



SECURITY OVER FREEDOM? COMPULSORY VACCINATIONS AGAINST COVID-19 AS A CONTROVERSIAL METHOD GUARANTEEING HEALTH SAFETY



Bezpieczeństwo ponad wolność?

Przymusowe szczepienia przeciwko covid-19 jako kontrowersyjny środek gwarantowania bezpieczeństwa zdrowotnego

Wawrzyniec Kowalski¹

1. Institute of Security and Defence, Military University of Technology, Poland

Streszczenie: Celem artykułu jest przybliżenie kontrowersji, związanych ze stosowaniem przez władze poszczególnych państw środka gwarantowania bezpieczeństwa zdrowotnego, jakim są przymusowe szczepienia. Dopuszczalność przyznania szczepieniom przeciwko zakażeniu wirusem SARS-CoV-2 statusu obowiązkowych rodzi pytanie, jakie są dopuszczalne granice ingerencji w sferę wolności jednostki. Problem ten tym samym związany jest zarówno z systemami ochrony praw człowieka, jak i postrzeganiem istoty bezpieczeństwa przez władze publiczne. Wskazano, że istota problemów i kontrowersji, związanych z ewentualnym ustanowieniem obowiązkowych szczepień, ma nie tyle charakter sporu o podłoże prawnym, lecz dotyczy politycznego i społecznego, a nawet kulturowego wymiaru sprawy.

Abstract: The aim of the article is to present the controversy related to the use by authorities of individual countries compulsory vaccination as a measure for guaranteeing health safety. The admissibility of granting mandatory status to vaccines against SARS-CoV-2 virus infection raises the question of the permissible limits of interference in the sphere of individual freedom. This problem is therefore related to both human rights protection systems and the perception of the essence of security by public authorities. It was pointed out that the essence of the problems and controversies related to the possible introduction of compulsory vaccinations is not so much a legal dispute, but concerns the political, social and even cultural dimension of the case.

Key words: COVID-19, bezpieczeństwo zdrowotne, przymusowe szczepienia, SARS-CoV-2, pandemia.

Słowa kluczowe: COVID-19, health security, compulsory vaccinations, SARS-CoV-2, pandemic

DOI 10.53301/lw/144704

This paper was received by the Editorial Office:
06/10/2021

Accepted for Publication: 08/12/2021

Corresponding Author:

Wawrzyniec Kowalski
Institute of Security and Defence, Military University of
Technology, Poland
email: wawrzyniec.kowalski@wat.edu.pl

There is no doubt that the SARS-CoV-2 pandemic has affected virtually every aspect of modern life – economic, medical, political, social, as well as legal. The pandemic has not only resulted in more than four million deaths and nearly 190 million cases worldwide [1]. It is also difficult to estimate the economic losses and – as will be discussed in the article – significant changes in the legal systems of individual countries. What happened during the pandemic was a kind of reevaluation of the idea that by means of global health management mechanisms, particularly by the international community imposing tasks on the World Health Organization (WHO), both the outbreak and spread of epidemic could be effectively counteracted. While only the coming years will provide an answer about whether, and to what extent, the countries will actually redefine the tasks and mechanisms of action of

the WHO – which will undoubtedly be a long process given the way in which changes in international law are implemented – it can already be said that we are witnessing a transformation of legal systems in individual countries. The apparent redefinition of the regulations aimed at ensuring collective security in individual countries, on the one hand axiologically contradicts previous development of international human rights law, that places the individual at the centre, which has been accompanied for decades by a progressive process of positivisation of human rights. On the other hand, it is characterised by conviction that the security of societies can be guaranteed to the greatest extent through laws and efficient legislation. Moreover: "It seems reasonable to conclude that the pandemic period is a unique test for the mechanisms of democracy, since often state authorities, motivated by

the intention to ensure the effectiveness of protective measures taken to protect the security of citizens, will take actions both *praeter legem* and *contra legem*" [2].

The aim of this article is to present the issue of compulsory vaccination against SARS-CoV-2 infection, and to highlight the problems and controversies that arise from the decisions of particular countries which have decided to implement this measure. Due to the methodology of this study, the author will focus on selected legal conditions related to the analysed issue, in particular the issue of consistency of the human rights system with mandatory vaccination.

The SARS-CoV-2 pandemic, which began on 11 March 2020, has caused significant economic and social disruption in almost all countries around the globe and has permanently transformed the modern world. These changes have also occurred within the limits of the law. We need to remember that previous efforts aimed at limiting the spread of the virus were based on the belief that it is up to the individual to decide whether or not to get vaccinated. However, in some countries, workers in selected sectors, most often health care, have been obliged by law to undergo mandatory vaccination. If they refused to get vaccinated, they were to face sanction in the form of termination of their employment contract. In June 2021, the world saw photos depicting health care workers having been fired and forced to resign from their jobs at hospitals belonging to Houston Methodist in Texas. Its authorities announced on 1 April 2021 that all employees who wish to keep their jobs at Houston Methodist-affiliated hospitals must get vaccinated. While 24,972 employees were vaccinated, more than 150 were either fired or resigned as a result of the employer's decision [3]. 117 of these unvaccinated employees brought a lawsuit; however it was dismissed by federal district court judge Lynn Hughes. In the justification for her decision, the judge pointed out that the employer's position is not coercive, and Houston Methodist "[...] is trying to save lives by not infecting them [the employees – author's note] with the SARS-CoV-2 virus. This choice is aimed at ensuring the safety of staff, patients and their families. Bridges [a plaintiff – author's note] is free to choose whether or not to undergo the COVID-19 vaccination; however, if she refuses, she will simply have to work elsewhere" [4]. Despite the controversy caused by this process in the United States, the University of Pennsylvania Health System has also announced that all hospital staff must be vaccinated by the end of September this year. Employees, including medical staff, who choose not to be vaccinated will have to leave their jobs [5].

For the sake of complementarity of considerations, we need to emphasise that apart from the United States, where President Biden's administration imposed the vaccination requirements on employees and federal contractors in September 2021, vaccination of selected social groups is already mandatory in such countries as:

United Kingdom: compulsory vaccination has applied since October 2020 to people working in care homes, France: compulsory vaccination of medical personnel, including volunteers by 15 September 2021, Russia, Greece, Hungary, Italy – from March 2021, and Kazakhstan. It should also be mentioned that, in the United States, the vaccination mandate also applies to employees of medical institutions that receive federal funds. At the same time, unvaccinated employees do not have access to free testing. In addition, the authorities of some states have already decided to introduce mandatory vaccination for health care workers. We further need to keep in mind that different states have different legal regulations against COVID-19. Interestingly, in contrast to unitary countries, federal ones often put public health legislation in the hands of the states and territories *vide* Australia [6].

In Italy, the introduction of mandatory COVID-19 vaccination was explained by the government as a desire to ensure "the greatest possible protection of both medical and paramedical personnel, as well as individuals in environments that may be at greater risk of infection" [7].

Some countries, such as Tajikistan and Turkmenistan, on the other hand, have introduced mandatory universal vaccination. In both countries, vaccination is mandatory for all citizens over 18 years of age, and the pandemic approach of the authorities is the most restrictive in the world [8]. There are also countries where a vaccination requirement has been established for those who intend to visit or work in certain places: such policies have been implemented in Saudi Arabia and Pakistan. Saudi Arabia implemented a "no vaccination, no work" policy, which applies to both the state and private sectors of the economy. There is also the fourth and largest group of countries, including Poland, in which an individual makes a sovereign decision whether or not to get vaccinated.

When faced with reports of increasingly contagious strains of SARS-CoV-2, such as the Delta variant, an increasing number of researchers are wondering whether implementing mandatory vaccination is justified and what the implications of this very controversial remedy would be.

Undoubtedly, public authorities in most countries around the world, particularly in democracies, avoid implementing this measure that interferes with the personal rights of an individual, aimed at reducing the risk of infection. Objections result both from an individualistic approach to human rights in some democratic countries and from political and religious beliefs of citizens. As a counterpoint, we should emphasise that the views of some researchers considering the introduction of mandatory vaccination are based on the belief that the more people get vaccinated, the faster herd immunity will be achieved.

In doctrine Daniel Graeber, Christoph Schmidt-Petri and

Carsten Schöeder point out that an argument for mandatory vaccination is the presence of “free riders”, i.e. individuals who take advantage of the reduced risk of disease achieved by other people’s vaccination, but do not wish to vaccinate themselves. The above-mentioned researchers emphasise that those who have decided to get vaccinated “have incurred personal costs in the form of discomfort or money” [9]. According to the authors, a mandatory vaccination policy could prevent such behaviour. However, they recognise other factors that accompany vaccination, such as potential side effects and vaccine ineffectiveness.

An exemplification of the challenges faced by public authorities in most countries in deciding whether to introduce vaccination mandates, regardless of their scale, is represented in the words of Ryszard Piotrowski. He points out that when considering the use of compulsion in the sphere of health, in the Polish constitutional system, “[...] constitutional reservations would certainly arise, first of all whether the introduction of mandatory vaccination is necessary and whether it is proportional; in other words, whether the good that we are sacrificing, in this case freedom, is really less important than the good that we are, perhaps not very effectively, protecting in this way, that is, public health. Opinions on this issue would certainly be divided. Our Constitution defines personal liberty individually, not collectivistically. [...] Coercion is the worst argument, and it sets a precedent for creating totalitarian solutions. Control over the individual will greatly expand, and then we may find that human rights also become victims of the virus” [10].

It is interesting to note, however, the appearance of a polemic voice with the view expressed by Ryszard Piotrowski. According to Łukasz Korzeniowski, the introduction of mandatory vaccination against SARS-CoV-2 infection would not weaken the human rights system. He points out: “If someone were to argue that they are contrary to the Constitution of the Republic of Poland, they would thereby undermine legality of mandatory vaccinations against diphtheria, tuberculosis, whooping cough, mumps, rubella, which, after all, have been with us for quite a long time. [...] COVID-19 would become just another infectious disease covered by mandatory vaccination. Since we are obliged to vaccinate against mumps or tetanus, wouldn’t it make sense to implement mandatory vaccination against COVID-19, a disease which has totally changed our lives in recent months, and which in Poland has caused the greatest number of deaths since World War II?” [11]. Following the proposed reasoning, the content of Article 2 of the Regulation of the Minister of Health of 18 August 2011 on Mandatory Preventive Vaccination should be amended and the list of infectious diseases subject to mandatory preventive vaccination should be expanded [12]. On the basis of the statutory authorisation contained in Article 17(10) of the Act of 5

December 2008 on the Prevention and Control of Infections and Infectious Diseases in Humans, it is the Minister of Health who determines [13] both the list of infectious diseases covered by the preventive vaccination mandate and persons or groups of persons obliged to undergo mandatory preventive vaccination against infectious diseases.

Referring to the very broad, long expanded catalogue of human rights, which in the form of many international agreements has been introduced into the legal systems of most countries in the world, we need to recall that one of the fundamental rights underlying the entire system is the right to the protection of individual health, stipulated in Article 12(1) of the International Covenant on Economic, Social and Cultural Rights. “The States party to the [...] Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health” [14]. Robert Tabaszewski wrote about the significance of Article 12 of the ICESCR, pointing out that “Article 12 in Part III of the ICESCR establishes social rights to health, which consist of a number of specific rights, including the right to health care and the right to participate in a universal health insurance system. Thus, for the first time, the right to health care has been included *expressis verbis* in the catalogue of conventionally protected human rights” [15].

The right to health care defined in this way is an emanation of human dignity, as well as one of the fundamental rights of an individual included in the model of a democratic state under the rule of law. According to Article 2 of the said article, the states are obliged to fully guarantee this right, and in order to achieve it, the actions of the states “[...] shall include measures necessary to: [...] c) prevent epidemic diseases [...]” [14].

In the approach proposed by Ryszard Piotrowski, mandatory vaccination of citizens is equivalent to restriction of freedom. It is worth to recall the words of English philosopher and economist John Stuart Mill, according to whom “[...] the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. The only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant” [16]. Adam Plichta, referring to this very well-known view of John Stuart Mill, points out that: “John Stuart Mill made it clear that living in a society, the individual has specific duties. He points out that society must be repaid through obeying the law, working, and making sacrifices to defend it. Moreover, society can enforce fulfilment of these duties” [17].

At this point, we must note that although the Convention for the Protection of Human Rights and Fundamental Freedoms, which is very important for the

European culture, guarantees the right to respect for private and family life, it also contains a reservation that "No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, [...] for the protection of health [...]" [18]. It should be noted that some researchers clearly indicate that Article 8 of the Convention can provide a basis for the establishment of mandatory vaccination. For example, according to Anja Krasser: "Interferences within the scope of Article 8 CPHRFF can, however, be justified provided that the benefit to the community outweighs the burden on the individual" [19].

In Poland, this rule is stressed by Mateusz Paplicki, according to whom: "The statutory obligation to undergo vaccination is not a violation of constitutionally guaranteed human freedoms, because these freedoms are not absolute and must take into account the rights of others, including the right to live in a society free from contagious diseases [...]" [20].

For the sake of clarity, we need to recall that, in contrast to the views of researchers who argue against mandatory vaccination, Julian Savulescu states in the doctrine, that the introduction of compulsory vaccinations should be considered, under the condition that a total of four premises are met. These are: occurrence of a serious threat to public health, the vaccine being safe and effective, mandatory vaccination offering a better cost-benefit profile compared to other alternatives, and finally, the level of coercion should be proportional [21].

Perhaps we should also consider whether resorting to any form of coercion by public authorities in the realm of pandemic control will be effective. Numerous studies have shown that coercion may bring about effects that are completely different from those intended. We need to note the position presented by Lawrence Gostin, Daniel Salmon, and Heidi Larson, according to whom, coercion can "[...] undermine public support, generating opposition and even decreasing vaccine uptake" [22].

Not without significance in undermining the idea of mandatory vaccination, both sectoral and universal, is the fact that some of the countries whose authorities have chosen to arbitrarily establish vaccination mandates are non-liberal countries. For example, the aforementioned authoritarian Turkmenistan is ranked infamously second last on the list of countries compiled by *Freedom House* which positions countries in terms of their human rights access [23]. According to the *Freedom House* index, Turkmenistan observes only two civil rights, while Poland is credited with the presence of 34 political rights and 48 civil liberties.

It seems that the essence of the problems and controversies related to possible implementation of mandatory SARS-CoV-2 vaccination is not so much in

the nature of a dispute with a legal basis, because, as has been shown, the legal systems of individual countries are able, in accordance with the convention obligations, to establish such a mandate, but concerns the political and social, and even cultural dimension of the issue. Not without significance for consideration of the legitimacy of mandatory vaccination is also the fact that the coronavirus pandemic concerns a new health threat and, associated with it, the presence of newly produced vaccines and distrust in their effectiveness on the part of citizens. These negative processes are aroused by the enormous amount of false information circulating in the media. Finally, the noticeably reduced credibility of the World Health Organization is important for the effectiveness of actions taken from March 2020 to limit the reach and impact of the coronavirus. It has been accused by the authorities of countries such as Japan and the United States of not providing enough effective information on the scale of the threat posed by the coronavirus. Hence, perhaps the words formulated by Italian researchers: Paola Frati, Raffaele La Russa, Nicola Di Fazio, Zoe Del Fante, Giuseppe Delogu and Vittorio Fineschi, remain true. In their opinion "as the vaccination program continues, social norms about COVID-19 vaccines will become more deep-rooted, people will see that their friends, colleagues and loved ones have been vaccinated and are fine. Levels of hesitancy are then likely to decrease" [24].

Literature

1. WHO data as of 19 July 2021. WHO Coronavirus (COVID-19) Dashboard, <https://covid19.who.int/>
2. Kowalski W. Impact of the COVID-19 pandemic on the legal conditions of safety and security of selected countries. *European Research Studies Journal*. 2020; 23 (3): 271
3. Diamond D, 153 people resigned or were fired from a Texas hospital system after refusing to get vaccinated, <https://www.washingtonpost.com/health/2021/06/22/houston--methodist-loses-153-employees-vaccine-mandate/>
4. Jennifer Bridges v. Houston Methodist Hospital Case, <https://www.documentcloud.org/documents/20860668-houston-methodist-lawsuit-order-of-dismissal>
5. Penn Medicine to Require All Health System Employees to Receive COVID-19 Vaccine, <https://www.pennmedicine.org/news/news-releases/2021/may/penn-medicine-to-require--all-health-system-employees-to-receive-covid19-vaccine>
6. AS Kevat D, Panaccio D, Pang S, et al. Medico-legal considerations of mandatory COVID-19 vaccination for high risk workers. *The Medical Journal of Australia*. 2021; 215 (1): 22
7. Amante A. Italy makes COVID-19 vaccine mandatory for all health workers. <https://www.reuters.com/article/us-health-coronavirus-italy-vaccine/italy-makes-covid-19-vaccine-mandatory-for-all-health-workers-idUSKBN2BN34F>
8. Dyer O. Covid-19: Turkmenistan becomes first country to make vaccination mandatory for all adults. *BMJ*, 2021; 374: 1
9. Graeber D, Schmidt-Petri C, Schröder C. Attitudes on

- voluntary and mandatory vaccination against COVID-19: Evidence from Germany. PLOS ONE. 2021; 16 (5): 2
10. Kapiszewski J, Piotrowski R. Ofiarami wirusa nie mogą być prawa człowieka [WYWIAD] [Human rights cannot be the victims of a virus [INTERVIEW], <https://serwisy.gazetaprawna.pl/zdrowie/artykuly/8209101,piotrowski-obowiazko-we-szczepienia-sluzba-zdrowia-prawa-czlowieka.html>
 11. Korzeniowski Ł. Prawa człowieka będą ofiarą nieszczepienia się. Polemika z prof. Piotrowskim [Human rights will be the victim of non-vaccination. A polemic with prof. Piotrowski], <https://prawo.gazetaprawna.pl/artykuly/8212137,prawa-czlowieka-beda-ofa-ra-nieszczepienia-sie-polemika-z-prof-piotrowskim.html>
 12. Regulation of the Minister of Health of 18 August 2011 on Mandatory Preventive Vaccination [Journal of Laws of 2011 no. 182 item 1086 as amended, Article 2].
 13. Act of 5 December 2008 on the Prevention and Control of Infections and Infectious Diseases in Humans [Journal of Laws of 2008 no. 234 item 1570, as amended].
 14. International Covenant on Economic, Social and Cultural Rights of 19 December 1966 [Journal of Laws of 29 December 1977 no. 38 item 169], Article 12(1).
 15. Tabaszewski R. Prawo do zdrowia w systemach ochrony praw człowieka [The right to health in human rights protection systems], Lublin, The Publishing House of the Catholic University of Lublin. 2016; 66
 16. Mill J. S., Utylitaryzm; O wolności [Utilitarianism; On Liberty]. Warsaw, Polish Scientific Publishers PWN. 2005; 102
 17. Plichta A. Koncepcja wolności Johna Stuarta Milla [John Stuart Mill's concept of freedom]. In: Machaj Ł, eds. *Varia Doctrinalia*. Wrocław. 2012; 20: 87
 18. Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, as amended by Protocols nos. 3, 5 and 8 and supplemented by Protocol no. 2 [Journal of Laws of 1993 no. 61 item 284] Articles 8(1) and 8(2).
 19. Krasser A. Compulsory Vaccination in a Fundamental Rights Perspective: Lessons from the ECtHR. ICL Journal. 2021; 15 (2): 233
 20. Paplicki M, Susło R, Najjar N, et al. Conflict of individual freedom and community health safety: legal conditions on mandatory vaccinations and changes in the judicial approach in the case of avoidance. *Family Medicine & Primary Care Review*. 2018; 20 (4): 393
 21. Savulescu J. Good reasons to vaccinate: mandatory or payment for risk? *Journal of Medical Ethics*, 2020; 44 (2): 78–81;
 22. Gostin L, Salmon D, Larson H. Mandating COVID-19 Vaccines. *Journal of the American Medical Association*. 2021; 325 (6): 533
 23. Freedom House, Countries and territories, <https://freedomhouse.org/countries/freedom-world/scores?sort=asc&order=Country>
 24. Frati P, La Russa R, Di Fazio N, et al. Compulsory Vaccination for Healthcare Workers in Italy for the Prevention of SARS-CoV-2 Infection. *Vaccines*. 2021; 9 (9): 7