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Justification of Governments for Mandatory Use of Covid-19 Vaccination Digital Certificates under the European Convention on Human Rights

Niloofar Foroozanfar

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Justification of Governments for Mandatory Use of Covid-19 Vaccination Digital Certificates under the European Convention on Human Rights

*Niloofar Foroozanfar**

Abstract

Considering the European Convention on Human Rights, strategies by member states are only lawful if it is necessary and proportionate to achieve legitimate aims. The exclusive circumstances caused by the covid-19 pandemic, induce member states of the European Union to exert compulsory digital green certificates and hereupon, compulsory vaccination for their residents to slow down the spread of the virus and ease the burden on frontline staff. The European commission stipulates that the use of digital green certificates will facilitate free movements across the EU and encourage the lifting of current restrictive covid measures that are in place in different member states. However, it currently triggers several protests in different states because mandatory use of Green Certificates by each government based on its own approach may limit the freedom of movement, the right to privacy, the right to data protection and, indirectly, the right to the integrity of persons. This article evaluates the implications of governments under The European Convention on Human Rights by assessing whether a certain level of risk posed by the covid-19 digital certificates outweighs the infringements of human rights, and evaluates whether their aim is protecting public health or facilitating tourism and thus offers an actionable framework for decision-making in a way that poses fewer dangers to the rights and freedoms of persons and is in favour of public interests.

Keywords: *Covid-19 digital certificates, fundamental Rights, European Convention on Human Rights (ECHR), Personal Health data, Principle of proportionality, Freedom of movement*

* Sapienza - University of Rome, email: niloofarforoozanfar@gmail.com

Introduction

Coronavirus is the most catastrophic pandemic in recent world history. By spreading SARS-coV-2 most countries were shocked to control the fatality of the virus. To reduce the deaths and to minimize transmission of the virus between individuals, specific vaccines have been launched this time in several countries but were not mandatory anywhere, because the main rule in international human rights law is that vaccination, as well as any other medical intervention, must be based on recipient's free and informed consent.

The main concern among individuals for being vaccinated was the fear of side effects; therefore, to encourage residents to get vaccinated and immunize them from lockdown restrictions, governments introduced Covid-19 green certificates (green passes) as a crucial reason and justification for motivating individuals to get vaccinated and for using public facilities, travelling and moving freely between countries. Subsequently, several protests have erupted against the new anti-coronavirus measure. Protesters mostly in European countries have claimed that compulsory certificates for accessing public and commercial activities particularly for entering their works, schools and universities are a violation of human rights and infringed some provisions of the European Convention on Human Rights (ECHR) because not everyone can be vaccinated against covid-19, e.g., people with special disease or some allergies should not be given certain vaccines and also there is not enough data about whether is safe or not children, those with the compromised immune system (such as HIV) and pregnant women get the vaccination, thus it is disproportionate to require that these people would completely be excluded from exercising the rights that they have as a human being in society. The main question that arises here is are we thinking about the rights of everyone in society?

Based on several opinions and case laws of European courts such as the European Court of Justice, the interference by the governments for mandating the green pass could be justified with the fulfilment of three criteria which are necessary for the test of proportionality and make appropriate solutions for who cannot or do not wish to be vaccinated to reach the balance and prevent to deprive anyone of his right. Our actions as a society are essential to keep the human rights for all. Each of us has at least an ethical duty to treat others with dignity and respect, to lead with unanimity and try to keep each other safe. The governments have also critical responsibility for the health of their population.

One of the most challenging issues for those who oppose the Covid-19 certificates is the concerns regarding their data protection. They are afraid

of any abuse of their personal data or collecting and storing the data even after the pandemic. Consequently, the European data protection board and supervisors ensure individuals the protection of their health information by regulating the international standards and requiring the member states to act based on them. It is worth mentioning that for the use and collection of any personal data, a fair balance must exist as well and the test of proportionality must be applied.

1. Vaccination Choice as a Human Right

1.1. A Tendency for Mandating the Covid-19 Vaccination

After the introduction of vaccines by several companies, public debates about vaccination choice and safety have increased in some countries. Albeit vaccination was not at first mandated by governments, it has been highly crucial to get the vaccination against Covid-19 and in this way, we can all help keep each other as secure as possible, particularly the most medically vulnerable people who are most likely to experience harm during the pandemic in our society. However, some countries tended to mandate the vaccination by justifying that they try to protect their population from Coronavirus, stop lockdown and resume the in-person activities (Chia 2021). Hereupon, individuals from different stratum have warned about the lack of sufficient liability of the pharmaceutical industry and the necessity of compulsory vaccination programs, particularly for those who are afraid, who cannot trust and whose assessment of risk is low, it is important that they are listened to and that their concerns are taken seriously into account (Juen 2021). Moreover, contrary to the fact that vaccination is a prevalent precautionary measure, there is some evidence that several vaccines might produce serious injuries to someone. subsequently, governments tried to find a balance by considering whether compulsory vaccination could be regarded as a reasonable policy or whether there are some alternative methods that are equal or more effective in reducing the Covid-19 infection rate. Public health ethical principles determine that “an individual’s rights sometimes might yield to the collective good.” In fact, under the precautionary principle, “public health officials have “an obligation to protect populations against reasonably foreseeable threats, even under conditions of uncertainty.” (O Gostin and Bayer 2003)

There are three levels of prevention improving the overall health of the individuals: primary prevention intends to preclude injury or disease before it ever occurs. Secondary prevention aims to lessen the impact of a disease

that already occurred. Tertiary prevention seeks to moderate the effect of a continuous disease that has lasting effects. Vaccination is a clear example of primary prevention and in some cases, such as Covid-19 is secondary prevention (Kisling and M Das 2022). According to the International Human Rights Law, all medical measures and solutions can only be applied to individuals only with informed consent except under a few extraordinary circumstances. This rule is developed in Universal Declaration on Bioethics and Human Rights (UDBH), human rights instruments, human rights doctrine and judicial procedures (Juana 2015). In addition, the first principle of the Nuremberg Code underlines that “the voluntary consent of the human subject in a medical procedure is absolutely essential” (Nuremberg Code 1947). Subsequently, some international documents, in particular, the UNESCO Declaration of 2005 and the Oviedo Declaration of 1997 directly protected the right to the free and informed consent for medical intervention.

Contrary to the previous documents which determined absolute individual’s consent to get a vaccination, in 2008, the International Bioethics Committee (IBC) issued a report stating that:

“Public health measures, aiming at preventing, eradicating, or alleviating a problem of importance for the whole population or groups within it, might interfere with the self-determination of individuals....even without epidemic danger, it might be justified to declare immunizations compulsory in order to ensure sufficient coverage in the population.” (IBC report 2008)

The report determines the probability of mandating the vaccination, but always under the limitation principles of the UNESCO Declaration. Moreover, the Council of Europe in 1997 approved the Convention on Human Rights and Biomedicine (Oviedo Convention) for the European countries. Based on it, compulsory vaccination is not a protected decision under equal opportunity as it does not offer protection for those who are reluctant to get vaccinated or who cannot be vaccinated due to a disability or medical conditions supported under the equal opportunity act (Bachelet 2021). The vaccine may not be tested on individuals with certain diseases and could be dangerous for them. However, it is worth mentioning that if a person does not want to get vaccinated due to personal preference with no reasonable justification, he may nonetheless be protected under the Equal Opportunity Act (EOA 2010).

1.2. The Test Used by the ECtHR

The ECtHR in different cases acknowledged that free and informed consent is necessary for any medical intervention under the Oviedo Convention. It also in cases *M.A.K and R.K v. the United Kingdom* reaffirmed that: “Domestic

law and practice clearly require the consent of either the patient or if they are incapable of giving consent, a person with appropriate authorisation before any medical intervention can take place” (ECtHR 2010). thus, the Court considered the principle of “informed consent” in any medical treatment and intervention as an essential human rights standard, thereupon, the vaccination as primary or secondary prevention requires the previous informed consent of individuals.

Despite the necessity of consent of persons for all medical interventions, there are some exceptional circumstances. the ECtHR specified these exceptions and enlarged a test to assess whether measures limiting the rights of individuals are legitimate and lawful by considering if the measure is provided by law and whether it is strictly necessary and proportional (ECtHR 2004). For example, the Court in the case of *Solomakhin v. Ukraine* -in response to the applicant who argued that getting the vaccination was against his will and there was no reason to interfere with his private life- held that: “mandatory vaccination interferes with a person’s right to the integrity which protected under Article 8 of the ECHR. Nevertheless, the Court concluded that such interference may be justified if considered a ‘necessity to control the spreading of infectious diseases”(ECtHR 2012). In fact, the Court reaffirmed what was underlined in the case of *Boffa and 13 Others v. San Marino* in 1998.

The Court also in the case of *Vavricka and others v. the Czech Republic* which was regarded the mandatory vaccination in the context of childhood vaccines, provided that “Low vaccination rates increase risk of outbreaks of serious diseases which may severely impact individuals’ health and society in general” (ECtHR 2021). Thus, the Court considered mandatory vaccination not contrary to the ECHR in some special circumstances. The criteria developed by the Court mean that: firstly, each government has a responsibility to regulate the public health’s purpose clearly and definitely to facilitate public understanding. In this regard, the Inter-American Court of Human Rights expressly stipulates that:

“In order to guarantee human rights, it is therefore essential that state actions affecting basic rights not be left to the discretion of the government but, rather, that they are surrounded by a set of guarantees designed to ensure that the inviolable attributes of the individual not be impaired. Perhaps the most important of these guarantees are those restrictions on basic rights only be established by a law passed by the Legislature in accordance with the Constitution. Such a procedure not only clothes these acts with the assent of the people through its representatives but also allows minority groups to express their disagreement.” (Inter-Am. Ct. H.R. 1986, 22)

If there is no specific law requiring individuals to get vaccinated, employers, businesses and service providers are encouraged to consider their own legal advice based on their own circumstances. It may lead to an unintended consequence for those who have specific status and are unable to be vaccinated. Furthermore, when a state restricts human rights due to the reasons of general interest or public welfare and imposes vaccination on certain categories of people and/or workers, according to the ECtHR, it requires to prove the existence of a “pressing social need”. In other words, it must be “necessary for a democratic society”. The government should also consider whether a person poses a substantial probable risk to the public or not (ECtHR 2008).

Due to the Court’s affirmation in *Hutten-Czapska v. Poland*, “all limitations must entail a reasonable relationship of proportionality between the means employed and the aim sought” and “proportionality implies the balance between the interests of the community and the protection of individual rights” (ECtHR 2006). Therefore, there is a required process that any government must consider before instituting any kind of compulsory vaccination policy and testing all the abovementioned criteria. We should consider that however informed consent is a very important criterion that any state must consider, no one’s safety can be put at risk because of others’ personal choices not to get the vaccination and simultaneously, no one should experience trouble and unreasonable discrimination when there are other more or equally effective alternatives to vaccination status policies.

In July 2021, the government of France mandated full Covid-19 vaccinations for eligible emergency workers. If anyone does not get vaccinated, he would face suspension from his job without pay. In response, on 19 August, 672 French firefighters asked the ECtHR to suspend the requirement of being fully vaccinated along with any penalty which would prevent them from doing their jobs. They argued that this requirement breached their right to life and their right to respect for private and family life under Articles 2 and 8 of the ECHR (ECtHR 2021).

Later in September, a group of 30 Greek health professionals filed an application requesting suspension of the application of Greek law which mandates Covid-19 vaccination for health professionals to continue their jobs. They also claimed that compulsory vaccination is contrary to Articles 2, 3, 4, 5, 6, 8 and 14 of the ECHR which are respectively regarding the right to life, the prohibition of inhumane and degrading treatment, the prohibition of slavery and forced labour, the right to liberty, the right to a fair hearing, the right to respect for private and family life and the prohibition of discrimination. The Court rejected the request of the applicants for granting the interim measures and protecting the applicants’ rights from irreversible

harm while it proceeds with the case. It seems that the main request of the applicants - suspension of the law decrees by the governments – based on the Court’s previous decisions is unlikely to be accepted. The ECtHR finally held that compulsory Covid-19 vaccination by the governments of France and Greece has not been a violation of ECHR (ECtHR 2021).

The national courts in several other jurisdictions decided to the same and similar conclusions. For Example, pre-Covid-19 judgments that reinforce mandatory vaccination schemes in France (no. 2021-824 DC), Italy (no.5/2018, 1272/2021), and Chile (no.7074). the US Supreme Court’s ruling in *Jacobson v Massachusetts* (1904) and Covid-19 particular decisions for programmes in New York (no. 21A145/ 2021) and Brazil (no. 13.979/2020). From April 2021, the movement was followed by governments of many other states such as Germany, Israel, Mexico, Norway, Serbia, Spain, and a number of states in the USA that had pre-pandemic laws, and mandated vaccination for all their residents. It indicates that no major national or international tribunal has decided that compulsory vaccination policies violate human rights law, either in the EU under the ECHR or in non-EU countries. However, no one would disagree that a fair balance must exist between the legitimate goal of public health and the protection of individual rights. It means that vaccination status policies may be executed only in some restricted circumstances only if other measures to prevent Covid-19 transmission would be less efficacious or insufficient and if the human rights of everyone involved are due considered (*Powell and Rayner v. the UK* 1990).

1.3. Enhancing Public Trust in COVID-19 Vaccination

As vaccinating most of the global population is a great challenge, to increase the rate of vaccination among individuals, public trust in the vaccination is vital and is highly dependent on the ability of governments to introduce vaccines to their population while promoting confidence through impressive communication and distributing it safely and equitably. If a government would not be able to handle the crisis, it leads to declining compliance with public health-related rules, and increasing uncertainty about long-term economic recovery.

The OECD has established a trust framework as a guide for governments to develop specific policy measures to strengthen public trust by identifying five main policy dimensions including responsiveness, reliability, integrity, openness and fairness. Trust in vaccination is highly dependent on the ability of a government to maintain public confidence in the effectiveness and safety of vaccines, the reliability of the institutions delivering them, the effectiveness of regulatory agencies in monitoring issues, transparent

and coherent public communication and the effectiveness of community engagement (OECD 2018).

To create trust, governments need to conceive the individuals' concerns and provide suitable, transparent and accessible information such as experimental data on the effectiveness of vaccines in the population and the danger of not getting vaccinated for all the society; for example, the research found that the mortality rate in countries with high rates of vaccine hesitancy could be eight times higher than in those with ideal vaccine uptake and full-year global growth for 2021 could fall from an estimated 4% to 1.6% if the rollout of vaccines is delayed and the rate of infection rises (World Bank report 2021).

By enhancing the public trust, individuals would automatically be more encouraged to get the vaccination. Instead of applying these measures, many governments tried to resort to one specific measure which is mandating the exhibition of a digital Covid-19 certificate in almost all places, which has led to lots of controversial debates. The effect of this certificate on public trust and other states' instruments besides it would be assessed later in the current paper.

2. European Union Digital Covid Certificates and Green Pass Hesitancy

2.1. Covid-19 Certificates for Safe and Free Movement

On 25 November 2021, the European Commission in response to the Covid-19 pandemic published a proposal to update the rules regarding the free and safe movement within the European Union (EU) and on 14th June 2021, in the anniversary of the Schengen treaty signing, the EU introduced the European Digital Covid Certificates (EUDCC) for those being vaccinated against covid-19 (valid for 12 months) or who have recovered from the disease (valid for 6 months), or who have a negative test result (valid for 48-72 hours). The commission of the EU held that EUDCC would facilitate the European citizens' lives by enabling them to travel and move freely and safely within the member states of the EU or abroad. It also noted that EUDCC will respect data protection, security and privacy. Some of the key features of the EUDCC are as follows:

1- It focuses on a person-based approach. It means that additional restrictions would not be imposed on a person with a valid Covid certificate including the Covid-19 test or quarantine irrespective of the place of departure in the EU. 2- To prevent arising different approaches, the Commission proposed

a standard valid period of 9 months for vaccination certificates starting from the date of completion of both doses of vaccination. Afterwards, many European countries have not accepted the certificates of mere the first dose of vaccination. 3- In these days, we are witnessing that booster shots are going to be necessary for validating Covid-19 certificates (EU Commission 2021).

Furthermore, the commission proposed a structure for travelling from outside the EU while prioritising individuals who get vaccinated with strong safeguards. It stated that member states of the EU should reopen their borders to those vaccinated with EU-approved vaccines. For more safeguards, proof of a negative PCR test will always be required for all travellers as well. Member states should accept non-EU vaccination certificates which are equivalent to the EUDCC. The Commission reaffirmed that the intention for issuing the certificates is facilitating the free movement and ensure the governments of the EU that persons crossing their borders comply with their recognized standards and Covid-19 protocol and subsequently, ensure a reliable, secure and common approach to restore mobility during the pandemic (EU Commission 2021). Hence, the decision highlights the importance of free movement as a fundamental right for all within the EU.

Other than EU countries, the Commission intended to generalize the EUDCC to Schengen Associated countries including Iceland, Liechtenstein, Norway, Switzerland and some non-EU countries such as North Macedonia, Turkey, and Ukraine. First, they had their own system of proofing the vaccination status but now, they have agreed on a revised coordinated approach to facilitating safe and free movement by establishing common criteria and a common framework during the pandemic from 1 February 2022. On the other hand, travellers from the UK have had several challenges to enter the EU as they have their own app accessible only in England and Wales. Hence, when they travel to EU countries such as Italy, they have to be in self-quarantine for a period of time.

In response to EUDCC, the Dutch section of the International Commission of Jurists (NJCM) sent a letter to the European Parliament expressing that:

“The EU has set up a system and infrastructure for Green Certificates, but only partially regulates the use of them. This leaves it up to member states to make their use mandatory, or to use Green Certificates in many more areas than just border control, and this is problematic because the regulation may lead to the largescale limitation of fundamental rights.” It also held that:

“From a fundamental rights perspective, the problem with the Regulation is that the mandatory use of Green Certificates may limit a large number of fundamental rights, such as the freedom of movement (article 45 CFR), the right to private life (article 8 ECHR, article 7 CFR), the right to data protection

(article 8 CFR), and indirectly the right to the integrity of the person (article 3 of CFR). Of course, other fundamental rights such as the right to life and the right to health mandate that governments and the EU legislator take measures to protect public health against the threat of COVID-19” (NJCM report 2021)

2.2. Digital Green Certificates: Own Measure of Member States

Although the EUDCC was firstly meant to be conceived as an instrument of return to the freedom of movement, as NJCM predicted, in some countries also be used domestically, and unexpectedly transformed into a tool of discrimination between pass holders and non-holders, In that, some member states of the EU began using their own covid pass/green pass/ Covid certificate parallel to the EUDCC which presumably mark the route for individual Covid-19 strategies and local policies to resume mobility and tourism (Roncati 2021).

Although almost all countries experienced individual deaths, lockdown, social distancing and hospitality, despite the development of tested and effective vaccines, not every person is willing to get vaccinated and organised antivaccination groups contributed to expressing their anxiety concerning vaccination. The World Health Organisation (WHO) also identified vaccine hesitancy and hereupon, green pass hesitancy as a critical threat to public health (WHO 2019). They potentially become vital issues during the Covid-19 pandemic. In fact, green pass hesitancy which highly varies between member states stemmed from vaccine hesitancy as the main purpose of the green pass is encouraging individuals to be vaccinated. Thus, it should be assessed parallel to vaccine hesitancy (Roncati 2021).

The two key features of the green pass necessity during the pandemic are first, individuals transferring an infection, even if they do not have any symptoms, may impose a lethal threat to others. Second, if a large number of persons fall ill altogether, it may exploit the health systems and prevent others from easily accessing them. For this reason, governments tried to resort to green passes as a coercive measure during the pandemic and mandated their use not only for travelling but also for any public activities to encourage people to get vaccinated and impose penalties for those who are reluctant to be vaccinated by depriving them to benefit from such activities and services and finally to achieve the maximum immunization rate. (Cottier 2021).

The green pass also exempts people from quarantine. The rules for using the Covid-19 certificates widely vary from country to country. For instance, some member states such as Denmark regulated a law decree to mandate the exhibition of the green pass to all school and university staff, as well

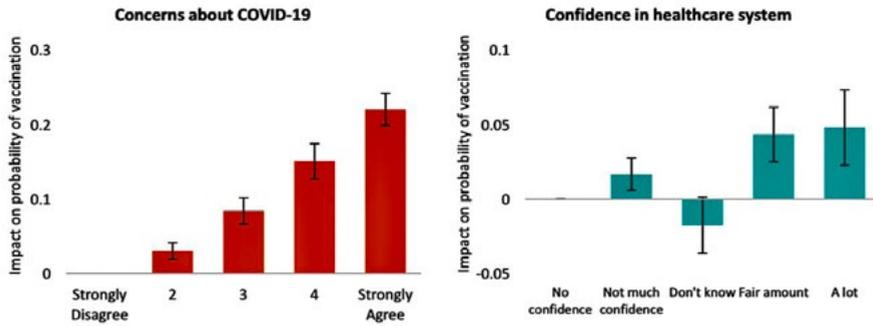
as the students and their parents and also to all workers regardless of the sector they work in, under the penalty of suspension of an employment relationship without paying. Furthermore, several countries such as France and Italy made it a requirement for those wanting to access venues such as restaurants, bars, hotels, museums, gyms, and all public activities and services. It leads to many concerns about the respect of the right to work and the right to education as fundamental rights.

Although the incentives may lead to slight growth in the vaccination rate, they may not be enough to overcome the doubts and health concerns regarding the efficiency and safety of vaccines. In addition, the opponents of compulsory green passes expressed their concerns while declaring that, by increasing the mandatory vaccination in different member states, they may look at vaccine passports as a stick approach, in that, impose on their residents who have not been vaccinated that they did a bad choice and must be punished by no accessing to public services (Savulescu and Wilkinson 2021). This is really worrying because public health intervention must be helpful and beneficial for people and for the collective health of people and should not be about punishing for wrong health choices of people. Several states made the green pass compulsory by stressing that a delay in getting vaccinated could result in considerable health and economic costs for the government. It could lead to a possible additional wave of infections in the country. The WHO's chief scientist underlined that: "delay in acceptance or refusal of vaccination despite the availability of vaccination service is complex and context-specific, varying across time, place, and vaccines" (WHO 2020). It led governments to exert their own coercive measures.

There are 3 ethical concerns against incentives of people by governments with their own instrument: 1- they are coercive and thereby, coercion causes limitation of a person's option and eliminates an existing desirable option. 2- sometimes the coercion perceived by persons is undue inducement as a person's judgement may be compromised because of the size of an incentive. 3- exploitation which makes individuals vulnerable due to the injustice background. It occurs if the incentive scheme involves substantial costs and hence, it cannot be justified (Fowler 1982).

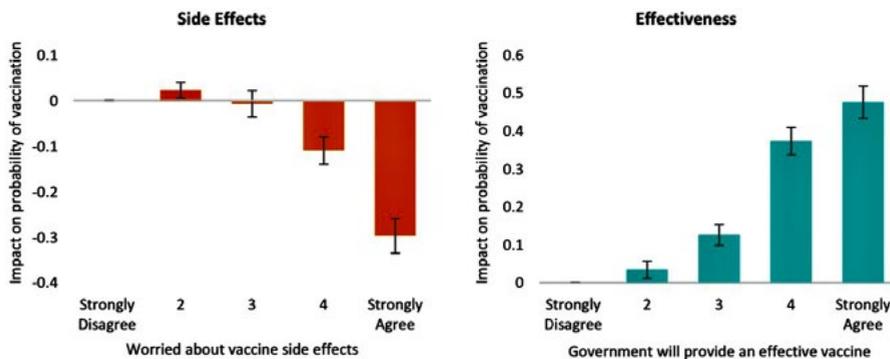
Outside the pandemic, financial incentives mostly try to positively affect the vaccination perception; for example, in the context of influenza and hepatitis B, evidence suggests that the financial incentives would be helpful to promote adherence to being vaccinated. For instance, Germany has moved to a paid system of plasma donation to increase rates and address the shortage, with success, however, one survey study with 1,349 participants suggested that payments of up to €200 did not increase willingness to receive a vaccine against COVID-19 (Nat Med 2021).

Figure 1: Probability of vaccination and perceptions of COVID-19



Note: “The left panel shows the impact of respondents’ concerns about COVID-19 on their probability of vaccination. The right panel plots the same effects, this time based on respondents’ trust in their nation’s healthcare system. Each panel plots the effect of vaccination relative to the lowest category of the survey” (IMF working paper 2021).

Figure 2: Probability of vaccination, side effects and effectiveness



Note: “The left panel shows the impact of respondent’s concerns about vaccine side effects on their probability of vaccination; the right panel shows the same effects based on the confidence that their government will provide an effective vaccine. Each panel plots the effect of vaccination relative to the lowest category of the survey.” (IMF working paper 2021)

Figure 1 shows that a person who is worried about getting Covid-19 vaccination is agreed to get vaccinated 20 percent higher than a person who strongly disagrees with it. Moreover, individuals who respect social distancing and wear a mask regularly are more likely to get vaccinated. Figure 2 demonstrates that highly concerning about vaccine's side effects reduces 30 percent the intention of a person to be vaccinated meanwhile, a strong trust that a government establishes by truly encouraging its residents and providing the effective vaccines increases 50 percentage the demand for vaccination in comparison to those with no trust at all. Incentive-based interventions are among the least successful measures to increase the perception of vaccination and mandatory green pass.

Therefore, it seems that choosing the proper public health policies and suitable measures for communication to inform individuals about the vaccines' effectiveness as well as side effects and creating a confident healthcare system in the society before mandating the Covid-19 certificate, can easily attract persons to get vaccinated and accept using the green pass. By exerting them appropriately, the green passes created by states might be justified in some manner.

3. The Rights Protected under the ECHR

Despite the high amount of vaccination in all member states of the EU, the pandemic has not finished and we are witnessing the new variants of the Coronavirus during the time. It means that Covid-19 is still a virus that can easily be out of states' control and thus, we must be ready to live with Covid-19 risks over the longer term. In this regard, the parliamentary assembly of the Council of Europe (The Assembly) recalls its resolution 2338 in 2020 on the impact of the Covid-19 pandemic on human rights and the rule of law, in which it recalled that "the positive obligations under the European Convention on Human Rights (CETS No. 5, the Convention) require States to take measures to protect the life and health of their populations". It affirmed that "sustainable socio-economic recovery will only be possible once the disease is durably under control. Vaccination will be an essential public health measure for achieving this, but insufficient by itself." There must be Covid-19 certificates as the official documentation of individuals' having been vaccinated or having recovered from this virus or having a negative test result. The Assembly stated that by using this certificate, member states can allow the resumption of enjoyment of certain rights or freedoms. Although the scientific evidence could be sufficient to justify holding the green pass, there may be some valid reasons to refuse using them because they may

undermine some human rights. The Assembly recalls its Resolution 2361 (2020) on “Covid-19 vaccines: ethical, legal and practical considerations”, in which it expected member states to “ensure that citizens are informed that the vaccination is not mandatory and that no one is under political, social or other pressure to be vaccinated if they do not wish to do so” (The Assembly 2020). Any indirect undue pressure on people who are unable or unwilling to be vaccinated may be mitigated if the green passes are available on grounds other than vaccination.

It calls the member states of the EU to:

1. Apply any public health measures needed for durably controlling the Covid-19 in accordance with their positive obligations under the ECHR.
2. Take full account of the latest advice and evidence, especially from the WHO regarding the green passes and their restrictions.
3. Ensure that the green passes exempt its holder from other restrictions which applied in a way to prevent the spread of the virus and avoid discrimination.
4. Different categories of green passes must be available for individual groups with different characteristics.
5. The Covid passports based on the recent negative test cannot be allocated to those who have the ability to pay. In another word, the tests cannot be unduly expensive.
6. Particular account must be taken into consideration for those who for medical reasons cannot or for their personal opinion do not wish to get vaccinated.
7. Appropriate measures based on the standards set out in the Council of Europe Convention on the counterfeiting of medical products and similar crimes involving threats to public health (MEDICRIME Convention) and the Council of Europe Convention on Cybercrime (Budapest Convention) should be taken to prevent counterfeiting or any criminal abuse of green passes.

According to the report of some members of the Assembly, although the Covid-19 certificates are useful for governments and also for people themselves, they might pose some challenges in terms of freedom of movement, data protection, discrimination and counterfeiting. After introducing own Covid-19 Green Certificates by the governments and leading individuals to more challenges for living, the opponents of mandatory use of the green pass expressed their concerns about respecting human rights and believed that some of their fundamental rights have been violated including the right to privacy, the right to liberty and security, the right to data protection and the right to not being discriminated which are all protected under the ECHR. There are some tests and methods to evaluate whether these fundamental rights are infringed by the governments or not.

3.1. The Right to Private Life and Liberty

Article 8 of the ECHR which explains the right to respect for private and family life is interpreted as “ensuring freedom from interference with physical and psychological integrity”; It includes respect for the personal autonomy of each person containing the right to decide on medical treatment. The convention requires that a ‘patient-specific decision’ must be taken and this decision must be based on a clear and accessible policy to comply with Article 8(2). These important rights manifestly require three conditions: 1- They can be limited only by the law 2- It should be a legitimate aim justifying the interference 3- The interference must be necessary for a democratic society which should be proven by the test of proportionality (Roncati 2021).

Article 2 of the ECHR protects the right of every person to their life. Under this article, states have a responsibility to protect the life of their population, particularly vulnerable people such as those with low immunity or who are suffering from some special disease and cannot be vaccinated and get the green pass. This article also underlined for states to take appropriate steps to safeguard the lives of those within their jurisdiction. In practice, governments seek for developing herd immunity by protecting the public from the consequences of Coronavirus. It counts as a legitimate aim for a mandatory vaccination regime, meaning that states may justify mandating the green pass for all public activities which leads to mandating the vaccination, to protect the vulnerable members of the society who cannot be vaccinated. However, they cannot justify it for the sole purpose of keeping individuals healthy who do not wish to get the vaccination. If a measure taken by a government is capable of achieving the legitimate aim and can prevent the disease (or at least severe progression), would be considered “appropriate”. Although, in *the Belgian linguistic case* “a just balance between the protection of the general interest of the Community and the respect due to fundamental human rights” has been stressed (ECtHR 1968).

Moreover, as it has been underlined by ECHR under Articles 5 and 8, restriction on liberty can be justified if it impedes harm to others. But liberty is not the only right protected under human rights law. The rights to health, education and work have been recognised under international law specifically by UN International Covenant on Economic, Social and Cultural Rights (ICESCR). Under Article 12, it lists “the prevention, treatment and control of epidemic... diseases” by “immunisation” as a right to health. In addition, the WHO in its 2013 Global Vaccine Action Plan underlined that “immunization should be recognized as a core component of the human right to health and an individual, community and governmental responsibility”.

Therefore, exerting an instrument -in this case, a green pass- for mandating the vaccination is not a new response to a pandemic. For instance, some versions of mandatory vaccination for school children have existed in more than 100 countries (Vanderslott and Marks 2021).

In contrast, on 13 August 2021, the superior court of justice of Galicia in Spain determined the fundamental rights which are violated by the digital covid certificates. The Court based its argument on the principle of proportionality. The questions that arise here are which conditions are required for this test and is it sufficient itself to justify the interference by a public authority? According to the settled case law of the European Court of Justice, compliance with the principle of proportionality requires the fulfilment of three cumulative criteria: 1- 'Necessity'¹ which means whether a measure adopted is necessary to achieve the aim or other effective measures which would be less restrictive are available to be applied 2- 'Suitability' means whether the restrictive measure is suitable to achieve the legitimate aim 3- 'proportionality' which assesses whether the advantages of a measure to the community outweigh its disadvantages to individuals and does it have a positive effect on public interests (CJEU 1970).

The Galician court held that however the protection of public health can be admitted, but the green pass is illegitimate because it does not fulfil the necessity and suitability conditions. The reason is due to the fact that both vaccinated and recovered persons from Covid-19 can be infected or reinfected especially by the Delta Variant and they can be easily a source of contagious in a community. It also reminded the advice of the WHO against the use of Covid-19 passports for travel and mobility because of the efficacy concerns. It underlined that it is not clear whether vaccination reduces the transmission of the virus or not; hence people who are vaccinated should not be exempt from complying with other travel risk-reduction measures. Because it is possible that a person comes into contact with the virus and gets infected after 24 hours while having a green pass still valid, he can easily infect other individuals. Therefore, the Court for these reasons considered this certificate as an unsuitable measure to achieve the legitimate aim. Moreover, it considered the green pass unnecessary because it violates the principle of non-discrimination and security of personal health data. Finally, the Court concluded that "the measure of an exhibition of certain documents is neither suitable nor necessary for the sought purpose and this court cannot authorize it" (Galicia 2021).

¹ For our analysis of the necessity test, see the EDPS Necessity Toolkit, available at: https://edps.europa.eu/data-protection/our-work/publications/papers/necessity-toolkit_en.

In addition to the court of Galicia, the European Law Institute (ELI) analysed the legal situation of covid-19 certificates from the perspective of limitation on individual rights. The ELI held that:

“General restrictions should not be imposed on individuals beyond what is necessary and proportionate, and they may have to be lifted if the epidemiological risk posed by the individual is low”. ‘Low epidemiological risk’ exists where there is, in the light of the facts of the individual case and scientific evidence, sufficient reason to believe that the individual will not spread any variants of the virus currently in circulation” (ELI 2021).

In response, the supreme court of Madrid in September 2021 recognised the green pass as a necessary and suitable measure where it is difficult to keep the interpersonal distance safe and where individuals eat or drink without wearing a mask for a period of time. The court stressed that the ultimate goal to mandate the green pass is not prevention of the contagious, but also to prevent the development of severe Covid-19 including hospitalisation and death. Furthermore, Italian’s top administrative court dismissed the challenge presented by some unvaccinated individuals against the compulsory green pass and stated that all public activities and areas are only accessible if a person is in possession of an identified green pass except for people excluded by age from the vaccination campaign and who exempt on a basis of appropriate medical certification.

Based on the reasons and arguments represented by consonants and opponents of the green pass, it seems that mandating the green pass is not a violation of Articles 8 and 5 of the ECHR, as Member states of the EU tried to mandate the green pass by regulating a law; e.g., the Italian Law decree No. 127/2021. Their legitimate aim is the protection of public health and declared that the green pass is necessary not to prevent the contagious of the virus completely, but to prevent the death of individuals. Thus, the three required elements to comply with Article 8 are fulfilled. In addition, based on the interpretations of the ECHR and doctrines opinions, “other people’s rights to health” is a vital argument which has been stressed. It is recalling Article 29 of the Universal Declaration of Human Rights (UDHR) which accepts a restriction on the free and full development of personality in the light of the “collective needs of the population”. Thus, both ECHR and UDHR maintained that public health reasons could trump individuals’ rights under certain circumstances.

3.2. Prohibition of Discrimination

The campaigns against the green pass indicated their protest by declaring that although the green pass is an instrument for governments to motivate

vaccination, it indirectly discriminates against those who cannot or do not wish to be vaccinated; Article 14 of the ECHR prohibits the discrimination of individuals' rights and freedoms. In addition, Article 1 of the convention on human rights and biomedicine (Oviedo Convention) also reaffirms the protection of dignity and integrity of all human beings. In this regard, the Assembly in a draft Resolution expressed its concern by declaring that: "If Covid-19 passes are used as a basis for preferential treatment, they may have an impact on protected rights and freedoms. Such preferential treatment may amount to unlawful discrimination within the meaning of Article 14 of the Convention if it does not have an objective and reasonable justification" (The Assembly 2021). Two conditions are necessary in this regard: 1- Measure pursues a legitimate aim 2- Test of proportionality must be fulfilled and a fair balance between protecting the interests of the community and respect for the rights and freedoms of persons must exist (ECHR, Art 8(2) - 11).

The Court in the *Abdulaziz, Cabales and Balkandali v. the United Kingdom case* recognised discrimination "where a person or group is treated, without proper justification, less favourably than another" (ECtHR 1985). In another word, a government could not discriminate, *de jure* or *de facto*, in its interventions in enjoying the rights enshrined in the European instruments. A Covid-19 certificate may impose a clear distinction depending upon the amount of specific medical status of a person which implies a considerable difference in the risk of the pass-holder transmitting the virus to others. The governments should distinguish between different cases for using the Covid-19 certificate due to the rights and freedoms affected, and the duration of exemption from restrictions that are allowed. Moreover, in some European Countries, the vaccine is inaccessible for some medically vulnerable people, however, in comparison with other groups of people, it should be prioritized; otherwise, it would be discriminatory (Acosta 2015). Therefore, it is highly important that prioritization be based on scientific evidence and the WHO recommendations.

Any risk of discrimination must be decreased for people who are unable or unwilling to get vaccinated by including safeguards and alternative means by which, certain rights of these persons enjoy restoration. Another issue that should be considered is that testing is widely in European Countries and the cost of the tests which underpin the provision of the covid-19 certificate is mostly high. Imagine someone unable to get the vaccination because of a health problem-even if he wants to have a vaccine- and besides, he is not a wealthy person to do the covid test daily or weekly because it costs a significant amount of money to access some basic services. Thus, this person in practice would be deprived of living the same as others in society in which only the wealthy would access the public services and have mobility.

As we saw before, the Galician court rejected the idea of the green pass by declaring that it is not necessary and suitable to fulfil the test of proportionality. It also argued that the green pass undermines the principle of non-discrimination and security of personal health data protected by the EU's legislation and all these efforts that are made for effective measures, are against the aim of elimination of pandemic (Galicia 2021).

Considering these arguments and several judgements of the ECtHR regarding the issue of mandatory vaccination in different cases, we can conclude that governments have a positive obligation to protect the life and health of their residents, particularly those who are vulnerable to certain diseases and who cannot get the vaccination for medical reasons. If the test of proportionality has been applied and there has been a need to collectively protect the lives of individuals, it would not be any discrimination. But considering the cost of the covid-19 tests, it seems that the test should be free for all individuals to allow anyone who is not able or does not want to get the vaccination, to access easily the public services and prevent any discrimination between the poor and wealthy persons.

4. Protection of Health Data and Privacy by the Governments

In March 2021, when the European Data Protection Board (the EDPB) and the European Data Protection Supervisor (the EDPS) adopted a joint opinion on the European Commission's proposal to create a digital green certificate, they did not consider the protection of personal data as a barrier to fight against Covid-19 pandemic, but they said that these certificates should comply with any legislation on data protection regulated by the EU. Their main concern was firstly the fact that certificates must not be considered for immunity or non-contagiousness of the virus. Second, there would be potential use of data collected when the pandemic ends. Third, as it is probable that the member states of the EU use the EUDCC for their domestic purposes, they must take into account the EU General Data Protection Regulation (GDPR) and fourth, the Proposal does not allow for the creation of any sort of personal data central database at EU level by member states (Funck 2021).

A Covid-19 certificate whether being issued for vaccination status, antibody status, previous infection or negative test result, contains sensitive personal health data. Protecting such data follows certain international standards including Council of Europe Conventions 108 and 108+.

Considering the guideline for the convention underlines some important issues for health data protection including:

- Processing of data especially those related to personal medical information, must be provided by law.
- The law must determine the situations in which the exhibition of the Covid-19 pass is required.
- The exact purpose for processing the data to resume the freedom of movement must be defined clearly.
- Appropriate measures must be adopted to ensure data security
- The categories of persons and authorities who are eligible to access the data must be specified.
- Data processing must be necessary and proportionate to achieve the aim pursued.
- Only in the essential circumstances, a minimum of data must be processed.
- The subjects of data processing (green pass holders) must be informed that their data is processing.
- Data subjects must be able to exercise their rights effectively.

As it has been guaranteed by Article 8 of the ECHR, the purpose of data protection is to protect personal privacy which is also regulated by the GDPR. It aims to increase the rights of European citizens and give them more control over their data. As the ECtHR noted in the case of *S. and Marper v. the United Kingdom*, “The mere storing of data relating to the private life of individual amounts to an interference within the meaning of Article 8 ... The subsequent use of the stored information has no bearing on that finding” the Court also stipulated that “Respecting the confidentiality of health data is a vital principle in the legal systems of all the Contracting Parties to the Convention. It is crucial not only to respect the sense of privacy of a patient but also to preserve his or her confidence in the medical profession and the health service in general” (ECtHR 2008). The question that arises now is what data is stored via the Covid-19 Certificates? The EDPB and the EDPS underlined that only a small amount of personal data will be stored just for validation purposes. For instance, information regarding a name, date of birth, information about the Covid-19 vaccine and the number of doses administered to the holder and the data regarding the certificate issuer will be standard and each holder must have a unique identification number as well.

The EU officials can also track the member state that issued the certificate. The certificates contain valuable personal medical information and its wrong distribution thereof would be a gross infringement on personal privacy. Thus, a considerable amount of care must be taken to ensure protecting the minimum amount of data on the certificate. It is worth emphasizing that personal data on passes, must not be processed longer than what is necessary

and accessing the data would not be permitted when the pandemic end (EDPB 2020).

The GDPR provides the legal rights for data subjects concerning personal data processed about them which include: a right of subject access; a right to request the correction of inaccurate information or the updating of incomplete or out of date information; a right to request the restriction of the processing of personal data in certain circumstances; a right to request the deletion of personal information and a right to lodge a complaint with the Data Protection Commission (GDPR 2016).

The Assembly held that governments must give preference to systems containing decentralised data storage and ensure that proper measures have been taken to prevent any counterfeiting or any criminal abuse of green passes by applying the standards set out in the Council of Europe Convention on the counterfeiting of medical products and similar crimes involving threats to public health (MEDICRIME Convention) and the Council of Europe Convention on Cybercrime (Budapest Convention). This statement is due to the fact that it has been observed in some cases with fake accounts and names. Therefore, it is crucial that government pay special attention to the protection of individuals' health data by respecting and acting based on the legal regulations and documents in this regard and also, EU officials supervise the acts of member states.

Conclusion

Due to International Human Rights Law, UDBH, UNESCO, the Oviedo Declarations and national and European courts' decisions, any interference with the physical and mental health of individuals should be based on the free and informed consent of the vaccination's recipient. Although some European governments seriously stated their disagreements with mandatory vaccination, most of them implicitly mandate vaccination by mandating the use of Covid-19 certificates while justifying that they intend to motivate persons to be vaccinated and stop the lockdown and pandemic. They required every person to hold a green pass if he wants to access public services and facilities in society. It should be considered that, before establishing the green pass by the European countries, the EUDCC has been introduced by the EU by declaring that it should be used by member states in the border controls to resume the free movement of persons within the EU or abroad. However, it has been used by governments as a development of the EUDCC. Even, some states mandate it for all university and school students and all workers and employees. This act leads to much opposition from different groups of people

in EU countries. Protesters claimed that mandatory Covid-19 certificates and hereupon, compulsory vaccination are infringements of human rights including the right to private life, the right to liberty and security, the right to life and the right to non-discrimination. For assessing the violation of these human rights, firstly we should consider that the rights can be restricted only in accordance with a law regulated by a state. Secondly, there must be a legitimate aim for restriction and most importantly, the right must be necessary, suitable and proportionate. If all these conditions are fulfilled, the restriction could be justifiable. However, different courts and scholars have different opinions in this regard. In fact, no major constitutional or international tribunal has decided that compulsory vaccination policies violate the human rights law. Such interference by governments seems reasonable if there exists a balance between the legitimate aim of public health and the protection of individual rights in some special circumstances. The last critical point that governments must take into account is personal health data protection. Covid-19 green certificates use personal health information which is sensitive data of everyone; thus, special protection for health data and Covid-19 test results and vaccination records under GDPR and convention 180 and some other evidence must be applied. Data providers need to build some data protection by maintaining the confidentiality and security of the information they collect. It is important who access the data and what can be done with these data. Just a little information should be accessible via the Covid-19 certificates.

Above all,

- It's true that by green pass we cannot prevent contagion of the virus but prevent hospitalisations and deaths.
- If in a place everyone has the green pass, it would be more safety; but the interpersonal distance should be respected.
- If there is not any discrimination in a country for using a green pass: those who are exempt should not be deprived of to access all services.
- It should be a Covid test with no cost (even for travelling) if anyone does not wish to be vaccinated.
- The protection of health data should be seriously done to be secure for anyone.

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