

COVID-19 Compulsory Vaccination of Healthcare Workers and the Italian Constitution

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Key words: Compulsory vaccination, healthcare workers, COVID-19, Italian Constitution, Constitutional Court, originalism

Parole chiave: Obbligo vaccinale, operatori sanitari, COVID-19, Costituzione italiana, Corte costituzionale, originalismo

Abstract

On April 1, 2021, the Italian Government issued the Decree Law no. 44 establishing COVID-19 compulsory vaccination for healthcare workers. In covering the news, national and international commentators have foreshadowed controversy over its constitutional status. In fact, it seems sensible to wonder if mandatory vaccination is consistent with the right to medical self-determination in the Italian Constitution, and if vaccine mandates that exclusively apply to a specific part of the population can be squared with its Equality Principle. As it happens, both answers are in the affirmative. On the one hand, the Italian Constitution acknowledges medical self-determination, but it explicitly admits of public health coercive measures, as both the text of the Constitution and its original understanding make abundantly clear. On the other, as to the Equality Principle, the scientific literature has long attested to the unique benefits of vaccinating healthcare workers, which seem all the more appropriate amidst a pandemic. Moreover, the government's choice of moderate penalties for vaccine refusal and the temporary nature of the mandatory regime further agree with the Italian Constitutional Court's interpretation of the Equality Principle - the so-called "Reasonableness Criterion." The Decree Law – meanwhile become, with minor modifications, Law 76 of May 28 2021 - is thus expected to pass foreseeable judicial review. However, it would be beneficial if the Italian government more vocally advocated the constitutionality of its vaccination policies in a general effort to contrast vaccine hesitancy.

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Introduction

On April 1, 2021, the Italian Government issued the Decree Law no. 44 (1), which established the compulsory vaccination of Healthcare workers (HCWs) against COVID-19. Italy was thus the first country in Europe to adopt mandatory vaccination as a strategy against the COVID-19 outbreak (2, 3). As a temporary piece of legislation, Decree Laws need parliamentary validation by statute in sixty days (4). For this reason, on May 28 the Italian Parliament enacted the Law no. 76 which signed the Decree into law with only minor changes to the original act (5).

By making vaccination an essential condition for professional practice, Art. 4 of the Decree imposes vaccine mandates on HCWs in both public and private institutions. Only individuals with special medical conditions can be exempted from vaccine mandates: a general medicine physician has to asseverate that vaccination would raise “verified health risk” for them. HCWs who otherwise refuse vaccination ought to be assigned to working positions that do not entail social interaction, or that would in any other way increase the risk of SARS-CoV-2 spread. Most notably, the new working positions of recalcitrant HCWs can be less qualified ones. In case reassignment or demotion are factually impossible, noncompliant workers are suspended without pay.

Despite general praise for the decision, international media reported on possible constitutional problems for the Decree (3, 6-8). Although most legal scholars maintain the constitutionality of the Decree (9-11), others have expressed doubts about it (12-14). A law professors’ famous think tank has also written a thorough legal brief disputing the Decree Law’s constitutional basis (15).

Doubts over the Decree’s constitutionality are not inconsequential. Social psychologists have long recognized the importance of

respect for legal procedures in gaining compliance with the law: “people defer to rules primarily because of their judgments about how those rules are made, not their evaluations of their content” (16). Whenever the authority’s trustworthiness cannot be easily assessed, people consider procedural fairness as a decisive factor in deciding whether or not to obey the law (17). This is likely the case with COVID-19 vaccination, where ordinary citizens may not fully comprehend the benefits of vaccine mandates because of the complexity of the subject (18) and the spread of contrasting information (19).

Compounded with the already low level of vaccination coverage among HCWs (20-23) uncertainty over the Decree’s constitutional basis can thus boost vaccine hesitancy. By contrast, firm consensus over the constitutionality of the compulsory vaccination of HCWs should foster trust in the government’s course of action, which in turn should lead to a higher degree of compliance with vaccine mandates.

Cases of vaccination refusals by HCWs (24) and appeals against subsequent penalties (25) have already been observed. Lawsuits have been filed against regional health authorities in Lombardy (26), Liguria (27), and Emilia-Romagna (28). After dismissing a feeble appeal by a religious organization in July (29), in August 2021 the administrative branch of the judiciary has heard two cases involving the Decree’s vaccine mandates (30, 31): in both instances, the administrative courts have denied the precautionary suspension of the HCWs’ layoffs and scheduled the ordinary hearings for September 2021. In one case, the administrative Court has explicitly envisaged the submission of the constitutional issue to the Italian Constitutional Court (ICC) (30).

Against this backdrop, judicial review of the Decree Law by ICC looms larger than ever. This paper purports both to advocate the constitutionality of COVID-19 vaccine

mandates and predict the Decree Law's legal fate. The first problem is whether the law is consistent with Art. 32 of the Italian Constitution (IC), which explicitly mentions the possibility of mandatory medical treatments, but demands that they be enforced by statute alone and do not "violate the limits imposed by respect for the human person" (32). The second issue deals with the Decree's status under the "Equality Principle" of Art. 3, which the ICC interprets as a ban on unreasonable and disproportionate differentiations in the law—the so-called "Reasonableness Criterion." HCWs compulsory vaccination can allegedly be disputed as the disproportionate discrimination of a single class of workers whose liberty is unreasonably sacrificed.

Methods

The research's primary sources were the IC text, relevant constitutional scholarship, and medical literature on vaccination—especially, vaccine mandates. To determine the meaning of Art. 32 the official notes to the Italian Constitutional Assembly have been consulted in accordance with originalist methodology (33). The words "vaccine" (*"vaccino"*) and "vaccination" (*"vaccinazione"*) have been inserted on the ICC case law site (34) and all the decisions containing it have been taken into account. Besides Italian constitutional scholarship, the research documents of the ICC Study Center have been consulted in order to determine the constitutionality of the Decree under the ICC Reasonableness Criterion (35, 36).

Results

The COVID-19 vaccine mandate for HCWs can arguably be challenged on two main grounds: as the illegitimate violation of

the right to medical self-determination under Art. 32 of the IC, or as the unreasonable treatment of a class of people—the HCWs—under Art. 3 of the IC.

Art. 32 subjects all compulsory medical treatments to two requirements: that they are enforced through statute—the so-called "statute reserve"—and do not "violate the limits imposed by respect of the human person" (32). With regard to the first requirement, several scholars have historically criticized the use of Decree Laws to fulfill the constitutional "statute reserves," especially in the case of coercive medical treatments (37). However, the ICC has unwaveringly upheld the practice (38). Since there is little doubt that a global pandemic exemplifies the conditions of "extraordinary necessity and urgency" under which a Decree Law can be adopted (4), it is hard to envisage a constitutional challenge to vaccine mandates under Art. 32's "statute reserve" requirement as was attempted in the past (39, 40).

Verification of the second requirement is more complex to the extent that what "respect for the dignity of the human person" entails seems highly indeterminate. Anti-vaxxers and scientific researchers arguably attach quite different meanings to the phrase. By resorting to originalist methodology of constitutional interpretation to ascertain the meaning of the clause, two questions ought to be considered: what did the framers of the IC mean by that expression? Would an ordinary Italian citizen have considered the law compatible with compulsory vaccination at the time of the IC adoption?

Several framers at the Constitutional Assembly opposed the introduction of a requirement that entailed such a vague notion as "the dignity of the human person." In fact, eugenic sterilization was the only significant example of a compulsory treatment that contrasted with "respect for the dignity of the human person": hence Gaetano Martino's complaint that the provision lacked "crystal

clearness” (41). Alberto Mario Cavallotti adumbrated that some could understand abortion as a practice against human dignity and therefore recommended that the topic be left to parliamentary debate and the provision rejected (41). Fabrizio Maffi made the most interesting remarks: he first alleged that the phrase might lead to “possibility of abuse,” since the concept of “human dignity” could undergo different interpretations with different “moral, religious, and political mentalit[ies]” (41). At the same time, Maffi recalled compulsory vaccination as an example of a legitimate coercive treatment in order to undermine the provision’s meaningfulness (41).

In any case, to the extent the IC is a public legal document the public understanding of the clause at the time of its adoption should be assessed (42). In this respect, it bears emphasizing that compulsory vaccination has a longstanding tradition in Italy (43-47). Since there was no sign of an abolitionist will at the Constitutional Assembly, it is hard to see how the Human Dignity Clause of Art. 32 could be understood as outlawing an entrenched medical practice, absent the slightest reference in the political debates at the time of the Constitutional Assembly. Because neither the framers nor a reader from that time period could interpret the phrase as a ban on vaccine mandates, the possibility that the original meaning of Art. 32 forbids compulsory vaccination of HCWs should be ruled out.

However, the original meaning of the Constitution has not always proved dispositive in constitutional adjudication. In order to forecast the real-world fate of the Decree, confronting ICC case law is decisive. In this respect, a second argument against HCWs vaccine mandates can be grounded in the Equality Principle of Art. 3 of the IC, which outlaws legislative distinctions based on “sex, race, language, religion, political opinions, personal and social conditions” (48).

The ICC has long interpreted the provision as a constitutional requirement that legislation does not effectuate unreasonable and disproportionate differentiations. While the conceptual tie to the notion of equality is still relevant to this day, the principle is now generally referred to as the “Reasonableness Criterion” (49). Despite longstanding controversy over its legitimacy and internal coherence (50-52), the Criterion’s presence in the ICC case law is considered “pervasive” (53). If submitted to the ICC for a judicial review, the Decree’s fate will thus likely turn on the Court’s appreciation of the reasonableness of compelling HCWs to vaccinate against COVID-19. Nonetheless, the Decree seems also to withstand judicial scrutiny under the ICC Reasonableness Criterion.

The ICC case law suggests that legislation is unreasonable to the extent that differentiation in legal treatment is arbitrary (i.e., it lacks a reasonable rationale), or one constitutional value (e.g., medical self-determination) is disproportionately neglected for another (e.g., public health)—the so-called “proportionality test.” As to the arbitrariness of the Decree, the rationale in singling out the HCWs for COVID-19 vaccine mandates is apparent and hardly deniable. HCWs are at a far greater risk both of infection and of spreading the virus among patients (54, 55). In the case of HCWs’ vaccination against SARS-CoV-2—an infectious agent that has thrown the world into a global pandemic-compulsion seems to greatly outweigh voluntary vaccination’s contribution to enhanced individual responsibility (56). Historical deficient levels of vaccine coverage in Italian HCWs (20, 57, 58) further weakens the possibility that a non-mandatory regime would suffice. By contrast, compulsory vaccination in Italy has proved effective (59-61).

As to the proportionality requirement, it ought to be noted that the Italian government

has eschewed the adoption of harsher legal penalties. The ICC itself acknowledges that compulsory vaccination is not a cut-and-dried strategy (39, 62, 63), but involves choosing among different degrees of compulsion (43, 64). Harsher penalties—such as criminalization or firing as a consequence of the HCW’s refusal to vaccinate—could be adopted to strengthen the efficacy of vaccine mandates. By choosing reassignment, demotion, or unpaid suspension from work, the Italian policymaker has refrained from infringing upon HCWs’ right to medical self-determination to a greater possible extent.

At the same time, it bears noting that the compulsory regime is set within a “flexible” time frame. It is supposed to end with the achievement of the National Strategic Plan on vaccination coverage that the Italian Minister of Health adopted on March 12, 2021. However, if target coverage is not meanwhile achieved, the mandatory regime shall terminate on December 31, 2021. To the extent that the ICC has praised flexible vaccination regimes in the past (39), the establishment of a time frame is expected to play in the government’s favor and additionally stand for the reasonableness of the Decree Law.

A final important issue remains to be addressed. In the pathbreaking decision no. 307 of 1990, the ICC stated that medical self-determination could reasonably be limited for public health reasons at one major condition: that the law indemnifies those who are injured or contract illnesses as a result of vaccination (65). In response to the decision, in 1992 the Italian Parliament enacted the Law no. 210 which set up an indemnity mechanism for those injured by vaccine mandates, blood HIV infections, or post-transfusion hepatitis (66). In subsequent cases, the ICC has extended the right to indemnity to those hurt by vaccinations that were not mandatory but only recommended (67, 68).

As to the HCWs’ vaccine mandates against COVID-19, no issue should arise.

Since it is a mandatory vaccination, the indemnity of the Law no. 210 system applies. By contrast, in the case of the general population, the ICC will likely step in and “interpretatively” extend the indemnity, if the Parliament or the Italian Government do not extend the indemnity to all COVID-19 vaccination injuries (69). In fact, the ICC has repeatedly stated that ordinary judges cannot independently stretch the scope of the indemnity mechanism to other cases (70, 71). Only a “manipulative decision” (72) by the ICC is capable of doing so. In this respect, it can be expected that the ICC will extend the indemnity system to those injured by COVID-19 recommended vaccination, as it has repeatedly done in the last decades (71, 73).

Discussion and Conclusions

Despite media concern and scholarly doubts over its constitutional status, the Decree Law no. 44 of April 1, 2021, seems to rest on solid legal footing. The compulsory vaccination of HCWs against COVID-19 lies in accordance with the original meaning of Art. 32 of the IC, in that neither the framers of the IC nor a hypothetical reader at the time of the Constitutional Assembly could regard mandatory vaccination as a medical treatment that “violate[s] the limits imposed by respect for the human person.” On the contrary, there was a general consensus in favor of compulsory vaccination at the time of the IC adoption.

At the same time, HCWs’ vaccine mandates against COVID-19 are not only constitutionally legitimate under the original meaning of the IC: they also square with ICC case law. In that there exists a reasonable rationale for the compulsory vaccination, that penalties for noncompliance are less than extreme, and that there is a flexible time limit for the mandatory regime, the Decree appears to agree with the ICC’s

Reasonableness Criterion.

As a final note, it bears emphasizing the importance of public awareness about the constitutionality of governmental actions. Procedural fairness is widely known to be a decisive element in fostering public trust and obtaining compliance with the law (16, 17). In the case of the COVID-19 vaccination, the OECD has explicitly stressed the role of public authorities in building trust in governmental action (74).

Some countries have a long-standing habit of publicly defending the legality of governmental policies: for example, the United States Department of Justice routinely publishes public opinions and briefs on the legal underpinnings of governmental decisions or programs (75). By contrast, no comparable practice exists in Italy. In this respect, the Italian government can certainly do better in advocating the legality of its public health decision. For example, it could require that the State Advocacy (“Avvocatura dello Stato”) produce legal briefs or official opinions in favor of the constitutionality of statutes and decrees before litigation arises.

At the same time, advocacy of governmental decisions on vaccination should not be understood as exclusive to public agencies. On January 8, 2020, the ICC has modified its procedural rules and allowed for private intervention in constitutional adjudication in the guise of “amici curiae” (76, 77). By this legal tool, private entities such as scientific societies or interest groups can now formally have an impact on vaccine-related cases.

The compulsory vaccination of HCWs thus highlights the salience of advocating the legality of governmental action. By fostering trust in the political process, constitutional advocacy of governmental policies can reinforce citizens’ compliance with the vaccine mandates and ultimately help the country overcome the pandemic. This can arguably be understood as another facet of the law as a “public health tool” (78-80)

Riassunto

La vaccinazione obbligatoria anti COVID-19 per gli operatori sanitari e la Costituzione italiana

In data 1° aprile 2021 il Governo italiano ha adottato il decreto-legge n. 44 con cui è stato disposto l’obbligo vaccinale anti COVID-19 per gli operatori sanitari. Nel darne notizia, i commentatori nazionali e internazionali hanno adombrato possibili controversie sulla costituzionalità del decreto. Ci si è infatti domandato se la vaccinazione obbligatoria sia compatibile con il diritto all’autodeterminazione sanitaria previsto dalla Costituzione italiana e se obblighi vaccinali che si applicano ad una sola parte della popolazione rispettino il principio di eguaglianza sancito dalla Carta. Ad entrambi i quesiti è possibile dare risposta positiva. La Costituzione italiana, pur riconoscendo l’autodeterminazione sanitaria, ammette che la legge possa prevedere misure coercitive di sanità pubblica, come si evince dal testo della Costituzione e dal suo significato originario. Inoltre, in riferimento al principio di eguaglianza, la letteratura scientifica ha da tempo dimostrato i particolari benefici derivanti dalla vaccinazione dei sanitari, che appaiono ancor più rilevanti durante una pandemia. Inoltre, la scelta governativa di sanzioni moderate per il rifiuto alla vaccinazione e la natura temporanea del regime obbligatorio appaiono conformi con l’interpretazione data al principio di eguaglianza dalla Corte costituzionale—il cosiddetto “criterio di ragionevolezza.” Ci si aspetta dunque che il decreto-legge—nel frattempo convertito con minori modifiche nella L 76 del 28 Maggio 2021—superi un possibile scrutinio di costituzionalità. Ciononostante, sarebbe utile se il governo italiano argomentasse in modo più esplicito la costituzionalità delle sue politiche in materia di vaccinazione, anche al fine di contrastare l’esitazione vaccinale.

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