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NATURAL SCIENCE ARGUMENTS BEFORE (CONSTITUTIONAL) COURTS IN THE FEDERAL REPUBLIC OF GERMANY, FRANCE AND COSTA RICA

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Abstract

The main thesis of the paper is that in restricting fundamental (public) health rights, the scientific reasoning should play a new, central role in the assessment of the conflict and the restrictiveness of fundamental rights *(de lege ferenda)*. In this article we argue through some specific examples from the Federal Republic of Germany, France and Costa Rica, that the jurisprudence of European and many overseas constitutional courts (or courts of appeal) is *infiltrated* by scientific reasoning.

Keywords: *natural science arguments; constitutional adjudication; judicial review; COVID-19; mandatory vaccination*

1. Introduction

This paper examines a specific aspect of constitutional law: the restrictions of human rights with a justification in natural sciences. The argument of the study is that the need to restrict fundamental rights in the field of public health is influenced by measurable data that can be expressed in the language of science. For example, in times of epidemics, a special situation (with or without a special legal regime) has led to a restriction of fundamental rights. In such cases, e.g. the imposition of a curfew (as a restriction on freedom of movement) or the compulsory wearing of masks or mandatory vaccination, the severity of the epidemic, the number of victims, the speed of transmission of the disease and thus the measurable consequences of infection are relevant in determining the proportionality of the need.

The main thesis of the paper is that in restricting fundamental (public) health rights, the scientific reasoning should play a new, central role in the assessment of the conflict and the restrictiveness of fundamental rights *(d*e lege ferenda). Ultimately, in the context of constitutional review of vaccinations and most public health measures, it must be borne in mind that these state measures (laws or, in most cases, government regulations) are man-made responses

to a naturally occurring danger. It is therefore appropriate for constitutional review to integrate scientific arguments[1].

The starting point for constitutional review is that the Constitutional Court is expected to subject its decisions to the test of justification, including public justification. The legitimacy of a decision is given by its reasoning, supported by facts[2].

In this paper, we argue that during a human pandemic, this means nothing less than placing the Constitutional Court's decision on a scientific footing and justifying it. To take an illustrative example, the introduction of compulsory vaccination against a virus depends on the measurable outcome of the vaccination: the epidemiological impact of the vaccination, for example, whether the vaccine stops the spread of the virus, reduces the number of cases and their severity. In other words, in the language of constitutional law, when it comes to deciding whether it is necessary and proportionate to make vaccination compulsory, this is decided on the basis of medical data.

[1] These regulations were introduced either by a special legal order or without. See: Ginsburg, Tom, Versteeg, Mila: The bound executive: Emergency powers during the pandemic International Journal of Constitutional Law, Volume 19, Issue 5, December 2021, Pages 1498–1535, doi.org/10.10 93/icon/moab059. 1514, Böckenförde, Ernst-Wolfgang: Die Krise in der Rechtsordnung: der Ausnahmezustand. In Krzysztof Michalski (ed.): Über die Krise. Stuttgart: Klett-Cotta, 1986, 183-191. Florczak-Wątor, Monika ; Fruzsina, Gárdos-Orosz ; Malíř, Jan ; Steuer, Max, States of emergency and fundamental rights in books and in action, In: Monika, Florczak-Wątor; Fruzsina, Gárdos-Orosz; Jan, Malíř; Max, Steuer (szerk.) States of Emergency and Human Rights Protection : The Theory and Practice of the Visegrad Countries Abingdon, Egyesült Királyság / Anglia : Routledge of Taylor and Francis Group (2024) 292 p. pp. 1-14. , 14 p. See also: Kecső, Gábor ; Szentgáli-Tóth, Boldizsár ; Bettina, Bor, Emergency Regulations Entailing a Special Case of Norm Collision. Revisiting the Constitutional Review of Special Legal Order in the Wake of the COVID-19 Pandemic, JURIDICAL TRIBUNE 14. 1 pp. 5-26. , 22 p. (2024).

[2] Győrfi. Tamás: Jogi érveléselmélet. In: Jakab András – Könczöl Miklós – Menyhárd Attila – Sulyok Gábor (szerk.): *Internetes Jogtudományi Enciklopédia* (Jogbölcselet rovat, Rovatszerkesztő: Szabó Miklós, Jakab András) http://ijoten.hu/szocikk/jogi-erveleselmelet (2021).

2. Scientific arguments and compulsory vaccination

In the article bellow, we will focus on how scientific arguments are presented in constitutional (or other judicial) review[3]. In examining scientific arguments, we will focus on compulsory vaccination cases, more precisely, the jurisprudence of the Federal Republic of Germany, France and Costa Rica. Germany and France with a Roman law tradition (with constitutional review by a special constituitonal body), Costa Rica with a Common law tradition with judicial supervision by ordinary courts[4].

We argue that mandatory vaccinations serve only as an example for natural science arguments in law, similar conclusion can be reached for any restriction on a fundamental right to health.

For the purpose of this article, we consider vaccination to be compulsory when it is required by law for some public health reason (it may be compulsory in general, compulsory by age group, or applied according to some other regulatory principle, such as vaccination in relation to vulnerable groups or specific occupations)[5]. In the classical sense, vaccination is sanctioned if it is accompanied by a fine, criminal sanctions or coercive measures (as a last resort, compulsory vaccination). In addition to classical coercion, the study argues that sanction can also exist when the sanction makes daily life significantly

[3] Pap, András ; Lőrincz, Viktor Olivér ; Kovács Szitkay, Eszter, Pandémia, közpolitika, jog: diskurzív és szakpolitikai összefüggések. In: Gárdos-Orosz, Fruzsina; Lőrincz, Viktor Olivér (szerk.) Jogi diagnózisok II. : A Covid 19 világjárvány hatásai a jogrendszerre. Budapest, Magyarország: L'Harmattan Kiadó (2022) 491 p. pp. 383-407. , 25 p.; Hungary: Hungler, S ; Gárdos-Orosz, F; Rácz, L, Legal Response to Covid-19: V-VI, In: King, J; Ferraz, O (szerk.) The Oxford Compendium of National Legal Responses to Covid-19, Oxford, Egyesült Királyság/ Anglia: Oxford University Press (2021) 113 p. p. on-line Paper: e40 , 62 p.

[4] Other example can be taken from other European countries. Hungary for example has a long history of COVID-19 jurisprudence. See: Fruzsina Gardos-Orosz, Constitutional review in COVID-19 crisis management in Hungary, In: Baraggia, Antonia (szerk.) Ustava na robu izrednega stanja : zbornik ob trideseti obletnici Ustave Republike Slovenije : s posebno zbirko esejev v angleškem jeziku *Covid-19 and the Constitution* (Covid-19 in ustava), Ljubljana, Szlovénia : Univerza v Ljubljani, Pravna fakulteta (2024) 476 p. pp. 380-399. , 20 p.

[5] Hungler, Sára, Compulsory Vaccination and Fundamental Human Rights in the World of Work, STUDIA IURIDICA LUBLINENSIA 31 : 1 pp. 63-77. , 15 p. (2022)

more difficult[6]. For example, several countries have made vaccination a condition for access to free public health care. In such cases, the state may, for example, require that only vaccinated persons can receive free hospital care or enrol a child in school. Furthermore, this issue also raises the question of the horizontal application of fundamental rights: compulsory vaccination cannot be imposed by the state, but may be required in legal relations between individuals (e.g. between employer and employee).

In their study, Gravagnaand colleagues[7] point out that governments are still struggling to balance complex, competing interests in the area of mandatory vaccination. We argue that these balancing of interests will later be reflected in the practice of national constitutional courts. (The study cited examined the mandatory vaccination system in nearly 200 countries. Of these, more than one hundred countries have some form of national compulsory vaccination. Of these, sixty-two countries have some form of sanction for failure to vaccinate – mostly financial or educational disadvantage, such as refusal to enrol in school.)

3. Jurisprudence of the Federal Republic of Germany

We analyse further bellow the decision of the German Federal Administrative Supreme Court *On the legality of the introduction of the mandatory vaccination of soldiers against COVID-19*[8].

This decision of the German Federal Administrative Court examined the compulsory vaccination of a professional soldier. The soldier, a lieutenant

[6] Gravagna, Katie – Becker, Andy – Valeris-Chacin, Robert – Mohammed, Inari – Tambe, Sailee – Awan, Fareed A. – Toomey, Traci L. – Basta, Nicole E.: *Global assessment of national mandatory vaccination policies and consequences of non-compliance. Vaccine,* (2020) 49: 7865–7873. https://doi.org/10.1016/j.vaccine.2020.09.063

[7] Ibid.

[8] BVerwG, Beschluss vom 07.07.2022 – 1 WB 5.22, ECLI:DE:BVerwG:2022:070722B1WB5.22.0, https://www.bverwg.de/pm/2022/44

colonel in the official staff, complained that the Federal Republic of Germany had imposed the mandatory vaccination against the COVID-19 in Regulation A1-840/8-4000 (in addition to the mandatory vaccinations for soldiers already in existence), which required one or two partial vaccinations against COVID-19 and booster vaccinations in accordance with current national recommendations. Under the new Regulations in scrutiny, the vaccine is compulsory for all services deployed on military, relief and support duty in Germany, including the disaster response forces. The German Central Military Service Regulation (ZDv, A-840/8) stipulates that all soldiers must tolerate the ordered vaccinations and prophylactic measures.

In his submission, the applicant stressed, inter alia, the following scientific arguments: vaccination does not prevent or control the infection or disease. There is no evidence that vaccination eliminates or reduces the risk of infecting other people. The applicant expressed concern about the lack of information on adverse reactions and long-term effects, the lack of studies on contra-indications and the complete lack of long-term studies and experience with new mRNA vaccines.

Concerning fundamental rights and scientific arguments, the applicant stressed his conceerns that the vaccine is unduly harmful to life and physical integrity and constitutes a disproportionate interference with his fundamental rights The applicant points out that, in his view, we are not dealing with a vaccination in the traditional sense, but we witness an experimental administration of a gene-based substance, which was only conditionally authorised by the national authorities. According to his opininion, consistent COVID-19 testing and social distancing rules provided sufficient safeguards to contain the spread of the virus.

The applicant therefore submits that the mRNA vaccines are not conventional vaccines but gene-based experimental materials. The administration of these products is considered gene therapy, which has been mislabelled as vaccines. This has allowed the substances to be approved without several years of testing.

However, only a conditional licence has been granted, with the consequence that research into the side effects and complications of vaccination will be carried out in a large-scale field trial for general use in the population. In this light, the vaccination campaign is considered a medical trial.

Consent to vaccination therefore cannot be voluntary. No one should be forced to participate in a scientific experiment.

3.1. *Special obligations to solders and members of the army*

The applicant underlies that in the Federal Republic of Germany, although it is possible to impose a mandatory rule on soldiers, they have not been properly informed of the risks of vaccination in violation of the legislation applicable to them and have been unlawfully forced to vaccinate, with the prospect of significant professional disadvantages and criminal/disciplinary legal consequences.

In the applicant's view, the spread of SARS-CoV-2 did not create an exceptional emergency situation justifying the obligation to vaccinate soldiers. Most people's immune systems are already sufficiently protected against the virus. In addition, good treatment and conventional prevention options are available. The operational capability of troops will not be compromised as the virus spreads. (It should be emphasised that these arguments are made in the legal argument to reinforce the aims of the study.)

3.2. *Risks override possible advantages*

According to the applicant, the spread of SARS-CoV-2 has not created an exceptional emergency situation justifying the obligation to vaccinate soldiers. The immune systems of most people are already sufficiently protected against the virus. In addition, good treatment and conventional prevention options are available. The operational capability of troops will not be compromised by the spread of the virus. (It should be stressed that these arguments are used in the legal argument to support the aims of the study). According to the applicant, vaccination poses a significant risk to the life and physical integrity of the vaccinated. Across Europe, 18,928 deaths and 1,823,219 injuries have been linked to vaccination as of 17 July 2021. According to the applicant, there is a temporal link between the excess deaths and the vaccination campaign,

which suggests a causal link. As a further scientific argument, the applicant noted that vaccine complications and adverse reactions were not properly recorded by the health authorities. The actual dangers and side effects of vaccines were concealed from the public. The applicant pointed out that the national statistics of the Paul Ehrlich Institute trivialise vaccination complications according to a study published by BKK ProVita, one of the largest German health insurers.

3.3. *Opinioin of the German Federal Court*

The action was dismissed by the Court. The Court pointed out that the vaccination against COVID-19 was a preventive measure under the relevant infection control law. The Court responded to the natural science arguments in its decision by stressing that the law does not require that the measure must provide complete protection against infection. This is not a requirement for other vaccines such as those against influenza, typhoid and cholera. It is sufficient if the vaccination *reduces* the likelihood of infection or the likelihood of a severe course. The Court also used scientific arguments when it stressed that individual protection against serious disease outbreaks and the reduction of the potential transmission of the pathogen already contribute significantly to the reduction of contagious diseases. This is not contradicted, the Court stressed, by the fact that many vaccines necessarily have to be boosted or adapted to mutated pathogens.

The Court also relied on scientific arguments when it emphasised in its reasoning that vaccination, in combination with other hygiene measures, was *the best way to achieve preventive medical objectives*. The Court did not refer to the views of other professional organisations, but directly emphasised its own opinion when it highlighted two medical benefits of vaccination: firstly, to prevent the transmission of the virus and, secondly, to avoid a serious course of the disease, in particular hospitalisation and intensive medical treatment. The Court went on to emphasise, with regard to the Omicron version of COVID-19, that vaccination, particularly in the case of current vaccination coverage, also significantly reduces the risk of symptomatic and, above all, severe disease.

The German Administrative Court even went so far as to state that it considered the medical and statistical data of the Paul Ehrlich Institute to be legitimate, in contrast to the study cited by the plaintiff BKK ProVita, which was *not based on any substantial data*. The court emphasised that in another case, the Federal Constitutional Court had also accepted the professional competence and reliability of the risk assessment of the Paul Ehrlich Institute in its decision of 27 April 2002 on the obligation to have a vaccination certificate.

The German Court later referred to the views of professional organisations to support its own scientific position. It stressed that, in so far as the applicant relies on the general risks and side effects of vaccines, a fundamental risk assessment is already carried out when the vaccines are authorised. The use of vaccines is subject to continuous monitoring by the competent European authorities and the Paul Ehrlich Institute. According to the Court of Justice, *the safety report of 30 November 2021, of the more than 123 million doses of vaccine administered, 0.16% of cases have been reported with adverse reactions, 0.02% with serious reactions and 15 deaths. In three cases, death was also suspected to have been actually linked to the vaccine. In conclusion, the Paul Ehrlich Institute concluded that serious adverse reactions are very rare and would not alter the positive risk-benefit ratio of vaccination.*

3.4. *The obligation to tolarate vaccination for soldiers*

The COVID-19 vaccination regulation is constitutional, the Court argues. A soldier must tolerate vaccination if it is for the prevention or control of communicable diseases. The Court pointed out that the obligation to tolerate infection control measures also serves to protect the fundamental rights of other soldiers. Many infectious agents can be transmitted directly or indirectly from person to person, which means that, for example, vaccination against influenza reduces the risk of other servicemen (and women) falling ill. As many soldiers often live in the same room with other soldiers for long periods of time and work closely with their comrades during exercises and deployments, for example in tanks, submarines or helicopters, the risk of transmission

between soldiers is higher than average. In these cases, vaccination can help to make transmission more difficult or prevent it; it can therefore protect the safety of other soldiers.

According to the Court, the obligation to tolerate vaccination promotes the objectives of the armed forces and is, moreover, an expression of the State's duty of care towards soldiers. COVID-19 also poses a serious health risk to soldiers. Infection can lead to serious illness or death. This applies not only to vulnerable groups, but also to otherwise healthy people between the ages of 17 and 65. Soldiers are at high risk of infection due to the specific nature of service operations.

3.5. *Balancing test for armed forces according to the jurisprudence of the German court*

The Court applied a four-pronged test to assess the constitutionality of the Regulation. It decides whether a statutory provision meets the following constitutional requirements: (a) it meets the requirement of substantive constitutionality, (b) it meets the right to physical integrity, (c) it meets the principle of freedom of occupation, and (d) they result in a permissible restriction of a fundamental right.

Finally, the Court emphasised that in the risk-benefit assessment of vaccines (in fact, in the reasoning of the present study, the balancing test), the side effects and adverse reactions of vaccination must be assessed in relation to the number of doses of vaccine administered. The temporal association of adverse reactions with vaccination does not always prove causality. The risk assessment should also take into account the risk of serious consequences of COVID-19 disease. Accordingly, the obligation to tolerate the vaccine was proportionate and reasonable in accordance with the risk-benefit assessment of the competent authorities. This reasoning was confirmed by the previously cited decision of the Federal Constitutional Court in its decision on the justification of the vaccination obligation of certain institutions.

4. Natural Science arguments of the Conceil D'Etat in France

In the case of the immunity certificates submitted to the Conseil D'Etat (Constitutional Council, France Decision No. 454621, case of 19 May 2019)[9], the plaintiff complained that in France, the medical certificate of immunity is issued to persons who have received vaccines authorised by the European Medicines Agency. In his view, this established an unjustified difference in treatment between those who received vaccines authorised by the European Medicines Agency and those who received Sinopharm authorised by the WHO. The Council of State did not uphold the appeal and rejected the application. The applicant also complained that the medical products were in the experimental phase in clinical terms.

In the scientific reasoning, the Council of State is dealing with medical dfinition. The Conseil emphasized that Article 2 of Regulation (EU) No 536/2014 of the European Parliament and of the Council of 16 April 2014 on clinical trials on medicinal products for human use defines a clinical trial as any study in human subjects designed to demonstrate the clinical, pharmacological or other pharmaco-dynamic effects of one or more medicinal products. The definition of a clinical trial is set out in detail in the Regulation. An emperimental pharmasutical product is defined as *a medical product which is tested or used as a reference, including a placebo, in a clinical trial*. In the reasoning of the Council, It clearly follows from these provisions that the introduction on the market of a vaccine for which the competent authority has granted authorisation for the general public does not, by its nature and purpose, constitute either a clinical trial or a clinical experiment, even if it is accompanied by a pharmacological system for monitoring possible adverse reactions. Consequently, says the Council, such a vaccine cannot be classified as an experimental medicinal product.

[9] Conseil d'État 454621, lecture du 19 mai 2022, ECLI:FR:CECHS:2022:454621.20220519, Décision n° 454621, https://shorturl.at/adDF9

According to the Council of State, the 'conditional nature' of Commission Regulation (EC) No 507/2006 of 29 March 2006 on the conditional marketing authorisation for medicinal products for human use does not lead to an interpretation that compulsory vaccination itself is considered 'conditional' in the current legislative framework. The Conseil d'Etat did not consider it necessary to further challenge its arguments in the case. In its view, the above EU Regulation does not infringe the free and informed consent of participants and therefore there is no need to refer the matter to the Court of Justice of the European Union (CJEU) for a preliminary ruling.

5. Natural Science arguements in the Supreme Court of Costa Rica

The Constitutional Council of the Supreme in its case 17995-2022[10], several parents complained that their fundamental rights and the rights of their children had been violated because the Ministry of Public Education had made vaccination compulsory in cases of entry or staying in a public educational institution. The Ministry therefore prevented them from being involved in their children's academic and administrative affairs as they were not vaccinated. The Supreme Court of Costa Rica pointed out that there was no evidence that either the parents' or the minors' fundamental rights had been infringed. The Supreme Court pointed out that *the requirement of vaccination against COVID-19 was not created on a whim but to safeguard the health and life of the community, with particular reference to the protection of minors in the particular case.*

The Constitutional Council of the Supreme Court of Costa Rica, in its decision 18514-2022[11], the applicant, who worked in a psychiatric hospital, was sent on unpaid leave in February 2022 because he had not been vaccinated against COVID-19. This was due to the Costa Rican government's decision to make vaccination compulsory for public and private sector workers.

[10] Costa Rica, Supreme Court, 5 August, 2022. https://shorturl.at/itHM3

[11] Costa Rica, Constitutional Court, 9 August 2022, No. 18514-2022. https://shorturl.at/wyMZ1

The Supreme Court pointed out that the applicant's fundamental rights had not been infringed because the mandatory nature of the COVID-19 vaccination had been determined by the Costa Rican National Commission on Vaccination and Epidemiology on the basis of Costa Rican legislation. The Supreme Court held that the restriction was a measure taken to protect the public health of the Costa Rican population and was therefore justified.

The Supreme Court made several natural science references. First, the Supreme Court examined the mandatory nature of the COVID-19 vaccine. In this respect, it pointed out that vaccination is part of the basic health care that the Costa Rican State must provide to individuals in order to protect the fundamental right to health. It also stated that people have the right to work in safe and healthy conditions. This is facilitated by vaccination. The Supreme Court pointed out that the applicant's fundamental rights had not been infringed because the vaccination was a measure taken to protect the public health of the Costa Rican population and was therefore justified.

In the natural sciences reference of the Supreme Court's decision, the dissenting opinion of Judge Rueda Leal stands out, pointing out that the Supreme Court had already in 2011 *recognised the importance of vaccination as part of the basic health care that the Costa Rican State must guarantee in order to protect the fundamental right to health of every person and, secondly, that the protection of public health and the prevention of disease are constitutionally legitimate objectives that justify the mandatory nature of vaccination*[12].

The dissenting opinion assessed the applicability of the vaccine in the natural sciences: it stressed that the COVID-19 vaccines for use against protected persons were not in the experimental phase and had been authorised for use in certain countries, so that there was no a priori unconstitutionality. The dissenting opinion did not exclude that the various technical, medical and scientific aspects of the vaccines could be examined in various non-judicial proceedings. On the other hand, the possibility of challenging medical opinions, which may arise in relation to contra-indications due to medical conditions, is an important aspect.

[12] Costa Rica, Constitutional Court, 9 August 2022, No. 18514-2022. https://shorturl.at/wyMZ1

6. Conslclusions

In summary, the paper has tried to show, through some specific examples from the Federal Republic of Germany, France and Costa Rica, that the jurisprudence of European and many overseas constitutional courts (or courts of appeal) is *infiltrated* by scientific reasoning.

In the argument of the study, the need for a fundamental rights limitation in the field of public health is influenced by measurable data that can be expressed in the language of natural science. For example, the special situation in times of epidemics has led to a fundamental rights limitation. In such cases, ie. when imposing a curfew (as a restriction on freedom of movement) or compulsory wearing of masks or mandatory vaccination, the severity of the epidemic, the number of victims, the transmission rate of the disease, and thus the measurable consequences of the infection, are relevant in determining the proportionality of the need.

The main contention of the paper is that, in the case of restrictions of fundamental (public) health rights, the scientific argumentation will play a new, central role in constitutional jurisprudence in assessing the conflict and the restrictiveness of fundamental rights.

We argue, the natural scientific argumentation develops *de lege lata* arguments that have appeared in constitutional practice, and we have tried to systematically take stock of them and organise them in this study. However, we argue more than this. In the argumentation of the study, the emergence of scientific arguments in constitutional decisions imposes de lege ferenda requirements.

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