

CONSEQUENCES OF LEGAL LIABILITY OF PARTIES IN CASE OF EXPRESSION OF REFUSAL OF REALIZATION OF THE MANDATORY VACCINATIONS

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Abstract

The views expressed through the media institutions in order to draw an alarm signal on the draft Law on Vaccination, draw attention to contravention sanctions without enforcing the term "medical negligence" and without corroborating the definition here of the Law no. 272/2004 on the protection and promotion of the rights of the child (r) respectively with the consequences expressly provided in the methodology approved by the Government Decision no. 49/2011. In fact, medical neglect listed as part of the category of forms of violence that can be exerted on the child is alongside possible violation of child rights, criteria that can repercussions across the family, obviously under the condition of proving the potential causal link with the form of violence. This article seeks to raise awareness of the consequences of legal liability for parents when expressing the refusal to carry out compulsory vaccinations, how vaccinations can really affect their rights, and ultimately cause undesirable effects in the child's life, but also to discuss which is based on the existing case-law of the European Court of Human Rights, focusing on the recognition of the obligation of the medical act of vaccination as an interference with the right to respect for private life, and especially on the condition of proving necessary, appropriate and proportionate of the compulsory vaccination decision.

Keywords: written refusal, mandatory vaccination, medical negligence, post-vaccine adverse effects.

JEL Classification: K23, K32

1. "Medical negligence" - introductory analysis from the point of view of the right to individual health and the right to collective health.

In the form adopted by the Senate of the draft law on the vaccination of persons in Romania, we identify the phrase "medical neglect" which, although in a first phase leads us to the involvement of the accountability of the medical staff, we identify it as a manifestation of a repeated refusal from the parent or legal representative, to take steps to administer the child of the mandatory vaccine antigens.

Specifically, we find out from this project that "medical neglect" leads to parental contravention and criminal liability at a time after informing him about unwanted post-vaccine adverse reactions, but undesirable reactions that have existed and can still occur with the vaccine, the mode of delivery of the medical act of vaccination, or certain particularities of the vaccinated person, which probably did not have to be identified.

In other words, on the simplest logic concluding, the parent is constrained to choose the vaccination, assuming the risk of adverse consequences on the child's life, in the context of a causal relationship that does not actually involve him. The fact that some believe that the parent must understand and accept as a single answer the compensatory measures offered by the state in case of long-lasting adverse effects is far from representing the rule, just as the moment of proving a causal relationship does not represent the point final.

Corroborating the obligation of the County Commission for Vaccination to notify the General Directorate for Social Assistance and Child Protection, with the legislation regulating the attributions of this public institution, we find the parent in front of new challenges that could affect and endanger the development of the family relationship, relationship with the child. So we follow, consequences that can affect psychologically. And why? It is a natural question, as the consequences of the adverse effects of vaccination are reflected in more and more burdensome and lasting cases than those of the non-vaccinating decision. Practically we come to ask ourselves,

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under what conditions are there greater chances of endangering the life, physical development, social integration, bodily integrity and even psychological integrity of the child? Are not we in the face of physical, emotional and psychological abuse of the family unmotivated, as long as there is no urgency to secure the right to collective health?

It is understandable and accepted that the right to individual health is recognized and promoted and can benefit from it as long as it does not affect the right to collective health and the latter requires preventive measures. But these preventive measures must be dealt with in a way that is limited to the scope of the aim pursued and does not cause the attainment of individual rights that can in turn produce physical, social and psychological consequences. The population needs to be informed of the ways of vaccination prevention by informing the epidemiological situation in a territorial context and the need to impose an emergency regime for certain population groups for the whole population or not at all. The fact that some states in the European Union, such as the United Kingdom, Germany, Austria or Switzerland have established that vaccination is an optional medical act, does not mean a lack of concern, but rather a focus on studies, checks and ongoing research on the epidemiological situation at the territorial level, a systematic and continuous collection of data on the health status of the population on the basis of which the public health priorities are identified and concludes with the idea of establishing or not of special measures.

This role, but also the institutions to which it belongs, is regulated at national level³, the main functions of public health assistance for epidemiological surveillance, epidemiological field investigations, prevention and control of epidemics or the establishment of epidemiological alert status. National and regional centers are responsible for monitoring the health status of the population and identifying community health problems, have special measures for patients or contacts with communicable diseases, can request measures to limit the circulation of people.

2. "Medical negligence" - analysis in the light of the draft Law on the vaccination of persons in Romania and in conjunction with the regulations in force

2.1. The corroboration of the draft normative act with the legislation in force

As a result of the corroboration of the draft normative act with the legislation in force, we note the following stages:

1. The parent / legal representative, who is entrusted with the responsibility of presenting the child to the vaccination at the time of enrollment in a community⁴, must submit a certificate stating that the vaccinations have been made / not performed;

2. If the vaccine history does not exist or is incomplete, within one year, the parent / legal representative must prove that the vaccination scheme has been completed in accordance with the vaccination schedule to be issued by the County Vaccination Commission;

3. In case the parent fails to report to the legal representative of the community the timetable for recovery, the latter has the obligation to notify the County Vaccination Commission no later than 30 days from the date of the child's arrival in the community;

4. The County Vaccination Commission records the unvaccinated child, asks parents to go to counseling until accepting the recovery plan every three months, informs the family doctor about the measures taken against the persons on their list and informs the state inspection in order to find contraventions and to apply contravention sanctions.

5. If, within one year from the date of entry into the community, the recovery timetable has not been respected by overlapping with the vaccination scheme, the county vaccination commission must notify the county school inspectorate.

³ Law no. 95/2006 on Health Reform (r) - Title I: Public Health.

⁴ "A group of children who, as the case may be, attend the courses of a state, private or confessional educational institution in Romania, inclusive of a special education institution, as well as any social assistance institution."

6. The County Vaccination Commission shall notify the competent public authorities including any facts that may be considered as falling within the criminal sphere and submit a written request to the Directorate General for Social Assistance and Child Protection either with reference to a suspicion of medical negligence or a case of violation of the child's right to health by his / her parent / legal representative;

7. The General Directorate for Social Assistance and Child Protection, within the meaning of the legislation specific to the object of activity, taking into account the provisions of the Methodology on prevention and intervention in a multidisciplinary and networked network in cases of violence against children and domestic violence, perceiving medical neglect according to the definition, namely "absence of necessary care, omission of vaccinations and control visits, non-application of treatments prescribed by a physician, not presenting to recovery programs", finds a form of deprivation / neglect violence on the child.

8. The multidisciplinary team's formulation of a diagnosis of the form of violence against the child, the actual needs of the child as well as the outline of the specialists' point of view and whether or not intervention for the child is a priority;

9. Instituting a special protection measure with respect to the child to whom the neglect has been established; the degree of placement or placement in emergency situations is determined by the court at the request of the Directorate General for Social Assistance and Child Protection in the case of the neglected child⁵;

10. The child's parents are required to take all measures to facilitate the physical, psychological and social reintegration of the child who has been the victim of any form of negligence;

2.2. Considerations on the correspondence between medical negligence as a form of violence against the child and the Criminal Code

Incapacity or refusal to place the necessary care for the development of the minor on the physical, mental and mental health line, the serious danger to the whole body, in relation to the existence of a continuity action (action/inaction), the characteristics and gravity of the deed violence, the result of cumulative effects implies civil, contraventional or criminal liability.

In the Government Decision no. 49/2011 for the approval of the Framework Methodology on prevention and intervention in a multidisciplinary and networked team in cases of violence against children and domestic violence, the correspondence between forms of violence against the child on the one hand and the Criminal Code and other laws, on the other hand. Concerning the forms of neglect, we have correlated with certain offenses, such as the ill-treatment of the minor (Article 197 Penal Code) or the danger of a person unable to take care (Article 314 of the Old Criminal Code).

The offense of maltreatment of the minor consists in "Punishing in serious danger, through measures or treatments of any kind, the physical, intellectual or moral development of the minor by parents or by any person in charge of the minor is punished by imprisonment from 3 to 7 years and the ban on the exercise of certain rights"⁶. Such a definition directs us towards the need to understand, by reference to the description of medical neglect, which are actually the facts that fall into the field of ill-treatment. We have described in the draft Law on Vaccination "the manifestation of a repeated refusal by the parent", and in Law no. 272/2004 on the protection and promotion of children's rights "the absence of necessary care, the omission of vaccinations and control visits, the non-application of the treatments", so the inactions perceived by the institutions empowered as deprivation of the minor's rights. The continuity fund following the repeated procedures of parental

⁵ Law no. 272/2004 on the protection and promotion of the rights of the child (r): "Art. 60 - The special protection measures established by the present law benefit from: c) the child abused or neglected".

⁶ Penal Code - Law no. 286/2009 adopted on 25 June 2009, pursuant to the provisions of art. 114 par. (3) of the Romanian Constitution, republished, as a result of the Government's commitment to the Chamber of Deputies and the Senate, in a joint sitting dated June 22, 2009, published in the Official Gazette no. 510 dated July 24, 2009.

information and counseling demonstrates the intentional nature of these inactions expressed precisely for this purpose, and the existence of a future legal obligation to act alongside the possible creation or facilitation of a state of danger for the protected social value places us in front of a comisic crime through omission.

However, we are in the presence of a crime only to the extent that the state of danger is produced, which in the case of parental refusal does not exist at the moment of manifestation, and a deterioration of the child's health over time presupposes a causal relationship between the harmful consequences for the development physical integrity or, where appropriate, the health of the minor concerned and the decision taken at a particular moment. On the other hand, in view of the undesirable adverse effect resulting from the administration of the vaccine, the deterioration of the state of health reflected by hospitalization, the installation of a disability or the death of the child occurs urgently, so that the causal relationship is much faster and easier to prove. However, forensic certificates will also be required to identify a relationship of possible causality between the reported situation and the diagnoses found.

3. Are the limits imposed on the exercise of parental rights - according to ECHR jurisprudence, interference or not in the exercise of the right to privacy?

The task of raising and educating the child implies a great responsibility, as the obligation not to harm the health of the minor or the stability of his / her family life implies a certain conduct imposed on any natural or legal person and all in one way or another mistakenly managed may harm the child's right to be protected, the superior interest, the special protection and assistance regime conferred by the Constitution in the exercise of his or her rights.

Of particular importance, which must be taken into account and which should be initiated, is that in the case of compulsory vaccinations, both competent institutions and parents or legal representatives, aim at defending the child's health and development, the well-being of the child and avoiding a possible deterioration of the condition its health, the child's abilities. It is equally true that the competent institutions also aim at preventing and limiting the spread of communicable diseases.

By reading Article 8 of the European Convention on Human Rights, we see a balance between the individual interest reflected by the right to respect for his private and family life and the collective interest, since it is not acceptable to interfere with a public authority in the exercise of the individual interest " is provided by the law and constitutes, in a democratic society, a necessary measure for national security, public security, the country's economic well-being, the defense of order and the prevention of criminal deeds, the protection of health, morals, rights and freedoms of others. "

This is precisely why this is the chance and considers it opportune to shape the law on compulsory vaccination in a manner that provides for a dividing line between "mandatory" and "necessity", and finally setting limits to interference in the exercise of rights parenting and setting the exact moment and the conditions under which it can be triggered.

Concerning compulsory vaccination and the assessment of the imposition of this medical act as an interference with the right to respect for private life, provided by art. 8 of the Convention, the European Court of Human Rights already has a practice because it has been heard in several cases, including: Aleksandra Skerlevska v. Republic of Macedonia⁷, Solomakhin v. Ukraine - application no. 24429/03 and Carlo Boffa and Others c. San Marino, application no. 26536/95.

The subject of the application in the case of Aleksandra Skerlevska v. Republic of Macedonia concerned the infringement proceedings, in which the Court of First Instance of Bitola condemned the applicant for refusing to allow her newborn to be vaccinated, relying inter alia on unjustified interference with parental rights and her freedom of conscience and religious belief. The

⁷ Section I, ECHR - Application no. 54372/15 - filed on 26 October 2015 and communicated on 12 June 2017 – Aleksandra Skerlevska v Republic of Macedonia.

European Court of Human Rights has concluded that such an interference with parental rights may be permitted only under the condition of domestic law and under the condition of proving that it is necessary, proportionate and proportionate in a democratic society and that the aim pursued must have been legitimate. It is therefore recognized that compulsory vaccination is indeed a medical act / involuntary medical treatment which is an interference with the right to respect for private life but which is admitted once provided for by law, and only if the proportionality of the measure implies that before vaccination, doctors have taken all care to ensure that the vaccine is not harmful to the child's health.

In situations where the petitioners claim health damage by administering the vaccine, the burden of proof always lies with them. Thus, in the case of *Solomakhin v. Ukraine*, with reference to the evidence administered by the applicant, the Court held that he had not shown that vaccination would have affected his health. The challenge was to administer a diphtheria vaccine and the Court found that the interference could be motivated by public health considerations and the need to control the spread of infectious diseases. He acknowledged the act of vaccination itself as an interference with the applicant's private life but found that such an interference as long as it is provided by domestic law and has a legitimate aim, namely the protection of public health, is accepted.

In the case of *Carlo Boffa and Others v. San Marino*⁸, the proportionality to the aim pursued was questioned, bearing in mind that the national authorities enjoy a margin of discretion, which also depends on the appropriateness of the intervention, and a large-scale vaccination campaign obliges individuals to put the general interest in the health of others, above personal interest, as long as their own life is not in danger. It has also been reiterated that the notion of necessity implies an interference based on a stringent social need, especially in proportion to the legitimate aim pursued⁹.

It should be noted that in all these cases the applicants have pointed out that the risk of death from vaccines or undesirable side effects is high and they have pleaded breach of Article 2 of the Convention and that it is impossible for parents to freely choose to vaccinate themselves children are an unjustified interference with freedom of thought and conscience, with personal beliefs. In parallel, the Court has always taken the necessary steps to establish the direct relationship between the applicant and the damage he considers to have been suffered as a result of the alleged violation in order to claim that they are victims of non-compliance with the provisions of the Convention but also with the evidence they administer. And let's not forget, as we have shown above, that the burden of proof lies with the patients, parents / legal representatives, who have to prove that the vaccination would have affected their child's health.

Parents document, read, and go so armed at informal meetings with family doctors that they will identify many situations in which the latter will not have the satisfactory answer, or even more, can not guarantee and express what they are, and really wants the parent, certainly starting with the quality of the vaccine, continuing to ensure that transport is carried out under perfect protective conditions and finalizing with an outstanding medical analysis and workmanship. In the documentation for this material we identified a well-documented article on the ActiveNews¹⁰ site, which includes an extract from a monograph titled "Vaccines and Immunity" signed by Professor Dr. Yehuda Shoenfeld of the Hebrew University "Tel Hashomer "In Israel, which lists autoimmune

⁸ on 11 February 1993, the General Medical Institute of Saint-Marino established the vaccination program against hepatitis B, the vaccination being regulated as compulsory.

⁹[https://hudoc.echr.coe.int/eng#{"documentcollectionid2":\["GRANDCHAMBER","CHAMBER"\]}](https://hudoc.echr.coe.int/eng#{); [https://hudoc.echr.coe.int/eng#{"itemid":\["001-29194"\]}](https://hudoc.echr.coe.int/eng#{); consulted on. 15.03.2018.

¹⁰ The document is available online at: <https://www.activenews.ro/stiri/Legea-vaccinari-obligatorii-Legislatia-nationala-si-internationala-care-interzice-obligativitatea-unui-act-medical-asupra-unei-persoane-Care-sunt-bolile-autoimune-induse-de-vaccinuri-146209> - Ștefania Brandușă, *Binding vaccination law: National and international legislation prohibiting the obligation of a medical act on a person. What are Autoimmune Diseases Induced by Vaccines*, consulted on. 15.03.2018.

diseases induced by vaccines. I can only say that it was not at all a problem imagining the reaction of parents directly interested in this time.

4. Conclusions

We assume that the starting point in drafting the draft law on the vaccination of persons in Romania had to take into account the motivations contained in the existing jurisprudence of the European Court of Human Rights, with emphasis on the recognition of the compulsory medical act of vaccination as an interference with the right to respect private life but especially on the condition that the compulsory vaccination decision is necessary, appropriate and proportionate. The notion of necessity implies an interference based on a need that proves to be stringent, which can only intervene in cases determined on the basis of studies, verifications and permanent researches of the epidemiological situation at the territorial level, the identification of community health problems what would justify the need to impose an emergency regime for certain population groups, for all or not at all. Neither should the statistics of cases of adverse reactions, the onset of autoimmune diseases or deaths be neglected, and in this context should have prevailed the special protection and assistance regime granted to all children by the fundamental law through the Romanian Constitution. In parallel, the methodology for multidisciplinary and networking prevention and intervention in medical negligence should be modified and adapted accordingly.

Bibliography

1. Ștefania Brândușă, *Binding vaccination law: National and international legislation prohibiting the obligation of a medical act on a person. What are Autoimmune Diseases Induced by Vaccine*, <https://www.activenews.ro/stiri/Legea-vaccinarii-obligatorii-Legislatia-nationala-si-internationala-care-interzice-obligativitatea-unui-act-medical-asupra-unei-persoane-Care-sunt-bolile-autoimune-induse-de-vaccinuri-146209>, consulted on 15.03.2018.
2. Law no. 95/2006 on health reform, republished in the Official Gazette, Part I no. 652 of 28 August 2015, as amended.
3. Law no. 272/2004 on the protection and promotion of the rights of the child, republished in the Official Gazette, Part I no. 159 of March 5, 2014, as amended.
4. Government Decision no. 49/2011 for the approval of the Framework Methodology on prevention and intervention in a multidisciplinary and networked team in cases of violence against children and domestic violence, published in the Official Gazette, Part I no. 117 of 16 February 2011.