The Italian “No Jab, No Job” Law Passes Constitutional Muster

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The Italian legal system has known some unprecedented measures during the pandemic, including the lockdown regime, “green pass” system etc. Such measures have been probed by ordinary and administrative judges and by the Italian Constitutional Court (ICC). Notwithstanding some outlying rulings, mostly by first instance courts, and some limited corrections by the ICC itself, these measures stood up to scrutiny overall.

This is also true for COVID-19 vaccine mandates. I have already commented on the relevant legislation in this blog. Now, with three judgments (no. 14, 15 and 16 of 2023), the ICC dismissed all the challenges against it. A few days later, a fourth judgment (no. 25 of 2023) came back to the issue from a different normative perspective, highlighting the need of a clear legal basis for vaccine mandates.

Especially in the first two judgments, the ICC displayed the same restrained attitude which it has taken consistently IC towards pandemic legislation. Such restraint seems entirely appropriate to the pandemic emergency, also in light of the case that can be made more generally in favour of judicial self-restraint whenever legislative measures impinge in highly technical fields, and in open or divisive questions on the fair balancing of several constitutional rights and principles.

Three judgments plus one

The main challenges brought forth in the first three proceedings (judgment nos. 14-16) can be divided in two groups.

A first group concerned vaccines and vaccination procedures themselves: whether available vaccinations are safe enough, taking into account the number of adverse events reported to the pharmacovigilance system; whether recurrent individual testing for COVID-19 should be considered a viable alternative; whether triage procedures, based on the clinical history of patients, were sufficient to identify every individual case where vaccination is contraindicated, or they should have been supplemented with further genetic and laboratory testing. These challenges relied mostly on Article 32 of the Italian Constitution (IC, see below), on previous ICC case law, and on the principle of proportionality.

A second group of challenges questioned the legal consequences of refusing mandatory vaccinations (which are never administered forcibly): essentially, temporary suspension from job and salary. Initially, non-vaccinated personnel were allowed to remain at work if they could be employed in risk-free tasks; at a later point, that possibility was suppressed (for health care workers); no provisions were ever made for a minimum income to be guaranteed to suspended employees, as long as vaccine mandates were in force.

The challenges relied again on the principle of proportionality (in balancing the individual right to work, Articles 1, 4, 35 IC, and protection of public health, Article 32 IC), as well as on the prohibition of unreasonable discriminations (e.g., these severe consequences were not incurred by workers who could not be vaccinated due to certified individual medical conditions).

A more limited question was whether a formal act of informed consent might be reasonably requested from patients whose vaccination is mandated by law.

All these challenges have been dismissed: some on procedural grounds (judgment no. 16), most for substantive reasons (see below).

The fourth proceedings again concerned COVID-19 vaccines, though in the context of a very different body of legislation. Military law broadly allowed military doctors to prescribe any vaccination which was deemed necessary for safe operation in a specific theatre.

The problem here was one of legality: is it sufficient for the law to refer to vaccinations in general, or should it specifically mention one or more? Both the remitting military tribunal and the ICC favoured the second answer. Therefore, the law was quashed inasmuch as it allowed the mandatory administration of vaccinations not previously identified in specific legal provisions.

Constitutional background

The 1948 Italian Constitution dwells on the right to health at some length, when compared to other bills of rights in post-WWII constitutions.

According to article 32, «[t]he Republic shall safeguard health as a fundamental right of the individual and as a collective interest, and shall ensure free medical care to the indigent. [first para.] / No-one may be obliged to undergo any health treatment except under the provisions of the law. The law may not under any circumstances violate the limits imposed by respect for the human person. [second para.]».

The second para. was specifically enacted to preserve the long-established Italian legal tradition of mandatory vaccinations (the first being introduced in 1888 against smallpox), while prohibiting aberrations such as involuntary sterilizations.

Well before the COVID-19 pandemic, constitutional case-law had clarified that medical treatments, including vaccinations, are in principle subject to free and informed consent and may only exceptionally be imposed, through national law provisions, provided that

(cumulatively):

1. the treatment is both beneficial to its recipient, and useful to preserve the health of other persons;
2. the treatment has no negative impact on the health of the recipient, besides the usual and tolerable consequences of its administration;
3. for the exceptional and unforeseeable cases in which the treatment might cause further injury, an equitable compensation is provided (besides from any damages which the injured party may claim under general tort law).

When it comes to vaccinations against infectious diseases, several constitutional principles – including self-determination – need to balanced, which leaves room for political discretion in choosing the legal tool to be employed in any given situation: ranging from mere persuasion and recommendation, to legal obligations (which in their turn may be assisted by a wide range of different sanctions). This discretion must be exercised considering the various health and epidemiological conditions, as ascertained by the responsible authorities and of the constantly evolving discoveries of medical research.

These principles had been restated lately in judgment no. 5 of 2018, concerning paediatric legislation, which was subsequently summarized also in ECtHR judgment Vavřička and Others v. the Czech Republic (nos. 47621/13 and 5 others; §§ 106-112; see also §§ 113-115 on further ICC case-law).

Principles new and old

The principle affirmed in judgment no. 25 (a specific provision is requested for each vaccination) is relatively new in constitutional case-law, although scholarship had already reached the same conclusion, and historically legislation had always resorted to specific provisions when establishing vaccine mandates.

The question concerning consent is easily dismissed in judgment no. 14: when a vaccination is mandatory, consent forms simply signify that patients have been informed on the nature of the therapy, and are cooperating in its administration (i.e., they are physically subjecting themselves to the inoculation). No further legal meaning may be attached to those forms.

On all the other points, judgments nos. 14 and 15 are squarely in line with the precedents, to which they add some clarifications and explications.

The question of evidence

The relevant legislation needs to be effectively based on sound science. Which evidence is to be used for that?

The advice of institutional medical authorities – the Ministry of Health, the national institute of health, the national pharmaceutical authority etc. – prevails, at least as far as it is clear and unanimous, unless the available data is manifestly wrong or entirely unclear (judgment no. 15, § 10.3.3 in law), i.e. unless even the most cursory scrutiny detects major anomalies. But the relevant legal framework should ensure that these authorities always operate with a high degree of competence, update, accountability, transparency, and adherence to best scientific practices.

While one of the remitting judges had attempted an autonomous investigation and evaluation of medical data, the ICC simply relies on the official statements of said bodies. Judgment no. 14 (§ 11 in law) also chides that they may not simply be questioned and substituted «with data coming from different sources, albeit referable to specialized "experts" […] not selected according to any discernible criteria».

The question of safety

May vaccines become mandatory, when it is uncertain whether they will effectively shield each patient from contagion and illness?

Yes. What matters is their capacity to reduce the overall circulation of viruses (judgment no. 15, § 11.1 in law).

May vaccines become mandatory, when a certain number of adverse effects, including severe, are consistently reported to the pharmacovigilance system?

Yes. It is an unfortunate but general truth that any medication may exceptionally have adverse effects, and that it is not always possible to foresee which individual patients will be affected. When this happens, an equitable compensation is due, whenever the vaccination was mandated or recommended by health authorities, including the national Ministry and regional health services. But what matters, when deciding whether to mandate or recommend a vaccination, is the overall incidence of adverse effects, also in relation to their severity (judgment no. 14, § 5.3). Besides, there is an obvious and poignant difference between the number of adverse effects reported, and the finding of a causal link between vaccination and adverse effect. Many reports could simply signify a high level of attention throughout the healthcare network. It is for the competent pharmaceutical authorities to make such assessments.

The question of scientific authority

More generally, which aspects of epidemiological policy should be left to scientific authorities, and which are for the legislator to evaluate politically?

No stark, bright line is traced, but in general medical suitability – including assessing the balance between benefits and risks – is mostly a scientific issue, while deciding whether and how a treatment should be recommended or imposed is mostly an administrative and

political issue. Judgment no. 14 (§ 14.2 in law) also resorts to standard medical practice when it finds that patient history is a sufficient basis for pre-vaccination triage, and that further genetic and laboratory tests are not indicated.

In judgment no. 25, the remitting judge had also questioned whether the conditional marketing authorization given to COVID-19 vaccines (which requires further data to be submitted by pharmaceutical companies to medical authorities after the medication is made available to the public) is a sufficient basis for a legal mandate. The legality issue has prevented this question to be examined by the IC. Nevertheless, in the light of what has just been said, the answer seems obvious: the competence to assess the reliability of data, on which the authorization – conditional or not – is based, belongs mainly to pharmaceutical authorities.

On the other hand, judgment no. 15 emphasizes political discretion in deciding whether a legal mandate should be established, its scope, conditions and content, and the consequences of refusing the vaccination. It is a wide discretion: it encompasses all the aspects of the mandate (addresses, duration, implications etc.) and is subject only to a fairly deferential scrutiny.

This is, in my opinion, entirely correct. As argued elsewhere, any reasonableness or proportionality scrutiny of emergency measures (including other pandemic measures, such as lockdown regimes) should be particularly deferential and consider that:

- all the measures were temporary;
- most have been actually revised, as epidemiological conditions shifted;
- precisely the shifting nature of epidemiological conditions, on the one hand, requires constant monitoring, on the other hand, and supports political discretion in taking precautionary measures;
- urgency justifies a more schematic ponderation of the myriad of relevant situations and interests;
- the objectives of immediate and widespread application, dissuasion of risky behaviours, as well as ease and promptness in administrative enforcement, may weigh in favour of sweeping limitations, even when it would be possible, in abstract, to craft them in more complex, detailed or flexible ways.

A brief transatlantic comparison

The attitude displayed by the ICC seems comparable to that adopted by the US Supreme Court on similar issues, at least at the outset of its pandemic case-law. In his concurring opinion in in South Bay United Pentecostal Church, et al., v. Gavin Newsom, et al. (denial of injunctive relief), Chief Justice Roberts argued that the Constitution «principally entrusts the safety and the health of the people to the politically accountable officials […] to guard and protect […]. When those officials undertake to act in areas fraught with medical and scientific uncertainties, their latitude must be especially broad […] Where those broad limits are not exceeded, they should not be subject to second-guessing by an

unelected federal judiciary, which lacks the background, competence, and expertise to assess public health and is not accountable to the people»[6] At a later point, the US Supreme Court shifted to a more activist gear.[7].

The ICC may at least be credited with a higher degree of consistency in recognizing the difficulties faced by government and science, each in its own way accountable, respectively, to the political and the scientific communities. At the very least, constitutional litigation may not always be the best forum for governing emergencies like the COVID-19 pandemic.

References

↑1 For further references see Pietro Faraguna, Davide Paris, Michele Massa, coordinated by Daria de Pretis: Italy, in R. Albert et al. (eds.), The 2021 Global Review of Constitutional Law, available at SSRN: , pp. 178-179.

↑2 English translations of the judgments should appear here at a later point.

↑3 For a broader discussion, see Michele Massa, Minimalismo giudiziario, Milano, FrancoAngeli, 2023 (forthcoming).

↑4 See Micol Pignataro, The "scientific reasonableness" doctrine in the Italian Constitutional Court's decisions on mandatory vaccinations, in Int'l J. Const. L. Blog, 2023/3/06.

↑5 A further argument supporting such attitude is based on comparative law: The suspension of hesitant workers has been employed in France also, while other systems (Germany, UK, USA) went as far as allowing employment termination. See judgment no. 14, § 13.3 in law.

↑6 Quotations and quotation marks omitted.

↑7 See e.g. NFIB v. OSHA and the final remarks in the dissenting opinion by Justices Breyer, Sotomayor and Kagan. For a summary of the Supreme Court pandemic case-law, see E. White, Table – COVID-19 U.S. Supreme Court Judicial Rulings 2020-2022 (updated on 30 December 2022), in The Network for Public Health Law, 2023/1/09.

References

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