

THE JUDICIARY IN TIMES OF PANDEMIC:
JUDGES' POSITION ON COMPULSORY VACCINATION

- I. Introduction

- II. Controversial issues with respect to compulsory vaccination
 - (a) Comparative law
 - (b) Enforcement or voluntariness and their legal frameworks
 - (c) Compulsory vaccination from a legal standpoint: national and European Union law

- III. Judges' position on the authorisation of enforced vaccination and other issues related to health passports

I. Introduction

In recent times, when judicial bodies have had to decide on issues of great political significance, such as the suspension of Parliament in the United Kingdom or the prosecution of pro-independence politicians in Spain, judges have sometimes exercised their jurisdictional function as a counterweight to the executive branch¹. Other judges, meanwhile, such as Iftikhar Muhammad Chaudhry, Chief Justice of the Supreme Court of Pakistan², have even helped to support the rule of law. Clearly, the functions of the judiciary continue to venture beyond being merely a mouthpiece for the law, as Montesquieu claimed.

The health emergency caused by the current COVID-19 pandemic entails a high degree of uncertainty and has given rise to the introduction of exceptional public policies. In this situation, the judiciary can establish itself as a counterweight to an increasingly powerful executive branch that imposes measures on citizens which, while they may be based on the need to safeguard public health, may also lead to the erosion of individual rights or fundamental legal principles, at both national and European Union level.

This paper does not - indeed cannot - seek to address all the challenges facing the judiciary during times of pandemic. Rather, we will focus on how judges should act with respect to a measure that is under consideration in many Member States and by the European Commission: the possibility of compulsory vaccination against COVID-19, as well as the related question of the issuance of a 'health passport' for persons who have been vaccinated or who are immune to COVID-19.

To this end, we will analyse the current situation from an ethical standpoint, considering the relevant legislation in force, the proposals that are currently being drafted but which in the coming months might become reality, and some of the judicial decisions that have already been issued and some which may be issued in the future. This analysis will be approached from the perspective of how judges can or should act in such situations, as guarantors of legality and fundamental rights. Principles of judicial ethics will also be taken into consideration.

¹Another example is Judge Igor Tuleya, who has become well known throughout Europe for his opposition to the reforms in the Polish Judiciary, particularly with respect to the disciplinary system for judges. See, inter alia: https://www.swissinfo.ch/spa/polonia-justicia_juez-polaco-contrario-a-la-reforma-del-gobierno-rechaza-declarar-ante-supremo/46557312 (accessed 10 May 2021).

² Jaffrelot, C. (2013) '¿Un gobierno de jueces?' *Le monde diplomatique*. <https://mondiplo.com/un-gobierno-de-los-jueces> (accessed 8 April 2021)

II. Controversial issues with respect to compulsory vaccination

The global health crisis caused by COVID-19 and the development of different vaccines to prevent its spread have rekindled debate on compulsory vaccination.

The international social and economic situation, in a pandemic unequalled in our time, has called for rapid development of vaccines to curb the disease. The proliferation of false news and misinformation, coupled with its precipitous arrival, have given rise to a mistrust of coronavirus vaccines among a section of the population.

As early as 2016, the Spanish Bioethics Committee analysed increasing vaccine refusal in neighbouring countries in a report entitled 'Ethical and legal issues in vaccine refusal and proposals for a necessary debate'³. The report pointed out that this refusal usually occurred in states where vaccines have been most successful, where there is, as a result, little perception of the risk of infection. While a lack of infections might lead some to the conclusion that vaccines are unnecessary, they are, in fact, essential to ensuring that there are no infections.

Yet is this degree of mistrust really a significant percentage? Should it pave the way for the possible implementation of compulsory vaccination? Is compulsory vaccination permissible within Spain's current legal framework? Or within the legal framework of other Member states of the European Union? Would this enforcement be ethical? Should judges, therefore, issue decisions on this enforcement in specific cases brought before them? We will consider these questions below.

(a) Comparative law

Firstly, we find that all EU Member States provide for a national immunisation⁴ programme that ensures compliance with Article 35 of the Charter of Fundamental Rights of the European Union, which enshrines the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national legislation.

At European level, there are various approaches to the issue of whether vaccination should be compulsory or voluntary. One approach shared by all states is that most vaccines are merely recommended. Nevertheless, some states provide for certain compulsory vaccines. This is the case

³ Comité de Bioética de España. (2016). *Cuestiones ético-legales del rechazo a las vacunas y propuestas para un debate necesario*.

⁴ Nuño, C. (1 January 2021). '¿Obligatoria o voluntaria? Así está legislada la vacunación general en otros países de Europa' *newtral.es*: <https://www.newtral.es/vacuna-obligatoria-voluntaria-paises-europa-francia-italia/20210101/> (accessed 7 April 2021)

in France, which introduced a regulation on 30 December 2017 with the aim of eradicating several of its remaining infectious diseases, including measles. Italy, meanwhile, stipulates that children under the age of 6 may not access childcare facilities if they do not meet the vaccination requirements, and has introduced financial penalties in this respect. Likewise, Poland provides for the existence of some compulsory vaccination, imposing fines for non-compliance⁵.

At the other end of the scale, states such as Portugal do not provide for the compulsory use of any vaccine. It should be noted, however, that Portugal did, in fact, establish mandatory vaccination for tetanus and diphtheria in the 1960s⁶.

One unusual case is that of Latvia, where, while vaccination is voluntary, parents sign a document whereby they take responsibility for any consequences of their decision not to vaccinate their children.

Outside the European Union, in Australia, financial incentives are provided, either directly or through tax deductions, to encourage parents to vaccinate their children. This is combined with a ban on children attending school if they are suffering from a disease for which there is a vaccine.

(b) Enforcement or voluntariness and their legal frameworks

Despite the differences that can be seen between these distinct models, they all share a preference for voluntary vaccination, relegating compulsory usage to exceptional cases. Practice shows that compulsory vaccination can be counterproductive in some cases⁷, since vaccine enforcement may lead to polarisation in social debate, shifting the focus away from health and the benefits of vaccination towards issues of a more political nature.

In the interests of public health, the authorities clearly cannot allow mistrust of the health system - and specifically in public immunisation strategies - to spread. Nonetheless, it has been shown that positive measures (such as awareness raising, text reminders or providing rewards to vaccinated people) can be more effective^{8,9}. Moreover, in the event that some of the population remains vaccine hesitant, this may not have an excessive impact if the vaccinated population exceeds the minimum immunisation rate.

⁵ Ídem

⁶ Ídem

⁷ Comité Asesor de Vacunas de la Asociación Española de Pediatría. (2018 de agosto de 2018). *Vacunas obligatorias en Europa*. [vacunasaep.org: https://vacunasaep.org/profesionales/noticias/vacunas-obligatorias-europa](https://vacunasaep.org/profesionales/noticias/vacunas-obligatorias-europa) (accessed 8 April 2021)

⁸ Nature. (2018). 'Laws are not the only way to boost immunization' *Nature*, 249-250.

⁹ The Lancet. (2017). 'The imperative of vaccination'. *thelancet.com*, Editorial.

At the same time, the potential effectiveness of measures promoting vaccine uptake should not be underestimated. In this respect, the organ donation policy which has made Spain the most successful country in this respect - more successful even than countries that provide financial rewards to donors - may offer inspiration.

Israeli economists Uri Gneezy and Aldo Rustichini carried out an experiment in which parents received fines for arriving late to school to collect their children¹⁰. Instead of reducing the number of parents who arrived late, the number increased; rather than viewing the fine as a penalty, parents saw it as a fee whose payment allowed them to disregard the pick-up time. This offers a clear example of how penalties do not always produce the desired effects.

In contrast, the same economists also conducted an experiment in which they encouraged three groups of students to raise funds for a cause¹¹. The first group was given an awareness-raising talk about the cause in question but was not offered any extra incentives. The second and third groups were offered 1% and 10% commission, respectively, on the total amount of money raised. While the third group raised more than the second group, which might lead to the conclusion that higher commission provided more motivation, the surprise lay in discovering that the first group of students obtained the best results of all. This is because, although economic incentives may be important, we often forget the existence of other incentives that drive people's behaviour.

It is important, therefore, to consider the sociological effects of penalties and not underestimate the positive impacts of a culture of solidarity, which will convey to the public that vaccination can be a moral rather than legal obligation, and a benefit for both individual and collective health.

As we have already indicated, while it might be advisable to avoid enforcing vaccination, there will be cases when it might be necessary, such as when the minimum immunisation rate is not reached. This rate - which ranges from 70% to 95%, depending on the situation - indicates the percentage of the population which needs to be vaccinated to prevent the spread of a disease and to protect people who cannot be vaccinated due to medical reasons, as can occur among immunocompromised patients.

If the percentage of the population willing to be vaccinated is below the immunisation rate, the question arises as to whether compulsory vaccination can fit into our legal framework.

With respect to the Spanish framework, Article 2 of Organic Law 3/1986 of 14 April, on special measures for the protection of public health, provides, albeit very broadly, for the possibility that

¹⁰ Gneezy, U., & Rustichini, A. (2000). A fine is a price.

¹¹ Gneezy, U., & Rustichini, A. (1998). Pay Enough-Or Don't Pay At All.

health authorities may take measures for treatment ‘when there are rational indications to suggest that there may be a risk to the health of a person or group of persons’.

Article 2 of Law 41/2002 of 14 November, on patient autonomy and on rights and obligations with respect to clinical information and documentation, states that every patient or service user has the right to refuse treatment, with the exception of ‘those cases determined by law’.

It appears, therefore, that there may be a basis for compulsory vaccination, provided that the need for the protection of public health can be justified. This would always entail a decision to be made on a case-by-case basis, in the form of a judicial authorisation which assesses the concurrence of the requirements of suitability, necessity and proportionality.

We can, then, refer to a number of more or less recent cases in which judicial bodies have chosen to enforce vaccination. One noteworthy case involves a judgement issued by a court in Granada in 2010, which enforced the vaccination of 35 children from the same school in order to curb a measles outbreak¹².

In 2019, the courts upheld the action of a municipal child-care centre that blocked the enrolment of an unvaccinated child, considering that the right to health of the other children was paramount. Similar judgments on schools’ refusals to admit pupils can be found in those issued by the Chamber of Administrative Disputes of the Superior Court of Justice of Catalonia on 28 March 2000 and by the Superior Court of Justice of La Rioja on 2 April 2002¹³.

More recently in Galicia, the vaccination of an elderly dependent was enforced, despite her daughter’s refusal, when the judicial body determined that the daughter’s decision was not in accordance with her mother’s best interests. In Seville, meanwhile, the Public Prosecutor’s Office has now made a form available to nursing homes which allows them to report conflicts over the vaccination campaign to the judge¹⁴¹⁵.

Nevertheless, some jurists advise that in the event of a decision to make the COVID-19 vaccine compulsory, it would be preferable to adopt specific legislation that is as explicit as possible¹⁶, since the legislation referred to above uses general terms which do not mention vaccination but merely ‘treatment’. The Spanish Bioethics Committee’s 2016 report foresaw the desirability of

¹² Sentencia [Ruling] 362/2010, de 24 de noviembre, del Juzgado de lo Contencioso Administrativo nº 5 de Granada.

¹³ Rius, M. (17 January 2021). ‘¿Nos pueden obligar a vacunarnos de la covid?’ *lavanguardia.com*: <https://www.lavanguardia.com/vivo/lifestyle/20210117/6183238/obligar-vacunar-covid.html> (accessed 8 April 2021)

¹⁴ Ídem

¹⁵ Quizhpe, E. (14 January 2021). ‘¿Se puede obligar a una persona a vacunarse contra la covid-19?’ *publico.es*: <https://www.publico.es/sociedad/vacuna-covid-obligar-persona-vacunarse-covid-19.html>

¹⁶ García, Y. (27 November 2020). *¿Sería posible la vacunación obligatoria ante la COVID-19? La legislación y los precedentes*. *newtral.es*: <https://www.newtral.es/vacuna-obligatoriedad-covid-19-espana/20201127/> (accessed 8 April 2021)

ensuring that the legal system encompassed various legal possibilities for these cases, taking into account the principle of proportionality and allowing sufficient flexibility for consideration on a case-by-case basis. In the same report, the Committee determined that a pandemic was one case where the need for coercive measures would be more justifiable, given the clear risk to public health.

If such legislation were to be considered, it could establish different forms of enforcement¹⁷: physical coercion, which is legally difficult to justify; the imposition of financial penalties; or the denial of access by unvaccinated persons to certain benefits or services, a measure whose proportionality could be justified by the risk of infection.

Individual freedom must always be restricted as little as possible; however, in a social state such as ours, individual actions will in many cases be necessarily delimited by the common good.

The ethical basis for compulsory vaccination lies in this tension between individual and collective rights. The Spanish Bioethics Committee's report¹⁸ underlines the fact that, while the right to health is an individual right, it is also reflected collectively in the right to public health. It is the protection of this collective right that transforms the right to health into both a right and duty, which requires a certain degree of diligence in the protection of one's own health. The obligation to be vaccinated would therefore be incorporated into this duty to protect both one's own health and public health.

The Spanish Bioethics Committee stresses that this issue is particularly relevant in cases, such as the current crisis, in which health resources are under strain, since it is then that individual decisions can have the most direct impact on public health.

Yet while vaccination may be an ethical or legal duty, it does not necessarily entail the imposition of coercive measures to ensure compliance. The fact that vaccination may never become legally binding does not suppose ethical indifference to whether or not vaccination is carried out, just as it is not ethically neutral to observe or disregard the other health measures that prevent the spread of the virus.

All these debates are still somewhat premature, given that vaccine coverage will not yet reach all citizens, and we still do not know whether voluntary vaccination will achieve herd immunity. Nevertheless, we can consider the issues in order to anticipate and be prepared for potential problems.

¹⁷ Ídem

¹⁸ Comité de Bioética de España. (2016). *Cuestiones ético-legales del rechazo a las vacunas y propuestas para un debate necesario*.

If the decision were taken to impose compulsory vaccination, a number of additional problems could arise.

First of all, we must bear in mind that there are several vaccines and that they differ both in their effects and in their production, since some have been created from messenger RNA and others using the viral vector system¹⁹. What happens if a person refuses to accept one of these vaccines, because they believe that it produces worse side effects, but agrees to be vaccinated with a different vaccine that is not appropriate for them? And if a person refuses to be vaccinated, which of the vaccines would they be given?

Another issue is the possibility that private entities may decide to impose vaccination requirements, even if it is not compulsory. Can a company force its employees to get vaccinated under the threat of a penalty? Can it choose to provide services only to vaccinated people? Does this issue have the same ethical significance from the standpoint of competitive advantage or the protection of public health? Could it become incorporated into a company's corporate social responsibility policy²⁰? And which criteria must judges take into consideration when deciding on one case or another?

(c) Compulsory vaccination from a legal standpoint: national and European Union law

As a general rule, vaccinations are voluntary in Spain, although there are exceptional cases where legislation can be read as allowing compulsory vaccination. This possibility is provided for in laws enacted some years ago and for highly exceptional cases: a 1980 law²¹ amended the National Health Act of 1944, introducing the possibility of implementing compulsory vaccination in the case of infection where safe and effective means of vaccination exist²². Likewise, the 1986 Law on special measures for the protection of public health²³ states that for the purpose of controlling transmissible diseases, the health authority may take any measures deemed necessary in the event of a risk of a communicable nature. According to some authors, this law authorises the imposition of vaccination when the health authority considers it necessary²⁴.

¹⁹ Sénecat, A. (17 November 2020). *Vaccination obligatoire contre le Covid-19 : pourquoi le débat est prématuré*. lemonde.fr: https://www.lemonde.fr/les-decodeurs/article/2020/11/17/covid-19-pourquoi-le-debat-sur-la-vaccination-obligatoire-est-premature_6060073_4355770.html (accessed 8 April 2021)

²⁰ Sorkin, A. R. (12 December 2020). *Should Companies Require Employees to Take the Vaccine?* nytimes.com: <https://www.nytimes.com/2020/12/12/business/dealbook/should-companies-require-employees-to-take-the-vaccine.html> (accessed 8 April 2021)

²¹ Law 22/1980 of 24 April, amending Basis IV of the National Health Act of 25 November 1944.

²² Established by the sole article of Law 22/1980.

²³ Organic Law 3/1986, on special measures for the protection of public health.

²⁴ Tolosa, C. 'Problemas legales de la vacunación en España' [Legal problems with vaccination in Spain]. In: *Diario la Ley* 827/2021.

Some Member States, such as Austria, Estonia, Greece and Denmark, implement a voluntary but recommended vaccination system, like Spain, while others, such as Italy, Germany, France and Poland, provide for enforcement of certain vaccines and recommendation of others.

With respect to European Union law, competence over public health lies with the Member States in the absence of delegated powers, without prejudice to the EU's capacity to pursue public health objectives through the integration of the internal market²⁵. It may also complement the actions of the Member States in this respect pursuant to Article 168 of the Treaty on the Functioning of the European Union (TFEU). For this reason, the institutions of the EU lack competence in the area of compulsory vaccination (and over vaccination in general); it has been argued that one of the most significant health-related problems to have arisen during the COVID crisis is the difficulty of coordinating joint action at European level²⁶.

If compulsory vaccination were to be imposed, the issue could reach the European Court of Human Rights or the Court of Justice of the European Union if it was considered that any fundamental rights protected by the European Convention on Human Rights or the Charter of Fundamental Rights of the European Union - such as the right to physical and moral integrity and the right to privacy - might be impinged on by this enforcement.

In recent months, health laws for the management of the pandemic have been adopted by the parliaments of the Spanish regions of Galicia and Aragon²⁷. These laws provide for the possibility of imposing coercive measures and stricter penalties in the event of a health emergency - measures designed to ensure compliance with the restrictions imposed by COVID-19.

These laws have been fiercely criticised in certain sectors for the alleged mandatory confinement of citizens with COVID-19 or those required to self-isolate²⁸, although the literal text of the law (Article 38.ter.2 of the Galicia Health Act) refers only to the public financing of accommodation for persons without access to adequate accommodation in order to comply with the measures required for self-isolating (e.g., having a bathroom for their sole use).

²⁵ Kurrer, C. (March 2021) 'Public Health'. *Fact Sheets on the European Union*. <https://www.europarl.europa.eu/factsheets/en/sheet/49/public-health> (accessed 15 May 2021)

²⁶ Brehon, N. 'The European Union and the Coronavirus'. *European Issues*. <https://www.robert-schuman.eu/en/european-issues/0553-the-european-union-and-the-coronavirus>. (accessed 15 April 2021)

²⁷ Aragon Health Act: Law 3/2020, of 3 December, establishing the legal framework for the health emergency to control the COVID-19 pandemic in Aragon (Permalink ELI:<https://www.boe.es/eli/es-ar/l/2020/12/03/3/con>) . Galicia Health Act: Law 8/2021 of 25 February, amending Law 8/2008 of 10 July, on health in Galicia. <https://www.boe.es/buscar/doc.php?id=DOG-g-2021-90086> (accessed 10 May 2021)

²⁸ López, P. (February 2021) 'La ley de Salud de Feijóo enciende a los antivacunas' *EL CONFIDENCIAL NEWS*: https://www.elconfidencial.com/espana/galicia/2021-02-06/fejoo-galicia-covid-19-antivacunas_2939036/ *EL EFE*. Labrador, Fernando (February 2021). 'La ley gallega de Salud no creará campos de concentración para contagiados' . *DIARIO.ES* https://www.eldiario.es/sociedad/ley-gallega-salud-no-creara-campos-concentracion-contagiados_1_7208922.html (accessed 8 April 2021)

The measure of interest for the purposes of this study, however, is the possible enforcement of vaccination and, consequently, the judicial decision pursuant to the principles of objectivity and impartiality - principles that also inform judicial ethics. The Galicia Health Act provides for vaccination or immunisation as a measure to be taken by the health authority (Article 38.2.5) and, in the case of persons who unjustifiably refuse the vaccine, the imposition of fines of different amounts depending on this action's impact or significance with respect to public health (Article 41.bis.d and Article 42.bis.c). These fines range from €3,000 in the case of minor infringements to €60,000 in the case of serious offences of the highest degree (Article 44.bis).

It should be noted that the imposition of these fines is not only provided for in the event that there is a risk to public health, but also in the event that the unjustified refusal to be vaccinated is of little or no direct significance to the health of the population (Article 41.bis.d).

In both cases, the coercive imposition of these measures will require the consideration of the individual rights both of the person directly affected by the measure and of indeterminate third parties who may be affected by a generalised disregard for public health²⁹.

Under these circumstances, and with respect to the news circulating about these laws, judges must ensure that their impartiality is not compromised in their application of the law, by examining the legislation objectively, putting aside any prejudices or biases that might have stemmed from news or media misrepresenting the facts. As a second example, we can also question whether judges should, likewise, put aside any preconceived opinions that they may have formed during conversations with medical professionals which encroach on judicial ethics.

A third hypothesis to be considered is that where a judge who has openly taken an open anti-lockdown position on social media is examining a case related to the application of pandemic regulations, such as a decision on the opening up of the restaurant sector; have they compromised their impartiality and will they, therefore, make a decision clouded by bias or prejudice which cannot be put aside?

²⁹As of the date of submission of this paper, this law has been suspended due to a challenge by the Government of the Spanish State in the Constitutional Court, an effect that occurs automatically when a law is *sub judice* before this Court and the challenge has been made by the Government of Spain. Nevertheless, the challenge is based on issues of competence rather than substance, and reflections on the law in terms of judicial ethics are also applicable to possible state legislation that includes the same provisions.

III. Judges' position on the authorisation of enforced vaccination and other issues related to health passports

After analysing the legislation allowing for the possibility of compulsory vaccination against COVID-19, it should be noted that this legislation would constitute a health policy measure corresponding to the health authorities of the various Member states. The jurisdictional function is responsible for judging (applying the law) and enforcing judgements, and, particularly with respect to administrative disputes, judicial review, i.e. the subsequent examination of the actions of the Administration, which may involve the imposition of specific measures on citizens in the application of general legislation.

From an ethical judicial standpoint, however, we can consider what would happen if a judge expressed their opinion on a controversial issue, even before we consider specific cases with relevance to this issue. In this regard, there was a recent instance where a senior judge made an unequivocal statement concerning compulsory vaccination in a legal article and on other forums.

In this type of situation, and from the point of view of judicial ethics, we could consider whether positioning oneself openly in favour of compulsory vaccination compromises the objectivity and impartiality of any subsequent legal procedure.

Indeed, it could be argued that by expressing their opinion in a journalistic forum, the judge might be telegraphing the content of a future ruling on a case brought before them, thus jeopardising their impartiality in future proceedings. Point 2.4 of the Bangalore Principles states that 'a judge shall not knowingly, while a proceeding is before, or could come before, the judge, make any comment that might reasonably be expected to affect the outcome of such proceeding'. At the same time, the Spanish Principles of Judicial Ethics stipulate that 'judges should avoid reaching conclusions before the stage in the procedure appropriate for this purpose, which is immediately prior to the court's decision'. On the basis of these principles, it could be questioned whether the impartiality of a judge who is clearly in favour of a measure could be compromised, thus paving the way to potential disqualification or recusal³⁰, a possibility which will be discussed below.

Furthermore, it might appear that a judge making such statements might intend to steer the actions of other public authorities, in particular the health authorities. Judges' opinions, therefore - especially senior judges in good standing serving in the higher courts that govern public action - might even give rise to a greater propensity to the adoption of such measures by health authorities, since the Spanish health authority might understand that its actions will not subsequently be censured.

³⁰ Article 219 of the law governing the Spanish judiciary (Organic Law 6/1985 on the Judiciary) provides for recusal and disqualification on the grounds of 'direct or indirect interest in the case'.

The considerations above call into question the appropriateness of the public disclosure of judicial opinions on the determination of public policies, particularly when we take into account that this is an area reserved for the legislative and executive powers, the bodies representing the will of the people.

In short, we again find ourselves in the territory of judicial ethics and its border zones.

Now that immunisation against COVID-19 is a possibility, a new debate has arisen as to whether immunised people should be subject to the same restrictions as those who are not, mainly with respect to international mobility.

The European Union has already set forth its proposal to create a type of ‘health passport’ by the summer³¹³², and the President of the Commission³³ has stated that its purpose will be to indicate not only whether the holder has been vaccinated but also whether they have antibodies or have had a recent negative test. This would thus avoid disclosure of whether or not the passport holder has refused the vaccine, which could impinge on that person’s right to privacy.

Similar initiatives have been introduced previously³⁴, as was the case with the World Health Organization’s creation of the Yellow Card, a vaccination certificate required for entry to several African states, proving that the holder has been vaccinated against yellow fever.

In the present case, the European Commission has stated that its solution will lean toward a platform connecting the different national systems. Such a health passport, however, raises dilemmas on three levels³⁵.

Firstly, as this is a novel situation, it is still not possible to be certain of the effects of the vaccines. Specifically, it is not yet possible to be sure that immunisation completely prevents transmission of the virus, given its mutations. If it does not prevent infection, the rationale for enabling the mobility of vaccinated people by means of this passport will be undermined.

³¹ Vega, G. (10 March 2021). ‘El Gobierno anuncia que lanzará el pasaporte covid en mayo’. *elpais.com*: <https://elpais.com/tecnologia/2021-03-10/el-gobierno-anuncia-que-lanzara-el-pasaporte-covid-en-mayo.html> (accessed 8 April 2021)

³² Malingre, V. (1 March 2021). ‘Covid-19 : la Commission européenne présentera un projet de passeport vaccinal en mars’ *lemonde.fr*: https://www.lemonde.fr/planete/article/2021/03/01/covid-19-la-commission-europeenne-presentera-un-projet-de-passeport-vaccinal-en-mars_6071615_3244.html(accessed 14 April 2021)

³³ European Commission. (25 de febrero de 2021). Statement by President von der Leyen at the joint press conference with President Michel, following the videoconference of the members of the European Council.

³⁴ Damgé, M., & Dagorn, G. (3 March 2021). ‘Covid-19 : six questions sur le passeport sanitaire’. *lemonde.fr*: https://www.lemonde.fr/les-decodeurs/article/2021/03/03/le-debat-sur-le-passeport-vaccinal-en-six-questions_6071847_4355770.html (accessed 14 April 2021)

³⁵ Lorasque, Á. N. (1 April 2021). ‘Entrevista a Federico de Montalvo. El pasaporte covid será ético cuando la vacuna sea universal’ *larazon.es*: <https://www.larazon.es/sociedad/20210301/ohl7e3mhsnf4bfrc6yj5jvt3eq.html> (accessed 8 April 2021)

Secondly, it may impinge on the principle of equality. Not all people will have access to the vaccine, due to circumstances beyond their control³⁶.

Thirdly, it might inspire some people to seek out infection in order to gain immunity and thus access to the corresponding benefits.

An ethical dilemma also arises with respect to those who have not been infected with COVID-19 precisely because they have acted responsibly in following the health recommendations. These people will effectively be punished by not being able to travel until they are vaccinated, even though their lack of immunity stems directly from the responsibility of their actions. At the same time, with respect to those who have been infected, while in some cases this may stem from a lack of observance of health recommendations, it is likely that in most cases, it will simply have been due to bad luck. There is no justification for limiting the rights of a person who cannot transmit the virus, irrespective of the reason. Yet it could be considered paradoxical that compliance with the rules and good luck might lead to another person's rights being limited.

Finally, in the event that a health passport is established at European level or in a Member State of the European Union, questions could be raised about the legality of the measure. Firstly, it would entail a restriction on the right to freedom of movement, as provided for in Article 19 of the Spanish Constitution and Protocol No. 4, Article 2 of the European Convention on Human Rights. Secondly, it would conflict with the right to equality and non-discrimination established in Article 14 of the Spanish Constitution and Article 14 and Protocol No. 12 of the Convention, as it would establish clearly differential treatment for persons who have not been vaccinated. Spanish judges could also question the legality of the decision through the mechanisms that we will examine below with respect to enforced vaccination against COVID-19.

In the event either that compulsory vaccination against SARS-CoV-2 is established or that the so-called health passport is imposed, it is no great leap to consider that judges, as guarantors of fundamental rights, would be the ones to authorise the enforced vaccination of those unwilling to receive the vaccine voluntarily or to resolve any conflicts that such a passport might entail in relation to freedom of movement. Even without the imposition of compulsory vaccination against this virus, under the current legal system in Spain, an application can be made to a judge for authorisation to forcibly vaccinate a person with disabilities in a health centre due to the risk of COVID-19 infection. This is already the case where a person who is not competent to look after themselves requires medical treatment which can be classed as aggressive and which requires judicial

³⁶ Jacquin, J.-B. (4 March 2021). 'Covid-19: la création d'un passeport vaccinal se heurterait à de nombreux obstacles juridiques'. *lemonde.fr*: https://www.lemonde.fr/societe/article/2021/03/04/covid-19-la-creation-d-un-passeport-vaccinal-se-heurterait-a-de-nombreux-obstacles-juridiques_6071942_3224.html (accessed 8 April 2021)

authorisation, for example, when their legal representative is not willing to authorise this treatment to be administered.

We should also bear in mind that companies and administrations may be keen to ensure that their workers or users get vaccinated, although they cannot, it seems, oblige them to do so. Nonetheless, they may apply to the courts to rule on their vaccination. In order to avoid the large influx of applications that might be expected to flood the courts, other possible options for companies and administrations can be anticipated. Firstly, vaccination uptake could be incentivised through positive reinforcement measures such as the payment of a certain amount of money or the relaxation of some of the imposed safety restrictions for employees who get vaccinated. Secondly, vaccination could be promoted without establishing compulsory vaccination *per se*, but by establishing restrictions of a coercive nature aimed at penalising those who do not get vaccinated. The latter option might not, however, be desirable since it entails discrimination against people who are not willing to receive the vaccine. In either case, such measures would remove the question of whether or not the person should be vaccinated from judicial consideration.

Having analysed the possibility of compulsory vaccination from an ethical and legal standpoint, we will next discuss how judges might act when they have to examine an administrative decision which obliges someone to be vaccinated.

It must be assumed that, by virtue of the principle of *non liquet*, judges must issue a ruling and cannot therefore recuse themselves on the basis of a possible ethics-based conscientious objection. A different question might be whether a judge has recourse to recusal because their impartiality is compromised when the judge has legal grounds for recusal or, in the event that they do not recuse themselves, they are challenged on the grounds provided for in the legislation.

The fundamental right to freedom of conscience is recognised in Article 16 of the Spanish Constitution and Article 9 of the European Convention on Human Rights. The Spanish Constitutional Court, the highest-level interpreter of the Constitution, has stipulated that this fundamental right includes the right to conscientious objection, which can be exercised within the limits established by law and irrespective of whether its exercise has been legally regulated (Constitutional Court Judgements 15/1982 and 53/1985, *inter alia*).

This right is expressly recognised in Article 30.2 of the Spanish Constitution, in respect of (the now defunct) compulsory military service. Given that it is only mentioned in this specific context, it is the Constitutional Court's case-law which has extended the exercise of this right to other specific contexts, such as pharmacists' dispensing of specific medicinal products (Constitutional Court Judgement 145/2015 of 25 June). Nevertheless, the Spanish Supreme Court has provided that, in

order to avoid this right being extended to any duty or obligation, it should be limited to the cases expressly recognised by the Constitutional Court or by the law.

The European Court of Human Rights recognised the right to conscientious objection to military service in its judgement in the case of *Bayatyan v. Armenia* of 7 July 2011³⁷. Nonetheless, this Court has rejected this possibility in the case of the practice of abortion as of the case of *Pichon and Sajous v. France* in 2001. Consequently, there is no general recognition of conscientious objection and it does not seem likely that this would be admitted in favour of a judge in relation to the exercise of their judicial function, especially if we take into account the principle of *non liquet*.

Article 219 of Spain's Organic Law on the Judiciary establishes the grounds for the recusal and disqualification of judges. These include circumstances that might adversely affect a judge's impartiality and objectivity, such as marital or familial relationships with the parties or with the representative of the Prosecution Service. Among the grounds listed in this article, the tenth point consists in 'having a direct or indirect interest in the lawsuit or case'. As the Spanish Supreme Court and Constitutional Court have established, this justification refers only to a personal rather than professional interest³⁸, since its aim is to safeguard the subjective impartiality of the judge's relationship with the parties³⁹. This means that a judge cannot be challenged on the above-mentioned grounds by invoking professional or objective reasons. The Constitutional Court considers that objective impartiality is intended to ensure that judges who are involved in deciding a case approach the case without bias or prejudice arising from a prior relationship or contact with the person subject to proceedings. Likewise, it indicates that in order to determine when doubts about judicial impartiality can be considered objectively justified, it is necessary to verify in each specific case whether previous action by the judicial body caused it to make a decision 'assessing issues identical in substance or very similar to those which must be subject to a ruling or decision in the consideration of merits'. To this end, account must be taken of 'not only the preliminary enquiries, the adoption of previous decisions involving a prejudgement of guilt, or the prior involvement in an earlier instance of the same process, but, more generally, the ruling on facts argued in a previous case'⁴⁰.

Nonetheless, there are those who advocate further expanding 'direct or indirect interest in the lawsuit or case'. According to Antonio del Moral García⁴¹, if a judge realises that it is contrary to

³⁷ CASE OF BAYATYAN v. ARMENIA (Application no. 23459/03) <http://hudoc.echr.coe.int/eng?i=001-105611>

³⁸ Order of the Supreme Court, Special Chamber on Article 61 of the Law on the Judiciary of 1/2015, 17 April 2008 (Application 2/2007) and 25 February 2015 (Application 1/2015).

³⁹ Judgement 164/2008 of the Constitutional Court, Second Chamber, of 15 December 2008.

⁴⁰ Judgements of the Constitutional Court: 133/2014 of 22 July, legal basis 3; 47/2011 of 12 April, legal basis 9; 36/2008 of 25 February, legal basis 2; 60/2008 of 26 May, legal basis 3; 26/2007 of 12 February, legal basis 4; 143/2006 of 8 May, legal basis 3; and 45/2006 of 13 February, legal basis 4.

⁴¹ del Moral García, A. (2009) 'Jueces y objeción de conciencia' [Judges and Conscientious Objection].

their convictions or beliefs to apply a rule relevant to the merits of the process, they should recuse themselves from the case due to lack of impartiality. In such cases, it could happen that a judge might seek out special obstacles or difficulties in applying the rule, which would result in bias. The principle of the judge's impartiality, which is a pillar of judicial ethics and closely related to the rights guaranteed by Article 24 of the Constitution, would provide grounds for judges to recuse themselves in such cases.

Despite this, Moral points out, a judge's simple disagreement with the law would not in any case suppose a conflict of conscience; thus, it must be the judge himself who decides whether this has occurred. This entails a judgement of discretion that is intrinsic to the act of recusal.

Offering another point of view, Abraham Barrero Ortega⁴² suggests that 'a judge (is) not a private individual; the judge is a public power. Conscientious objection is an individual's right before the State and the judge is the State'. Moreover, 'access to the jurisdictional function is voluntary. This function is not imposed on judges'. Judges are therefore obliged to exercise the jurisdictional function in accordance with the rules that apply to them, interpreting and implementing the legal order. It is understood that if judges do not wish to implement the legal order and, therefore, neglect their jurisdictional function, they should step down from their duties. Professor Barrero argues that allowing a judge to object to the application of any law which goes against their conscience would pose a serious risk, given that 'the mandates of the legal order are countless and the demands of conscience can be almost infinite'.

It is also possible that judges might oppose the authorisation of forced vaccination against coronavirus by raising an issue of unconstitutionality before the Spanish Constitutional Court. This mechanism is regulated by Article 163 of the Constitution and entails the suspension of proceedings until the High Court has issued its decision. It could be argued that there is a violation of the fundamental right to physical integrity enshrined in Article 15 of the Spanish Constitution. Thus, it would fall to the Constitutional Court to weigh this right against those of the rest of society.

In short, a judge who is asked for effective judicial protection with respect to whether or not a person should be vaccinated must put aside any prejudices or biases to focus on the impartial and objective application of the law, in order to ensure that the principles underpinning judicial ethics are not harmed and to safeguard rights, honouring the judicial function in the service of those seeking justice.

⁴² Barrero Ortega, A., 'La objeción de conciencia judicial (o de cómo lo que no puede ser no puede ser y, además, es imposible)' [Judicial conscientious objection (or how what cannot be cannot be and is, moreover, impossible)] *El cronista del Estado Social y Democrático de Derecho*. No. 22, June 2011 (pp. 28-33).

Finally, to conclude, mention should be made of the recent judgement of the European Court of Human Rights on compulsory vaccination, Judgment of the Grand Chamber of 8 April 2021 in the case of *Vavříčka and others v. the Czech Republic*. In this case, several parents were either fined or their children were denied admission to nursery school for failure to comply with the compulsory vaccination schedule. The claims were based on the necessary protection of the right to respect for private life provided for in Article 8.2 of the European Convention on Human Rights.

The European Court of Human Rights determined that such penalties, as well as compulsory vaccination, cannot under these circumstances be considered contrary to the ECHR. This decision was based on the proportionality of the measure, concerning the vaccination of minors, who are subject to very few risks from the potential side effects of vaccines, and at a stage of schooling which is not compulsory.