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INFORMATION ABOUT NAMIBIA'S LAW

ARE VACCINE MANDATES CONSTITUTIONAL?

“The right to choose what can and cannot be done to one’s body... is an inalienable human right. This is what the Namibian Supreme Court stated in a 2015 case involving a mother whose life was endangered when she refused a blood transfusion.

Debates about Covid-19 vaccination have been raging around the nation, despite clear statements from both the Namibian Government and the World Health Organisation that the vaccines in use in Namibia are generally safe and effective, with serious side effects being very rare – and that the risks of Covid-19 far outweigh the risks of having the vaccine.

The Namibian Government has indicated that it is *not* at this stage contemplating any legislation that would force anyone to be vaccinated against Covid. But the refusal to be vaccinated may still have consequences, for employment or for the ability to participate in certain activities.

Covid-19 “vaccine mandates” are being considered or imposed by some private employers in Namibia. In theory, they could be imposed by public or private entities for activities such as attendance at schools and entry into restaurants or events such as concerts or theatre performances.

Around the world, vaccine mandates of various sorts are being introduced, in some cases by national, state or local laws and in some cases by private action. Some “hard” mandates have no exceptions: no vaccination, no entry. Other “soft” mandates include a choice, where vaccination can be substituted with alternatives such as undergoing regular testing for Covid.

Some argue that vaccine mandates are both constitutional and ethical, on the grounds that their minimal interference with personal liberty is justified by the need to protect public health. Others argue that vaccine mandates may be counterproductive by leading to even more vaccine hesitancy, or that there are less drastic approaches such as intensified public education or incentive schemes.

The Namibian Constitution protects the right to personal liberty, the right to human dignity and the right to carry on any occupation, trade or business. These rights would arguably be restricted by a vaccine mandate for employees. The key question is whether the interference with these rights by a vaccine mandate imposed by individual employers to protect the health of their employees would be a justifiable limitation of those rights.

Namibia’s Labour Act give employers a duty to protect the health of their workers and any members of the public who come into contact with the workplace. Would a vaccine mandate for employees be a reasonable way to carry out that duty?

No Namibian court has yet considered this question. There are pending court cases about vaccine mandates in many jurisdictions around the world, making this a developing area of law. What do we know at the moment?

Questions about the permissibility of requiring vaccinations for contagious diseases arose long before Covid hit the world.

Back in 1905, the US Supreme Court ruled that a law requiring all members of the public to be vaccinated against smallpox on pain of criminal sanction was constitutionally permissible. It held that the US Constitution's protection of personal liberty does not mean an absolute right for every person to act as they please at all times and in all circumstances, saying that society "based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy."

This was also the view of a US District Court after eight students recently sued a university that required all students and employees to be vaccinated against Covid before returning to campus. The Court upheld the rule, noting that the vaccination does not only protect the vaccinated but also those who come into contact with them. It also emphasised that the university rule did not force anyone to be vaccinated; any students who does not want to get vaccinated is free to attend another university that does not require vaccination against Covid.

Other US court cases are likely. While some states are imposing or allowing vaccine mandates, others (such as Arizona) have enacted laws prohibiting vaccine mandates.

In Europe, the European Court of Human Rights also considered the question of whether vaccine mandates are compatible with the right to respect for private life protected by Europe's Convention for the Protection of Human Rights and Fundamental Freedoms, before the era of Covid-19. The Court found that a Czech law requiring certain vaccinations was a justifiable interference with the right to private life, because the law's objective was to protect the health of the people who receive the vaccinations as well as those who are vulnerable to disease because they cannot be vaccinated for some medical reason.

More recently, the French Government issued Covid regulations that require a "health pass" with proof of vaccination status to enter some public places. The French Constitutional Council has approved this approach as being constitutional.

Similarly, the Brazilian Supreme Court has held that individual rights do not render public health measures invalid if these measures promote the constitutionally protected right to health. However, the Court clarified that compulsory vaccination is not the same as forced vaccination. It held that it would not be permissible to physically force people to be vaccinated, but found that it is permissible to utilise indirect consequences for failure to be vaccinated – such as restrictions on carrying out certain activities or going to certain places, or even sanctions such as fines.

As far we have been able to discoverer, only one High Court case in India has ruled that vaccine mandates are unconstitutional. This case, decided in the Indian State of Meghalaya, held that a state order making it mandatory for shopkeepers, vendors, local taxi drivers and others to be vaccinated before they can resume their businesses was a violation of the right to life, which includes an individual's right to a livelihood. But the Court also held that customers have a right to make informed decisions, and so ordered shops, taxis and other enterprises to display prominent signs saying "VACCINATED" or "NOT VACCINATED", depending on the status of their staff.

This issue is bound to continue to give rise to heated debates and court cases around the world. Although there is not unanimous opinion across different jurisdiction on the constitutionality of vaccine mandates, the tendency in court decisions to date is that vaccine mandates constitute a minimal and justifiable interference with constitutional rights such as liberty and privacy, as long as they do not physically force vaccination on anyone.

Only the Namibian courts can decide if vaccine mandates are constitutional in Namibia. In the meantime, employers who are considering adopting a vaccine mandate would be well-advised to develop policies on this topic after consultation with the affected employees, and to consider whether there are feasible alternatives for employees who object to being vaccinated – such as regular testing, strict mask requirements or working from home or in an area when there is no contact with the public or with vaccinated employees. Furthermore, we suggest that any vaccine mandate should include exceptions for situations where the vaccine is medically contraindicated for a particular individual (such

as someone who has an allergy to some component of the vaccine), and for those who have genuine religious objections to being vaccinated.

Most importantly, we should all be approaching Covid-19 as a community instead of as individuals. Regardless of any rules about vaccination, there is no getting away from the fact that we are all in this together.

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