

## WHAT IS NEW WITH MUTUAL RECOGNITION IN PUBLIC LAW? A (POST) PANDEMIC REFLECTION

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**Abstract:** During the two years of the COVID-19 pandemics, countries have introduced various forms of certificates, approving either partial or full vaccination of the bearer of such certificate against COVID-19. While such certificates were originally intended to serve primarily for domestic purposes, various regimes of recognition of these certificates by other countries have gradually emerged during the second year of pandemics. This article understands the COVID-19 pandemics as a unique laboratory, where various regimes of recognition have emerged. It analyses major trends which arose with respect of mutual recognition of vaccination certificates. The main research question of this article is whether any key lessons can be learned from these developments for the general theory of mutual recognition in public law. In broader terms, this article also aims to deal with major challenges that the emergence of various regimes of recognition have implied for the scholarship of public law.

**Key words:** Mutual recognition, COVID-19 pandemics, vaccination certificates, vaccination exclusivism, vaccination pluralism, reciprocity

### INTRODUCTION<sup>1,2</sup>

*“Whosoever comes into Italy, and from whence soever; but more especially if he come from suspected places, as Constantinople, never free from the plague; he must bring to the Confines a certificate of his health”*

FYNES MORYSON, *An Itinerary: Containing His Ten Years Travel*,  
London, 1617<sup>3</sup>

Just few months before the outbreak of the COVID-19 pandemics, an interesting study entitled *Health Passes, Print and Public Health in Early Modern Europe* was published in the *Social History of Medicine*.<sup>4</sup> Here, *Alexandra Bamji* examined health passes issued by various cities of Europe in the period between 1484 and 1806 to confirm that the bearer had travelled from a city which was free from plague. In this respect, the author argued

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<sup>2</sup> This is a written and expanded version of a lecture, which opened the round-table entitled “What is new with mutual recognition in public law?” at the Faculty of Law, National and Kapodistrian University, Athens, Hellenic Republic in May 2022. Sincere thanks go to Professor Haris Pamboukis and Lecturer Faidon Varesis for their kind invitation, hospitality and several important incentives, which I reflected in the final version of this article.

<sup>3</sup> BAMJI, A. *Health Passes, Print and Public Health in Early Modern Europe*. *Social History of Medicine*. 2019, Vol. 32, No. 3, p. 441.

<sup>4</sup> *Ibid.*, pp. 441–464.

that a “*shared culture of public health print*” has emerged in Europe, inspired by recognition of print’s persuasiveness, efficiency and capability to transcend the boundaries of place.<sup>5</sup>

From today’s point of view, this study on the emergence of a shared European culture of health passes seems to be more than prophetic. Only a few months after its publication, a gradual introduction of vaccination against the COVID-19 caused a need to provide persons with a document, approving the fact that vaccination was either partially, or fully completed. Various regimes of public law began to require presentation of these documents for access to various services, and subsequently, also for entry into their territories.<sup>6</sup> One must bear in mind that the emergence of these documents was not the product of any co-ordinated approach, but merely a reaction by public authorities to the realities of the pandemics.

Consequently, documents confirming vaccination have primarily emerged as a product of domestic law and do not have their origin in any form of international law. However, despite any form of co-ordination at an international level in the early phase, the process of introduction of these documents was global. While there are grave differences among various jurisdictions, one may argue that these documents have a certain common feature, as they represent - in principle - an instrument of public law. Despite the differences outlined, this article will refer to these documents by an umbrella term, “vaccination certificates”.<sup>7,8</sup>

Emergence of vaccination certificates and their implications for both public and private law have attracted the considerable attention of legal scholars so far.<sup>9</sup> Some authors<sup>10</sup> argued any introduction of vaccination certificates must be carefully considered due to ethical reasons. Other warned<sup>11</sup> against cybersecurity threats, arising from digital forms of certification. Restrictions in the transboundary movement of persons, arising from the introduction of vaccination certificates, have also attracted<sup>12</sup> criticism in legal scholarship. A common denominator of all these critical voices was that they entirely ignored the existence of historical experiences existing in Europe.

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<sup>5</sup> Ibid., pp. 462–464.

<sup>6</sup> PARIS, E. Applying Proportionality Principle to COVID-19 Certificates. *European Journal of Risk Regulation*. 2021, Vol. 12, No. 1, pp. 287–297. See also SIMONNEAU, D. Gérer les frontières par temps de pandémie. *Économie politique*. 2020, Vol. 89, pp. 91–98.

<sup>7</sup> Terminology varies and many other terms are being used, such as immunity certificates, COVID-19 passports, green passes, health passes etc.

<sup>8</sup> This article addresses only the problem of mutual recognition of vaccination certificates. However, the problem itself is much broader and also includes mutual recognition of PCR tests, certifications on antibodies etc.

<sup>9</sup> In August 2021, a special issue of the *European Journal of Risk Regulation* was published, dealing with the gradual introduction of vaccination certificates in various jurisdictions.

<sup>10</sup> See GREELY, H. COVID-19 immunity certificates: science, ethics, policy and law. *Journal of Law and the Biosciences*. 2020, Vol. 7, No. 1, pp. 1–29. See also FOX-MURATON, M. Le pass sanitaire, un sérieux risque éthique. *The Conversation*. 2021.

<sup>11</sup> See GSTREIN, O. The EU Digital COVID Certificate: A Preliminary Data Protection Impact Assessment. *European Journal of Risk Regulation*. 2021, Vol. 12, No. 1, pp. 370–381. Also see BELKHELLADI, A. Les attestations de vaccination sont-elles le prochain vecteur de cyberrisques? *Deloitte*. 2021.

<sup>12</sup> See TAZZIOLI, M. A. “Passport to Freedom”? COVID-19 and the Re-bordering of the World. *European Journal of Risk Regulation*. 2021, Vol. 12, No. 1, pp. 355–361. Also see HÄKLI, J. COVID-19 Certificates as a New Form of Mobility Control. *European Journal of Risk Regulation*. 2021, Vol. 12, No. 1, pp. 362–369 and MILANOVIĆ, M. The compatibility of covid passes with the prohibition of discrimination. *Union University Law School Review*. 2021, No. 2, pp. 357–370.



public,<sup>16</sup> but was shared also by other Italian maritime republics, such as the Republic of Genoa (see the “green pass” as depicted above).

However, the experience with circulation of health certificates goes beyond the territory of Europe. Documents declaring immunity against yellow fever were frequently circulated in the Caribbean and the South of the United States in the 1900s.<sup>17</sup> With the emergence of aerial transport, certificates proving vaccination, or immunity against cholera, yellow fever, smallpox and typhus were introduced for the airplane staff. An international regime of mutual recognition of these certificates (*yellow cards*, *carte jeune*) was firstly established in 1933 by the *International Sanitary Convention on Aerial Navigation*.<sup>18</sup> This was replaced and completed by the *Fourth World Health Assembly* in 1973 and 1981. These later amendments reduced the number of diseases covered by the *carte jeune* from six to three (yellow fever, plague and cholera), marking the global eradication of smallpox. Since the 1980s, the *carte jeune* remains only for yellow fever.<sup>19</sup>

Despite all these historic parallels, authors of this article identified the COVID-19 pandemics as a very recent and therefore valuable laboratory, in which various approaches to recognition of foreign vaccination certificates emerged. Under the pandemics, the largest vaccination campaign in the known history of humankind has been organised<sup>20</sup> and, consequently, the circulation of vaccination certificates became a problem of severe intensity. Several countries entered into bilateral agreements, facilitating mutual recognition of vaccination certificates issued by each of the contracting parties. Within the EU, a regional regime of mutual recognition has been successfully established by Regulation (EU) 2021/953.<sup>21</sup> On the other hand, some countries opted for a policy of vaccination exclusivism, recognising only their own vaccination and, thus refusing any foreign proofs of vaccination.<sup>22</sup> While such vaccination certificates have so far attracted the considerable attention of legal scholarship,<sup>23</sup> so far the problems of their mutual recognition have only been partially addressed.<sup>24</sup>

<sup>16</sup> The *Stato da Mâr* or *Domini da Mar* (lit. ‘State of the Sea’ or ‘Domains of the Sea’) was the name given to the Venice’s maritime and overseas possessions from around 1000 to 1797, including at various times parts of what are now Istria, Dalmatia, Montenegro, Greece and Cyprus.

<sup>17</sup> See ROUKENS, A., VISSER, L. Yellow fever vaccine, past, present and future. *Expert Opinion on Biological Therapy*. 2008, Vol. 8, No. 11, pp. 1787–1795.

<sup>18</sup> See PAVLI, A., MALTEZOU, H. COVID-19 vaccine passports for safe resumption of travel. *Journal of Travel Medicine*. 2021, Vol. 28, No. 4, p. 1.

<sup>19</sup> *Ibid.*, p. 3.

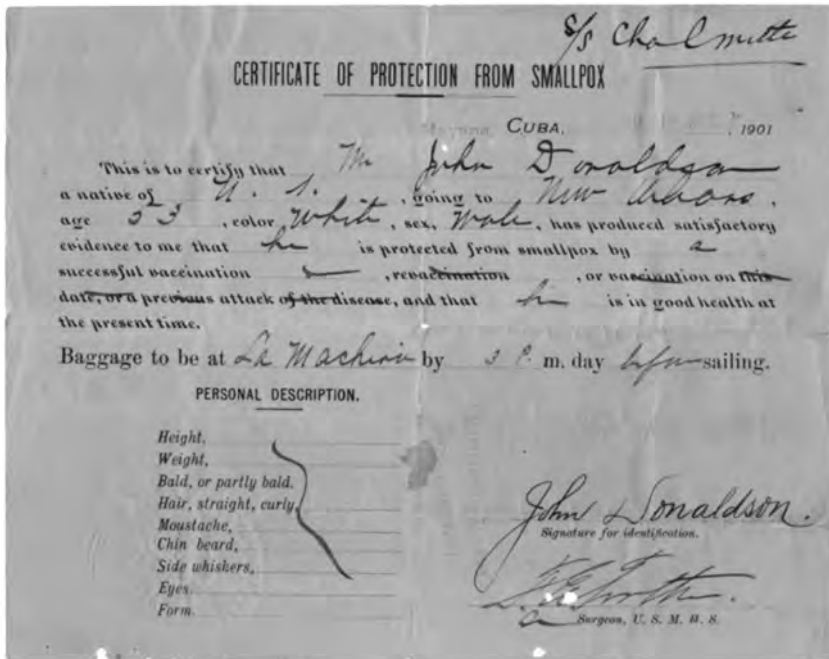
<sup>20</sup> LAGMAN, J. Vaccine nationalism: a predicament in ending the COVID-19 pandemic. *Journal of Public Health*. 2021, Vol. 43, No. 2, pp. e375–e376. See also the situation in France: BAUDIER, F. Crise de la Covid-19 et vaccination : la promotion de la santé pour plus de confiance et de solidarité. *Santé publique*. 2020, Vol. 32, pp. 437–439.

<sup>21</sup> Regulation (EU) 2021/953 of the European Parliament and of the Council concerning a framework for the issuance, verification and recognition of interoperable certificates of vaccination, testing and recovery in relation to COVID-19 (EU COVID digital certificate), OJ L 211, 15.6.2021, pp. 1–22.

<sup>22</sup> See VANDERSLOTT, S. Vaccine nationalism and internationalism. *BMJ Global Health*. 2021, Vol. 6, No. 10, article number e006305.

<sup>23</sup> Apart of the critical voices, referred above sub 11 and 12, several more counterbalanced articles have been published on the topic recently. See in particular GUIDI, S., ROMANO, A., SOTIS, C. Depolarizing the COVID-19 Passport. *The Yale Law Journal*. 2021, Vol. 131, [2022-06-13]. Available at: <<https://www.yalelawjournal.org/forum/depolarizing-the-covid-vaccine-passport-1>>.

<sup>24</sup> See HANDRLICA, J. Hesitantly towards mutual recognition of “vaccination passports”. *Juridical Tribune*. 2021, Vol. 11, Special Issue, pp. 277–290.



A health certificate, attesting protection from smallpox, issued in Havana (1901)

Source: <https://www.history.com/news/smallpox-vaccine-supreme-court>

In general, various perceptions of mutual recognition were expressed in legal scholarship. *Kalypto Nicolaidis* and *Gregory Shaffer* argued that mutual recognition represents a “core element of any global governance regime that eschews global government”.<sup>25</sup> *Susanne Schmidt* claimed, that “mutual recognition (...) is an important alternative to hierarchical steering in the form of harmonization.”<sup>26</sup> This rather positive stance against the concept of mutual recognition was shared by *Kenneth Armstrong*<sup>27</sup> and *Christine Janssens*.<sup>28</sup> Others were less optimistic. *John Coffee* claimed<sup>29</sup> that the difficulty of assessing the comparability of foreign regulation and enforcement will be a major obstacle for any further introduction of mutual recognition in any new field of governance. In the same vein, *Chris Brummer* argued that mutual recognition is unlikely to be effective as a convergence mechanism.<sup>30</sup> Reflecting these discussions, the main research question of this article is to evaluate

<sup>25</sup> See NICOLAIDIS, K., SHAFER, G. Transnational Mutual Recognition Regimes. Governance without Global Government. *Law & Contemporary Problems*. 2005, Vol. 68, p. 263.

<sup>26</sup> See SCHMIDT, S. Mutual recognition as a new mode of governance. *Journal of European Public Policy*. 2007, Vol. 14, No. 5, p. 667.

<sup>27</sup> See ARMSTRONG, K. Mutual Recognition. In: C. Barnard – J. Scott (eds.). *The Law of the Single European Market*. Oxford: Hart Publishing, 2022, p. 226.

<sup>28</sup> See JANSSENS, C. *The Principle of Mutual Recognition in EU Law*. Oxford: Oxford University Press, 2013, pp. 20–24.

<sup>29</sup> See COFFEE, J. Law and the Market. The Impact of the Enforcement. *University of Pennsylvania Law Review*. 2007, Vol. 156, No. 2, p. 309.

<sup>30</sup> See BRUMMER, C. Post-American Securities Regulation. *California Law Review*. 2010, Vol. 98, No. 3, p. 353.

whether the concept of mutual recognition – which had been criticised by many authors as being an ineffective approach – has stood the test of time in the course of the COVID-19 pandemics.

In broader terms, this article aims to deal with major challenges that the emergence of various regimes of recognition have implied for the scholarship of public law.

## 1. TERMINOLOGICAL CLARIFICATION

The terminology, which will be used in this article, deserves certain clarification: when referring to *mutual recognition*, this article will follow *Pierre-Hugues Verdier*, who defined it as “an understanding among two or more states under which each recognizes the adequacy of the other’s regulation or supervision of an activity or institution as a substitute for its own.”<sup>31</sup> As a concept, this understanding of mutual recognition goes further than national treatment, which simply entitles private foreign actors to access the host state by complying with the same rules as its nationals.<sup>32</sup> The concept of mutual recognition also differs from harmonization, which involves a systematic effort to eliminate substantive differences between countries’ regulatory requirements, usually by amending them to conform to uniform international rules. Instead, mutual recognition rests on an assessment that the home state’s regulation is *equivalent* or *comparable* to that of the host state, and *vice versa*.<sup>33</sup>

The document which is being recognised under the regime of *mutual recognition*, will be referred to as a *foreign vaccination certificate* in this article. An umbrella term is also being used here. A foreign vaccination certificate can, in principle, be distinguished from a national vaccination certificate in at least two respects. Firstly, it is adopted by the authority of a certain foreign country, not by the national administration of the concerned State. Secondly, foreign substantive and procedural law was applied in the issuance of such a certificate.<sup>34</sup> In this respect, another Member State of the EU is also considered as being a *foreign* country and, therefore, vaccination certificates issued by such States will be considered as foreign vaccination certificates.

The main consequence of defining a certificate as *foreign*, relates to its legal consequences in inland. Vaccination certificates, issued by the competent authorities of the concerned State, automatically cause impacts. On the other hand, foreign vaccination certificates are *per se* not capable of causing any direct consequences in inland. Such legal

<sup>31</sup> VERDIER, P. Mutual Recognition in International Finance. *Harvard International Law Journal*. 2011, Vol. 52, No. 1, p. 63. See also WENANDER, H. Recognition of Foreign Administrative Decisions. Balancing International Cooperation, National Self-determination and Individual Rights. *Heidelberg Journal of International Law*. 2011, Vol. 71, p. 758.

<sup>32</sup> VERDIER, P. *Mutual Recognition*. p. 63.

<sup>33</sup> *Ibid.*

<sup>34</sup> In this respect, this article applies, *cum grano salis*, the debate on the definition of the term “foreign administrative act” in legal academia, which culminated in identifying certain common features of this legal phenomenon. See e.g. PARIS, T. La reconnaissance des actes administratifs étrangers au droit français. In: Jaime Rodriguez-Arana Muñoz (ed.). *Recognition of Foreign Administrative Acts*. Heidelberg: Springer International, 2016, pp. 115–116.



consequences of a foreign certificate must be mediated by domestic law – this is accomplished either by an international agreement, an act, or a directly applicable Regulation. Thus, the differentiation between a national and a *foreign* certificate does not – in principle – rest upon the piece of legislation which confers their legal consequences. With respect to both cases, the domestic law applies, as foreign law cannot directly cause any effects in inland. Consequently, the actual difference is an organic one – meaning which authority issued the certificate.<sup>35</sup>

Lastly, this article will use the term *foreign public law*. In the same vein as the term *mutual recognition* and *foreign vaccination certificates*, this term is also ambiguous<sup>36</sup> and deserves clarification. Here, the term will also be understood as an organic one – which means that *foreign public law* is the product of law-making authorities of a *foreign State*. In this respect, we must bear in mind that directly applicable regulations exist under EU law in parallel to this *foreign public law*.<sup>37</sup> While such a directly applicable piece of legislation provides for mutual recognition, they remain – at the same time – products of the application of domestic (procedural and substantive) law.<sup>38</sup> Consequently, the mere fact that a regulation provides for mutual recognition, does not *per se* alter the notion of differing national and *foreign* public law.

## 2. IN THE LABYRINTH OF (NON)RECOGNITION

With the gradual introduction of vaccination, various countries began to issue their own national certificates, approving either partial or full vaccination. These certificates were aimed at representing an alternative to the state of lockdown and their intention was to facilitate the movement of those persons who were considered either vaccinated or immune against the illness.<sup>39</sup> With the gradual introduction<sup>40</sup> of vaccination certificates as documents necessary to access certain services, or entry into a territory, various regimes of public law had to deal with the nature and legal consequences of vaccination certificates issued by foreign States.<sup>41</sup>

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<sup>35</sup> See DOUGA, A. On the recognition of Foreign Administrative Acts in Greece. In: Jaime Rodriguez-Arana Muñoz (ed.). *Recognition of Foreign Administrative Acts*, pp. 174–175.

<sup>36</sup> See LALIVE, P. *Sur l'application du droit public étranger*. Zürich: Schulthess Polygraphischer Verlag, 1972, pp. 105–107 (a classical study on the application of foreign public law, which summarises the ambiguity of the term “foreign public law”; these considerations are still useful today).

<sup>37</sup> See CLASSEN, C. Gegenseitige Anerkennung und gegenseitiges Vertrauen im europäischen Rechtsraum. *Verfassung und Verwaltung in Europa*. 2014, pp. 556–576. See also MÜLLER, A. Gegenseitige Anerkennung von Verwaltungsentscheidung im europäischen Verwaltungsrechtsraum. *Verwaltungsrechtsraum Europa*. 2011, pp. 33–54. See also HOULE, F. *La reconnaissance mutuelle comme instrument de globalisation juridique*. Montréal : Éditions Yvon Blais, 2016.

<sup>38</sup> See DELLA CANAEEA, G. From the Recognition of Foreign Acts to Trans-national Administrative Procedures. In: Jaime Rodriguez-Arana Muñoz (ed.). *Recognition of Foreign Administrative Acts*, pp. 174–175.

<sup>39</sup> See SLEAT, D., INNES, K., PARKER, I. Are vaccine passports and covid passes a valid alternative to lockdown? *BMJ Global Health*. 2021, Vol. 6, No. 3, article number 2571.

<sup>40</sup> In the first quarter of 2021, Estonia, Iceland, Hungary and the United Arab Emirates introduced their own vaccination certificates, which were issued to their vaccinated residents.

<sup>41</sup> For a very comprehensive overview on vaccination passports in different jurisdictions, see WANG, B., PING, Y. A comparative analysis of COVID-19 vaccination certificates in 12 countries/regions around the world. *Health Policy*. 2021 [2022-06-13]. Available at: <<https://doi.org/10.1016/j.healthpol.2022.05.016>>.

Analysing various approaches to this question, this article argues that in the 2<sup>nd</sup> year of the pandemics, the international community of States was caught in a labyrinth of (non)recognition of foreign vaccination certificates. This labyrinth was built upon the following approaches of the different regimes of public law, which emerged *vis-à-vis* vaccination certificates issued by foreign States:

- *vaccination exclusivism*
- *vaccination pluralism*
- *vaccination bilateralism*
- *vaccination regionalism*

A tendency to maintain *vaccination exclusivism* arose in a number of countries during the two years of the pandemics. It is worth delimiting this particular tendency *vis-à-vis* another feature, which has been labelled as *vaccination nationalism*, and which is strongly connected, but not necessarily interlinked, with *vaccination exclusivism*. While *vaccination nationalism* entails the prioritising of the domestic needs of the country in non-recognition of others,<sup>42</sup> *vaccination exclusivism* refers to a concept where acceptance is given only to those vaccinations done by the concerned State itself. Under this concept, a person is considered to be vaccinated and consequently entitled to use the corresponding right only if vaccination has been done by the State itself.<sup>43</sup>

The basic notion behind *vaccination exclusivism* is the conviction that the State itself is both responsible and capable to guarantee public health by its own vaccinations. This entails trust in vaccination as a substance as well as trust in the proceedings which occur during the course of a vaccination. Consequently, a policy of *vaccination exclusivism* is, in principle, a product of the prudent execution of health monitoring within the territory of the concerned State.<sup>44</sup>

Apart from the above-mentioned considerations, a policy of *vaccination exclusivism* may also reflect a distrust in vaccinations developed by other countries, or distrust in the proceedings of foreign health administrations.<sup>45</sup> However, one may argue that a *vaccination exclusivism* is not primarily caused by a consequent refusal of foreign vaccines, which only appears as a secondary product of the policy.

The regime of non-recognition of foreign vaccination certificates is a natural product of each *vaccination exclusivism*. In this situation, the public law of a certain country exclusively links legal implications with the vaccination applied by its own health authorities, while vaccination certificates issued by foreign States can naturally produce widely varying effects.

One may add that, in the first months of the pandemics, prudent execution of public health protection implied a ban for entry of foreign citizens into the territory of the State. Under such bans, the question of recognition of foreign vaccines caused no major challenges for public law. Consequently, many countries of Europe opted for *vaccination ex-*

<sup>42</sup> LAGMAN, J. *Vaccine nationalism*. p. 1.

<sup>43</sup> See GRUSZCZYNSKI, L., WU, C. Between the high idea and reality. Managing COVID-19 vaccine nationalism. *European Journal of Risk Regulation*. 2021, Vol. 12, No. 3, pp. 711–719, at 719.

<sup>44</sup> See GREELY, H. COVID-19 immunity certificates. *Journal of Law and the Biosciences*. 2020, Vol. 7, No. 1, pp. 10–12.

<sup>45</sup> Such distrust was in many cases a product of circulation of fraudulent vaccination certificates.



*clusivism* in the early stage of the COVID-19 pandemics. The Russian Federation seemed also to follow this stance at the end of 2021, when strictly refusing to accept any vaccination certificates issued by countries of the EU.<sup>46</sup>

The fact is, however, that policies based on *vaccination exclusivism* have not contributed to the speedy renewal of circulation of persons.<sup>47</sup> Consequently, the first half of 2021 not only witnessed the introduction of first national vaccination certificates, but also the emergence of various attempts to recognise vaccination certificates issued abroad. Iceland, being the first country of Europe to introduce vaccination certificates for its own residents, introduced the recognition of all foreign vaccination certificates in February, 2021.<sup>48</sup> The holder of such a certificate, entering the territory of Iceland, was exempted from obligatory quarantine or mandatory testing. Several other countries, such as Georgia, announced the same policy of *vaccination pluralism* months afterward by unilateral decisions.<sup>49</sup>

One must bear in mind that, from a point of view of public law, both *vaccination exclusivism* and *vaccination pluralism* are products of national law. They are not linked to any international agreements, as they entirely stem from the unilateral decision of the concerned State. Consequently, *vaccination pluralism* was not capable of guaranteed reciprocity. While foreign vaccination certificates were recognised by the authorities of countries following this policy, the certificates issued by these authorities failed to gain similar recognition abroad.

The shortcomings arising from *vaccination pluralism* triggered efforts for facilitating a regime of mutual recognition by the means of international agreements. The quest for reciprocity in mutual recognition of vaccination passports emerged into the adoption of several bilateral agreements in the first half of 2021. In February, 2021, Greece and Israel entered into an agreement, providing for mutual recognition of their national vaccination certificates. In May, 2021, several countries of Central Europe<sup>50</sup> entered into mutual agreements, facilitating recognition of their national vaccination certificates. In the same period, a similar agreement was reported to be adopted between Malaysia and Singapore.<sup>51</sup>

The adoption of these agreements was a process which was not coordinated by any international organisation or institution.<sup>52</sup> The emergence of *vaccination bilateralism* was merely a consequence of the practical need to facilitate the free movement of vaccinated

<sup>46</sup> See ARGUEDAS-RAMÍRES, G. Build that wall! Vaccine certificates, passes and passports. *Journal of Global Ethics*. 2021, Vol. 17, No. 3, p. 382.

<sup>47</sup> See CHEN, L., FREEDMAN, D., VISSER, L. COVID-19 Immunity Passport to Ease Travel Restrictions? *Journal of Travel Medicine*. 2020, Vol. 27, No. 5, pp. 85–97.

<sup>48</sup> See GERYBAITE, A. Digital Governance: The Case of Proofs of Vaccination. In: E. Loukis – M. A. Macadar (eds.). *The 14th International Conference on Theory and Practice of Electronic Governance*. New York: Association of Computing Machinery, 2021, p. 450.

<sup>49</sup> See HELBLE, M. Can Vaccination Help Restart Tourism? In: *ADB Briefs* [online]. August 2021 [2022-03-24]. Available at: <<http://dx.doi.org/10.22617/BRF210321-2>>.

<sup>50</sup> Federal Republic of Germany, the Czech Republic, Poland, Austria, Slovenia and Hungary. For the time being, all these States issue their own “vaccination certificates”, which are both in English and their official language.

<sup>51</sup> HELBLE, M. *Can Vaccination Help Restart Tourism?* p. 7.

<sup>52</sup> See SCHLAGENHAUF, P. et al. Variants, vaccines and vaccination passports: Challenges and chances for travel medicine in 2021. *Travel medicine and infectious disease*, 2021, Vol. 30, No. 1, pp. 30–42.

persons, without any need for obligatory quarantine or testing. All these various regimes of mutual recognition were built upon the existence of national rules of vaccination, national proceedings applicable for issuance of vaccination certificates and national designs for such certificates. *Vaccination bilateralism* was built upon a bilateral acceptance of standards and a preparedness for *reciprocity*. The fact is, however, that such accepted standards varied in different existing agreements. Consequently, instead of establishing a solution for free circulation of persons, the actual effect of *vaccination bilateralism* was establishing a patchwork of conflicting rules and various designs for certificates.



The 'Al Hosn COVID-19 Certificate,' which was introduced in the United Arab Emirates in 2021. Mutual recognition with the EU is recently provided by a Commission Implementing Decision.

Source: <https://www.ncema.gov.ae/alhosn/index.html>

Thus, *vaccination bilateralism* was not able to facilitate the free circulation of vaccinated persons in entire regions. In the European Union, a need to facilitate the exercise of the right to move and reside freely within the territory of Member States triggered an endeavour for a common framework for the issuance, verification and acceptance of vaccination certificates.<sup>53</sup> The quest for a *vaccination regionalism* culminated in the adoption of Regulation (EU) 2021/953. This directly applicable piece of legislation not only introduced a regime of mutual recognition of vaccination certificates,<sup>54</sup> but also opened doors for the recognition of certificates from third countries. The Regulation provided,<sup>55</sup> that the Commission may adopt implementing acts establishing that COVID-19 certificates issued by a third country with which the Union and the Member States have concluded an agree-

<sup>53</sup> GOLDNER LANG, I. EU COVID-19 Certificates: A Critical Analysis. *European Journal of Risk Regulation*. 2021, Vol. 12, No. 1, p. 299.

<sup>54</sup> Regulation (EU) 2021/953, Art. 5 (5): "Where Member States accept proof of vaccination in order to waive restrictions to free movement put in place, in accordance with Union law, to limit the spread of SARS-CoV-2, they shall also accept, under the same conditions, vaccination certificates issued by other Member States in accordance with this Regulation for a COVID-19 vaccine that has been granted a marketing authorisation pursuant to Regulation (EC) No 726/2004."

<sup>55</sup> Art. 3 (10).

ment on the free movement of persons allowing the contracting parties to restrict such free movement on grounds of public health in a non-discriminatory manner and which does not contain a mechanism of incorporation of Union legal acts are equivalent to those issued in accordance with this Regulation.

The two years of the COVID-19 pandemics, now behind us, allow a brief summary of developments. One may argue that with respect to vaccination certificates, most countries gradually favoured their mutual recognition, either in the form of *vaccination bilateralism*, or (especially in later stages) through *vaccination regionalism*. Apart from the EU, Iceland, Liechtenstein, Norway, San Marino, Monaco, Switzerland and the Vatican, 28 other countries have participated in the regime of mutual recognition established by the Regulation (EU) 2021/953 as of February, 2022.<sup>56</sup> The emergence of such a complex framework of mutual recognition clearly demonstrates the viability of *vaccination regionalism* as an efficient tool to restore the free movement of persons.

### 3. A (POST-)COVID REFLECTION

In his seminal paper on mutual recognition, *Pierre-Hugues Verdier* identified<sup>57</sup> several reasons, why countries prefer entering into agreements on mutual recognition, rather than other options – such as unilateral recognition, harmonisation of legislation, or delegation of decision-making powers to supra-national institutions. Reflecting the recent developments with the introduction of vaccination certificates, one may ask whether the COVID-19 pandemics confirmed the arguments presented by *Verdier*, or if the recent developments have denied them. In other words: Are these arguments applicable only in ‘normal’ situations, or does mutual recognition also represent a solution in a state of emergency?

In normal situations, *Verdier* argued that introducing mutual recognition is a solution which bypasses time-consuming efforts to harmonize national rules.<sup>58</sup> In this respect, he concluded that in many fields of public law, “*the prospect of achieving absolute harmonization between sovereign jurisdictions is so fraught with impediments as to be practically unachievable.*”<sup>59</sup>

*Verdier* further argued<sup>60</sup> that countries opt for mutual recognition, as this approach is more likely to preserve a greater degree of regulatory competition and genuine difference among national laws.

A third potential benefit of mutual recognition arises, as *Verdier* claims,<sup>61</sup> from an important interaction of international agreements and domestic politics.

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<sup>56</sup> See e.g. Commission Implementing Decision (EU) 2021/1380 of 19 August 2021 (establishing the equivalence of COVID-19 certificates issued by Ukraine), Commission Implementing Decision (EU) 2021/2188 of 9 December 2021 (establishing the equivalence of COVID-19 certificates issued by the United Arab Emirates in accordance with the ‘Alhosn Pass’), Commission Implementing Decision (EU) 2022/724 of 10 May 2022 (establishing the equivalence of COVID-19 certificates issued by the Republic of Seychelles), Commission Implementing Decision (EU) 2022/726 of 10 May 2022 (establishing the equivalence of COVID-19 certificates issued by the Republic of Indonesia) etc.

<sup>57</sup> VERDIER, P. *Mutual Recognition*. pp. 63–66.

<sup>58</sup> *Ibid.*, p. 64.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*

In the era of pandemics, any quest for legislative harmonisation of rules on vaccination seems futile. What *Verdier* argued<sup>62</sup> for a period of stability also applies for the period of emergency. During the peak of the pandemics, countries could not afford to invest in long lasting discussions on harmonisation of their domestic programs. At the same time, neither a policy of *vaccination pluralism* (unilateral recognition), nor *vaccination exclusivism* offered adequate solutions to renew the free circulation of persons.

While *vaccination pluralism* did not guarantee reciprocity on the side of other countries, *vaccination exclusivism* failed to allow any circulation of vaccination certificates at all. Consequently, the introduction of mutual recognition represented a viable option in those cases where foreign regulation was deemed as *equivalent* or *comparable*. In this respect, one may easily understand why the first bilateral agreements on recognition of vaccination certificates were adopted between those countries which were situated in the same region and share common tradition in public administration.

Speaking about *foreign public law* being *equivalent* or *comparable*, we refer not only to *equivalency* in the terms of substance, but also to the equivalency of administrative proceedings. Thus, mutual trust must exist between the administrations of concerned countries in the credibility of certificates.

*Kalypto Nicolaidis* and *Gregory Shaffer* argued that mutual recognition consensually transfers authority from the host state to the home state: instead of the former applying its laws extraterritorially to protect its residents, the latter applies its laws extraterritorially to protect others.<sup>63</sup> A decade later, these theoretical considerations were (re)confirmed by the Regulation (EU) 2021/95,<sup>64</sup> which declares that “*the introduction of a common approach for the issuance, verification and acceptance of interoperable COVID-19 certificates relies upon mutual trust.*” As argued very recently by *Edoardo Chiti* in his outstanding study on *Administrative Inter-Legality*<sup>65</sup>, mutual trust is strictly connected with mutual responsibility of states, participating in the regime of recognition.

At this time, the third argument, as presented by *Verdier*, must be highlighted. During the COVID-19 pandemics, any introduction of vaccination certificates would be more successful when such certificates had recognition abroad. Neither the policy of *vaccination exclusivism*, nor the *vaccination pluralism* was able to compete with this argument. Thus, mutual recognition seems to be a driver of the success of vaccination certificates, at least in those sections of the population who prefer transboundary movement.

Thus, one may argue that the developments which occurred during the COVID-19 pandemics confirmed considerations on governance by mutual recognition that were made a decade ago. Mutual recognition clearly represents a viable legal vehicle, capable of facilitating situations arising in the state under normal conditions, as well as those of an emergency character.

The fact is, however, that while *Verdier* paid considerable attention to the *emergence* of the regimes of mutual recognition, little attention has thus far been paid to the phaenome-

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<sup>62</sup> Ibid.

<sup>63</sup> See NICOLAIDIS, K., SHAFFER, G. *Transnational Mutual Recognition Regimes. Governance without Global Government*. p. 270.

<sup>64</sup> Regulation (EU) 2021/953, recital (15).

<sup>65</sup> See CHITI, E. *Administrative Inter-Legality. A Hypothesis*. *Italian Law Journal*. 2021, Vol. 7, No. 2, pp. 985–1002.

non of their gradual *disappearance*.<sup>66</sup> The COVID-19 pandemic represents a major impetus for such discussion. Here, we do not refer to formal revocation of the legal basis, but to a *desuetudo*, meaning the non-enforcement of legislation which causes it to lapse. With the decrease of COVID-19 cases, one might expect that the circulation of both domestic and foreign certificates would dramatically decrease, or disappear in practice. The question remains of what the impact will be of such disappearance of practice to the legal framework on national and regional level.

## 4. A CHALLENGE FOR THE LEGAL SCHOLARSHIP

Apart from a challenge for the general doctrine on mutual recognition, the introduction of vaccination certificates and the emergence of various regimes, facilitating their mutual recognition, has also implied a number of challenges for the legal scholarship of public law in general. This section aims to address some of them and also calls for a wider discussion of these recent developments in legal academia.

### 4.1 From *ius commune* to regional governance

In the early months of the COVID-19 pandemics, many authors expressed their critical stance toward any introduction of vaccination certificates.<sup>67</sup> However, it seems that all these critical voices totally neglected the fact that Europe has a common tradition in certifying health through a document in printed form and that such certification has been part of a shared culture of public health for a long-time. In her outstanding study on *Health Passes, Print and Public Health in Early Modern Europe*, Alexandra Bamji addressed the practice of health certification by printed documents existing between 1484 and 1806. In this respect, the author analysed health passes, issued in Italy, Switzerland, Austria and France. Her research also included certificates issued by Venetian health authorities in today's Greece<sup>68</sup> and by the *Hospitaller Malta*. In this respect, Bamji argued for an emergence of a “shared culture of public health print” in Europe.<sup>69</sup>

This *shared culture* was demonstrated through the existence of various regimes of public law, providing for issuance of health passes in different jurisdictions. In her study, Bamji refers<sup>70</sup> to a Venetian decree of 1576, which emphasised the importance of the authenticity of health passes, nudging foreign authorities towards producing printed forms which con-

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<sup>66</sup> This article has been written in the 2<sup>nd</sup> quarter of 2022, when the number of the new COVID-19 cases became very low, with virtually no restrictive measures in most of the states of Europe. Therefore, the subtitle of the article refers to a (post) pandemic reflections. However, the authors of this article also bear in mind that such evaluation may seem preliminary, as one may expect further appearance of new variants of COVID-19 in the autumn of 2022. Thus, the reference to “post” pandemic situation is just a matter of the moment and this reference will need to stand the test of the developments in the months that will come.

<sup>67</sup> See e.g. ALEMANN, A., BIALASIEWITZ, L. Certifying Health: The Unequal Legal Geographies of COVID-19 Certificates. *European Journal of Risk Regulation*. 2021, Vol. 12, No. 1, pp. 273–286 and VOO, T. et al. Immunity certification for COVID-19: ethical considerations. *Bulletin of the World Health Organisation*. 2021, Vol. 99, No. 2, pp. 155–161.

<sup>68</sup> Corfu and Modon in Messenia.

<sup>69</sup> BAMJI, A. *Health Passes, Print and Public Health in Early Modern Europe*. p. 441.

<sup>70</sup> *Ibid.*, p. 445.

ferred added legitimacy on the pass. Many other legislations, adopted either at national, or municipal levels, and providing for different forms of health passes, or immunity certificates (*fedi di sanità*)<sup>71</sup> may serve as an argument that a *ius commune* has existed in Europe in the field of public health.

In this respect, we need to bear in mind, that the introduction of vaccination certificates in the course of the COVID-19 pandemic was, in principle, not the product of any efforts on an international level. It was neither international law, nor EU law<sup>72</sup> that triggered the introduction of these vaccination certificates. They were introduced spontaneously, by means of national legislation. Despite this un-coordinated nature of the introduction of these certificates, they bear certain *common features*, which – in later stages – opened the door for their mutual recognition.

The fact that – despite all critical considerations – a myriad of European countries spontaneously introduced their own vaccination certificates in the first half of 2021, may be considered as a mere demonstration of a *ius commune*, existing in Europe (and beyond).<sup>73</sup> This *ius commune* is of European nature and is not strictly linked to EU law. The fact that vaccination certificates were introduced by countries like Iceland, Israel and Singapore, demonstrates that this *ius commune* is not necessarily linked to any institutional form of regional cooperation. The digital character of many of these vaccination certificates merely represents a *new appearance* of this already existing *ius commune* and does not in principle alter its existence.

The fact is that *ius commune* has not only opened the doors for establishing a system of mutual recognition, but also indirectly to the emergence of a new model of governance.<sup>74</sup> Circulation of vaccination certificates by means of mutual recognition proved to be a viable alternative to centralised governance, executed directly by the EU. In this respect, one must bear in mind that emergence of this centralised governance would be not possible without the existence of *ius commune* in Europe.

## 4.2 Administrative pluralism

While this article argues that the emergence of vaccination certificates in various jurisdictions is a product of a *ius commune*, the vaccination certificates themselves also represent a product of the application of national law. Thus, the emergence of circulation of vaccination certificates by means of *mutual recognition* implies a necessity to face products of an application of foreign public law by national administrations. Under the regime, as established by the Regulation (EU) 2021/953, certificates issued by a number of third

<sup>71</sup> See SANSA, R. Un territorio, la peste, un'istituzione. *Storia urbana*. 2015, Vol. 147, No. 2, pp. 9–32. Also see an overview of different pieces of legislations, which are to be found in BERNARDI, I. *Per li presenti, et urgenti bisogni di peste: la Congregazione di Sanità di Senigallia nel Seicento* (Università Ca' Foscari Venezia, tesi di laurea, 2012).

<sup>72</sup> See Regulation (EU) 2021/953, Recital (8), which refers to the national initiatives, introducing vaccination certification pursuant to their own national law.

<sup>73</sup> See DELLA CANANEA, G. *Ius Publicum Europaeum: Divergent National Traditions or Common Legal Patriotism?* In: Matthias Ruffert (ed.). *Administrative Law in Europe: Between Common Principles and National Traditions*. Groningen: Europa Law Publishing, 2015, p. 125.

<sup>74</sup> See SCHMIDT, S. Mutual recognition as a new mode of governance. *Journal of European Public Policy*. 2009, Vol. 14, No. 5, pp. 667–681.



countries may circulate among the EU Member States. Under the regime, as established by this Regulation, vaccination certificates issued by the authorities of Armenia, Lebanon, or Montenegro (to mention just few of the third countries, participating in the regime) may be recognised in the territory of any of the Member States of the EU. The same applied *a vice versa*.

Thus, the circulation of vaccination certificates in Europe and beyond may serve as one of the salient examples of *administrative pluralism*.<sup>75</sup> This notion is twofold: firstly, the emergence of mutual recognition of vaccination certificates implies that in the jurisdictions of Europe, products of application of foreign public law gain consequence. For example, a product of application of Armenian, Montenegrin, or Lebanese public law produces effects under Greek or Czech law. The same applies also *a vice versa*. While this first observation seems to be a classic one,<sup>76</sup> the second deserves more attention.

As highlighted above, this platform of administrative pluralism is necessarily based upon a mutual trust in the quality of foreign vaccination certificates. At the same time, as *Mario E. Comba* and *Sara Richetto* correctly identified<sup>77</sup> a decade ago, the platform of mutual recognition also serves as a laboratory of cross-fertilisation. The emergence of bilateral agreements in the first half of 2021, facilitating recognition of vaccination certificates in Central Europe, may serve as a good example of such cross-fertilisation. In May 2021, the Federal Republic of Germany, the Czech Republic, Poland, Austria, Slovenia and Hungary entered into bilateral agreements with each other, facilitating recognition of their national vaccination certificates. The Slovak Republic was not part of this process, which was due to the fact that vaccination certificates issued at that time by the Slovak authorities did not bear any text in English. In order to gain recognition of their certificates and to enable free movements of the holders, the Slovak authorities thereafter opted for issuing vaccination certificates also containing a text in English. These developments may serve as a good example of cross-fertilisation by the means of mutual recognition.

### 4.3 The mirage of public/private law divide

Lastly, the emergence of mutual recognition of vaccination certificates represented a challenge for the traditional division between the private and the public law. In many cases there were private entities – such as airlines – which triggered the use of both domestic and foreign vaccination passports. Vaccination certificates – both domestic and foreign – were frequently – and in most cases almost exclusively – checked by private (such as restaurants, hotels and shopping malls), or hybrid entities (such as railways and airports).<sup>78</sup> The phenomenon of mutual recognition of vaccination certificates may be considered unique, as – in comparison to other regimes of mutual recognition<sup>79</sup> – the control

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<sup>75</sup> See DE LUCIA, L. Administrative Pluralism, Horizontal Cooperation and Transnational Administrative Acts. *Review of European Administrative Acts*. 2012, Vol. 5, No. 2, pp. 17–18.

<sup>76</sup> *Ibid.*

<sup>77</sup> See COMBA, M., RICHETTO, S. Horizontal Cross-Fertilization and Cryptotypes in EU Administrative Law. *Review of European Administrative Law*. 2012, Vol. 5, No. 2, pp. 153–165.

<sup>78</sup> See MBUNGE, E. et al. Emerging technologies and COVID-19 digital vaccination certificates and passports. *Public Health Practice*. 2021, Vol. 2, [2022-06-13]. Available at: <<https://pubmed.ncbi.nlm.nih.gov/33977281/>>.

<sup>79</sup> Such as those existing in the field of driving licenses, university diplomas, passports etc.

of foreign certificates has been done in the reality in a large extent by private parties, rather than by public authorities. Finally, the certificates – such as documents attesting negative PCR test – themselves were in many cases enacted by entities of a hybrid nature, such as medical clinics, or university hospitals. The question has appeared in several jurisdictions, whether when controlling the validity of the certificate, the entity of private nature acts, or does not act as a public authority. Another aspect, which will be worth of further research, is establishing of parallel existing regimes of restrictions by the states and by private entities, such as airline companies. The latter have appeared to be far more stricter in many cases, than the firstly mentioned.

Consequently, the emergence of mutual recognition of vaccination certificates (re)confirmed that strict boundaries between the sphere of private and public law and are rather a *mirage*, than a reality.<sup>80</sup> Vaccination certificates may stem from the application of private law and – *a vice versa* – those vaccination certificates which were issued by the authorities under public law may imply consequences in the relations of private law – in inland and also abroad.

## 5. CONCLUSIONS

During the two years of the COVID-19 pandemics, countries have introduced various forms of vaccination certificates. Such certificates were originally intended to serve primarily for domestic purposes. In the course of time, however, as a consequence of the practical need to facilitate and renew the free circulation of persons not only domestically but also across borders, it became unavoidable for the States to deal with the nature and legal consequences of foreign vaccination certificates.

In this sense, the COVID-19 pandemics truly was (and to this day continues to be) a unique laboratory, in which various regimes of recognition of foreign vaccination certificates have emerged. In the second year of the pandemics, following approaches of the different regimes of public law could be detected: vaccination exclusivism, vaccination pluralism, vaccination bilateralism and vaccination regionalism. Most countries gradually favoured mutual recognition of vaccination certificates in the form of vaccination bilateralism or through vaccination regionalism. As for vaccination regionalism, it was preferred especially in later stages of the pandemics and its viability was further demonstrated by the emergence of a complex framework of mutual recognition established by the Regulation (EU) 2021/953.

The situation caused by the COVID-19 pandemics is undoubtedly unique. The article however points to the seminal paper on mutual recognition by *Pierre-Hugues Verdier* and argues that the developments which occurred during the COVID-19 pandemics confirmed considerations on governance by mutual recognition that were made by *Verdier* a decade ago, as mutual recognition clearly represents a solution not only in the state under normal conditions, but also in the state of emergency. However, while *Verdier* focused mainly on the *emergence* of the regimes of mutual recognition, the article argues that it is relevant to also discuss the issue of their gradual *disappearance*.

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<sup>80</sup> See MICHAELS, R. The Mirage of Non-State Governance. *Utah Law Review*. 2010, Vol. 31, No. 1, pp. 31–33.

While reflecting on mutual recognition, it should be emphasized that the use of vaccination certificates in connection with the COVID-19 pandemics is not unprecedented. Many historical experiences with various health passes can be found throughout history, worldwide. In Europe, there is a common tradition in certifying health through a document in printed form and such certifications have been part of a shared culture of public health for a long-time. In this regard, a *ius commune* has existed in Europe in the field of public health.

The introduction of vaccination certificates and the emergence of various regimes of their mutual recognition due to COVID-19 pandemics, however, implied a number of challenges for the legal scholarship of public law in general. The article argues that *ius commune* has indirectly opened the doors to the emergence of a new model of regional governance. It also considers the circulation of vaccination certificates as an example of administrative pluralism. Finally, the article points out the consequences of mutual recognition of vaccination certificates for the concept of legal dualism. All these issues certainly deserve wider research and discussion, taking into account recent developments.