

Chapter 6 Ethical-Legal dilemmas of the application of vaccines

Capítulo 6 Dilemas Ético-Jurídicos de la aplicación de vacunas

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Abstract

In a context in which an unprecedented pandemic has upsetting the entire world, there are collisions of rights and ethical problems that the legal system must resolve and whose solution is clearly not easy. We must start from the different environments in which society develops its fears, beliefs and even the misinformation that is emitted by irresponsible people without any or little degree of preparation in the matter. This paper focuses on vaccines and the series of conflicts that are triggered by their application and possible mandatory. We start from the hypothesis that the collective interest should prevail over the individual interest and beliefs; applying legal hermeneutics and epistemology and the technique of literature review we arrive at valid conclusions that allow us to confirm that modern states and in particular the Mexican State choose to protect in a privileged way the collective interest represented by the right to health and access to vaccines as a means of alleviating the pandemic and resuming the social and economic life that has been paused.

Collision of rights, Right to health, Religious

Resumen

En un contexto en el que una pandemia sin precedentes ha trastocado al orbe entero se presentan colisiones de derechos y problemas éticos que el sistema jurídico debe resolver y cuya solución a todas luces no es sencilla. Debemos partir de los diferentes entornos en que se desenvuelve la sociedad sus miedos, creencias e incluso la desinformación que se emite por personas irresponsables sin ningún o escaso grado de preparación en la materia. El presente trabajo se centra en las vacunas y la serie de conflictos que se desencadenan por su aplicación y posible obligatoriedad. Partimos de la hipótesis de que el interés colectivo debe prevalecer sobre el interés y creencias individuales; aplicando la hermenéutica y la epistemología jurídicas y la técnica de revisión de literatura arribamos a conclusiones válidas que nos permiten confirmar que los estados modernos y en particular el Estado Mexicano se decantan por proteger de manera privilegiada el interés colectivo representado por el derecho a la salud y el acceso a las vacunas como medio de paliar la pandemia y retomar la vida social y económica que se han pausado.

Colisión de derechos, Derecho a la salud, Libertad religiosa

1. Introduction

The right to health has implications that evidently go beyond the legal environment of citizens to reach personal issues such as their beliefs, in this section we will examine the scope of this much debated right and its permanent collision with religious freedom and sometimes even with the freedom of decision that the citizen has, analyzing the legal perspective of the problem and the solutions that the courts have given to these collisions framed in the social interest. The subject of the collision of rights is not something new but it is very transcendental and its answers are very varied in the doctrine and jurisprudence that are the ones who answer such questions in a more forceful way; in view of this it is a subject of permanent actuality and whose complexity is always present privileging an unrestricted respect to the human rights in the search to establish which are the assumptions in which from the national and international legislation, such rights can be delimited.

In the legal doctrine, authors such as Aldunate (2005) state that the collision of rights arises when "the legal effect of the legal protection alleged by a subject (holder of the respective right) is incompatible with the legal effect pursued by another subject based on an allegation of legal protection".

It is clear that, as with other legal concepts, there is no universal consensus on this concept and there are even currents in the doctrine that deny the existence of the collision of rights, such as Ferrini (1908) who states that in his opinion there can be no contradiction between two norms and therefore no real conflict between two rights; this position seems to be reinforced by the thinking of López Berenguer (2021) when he states that "[e]very system must tend to achieve maximum coherence and unity, through a fundamental postulate: the absence of contradiction. That is why the collision of subjective rights initially appears to the eyes of the jurist as something totally incompatible with the idea of a system", and further adds:

The possibility of the existence of incompatible rights is repugnant to the idea of legal order. They would be spheres of power in struggle, with the consequent lack of order. In the abstract, within the juridical order, the existence of incompatible rights cannot be conceived. Contradiction would destroy the system (López Berenguer, 2021: D-70).

Despite these postulates, in the careful analysis that the referred author makes of the subject, he concludes that the collision of rights does occur, but for this to exist, he considers that certain assumptions must converge in principle that the "concurrence is of equal rights, and, in addition, that no other reason advises the application of any of the remaining principles of the collision. It does not apply, therefore, when rights of different nature concur, and even of different date, according to the most common solution, although not general" (López Berenguer, 2021:D-149).

Consequently, it can be deduced that modern doctrine in general terms considers the existence of the collision of rights feasible given the evidence in the sense that the legislator frequently falls into contradictions and that the very nature of the rights periodically causes them to be in conflict with each other.

2. Fundamental rights to health and religious freedom

In order to introduce the problem under study, it is essential to examine the concepts involved in the research. Thus, we can establish that the right to health, whose definition is not simple in light of the debate as to its nature as a social or public right and even as a private right, although in general terms it has been framed in the first category since, as Montiel (2005) states, at the beginning it was catalogued only in the assumption of recovering health, to later be extended also to the prevention of diseases and we must add that more recently to a sufficient and adequate food, adding the very important value of dignity. That is why the Mexican Supreme Court of Justice has determined that the right is presented in two dimensions, one individual and the other collective (Montiel Lucia, 2005).

In merit of the above, rather than thinking of a limited definition of the right, we must focus on determining its content, for which we consider it pertinent to start from the tenor of the international instruments in the universal system of human rights, within which we could focus in principle on article 10 of the Additional Protocol to the American Convention on Human Rights on Economic, Social and Cultural Rights (Protocol of San Salvador (OAS, 1988)), which determines:

Article 10. Right to Health

1. Everyone has the right to health, understood as the enjoyment of the highest level of physical, mental and social well-being.
2. In order to give effect to the right to health, the States Parties undertake to recognize health as a public good and, in particular, to adopt the following measures to guarantee this right:
 - a. Primary health care, understood as essential health care made available to all individuals and families in the community;
 - b. The extension of the benefits of health services to all individuals subject to the jurisdiction of the state;
 - c. Full immunization against the major infectious diseases;
 - d. The prevention and treatment of endemic, occupational and other diseases;
 - e. The education of the population on the prevention and treatment of health problems; and
 - f. The satisfaction of the health needs of the most vulnerable and high-risk groups due to their conditions of poverty.

The Convention protects the essential aspects of the right to health in its physical and mental dimensions, making States responsible for its adequate protection through prevention and, of essential interest to this study, through immunization.

Of particular relevance is General Comment 14 of the Committee on Economic, Social and Cultural Rights (UN, 2000), which in its twelfth paragraph establishes that the right to health encompasses four essential and interrelated elements: availability, accessibility, acceptability and quality.

Thus, it is clear that three of the elements depend to a large extent on the state and only one of them on the will of individuals. Availability and accessibility are obviously very different concepts, since the former depends on the existence of many diseases for which there is still no cure, so that in such cases there is no availability, speaking in the case of vaccines, although the instrument in question also alludes to human and institutional capital in this sense, and neither is there availability when the necessary authorizations are not granted by the competent public health agencies.

Consequently, in our opinion, availability is a prerequisite for accessibility, which may depend on medical, economic and political factors, this is so because, as established in the fifth paragraph of the observation under study:

The Committee is aware that for millions of people around the world, full enjoyment of the right to health remains a remote goal. Moreover, in many cases, particularly for those living in poverty, this goal is increasingly remote. The Committee is aware that formidable structural and other obstacles resulting from international and other factors beyond the control of States impede the full realization of article 12 in many States parties. (UN, 2000).

To reaffirm the above, accessibility in the terms of the aforementioned instrument also includes the absence of discrimination, real physical accessibility, economic accessibility, which in the case of vaccines in Mexico does not represent a problem given that they are free of charge, and access to information (UN, 2000) which in the case of vaccines in Mexico has presented problems of misinformation caused by politicians and media that without scientific support have disqualified some of the vaccines acquired by our country and generated problems of mistrust in the population that affect the levels of immunization.

Acceptance is the central point of our analysis today. Faced with the onslaught of the pandemic that has called into question the scope of individual freedom in the face of social interest, there is no doubt that we have to consider the aforementioned collision of rights and ask ourselves: is it reasonable to sacrifice social interest before the freedom of the patient or, in this case, religious freedom?

It is therefore necessary to allude to religious freedom contained as an express right in article 24 of the Constitution and to determine its content for this purpose it is worth citing our highest court that has determined in this regard (SCJN, 2018):

[...] Article 24 of the Constitution enshrines freedom of religious belief, which in itself implies and presupposes freedom of belief, freedom to believe in what one chooses to believe and consequently to act accordingly.

[...] The first paragraph consecrates religious freedom, that is, the freedom to hold and cultivate the religious beliefs that each one considers; a freedom that also includes the freedom to change religious beliefs. The precept also contains a reference to both the internal dimension of religious freedom ("everyone has the right to freedom of ethical conviction, conscience and religion, and to hold or adopt, as the case may be, the religion of his choice"); and the external dimension of the same ("This freedom includes the right to participate, individually or collectively, both in public and in private, in the ceremonies, devotions or acts of the respective cult, provided that they do not constitute a crime or offense punishable by law").

Closely linked to the right in question we find the conscientious objection that has become a legal means to claim this freedom of belief that our fundamental charter limits to religious beliefs and that Irrazábal, Berri and Funes(2019) consider that "it implies making use of the right not to be forced to carry out actions that oppose certain ethical or religious convictions".

Cobos(2015) considers that this right under the heading of religious freedom actually comprises three diversifiable rights which are ideological freedom, religious freedom and freedom of worship, inferable deduction from the content of the aforementioned constitutional text, from international instruments such as the American Convention on Human Rights article 12, International Covenant on Civil and Political Rights article 18, Universal Declaration of Human Rights article 18, European Convention for the Protection of Human Rights and Fundamental Freedoms article 9 and from the jurisprudence of the Inter-American Court of Human Rights and the European Court of Human Rights.

From the doctrinal conception we consider that the concept of Roa(2015) is adequate to define this transcendental right which he considers to be the "right of individuals and communities to have a set of ideas about the existence of a superior being or divinity, some ethical standards of individual and collective conduct, some rites to please or celebrate their deity, a way of relating to the superior being and the possibility -not obligation- to manifest or externalize this set of ideas individually and collectively, always within a relative conception of fundamental rights that adheres to the limits of public order and respects the rights of third parties".

The transcendence of the right in question in the present analysis is translated into the feasibility of alluding to the religious freedom to refuse to receive the immunization, particularly with regard to the present pandemic that scourges all countries at the present time, a point that we will examine in the following paragraphs.

Regarding the concept of public interest, we turn to Huerta (2007), who considers that it is not an univocal meaning, but from a functional perspective we can say that it justifies the intervention of the state in the legal sphere of individuals, an intervention that can take various forms of restriction of their rights, either through permits, prohibitions or forms of management, according to the author in question. It is clear that such limitations cannot be arbitrary or unlimited, but the point of discussion is precisely those limits of the state in terms of immunization of the population.

It is also worth examining the concepts that are also related to the problem under study, starting from what can be considered a public health emergency of international concern, which is the term used by the World Health Organization. We consider that an emergency should be considered as such when it has the connotation of extraordinary, as opposed to issues that affect public health on a daily basis, but also constitutes a risk for the latter, derived from the ease with which the disease in question is transmitted and that at a given moment may require international coordination, it is not really a concept but rather a list of characteristics that we believe do not allow a clear identification.

It is evident that the current COVID19 pandemic meets all these characteristics given the scope and ease of its spread, which has forced countries to establish unusual control measures; Similarly, we must establish the concept of pandemic, which is not simple because according to Villarreal Lizárraga (2019) existing ones are vague, but the author concludes that an adequate concept should contain several elements that start from the fact that it is one of many events that can be framed under the legal concept of public health emergency of international concern referred to in the aforementioned regulation, also, it is preceded by an epidemic and always refers to communicable diseases; Thus, we can say that a pandemic is a public health emergency derived from a communicable disease in an accelerated manner and whose effects are of global significance; Therefore, its distinguishing features are its transmissibility and global impact, which leaves no doubt that the so-called COVID19 that causes the disease that bears its name and is known as severe acute respiratory syndrome coronavirus 2 (SARS -CoV-2) is a pandemic that at the date of writing this paper has already caused 3,466,670 deaths in the world, of which 238,770⁷ correspond to Mexico, a number that unfortunately will increase.

Regarding religious freedom and its collision with the right to health, in light of the recognition that the Supreme Court of Justice of the Nation itself has made regarding the non-existence of absolute rights, as can be seen in the contradiction of thesis under the heading "Human rights contained in the constitution and in international treaties. constitute the parameter of control of constitutional regularity, but when in the constitution there is an express restriction to the exercise of those, what is established in the constitutional text must be followed" (SCJN, 2014), issued by the highest Mexican court, emphasizing that "[...]those rules that establish some kind of limitation or restriction, do not redefine the right or translate or design it, but in its case, they limit, limit or suspend its exercise for valid objective reasons. [...] In the first place, fundamental rights are not absolute, as has been recognized by the jurisprudence of this Supreme Court and international doctrine[...]"(SCJN, 2014).

⁷ <https://datos.covid-19.conacyt.mx/>

Once this premise is established, it is also necessary to determine what has been the position of the Supreme Court of Justice of the Nation, in the collision of the rights in question, thus verbigracia in Amparo en Revisión 1047 of 2017, under the heading "The state may intervene when the life or health of a minor is at risk and his parents do not accept the appropriate medical treatment", the court consequently opts for the right to life and health of the minor against the right of the parents to exercise their religious beliefs that prevented the appropriate treatment of the minor in question.

In another order of ideas in Amparo en Revisión 854/2018, a group of 15 ophthalmologists and an Otolaryngologist, aspiring to take the exam of the Mexican Board of Ophthalmology and Otolaryngology respectively, argued that the same had been scheduled on Saturday and that according to their beliefs they could not take it on that day; In this regard, the Court considered that the grievances asserted were inadmissible since, as determined by the law on the matter in its first article, "religious convictions do not exempt in any case the compliance with the laws of the country and that no one can allege religious reasons to evade the responsibilities and obligations prescribed in the laws" (Legislative Power, 1992), in this case they were bound by provisions of legal orders that in no way affect their religious freedom.

Furthermore, in Amparo en Revisión 1049/2017, the highest court states that "[...] religious freedom is not absolute, since it is subject to certain limits imposed by the Constitution: the rule of law, the rights of others, the prevalence of public interest and the fundamental rights of the individual against its abusive exercise [...]" (SCJN, 2017).

It is evident that in cases of collision the Mexican Court has privileged health over religious freedom, however in the issue that concerns us specifically a turning point is represented by Constitutional Controversy 20/2021, through which a Mexican City Council fought the so-called National Policy of vaccination against the SARS-CoV2 virus for the prevention of COVID-19 in Mexico, requesting the suspension of the same in that municipality, which was denied on the grounds that it was not in any way the preservation of a right; However, the merits of the matter are actually related to public health competencies and not to the application of the vaccine itself.

On August 17, 2021, a District Judge granted in Amparo 1054/2021 the protection of federal justice to a minor so that he could be vaccinated, empowering the health authorities to carry out the assessment of such application in the specific case.

As it is evident that there are still no judicial precedents to apply in this matter that would allow to visualize which way the Court could decide in the case of establishing the obligatory nature of the vaccine and that this would collide with the freedom of beliefs, until today the federal executive maintains the voluntariness of the citizens in its application, in spite of the existence of laws that could support a decision towards the obligatory nature of the vaccine.

3. Vaccines and their legal regulation

As for the vaccines themselves, they "may contain the microorganism that causes the disease (a virus or a bacterium) but killed or weakened, some derivative of the microorganism (for example a toxin) or particles of the microorganism (protein), for the production of defenses. These types of substances are called antigens"⁸.

A vaccine can be defined according to Bellver(2015) as an "extraordinary instrument of immunization of the population against infectious diseases".

Now, as regards its regulation, we start from the protection that article 4 of the Constitution provides in relation to health, where it is clearly determined that the right is specified in safeguarding health, we could determine that there is an indiscriminate freedom for the subject of the right to refuse to receive any treatment or medication.

⁸ <https://www.gob.mx/profec/documentos/vacunas-tu-derecho-y-obligacion-de-estar-sana-o?state=published>

However, is this true? Is there an absolute facultative power?

Article 35 of the Charter of Fundamental Rights of the European Union (Bellver, 2015) states that "everyone has the right to preventive health care and to benefit from health care in accordance with the conditions laid down by national provisions. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities".

It is clear that the international instrument focuses on the obligations of states and not on the discretionary power in the individual exercise of the right in question.

The Inter-American Commission on Human Rights adopted, last April 6, 2021, Resolution No. 1/2021 corresponding to: "Covid-19 Vaccines within the Inter-American Human Rights Obligations"(IACHR 2021), which has as its main objective to contribute to the States to assume the scope of their international obligations in the context of decisions on vaccination, in order to guarantee human rights, especially the right to health and life. The aforementioned document states in a recital,

[...] that free, prior, full and informed consent derives from rights recognized in the Inter-American System such as the right to health, the right to receive and access information and the right not to suffer arbitrary interference in privacy, and that it is also a central aspect in the development of human rights bioethics, understood as a necessary tool for framing and resolving the challenges and dilemmas related to the pandemic.

In addition, the document ratifies the obligation of the state to combat disinformation and provide clear and accessible information for this purpose. From the above, it is possible to deduce that the Inter-American Commission on Human Rights is inclined towards non-obligatory vaccination and holds the State responsible for the sufficiency in the dissemination of information on the subject in order to avoid misinformation and rumors that lead citizens not to be vaccinated.

The internal secondary legislation is essentially the general health law that clarifies this aspect, since its content determines the obligatory nature of the application of vaccines in its article 144 (Congress of the Union, 1984), where it establishes that "[t]he vaccination against transmissible diseases, preventable by this means of immunization, which the Ministry of Health deems necessary, will be obligatory under the terms established by said agency and in accordance with the provisions of the present Law". In the previous wording of this numeral, there was an enumeration of vaccines to be applied that is not currently contained and, furthermore, regarding the regulation of vaccines, numeral 157 Bis 1 establishes that:

Every person residing in the national territory has the right to receive the vaccines contained in the Universal Vaccination Program universally and free of charge in any of the agencies and entities of the Public Administration, both federal and local, of the National Health System, in accordance with this Law, regardless of the social security or social protection regime to which he/she belongs.

The persons who exercise parental authority, guardianship, custody or, in general terms, are responsible for minors or incapable persons, shall be obliged to take all the necessary measures so that they receive the vaccines contained in the Universal Vaccination Program.

Likewise, article 404 of the aforementioned legal body determines that the vaccination of persons is a sanitary security measure and, finally, numeral 408 empowers the sanitary authorities to order vaccination as a security measure, among others, in case of serious epidemics in its second fraction and in the last paragraph it states "[t]he actions of extraordinary immunization will be mandatory for all individuals in the national territory" (Congress of the Union, 1984).

However, to date there is no mandatory policy regarding the COVID vaccine, despite the fact that it could easily be included in the assumptions of the law on the subject in the interest of health security, which has undoubtedly been broken by the pandemic, since the public policies regarding the same were not included in the universal program, but in a different document called Política nacional rectora de vacunación contra el SARS-CoV-2 para la prevención de la COVID-19 en México. Guiding document. To date, 1,675,155,698 have been administered, but what we intend to reflect on is precisely from a legal perspective whether there really is an obligation to be vaccinated.

If we examine the components of the right to health we will find that it is concretized in the protection of health but this protection cannot be at all times optional since in cases like the current one the interest of society in general is affected by those who refuse to be vaccinated, then, can the state force them to be vaccinated?

And, if so, what means will be valid to compel the refusers?

In principle and under the aforementioned guidelines of the general health law, there is no doubt that there is not only the right but also the obligation to be vaccinated.

However, there is also the questioning of the scope of religious freedom since there are creeds in which their members are prevented from receiving vaccinations.

Uberos (2013) considers that the anti-vaccine movement originated in the United Kingdom in 1853 and from there it spread to the whole world, causing public health problems in the communities where they reside due to their refusal to any type of inoculation.

Castro Méndez (2018) states that resistance and distrust towards vaccines arises contemporaneously with the experiments of Edward Jenner, in 1802, so it is a controversy that has spread throughout the evolution of the forms of inoculation. He also points out that Hinduism and Buddhism are beliefs prone to vaccination, as are Eastern Orthodox churches, Amish, Anglicans, Baptists, the Church of Jesus Christ of Latter-day Saints, Congregationalism, Episcopalianism, Lutheranism, Methodism (including African Methodism), the Methodist Episcopal Church, Pentecostalism, Presbyterianism, the Seventh-day Adventist Church and Catholicism. On the other hand, the Dutch Reformed Church has been against its application since the 19th century, which caused outbreaks of diseases such as measles in 2013 in the Netherlands.

In Mexico, according to INEGI⁹ 2020¹⁰ census data, there are 90,224,559 people over five years of age who profess the Catholic religion, 16,118,762 people who profess religions other than Catholicism and 9,156,555 people who said they have no belief or creed. In principle, the Catholic Church, as already mentioned, is in favor of vaccination and does not establish restrictions for it; however, in view of the discussions that have arisen in relation to the use of fetal matter from voluntary abortions, it has made an express pronouncement in the sense that public health cannot justify voluntary abortion (Vatican 2020); However, it is also clarified that "it is morally acceptable to use vaccines against Covid-19 that have used cell lines from aborted fetuses in their research and production process", when no other type of vaccine is available (Vatican, 2020).

Muslim fundamentalists have presented resistance and strong opposition to the application of vaccines such as the polio vaccine, failing immunization efforts against this disease in countries such as Nigeria, Afghanistan and Pakistan. This has led to outbreaks of the disease in eight African countries (Warraich HJ, 2009).

Evangelicals are another of the religious currents that are not akin to the application of vaccines (Días and Graham, 2021), for them it is the divine action that protects and heals, the seriousness of this refusal at least in the United States is that this community amounts to 41 million white evangelical adults in that country and of them approximately 45 percent have stated that they will not be vaccinated against COVID 19 (Días and Graham, 2021).

As for their judicialization, the origins of these objections are considered to derive from the case of *Jacobson v. Massachusetts* (U.S. Supreme Court, 1905), brought before the U.S. Supreme Court. Supreme Court, 1905), brought before the Supreme Court of the United States because the citizen refused to be vaccinated against smallpox arguing that he had the right to take care of his own body as he deemed best, however the Court found that in the conflict of rights should prevail the public health that would be affected if not vaccinated with clear clarity determines that freedoms are not absolute and that it is legitimate the existence of a mandatory vaccination law that does not contravene the constitutionally enshrined right to liberty.

⁹ Acrónimo del Instituto Nacional de Información Estadística y Geográfica

¹⁰ https://www.inegi.org.mx/temas/religion/#Informacion_general

Notwithstanding this ruling, most local legislations in that country allow citizens to exercise their right to religious objection and on that basis allow people to request religious exemptions to mandatory vaccinations, the number of exemptions requested to increase more and more.

In Spain, judges have established the obligatory nature of their application in specific cases, thus in November 2010, in the face of an outbreak of measles that was getting out of control, the Andalusian government decided to forcibly vaccinate children in an area of Granada and, given the refusal of some parents to allow the vaccination of their children, the Administrative Court 5 of Granada authorized the forces of order to accompany the medical staff to force parents to vaccinate them (Tribunal Superior de Justicia de Andalucía, 2010).

In a similar vein was the decision handed down by the Superior Court of Justice of Catalonia, Administrative Chamber, on March 28, 2000, in which parents challenged the resolution of the Autonomous University of Barcelona that left without effect the enrollment of their minor daughter because they were reluctant to have any type of vaccine administered to her. The decision held that there was no violation of the right to education and determined that there was

[...] the failure to comply with obligations aimed at disease prevention, which in practice translate into the requirement to prove the systematic vaccinations that correspond to their age, which respond to the idea of obtaining a group immunity that, in addition to protecting individuals not vaccinated due to individual contraindications from contagion, allows the elimination of the disease from a given geographical area, and even worldwide (Alvarez, 2020).

Another precedent also from Spain in 2002, where the Superior Court of Justice of La Rioja (2002), Contentious-Administrative Chamber, challenged a decision of a state authority that prevented a minor from enrolling in a daycare center because he did not have a vaccination card because his vaccination card was not up to date. In the ruling, the judge made it clear that the right of access to a daycare center of parents who did not want to vaccinate their child could not be superior to the right to health of the rest of the children:

In fact, nothing prevents such an alternative option and nothing obliges a vaccination that is decidedly rejected; but the power of the Administration to impose such a requirement on those who intend to use the day care services, denying admission to children who do not comply with it, cannot be ignored, given that the prophylactic measure applied to each child is advisable for the health of all the members of the group. In short, whatever option the parents had taken in this matter regarding the health care of their child, it was in accordance with the law to deny the child admission to the day care center if the requirement to undergo the official vaccination imposed by law for this purpose was not complied with.

In January 2021 a judge has forced to vaccinate an elderly dependent woman living in a nursing home in Santiago de Compostela despite her daughter's refusal to do so. "Vaccinating may entail a risk, but not doing so also; it is a matter of putting the two risks in the balance and opting for the lesser evil, which for an 84-year-old person is to be vaccinated," has assured the head judge of Santiago Castro's Court of Instruction 2, 2021).

The conflicting rights represent an important dilemma for the legal order, but in the interest of public health and given the dimensions of the pandemic and its damage, it seems clear that personal interest cannot prevail over a general interest of a global nature, that is the criterion that the courts seem to assume in this regard.

Countries such as Argentina have opted for the obligatory nature of the vaccine, while others such as Spain and Mexico have favored freedom of decision, in the latter despite the existence of a legislation that makes the vaccine obligatory. On the other hand, the Senate of the Republic in the explanatory memorandum of the proposed reform to the general health law of March 2012 regarding vaccines, considered that

[...] vaccines represent a fundamental and essential health tool, since they are a highly efficient and cost-effective public policy to save and improve lives, in addition to having a high social value, thanks to their multiplying effect of benefits derived from the prevention of communicable diseases.

The legal doctrine raises many dilemmas in this regard such as those arising in the workplace under the scheme that if a person is not vaccinated what may be the attitude of others, can they validly absent themselves from work to avoid running risks?

The validity of the vaccination requirement for travel is also raised, despite the fact that this requirement has existed in some countries for decades.

It is a debate of voluntariness versus obligatory nature. Of fundamental rights such as health or personal freedom, versus collective health and safety.

In all this panorama, what does the jurisprudence tell us?

We will analyze in this paragraph what the European Court of Human Rights resolved in the case of *Vavříčka and others against the Czech Republic* (European Court of Human Rights, 2013), in principle it determined that, although it was true that the Court considers that vaccination is an intrusion into the private life of those who are subjected to inoculation and from that perspective the eighth article of the Convention would be updated considering the existence of an interference in this, It is also true that the Court itself has considered that vaccination is compulsory, and the interference, despite being so, the essential point is to determine whether it was justified, that is, carried out in accordance with the law, whether it pursued legitimate aims and whether such interference can be considered necessary in a democratic society. In the first sense, the intrusion must have taken place within the framework of domestic law, which is evident in light of the content of the legislation of the country in question, particularly contained in the Charter of Fundamental Rights and Freedoms (Constitutional Law no. 2/1993), the Ministerial Decree 537/2006 and the Public Health Protection Act Law No. 258/2000, which contained the classification of vaccines, the conditions for their administration and the methods for examining immunity (European Court of Human Rights, 2013).

Accordingly, the Court considered that compulsory vaccination amounted, in principle, to an admissible limitation of the fundamental right to freely manifest one's religion or beliefs, since it was evidently a necessary measure in a democratic society for the protection of security, public health and the rights and freedoms of others and its essential objective is precisely the health and protection of the rights of others, so they are relevant and sufficient reasons in the pursuit of a legitimate aim (Ayala, 2021).

In the opinion of Ayala (2021), it is necessary to differentiate between the fact that child vaccination is currently an unbiblical part of the public health programs of modern states, and the fact that the compulsion to vaccinate does represent a "sensitive issue that should not be forgotten as it encompasses the value of social solidarity", the author considers that this is a historical failure given its connotations that will set the tone for the present international situation. In the internal context at least in Europe there are multiple resolutions in which the constitutional courts have estimated the legitimacy of these mandatory measures as constitutional so we have *verbigracia* in France Decision No. 2015-458 QPC of March 20, 2015 - *Husbands L. [Vaccination obligation]*, Italy Judgment No. 5 of 2018, Estonia Constitutional judgment 5-18-5, the list would be endless by virtue of the fact that there are already many precedents on the matter in Europe, although we cannot say the same in Latin America generating as stated by Morice and Aguila-Aguero (2009) resurgences of already controlled diseases such as measles and rubella in countries such as Costa Rica and Argentina.

Consequently, the opinion of the consulted jurisprudence is generalized in the sense that although compulsory vaccination causes interference in the right to privacy and freedom of belief, such interference is justified by the interest of public health and therefore it is not an arbitrary or disproportionate interference, it is invariably supported by domestic legislation and the reasons that drive it are based on the aforementioned public interest. In Mexico, as analyzed in the preceding paragraphs, there are still no jurisprudential decisions to guide us in this regard.

4 Conclusions

We can therefore determine that vaccines represent adequate protection mechanisms for the prevention of countless diseases that have scourged humanity and their existence is undoubtedly necessary in contemporary states.

Regarding the collision that their application generates with other fundamental rights, particularly with the right to privacy and freedom of belief, it is possible to establish that rights are not absolute and that they can be limited as long as the premises that the jurisprudence itself has established, such as proportionality, are complied with.

In the case of Mexico, as already mentioned, the Supreme Court of Justice of the Nation has determined that in this country there are no absolute rights (SCJN, 2014), which leaves the door open to resolve in the specific case what would be the legal right to be protected in the collision of religious freedom and public health, although the particular cases examined in this regard allow considering that the right to public health could prevail.

In the content of the internal legislation in Mexico there is an express power for the health authorities to establish the obligatory nature of vaccines, so that when the rights that we have been mentioning collide, we consider that it is justified to assume the criteria that have prevailed in most of the world, privileging the general interest over the individual, so that such action could not be considered contrary to the constitutional spirit or illicit, but as a valid limitation to human rights for the sake of higher purposes such as public health.

It is also possible to conclude that in general terms and in view of the INEGI data regarding religious beliefs, vaccine resistance in this country is not mostly generated by religious beliefs but by misinformation, which seems to prevail despite the efforts of the Mexican State to keep the population informed regarding vaccines, particularly the COVID-19 vaccine; consequently, it is necessary to expand the research and introduce empirical data collection techniques in order to determine the real problem of resistance and its solution.

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