19 in conditions of pandemic have been identified. These measures must be provided by the state legislation which is to meet quality rule of law criteria (be accessible; rules of law must be predictable; be compatible with the Supremacy of the Law); to pursue legitimate goal (protection of the population from COVID-19); to be necessary in democratic society (the existence of real “urgent social need”, but not hypothetical or imaginary one). When the state is guided by considerations of general interest or public well fair to limit the rights of the medical employee guaranteed

by the Article 8 of the Convention, those considerations should be interpreted narrowly, taking into account sticking to fair balance between different interests in this area. The public interest should be under special consideration in preserving the life and/or health of the medical personnel and other people, as well as the private interest of the medical employee as for controlling his or her own life. Mandatory vaccination of healthcare professionals against COVID-19 should be used if the goal of protecting the population from COVID-19 cannot be achieved in other ways. Here is the responsibility of the state to prove the justification and legitimacy of the state’s mandatory vaccination of medical personnel against COVID-19. Mandatory vaccination of medical personnel against COVID-19 is not the same as forced vaccination. The medical employee himself chooses whether to be vaccinated against COVID-19 or not according to his own views, values, no matter how irrational, unreasonable, shortsighted they may be in the opinion of the state and other people.

The state does not have the right to use forced vaccination, but may apply the following:

1) a range of measures to clarify, persuade, encourage mandatory vaccination of medical personnel against COVID-19, which may be direct or indirect, but not violent;

2) sanctions for refusal from mandatory vaccination of medical personnel from COVID-19 who have no contraindications (suspension from medical activities, fines, etc.).

This will develop further proposals for improving legal regulation of vaccination in Member States of the Council of Europe and increase the effectiveness of ensuring the rights of medical personnel, reduce tensions within society.

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**Objective:** to identify the standards of the European Court of Human Rights on the introduction of mandatory vaccination of medical personnel from COVID-19 in conditions of pandemic.

The analysis has been carried out on the Decisions of the European Court of Human Rights as for vaccination matters, which formed the legal position of the Court on its implementation by the State. These decisions were divided into groups according to the conditions in which the European Council launched mandatory vaccination: the situation, which is being ordinary, one (standard vaccination against diseases well known to medical science, where vaccines have been tested and investigated thoroughly). Another one is extraordinary situation within society and state, as well as in the world, for example, COVID-19 pandemic.

The standards of the European Court of Human Rights for the introduction of mandatory vaccination of medical personnel against COVID-19 in conditions of pandemic have been identified: these measures must be provided by the State legislation which is to meet quality rule of law criteria; to pursue legitimate goal (protection of the population from COVID-19); to be necessary in democratic society. Mandatory vaccination of healthcare professionals against COVID-19 should be used if the goal of protecting the population from COVID-19 cannot be achieved in other ways. Mandatory vaccination of medical personnel against COVID-19 is not the same as forced vaccination. The medical employee chooses whether to be vaccinated against COVID-19 or not according to his own views, values, no matter how irrational, unreasonable, shortsighted they may be in the opinion of the state and other people. The state does not have the right to use forced vaccination, but may apply the following: a range of measures to clarify, persuade, encourage mandatory vaccination of medical personnel against COVID-19, which may be direct or indirect, but not violent; sanctions for refusal from mandatory vaccination of medical personnel from COVID-19 who have no contraindications (suspension from medical activities, fines, etc.).

**Conclusions.** The data obtained in this way allow us to develop further proposals for improving legal regulation of vaccination in Member States of the Council of Europe and increase the effectiveness of ensuring the rights of medical personnel, reduce tensions within society.

**Keywords:** COVID-19, vaccination, medical personnel, health, public interest, restriction of rights, sanction.

## ОБОВ'ЯЗКОВА ВАКЦИНАЦІЯ МЕДИЧНИХ ПРАЦІВНИКІВ ВІД COVID-19: ЄВРОПЕЙСЬКІ СТАНДАРТИ ЗАПРОВАДЖЕННЯ

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**Мета:** визначити стандарти Європейського суду з прав людини щодо запровадження державою обов'язкової вакцинації медичних працівників від COVID-19 в умовах пандемії.

Проведено аналіз рішень Європейського суду з прав людини у справах із вакцинації, у яких сформувано правові позиції Суду щодо її запровадження державою. Ці рішення було розподілено на групи за умовами, у яких держави Ради Європи запровадили обов'язкову вакцинацію: ситуація, яка є звичайною (стандартна вакцинація від хвороб, які добре відомі медичній науці, вакцини є апробованими й добре дослідженими); екстраординарна ситуація в суспільстві та державі, світі (пандемія COVID-19).

Визначено стандарти Європейського суду з прав людини щодо запровадження державою обов'язкової вакцинації медичних працівників від COVID-19 в умовах пандемії: цей захід повинен бути передбачений законодавством держави, яке має відповісти критеріям якості, мати легітимну мету (захист населення від COVID-19), бути необхідним у демократичному суспільстві. Обов'язкова вакцинація медичних працівників від COVID-19 повинна застосовуватися в разі, якщо досягнути мети – захистити населення від COVID-19 – неможливо іншими способами. Обов'язкова вакцинація медичних працівників від COVID-19 не тотожна насильницькій вакцинації. Медичний працівник самостійно обирає, вакцинуватися від COVID-19 чи ні, відповідно до власних поглядів і цінностей, хай якими нерациональними, нерозумними, недалекоглядними вони є, на думку представників держави та інших людей. Держава не має права застосовувати насильницьку вакцинацію, але може використовувати:

- 1) спектр заходів із роз'яснення, переконання, стимулювання обов'язкової вакцинації медичних працівників від COVID-19, які можуть мати прямий чи опосередкований характер, але не насильницький;
- 2) санкції за відмову від обов'язкової вакцинації медичних працівників від COVID-19, які не мають протипоказань (відсторонення від здійснення медичної діяльності, штрафи тощо).

**Висновки.** Визначені стандарти Європейського суду з прав людини дають змогу розробити пропозиції з удосконалення правового регулювання вакцинації в державах – учасницях Ради Європи та підвищити ефективність забезпечення прав медичних працівників, зменшити напруженість у суспільстві.

**Ключові слова:** COVID-19, вакцинація, медичний працівник, здоров'я, публічний інтерес, обмеження прав, санкція.