



VACCINE MANDATES



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1. INTRODUCTION

In this memo, the term “vaccine mandates” refers to rules requiring vaccinations as a condition for employment, entry into certain places or participation in specific activities. Some commentators refer to “hard” mandates (where vaccinations are required for attendance at schools, workplaces or other venues or events) and “soft” mandates (where there is a choice between proof of vaccination or alternatives such as undergoing regular testing for Covid).¹ Vaccine mandates of various sorts are being imposed in many jurisdictions around the world, in some cases by national, state or local laws and in some cases by private action.

The Namibian Government has indicated that it is *not* at this stage contemplating any legislation that would make vaccination mandatory across the board.² The current topic of discussion is the legality of vaccine mandates imposed by employers or other private entities.

Some argue that vaccine mandates are both constitutional and ethical, on the grounds that the minimal interference with personal liberty is justified by the need to protect the public and the need to utilise limited public health resources efficiently, in light of the fact that the burden on health care services posed by Covid affects everyone who needs to access those health services:

People cite bodily integrity, personal liberty and freedom as the most common justifications for refusing vaccines. But these arguments don't hold water. It's true that everyone has the right to refuse a medical intervention for their own good. But vaccines not only protect the person vaccinated but also that person's family, neighbours, and classmates or co-workers. No one has the right to go into a crowded classroom or workplace unmasked and unvaccinated. Vaccine mandates do not unethically discriminate. Discrimination is wrong when it is based on irrational reasons or animus, such as discrimination based on race, gender or disability. But vaccine mandates are simply a tool, and they apply equally to everyone. They don't impute blame or seek to shame the unvaccinated. They are intended only to keep the entire population safe. Finally, requiring proof of vaccination does not violate a person's privacy. Individuals are free to decline to give information about whether they received a shot, but if they do decline, they must expect reasonable consequences to ensure everyone's health.³

Ethically, vaccine mandates are justifiable on multiple levels, based on the common good and a public health ethics framework. This framework, which has been outlined by researchers, is based on the principles of solidarity, effectiveness, efficiency, proportionality and transparency. It intends to achieve three things in a public health emergency. First, to save lives. Second, to use limited resources efficiently. And, finally, to create social cohesion in the public interest and to build public trust.⁴

Others argue that vaccine mandates may be counterproductive:

Legal mandates signal clear policy support for immunizations, which can also increase resources for a vaccine infrastructure. Yet mandates can undermine public support, creating a backlash and even reducing vaccine uptake. Mandates may be useful in the future, but their implementation among any population that

¹ See, for example, Lawrence O Gostin, “[Vaccine Mandates Are Lawful, Effective and Based on Rock-Solid Science](#)”, *Scientific American*, 5 August 2021.

² Republic of Namibia, The Presidency, “Statement by His Excellency Dr Hage G Geingob on the Occasion of the 34th Covid-19 Public Briefing on the National Response Measures”, 14 September 2021:

When the Government developed the National COVID-19 Vaccination and Deployment Plan earlier this year, we adopted the principle of voluntary vaccination. The aim of that approach was to encourage vaccine uptake on a voluntary basis. Of recent, there has been broad discussion on different platforms about mandatory vaccination. It has also been reported that some employers are making it a requirement for their employees to get vaccinated. This does not change the position adopted by Government. As such, to date, vaccination in Namibia remains voluntary.

³ Ibid.

⁴ “[Why COVID-19 vaccines should be mandatory in South Africa](#)”, *The Conversation*, 10 August 2021.

does not widely support vaccination could be counterproductive. The purpose of risk communication is to inform decision-making, respecting individual choice. Mandates fundamentally alter this dynamic by overriding personal autonomy.⁵

It has also been asserted that broad vaccine mandates for businesses do not take into account the varied nature of different enterprises:

The risks of COVID-19 spread also vary widely depending on the nature of the business in question, many of which can have their employees, for example, work remotely.⁶

Another point that has been raised is whether vaccine mandates are the least restrictive means of protecting public health, in contrast to other approaches to encouraging vaccination such as incentive schemes – although incentives may be insufficiently protective of the welfare of, for instance, employees or members of the public who are medically unable to get vaccinated or those who are particularly vulnerable.

There is no doubt that COVID-19 poses a big threat to public health. But we suggest that a vaccine mandate is clearly not the least restrictive means to protect public health from COVID-19. There are numerous other policy options, such as incentive schemes... A number of states have already offered a variety of incentives such as money awards, lotteries with monetary or other prizes, and free or discounted food.⁷

This short paper looks at the Namibian legal background to vaccine mandates, as well as recent legal developments around the world. Note that this is an emerging and developing area of law. At the time of writing, there were pending court cases in many jurisdictions which are not discussed here; this document discusses only court cases that have been decided as of September 2021.

2. OFFICIAL POSITIONS ON VACCINE SAFETY

The starting point for the discussion which follows is the assumption that the risk of contracting Covid-19 outweighs the risk of being vaccinated, and that the vaccines in use in Namibia are generally safe and effective, with serious side effects being very rare. This is the position of both the Namibian Government and the World Health Organisation, and we have not found any contrary ruling on this issue by any court anywhere in the world.

2.1 Government of the Republic of Namibia: In August 2021, the Government launched a “Get Vaccinated, Help Kick Covid-19 Out Of Namibia” campaign “to motivate and provide information on the COVID-19 vaccines and vaccination process, generate awareness, assist in managing myths and misinformation and thereby helping in developing people’s trust and confidence to improve acceptance and uptake of vaccine”. The launch of this campaign reiterated frequent Government statements that Covid-19 vaccination is “safe and effective”.⁸ At the launch, the Prime Minister stated: “Vaccination is the right thing to do if we are to protect and shield ourselves and loved ones from irreparable harm and risks posed by COVID-19.”⁹

⁵ Lawrence O Gostin, Daniel A Salmon and Heidi J Larson, “[Mandating COVID-19 Vaccines](#)”, 325(6) *Journal of the American Medical Association* 532-533 (2021). 29 December 2020,

⁶ [Letter from Attorneys-General of 24 US states to US President Joe Biden](#), 16 September 2021.

⁷ “[Why a COVID-19 vaccine mandate is not the best policy option for South Africa](#)”, *The Conversation*, 18 August 2021.

⁸ Republic of Namibia, “[Statement By Right Honourable Saara Kuugongelwa-Amadhila Prime Minister of the Republic of Namibia during the Official Launch of the “Get Vaccinated, Help Kick Covid-19 Out Of Namibia” Campaign](#)”, Government Information Centre, Friday, 6 August 2021.

⁹ *Ibid.*

Government officials have repeatedly assured the nation that the Covid-19 vaccines being used in Namibia are safe and made efforts to debunk various popular myths and misinformation. For instance, on 15 September 2021, the Minister of Health and Social Services stated:

There is false information being circulated alleging that Namibia has received expired vaccines. I am debunking these lies and state categorically that there is absolutely no truth in these allegations. The nation must remain assured that all the vaccines delivered to Namibia, whether through donations or those that we have procured with government resources are within their shelf life and are safe for use.¹⁰

excerpt from Ministry of Health and Social Services, “What You Should Know About COVID-19 Vaccines”

Myths you may have heard about the vaccines

“You will get COVID-19 from the vaccine”

You can’t get the virus from the vaccine. It makes your body better able to fight COVID-19.

“The vaccines will make you sick or kill you”

As of July 2021, more than 3,500,000,000 vaccinations have been given across the world – more than 1/3 of the world’s population. Countries where most people are vaccinated have far fewer cases of COVID-19. Vaccines help us.

“My natural immune system is stronger than a vaccine”

The vaccines make your body much stronger, and stronger for longer, than if you recover from COVID-19.

“The vaccines were developed too quickly”

Similar vaccines for other viruses have been researched for more than ten years. The scientists and doctors adapted those vaccines, so they were quicker.

“There is a computer chip or magnets in the vaccine”

This is not true, it’s a made up story.

2.2 World Health Organisation: The World Health Organisation (WHO) is a specialised agency of the United Nations that deals with global public health issues. Namibia ratified the Constitution of the WHO shortly after independence. The WHO made the following statement about vaccines in mid-2021:

Vaccines save millions of lives each year. Vaccines work by training and preparing the body’s natural defences – the immune system – to recognize and fight off the viruses and bacteria they target. After vaccination, if the body is later exposed to those disease-causing germs, the body is immediately ready to destroy them, preventing illness.

There are several safe and effective vaccines that prevent people from getting seriously ill or dying from COVID-19... As of 3 June 2021, WHO has evaluated that the following vaccines against COVID-19 have met the necessary criteria for safety and efficacy:

- AstraZeneca/Oxford vaccine
- Johnson and Johnson
- Moderna
- Pfizer/BionTech
- Sinopharm
- Sinovac.

¹⁰ As reported in “[Namibians implored to get vaccinated: Covid-19 briefing](#)”, *Erongo News*, 15 September 2021. See also, as another recent example, Hileni Nembwaya, “[Vaccine fear hampers Kunene roll-out](#)”, *The Namibian*, 15 September 2021:

Elina Munkawa, a senior social worker at the Ministry of Health and Social Services, stationed at Opuwo told The Namibian that many people, especially those in the rural areas, are hesitant to get vaccinated because they believe the virus reduces immunity, makes one sterile and, in worst cases, kills you. “There is a lot of misinformation doing the rounds in the communities, which hinders people from getting vaccinated. It’s sad to note. Many people are now refusing to get vaccinated because they are fed false information and they believe that the vaccine is deadly, which is not true at all. We have tried to convince and encourage community members to get vaccinated but many people are not ready,” she says.”

...**The COVID-19 vaccines are safe for most people 18 years and older**, including those with pre-existing conditions of any kind, including auto-immune disorders.¹¹

3. NAMIBIAN CONSTITUTION

The key Constitutional rights which might arguably be constrained by a vaccine mandate for employees are the right to **personal liberty** (Art 7), the right to **human dignity** (Art 8) and the right to **practise any profession, or carry on any occupation, trade or business** (Art 21(1)(j)). The key question is whether or not the interference with those rights by a vaccine mandate imposed by individual employers to protect the health of their employees and other persons is a reasonable and justifiable interference with those rights.¹²

As a backdrop to this discussion, it should be noted that **Article 95(c)** of the Namibian Constitution urges the State to adopt policies aimed at the “active encouragement of the formation of independent trade unions to protect workers’ rights and interests” and “to promote *sound labour relations and fair employment practices*” (emphasis added). Article 95 also speaks to individual and public health issues. **Article 95(b)** urges the State to “actively promote and maintain the welfare of the people” through the “enactment of legislation to ensure that *the health and strength of the workers*, men and women, and the tender age of children are not abused” (emphasis added). **Article 95(j)** furthermore calls on Government to engage in “*consistent planning... to improve public health*” (emphasis added).¹³ None of these statements are entirely on point to the issue of privately-imposed vaccine mandates, but they do show that public health, and particularly the health of workers, is an important concern in the Constitutional framework alongside the promotion of fair employment practices.

Namibian case law establishes a right to personal medical autonomy, but not as an absolute right. Case law also indicates that legal restrictions in the employment setting may be justifiable where they are reasonably related to public health and safety.

3.1 The right to personal medical autonomy (Namibian Supreme Court. 2015): The 2015 case of *ES v AC* 2015 (4) NR 921 (SC) concerned the right of a parent who was a Jehovah’s Witness to refuse a blood transfusion in a life-threatening situation, where this decision could have deprived her children of her care. The Namibian Supreme Court held that the “right to choose what can and cannot be done to one’s body, whether one is a parent or not, is an inalienable human right” (para 71):

In a case concerning the refusal of an adult patient of full mental capacity to have a blood transfusion administered, the starting point must be the principle of patient autonomy, which embodies both Art 7 (protection of liberty) and Art 8 (respect for human dignity) of our Constitution. **The principle of patient autonomy reflects that it is a basic human right for an individual to be able to assert control over his or her own body.** Adhering to this principle requires that a patient must consent to medical procedures after having been properly advised of their risks and benefits, so that the consent is informed. Medical practitioners must inform their patients about the material risks and benefits of the recommended treatment but it is up to the patient to decide whether to proceed with a particular course of treatment. For this reason, it is the patient’s judgment of his or her own interests that is the most important factor.

¹¹ WHO, “[COVID-19 advice for the public: Getting vaccinated](#)”, last updated 14 July 2021 (hyperlinks removed; emphasis in original).

¹² Note that Article 5 of the Constitution says that the fundamental rights and freedoms enshrined in the Constitution must be respected and upheld “where applicable to them, by all natural and legal persons in Namibia”, as well as by the Government and its agencies.

¹³ As explained in Article 101, all of these are non-binding provisions which are intended to guide the Government in making and applying laws to give effect to the fundamental objectives of the cited principles. Furthermore, the Courts “are entitled to have regard to the said principles in interpreting any laws based on them”.

The corollary of patient autonomy is that a patient may refuse to undergo specific medical procedures, and that refusal must ordinarily be respected so long as the patient is an adult of sound mind and the patient understands the implications of the refusal...

Pertinently, it is not for medical professionals or judicial officers to judge the basis upon which an adult of sound mind has taken a decision to accept or refuse a specific medical procedure (excepting certain exceptional circumstances such as duress: see, for instance, the English authority of *Re T (Adult)* [1992] 4 All ER 649). This means that in the present case, the court is not called upon to consider whether it agrees with the religious basis upon which Mrs ES elected to refuse treatment involving blood transfusions. Importantly, Art 10(1) of the Constitution states that all persons shall be equal before the law and that no person may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status (Art 10(2)).¹⁴

In that case, the Court considered the relationship between the rights of the patient, who was the mother of three young children, and the children's constitutional right to know and be cared for by their parents as far as possible, in terms of Art 15(1) of the Constitution. The majority of the Court concluded that the interests of children in parental care do not outweigh the interests of parents in being able to make decisions about their own medical treatment – citing cases in other jurisdictions that affirmed the right of a pregnant woman to refuse medical treatment even if that decision may endanger the life of her unborn child.

One dissenting justice would have decided the case differently, emphasising that the right to medical autonomy is not absolute, asserting that when the exercise of that autonomy prejudicially impacts the interests of others, society may be justified in overruling it. The dissenting justice, also citing case law from other countries, believed that the responsibilities of parenthood were sufficient to justify overriding the mother's desire to refuse a blood transfusion. He emphasised the fact that no constitutional right is absolute, but is always inherently limited by the rights and freedom of others.

However, the application of the concept of medical autonomy is limited in the case of the vaccine mandates currently under discussion. It is not being proposed at this stage that anyone should be *forced by law* to be vaccinated against Covid-19; instead, it is being proposed that the failure to be vaccinated could have consequences for a person's employment situation or ability to participate in certain activities, to the extent necessary to protect the health and safety of others as well as the national interest.

3.2 Emergency regulations affecting employment relations (High Court of Namibia, 2020): In April 2020, regulations issued under the state of emergency declared in terms of Article 26 of the Namibian Constitution to address the Covid pandemic, amongst other things, suspended certain provisions of the Labour Act during the lockdown which was in force at that stage.¹⁵ Regulation 19 of these Regulations made it an offence for an employer to dismiss an employee or to terminate any contract of employment for reasons relating to the impact of Covid-19 on the employer's business. It also prohibited employers from forcing employees to take unpaid leave or paid annual leave for such reasons, or to reduce remuneration due to Covid-19. Deferment of payment of full remuneration was allowed if the impact of Covid-19 rendered the payment of full remuneration impossible, but only after good-faith negotiation with the relevant trade union, workplace representative of employees affected. This regulation also required employers to allow employees to make use of sick leave to care for family members with Covid-19.

The Namibian Employers' Federation and several other applicants challenged regulation 19 on several grounds, some of which are not relevant to this discussion.¹⁶ The High Court found some of the challenged

¹⁴ *ES v AC* 2015 (4) NR 921 (SC), paragraphs 48-50, emphasis added.

¹⁵ State of Emergency - Covid-19: Suspension of Operation of Provisions of Certain Laws and Ancillary Matters Regulations, Proclamation 16 of 2020, published in *Government Gazette 7194*, regulation 19.

¹⁶ The decision on this challenge is contained in *Namibian Employers' Federation v President of the Republic of Namibia* (HC-MD-CIV-MOT-GEN-2020/00136) [2020] NAHCMD 248 (23 June 2020).

regulations to be unconstitutional on the grounds that they were not “reasonably justifiable for the purpose of dealing with the situation which has given rise to the emergency”, as Article 26(5)(b) requires for the suspension of the operation of any rule of the common law or statute or any fundamental right or freedom protected by the Constitution during a state of emergency.¹⁷ The employers argued that the regulations pertaining to employee benefits and dismissals were not reasonably related to containing the spread of the virus which gave rise to the emergency. The State asserted that the regulations were relevant to the spread of the virus since the objective of the lockdown was to control and reduce movement that might spread Covid-19, and, if employees were to stay home, they needed income to put food on the table during the lockdown – which made it important to maintain the status quo with regard to employment. The Court found that, although this thinking was laudable, the challenged provisions on employment did not fall without the President’s emergency powers because they did not control or constrain the spread of the virus.¹⁸

The corollary reasoning that makes this case relevant to the current discussion is that reasonable restrictions that are more directly relevant to the protection of public health and safety might be permissible, even in the absence of a state of emergency, given the balancing of rights that is required in the application of the Constitution.

4. NAMIBIAN STATUTE LAW

Namibia’s **Labour Act** provides authority for employers to impose vaccine mandates and supports the argument that employers have a duty to protect workers and members of the general public who come into contact with the workplace. The **Public and Environmental Health Act** appears to provide sufficient authority for national regulations on vaccine mandates, should the Government wish to take this route in future.

There is no specific statutory authority concerning vaccine requirements imposed for other venues or events, but the rights to freedom of association and the duty to guard against harm to others would probably be sufficient authority in these situations – in the same way that a person brandishing knives or a person who is obviously drunk and unruly might legitimately be turned away from an event or barred from entering a venue to protect the safety of others.

4.1 Labour Act 11 of 2007: Chapter 4 of the Labour Act concerns the health, safety and welfare of employees. Section 39 in this Chapter outlines employer duties to employees in this regard. Section 39(1)(a) reads as follows:

Employer duties to employees

39. (1) Every employer or person in charge of premises where employees are employed must, without charge to the employees -

- (a) provide a working environment that -
 - (i) is safe;
 - (ii) is without risk to the health of employees; and
 - (iii) has adequate facilities and arrangements for the welfare of employees.

¹⁷ Others were found invalid on the basis that the President impermissibly delegated his power to make some of the regulations.

¹⁸ For a critical discussion of the Court’s ruling, see Vimbai Mutandwe, “[COVID-19 and Africa Symposium: Lockdowns, the Right to Work and the Rule of Law in Namibia](#)”, *OpinioJuris*, 8 Dec 2020.

Section 40 gives employers certain duties to the general public regarding health and safety risks:

Employer's duties to persons other than employees

40. (1) Every employer must conduct its business operations on its premises in a manner that, as far as is reasonably practicable, persons who are not employees of that employer are not exposed to the risk of their safety or health.

(2) The Minister may require, by regulation, an employer to inform persons who are not employees of that employer of any risk to their safety or health that might arise from the conduct of that employer's business.¹⁹

Employees have corresponding rights and duties. Section 41 requires them to take "reasonable care" not to endanger other employees or persons affected by the employee's work activities (which might include persons such as suppliers or customers).

Employee duties

41. Every employee has a duty to -

(a) take reasonable care to ensure -

(i) the employee's own safety and health in the workplace; and

(ii) the safety and health of any individual who may be affected by the employee's activities at work; and

(b) co-operate with the employer to enable the employer to perform any duty imposed under this Chapter or the regulations.

Also relevant to this discussion is the employee's right under section 42 to leave a workplace without negative consequences if the employee reasonably believes that "it is neither safe nor healthy to continue work" in that workplace. This right might, in theory, be exercised by a vaccinated employee who was required to work with unvaccinated employees, particularly in close quarters.

Employee's right to leave dangerous place of work

42. (1) If an employee has reasonable cause to believe that, until effective measures have been taken, it is neither safe nor healthy to continue work in a place of work, that employee may leave that place.

(2) If an employee leaves a place of work in terms of subsection (1), the employee must immediately inform the employer of the basis for believing that it is not safe or healthy to continue working there.

(3) An employee who leaves a place of work in terms of this section is entitled to the same conditions of service applicable to that employee and to receive the same remuneration during the period of absence.²⁰

The Labour Act requires in terms of section 43 the election of at least one health and safety representative in any workplace that has at least 10 employees; large workplaces must arrange for the election of at least one such representative for every 100 employees. Amongst the other functions and duties related to such representatives is the requirement that an employer must consult with a health and safety representative "on any policy on health, safety or welfare that may apply to the employees represented by that representative" (section 45(1)(b)). Conversely, the representative has the power and duty to make representations on the safety, health or welfare of employees to the employer (section 44(d)(i)). This means

¹⁹ See also the [Regulations relating to the Health and Safety of Employees at Work](#), Government Notice 156 of 1997 published in Government Gazette 1617, regulation 7:

Duties of employers to persons other than their employees

7. An employer shall conduct his or her undertaking in such a manner as to ensure, as far as is reasonably practicable and to the satisfaction of an inspector, that any person, including a person not in his or her employ, who may be affected by the activities of the employer, are not as a result of such activities exposed to any risks relating to the health or safety of such person.

²⁰ More details about the procedure to be followed when an employee removes himself or herself from a workplace on health or safety grounds, including procedure for attempting to resolve the matter, are contained in the [Regulations relating to the Health and Safety of Employees at Work](#), Government Notice 156 of 1997 published in Government Gazette 1617, regulation 11.

that any vaccine mandate adopted by an employer (as opposed to being required by law) would have to be preceded by discussions between the health and safety representative and the employer.

Employers with more than 100 employees must additionally set up a health and safety committee consisting of every elected health and safety representative, an equal number of representatives appointed by the employer and any additional individuals agreed to by the committee. The functions of such committees include “monitoring the application of health and safety regulations and rules in the workplace” and “advising the employer on any matter concerning health and safety in the workplace” (section 46). Thus, it also appears that this committee would need to be consulted on a vaccine mandate imposed by an employer (rather than by law).

The Ministry of Labour, Industrial Relations and Employment Creation has issued “Namibia Covid-19/ Occupational Safety and Health Guidelines (2021)”,²¹ but these make no mention of vaccination.

4.2 Public and Environmental Health Act 1 of 2015: Vaccination is not specifically mentioned in the Public and Environmental Health Act 1 of 2015, except where it provides for the classification of notifiable diseases into “notifiable infectious diseases” or “vaccine preventable notifiable infectious diseases”, with a view to providing for the possibility of different regulations for the notification of diseases in these two different categories (sections 6 and 77(1)(a)-(b)).

However, some of the issues on which the Minister is authorised to make regulations could possibly be understood to authorise regulations containing a vaccine mandate for workplaces or other settings. Section 77(1)(m) refers to regulations on “measures to be taken for preventing the spread of... any notifiable infectious disease requiring to be dealt with in a special manner”, in addition to some specific diseases that are listed.

More specific to the employment context, section 77(1)(v) refers to regulations for the “prevention of the spread of an infectious, contagious or loathsome disease by the carrying on of a business, trade or occupation”, and section 77(1)(y) refers to regulations on the “restriction of a trade or occupation causing danger to the health of the persons involved, whether from notifiable infectious disease or otherwise, and the institution of measures for preventing or limiting the danger”.

4.3 Correctional Service Act 9 of 2012: Section 24(1)(b)(ii) and (2) of this Act authorise the medical officer of a correctional facility to inoculate or vaccinate an inmate against disease without the consent of the inmate concerned.

4.4 Defence Act 1 of 2002: Section 81 of this Act, entitled “Compulsory immunization and prophylaxis”, states that any member of the Defence Force or any auxiliary services, medical service or reserve force may be required to submit to “immunization or prophylaxis against such communicable, infectious or epidemic illness as may be determined from time to time by a prescribed authority”, with the required actions being carried out by a “by a registered medical officer”.

4.5 Child Care and Protection Act 3 of 2015: Section 6 of this Act sets out “Children’s rights to basic conditions of living” which the child’s parents, guardian or other care-giver has a duty to secure within their abilities and financial capacities. One of these rights is “care and protection, which includes adequate health care and immunisation”. The law does not specify the types of immunisation covered by this provision.

²¹ Ministry of Labour, Industrial Relations and Employment Creation, “[Namibia Covid-19/Occupational Safety and Health Guidelines \(2021\)](#)”.

5. COMPARATIVE LAW

5.1 United States: At the federal level in the United States, the Equal Employment Opportunity laws do not, in principle, prevent an employer from requiring that all employees who physically enter the workplace must receive a Covid-19 vaccination.²² But Title VII of the Civil Rights Act and the Americans with Disabilities Act require employers to provide reasonable accommodations for employees who do not get vaccinated for Covid-19 because of a disability or a sincerely held religious belief, practice, or observance – unless providing an accommodation for such persons would pose an undue hardship on the operation of the employer’s business.

In a speech to the nation on 9 September 2021, US President Joe Biden announced a six-pronged plan against Covid that includes requiring either vaccination or the alternative of weekly Covid tests for all federal employees and contractors as well as for workers at businesses with 100 or more employees.²³

The following key court cases provide guidance on this issue in the US. Note that the US jurisprudence relies mainly on the right to liberty protected by the 14th Amendment to the US Constitution,²⁴ which is similar to Article 7 of the Namibian Constitution.²⁵

Jacobson v Massachusetts, U.S. Supreme Court, 1905²⁶

In this 1905 case, the US Supreme Court ruled that a legal requirement that all members of the public must be vaccinated against smallpox on pain of criminal sanction was constitutionally permissible. The US state of Massachusetts had enacted a law permitting cities to require their residents to be vaccinated against smallpox. The city of Cambridge passed an ordinance requiring its residents to receive a free smallpox vaccination if they were medically fit to be vaccinated. But Mr Jacobson refused to comply, being opposed to vaccines after he had developed a persistent rash from a vaccine administered to him as an infant.

Mr Jacobson argued the vaccination law which authorised the local ordinance violated his right to liberty. He asserted that a vaccination requirement was “unreasonable, arbitrary and oppressive, and, therefore, hostile to the inherent right of every freeman to care for his own body and health in such way as to him seems best, and that the execution of such a law against one who objects to vaccination, no matter for what reason, is nothing short of an assault upon his person”.²⁷

The Supreme Court disagreed, noting that the constitutional protection of liberty does not impart an absolute right for every person to act without restraint at all times and in all circumstances: “There are manifold restraints to which every person is necessarily subject for the common good. On any other basis, organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy.”²⁸

²² US Equal Employment Opportunity Commission, “[What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws](#)”, 9 September 2021.

²³ “[Path out of the Pandemic: President Biden’s Covid-19 Action Plan](#)” [September 2021].

²⁴ The key phrase on liberty in the 14th Amendment to the US Constitution is that no State may “deprive any person of life, liberty, or property, without due process of law”.

²⁵ Namibian Constitution, Article 7-Protection of Liberty: “No persons shall be deprived of personal liberty except according to procedures established by law.”

²⁶ *Jacobson v Massachusetts* 197 U.S. 11 (1905).

²⁷ *Id.*, page 26.

²⁸ *Ibid.*

There is, of course, a sphere within which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human government, especially of any free government existing under a written constitution, to interfere with the exercise of that will. But it is equally true that, in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.²⁹

Thus, the Court concluded that it was competent for States to enact laws requiring vaccination against a dangerous and contagious disease under their general police powers, which include the power to enact laws to protect the health, safety and general welfare of the public. So *Jacobson* lost the case and as a result was fined five US dollars (equivalent to about US\$150 today).³⁰

This case is still good law today. The US Supreme Court came to a similar decision in 1922 in the case of *Zucht v King*³¹, which considered a local law in San Antonio, Texas that excluded students from schools if they were not vaccinated against smallpox. The challenger argued again that the vaccine policy violated the right to liberty; the Court disagreed, referring to the *Jacobson* decision.

Much more recently, in 2020, in the case of *Roman Catholic Diocese of Brooklyn v Cuomo*³² which considered Covid-related restrictions on religious gatherings, Supreme Court Justice Neil Gorsuch (in a concurring opinion) confirmed the constitutionality of state vaccine mandates:

In *Jacobson*, individuals could accept the vaccine, pay the fine, or identify a basis for exemption. The imposition on Mr Jacobson’s claimed right to bodily integrity, thus, was avoidable and relatively modest. It easily survived rational basis review, and might even have survived strict scrutiny, given the opt-outs available to certain objectors.³³

Klaassen v Trustees of Indiana University, United States District Court Northern District of Indiana, 2021³⁴

Indiana University requires all students and employees to be vaccinated against Covid-19 before returning to campus, unless they qualify for a medical, religious or ethical exemption. Exempted students must wear masks and be tested twice a week.

Eight students sued the University, asserting that this policy interfered with their right to liberty under the 14th Amendment to the US Constitution. They argued that this provision prevents a public university “from mandating a vaccine for its students unless it has rationally pursued a legitimate interest in public health for its campus community”.³⁵

The US District Court denied the plaintiff’s request for a preliminary injunction. The US Court of Appeals also denied an injunction pending appeal.³⁶ Both courts referred to the case of *Jacobson v Massachusetts* discussed above.

²⁹ Id, page 29.

³⁰ For more background on this case, see Peter S Canellos & Joel Lau, “[The Surprisingly Strong Supreme Court Precedent Supporting Vaccine Mandates](#)”, *Politico*, 9 August 2021; Garrett Epps, “[Cowpox and the Constitution](#)”, *The Atlantic*, 6 February 2015.

³¹ *Zucht v King* 260 U.S. 174 (1922).

³² *Roman Catholic Diocese of Brooklyn v Cuomo* (concurring opinion) 592 U. S. ____ (2020).

³³ Concurring opinion (slip opinion) at pages 4-5.

³⁴ *Klaassen v Trustees of Indiana University*, United States District Court Northern District of Indiana, CAUSE NO. 1:21-CV-238 DRL (slip opinion).

³⁵ Ibid.

³⁶ *Klaassen v Trustees of Indiana University*, United States Court of Appeals, 7th Circuit, decided 2 August 2021.

Both courts noted that Indiana University’s policy does not require every adult member of the public to be vaccinated, as the Massachusetts law did in the case of smallpox; the vaccination is instead a condition of attending Indiana University. If students do not want to get vaccinated, they are free to go to another university that does not require vaccination against Covid. In addition, both courts stated that while the Massachusetts law lacked exceptions, the University’s policy does provide exceptions for persons who declare that vaccination is incompatible with their religious beliefs, as well as for persons for whom vaccination is medically contraindicated.

The Court of Appeals further noted that health examinations and vaccinations against other diseases such as measles, mumps, rubella, diphtheria, tetanus, pertussis, varicella, meningitis and influenza are part of the usual requirements for higher education. The Court makes it clear that vaccination does not only protect the vaccinated persons but also those who come into contact with them – noting further that close contact is inevitable at a university.

The US Supreme Court refused a request to issue an emergency order blocking the ruling of the US Court of Appeals.³⁷

US state laws and court cases opposing vaccine mandates: There is strong opposition to vaccine mandates at the state level in some US states. Here are a few examples of state laws and court cases tending in the opposite direction in the United States.

Arizona: On 16 August 2021 the Governor of the US state of Arizona issued an Executive Order stating that (unlike states), cities, towns and counties do *not* have the necessary police powers to implement vaccine mandates. Furthermore, an Arizona state law prohibits any city, town or county in Arizona from establishing a Covid-19 vaccine passport or requiring any person to be vaccinated against Covid-19, as well as prohibiting businesses from requiring proof of the Covid-19 vaccination status of any person who wishes to enter the business establishment. However, this prohibition specifically states that it will not be applied to prevent a licenced health care institution from requiring that its employees be vaccinated.³⁸ The law also states that, where sincerely held religious beliefs, practices or observances prevent the employee from complying with a Covid-19 vaccination requirement, an employer shall provide a reasonable accommodation unless such an accommodation would pose an undue hardship and more than a minimal cost to the operation of the employer’s business.³⁹ This law has not yet been challenged in court, as far as we can ascertain.

Pending court case in New York: There is a pending court challenge to a New York state order requiring personnel at hospitals and nursing homes to be fully vaccinated against Covid-19. Seventeen medical professionals employed by the State challenged the constitutionality of the order, alleging that their sincere religious beliefs compel them to refuse the Covid-19 vaccines that are currently available. The regulation at issue does not provide for any religious exemption. A federal judge has temporarily blocked implementation of the order while the case is pending, but there is as yet no final decision.⁴⁰

³⁷ See Pete Williams, “[Supreme Court rejects challenge to Indiana University's vaccination requirement](#)”, *NBC News*, 12 August 2021.

³⁸ See [Senate Bill 1824](#), sections 36-681 and 36-682. The Arizona State Senate passed this Bill on 23 June 2021 and the Arizona House of Representatives passed the Senate Bill on 25 June 2021. It was signed into law on 30 June 2021.

³⁹ *Id.*, section 23-206.

⁴⁰ [Dr. A. Nurse and others v Kathy Hochul, Governor of the State of New York, in her official capacity and others](#), Case No.: 1:21-CV-1009, decided on 14 September 2021.

5.2 Czech Republic: The Czech Republic provides an important example of jurisprudence on mandatory vaccination given that its law on this topic was considered by the Grand Chamber of the European Court of Human Rights. Although recently decided, this case originates from pre-Covid times and deals with the Czech policy of mandatory vaccination for other diseases.

Case of Vavříčka and others v the Czech Republic, European Court of Human Rights, 2021⁴¹

Section 46(1) and (4) of the Czech Republic’s Public Health Protection Act⁴² require all permanent residents and all foreigners authorised to reside in the Czech Republic on a long-term basis to undergo a set of routine vaccinations. Section 50 of this law provides that preschool facilities may only accept children who have received the required vaccinations, who have been certified as having acquired immunity by other means or who are unable to undergo vaccination on health grounds. If parents do not comply with this policy, they can be fined and their children cannot attend preschools.

The applicants alleged that the consequences of non-compliance with the statutory duty of vaccination were incompatible with the right to respect for their private life under Article 8 of Europe’s Convention for the Protection of Human Rights and Fundamental Freedoms.⁴³

The European Court of Human Rights clarified that physical integrity is part of a person’s “private life” within the meaning of this provision of the Convention, which includes, to a certain extent, the right to establish and develop relationships with other people.⁴⁴ It also agreed with the applicants that this policy interferes with their right to private life. In particular, the Court found that the child applicants who bore the direct consequences of non-compliance with the vaccination duty by being barred from preschool had experienced an interference with their right to respect for private life.⁴⁵

However, the Court was satisfied that the law’s interference with this right was justifiable.⁴⁶ The objective of the relevant legislation is to protect against diseases that may pose a serious risk to health. This aim refers both to those who receive the vaccinations concerned as well as those who cannot be vaccinated and are thus in a state of vulnerability, who must rely on the attainment of a high level of vaccination within society at large for protection against the contagious diseases in question. The Court stated that this objective corresponds to the aims of the protection of health and the protection of the rights of others, recognised by Article 8 as acceptable grounds for interference with the right to private life.⁴⁷

As a general principle, an interference will be considered “necessary in a democratic society” for the achievement of a legitimate aim if it answers a “pressing social need” and, in particular, if the reasons adduced by the national authorities to justify it are “relevant and sufficient” and if it is proportionate to the legitimate aim pursued. In the Court’s opinion these conditions were met. The vaccination requirement

⁴¹ [Case of Vavříčka and Others v The Czech Republic](#) (Applications nos. 47621/13 and 5 others), Grand Chamber, European Court of Human Rights, 8 April 2021.

⁴² [Public Health Protection Act](#) (Czech Republic).

⁴³ [Convention for the Protection of Human Rights and Fundamental Freedoms](#), Art 8:

ARTICLE 8 Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

⁴⁴ [Case of Vavříčka and Others v The Czech Republic](#), paragraph 261.

⁴⁵ Id, paragraph 263.

⁴⁶ Id, paragraph 271.

⁴⁷ Id, paragraph 272.

represents the answer “to the pressing social need to protect individual and public health against the diseases in question and to guard against a downward trend in the rate of vaccination among children”.⁴⁸

The Court acknowledged that there were weighty public health reasons underlying this policy, particularly with regards to the effectiveness and safety of childhood vaccinations. Accordingly, “relevant and sufficient” reasons also exist.⁴⁹

In the Court’s view, these interferences with the right to private life were also proportionate. In particular, the Court stressed that compulsory vaccination was not an absolute duty under the Czech law; children with a permanent contraindication to vaccination were exempted.⁵⁰ In addition, the sanctions for not complying with the vaccination duty can be regarded as relatively moderate.

In addition, the Court recognised that the possibility of preschool attendance by children who cannot be vaccinated for medical reasons depends on a very high rate of vaccination against contagious diseases by *other* children. For that reason, it cannot be regarded as disproportionate for a State to require those for whom vaccination represents a remote risk to health to accept this universally practised protective measure, as a matter of legal duty and in the name of social solidarity, for the sake of the small number of vulnerable children who are unable to receive vaccinations.

So, in the view of the Court, it was validly and legitimately open to the Czech legislature to legislate a vaccination mandate consistent with the rationale of protecting the health of the population.⁵¹

5.3 France: On 5 August 2021, the French Conseil Constitutionnel declared that the new Covid regulation⁵² adopted by Parliament does not violate the French Constitution.⁵³

The French Parliament adopted a regulation which states that a “health pass” is required to enter restaurants, bars, trains, aeroplanes, busses, health facilities, shopping malls and fairs. This “health pass” takes the form of either the results of a viral screening test concluding that a person is not infected with Covid-19, proof of vaccination status or a certificate of recovery following an infection. In addition, the new regulation states that all people who work in the health sector must be vaccinated. This health pass requirement applies not only to customers, but also to employees in the listed sectors.

When an employee or public official who is obliged to present the health pass does not do so, the employer must notify him or her of the suspension of his or her contract of employment or duties.⁵⁴ The suspension can be accompanied by the interruption of payment or remuneration. It ends as soon as the employee or public official produces the required documents. When the suspension of the employment contract extends beyond a period equivalent to three working days, the employer must summon the employee or public official to an interview in order to consider with the employee how to regularise the situation. In particular, the employer must examine with the employee the possibilities of assigning him or her to an alternative position within the company which is not subject to this obligation.

⁴⁸ Id, paragraph 284.

⁴⁹ Id, paragraph 285.

⁵⁰ Id, paragraph 291.

⁵¹ Id, paragraph 306.

⁵² [LOI n° 2021-689 du 31 mai 2021 relative à la gestion de la sortie de crise sanitaire \(1\)](#) (in French).

⁵³ [Conseil Constitutionnel, decision no. 2021-824 DC of 5 August 2021](#) (in English).

⁵⁴ Id, paragraph 81.

Some members of French opposition parties believed that the regulation violates the principle of equality of all citizens before the law as not everyone, especially those in poorer sections of the population, has access to vaccinations. Another aspect of the law which arguably infringes the principle of equality of citizens, in the opinion of some Senators, is that these provisions would create an unjustified difference in treatment between businesses and their employees depending on whether their activity is carried out within or outside shopping centres. This would result in an unjustified difference in treatment between businesses in large shopping centres and other businesses.⁵⁵ In addition, these politicians believed that the regulation violates freedom of movement and would result in an infringement of the right to personal privacy.⁵⁶

However, the French Constitutional Council has approved the new regulation as being constitutional, with one caveat. The Council found that the “health pass” represents a “balanced” compromise solution between civil liberties in the public sphere and health protection. However, it also found that the law was unacceptable in one particular, because it provided that non-compliance was a basis for termination of fixed-term employment contracts while non-compliance by employees with open-ended employment contracts produced less drastic sanctions. In the Council’s view, differential treatment of employees with fixed-term employment and those with open-ended contracts violates the principle of equality of all citizens before the law.⁵⁷ Thus, the Council found that employees with fixed-term contracts should face the same sanctions as employees with open-ended contracts – including suspension of the contract or of his or her duties, which could be accompanied by the interruption of payment.

5.4 Brazil: The Brazilian government enacted Federal Law No 13,979 of 2020 of 6th February 2020,⁵⁸ which provides measures to deal with public health issues. Article 3(III)(d) of this law states that the authorities may adopt within the scope of their powers determinations on compulsory vaccination.

The Brazilian Supreme Federal Tribunal (Supremo Tribunal Federal, STF) considered the constitutionality of compulsory vaccination. Three separate cases were considered by the STF, two of which were related to Covid vaccination;⁵⁹ the third case was not about Covid-19 vaccination but about child vaccination in general and whether parents have the right to refuse to vaccinate their children on philosophical and/or religious grounds.⁶⁰

The Covid-related cases were filed by opposition political parties, after the Brazilian President made a statement in September 2020 that no one in Brazil would be forced to be vaccinated against Covid. The Democratic Labour Party was concerned that the President might try to undermine the federal vaccination programme or try to block potential mandatory vaccination programmes. So it requested the Supreme Federal Tribunal to make a declaration that states and municipalities have the competence to institute mandatory vaccination programmes.

The Supreme Federal Tribunal held that the law is constitutional, holding that the right to individual autonomy is not a basis for invalidating public health measures that promote the constitutionally protected right to health. However, the Court made it clear that *compulsory* vaccination does not mean *forced*

⁵⁵ Id, paragraph 34.

⁵⁶ Id, paragraph 33.

⁵⁷ Id, paragraph 79.

⁵⁸ [Lei Nº 13.979, de 6 de Fevereiro de 2020](#) (in Portuguese).

⁵⁹ [Case No.: 6.586 \('ADIN 6.586'\) and 6.587 \('ADIN 6.587'\)](#), Supreme Federal Tribunal, 17 December 2020 (in Portuguese).

⁶⁰ [Case No: ARE 1.267.879](#), Supreme Federal Tribunal, 17 December 2020 (in Portuguese).

vaccination. Vaccination can be implemented only by indirect measures, which may include a restriction on carrying out certain activities or going to certain places or even sanctions such as fines – as opposed to being physically coerced to be vaccinated. The Court also emphasised that rules on mandatory vaccination must be informed by scientific evidence regarding the vaccine safety and efficacy, and that such rules can be applied only where there is free and universal access to the relevant vaccines.⁶¹

In addition, in the decision on child vaccination in the non-Covid related case,⁶² the Court considered whether parents have a right to refuse to vaccinate their children on grounds of religion or philosophy. The Court ruled that mandatory immunization for children is constitutional if prescribed by law, if the vaccines in question have been approved by the national drug regulatory agency, and if the vaccine is part of the National Immunization Program or local-level immunization programmes. If these conditions are met, then mandatory vaccination of children cannot violate any of the constitutional rights of their parents.⁶³

5.5 India (State of Meghalaya): India is the only country we have found so far where a court has invalidated a vaccine mandate aimed at employees.

The State of Meghalaya issued an order making it mandatory for shopkeepers, vendors, local taxi drivers and others to be vaccinated before they can resume their businesses. In addition, all shops and establishments were required by the order to indicate the vaccination status of their staff at a prominent place in the shop premises. The order stated that any shop which has not completed vaccination of its staff will not be permitted to open from 24 June 2021 onwards.⁶⁴

The High Court of Meghalaya decided on 23 June 2021 that this mandate contravenes the law-making power of the State Government, which has to be consonant with the fundamental right to life, including an individual's right to a livelihood.⁶⁵

Although, Article 19(6) prescribes “reasonable restrictions” in the “interest of [the] general public”, the present instance is exemplary and clearly distinguishable. It affects an individual's right, choice and liberty significantly more than affecting the general public as such or for that matter, the latter's interests being at stake because of the autonomous decision of an individual *human being* of choosing not to be vaccinated. It is more about striking the right balance between an individual's right vis-à-vis the right of the public at large... In this case, there is a clear lack of legitimacy in prohibiting freedom of carrying on any occupation, trade or business amongst a certain category or class of citizens who are otherwise entitled to do so, making the notification/order ill-conceived, arbitrary and/or a colourable exercise of power.

The Court found that the coercive approach of the order was procedurally flawed because more positive incentives would be consistent with the national government's stance that Covid vaccination is voluntary.

In our view, the burden lies on the State to disseminate and sensitize the citizens of the entire exercise of vaccination with its pros and cons and facilitate informed decision making particularly in a situation where the beneficiaries are sceptical, susceptible and belonging to vulnerable/marginalised section of the society,

⁶¹ Octávio Luiz Motta Ferraz, Danielle Rached, Deisy Ventura, Conrado Hubner Mendes, Marco Antônio Moraes Alberto, “[Brazil: Legal Response to Covid-19](#)”, April 2021, paragraph 94. See also Daniel Wei Liang Wang, Gabriela Moribe & Ana Luiza Gajardoni de M Arruda, “[Is Mandatory Vaccination for COVID-19 Constitutional under Brazilian Law?](#)” 23 (1) *Health and Human Rights Journal* 163-174, June 2021.

⁶² [Case No: ARE 1.267.879](#), Supreme Federal Tribunal, 17 December 2020 (in Portuguese).

⁶³ Daniel Wei Liang Wang, Gabriela Moribe & Ana Luiza Gajardoni de M Arruda, “[Is Mandatory Vaccination for COVID-19 Constitutional under Brazilian Law?](#)” 23 (1) *Health and Human Rights Journal* 163-174, June 2021.

⁶⁴ See Government of Meghalaya, [Press Release](#), 14 June 2021.

⁶⁵ *Registrar General, High Court of Meghalaya v State of Meghalaya*, PIL No.6/2021, 23 June 2021 (slip opinion available for download [here](#)). A brief summary of the case can be found [here](#).

some of whom are also gullible members of the indigenous communities who are constantly being fed with deliberate misinformation regarding the efficacy of vaccination by some persons/organisations with oblique motives. The welfare nature of the State isn't for coercive negative reinforcement by seizing their right to livelihood, proscribing them to earn from their occupation and/or profession without any justification in the garb of public interest, but lies in walking together with concerted efforts attempting to effectuate a social order as mandated under Article 38 by approaching the people directly by engaging them in one-to-one dialogues and dwelling on the efficiency and the positive aspects of administering of the vaccine without compromising its duty under Article 47 nor abrogating its duty to secure adequate means of livelihood under Article 39(a).

Interestingly, the Court issued directions as an alternative to the order which it invalidated, “so that the public at large are provided with an option of making an informed choice”. These directions require all shops/establishments/local taxis/auto-rickshaws/maxi cabs and buses to display prominently a sign saying “VACCINATED” or “NOT VACCINATED”, depending on the status of the employees and staff of the enterprise concerned. It also directed the State Government to take steps to address vaccine hesitation, and undertook to monitor State action in this regard, as the best method of ensuring that “all eligible persons in the State of Meghalaya are vaccinated well within the timeframe as may be specified by the State”. The Court further directed State authorities to take action against any person or organisation that spread misinformation regarding the efficacy of vaccination, and to ensure that Government Welfare Schemes aimed at the marginalised sectors of society are being properly and effectively implemented.

5.6 United Kingdom: The UK government recently introduced new legislation on vaccine mandates. From 11 November 2021, all care home workers, and anyone entering a care home, will need to be fully vaccinated unless they fall under the exemptions in the regulations.⁶⁶ These exemptions cover clinical reasons not to be vaccinated as well as situations where it is reasonably necessary for the person who wants to enter the care home to provide emergency assistance in the care home, to provide urgent maintenance assistance, if the person is a member of the emergency services, or if the person visits a person who is dying. In addition, persons under 18 are exempt from the vaccine mandate. There is as yet no court challenge to this law, as far as we can ascertain.⁶⁷

5.7 Fiji: Fiji's government has made Covid-19 vaccinations a mandatory condition of work for civil servants and staff in the private sector, via the “Health and Safety at work (General Workplace Conditions) (Amendment) Regulations 2021”.⁶⁸ Employees who are less than 18 years old or those have a history of severe allergic reaction to any component of the Covid vaccine, as verified by the permanent secretary responsible for health and medical services, as well as those who have another legitimate medical reason for remaining unvaccinated, are exempted from the vaccination requirement. An employer who contravenes this regulation commits an offence and is liable to a fine. In addition, an employee's failure to get vaccinated constitutes grounds for dismissal of that employee.

Article 11(3) of the Fiji Constitution states that everyone has the right to freedom from medical treatment or procedures in the absence of an order of the court or his or her informed consent.⁶⁹ Article 6(5)(c)

⁶⁶ [The Health and Social Care Act 2008 \(Regulated Activities\) \(Amendment\) \(Coronavirus\) Regulations 2021, amendment to regulation 5.](#)

⁶⁷ UK Government, “[Coronavirus \(COVID-19\) vaccination of people working or deployed in care homes: operational guidance](#)”, updated 3 September 2021.

⁶⁸ [Health and Safety at work \(General Workplace Conditions\) \(Amendment\) Regulations 2021.](#)

⁶⁹ [Constitution of the Republic of Fiji](#), Art 11(3):

Every person has the right to freedom from scientific or medical treatment or procedures without an order of the court or without his or her informed consent, or if he or she is incapable of giving informed consent, without the informed consent of a lawful guardian.

states that the human rights protected by the Constitution may be limited when “necessary”.⁷⁰ We have not located any court case on the constitutionality of this regulation as yet.

6. ILO POSITION

An official ILO report deals with the question of whether workers can be obliged to get vaccinated to access the workplace.⁷¹ It notes that international labour standards do not directly address the question of mandatory vaccinations as a condition for work, stating that the legal basis for such measures would depend on national regulatory frameworks. However, a standard-based approach to this issue should “emphasise the principle of dialogue and consultations between employers and workers”. While occupational safety and health duties may cover protective measures such as vaccinations, this requires consultation between management and workers at the enterprise level.

The report makes it clear that the cooperation of workers is key to the implementation of workplace-related prevention measures; it emphasises that, “where standards do specifically touch on measures of immunization, they focus on the importance of protective measures being accessible and available, rather than being obligatory”.

However, the ILO does not rule out the possibility that vaccination may be required in some instances: “Social dialogue and consultations would also appear to be the best means to establish if vaccination might indeed be required for designated jobs, based on objective criteria.” In addition, the ILO makes clear that, if vaccination is required by an employer, this requirement should be implemented in a non-discriminatory manner, with appropriate exemptions and accommodations, and any vaccination requirement should not entail any costs for the workers.

7. THE WAY FORWARD

It is not the place of the Legal Assistance Centre to determine whether or not vaccine mandates are constitutional in Namibia; this issue can only be decided by our courts.

Some helpful guidance is provided in an article in the American Medical Association Journal of Ethics, concerning vaccinations in general:⁷²

Because no society protects individual freedom to an absolute degree, when is it ethical and reasonable to limit individual freedom? The following criteria are used by the courts to assess the reasonableness of limits on individual freedom: (1) proportionality, (2) precedent, (3) context, and (4) sufficiency of access to the good or service being mandated. Here, we apply these criteria to limits on individual freedom with regard to vaccination.

⁷⁰ This newspaper article is an example of a critical opinion of the regulation: Graham Leung, “[Vaccination and human rights](#)”, *The Fiji Times*, 17 July 2021.

⁷¹ International Labour Standards Department, ILO “[ILO Standards and COVID-19 \(coronavirus\) FAQ](#)”, 13 April 2021 - Version 3.0, pages 29-30.

⁷² Carmel Shachar, JD, MPH and Dorit Rubinstein Reiss, LLB, PhD, “[When Are Vaccine Mandates Appropriate?](#)” 22(1) *AMA J Ethic* E36-42 (2020). The article focuses on the example of vaccination for Ebola in particular.

1. *Proportionality*. Higher levels of risk justify more restrictive limitations on individual freedom, where risk is construed as a combination of risks posed by a disease and the ease of transmission of that disease in relevant local circumstances.
2. *Precedent*. Precedent set by prior limitations on individual freedom matters: more coercive or restrictive approaches should generally only follow failures of less coercive or restrictive approaches. That is, unless there is an immediate, severe risk, adults should be free to exercise their autonomy to the extent that vaccination rates afford sufficient public protection.
3. *Context*. Social and cultural context of liberty restrictions must also be considered. In areas where government is unstable or in societies in which trust is fragile, coercive measures could undermine what's left of a state's stability or a society's trust. Liberty restriction and coercion can exacerbate distrust, suggesting the appeal of less restrictive and less coercive education-based approaches. Two drawbacks of education-based approaches, however, are that they might not be trusted by some or might not be sufficiently protective of public safety.
4. *Sufficiency of access*. Restrictive, coercive legal approaches require sufficient access to the good or service being mandated. That is, it is patently unfair and nonsensical to demand compliance with vaccination policies without making vaccines sufficiently available to those subject to a mandate. This reasoning suggests the importance of the state's capacity to provide adequate supply for the vaccine for which a mandate creates demand.

Considering the information available to date from court cases around the world, the Legal Assistance Centre would suggest that, *if* a vaccine mandate *is* adopted in a workplace, it should at the very least comply with the following criteria:

- Any rule or policy should be developed after consultation with the affected employees.
- Consideration should be given to providing information about the vaccine situation to members of the public who may come into contact with employees, to enable them to make an informed choice about protecting themselves.
- Consideration should be given to alternatives for objecting employees, 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 employees who are unable to be vaccinated, if the nature of the enterprise permits.
- Any rule on vaccination should include exceptions for persons for whom the vaccine is medically contraindicated, and for those who have *bona fide* religious objections to being vaccinated.

Depending on the context, similar considerations could be applied to vaccination requirements imposed by private entities in other situations.

In addition, as in India, in Namibia there appears to be scope for intensification of campaigns against misinformation about vaccine safety and positive encouragement of the population to consider vaccination.