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BALANCING OF FUNDAMENTAL RIGHTS BY THE EMPLOYER? EMPLOYER'S MARGIN OF MANOEUVRE TO ORDER MANDATORY VACCINATION AND TO TERMINATE OR SUSPEND THE LABOR CONTRACT OF NON-VACCINATED EMPLOYEES¹

Abstract. During the (post-)COVID period, states rendered several restrictions of fundamental rights justified by the overarching interest in the protection of human life and public health. Among others, mandatory vaccination may be ordered by the employer, which imposes a clear limitation on employees' rights to free conscience, self-determination, free occupation, and the right to work. Moreover, in several countries, the decision was vested in the employer for termination or suspension. In a public health emergency, strong arguments support the implementation and extension of mandatory vaccination requirements as well as further extraordinary steps, such as unprecedented allocation of competences, may be reasonable. Some countries opted for mandatory vaccination in healthcare institutions as either a condition of employment or a precondition for entering the institutions. In these cases, however, mainly states had to balance the colliding fundamental rights in order to determine an exact conclusion. On the contrary, involving private stakeholders (employers) in determining the scope of the mandatory vaccination requirement may overstep the lawfully increased margin of manoeuvre of state authorities during a public health emergency. Several states allowed mandatory vaccination in the private workplace on very differentiated grounds. Based on the comparison of three models constituted by Canada, Hungary, and Poland, our research outcome provides a proposed system of criteria for states to determine

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under which circumstances and under which limitations private employers may be authorized with the power of balancing fundamental rights, especially regarding mandatory vaccination.

Keywords: vaccination, COVID-19 pandemic, termination or suspension of labor contract, fundamental rights, comparative analysis, right to bodily integrity, right to health

RÓWNOWAŻENIE PRAW PODSTAWOWYCH PRZEZ PRACODAWCĘ? MARGINES UZNANIA PRACODAWCY W ZAKRESIE ROZWIĄZANIA LUB ZAWIESZENIA UMOWY O PRACĘ Z NIEZASZCZEPIONYMI PRACOWNIKAMI

Streszczenie. W okresie (po)pandemicznym COVID-19 państwa wprowadziły szereg ograniczeń praw podstawowych, uzasadniając je nadrzędnym interesem ochrony życia ludzkiego i zdrowia publicznego. Między innymi, pracodawcy mogli wprowadzać obowiązek szczepień, co stanowiło wyraźne ograniczenie prawa pracownika do wolności sumienia, samostanowienia, swobodnego wyboru zawodu oraz prawa do pracy. Ponadto, w kilku krajach decydując o rozwiązaniu lub zawieszeniu stosunku pracy powierzone pracodawcom.

W sytuacji zagrożenia zdrowia publicznego istnieją silne argumenty przemawiające za wprowadzeniem i rozszerzeniem obowiązku szczepień, a także za podejmowaniem dalszych nadzwyczajnych działań, takich jak bezprecedensowe przekazywanie kompetencji, które mogą być uzasadnione. Niektóre państwa zdecydowały się na wprowadzenie obowiązkowych szczepień w placówkach opieki zdrowotnej, traktując je jako warunek zatrudnienia lub wymóg wstępu do tych placówek. W takich przypadkach to głównie państwo dokonywało wyważenia kolidujących praw podstawowych i podejmowało ostateczne decyzje.

Z kolei angażowanie prywatnych podmiotów (pracodawców) w określanie zakresu obowiązku szczepień może wykraczać poza prawnie zwiększony margines swobody działania władz publicznych w sytuacjach nadzwyczajnych. W kilku państwach dopuszczono obowiązkowe szczepienia w sektorze prywatnym, opierając się na bardzo zróżnicowanych przesłankach. Na podstawie analizy trzech modeli: kanadyjskiego, węgierskiego i polskiego, nasze badania przedstawiają proponowany system kryteriów, który może pomóc państwom określić, w jakich okolicznościach i przy jakich ograniczeniach prywatni pracodawcy mogą zostać uprawnieni do równoważenia praw podstawowych, w szczególności poprzez wprowadzanie obowiązku szczepień.

Słowa kluczowe: szczepienia, pandemia COVID-19, rozwiązanie lub zawieszenie umowy o pracę, prawa podstawowe, analiza porównawcza, prawo do integralności cielesnej, prawo do zdrowia, stan nadzwyczajny, równoważenie

1. INTRODUCTION AND METHODOLOGY

During the public health emergency and the initial stages of the post-COVID period, states rendered several far-reaching restrictions of fundamental rights, which were justified by the overarching interest in the protection of human life and public health. Among others, mandatory vaccination may be ordered by the employer, which imposes a clear limitation on employees' rights to free conscience, self-determination, free occupation, and the right to work (*Ius Laboris* 2021). Moreover, in several countries, such as Hungary, the decision was

vested in the employer for termination or suspension, while in the public sector, similar measures have been implemented in other countries, which have entailed constitutional review processes (Reuters 2021).

Nonetheless, requiring the employees to be vaccinated was also present before COVID-19 (Mtinkulu-Eyde et al. 2022), and employers were also involved in the establishment of such policies (Erikson 2022). For instance, in Hungary, the employer has been obliged to prepare a risk assessment and may be required to mandate employees be vaccinated. However, the State provided strict prerequisites for the employers to balance which positions may be subject to which kind of vaccination as an *ultima ratio* solution.

In a public health emergency, strong arguments might be raised for the implementation and extension of mandatory vaccination requirements (King et al. 2022), and further extraordinary steps such as unprecedented allocation of competences may be reasonable (Varga 2022). Some countries opted for mandatory vaccination in healthcare institutions as either the condition for employment or a prerequisite for entering the institutions (e.g., Hungary, Australia, or France). In most cases, the restriction of the employees' fundamental rights was deemed to be necessary and proportionate given the public health circumstances of that period. In these cases, however, mainly states had to balance the colliding fundamental rights in order to determine an exact conclusion (i.e., need for mandatory vaccination).

On the contrary, involving private stakeholders (employers) in determining the scope of the mandatory vaccination requirement may overstep state authorities' lawfully increased margin of manoeuvre during a public health emergency, or at least strict conditions should be attached to such mechanisms. Several states have allowed private employers to impose mandatory vaccination for employees on very differentiated grounds; still, as detailed below, there are some groups of countries with certain similarities that help the comparative analysis.

The European Court of Human Rights (ECtHR) has addressed the limits of employer authority and the legal framework surrounding vaccination mandates. While no direct ruling exists on workplace vaccination requirements, relevant case law provides insight into how the Court balances employer power (see, for instance, *Barbulescu v. Romania*; *Lopez Ribalda and Others v. Spain*) and public health interests (see, for instance, *Vavříčka and Others v. Czech Republic*; *Solomakhin v. Ukraine*). Moreover, in a case specifically related to workplace vaccination mandates, the ECtHR dismissed an application challenging a mandatory COVID-19 vaccination requirement for certain professions. The applicant, a firefighter, contested the suspension from his position due to non-compliance. The Court deemed the case inadmissible for procedural reasons; therefore, the legality of the mandate itself was not examined (*Thevenon v. France*).

Our analysis will reflect on an issue with a long history, which should have been almost completely reconsidered in light of the global pandemic (TexasLawHelp 2022). We first identify three main models of balancing

competences between the state, the employer, and the employee when mandatory vaccination is concerned.

The first category would be based on Canada, where no special rules of employment have been enacted during the public health emergency. The vaccination mandates ordered directly by employers were based on the extensive interpretation of existing laws, and such decisions were subject to judicial review. A similar model was apparent in the United States (Anderson 2022), where the Supreme Court struck down the mandate of the Biden administration for large businesses working with more than 100 employees to impose vaccination mandates on their workers (*Biden v. Missouri*), while upholding the validity of the mandatory vaccination of healthcare workers employed in institutions receiving federal funding (*National Federation of Independent Business v. Department of Labor, Occupational Safety and Health Administration*).

The second group is represented by Poland, where the State obliged employees in certain sectors to be vaccinated; such a requirement could not be established by the employer. Nevertheless, the position of the employer has been strengthened vis-à-vis the employees in various manners since employers were authorized to access the medical records and vaccination information of employees even without said employees' consent. Such regulation was implemented, among others, in France and Italy.

Thirdly, the countries where state intervention went even further will be illustrated by Hungary, where employers were vested with the right to impose mandatory vaccinations on employees. Non-compliance with this demand resulted in the suspension of the employment contract. Brazil might also be found in this spectrum of the scale of state intervention.

This study would join the strand of literature assessing the margin of manoeuvre of employers to order mandatory vaccination as a prerequisite for employment; our analysis will contribute to the existing scholarship with two meaningful elements. Firstly, with the help of the aforementioned classification of existing models, we will provide a deeper understanding of already elaborated conceptualizations of the issue, especially owing to the integration of the comparative method into the already detailed approaches. Secondly, based on the careful assessment of relevant regulatory concepts, we identify three main subgroups of countries; and then, with the combination of these, we would put forward a system of criteria establishing a proper and differentiated distribution of competences between the state, the employers, and the employees in the field of vaccination (Elson 2021).

In our view, the best solution would be to differentiate among occupations by law on the grounds of objective public health situations, while a limited space for maneuver should be left for employers in this regard, also subject to clear and detailed standards for the assessment (Charalampos et al. 2022). We will accept the definition of Barak, who described the need to balance the marginal benefit to the public good and the marginal limit to human rights (Barak 2010).

2. LITERATURE REVIEW

Our contribution is part of an extensive effort in legal scholarship to reconsider the space of maneuver of the State to vest employers with the power to impose mandatory vaccination on their employees. As Rothstein and his co-authors analyzed, vaccination mandates date back to the 19th century, and even employers had the possibility to assess the necessity of introducing a mandatory vaccination requirement (Rothstein et al. 2021). Bardosh and his co-authors took a cursory glance at the short-term impact of the COVID-19 pandemic on the employers' role in restricting the personal autonomy of their employees on public health grounds (Bardosh et al. 2022).

However, Giubilini and his co-authors warned that the global pandemic should reconsider the sharing of competences regarding vaccination not only during the emergency period, but also in the long run, as attitudes towards balancing individual autonomy and public health considerations would change dramatically (Giubilini et al. 2023).

Linked to the public health emergency, a series of national reports have been published on job-related vaccination mandates. Jefferies dealt with the issue in a specific Australian context (Jefferies 2022), while Mapuranga and her co-authors researched the dialogue between employers and employees considering mandatory vaccination in Zimbabwe (Mapuranga et al. 2022). Ashwell and his co-authors convincingly demonstrated that the involvement of employers in ordering compulsory vaccinations and the sanctions envisaged for non-compliance considerably enhanced the willingness of employees to be vaccinated in New Zealand (Ashwell 2021).

By contrast, Graeber and his co-authors came to the opposite conclusion based on German statistics and experience (Graeber et al. 2021). As regards the supranational level, Hungler (2022) and Krasser (2021) examined whether the case law of the ECtHR would allow for enabling the employers by national regulations to impose a vaccination duty in the workplace. Furthermore, Kaminer provided an overview of the first reflections of national courts on employers' decisions regarding mandatory vaccination (Kaminer 2020).

Ferranna and her co-authors enumerated the potential benefits and disadvantages of employers participating in determining the scope of the mandatory vaccination requirement imposed on employees (Ferranna et al. 2021). Archard and his co-authors (Archard et al. 2021), as well as Reczulska and Tomaszewska (2022), also highlighted the potential role of employers in increasing the vaccination rate of children by influencing the attitudes of parents. Meanwhile, Politis and his co-authors focused on the attitudes of employees in sectors where mandatory vaccination was imposed directly by the State as a measure with general sectoral applicability (Politis et al. 2023).

Gur-Arie and her co-authors provided a deeper understanding of ethical concerns regarding prescribing COVID-19 vaccination mandates by the employer (Gur-Arie et al. 2021). In addition to this, Law and her co-authors evaluated the ethical aspects of imposing vaccination mandates on employees only in certain sectors (Law et al. 2022). Kamlesh and his co-authors went further in this direction and argued for a differentiation of employment sectors to determine the preconditions and scope of vaccination mandates in the labor environment (Kamlesh et al. 2021).

Based on these strands in the literature, Litor recognized the importance of comparative materials regarding the role of employers in the field of vaccination mandates; therefore, he compared the latest American and Israeli developments in this regard (Litor 2022). Turning toward the visions for the future, Manning recommended a complex mechanism for allocating vaccination mandates, where the State should have the primary responsibility to outline the scope of such a requirement, but limited flexibility would be left to account for the circumstances of each sector and workplace (Manning 2021). Our contribution would outline a slightly similar structure to that proposed by Manning; however, as a step forward, a classification of currently existing models will be proposed, and policy recommendations will also be formulated based on our comparative assessment.

3. RESEARCH

3.1. The first category: vaccination even without Government Decrees – a general approach in Canada

Many Canadian employers have introduced mandatory COVID-19 vaccination policies, considering the legal obligation to identify potential workplace hazards and take all reasonable precautions to protect the health and safety of employees based on occupational health and safety legislation (Lach 2023). In Canada, an employer cannot automatically impose a vaccine mandate for non-unionized employees (Human Rights Victoria 2021); moreover, a company's policy on vaccinations may be considered legal if the government that regulates the workplace (provincial or federal) mandates vaccinations for that workplace or sector of employment (Samfiru Tumarkin LLP n.d.).

Based on this background, several cases reached diverse courts and tribunals in recent years, which may provide us with guidance in assessing the validity of job-related mandatory vaccination policies in Canada (Flood et al. 2021). We detail two of these cases below: [Parmar v. Tribe Management Inc., 2022 BCSC 1675 (British Columbia); and Extencicare Lynde Creek Retirement Residence and United Food and Commercial Workers, Local 175 (Ontario)].

The Supreme Court of British Columbia was the first court in Canada to confirm that a non-unionized employee was dismissed unconstitutionally when the employee was placed on unpaid leave for failing to comply with the employer's mandatory COVID-19 vaccination policy.

The plaintiff ('Ms. Parmar') was employed by Tribe Management Inc. ('Tribe'), which implemented a Mandatory Vaccination Policy ('MVP') to protect the health and safety of Tribe's employees (Parmar v. Tribe Management Inc. 2022 BCSC 1675 (British Columbia) [53]). The Policy required all employees to be fully vaccinated; however, it provided for medical and religious exemptions and allowed extra time for those employees who were unable to meet the deadline for being vaccinated (Parmar v. Tribe Management Inc. [56]). The Policy also provided that any employee who (for personal reasons) chose to remain unvaccinated would be placed on an unpaid leave until the employee took the vaccines, similarly to the Hungarian legislation. Unvaccinated employees would not be dismissed or disciplined (Parmar v. Tribe Management Inc. [47]). Ms. Parmar did not meet the requirements of the MVP; therefore, Tribe put her on a three-month unpaid leave, after which she resigned from Tribe and filed a civil claim alleging constructive dismissal (Parmar v. Tribe Management Inc. [78]).

The Supreme Court of British Columbia held that the MVP appropriately balanced Tribe's primary and substantial interests of protecting the health and safety of its employees along with its continued viability as a commercial enterprise, and the MVP also contemplated exemptions on legitimate medical or religious grounds (Parmar v. Tribe Management Inc. [121]). The Supreme Court further explained:

[Tribe] struck an appropriate balance between Tribe's business interests, the rights of its employees to a safe work environment, its clients' interests, and the interests of the residents in the properties it serviced. It also satisfied its responsibility as a corporate citizen. At the same time, it ensured that individuals like Ms. Parmar could maintain a principled stance against vaccination without losing their employment by, instead, being put on a leave of absence. (Parmar v. Tribe Management Inc. [137])

The Supreme Court also stressed that unpaid leave cannot be considered as termination of employment. It was clear that Tribe wanted the employment relationship to continue, as it had plans for Ms. Parmar's role in management. It was Ms. Parmar who resigned, taking the position that she had been constructively dismissed (Parmar v. Tribe Management Inc. [151]). The Supreme Court, in general, held that the MVP was reasonable under such pandemic circumstances:

it is extraordinary for an employer to enact a workplace policy that impacts an employee's bodily integrity, but in the context of the extraordinary health challenges posed by the global COVID-19 pandemic, such policies are reasonable. (Parmar v. Tribe Management Inc. [154])

The Supreme Court highlighted that ordering mandatory vaccination with certain exceptions, as mentioned above, does not force an employee to be

vaccinated. What they do force is a choice between getting vaccinated and continuing to earn an income or remaining unvaccinated and losing income (*Parmar v. Tribe Management Inc.* [154]).

In another landmark Canadian judgment [*Extendicare Lynde Creek Retirement Residence and United Food and Commercial Workers, Local 175 (Ontario)*], Arbitrator Stephen Raymond upheld a private retirement home's mandatory vaccination policy as a reasonable workplace rule consistent with the collective bargaining agreement, the Occupational Health and Safety Act (OHSA), and the Retirement Homes Act, 2010 (RHA) ('Decision'). The retirement home's policy required all newly hired and existing employees to be fully vaccinated. The short judgement detailed the reasonableness and lawfulness of the retirement home's mandatory COVID-19 policy when the province of Ontario reduced and/or eliminated public health measures relating to COVID-19, especially those impacting retirement homes:

Having carefully considered the evidence, arguments and authorities, it is my view that the Policy has been and remains a reasonable workplace rule, consistent with the Collective Agreement, the Occupational Health and Safety Act, Retirement Homes Act, 2010 and the related regulations and requirements, and the relevant authorities. More specifically, this is my view even in the context of the Ontario Government and other public health authorities recently reducing or eliminating various vaccination and other COVID-19 related requirements for staff, contractors and visitors in the context of retirement homes, long-term care homes and, more generally, other facilities and venues. (*Extendicare Lynde Creek Retirement Residence and United Food and Commercial Workers* [5])

This judgment, even if the background and the precise legal reasoning are not public, is important in the post-COVID era of ordering vaccination by the employer. The judgment suggests that it is likely that the elimination or loosening of COVID-19 restrictions will not create barriers to the implementation of vaccination policies by the employers and that all employers will act reasonably if they require their employees to get all recommended boosters even in the future (*Extendicare Lynde Creek Retirement Residence and United Food and Commercial Workers* [6]).

3.2. The second category: Poland

Shortly after having revealed the very first types of COVID-19 vaccinations, no special legal provisions were enacted to reconsider the legal relationship between the employer and its employees (Kowalczyk-Pakula 2021). Nevertheless, the Government acknowledged the special role of employers in fostering vaccination among their employees (COVID-19 vaccination 2021); however, mandatory vaccination, especially rendered by the employer, had not been widely discussed during this period. The Government introduced a workplace vaccination program (Wądołowska 2021) that intended to increase the availability of this

protection for employees even in their workplace, without having to be absent from work for a whole day if not for at least several hours. The option to grant an additional rest day for workers who have been vaccinated had been rumored (CA Contract Administration 2021), but such a rule had not been adopted. On the contrary, employers were obliged to conduct an occupational risk assessment until January 2021 in certain sectors such as agriculture, food production, and health-care units, and, based on this assessment, necessary protective measures were expected to avoid being fined by the National Labor Inspectorate (NOERR 2021).

The spread of additional virus variants during the second half of 2021, especially the rise of the Omicron variant, again invigorated the discourse on strengthening the role of the employer vis-à-vis its employees in terms of enforcing or at least supporting the increase of the vaccination rate. In Poland, the authorization of the employer to impose a vaccination mandate on its employees had not been seriously raised; however, other legal means had been introduced as adaptations to the extraordinary public health concerns. At first, in August 2021, a bill was proposed to allow employers to check the vaccination status of employees (Kolasa-Dorosz, Sopata 2021) even without the consent of the persons concerned (Poland: Employers will 2021).

The first reflections on these ideas were mostly critical; therefore, this plan was withdrawn from the agenda (Małobęcka-Szwast, Syska 2021). However, during the winter period, when the public health situation deteriorated again (Visegrad Post 2021), this bill was finally passed (CA Contract Administration 2022). This happened almost simultaneously with the adoption of the Hungarian law allowing employers to suspend labor contracts unless the employee was vaccinated by a specific deadline set by the law. The Polish amendment just authorized the employers to access the medical reports and vaccination information of employees, which might have meant an additional motivation for employees to be vaccinated (Kalecka 2022), but it was far from any form of vaccination mandate (Wołoszyn-Cichocka 2021).

Moreover, mandatory vaccination was suggested by the opposition, also with fines envisaged for non-compliance with this requirement (Notes from Poland 2021), but this was clearly rejected by the right-wing governmental parties as well as by the president of the republic (Wilczek 2021). Despite this attitude, the necessity of sectoral vaccination mandates was acknowledged (Poland to introduce 2021), and in December 2021, the State ruled on the mandatory vaccination as a requirement for medical workers, teachers, and members of armed forces to maintain their employment (AP News 2021).

This meant that the Government completed the balancing mechanism between competing rights and interests in the field of vaccination without involving employers and employees in the process (Borowska 2021). Those who did not meet the criteria of vaccination by the deadline set by the law were removed from their position due to non-compliance with a statutory requirement;

employers did not have any margin of discretion. Consequently, in Polish-like regulatory concepts, as well as in France and Italy, the State preserved its exclusive competence to impose mandatory vaccination on its citizens; no other actors, especially private employers, had this competence, as in Hungary. Moreover, the Polish amendments were not subject to judicial review, in contrast to Canada and Hungary.

3.3. The third category: Hungary

In Hungarian practice, it is not unique to require certain or all citizens be vaccinated. In a wider context, the legislator, as well as the Hungarian Constitutional Court (HCC), dealt with cases of age-based vaccination, i.e., protection of children (HCCD 39/2007). In the employment context, there were, however, no strict mandatory rules on this topic; therefore, judicial practice is mostly missing (Horváth 2022). The only guidance employers could seek to decide when and where to require vaccination was based on the Methodological Letter of the National Centre for Public Health issued year to year (Methodological Letter 2019).

The regulation obliged the employer to assess the biological risks to the health and safety of employees [NM Decree 18/1998 Section 9 (1): “Employers must assess the biological exposures at the workplace that pose a risk to the health and safety of employees in accordance with separate legislation. In order to reduce this risk, the employer must ensure, as a condition of employment, that employees employed in the positions at risk are vaccinated in accordance with the separate legislation. At the request of the employer, the district office shall issue an opinion on the results of the assessment of the positions at risk.”], the exposure (hazard) at the workplace in accordance with the provisions of a separate decree (EüM Decree 61/1999).

Based on the Methodological Letter, “in order to reduce the risk of illness, the employer must ensure, as a condition of employment that the employee employed in a hazardous position is vaccinated” (Methodological Letter 2019). This includes, for example, vaccination against tick-borne encephalitis for foresters. Based on this soft-law document interpreted *in lieu* of the mentioned decrees, only general occupational health and safety sanctions may be imposed on the employer if the employee does not take the vaccine. This means that the legal consequences of not taking the COVID-19 vaccination by the employee, as detailed below, were not part of the Hungarian legal system in the pre-COVID era.

As many scholars argue, the unilateral ordering of mandatory vaccinations is perhaps the most controversial area of employer measures contended by employees (Varga 2022; Hungler 2022). The Hungarian State issued three different Government Decrees for a certain group of workers during the public health emergency: (1) compulsory vaccination of healthcare workers against COVID-19 (Government Decree of Healthcare GD 449/2021); (2) the protection of private

workplaces against COVID-19 (Government Decree of Private Employers GD 598/2021); and (3) the compulsory use of COVID-19 vaccination by employees of public institutions (Government Decree of Public Institutions GD 599/2021).

The private employers were provided the opportunity to decide whether they want to implement mandatory vaccination or not based on the Government Decree of Private Employers. This Government Decree mostly allows private companies, other than those referred to in the other two Government Decrees (e.g., municipalities), to require employees to be vaccinated against COVID-19 as a condition of employment if they consider it necessary for the health and safety of the employees and taking into account the specific nature of the workplace and the position. The employee is exempted from the obligation to receive vaccinations if it is supported by a medical opinion (GDPE Section 1-2).

If the employee has not taken the vaccination within the time limit specified in the employer's notice, the employer could order unpaid leave or, after one year, terminate his/her employment with immediate effect (Gera 2022). If the employee takes the vaccination after the unpaid leave has been ordered, the employer shall immediately terminate the unpaid leave [GDPE Section 2(11): "If the employee takes the vaccination after the unpaid leave has been ordered in accordance with paragraph 8, the employer shall immediately terminate the unpaid leave."]

Similarly to the other two Government Decrees (HCCD 3128/2022; HCCD 3537/2021; Csink 2022), the HCC examined the Government Decree of Private Employers. The four complainants referred to the interference with the following six fundamental rights in their petitions: right to physical and mental integrity, right to equal treatment, right to human dignity, prohibition of human experimentation without consent, right to physical and mental health, and right to work (HCCD 3088/2022 [6]-[14]). One complainant also pointed out that the Government Decree of Private Employers infringed upon the fundamental rights of the employee because it provided discretion for the employer to decide whether to order compulsory vaccination, even though it had neither the professional nor any other qualifications to determine whether vaccination is necessary (HCCD 3088/2022 [7]).

Unfortunately, the HCC did not examine the Government Decree of Private Employers on the merits but dismissed the claims because – based on its reasoning – neither ordering compulsory vaccination, nor ordering unpaid leave, nor the termination of the employment relationship follows directly and compellingly from the challenged Government Decree of Private Employers, as it merely creates the possibility of compulsory vaccination and the application of legal consequences (HCC 2022). As to the HCC, it follows from the dispositive nature of the contested rules that all these provisions do not take effect *ex lege*, but by a discretionary measure taken by the employer individually.

Consequently, against those decisions of the employer, the employee may bring a claim under the general rules of labor law if the employer has infringed the

rules governing decision-making (HCCD 3088/2022 [23]; Rules on such labor law claims are laid down in Section 285(3) of Act I of 2012 on the Hungarian Labor Code: “A claim may be brought against an employer’s discretionary decision if the employer has breached the rules governing the making of that decision.”).

As of the date of the publication of this contribution, we are not aware of any labor law court decisions that ruled on such complaints. However, two dissenting opinions and two concurring opinions were attached to the HCC ruling. From these opinions, we may be able to draw conclusions as to what decision could have been reached based on the merits of the case. One judge who deemed the case admissible mentioned the HCC’s well-established case law with regard to compulsory vaccination in her dissenting opinion (HCCD 3088/2022 [43], [49]). Based on this, we may conclude that the HCC would have dismissed the claims even on the merits of the case. Another judge, however, highlighted the problem of the wide margin of manoeuvre of the employer:

I do not see a clearly convincing reason whether the legal background (i.e., the Government Decree) provided for ordering compulsory vaccination by the employer is sufficient to allow the balancing of arguments for and against compulsory vaccination, and whether the obligation can be considered (taken) as a consequence of this balancing, and whether it is a reassuring normative answer against the doubts of the realistically possible (potential) obligations. (HCCD 3088/2022 [53])

It would have been interesting to see what the substantial decision of the HCC on this topic would have been. The examination of this question would have been a cornerstone of future interpretation of the employer’s discretionary right to order vaccination (Society for Liberties 2021). In our opinion, only the State is authorized to restrict the fundamental rights of individuals or at least to determine the main aspects of the balancing test to be performed by the employers, as the State has the necessary information to reach a conclusion on this topic. The restrictive data processing options of the employers at the time of the Government Decree of Private Employers did not allow the employers to precisely determine which positions require vaccination with respect to which employees (NAIH).

As Herdon and Rab point out: “The employer does not have any data that would show the danger of jobs in such an epidemic situation, nor does it have any additional statistics that show the employees at risk. Likewise, the employer cannot assess the success of individual alternative therapies and is also not competent to judge the frequency and severity of complications caused by possible vaccinations” (Herdon, Rab 2021; Varga 2022). Consequently, we deem the too wide margin of manoeuvre of the employer as stipulated by the Government Decree of Private Employers rather problematic.

4. DISCUSSION

The abovementioned models demonstrate that we are very far from a consensus, even at the theoretical and practical level, on how to allocate decision-making competences between the state, the employers, and the employees when vaccination is concerned in classical employment relationships. In other words, it is dubious where we should allocate the task of balancing competing rights and interests among the three stakeholders. Using our classification as a starting point, we would describe our proposed regulatory framework, which might be worthy of consideration for all countries facing these paramount issues even in the future.

4.1. The scope of vaccination mandate imposed by the State

The first main element of our concept distinguishes certain sectors selected on objective public health grounds, where the state would have exclusive competence to render mandatory vaccination for all employees (Kozma, Pál 2021). The sectors that should belong to this category are where: employees would be more vulnerable *vis-à-vis* public health concerns; where the employees could easily infect other potentially vulnerable persons; where job-related ordinary activities would cause significant risk of contamination; and where the role of the service provided is essential for safeguarding certain fundamental rights. Further analysis should be required, and in the public sector, the role of the employer might be stronger, but in the private sphere in our understanding, healthcare workers, private teachers, food production workers, agriculture workers, shop assistants, and private security guards may fall within this group.

In this category, the State retains the option to prioritize the right to life, the right to health, and the protection of public health over competing rights such as the right to self-determination, the right to conscience, the right to occupation, and the right to work. Compelling reasons should justify such far-reaching state intervention; nevertheless, the envisaged social harm and the assumed severe limitations of paramount fundamental rights and constitutional values might provide a proper explanation for granting strong competences to order restrictive measures with general applicability, such as mandatory vaccination. In the balancing mechanism, the fundamental rights of the employers, the employees, as well as third parties (clients or other potential collaborators) should be taken into account. The uninterrupted operation of these businesses would secure the prevalence of numerous essential fundamental rights, which also justifies state interference.

One can easily recognize that this component of our framework is mostly borrowed from Poland, where stricter requirements are applicable for the employees of certain sectors, while state interventions for the promotion of vaccination are also stronger in certain occupations. In our view, the State should

not be deprived of the opportunity to impose a vaccination mandate on certain employees, especially in the case of an extraordinary context; however, such measures should be strongly justified, narrowly tailored, and based on objective public health justifications. In these sectors, the State should not necessarily implement a vaccination mandate for certain illnesses but should retain this right as an exclusive competence, where other stakeholders should not intervene.

The law should not provide the exact circumstances that may lead to the extension of the vaccination mandate but shall enumerate those sectors of employment outside the public sector where such a requirement might be implemented by state authorities. In case of non-compliance with such a requirement within a reasonable deadline prescribed by the law or the emergency decree, the employee shall be dismissed, and his/her employment contract should be suspended or terminated. Reasonable exemptions should be provided for those for whom vaccination is not recommended due to specific health concerns. If the State ordered mandatory vaccination, the costs of implementation should be covered by state authorities. The exemptions should safeguard the fundamental rights of the employees, while the cost allocation serves the right of employers to conduct their business.

4.2. Sectors where employers would have margin of decision based on objective criteria prescribed by law

In the second category of employment sectors, the employer would have a margin of movement to decide whether a vaccination mandate would be imposed on its employees. If an employer were to rely on a vaccination mandate in these sectors, employees who failed to comply with this requirement should be dismissed or at least suspended from their position. This flexibility should be provided for those employers whose activities would entail huge public health concerns; however, the threat is less intense than within the first group, or the public interest is less weighty in maintaining the uninterrupted functioning of these services (Tambone et al. 2022). To set some concrete examples, restaurants, bakeries, patisseries, pubs, sports clubs, fitness centers, theaters, cinemas, libraries, accommodations, maintenance services, and workplaces with fully remote activities may belong to this category, among several other potential fields of application (Sporrer 2023).

In these sectors, the State would not conduct the whole balancing mechanism through regulation; instead, the law would provide only some points for consideration, but the final decision would be left in the hands of the employer. Amongst others, the law may provide the severity of the public health concerns (Samuel, Shimada 2023); the local intensity of the pandemic; the activity of that particular business; the number of employees; the number of clients; the form of contact between the employees and the clients; the roominess of the space in the

workplace; the frequency of job-related international travels; the effectiveness of home office methods to fulfill the essential tasks in case of contamination.

Owing to this regulatory concept, the employer could consider: the local circumstances; the characteristics of the particular activity; the latest tendencies of public health concerns, and the uniqueness of that labor surrounding. Obviously, this assessment by the employer should be limited by the law, which should determine which factors the employer must consider when deciding. By this method, especially during extraordinary periods, a certain level of flexibility might be in compliance with the requirement to provide any limitation of fundamental rights by a law (Lach 2023). Reasonable exemptions based on medical recommendations should also be included in the employer's policies, while the costs of vaccination mandates rendered by the employer must be primarily borne by the employer. Nevertheless, the State might provide partial or full compensation for the employers if their intervention is deemed to be reasonable.

From a fundamental right perspective, the law establishes the grounds and the limits of the employer's competence, balancing competing rights and interests. However, the exact application depends on the employer, which may give additional flexibility on the one hand, but also excludes the consideration of broader social implications by the employer on the other. Most constitutions lay down the principle that fundamental rights may not be restricted unless provided for by law. Therefore, the constitutionality of such a regime would be almost doubtful: precise regulatory orientation would be needed on behalf of state authorities safeguarding the constitutional protection of fundamental rights; however, the margin of manoeuvre of the employers should not be emptied. The continuous operation of these businesses would still have a significant influence on exercising fundamental rights; however, this link is deemed to be less intense in comparison with the first category. Apart from this, reasonable exemptions and rules on allocating the costs would have also strong impact on the protection of fundamental rights.

4.3. Fields where vaccination mandate would be excluded

Obviously, the exact classification may vary from illness to illness; our current vision is focusing on epidemiological fears similar to the recent global pandemic. Nevertheless, if we go forward in the same direction as in the previous two subchapters, the third category would contain those sectors where a vaccination mandate would be forbidden; neither the State nor the employer could render such a requirement to maintain existing labor contracts. In these sectors, the impact of potential public health concerns is estimated as less serious in comparison with the first two groups, and also the public interest in continuing the operation of these workplaces would be less meaningful in the shadow of extraordinary health dangers.

Amongst others, this group might be comprised of amusement centers, casinos, and gambling centers. In these workplaces, no compelling reason might be raised to introduce a mandatory vaccination requirement; therefore, interference is not reasonable to restrict the autonomy of employees in this regard (Legalaid 2023). If these businesses were to be closed, this would not cause significant disruption in exercising citizens' fundamental rights; consequently, less weighty arguments might be raised for restricting employees' fundamental rights.

We are fully aware of the fact that the enumeration of each category is very far from providing a complete and exclusive list of employers falling into any of the respective groups. However, our purpose with this study was not to outline a detailed regulatory concept but to formulate policy recommendations that would merge the elements of the three identified models.

5. CONCLUSION

The curfew period caused by the COVID-19 pandemic is behind us; however, its long-term consequences and experiences will remain with our society, and several issues should be reconsidered in the first years of the post-COVID period. One of these crucial fields has been the decisions regarding vaccination mandates, which constituted a controversial matter even before the global pandemic. The involvement of employers in imposing such requirements was also experienced before the rise of the global pandemic; the public health emergency just highlighted and reinforced these ongoing debates with the introduction of several types of vaccinations (Rácz, Rácz 2022). The mandatory use of a protective mechanism, which was explored shortly after the appearance of the global pandemic, entailed huge concerns from the widest circles of society, which elevated the previous discussion of the constitutional standards of mandatory vaccination requirements (Allinger, Adam 2022).

The authorization of private employers to impose vaccination mandates on their employees generated considerable resound in light of the extraordinary context of the global pandemic (Workers' Rights under the COVID-19). The legal scholarship should play a weighty role in clarifying the constitutional implications of this matter. Our analysis contributed to this strand of the literature and complemented the already known assessment of the competing rights and interests with some new methods and arguments. In our view, insufficient attention has been paid to comparative analyses in this regard; a scale was missing to illustrate the potential frameworks to share the responsibility between the State, the employer, and the employee. The comparative endeavors led us to combine certain elements of the main identified models and to propose a complex alternative to elaborate a sophisticated classification of labor sectors from the perspective of rendering vaccination mandates.

The proposed policies should be adapted to the individual circumstances of each legal system, and concrete suggestions for classifications may also be premature at this stage. Moreover, the exact categorization should differ in light of the sources of public health concerns. Despite these reservations, the combination of the three main models, and on this ground, the proposed three layers of vaccination mandates might be worthy of consideration for policymakers around the world and may integrate the experience of the recent public health emergency into the post-COVID vaccination policies.

Although the fact that the vaccination programs reflected on the global pandemic constituted probably the most extensive endeavors to date to immunize the population against a public health concern, forthcoming threats should also require similar efforts from the whole society. Whenever this will be necessary, a more coherent sharing of vaccination competences between the State, the employers, and the employees would undoubtedly serve the best interest of the whole society; our contribution aimed to make some minor steps in this direction.

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