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## Mandatory COVID-19 vaccination and human rights

Published Online  
 December 23, 2021  
[https://doi.org/10.1016/S0140-6736\(21\)02873-7](https://doi.org/10.1016/S0140-6736(21)02873-7)

On Dec 9, 2021 the Austrian Government laid a bill before parliament that would impose a mandatory COVID-19 vaccination requirement for all its residents.<sup>1</sup> This move followed the Greek Prime Minister's announcement to impose fines on residents aged 60 years and older who do not take up COVID-19 vaccination.<sup>2</sup> Many other nations are contemplating similar mandates or have adopted mandates in certain workplace settings, such as Australia, Brazil, Canada, France, Indonesia, Italy, and the UK.<sup>3</sup> Some people resist vaccine mandates on pragmatic grounds, for example, that such mandates could decrease health-care staffing levels or morale.<sup>4,5</sup> However, mandatory

vaccination is also often opposed in principle. The UK Secretary of State for Health and Social Care, Sajid Javid, for instance, told the BBC on Dec 10, 2021 that he thought mandatory vaccination is “unethical”.<sup>6</sup> Many others presume mandatory vaccination violates human rights.<sup>7</sup> We believe that this view is mistaken, at least as a matter of international and comparative constitutional law.

Our opinion is based on extensive discussion and analysis held as part of the Lex-Atlas: Covid-19 (LAC19) project, a worldwide network of jurists that is producing and curating the open-access *Oxford Compendium of National Legal Responses to Covid-19*.<sup>8</sup> 50 jurists in the network adopted principles concerning the legality and constitutionality of mandatory vaccination in October, 2021 (the LAC19 Principles).<sup>9</sup> We concluded that mandatory vaccination and human rights law are compatible in principle and that there is a compelling rights-based case for a state duty to consider adopting mandatory vaccination, defined as any law that makes vaccination compulsory, or any public or private vaccination requirement for accessing a venue or service that cannot be avoided without undue burden.<sup>9</sup> This definition recognises mandates adopted by public and private bodies and, crucially, that requirements avoidable through affordable testing are not mandatory.

Even on the most libertarian understanding of liberty, philosophers and jurists agree that restrictions on



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liberty can be justified if they prevent harm to others. The European Convention on Human Rights recognises this by considering the right to physical integrity under article 8 to be a “qualified right” that can be limited “for the protection of health”.<sup>10</sup> If a mandatory vaccination scheme aims in part or whole to reduce harm to others, it is not paternalistic.

But liberty is not the only value relevant to human rights law. Economic and social rights to health, work, and education have been recognised in international law since 1948, most comprehensively in the UN International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>11</sup> an international treaty ratified by 171 states, including all those in Europe and the UK. In its 2013 Global Vaccine Action Plan, WHO reinforced the view that “immunization is, and should be recognized as a core component of the human right to health and an individual, community and governmental responsibility”.<sup>12</sup> A similar view was recognised in article 12(c) of the ICESCR, which lists “the prevention, treatment and control of epidemic... diseases” as among the obligations entailed by the right to health.<sup>11</sup>

Mandatory vaccination is not a knee-jerk response to COVID-19. In more than 100 countries there already exist some version of mandatory vaccination of school children for a range of diseases, including measles, mumps, rubella, tetanus, and polio.<sup>13</sup> In April, 2021 Chile, Germany, Israel, Mexico, Norway, Serbia, Spain, and a number of states in the USA had pre-pandemic laws that gave legal authority to impose vaccination mandates against COVID-19 in particular.<sup>14</sup>

As far as we know, no major constitutional or international court has found that a mandatory vaccination policy violates any general right to liberty. Many such policies have been upheld when challenged. In April, 2021 in relation to a pre-COVID-19 law, the Grand Chamber of the European Court of Human Rights found that a Czech law requiring compulsory vaccination of children against nine diseases did not violate the article 8 right to physical integrity because the scheme was a proportionate means of protecting public health.<sup>15</sup> In several other jurisdictions, courts have reached the same or similar conclusions, including the US Supreme Court’s ruling in *Jacobson v Massachusetts* (1904),<sup>16</sup> recent pre-COVID-19 judgments that uphold mandatory vaccination schemes in France,<sup>17</sup> Italy,<sup>18,19</sup> and Chile,<sup>20,21</sup>

and COVID-19-specific decisions for programmes in New York, USA,<sup>22</sup> and Brazil.<sup>23</sup> In most of these decisions, the courts found the schemes gave effect to the right to health.

Nevertheless, the in-principle compatibility of mandatory vaccination and human rights does not mean that governments, employers, or schools should be cavalier about their adoption. They certainly interfere with fundamental rights, so careful design is required to ensure that vaccine mandates do not violate rights. The LAC19 Principles thus aim to provide guidance on how to enact rights-compliant schemes.<sup>9</sup>

The LAC19 Principles recommend that mandatory vaccination schemes must be prescribed by law that is clear and preferably adopted after consultation. Ideally, mandatory vaccination should be regulated by statute, rather than executive rules (ie, regulations). The making of mandatory vaccination laws should undergo a period of consultation of at least 4–6 weeks and involve subnational governments, opposition parties, trade unions, experts, the public, and others. These consultations, and the government’s response, should be published before the passage of any bill, to allow for debates and amendments. Consistently with widely accepted constitutional principles that relate to the non-delegation of core legislative functions, mandatory vaccination laws should not leave major policy questions for governments, private businesses, or employers. They should be addressed in the bill going through the legislature, allowing for debate and amendments.

Mandatory vaccination schemes must also meet the legal principle of proportionality. As detailed in the LAC19 Principles, the scheme must have a legitimate aim—eg, the reduction of virus transmission or protection of health services. The means chosen must be rationally connected to that aim. In practice, proportionality will be satisfied if the mandatory vaccination scheme is based clearly on sound public health advice. The scheme must also be necessary in the sense that there is no other less-impairing means of achieving that aim. Here there will be much debate about vaccine efficacy and probable social responses to mandatory vaccination. Public law principles counsel judicial restraint on a question as complex as the epidemiological necessity of a nationwide

vaccine mandate. Finally, fines and punishments for not complying with the mandate should be effective but not be too onerous. The more severe the penalty, the more vulnerable is the policy to a legal finding of disproportionality.

The LAC19 Principles also call for constructive engagement with reasonable vaccine hesitancy. The political philosopher John Rawls famously distinguished what is rational from what is reasonable.<sup>24</sup> Vaccine hesitancy may be reasonable (understandable and respect-worthy) for some groups who are suspicious of vaccine mandates—eg, communities who have been subject to state-complicit persecution, discrimination, marginalisation, or neglect.<sup>9,25</sup> In such cases, the state and other actors should adopt constructive engagement interventions with these groups, such as community-led education or delayed commencement periods. Blunt termination notices on their own are insufficient. However, constructive engagement falls short of offering full exemptions. Medical exemptions should be considered, but exemptions for religious beliefs or freedom of conscience are not generally required by human rights law.<sup>25</sup>

Although mandatory vaccination requirements must be designed with great care, there is no reason to think they are inherently incompatible with human rights law.

The Lex-Atlas project is funded by the Faculty of Laws, University College London, UK, the Dickson Poon School of Law, King's College London, UK, and the Max Planck Institute of Comparative Public Law and International Law in Heidelberg, Germany. JK and OLMF are principal investigators and AJ is a research fellow of the LAC19 project, which is supported more widely by the UK's Arts and Humanities Research Council, the Leverhulme Trust, and UK Research and Innovation (UKRI). The funding sources had no role in this Comment. We declare no other competing interests.

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