

MART SUSI AND TIINA PAJUSTE (EDS.)

Covid-19 “Vaccine Passport” Discourses

An Exploratory Study of 23 Countries



„All human beings are born free and equal in dignity and rights.“

Art. 1, sentence 1, Universal Declaration of Human Rights (1948),

Covid-19 “Vaccine Passport” Discourses

An Exploratory Study of 23 Countries

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Statement by Toomas Hendrik Ilves

History has shown that during crises decisions are often made, which have far-reaching consequences and will for many decades continue to affect the way of life of entire societies. These decisions are made under time and social pressures. Social pressure mounting amidst the current Covid-19 crisis calls for return to “normality”, which means the way of life in the pre-crisis period. The proposed “vaccination passport” is viewed by many as an instrument for such a return. Yet, there are many challenges, primarily related to the protection of sensitive personal data, potential abuse by private companies and governments, and the need to avoid discrimination. The key to avoiding, or minimize these threats lies in e-governance technological solutions. Such solutions carry by default and design safeguards against profiling and arbitrary application, thereby raising confidence among the “passport holders” that privacy rights secure, and among those who condition their use of these services upon the data entered into such passports that the data is accurate and cannot be manipulated. I call for decision makers on the global, European and national levels to consider the usage of blockchain technologies or other comparable solutions as the technological pillar of this necessary development. And last but not least, I would like to emphasize the importance of communication between political, academic, medical and civil society circles. In this communication, the voice of academia as the guardian of democratic values needs to be consistently heard.

Toomas Hendrik Ilves

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Comparative Study of Covid-19 “Vaccine Passport” Discourses

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Introduction and Synopsis

This comparative study looks into the proposed “vaccine passport” initiative from various human rights aspects. It was undertaken by the Global Digital Human Rights Network, an action started under the EU’s Cooperation in Science and Technology programme. The network currently unites more than 80 scholars and practitioners from 40 countries. The findings are based on responses to questions put to the network members by the authors of this study in February 2021 (questions attached in Annex I). We acknowledge individual contributions from colleagues (listed in the table of contributors above), whose views are sometimes presented in a generalised fashion.

The study concentrated on the availability of a legal framework for the proposed “vaccine passport”, whether such a “passport” would create binding obligations in the public and private sectors or, alternatively, what would be the scope of discretion allowed to public and private entities to make their decisions affecting rights holders’ access to various services. The attitudes prevalent in different states and in the media were also analysed, along with the aspects that need to be considered to avoid potential human rights violations.

There has been no thorough analysis in most countries as to whether a normative national basis exists to restrict fundamental rights through the requirement of having a “vaccine passport” to access certain locations or services. Compatibility of the proposed passport with European and/or international human rights rules and principles is a marginal issue in public discourse. Conceptualisation about such compatibility remains general and theoretical, and has not reached the level of practicality and effectiveness. Most countries have not enacted concrete legislative acts or provisions to deal with a pandemic of this scale and magnitude.

The findings indicate a complete absence in the EU countries and selected countries outside of the EU of the normative basis in national legal systems which would obligate private companies to enforce restrictions originating from the “vaccine passport”. This legal vacuum – provided that such a “vaccine passport” becomes sooner rather than later a technical and medical reality – raises a subsequent concern as to whether the private companies have the legal discretion to make decisions regarding who to serve and who not to serve on their own volition. This is not a question of a legal obligation to discriminate, but a legally allowed freedom to discriminate. Provided that normative concretisation of such a “vaccine passport” within national legal systems and/or in the EU level is unable to run in parallel with the accelerated practical requests for such a “passport” from private entities, we see a real threat of the “private” profiling of citizens and exploitation of their vulnerabilities for commercial purposes. The concern, which legal scholarship has been aware of for decades – the compatibility of private business interests with the

obligation to safeguard human rights when doing business – finds its clear manifestation when the EU is faced with the quest to find a solution to the pandemic crisis via the “vaccine passport”.

The fundamental concern is that the “vaccine passport” can lead to everyday discriminatory choices by individuals, the public, and private entities, which in turn become deeply rooted discriminatory patterns either in practice or law or both. There is a theoretical dilemma and, for many, a practical issue how to realise one’s fundamental rights to refuse medical treatment and not to know one’s medical condition when having a “vaccine passport” is a utilitarian pre-condition for social participation. We caution against the possibility of public and private “lists” created on the basis of “passports”. The sooner such “passports” are issued in normative vacuum or fragmentation, the greater the threat of profiling. If blockchain technology is to be used for such profiling, it can lead to “vaccine prisons”.

Challenges related to *safeguards* during implementation primarily concern the purposeful use of gathered medical data. A clear and specific normative basis is necessary, since the generally worded legislative or constitutional level norms may not be sufficient to protect personal data.

Discourse Regarding an EU-wide “Vaccination Passport”

The topic of “vaccine passports” is emerging in all corners of the world, but currently countries seem roughly split on whether there is or is not discussion regarding an EU-wide (or global) “vaccination passport”.¹ There seems to be less discussion of a “vaccine passport” outside of the European Union. For example, as of February 2021, neither South Africa nor Argentina were discussing this topic and it was also not under consideration in regional organisations, such as the African Union, Mercosur and other inter-American bodies.² In countries where there has been no official discourse on the issue, one perceived reason for this has been the slow rollout of the vaccination programme.³ In such cases, the dialogue on “vaccine passports” is seen as premature as the focus of governments and the media is mostly on the procurement of vaccines and the logistics of the vaccination programmes. In general, the perception is also that there should be free access to vaccines before a “vaccine passport” could provide special rights or easier access to certain venues or services (if people have no choice to vaccinate the potential for discrimination is greater).

In some states, although official discussions are lacking, there is coverage of the issue in the media.⁴ Discussions in the media reflect a variety of positions and highlight both the strengths and weaknesses of a potential standardised “vaccine passport”.

1 As of February 2021, discussions were taking place in Estonia, Finland, France, Germany, Greece, Italy, Lithuania, Malta, Romania, Slovakia, Slovenia, Spain, United Kingdom; but lacking in: Argentina, Bosnia and Herzegovina, Cyprus, Iceland, Ireland, Portugal, Serbia, South Africa, Turkey.

2 Question 1, submissions from South Africa and Argentina.

3 Question 1, submissions from Portugal, where at the start of February only around 3.57 percent of people were vaccinated (<https://www.theportugalnews.com/news/2021-02-03/slow-roll-out-of-vaccines-in-portugal/58036>) and Bosnia and Herzegovina, which highlights that the first phase of vaccination had not started until February 12, due to the complex political and constitutional structure and the failure of authorities to reach a timely agreement on the state-led procurement of vaccines.

4 Question 1, submissions from Cyprus, Slovenia, Iceland, Ireland and Serbia.

Positive aspects that are highlighted in discourse include, for example, the idea that "vaccine passports" may offer a way to overcome the economic crisis, especially in the tourism and leisure sectors.⁵ Many proponents of a "vaccine passport" see it as a way to facilitate travel in Covid-19 conditions. For example, the Spanish Minister of Industry, Trade and Tourism, Reyes Maroto, said in relation to the idea of a "vaccine passport" that "it could contribute to restoring mobility at the European level".⁶ Moreover, a Spanish journal, *El Diario*, elaborates on two positive factors for Spain: travel and the economy are promoted.⁷ In Malta, MEP Roberta Metsola (PN) has declared that "proof of immunity will mean our economies can open up safely, quickly and with confidence – meaning we can offer a lifeline to industries so many families depend on".⁸ In Cyprus the positive discourse regarding an "EU-wide vaccination passport" has focused on the protection of public health.⁹

A positive technical aspect of "vaccine passports" that has been highlighted is their potential to improve the verification aspects of vaccinations. For example, a health politician from the SPD party in Germany advanced "vaccination passports" as a means to prevent fraud pertaining to someone's vaccination status through the use of digital verification measures (stating that the yellow, paper, WHO "vaccination passports" used in Germany thus far are "as easy to forge as student IDs").¹⁰ Similarly, while there is concern that national systems of vaccine passports would be inefficient because of their differences, there is a belief that an EU-wide vaccination certificate would be functional and fulfil its purpose.¹¹ Proponents also note that there are already requirements to provide documentation of certain vaccinations for travelling to or entering from certain regions (relating to yellow fever).¹²

5 Question 1, submissions from France, Estonia, Italy, Portugal, Malta (referring to Cilia, Jonathan. "Immunity Passport For Vaccinated Malta Citizens On The Cards, Chris Fearn Confirms". Lovin Malta. 26 December 2020. <<https://lovinmalta.com/news/immunity-passport-for-vaccinated-malta-citizens-on-the-cards-chris-fearne-confirms/>> Accessed: 09 February 2021).

6 RTVE.es. Agencies. Coronavirus El pasaporte de vacunación para viajar sin restricciones divide a los países de la UE . 18.01.2021. Retrieved from RTVE nacional public media <https://www.rtve.es/noticias/20210118/coronavirus-pasaporte-vacunacion-union-europea/2067142.shtml>

7 Andres Gil. Spanish correspondent in Brussels. 15/01/2021. La UE apuesta por un 'pasaporte de vacunación' para agilizar los viajes en medio del retraso en la campaña de inmunización. El diario.es. Retrieved from https://www.eldiario.es/internacional/ue-apuesta-pasaporte-covid-facilitar-viajes-medio-retraso-campana-vacunacion_1_6800040.html

8 Question 1, submission from Malta, referring to Diacono, Tim. "Chris Fearn And Roberta Metsola Urge EU To Create COVID-19 'Vaccine Passports' For Travel Across Europe". Lovin Malta. 14 January 2021. <<https://lovinmalta.com/lifestyle/health/covid-19/chris-fearne-and-roberta-metsola-urge-eu-to-create-covid-19-vaccine-passports-for-travel-across-europe/>> Accessed 09 February 2021.

9 Question 1, submission from Cyprus.

10 Question 1, submission from Germany, referring to information available at: <https://www.ksta.de/politik/impfpassee-in-corona-zeiten-spd-will-die-ausweise-faelschungssicher-machen-37770562?cb=1613833581044>

11 This is the position of, e.g., Lithuanian MEP Petras Auštrevičius; information available at: <https://www.15min.lt/pasaulis-kiseneje/naujiena/kelioniu-pulas/kada-galime-sulaukti-skiepu-paso-su-irasu-apie-vakcina-nuo-covid-19-637-1451382> , 05/02/2021; G. Jaruševičiūtė, ELTA, <https://madeinvilnius.lt/naujienos/aktualijos/skiepu-pasas-es-mastu-galetu-buti-ivestas-tik-paskiepijus-didziaja-dali-populiacijos/> , 05/02/2021.

12 Question 1, submissions from Lithuania and Germany (referring to information available at: <https://www.welt.de/politik/ausland/article224674287/Corona-Sondergipfel-Kommt-der-EU-Impfpass-und-wie-soll-er-funktionieren.html>).

Negative aspects that are highlighted in discourse are, firstly, the potential for discrimination, which is mentioned most often.¹³ For example, the Spanish media has pointed out the discriminatory aspect of a "vaccine passport" (e.g. letting people who are vaccinated travel while forbidding those who are not) when vaccination has only just begun and is voluntary in most states.¹⁴ Moreover, while the Lithuanian Prime Minister Ingrida Šimonytė admitted the possible positive impact of certificates such as a "vaccine passport", as they would allow a part of the population to be freed from quarantine requirements, she mentioned that there are risks of possible discrimination and abuse of the system. This was also the position of another Lithuanian MEP, Rasa Juknevičienė, who noted that discrimination would be created if vaccination certificates were introduced before a large part of the population was vaccinated.¹⁵ The Serbian media reported a statement by the Director of the World Health Organization's (WHO) office in Serbia, who stressed that the WHO is against the introduction of "Covid passports" because not all countries and people enjoy access to vaccination to the same degree.¹⁶

As an example of another type of negative comment in relation to "vaccine passports", the former Albanian Minister of Health Leonard Solis has spoken out against the "passport" due to unfeasibility and the current stage of vaccine production, insufficiency with regards to vaccine distribution and the still-existing doubts especially *vis-a-vis* its effectiveness towards the new virus mutations. According to Solis, this kind of initiative is premature and harmful, and it would hurt the EU more than it would regulate the situation.¹⁷ The German Ethics Council, an independent expert council instituted by the federal government and the German Bundestag, decided that it is wrong to lift Covid-19-related infection prevention measures for vaccinated people so long as it is uncertain whether vaccinated people continue to pose a risk of infection, stating that lifting restrictions for vaccinated people alone could only be justified if it was sufficiently certain that they cannot spread the virus.¹⁸

Other negative aspects that were mentioned are the fear of creating a "two-class society" (vaccinated/non-vaccinated) relating to infection prevention rules; the perceived erosion of fundamental rights because

13 Question 1, submissions from Lithuania, Serbia (referring to Blic online, (<https://www.blic.rs/vesti/drustvo/slabe-su-sanse-brnabic-dva-su-razloga-zbog-kojih-mislim-da-uvodenje-kovid-pasosa-nije/lb0h5pe> 21.01.2021).

14 RTVE.es. Agencies.18.01.2021. Coronavirus El pasaporte de vacunación para viajar sin restricciones divide a los países de la UE, available at <https://www.rtve.es/noticias/20210118/coronavirus-pasaporte-vacunacion-union-europea/2067142.shtml> and Irene Martel. ABC. 20/01/2021. Qué es el pasaporte sanitario de vacunación, available at https://www.abc.es/sociedad/abci-que-es-pasaporte-sanitario-comun-vacunacion-nsv-202101201132_noticia.html?ref=https:%2F%2Fwww.google.com%2F. The aspect of not all states being able to procure a sufficient amount of vaccine doses for their citizens leading to discrimination is also pointed out in the submission of Albania in relation to Question 1.

15 Question 1, submission from Lithuania, referring to <https://www.vz.lt/verslo-aplinka/2021/01/13/premjere-koronaviruso-imuniteto-pasas-velesnio-laiko-projektas>, 13/01/2021, <https://www.15min.lt/pasaulis-kiseneje/naujiena/kelioniu-pulsas/kada-galime-sulaukti-skiepu-paso-su-irasu-apie-vakcina-nuo-covid-19-637-1451382>, 05/02/2021; G. Jaruševičiūtė, ELTA, <https://madeinvilnius.lt/naujienos/aktualijos/skiepu-pasas-es-mastu-galetu-buti-ivestas-tik-pasiekijus-didziaja-dali-populiacijos/>, 05/02/2021.

16 Question 1, submission from Serbia, referring to information by BETA News Agency, available at <https://beta.rs/vesti/covid-19/140123-ivanusa-mnoge-zemlje-imaju-manje-vakcina-nego-srbija> 18.01.2021.

17 Top News – Pasaporta dixhitale e vaksinimit/ Ish-ministri i shëndetësisë do e dëmtonte BE-në, 19.02.2021. Available at: <https://top-channel.tv/video/top-news-pasaporta-dixhitale-e-vaksinimit-ish-ministri-i-shendetesise-do-e-demtonte-be-ne/>. [Accessed on 22 February 2021].

18 Question 1, submission from Germany, referring to information available at: <https://www.lto.de/recht/nachrichten/n/ethikrat-besondere-regeln-geimpfte-aufhebung-beschaenkungen-infektionsschutz/>

being vaccinated in order to be exempt from infection prevention rules is viewed as creating a *de facto* obligation to get vaccinated;¹⁹ and the potential for violations of basic human rights like freedom of movement.²⁰ Another potential issue of concern that has been noted in discussions is that a “passport” with such health data has questionable moral implications.²¹ In addition, significant concerns have been raised in relation to the protection of personal (health) data.²²

Other discussions that have taken place in Europe look for **alternatives** to a “vaccine passport”. For example, the idea of a “green passport”²³ (as in ‘green light’ and following the example of Israel) or a “sanitary passport”²⁴ is proposed and preferred to that of a vaccination one, in that it would encompass additional (or alternative) information such as a Covid-19 test result or an antibodies test result.²⁵ The broader concept is also put forth in Germany, where the Federal Minister of Health Jens Spahn (CDU) has advanced the broader idea of “immunity documentation” (i.e. a document that is also for those who may have already acquired immunity through infection) in May 2020, among others with the argument that this would be necessary to enable German citizens to travel abroad as other countries would likely demand such documents.²⁶ The initiative was not followed through with however, over criticism of lack of underlying scientific evidence.²⁷

In most researched states the **political parties** have not adopted an official position in relation to a “vaccine passport”.²⁸ Opinion amongst politicians is divided, as is the case amongst experts and the general population. In many states, governments have yet to formulate an official position on the matter. In contrast, some states have presented an official supportive stance. For example, the German federal government (Bundesregierung) supports the idea of an EU-wide vaccination “passport”.²⁹ And the State Secretary of the Ministry of Foreign Affairs of Slovakia – Martin Klus – has declared that the Slovak

19 Question 1, submission from Germany.

20 Question 1, submission from Spain.

21 Question 1, submission from Spain, referring to information available at: Irene Martel. ABC. 20/01/2021. Qué es el pasaporte sanitario de vacunación. Retrieved from https://www.abc.es/sociedad/abci-que-es-pasaporte-sanitario-comun-vacunacion-nsv-202101201132_noticia.html

22 Question 1, e.g. submission from Slovenia.

23 https://www.francetvinfo.fr/sante/maladie/coronavirus/covid-19-une-deputee-udi-propose-un-passeport-vert-pour-les-personnes-vaccinees_4222333.html.

24 See, e.g., https://www.francetvinfo.fr/replay-radio/le-brief-politique/covid-19-une-deputee-propose-le-passeport-sanitaire-pour-relancer-le-tourisme_4274577.html.

25 Question 1, submission from France.

26 <https://www.tagesschau.de/inland/spahn-corona-immunitaetsausweis-101.html>.

27 Question 1, submission from Germany.

28 The exception here is Greece, where two of the opposition political parties (Syriza and Helliniki Lisi) clearly announced that they are against the government’s policy and its proposal for the vaccination passport (without setting clear arguments against the vaccination passport in the public dialogue), after the EU rejected the Greek prime minister’s proposal for the vaccination passport: Question 1, submission from Greece.

29 Question 1, submission from Germany, referring to information available at: <https://www.zdf.de/nachrichten/politik/eu-gipfel-coronavirus-grenzen-impfung-100.html>

approach to the Covid-19 passport would be in line with EU requirements.³⁰ He pointed out that there is still ongoing discussion and there would have to be negotiations regarding vaccines not registered in EU. As Slovakia bought Sputnik V vaccines from Russia (which is not yet approved by EU), there is also discussion whether the state should use it and whether the "vaccine passport" would include also these vaccines.³¹

Greece has gone as far as to propose the idea of the "vaccine passport" in the EU institutions, along with a declaration that in case the EU does not accept this idea, Greece will conclude bilateral agreements with other countries (such as the UK, Austria, Israel, etc.) for the adoption of a "vaccine passport".³² This firm position is understandable due to the extensive role that tourism plays in the Greek economy. The aim of the country is to support tourism during summertime by attracting citizens from the countries that will have been vaccinated, in order to avoid restrictive measures, such as a quarantine or the obligation of a negative Covid-19 test.³³

Private companies, especially in the tourism sector, tend to be supportive of the idea of an EU-wide "vaccine passport", because it is seen as a mechanism to "re-activate" the sector.³⁴ The International Air Transport Association is also in favour of this new "passport".³⁵ The airline Lufthansa and Europe's largest travel company, Tui, have stated that they would not voluntarily establish an obligation to provide such a document in order to use their services, but welcome a clear solution on the European level.³⁶ In Finland, the service industry organisation PALTA has supported the "vaccine passport" and has taken the stand that it could help those services that are heavily impacted by the pandemic such as restaurants, the travel industry, cultural services and event organisers.³⁷ As another example, in Italy tourism and sports companies are especially supportive of the idea on the assumption that it would create a safe circulation of people and financially help those sectors, without creating risks for the population. One of the arguments used was, indeed, that "vaccine passports" would make people feel comfortable in performing daily activities, thus also improving the mental health of the population severely impacted by Covid-19. Those arguments were, in particular, supported by the President of the Italian Swimming Federation and the President of Gymnastic Federation.³⁸

It is interesting to note that the positive view of "vaccine passports" in the tourism sector is not universal. This is because some companies perceive a potential obligation to have a "vaccine passport" as excessive

30 Question 1, submission from Slovakia, referring to information available at: Pravda 18.3.2021: Klus: Očkovacie pasy by mali byť predbežne pripravené na letnú sezónu - Domáce - Správy - Pravda.sk

31 Ibid.

32 Question 1, submission from Greece.

33 Ibid.

34 Question 1, submissions from, e.g., Bosnia and Herzegovina, Finland, Greece, Italy, Lithuania.

35 https://cincodias.elpais.com/cincodias/2021/01/19/companias/1611060654_337047.html.

36 Question 1, submission from Germany, referring to information available at: <https://www.rnd.de/reise/urlaubs-vorteil-durch-corona-impfung-was-auf-reisende-zukommt-6GDIO4D5IREBNH7AW2GE36GHSA.html>.

37 Question 1, submission from Finland.

38 Question 1, submission from Italy.

and more restrictive than the current situation. Some companies have expressed a fear that such “passports” would only bring additional restrictions to travelling and consequentially a decrease in the number of travellers/customers.³⁹ Moreover, the Malta Hotels and Restaurants Association deemed the idea of a “vaccine passport” excessive and suggested that a negative test result should suffice – their main goal appears to be to lower the threshold for tourism.⁴⁰ Similar ideas are echoed in Finland by festival organisers, who have accepted that a vaccination certificate would be an advantage compared to the current situation, but they are not ready to support the position that a vaccination “passport” should be a mandatory condition for entry.⁴¹ As another example of a more sceptical position in the private sector, in Germany the managing director of Dehoga (Germany’s hotel and restaurant trade association) asserted that “[t]he debate is premature because not everyone who wants to be vaccinated can do so yet. (...) it makes no sense to restrict access to our operations to those who have been vaccinated because relevant target groups have not yet received vaccination or will not receive it in the foreseeable future. Until then, there are numerous legal issues to be resolved”.⁴²

Some countries in Europe have already gone **beyond mere discussions** of a “vaccine passport” and taken **specific action**. In addition to the well-known case of the “green pass” of Israel, the Greek government recently enforced new legislation for the vaccination certificate. This is an official certificate given to each person who has already been vaccinated. The procedure is not mandatory; however, each citizen who has already been vaccinated may enter an electronic platform and submit an application in order to obtain the aforementioned certificate.⁴³

In Finland, the Ministry of Social Affairs and Health is preparing a digital Covid-19 vaccination certificate. The certificate would be available in the My Kanta Pages service (online health records system). The plan is for the certificate to be either digital vaccination data, a barcode, a QR code or a combination of these to be available in the My Kanta Pages and people could display the certificate on their phones or have it printed on paper.⁴⁴

In France, a draft law was proposed by the French government on December 21, 2020 and withdrawn the following day.⁴⁵ The main controversial provision allowed subjecting people’s movement, their access to some transportation means, certain places and specific activities, to having been tested negative or having undertaken a preventive or a curative treatment, or having been vaccinated. This was considered by the

39 Question 1, submission from Bosnia and Herzegovina, referring to information available at: <https://rtvbk.ba/covid-pasosi-rjesenje-ili-dodatno-opterecenje/> accessed on 14 February 2021

40 Question 1, submission from Malta, referring to “Vaccine certificate should not be only way to travel – MHRA”. Times of Malta, 15 January 2021, available at <https://timesofmalta.com/articles/view/vaccine-certificate-should-not-be-only-criteria-allowing-one-to-travel.845091>.

41 <https://www.is.fi/kotimaa/art-2000007805273.html>

42 <https://www.rnd.de/reise/neustart-nach-drei-monaten-hotel-schliessung-regelchaos-muss-vermieden-werden-5BEC4G3FOJA3DOM3E5HPL3BMYM.html>.

43 Question 1, submission from Greece.

44 Question 1, submission from Finland. Information referred to in the submission is available online at: <https://stm.fi/en/-/finland-is-preparing-introduction-of-digital-covid-19-vaccination-certificate>.

45 Projet de loi n° 3714 déposé le 21 décembre 2020 instituant un régime pérenne de gestion des urgences sanitaires: https://www.assemblee-nationale.fr/dyn/15/textes/l15b3714_projet-loi.

public to constitute a way to make vaccination mandatory, at a time when polls indicated that only 40% of the French population intended to be vaccinated, one of the lowest rates in the world.⁴⁶

Summing up, discourse in Europe and beyond has been mixed, focusing on both the positive and negative aspects of a potential “vaccine passport”. This is also reflected in the positions of politicians and political parties, in the opinions of experts and the media, and in the attitudes prevalent in the private sector.

Challenges for Human Rights Protection Created by a Potential “Vaccine Passport”

The main human rights challenges referred to in the data of our study are: (a) the potential conflict with data protection/privacy; (b) ensuring that the right to non-discrimination is upheld (especially in the context of freedom of movement).

Right to privacy

Opinion is divided over whether a “vaccine passport” constitutes a new type of instrument with corresponding new risks. Academics point out that states already gather large amounts of data about the citizens’ health status, also concerning vaccination.⁴⁷ Moreover, the practice of documenting vaccinations and providing proof of such vaccinations, especially when travelling, is also relatively well-established. However, previously such documents have been on paper and the data contained in them have not been shared amongst different states. It is important to note, however, that digital uniform versions of vaccination documents have been proposed even before Covid-19 due to the impracticality of a paper document (e.g. ease of losing it; ease of forging it). In addition, the requirement of producing a medical certificate for accessing some services (e.g. health checks of children and their guardians for the purpose of being admitted to certain swimming pools, notably those providing physical therapy prescribed by a physician) is also common in many states.⁴⁸

The main potential encroachment of the right to privacy in this context is the obligation to share personal health information (e.g. when you travel or want to access a venue or a service) to a wide range of people and public or private entities. The **proportionality** of restrictions of privacy in order to curb the spread of the virus has been widely discussed in relation to “contact tracing” measures such as Covid-19 tracing apps and customer lists in restaurants (specifically highlighting the potential for the reappropriation of such data for non-health-related purposes such as criminal prosecution). It has been pointed out that in comparison to the abovementioned measures, which are widely considered proportional, the privacy implications of a Covid-19 passport seem rather limited. In most cases, the information when, where and with what vaccine someone was vaccinated seems to allow significantly less conclusions about this person

⁴⁶ Question 1, submission from France. Data available online at: <https://www.ipsos.com/en/global-attitudes-covid-19-vaccine-december-2020>.

⁴⁷ Question 3, submissions from Bosnia and Herzegovina, Germany, Estonia.

⁴⁸ Question 3, submission from Lithuania.

than (especially compiled) data on contacts or frequented locations that were widely considered proportional.⁴⁹

In assessing the proportionality of a restriction of privacy, it is necessary to identify whether the existence of a vaccination certificate system increases health protection. Some authors have noted that currently there is not enough scientific information available to know: a) the effectiveness of vaccination against all the existing types (variants) of the virus, and b) the time period of immunity.⁵⁰ Therefore, the necessity and effectiveness of the measure is not yet proven, which makes a determination of proportionality difficult.

Data protection

A connected issue with the right to privacy is the problem of ensuring personal data protection in relation to the potential “vaccine passport”. States have different types of health data systems and if a uniform “vaccine passport” is introduced in the EU or globally, many domestic systems will need to adjust accordingly to ensure compatibility and that data management is performed in accordance with the relevant legal requirements.⁵¹ Safety of personal data in relation to the “vaccine passport” must be ensured by technical (safeguards against data leaks and other potential abuses) and legal (defining who and in what manner gets access to personal data) means.⁵²

Some of the data protection questions that need to be considered are: who are the data processors of the sensitive (health) data; what is the legal basis for the processing of data; how long can the data be stored; how are the principles of necessity and proportionality respected⁵³; and how to ensure the implementation of data protection rules by private companies.⁵⁴ A difficult balance has to be found between many interests, among which individual privacy, public healthcare and business interests are crucial, even if they are not the only ones.⁵⁵

Non-discrimination

One of the challenges that comes with a “vaccine passport” is to avoid creating a system where vaccination against Covid-19 essentially becomes mandatory and leads to discrimination towards those not willing or able to get vaccinated.⁵⁶ At this moment it is not yet clear whether the document would be used merely for facilitating international travel, or whether it would serve as a means of allowing or limiting access to private and public spaces (which would have a substantial impact on people’s daily lives).⁵⁷ The potential

⁴⁹ Question 3, submission from Germany.

⁵⁰ Question 3, submissions from Greece, Slovenia and Argentina.

⁵¹ This is highlighted in relation to Question 3 in the submission from Bosnia and Herzegovina.

⁵² Question 3, submission from Lithuania.

⁵³ Question 3, submission from Cyprus.

⁵⁴ Question 3, submission from Portugal.

⁵⁵ Question 3, submission from Italy.

⁵⁶ Question 3, submission from Lithuania.

⁵⁷ Question 3, submission from Albania.

human rights implications of such a “passport” principally stem from individual uses of such a document as a prerequisite for taking part in societal activities.⁵⁸ If the “vaccine passport” were to limit access to services or spaces, there is a significant risk of discrimination as not all people currently can (or want) to be vaccinated (due to a lack of sufficient doses of vaccines, etc.). However, this concern is not universally shared. For example, in Germany, where there is a discussion whether vaccinated people should be exempt from infection prevention restrictions, the Federal Minister of Justice Christine Lambrecht has pointed out that lifting fundamental rights restrictions once they become disproportionate does not constitute an unjustified privileged treatment, pointing out that it is not the exercise of fundamental rights that requires justification, but rather their (continued) restriction.⁵⁹

Moreover, people of different religious groups and their standpoints towards vaccination is also a sensitive matter that has to be taken into account, as the document would likely discriminate against this category of people. It has also been pointed out that in developing countries people living in remote areas are likely to remain disadvantaged as some of them may also not be able to access the vaccine or even afford it.⁶⁰

In discussing potential public space restrictions on the basis of the “vaccine passport”, it is important to bear in mind European Court of Human Rights (ECtHR) case law in relation to *de facto* mandatory vaccinations. Prior vaccination should not be the prerequisite for the exercise of fundamental rights, such as the right to education or the right to work. It was highlighted that Greece has been condemned by the ECtHR in the case of *Sampanis and others v Greece* (2008, 2012) in which the head teachers of two primary schools in Aspropyrgos refused Roma parents the right to enrol their children on the basis of medical reasons (they were afraid of the transmission of diseases since the children had not been vaccinated). The Court found that the Greek government violated article 14 of the ECtHR. In another important case – that of *Vavříčka and others v the Czech Republic* – where the parents refused to submit to the legal obligation to vaccinate their children because they considered, in substance, that such a vaccination was against the interests of their children, they were sanctioned, denied permission to set up a privately run school and their children were denied enrolment in a public nursery school. Although the Grand Chamber has not yet issued its decision on *Vavříčka and others v the Czech Republic* (which will clarify the ECtHR’s view on mandatory vaccination and the consequences of one’s refusal to comply with the national legislation thereon), earlier relevant jurisprudence does not leave much room for assumptions (*Acmanne and others v. Belgium, Solomakhin v Ukraine*) – vaccination is a medical treatment which demands prior consent and a legitimate goal.⁶¹

Another danger that has been highlighted in relation to the “vaccine passport” is that introducing special privileges for the future “passport holders” might in some countries encourage unrest due to the discriminatory effects that this policy could cause. Additionally, if governments begin to request this kind of document, it will encourage private companies to demand it for other activities, with the consequent

⁵⁸ Question 3, submission from Germany, referring to information available at: <https://www.tagesschau.de/inland/spahn-corona-immunitaetsausweis-101.html>

⁵⁹ Question 5, submission from Germany, referring to information available at: <https://www.tagesschau.de/inland/rechte-geimpfte-101.html>.

⁶⁰ Question 3, submission from Albania.

⁶¹ Question 5, submission from Cyprus.

discriminatory effect on the population. As proof of this, the example of the German ticket company Eventim was brought up, noting that the company had already revamped its online booking service to allow for customers to upload proof that they had been vaccinated in anticipation that organisers of events from concerts to sports tournaments will in future require it as a condition of entry.⁶²

Due to the abovementioned concerns, it is vital to define with sufficient precision and clarity the purposes for which any such vaccination certificates are to be used, the right to get vaccinated (or to stay unvaccinated), as well as alternative ways for gaining access to the same goods (spaces, services) and this information on legal aspects should be accessible to the public.⁶³ It has also been noted that prior to adopting a system of „vaccine passports“, in order to avoid discrimination, all key stakeholders should be engaged with and governments should co-ordinate with the WHO on the matter.⁶⁴

The Existence of a Normative Basis for Obliging Private Companies to Enforce Restrictions Originating from the “Vaccine Passport”

The study indicates the complete absence of the normative basis in national legal systems which would obligate private companies to enforce restrictions originating from the “vaccine passport”. In addition to noting such an absence, the respondents from different countries have pointed to some legislative and administrative aspects. For example, Finland has a prohibition to delegate administrative tasks to private entities. Private entities in Lithuania are expected to seek assistance from the public authorities for enforcing restrictions originating from law. Spain reported the existence of a general legal framework for private enforcement of restrictions if there is a public interest.

Eight countries or areas have reported no discussion in legal circles about legality or even constitutionality of such obligation.⁶⁵ In Lithuania is an ongoing discussion as to the constitutionality of paramilitary entities’ right to enforce restrictions to fundamental rights. Greece has a large-scale discussion regarding whether some airlines or shipping companies should be obliged to ask for vaccination “passports”. Nobody seems to be in favour of this position in public dialogue at present.

A related issue is whether, in the absence of a legally binding requirement to enforce the “vaccine passport” when deciding who has and who has no access to privately provided services, the private companies have the legal discretion to make these dividing decisions on their own volition. In the other words, this is not a question of legal obligation to discriminate, but legally allowed freedom to discriminate. It appears that some countries see such debates and we have reason to assume that such discussions will emerge within a relatively short period of time, therefore the comparative results of this study may soon not represent the

⁶² Question 3, submission from Argentina.

⁶³ Question 3, submission from Lithuania.

⁶⁴ Submission from the United Kingdom, referring to Recommendation 1 from Ada Lovelace Institute (2021), „What place should COVID-19 vaccine passports have in society? Findings from a rapid expert deliberation chaired by Professor Sir Jonathan Montgomery“, available at: <https://www.adalovelaceinstitute.org/summary/covid-19-vaccine-passports/>.

⁶⁵ Bosnia and Herzegovina, Italy, Slovenia, Latin America, Portugal, Serbia, Malta, France

reality. However, we believe that the essence of ongoing and geographically spreading debates will have similar focus points. For the purposes of the current study, Romania claims that it is possible for private parties to establish rules they consider necessary if this is not explicitly prohibited by law. Under the current legal situation, it would be difficult to prohibit a restaurant owner to only offer services to vaccinated people if he or she wants to do so in Romania. German ministries have not developed a clear position regarding the question of whether private companies are allowed to exclude non-vaccinated people from events or travel. The Federal Ministry of Justice recently stated that this depends on “a multitude of factors about which no reliable statement can be made at this point in time”.⁶⁶ In Estonia, some practising lawyers have initiated a narrative on social media that private individuals and companies are principally allowed to decide with whom they want to do business.

The Existence of a Normative Basis to Impose Restrictions on the Basis of the “Vaccine Passport” in the Exercise of Fundamental Rights in Public Space and Accessing Public Services

In most participating countries, there has been no thorough analysis as to whether a normative basis exists to restrict fundamental rights through the requirement of having a “vaccine passport” to access certain locations or services.⁶⁷ Most countries have not enacted concrete legislative acts or provisions to deal with a pandemic of this scale and magnitude.⁶⁸ In Italy, the Vice-President of the Data Protection Authority has maintained that a “vaccine passport” is unlawful, under the current Italian legal framework, unless *ad hoc* legislation is passed. The Vice-President highlighted that there is no obligation to accept treatment in the form of vaccination and therefore it should be thoroughly examined whether someone could suffer any kind of consequences from the choice of not submitting him/herself to vaccination.⁶⁹

Some academics have pointed to the fact that the bases for a “regular” balancing of rights could be used in this context.⁷⁰ It is quite common to have constitutional provisions that allow for the restriction of certain human rights in specified conditions. For example, the Serbian Constitution provides a normative basis, which could be utilised in the case of the “vaccine passport” – its Article 39, which regulates freedom of movement, states that “[f]reedom of movement and residence, as well as the right to leave the Republic of Serbia, may be restricted by the law if necessary for [...] prevention of spreading contagious diseases [...]” (Article 39 (2)(b)).⁷¹

⁶⁶ <https://www.airliners.de/eu-impfpass-funktionieren/59025>

⁶⁷ Question 5, submissions, e.g., from Finland, France, Malta, Portugal.

⁶⁸ Question 5, submissions, e.g., from Albania, Bosnia and Herzegovina, Greece, Romania.

⁶⁹ Question 5, submission from Italy, referring to information available at: Ginevra Cerrina Feroni, Pass vaccinali illegittimi senza una legge *ad hoc*, *Il Messaggero*, 1 March 2021, available at <https://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/9550463>.

⁷⁰ E.g., question 5, submission from Spain.

⁷¹ Question 5, submission from Serbia.

Case Study of Lithuania⁷²

In Lithuania there is an ongoing debate in legal circles concerning whether the special legal regime presently applied in the country provides a sufficient legal basis for the various restrictions that are applied in connection with the declared quarantine. Prof. E. Šileikis claims that currently imposed restrictions (e.g., of movement between municipalities) are not legitimate, as an emergency (*ekstremali situacija, karantinas*) in Lithuania has not been declared under the Law on Public Emergency (*Nepaprastosios padėties įstatymas*) in which case it would have been declared by the parliament and would provide a proper legal basis for far-reaching restrictions. Assoc. prof. V. Vaičaitis holds that restrictions currently imposed in Lithuania by the government by means of its resolutions (*nutarimas*) go beyond what is permitted by the currently applied Law on Prevention and Control of Communicable Diseases in Humans (*Užkrečiamųjų ligų profilaktikos ir kontrolės įstatymas*) and the Law on Civil Protection (*Civilinės saugos įstatymas*), but the situation could be rectified by amending the law. There is some disagreement in legal circles on whether a public emergency should be declared by the parliament or whether the formally more lenient legal regime is sufficient in the current conditions.⁷³ Similar questions could be raised with regard to potential vaccine certificates and resulting restrictions for those not in possession of them.

If vaccine certificates were also to be required after the pandemic and, consequently, after the revocation of the special legal regime of emergency of one kind or another, the requirement to have vaccine certificates would raise questions of a different kind, similar to the one of whether there is a legal basis to admit to nursery schools the children whose parents refuse to have their children vaccinated (unless there are counterindications) with standard vaccines (against measles, rubella, poliomyelitis). The Supreme Administrative Court of Lithuania in 2016 (case no. I-6-662/2016) found a requirement to have children vaccinated unconstitutional but, in that particular case, only because such a requirement in Lithuania stemmed not from a law adopted by the parliament but rather from a hygiene norm adopted by the Minister of Health. The Court relied on the ECtHR case law and addressed the issue of vaccination under Article 8 of the ECtHR holding that vaccination was an interference with the physical integrity of a person, which fell within the scope of the right to private life. Restrictions of this right are possible but need to meet certain requirements including that of having a proper domestic legal basis. As a result of the above Court decision, the requirement of vaccines was dropped.

It is noteworthy that currently the Lithuanian Law on the Prevention and Control of Communicable Diseases in Humans (Article 11 § 1) provides that immunoprophylactic measures shall be administered upon the person's consent unless other legal acts provide otherwise. At present there are no such laws (in line with the abovementioned case law, acts of a lesser legal value would not suffice as a basis for an obligation to get vaccinated). Furthermore, the government is currently opposed to the idea of mandatory vaccination.⁷⁴

⁷² Question 5, submission from Lithuania.

⁷³ Vilnius University Faculty of Law conference, 04/02/2021, <http://www.teise.pro/index.php/2021/02/05/covid-19-pandemija-issukiai-zmogaus-teisems-demokratijai-ir-teisines-valstybes-principams/>.

⁷⁴ D. Nagelė, https://www.respublika.lt/lt/naujienos/mokslas/sveikata/vyriausybe_pries_privalomus_skiepus/, 22/01/2021.

Some experts also hold that an additional provision in the law (adopted by the parliament) would be required for linking access to certain spaces and services with the possession of a vaccination certificate, irrespective of whether vaccination itself is mandatory or not. Alternatively, a new legal act by the EU could potentially provide the necessary legal basis for such restrictions.

Main Practical Challenges and Fundamental Concerns – from a Human Rights Perspective – Connected with the Idea of the “Vaccine Passport”

For the purposes of academic scholarship, the challenges and concerns put forward by respondents are not identified by countries, since these issues are not country-specific, but instead substance-specific.

Practical challenges identified can be categorised as follows:

Difficulties in reaching a *political consensus* about the need for the “vaccine passport”.

Challenge to provide a *legal framework* for the vaccine passport. This challenge has also the aspect of the *exact content* of the “vaccine passport”. A legal framework is needed to define the passport’s nature, precise regulation, effects, procedure for obtaining and guarantees of judicial protection. The matter of fragmented standards across the countries may emerge.

Challenges related to *implementation*. This seems to be the main practical challenge, as respondents refer to difficulties originating from decentralised political and medical systems, making certain that the idea of the passport does not disappear or transform in the midst of administrative hurdles, as well as the unknown costs involved with initiating such system.

Challenges related to *safeguards* during implementation. These are primarily concerns about the purposeful use of gathered medical data. The data should not pass to the hands of private companies, become an instrument for discrimination in employment activities.

Fundamental concerns

The main concern is that the vaccine passport can lead to everyday discriminatory choices by individuals, the public, and private entities, which in turn become deeply rooted discriminatory patterns either in practice or law or both. Respondents point out that discrimination can have several levels – it can either occur within a specific country, or within the EU, or we can also speak of global discrimination patterns. Discrimination can have horizontal and vertical dimension.

Horizontal discrimination means that the “vaccine passport” can lead to “private” profiling and the exploitation of vulnerabilities for commercial purposes.

Vertical discrimination means that in some form or another “public lists” will be created. This in itself is a practice against the notion of privacy. Respondents point out that if “vaccine passports” are finally adopted, these carry a new national or regional or global prejudice against young people, pregnant women and individuals with previous medical conditions. The global divide between the rich and the poor may deepen.

Availability of alternative forms of participation to those who do not carry the passport (mask wearing obligation, quarantine) is emphasised. The issue of alternatives also involves the vertical and horizontal dimension.

From a purely rights perspective, the possibility of a “vaccine passport” which can have a decisive effect if some doors are opened or remain closed to rights holders, is connected to questions about the scope and universality of some concrete human rights. The right to privacy contains the specific right to say no to medical treatment. Contemporary scholarship does not exclude that there is also a right not to know one’s medical condition, which by default excludes disease testing and vaccination. If the “vaccine passport” becomes a universal instrument of social control enabling full participation for some and blocking others out, then the decision as to whether to get vaccinated or not may no longer be a matter of free choice but rather a recognition of necessity. The view from human rights scholarship points to the absolute nature of the right to refuse medical treatment and not to know one’s medical condition, which does not become compromised due to the utilitarian need for social participation.

Recommendations

The main challenge is how to minimise the possibility of discrimination coming hand in hand with the “vaccine passport”.

To avoid potential discrimination in providing access to public venues and services, alternative means of gaining access should be made available (e.g. by showing a recent negative Covid-19 test result), so that vaccination does not become *de facto* mandatory. Moreover, the access restrictions should be justified and proportionate.

The EU and national governments should reach an agreement as soon as possible on the legal framework and standards forming the basis of an EU “vaccine passport”.

States should refrain from moving vigorously ahead with their national norm creation in order to avoid EU wide fragmentation.

The general legal framework should contain safeguards against vertical and horizontal profiling and discrimination, and provide, *inter alia*, clear and legally binding operation model for private entities when conditioning access to services upon the presentation of the “vaccine passport”.

Data protection (GDPR) requirements need to be taken into consideration in all – planning, legislative and implementation – stages of creating a “vaccine passport”.

Annex 1. Questionnaire

1. In your country, is there discussion regarding an EU-wide “vaccination passport”?

If yes, then:

- Do political parties support this idea? Please briefly give your main arguments.
- Do private companies support this idea? Please briefly give your main arguments.
- What is the perception in the media? Please briefly give your main arguments.

When replying to the previous question, please address what are the (positive and negative) factors that are mentioned in connection with the “vaccine passport” idea?

2. Is there an e-health system (that could be utilised in connection with the vaccination passport)? Is this system based on blockchain or other comparable technology and what (if any) safeguards are built into the system to safeguard the right to privacy? (In concrete terms, you may comment on what is the country’s reaction to such technology or are there competing technologies?)
3. Can you provide input for our recommendations regarding this issue – especially commenting on the matter of whether giving up privacy in exchange for alleged increased protection of the health of the general protection creates fundamental and/or practical challenges of human rights protection. What are these challenges in particular?
4. Is there a normative basis which would obligate private companies to enforce restrictions originating from the “vaccine passport”? If not, are these being worked out or is there respective discussion in legal circles? Concrete examples would be excellent.
5. Is there a normative basis to impose restrictions on the basis of the “vaccine passport” in the exercise of fundamental rights in public space and accessing public services? If not, are these being worked out or is there respective discussion in legal circles? Concrete examples would be excellent.
6. Can you please identify and briefly comment on two main practical challenges and two main fundamental concerns – from a human rights perspective – connected with the idea of the “vaccine passport”. (For example, how to store respective information, whether to store and manage data for those who are not vaccinated, are there any challenges related to enforcement?)
7. In your view, is there a need for such an instrument? If no, please comment. If yes, how can we simultaneously guarantee fundamental rights?
8. In your view, does the rhetorical (positive) aspect of the proposed “vaccine passport” overshadow the fundamental concerns? Briefly comment.