

## CONFIDENTIAL

### CONFIDENTIAL BRIEF TO THE OECS HEADS OF GOVERNMENT - THE LEGAL DIMENSIONS OF MANDATORY/ COMPULSORY REQUIREMENTS FOR COVID-19 VACCINATIONS© - August 2021-

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#### A. INTRODUCTION - EMERGING GREY AREAS AND MISPLACED LEGAL ARGUMENTS

This paper exposes the legal principles believed to be applicable and appropriate to the COVID-19 vaccine context, in addition to addressing some counter-arguments already in the public domain, many of which have no valid legal basis (e.g. the arguments that employers' actions will violate human rights or breach terms and conditions of employment, considered below.)

The paper is intended to provide legal support for the policy direction of OECS Governments. By choice, it avoids excessive legal jargon and a preponderance of case-law, as one would generally find in a legal brief, although the principles and positions outlined are informed by comprehensive research. Rather, the paper attempts to provide a clear and concise narrative upon which decisions may be based.

It is emphasised that mandatory COVID-19 vaccination, like so many other subject-areas emerging because of the pandemic, brings forth some grey areas for law, especially Labour Law. The issue is, of course, untested in the region despite the fact that some employers and to some extent, universities (the UWI) have already begun mandating vaccination as a policy.<sup>2</sup> The question of who pays for quarantine leave, e.g. is a brand new labour law issue. We can extrapolate from existing jurisprudence in analogous situations (HIV pandemic etc.), but in some instances we will have to wait and see what the courts decide if challenged. Notwithstanding and perhaps ironically, considering the wide debates, the vaccine issue is one of the clearer legal issues, in terms of existing legal norms.

#### Public Sector or Private Sector

There are **2 separate dimensions** to the compulsory COVID-19 vaccine question:

- (i) **The Public law dimension** – where a law making vaccines compulsory for all or some persons is enacted by the state; and / or where the state as the employer makes the vaccine compulsory for its workers. Both will involve considerations of constitutional rights/ human rights.
- (ii) **The Private Sector dimension** – where employers, airlines, universities and others (landlords) take action unilaterally to compel employees, customers etc. to be vaccinated before interacting with the workplace, airplane, house etc. In this dimension human rights are inapplicable and instead, principles of labour law and administrative law obtain.

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<sup>2</sup> UWI took a decision to require medical interns working in hospitals to take the vaccine, or elect to defer internship. Medical students are already required to take a number of vaccines against several diseases.

While Heads of Government (Heads) are more directly involved in (1) the legal questions and answers to (2), the private law question, will also impact the Governments, since the public, workers, unions will look to the state – Ministers of Labour etc. for responses to what may be perceived as drastic steps by employers etc. It would therefore be helpful to have a firm appreciation of the issues in the private law sphere so as to shape national policy. Conversely, the public law question – Constitutions, rights etc. will impact on the legal dimensions of the COVID-19 vaccine issue in the private sector, both in terms of how the courts will view their COVID related actions and also because of the state's attitude, or possible responses to such actions.

Ideally, there should be coherence between public and private sector as to how to proceed in terms of vaccination, but thus far, generally, this is not forthcoming. The vaccine has huge implications for sustainability, not just of our enterprises, but the entire economic, commercial system. This element is relevant and recognized when assessing the legal issue. The private sector can ill afford to wait and see – faced with urgent questions and need for action, including end-line questions such as can I afford to open without vaccinated employees – can I afford the quarantines, can I afford the sick leaves when employees get sick, can I afford the fall-out if my customers are perceived to have caught the virus from unvaccinated employees in my work-place etc.? For the UWI – can I allow my medical interns to work in hospitals without the vaccine?

### **Legal Framework supports Compulsory COVID-19 Vaccination**

In sum, we are of the view that a compulsory requirement for the COVID-19 vaccine is generally justifiable in law – whether constitutionally, or in the private sector. The current legal framework, including jurisprudence, be it by analogy, or from the fast emerging specific case-law, does support it.

However, legitimacy in the law is not the only factor to consider in making the determination in favour of mandatory vaccination. There are social and industrial relations implications. Compulsion might be legally correct, but not necessarily desirable, or necessary. Alternatively, Heads may take a more nuanced approach instead of a blanket-approach to the issue, prioritising high risk workers.

The validity of a compulsory response to vaccination depends, of course, on the assumption that vaccines are available to the public at large.

**Two key principles** ground the identification of the legality of compulsory vaccination:

(i) **Reasonableness** – The underlying premise would be that, given the seriousness of the pandemic, which threatens life and livelihood, vaccination is a reasonable option for protection, as opposed to doing nothing and hoping for the best? Reasonableness here does not mean perfection. This principle holds whether interrogating the Constitutional parameters of the issue, or private actions in labour law, or administrative law;

(ii) **Proportionality** – taking the route that is least harmful to human rights. This is an additional hurdle for legality once rights are being limited. The contextual premise is that after taking other measures: persuasion, PPE etc., compulsory vaccination emerges as the only feasible way to protect safety and lives. While a public law/ rights principle, its content can easily be translated to employer actions.

## **Established Science on COVID-19 will Be Instrumental**

In considering both of the above questions, the law and courts will examine the established science that supports the vaccine and the current status of the pandemic and **not** myths, stigma, conspiracy theories and the like. This is consistent with case-law on the HIV pandemic, disability etc. <sup>3</sup>

“Established science” in our context means information coming from WHO, CDC, PAHO etc. Organisations like CARPHA, MOH have important roles to play here as well, since much of the vaccine resistance has to do with MYTHS and misinformation, e.g. the transmission question.

## **B. THE PUBLIC SECTOR DIMENSION – RIGHTS AND PROTECTIONS**

### **Rights and the Constitution**

There have been many misconceptions and much misunderstandings surrounding the COVID-19 vaccine question, unfortunately even from lawyers, some of whom have stated upfront that compulsory vaccination is a violation of human rights (often without citing which particular right). While much of that opinion is waning after being challenged, it is worthwhile to state the appropriate legal principles.

There is no doubt that mandatory vaccination involves the abrogation or limiting of some rights, or at least a sifting of rights. Three principles are relevant in assessing the rights question:

- (i) No right is absolute and neither law nor rights exist in a vacuum. Compulsory vaccination then becomes a question of *balancing* identified rights against the proposed limitation to prevent potential harm;
- (ii) There are 2 individual rights conflicting – both anti-vaxers and others have the right to personal liberty, etc. The rights of the individual who asserts that his or her rights are being violated must also be balanced against the individual rights of others who are pro-vaccination, e.g. someone who does not wish to come to work due to danger or harm by the unvaccinated can also speak to her own individual rights being compromised. In this case the two conflicting individual rights must be assessed to determine which is weightier; and
- (iii) Vaccination involves not just *individual* rights to dignity, to privacy, personal liberty, religion, etc., but also *collective* rights, particularly economic, social and cultural rights, e.g. right of the public to health and safety and even life. These must be balanced.

The issue is therefore not so much a denial of rights, but a balancing of conflicting rights. Ostensibly, compulsory vaccination is not about taking away rights, but protecting conflicting rights, as well as protecting even the rights of anti-vaxers to life – i.e. the right to life. While the voices of anti-vaxers asserting their own individual rights have been loudest, the other rights contexts are just as important.

On examining the parameters for limiting rights in our constitutions, as well as past precedents, it is likely that a state will have a wide discretion, or margin of appreciation in enacting mandatory Covid-19 laws for the following reasons:

ALL of our CARICOM Constitutions permit limitations if reasonable – in different formulae – “reasonably required”, “reasonably justifiable” etc. and all recognize the public interest (such as public health) in

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<sup>3</sup> E.g. *Hoffman v South African Airways*, challenging the then popular myth and stigma that persons could transmit HIV from ordinary contact and thereby justify dismissing HIV positive workers.

assessing reasonableness.<sup>4</sup> In most cases this is spelt out explicitly in the various Constitutions, for example, the Grenada constitution, s. 1 which speaks to “limitations” of rights to protect the “public interest”,<sup>5</sup> or s. 11 Barbados and s. 14 of the Jamaica Constitutions respectively.<sup>6</sup>

However, in terms of disease and vaccines, OECS countries are on even **stronger** constitutional ground. Significantly, OECS Constitutions specify public health and even infectious diseases as acceptable and consequently, reasonable rationales for limiting rights.

The rights to not be arbitrarily searched, freedom of conscience, etc. freedom of expression, movement, and protection from discrimination are all rights subject explicitly to the interest of public health. See e.g. section 7 of the Grenada Constitution, section 17(1) of the Saint Lucia Constitution on arbitrary search, s. 5a of the St. Vincent Constitution, sections 10, 11, 12, 13 of the Constitution of Antigua and Barbuda, sections 8-13 of the Saint Christopher and Nevis Constitution, ss 6-12 of the Dominica Constitution and the Barbados Constitution, s. 19 (6):

“Nothing . . . done under . . . any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision- which is reasonably required- (i) in the interests of . . . public health; “

Moreover, the right to “personal liberty” which would ordinarily protect against such compulsion, and one being touted a lot these days – is specifically compromised. Several Constitutions, such as section 3(1)(g) of the Grenada and Dominica Constitutions, s. 13 (1) g) of the St. Vincent, Barbados Constitutions, s 5 (1)(h) of the Antigua and Barbuda and the St. Kitts and Nevis Constitutions and s.3 of the Saint Lucia Constitution, make that right subject to the state taking measures to prevent the spread of “infectious or contagious disease.”<sup>7</sup> This is in addition to disease being a ground for states of emergencies.

### **Elements of Reasonableness in the COVID-19 context**

The core question is whether it is reasonably justifiable to impose mandatory vaccination and limit rights to protect health and lives in this pandemic. The elements and considerations which a court will take into account in assessing reasonableness in the COVID-19 context are those surrounding the pandemic and with which ALL Heads are familiar. They include, for example:

- PPE and masks not sufficient to contain the enduring a COVID-19 virus and pandemic;
- Vaccination is safe and effective both to reduce transmission and ameliorate severe disease and death and the only means to do so;
- COVID-19 is deadly and becoming deadlier;
- COVID-19 presents a huge burden to the state, individual livelihoods and commercial infrastructure so must be contained;
- The social and economic cost when hospitals are overwhelmed, including preventing persons who are ill with other ailments and need hospitalization.

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<sup>4</sup> Trinidad and Tobago has a different formula but here again – reasonableness. The Constitution permits such abrogations unless shown “not to be reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual.” It requires the special 3/5 majority of Parliament.

<sup>5</sup> See, e.g. Section 1 of the Constitution of St. Vincent and the Grenadines: “Whereas every person in Saint Vincent is entitled to the fundamental rights and freedoms, . . . but subject to respect for the rights and freedoms of others and for the public interest, . . .”

<sup>6</sup> which proclaims that rights limitations are “designed to ensure that the enjoyment of the rights and freedoms of any individual does not prejudice the rights of others or the public interest.” In Guyana’s Constitution, section 40 (2).

<sup>7</sup> While Trinidad and Tobago has a different formula, the philosophical and jurisprudential responses to constitutional principles are very much the same here. The 2019 *Jamaican case of Robinson v AG of Jamaica* [2019] JMFC 04 on privacy, which declared that “in free and democratic societies, [residents] have a right to be left alone and to retain control over their body, mind, heart and soul” cannot be taken as a carte blanche denial of limitations to override such specific permissions in our constitutions- especially when Caribbean states so clearly control decisions about our bodies, especially women’s bodies, in other respects. Moreover, in states with anti-abortion laws we already intrude and control women’s bodies.

- Perceived risks of vaccines are miniscule in comparison to the risk of transmission and impact of COVID-19.

### **Mandatory Vaccination Already Part of the Legal Status Quo**

The view that mandatory COVID-19 vaccination is permissible within the constitutional parameters is supported by the fact that CARICOM already has clear precedents for legislation mandating other types of vaccines. These have never been declared unreasonable, or unconstitutional and, arguably, the COVID-19 pandemic is even more serious. For example, CARICOM already has legislation mandating vaccines for children's entry into schools – measles, yellow fever etc.<sup>8</sup> Such mandatory vaccination statutes are found the world over, perhaps influenced by a 1905 US ruling, *Jacobson v Massachusetts*, permitting mandatory vaccination against small-pox.

Even where there is no law mandating a vaccine, there is precedent and practice which make certain vaccines *de facto* mandatory. For example, one cannot travel to other countries without a yellow fever vaccine. Similarly, many health-care institutions already require staff to be vaccinated for known contagious diseases, including Medical Students/ Interns, who are required to show evidence of immunization against Hepatitis B, Varicella and Tuberculosis. There is therefore sufficient precedent for mandatory COVID-19 vaccination – the horse has already bolted.

### **Trend Prioritises Collective Rights**

Moreover, the current judicial trend leans in favour of public health/ collective rights imperatives and does *not* prioritise individual rights. This is the reason e.g. why the courts have *not* upheld challenges by persons who were locked out of their own countries alleging violation of individual rights of citizenship etc. in Trinidad and Tobago. It is also the rationale for current regulations which abrogate our rights to freedom of movement under States of Emergency imposed in the OECS and CARICOM, the mandatory wearing of masks etc. Note that there have also been protests elsewhere about the compulsory requirement to wear masks!

### **Rationale for Limitations**

The rationale for, or philosophy underpinning limitations on individual rights is relevant in the current emotive debate. Limitations on rights are premised on HARM. It is reasonable and justified to limit rights in situations where preserving such rights may cause harm to others, since rights are protected to the extent that they do not cause harm. It is difficult to find situations where harm is more prominent than a pandemic where people are dying.

Moreover, mandatory vaccination laws should be viewed ***not*** as punitive or draconian laws limiting rights, **but as protective legislation aiming to protect rights**, including the right to life and the competing rights of others. This is similar to laws mandating seat-belts (paternalistic but protective). The rationales for such laws should be explained to encourage workers, unions and citizens to see them as such.

There is therefore, a low threshold to cross to accept that mandatory vaccination is constitutionally legitimate. In view of the above, mandatory vaccine legislation could easily meet the constitutional reasonableness threshold in the current exceptional circumstance - a life-threatening pandemic, which also has the potential to harm, or destroy the economy and social fabric.

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<sup>8</sup> For example, the Public Health (Nursery Schools and Primary Schools Immunization) Act 1973, Chap 28:03 (PHNPSI Act) of Trinidad and Tobago mandates the immunization of persons seeking entry into nursery schools and primary schools against specified communicable diseases (i.e., Poliomyelitis, Diphtheria, Tetanus, Yellow Fever, and Measles).

### **Proportionality Principle as Applied to COVID Context**

While public health rationales are clearly legitimate, modern courts will likely consider the proportionality principle in the COVID-19 context. The question that needs to be asked in the assessment of limitations on constitutional rights would be whether mandatory vaccination is a proportionate response. The requirement for proportionality in human rights/ constitutional/ public law requires that the state demonstrates that it is unable to take a route less harmful of rights in order to obtain a legitimate objective. The State must show that it explored other measures in its choice. In the context of the COVID-19 pandemic, for example, OECS Governments would have employed persuasion and education to encourage persons to vaccinate, without the desired success (herd immunity). Other relevant factors would be: the percentage of persons unwilling to take the vaccine voluntarily and the impact that would have on public health and life; the fast-growing pace and seriousness of the pandemic; and gaps in the operationalization of a voluntary vaccine program. It is suggested that mandatory vaccination would be proportionate and therefore justifiable in the current context.

### **Need for a Risk Assessment**

A risk assessment must be made, considering proportionality and reasonableness variables, e.g.:

- How great is the risk for the society if we do nothing and do not vaccinate?
- Is the risk the same in all sectors and for all workers? Is mandatory vaccination proportionate only for certain high risk sectors and less invasive methods sufficient for others?
- What is the risk of any vaccine side-effects versus the risk of curbing the pandemic/ saving lives?
- Are alternative methods – PPE, social distancing, mandatory mask-wearing, which are less invasive of human rights just as effective to confront the risk and protect?

The increasing burden placed on health systems, negatively impacting State resources, including its ability to treat non-COVID-19 patients, is another risk and cost relevant to proportionality and reasonableness and speaking directly to the public interest and balancing of competing rights issues.

Certainly, alternative methods are acknowledged as less effective in certain high risk sectors, e.g. healthcare work. In the UK over 8700 persons got infected from hospitals. On June 16, 2021, the UK government announced that it was making COVID-19 vaccines mandatory for staff in care homes and planned to do so for all NHS workers. France too. While controversial, it is believed to be the safer option.

In terms of the medical risk/ efficacy question, if science shows that the vaccine is not going to be so effective, limiting rights is less justifiable? However, the science thus far is proving the opposite. While vaccinated persons can still get the virus, it significantly lowers both transmission risks and severe illness due to lower viral loads. These are two myths accounting for much of the vaccine hesitancy that need to be debunked to get more buy-in from the public. It is expected, however, that a court will have the accurate information.

The bottom line is that it must be demonstrable that the science is showing that a voluntaristic scheme with only PPE and other safety protocols is NOT working or workable to achieve public safety and that the only effective way is through vaccination.

Recent case-law on mandatory vaccination demonstrates this proportionality requirement. In *Vavříčka and others v. Czech Republic* [2021] ECHR 116 from the EU, a key issue here was that other methods relying on persuading persons to take the hepatitis vaccine, were not effective or sufficient to acquire the desired protection due to vaccine hesitancy. In these circumstances the State could mandate vaccination since the rights limitation was considered "necessary in a democratic society".

Significantly, the judgment emphasized science-based knowledge over fear and stigma. There was evidence that the nine (9) vaccines in question were proven to be safe and effective against long-lived diseases. This decision is likely to be persuasive in any COVID-19 mandatory vaccine challenge, given the similarity of the EU Convention with Caribbean constitutions.

Consequently – the first step should be to persuade and educate, but if that does not work mandatory vaccination is proportionate. In a strong anti-vaxer situation exacerbated by media hype, it is easy to determine that these softer approaches cannot work and more forceful methods are needed to protect the population, especially in high risk contexts.

### **Fluid Context and Emergence of Deadlier Delta Strain Increases Risk**

COVID-19 also presents a time-sensitive, dynamic, even fluid situation which impacts what is considered to be proportionate. Context matters. A couple of months ago, in Dominica, or St. Kitts, mandatory vaccination may not have been a proportionate response given that the virus seemed to be under control. Now, with increasing numbers and death rates, if it is recognised that alternative methods, social distancing, lockdown are *not* working, mandatory vaccination becomes proportionate and reasonable.

Importantly, with the incoming deadlier Delta variant, the situation becomes riskier and is even more conducive to compulsory vaccination since there is higher risk of transmission, severe illness, death etc.

There have been some questions of harm re AstraZeneca and recently Pfizer in terms of blood-clots, especially on younger persons. However, the conspiracy theories about instant death following the vaccine as a general premise is demonstrably false. Conversely, the increasing life-threatening risk of death posed by the Delta strain, it is suggested, outweighs the perceived risk of the vaccine.

The fact that WHO/ CARPHA has recently informed that the required percentage for herd immunity is now 90% - no longer 80 %, also makes the case for mandatory vaccination stronger since OECS states are unlikely to achieve this target without some sort of compulsion.

### **Soft Law or Indirect Approach to Compulsion**

Legal direction or regulation may be nuanced, making it more palatable. Instead of specific legislative requirements to mandate vaccination, or prevent employers and others from mandating it, the legal approach could be passive or indirect regulation. Indeed, mandatory vaccination, even before COVID, is often *de facto*. Analogies with existing immigration requirements for certain vaccines are relevant here. For example, there is no law compelling a yellow fever vaccine, but we cannot fly to many places without it. A similar situation is already happening with the COVID vaccine e.g. – with airlines. CAL signaled since July that unvaccinated non-nationals will be prohibited from flying. More recently, Canadian airlines have done the same. There is an ILLUSION of choice. This has not provoked any negative reactions. In fact, it propelled some Trinbagonian anti-vaxers to go and get the vaccine. No one is being forced to fly or do anything. France of course, has now taken this to the extreme.

That approach has often worked with courts – e.g. in Europe and the UK, where employers prevented persons from wearing full hijab at workplaces. The courts reasoned that they were not forced to conform. Rather, they had a choice – to work somewhere else. In fact, that kind of thinking was prominent in the first COVID-19 vaccine case – in Texas – *Bridges*,<sup>9</sup> concerning mandates given to hospital workers.

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<sup>9</sup> *Jennifer Bridges, et al v. Houston Methodist Hospital et al*, Docket No. 4:21-cv-01774 (S.D. Tex. Jun 01, 2021), decided June 12, 2021.

The court reasoned that forcing Bridges to take the vaccine was “not coercion” since the Methodist hospital “was in the business of saving lives without giving them the COVID-19 virus. It is a choice made to keep staff, patients and their families safer. Bridges can freely choose to accept or refuse the vaccine. However, if she refuses, she will simply need to work somewhere else.” “If a worker refuses an assignment . . . or other directive, he may be properly fired. Every employment includes limits on the worker’s behaviour in exchange for his remuneration. That is all part of the bargain . . . The public’s interest in having a hospital capable of caring for patients during a pandemic far outweighs protecting the vaccination preferences.” It also held that mandatory vaccination did not violate public policy.

The Court also relied on a May 28, 2021 Guidance Note offered by the USA’s Federal agency, the Equal Employment Opportunity Commission, which declared that mandatory vaccination was lawful, save for reasonable accommodation being made for religious and medical grounds.

On August 12, 2021, the US Supreme Court upheld 2 lower court rulings upholding the legality of Indiana University’s policy of mandatory vaccination for its students. The students asserted, unsuccessfully, that their right to bodily integrity had been violated, but all of the courts disagreed.<sup>10</sup> The reasoning was based on business sustainability, that the operations of the university could not be carried on effectively otherwise. In a similar ruling earlier, Judge Frank Easterbrook of the Chicago-based U.S. Court of Appeals for the 7th Circuit upheld the requirement in a decision earlier this month, citing the 1905 *Jacobson* Supreme Court precedent that allowed Massachusetts to impose a penalty on those who declined smallpox vaccinations. He said: “People who do not want to be vaccinated may go elsewhere.”

### **Experimental Vaccine Counter-Argument**

Anti-vaxers have been changing their arguments. First, it was claimed that ‘there was no mandatory law so employers could not impose it’, ‘then violation of rights’, then the ‘inability to change unilateral terms and conditions.’ As these arguments have been challenged – new ones have emerged. A recent counter-argument is that they are not against vaccines *per se*, but only against the COVID-19 vaccine because it is an “experimental vaccine.” This is potentially the strongest argument, but is it solid?

Is it reasonable to compel a vaccine that is “experimental,” approved only for emergency use? Again, Courts will take a fairly orthodox approach, deferring to established science (not the outliers and sceptics). WHO approvals etc. will be weighty. We know that all vaccines, indeed ALL medicines/ pharmaceuticals (and alternative medicines) have some element of risk, so “emergency use” is not likely to deter findings of safety and efficacy. The question of what is the greater risk or harm – a vaccine with some risk, or PPE and other safety protocols only is key? This view is supported by the *Bridges* case.<sup>11</sup> The main bone of contention was the experimental nature of the vaccine. The court disagreed and indeed scoffed at the argument. Ultimately, it assessed the risk of any possible fall-out of the vaccine versus the risk of doing nothing and found in favour of the former.

Whether the term “emergency use” could be equated to “experimental” is another issue. The COVID-19 vaccine was developed quickly (like the Ebola vaccine), but this was largely due to improvements in science and technology. Further, the latest data is showing that while there is some ‘breakthrough’ disease with vaccinated persons, this is in the minority and such persons tend to have very mild forms of the illness. Unless there is a drastic shift in the scientific assurances on the vaccine, it is unlikely to stand.

In any event, the experimental argument is short-lived. Each day that passes it becomes less ‘experimental.’ Pfizer is reportedly about to get its license.

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<sup>10</sup> <https://www.usatoday.com/story/news/politics/2021/08/12/covid-19-vaccine-scotus-declines-indiana-university-vaccine-challenge/8115997002/>

<sup>11</sup> *Supra*.



### **Exemptions and Exceptions**

Any law or policy MUST accommodate certain exceptions e.g. medical reasons and religious reasons for not taking the vaccine.

In sum, it is likely that a state will have a wide margin of appreciation in formulating mandatory vaccination laws and that they will be viewed as lawful, legitimate, proportionate, necessary, and ultimately, reasonably required/ justifiable in the particular current context of the COVID-19 pandemic.

### **C. THE PRIVATE SECTOR - COMPULSORY VACCINES IN THE ABSENCE OF A MANDATORY LAW**

Similar elements discussed above in terms of reasonableness and proportionality will be relevant to the private law context, applicable e.g. to employers, universities, landlords, airlines. However, these must be assessed not under the doctrine of human rights, but under different principles associated with labour, administrative law etc.

As with the public law question, there have been several counter-arguments to vaccination, even from lawyers, which are based on misleading or even false legal premises. These will be addressed in turn.

#### **Human Rights, Constitution Inapplicable to the Private Sector Sphere**

First, the often repeated counter-argument that employers violate human rights when they attempt to impose compulsory vaccination is without any legal foundation. While there are similarities in the legal issues involved, it is only in the public sector/ public law arena that human rights and constitutional issues arise – since, of course, our constitutionally protected rights only apply as against the state. The exception is where the state is the employer i.e. for public service workers. This is a misunderstanding in the current discourse where persons believe that they are entitled to human rights which frankly, they do not have.

However, while the Constitution does not bind private actors such as employers, airlines etc., except in Jamaica, the constitutionality of mandatory vaccination will impact the question of reasonableness in the private law context, IR environment etc. If a constitutionally justifiable measure – it is likely that courts will find it reasonable for employers to take such measures. Conversely, if constitutionally suspect, or too harsh, it would be very difficult for employers, or universities etc. to justify it. While the final determination will be left to a court, if challenged, the above discourse which concluded that mandatory COVID-19 vaccination is both reasonable and proportionate, will likely positively influence any such legal action.

#### **Absence of Mandatory Vaccination Laws Does Not Preclude Unilateral Action by Employers**

The argument that *because* there is no law mandating vaccines, employers and others cannot compel compulsory vaccination still endures, though waning after being challenged.<sup>12</sup> This is a manifestly false and simplistic view of law and law-making within any legal system. Where there is no legislation governing an issue, it is simply unregulated and there is no presumption that it is outlawed or prohibited. Law is often enacted to prevent acts or omissions, not necessarily to prescribe them. Indeed, where the law is silent, the presumption is that unregulated acts and omissions are permissible, unless adjudicated otherwise, not vice versa. Law is required to be certain and Parliament has a responsibility to clearly delineate what is outlawed.

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<sup>12</sup> First apparently raised in Trinidad and Tobago by lawyers, but challenged - See Antoine, R-M.B. *Mandatory COVID-19 Vaccines: Public Health vs. Individual Freedom* – *Newsday*, 13.6.21. <https://newsday.co.tt/2021/06/13/mandatory-covid19-vaccines-public-health-vs-individual-freedom/>; <https://www.breakingbelizenews.com/2021/06/24/should-covid-19-vaccination-be-made-mandatory/>; Antoine R-M. B. – *Presentation to OCBA* – 8.7.21 - <https://demerarawaves.com/2021/07/09/compulsory-covid19-vaccination-is-legal-caribbean-law-professor/>

Law does not or cannot prescribe or regulate every action of life. There are already many accepted, unchallenged requirements that employers impose despite the absence of legislation to regulate them, even in analogous contexts. For example, most workplaces, universities, etc. already have the latitude to impose wide requirements for hire or admission, such as compulsory medicals, despite there being no law governing such issues. These include too standards of conduct, specific criteria or qualifications for jobs and quotas for minorities (also in the public interest). Similarly, many healthcare institutions already require staff to be vaccinated for known contagious diseases. For example, students in the Faculty of Medical Sciences, UWI, all of whom intern at hospitals, are required to show evidence of immunization against Hepatitis B, Varicella and Tuberculosis before acceptance into the program. Moreover, in the United States and elsewhere, both employers and universities have already imposed unilateral compulsory COVID-19 requirements and courts have upheld them when challenged.<sup>13</sup>

Accordingly, the real test for assessing the validity of any unilateral employer compulsory vaccination requirement is whether such a requirement would be reasonable and fair in the current context and not simply whether any law mandates it.

### **General Duties to Health and Safety and Care at The Workplace**

The most important premise for compulsory vaccines in the private sector is that under the common law and via statute, both employers and employees have over-riding general duties of care to maintain a safe work environment and to protect the safety and health of employees, co-workers and even, in certain circumstances, the public. In fact, this duty is a specific term of the contract of employment, whether express, statute-based, or implied. Recognition of this general duty would be part of the evaluation of what is reasonable and fair in the COVID-19 vaccination context.

The action will need to be proportionate. Ultimately, the rationale is that in the particular workplace PPE and other safety protocols are not sufficient to create a safe workplace, so that vaccination is the only reasonable option. This involves a risk assessment at the workplace. The reasonableness question in the workplace, or universities, schools, airlines, housing etc. will also involve assessing risks to *others* – other employees, the public, the worker herself, if she does *not* vaccinate.

Again – context is important. A high risk environment will make it more reasonable to compel vaccines. Equally, it may be a breach of statutory obligations. In a low risk workplace, where PPE and distancing and homework are easy alternative measures, compulsory vaccination will be less reasonable. This is also **an echo of** the proportionality principle discussed earlier.

### **Duty to Maintain Health and Safety Extends to Co-Workers**

The duty of care in safety and health matters extends to employees also. This is particularly important in the COVID-19 vaccination context where there is the possibility of employees infecting others. Given that the duty of care extends to workers' obligations to protect co-workers, a worker who refuses a vaccine threatens the safety of others which may commit a breach. This duty of employees toward health and safety also incorporates a duty to cooperate with the employer in safety and health objectives.

COVID does not need to be specifically named in OSH legislation as a biological hazard – as one union argued. There is a general duty of safety and health which is sufficient to encompass the COVID-19 pandemic. In fact, the provision of a safe and healthy work environment is considered a fundamental 'condition'<sup>14</sup> of the contract of employment and above all, is considered good IR practice.

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<sup>13</sup> See the US cases above.

<sup>14</sup> See *Communications Workers' Union and Bayside Towers Management Limited*, Trade Dispute 643 of 2012, p. 3.

### ***Refusal to Work Due to COVID-19.***

Just as there are competing rights in public law, there are competing interests in the private sphere. While there are workers who are reluctant to be vaccinated, there are also those who would feel at increased risk if their co-workers and themselves are not vaccinated, regardless of PPE or COVID-19 safety protocols. This provides another justification for employers to take steps to mandate vaccination. Competing interests of the anti-vaxers and pro-vaxers are therefore to be considered and must be part of the overall risk-assessment to be made in seeking to protect workers' health safety, or even life.

Moreover, health and safety protections in OECS countries also give an employee the right **to** refuse work on safety and health grounds if there is serious and imminent danger to himself or herself, or emerging hazards injurious to health and life. In the COVID context, a relevant question is whether unvaccinated workers who pose a health and safety risk to the workplace can ultimately trigger such protections? In the context of vaccination, employers can posit that should they fail to protect employees by **not** requiring them to be vaccinated, this would increase, rather than diminish the safety and health threat at the workplace and pave the way for employees to refuse to work.

### **Counter-Argument that Compelling Vaccination Unlawfully Imposes Unilateral Terms**

A counter-argument has emerged that mandatory vaccination by employers will breach the terms and conditions of employment of existing workers. This came from certain public statements made by the President of the Industrial Court, Trinidad and Tobago in an interview. It has been taken up by the Unions and others and mistakenly treated as a judgment, or "determination." In fact, this was not a determination because this was not a case in front of her that she adjudicated and for which she had the benefit of full legal argument. At best, it is what is termed an *obiter* statement, and has no bearing on law. Moreover, other aspects of her statement have not been fully appreciated. In fact, she indicated that mandatory vaccination was, in principle, legitimate since she stated that it was acceptable for future employees. That must mean that she agrees in principle that it is lawful. Her reservation focused on unilaterally changing terms and conditions of employment of existing employees only. Here too, however, the position is somewhat misleading and needs to be nuanced.

### ***Content of the Obiter Statement is Misleading – OSH an Existing Term***

Requiring a COVID-19 vaccine to protect employees and the public's health and safety is not an unlawful unilateral change in terms and conditions of employment. The duty toward health and safety – to provide a safe place of work is also an existing term of the contract of employment, not a new term, whether express, statute based, or implied, that cannot be derogated from. Consequently, where the employer seeks to honour that duty, it cannot be said that new terms and conditions of employment are being unilaterally imposed, or existing terms and conditions altered. At minimum, there are competing terms. However, where, as in most countries, this duty has been codified in statute, it assumes an even higher hierarchy and supersedes any conflicting contractual term or common law obligation. As explained above, the employer can be held to task for failing to take steps to protect the worker and co-workers. This would be part of the evaluation of what is reasonable and fair and even statutorily required.

Even if we accept that this is a new term (which is not accepted), not every alteration of employment terms and conditions equates to a contractual breach. While we agree that employers cannot normally unilaterally change employee terms and conditions, there are exceptional circumstances which permit it, such as where the work environment changes fundamentally and modification is necessary to protect the sustainability of the enterprise itself. Common examples from case law speak to technological advancements that impact the workplace. For example, employees hired as typists may legitimately have their terms and conditions of work adjusted to enable them to operate in a computer-based workplace as technology progressed. While the employer may be required to retrain, such modifications will and have

been allowed. Changing health and safety conditions that impact the workplace, such as the COVID-19 pandemic, should be viewed in the same light.

Given the weight to public health rationales in our law and the existence of the implied term on health and safety, it is likely that mandatory vaccination would **not** be considered an unreasonable modification of terms and conditions, particularly given the general 'fit for work' medicals already accepted.

There is nothing unique or peculiar about the terms and conditions of Caribbean contracts of employment which prohibit compulsory vaccination. Already, in the world over such terms are being imposed without any legitimate challenge or concern about breaching such contracts by violating the unilateral imposition principle. The cases that have emerged in the US did not even consider such an argument, which, it is suggested, has little or no merit.

### **Economic Cost and Effectiveness of Alternatives**

Economic cost to the Employer will also factor into the reasonableness question. If the employer is having to quarantine workers regularly, as is apparently happening in some enterprises, or is faced with multiple sick leaves due to the pandemic, it is unreasonable to expect her to accept this as it may put the survival of the business in jeopardy. Undue hardship, a term born out of Discrimination Law, will be relevant.

Further, the effectiveness question is not only important for the vaccine science. It also applies to the effectiveness and feasibility of the alternative methods. It may be impractical to expect or monitor or enforce strict adherence to PPE, social distancing etc. Other workplaces may also impose vaccine requirements, barring non-vaccinated suppliers etc. from physically entering the work-space and making PPE redundant. Homework may not be viable or productive etc. even if accommodated.

### **Option for Mandatory Vaccination for High-Risk Employees**

Mandatory vaccination only for certain categories of high-risk workers, particularly those who interact, to a high degree, with members of the public or cannot work remotely, or certain high-risk sectors, is an option. Vaccination may be necessary because of the nature of the job itself or the industry.

The level of risk in such cases impacts on the question of what is reasonable and the burden of care on the employer to protect the employee in such circumstances increases as determined in the risk-assessment. The duty to take proactive steps to protect such workers and the public, including preventing "super-spread" will be much higher than with other workers. Indeed, in a high risk environment, it may be irresponsible and even negligent to permit employees to work without a vaccine.

The phenomenon of airlines and universities requiring COVID-19 vaccines before travel or admission without successful challenge strongly suggests that such compulsion is neither unreasonable nor disproportionate. In fact, there is already a *de facto* mandatory vaccination requirement in existence in several sectors globally. Apart from airlines and universities, as noted above, other countries, such as the US, the UK and Italy have introduced compulsory COVID-19 vaccination for many healthcare workers, including medical students, due to these additional health risks and this has been accepted as reasonable and even desirable.<sup>15</sup> St. Georges Offshore Medical School in Grenada implemented mandatory vaccination with termination as a penalty.

However, while mandatory vaccination for only high-risk employees is certainly a more proportionate response to COVID-19, the recent developments with the vaccine, such as its exponential increase and

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<sup>15</sup> <https://www.reuters.com/article/us-health-coronavirus-italy-vaccine-idUSKBN2BN34F>. Teachers and transport personnel are also identified in some countries.

more deadly and transmissible variants, makes this option less viable than previously, whether in terms of a national law or in the private sector and points to general obligations for vaccination.

In general, as with the constitutional question on mandatory vaccination, with regard to employer requirements, given the seriousness of the pandemic and the trends toward public health, courts the world over are likely to rule in favour of the collective interest of public health deemed reasonable and not individual worker interest in refusing vaccines. This may change if the pandemic eases and the threats to public safety decrease, or in the unlikely event that scientific evidence proves the vaccines to be unsafe, or ineffective, since reasonableness depends on the state of the virus and its scientific profile.

### **Dismissal, Other Sanctions and Reasonable Accommodation**

While there is a strong argument toward making vaccination mandatory, the issue of sanctions, including dismissal for persons who refuse to comply, should be approached cautiously. Already, in the US, the official guidance is that persons may be dismissed legitimately and fairly easily (*Bridges*). However, in the Caribbean, dismissal law tends to be stricter. In the OECS, there is unfair dismissal law, which imposes strong protections against dismissal, with the requirement that all dismissals must have a valid reason to be considered fair. A dismissal is only considered fair if it is in keeping with the principles of good industrial relations practice, which is itself premised on reasonableness and fairness.

Penalties for failure to meet mandatory vaccine requirements might be viewed restrictively, given the humane aspects of the COVID-19 context. Would it be fair to terminate such an employee? It is suggested that lesser penalties are more reasonable, such as alternative safety arrangements: isolation, in addition to the usual PPE, etc. so as to provide for the greatest possible leeway to employees reluctant to take the vaccine. The indirect/ de facto approach discussed above could also be used in the workplace to protect safety and health. Without compelling a vaccine, unvaccinated employees could be rostered differently, switched to isolated work-spaces, placed on home/remote-work if productive and feasible. It would be important to present these not as sanctions, but as accommodating measures.

These would be accompanied by compulsory requirements for COVID-19 testing – a negative result, similar to requirements for medicals. It is legitimate for an employee to bear this cost.

Dismissal should be seen as a last resort. Ultimately, it will depend on whether the general objectives of safety can be realized in the work-sphere without compromising the sustainability of the enterprise.

As with other types of dismissal, **due process** is important. Employers should clearly document why they cannot accommodate the employee and that they have considered all reasonable substitute options e.g., failure of the worker to follow safety protocols, inability or inefficiency of home / remote work, testing etc.; before terminating an employee. If all else fails in good faith, then dismissal is a legitimate option.

### **Lockout or Furlough**

In addition to the remote work and other indirect measures above, the question arises whether the employer could lawfully refuse unvaccinated employees access to the workplace or place them on 'furlough', or 'lay-off'. As always, health and safety interests and duties must be evident as the rationale for this action. It should also be clear that there was no other feasible option.

Refusal of access to work in such a situation should not be viewed as a "lockout" since that term is reserved for intentional industrial action by an employer. Rather, it is a safety measure.

The refusal of access to the workplace may come from another employer, e.g. refusing to allow unvaccinated workers to make deliveries etc. This would contribute to a finding that work functions are not sustainable.

In addition, however, care must be taken not to offend the statutory procedural requirements that obtain with respect to lay-offs, such as exist, e.g. under Antigua and Barbuda and Saint Lucia's Labour Codes. After a specific period, lay-off paves the way for severance, including severance benefits etc.

The term 'furlough' is mainly an American term, but one which has been adopted globally, even in the UK. Thus far, there are no known legal challenges to this response to the pandemic and employees have been kept at home without pay, or reduced pay for significant periods. Ideally, such action should only be done in consultation with a recognized union, where there is no reasonable alternative and because it is recognized as a more desirable end-game than lawful severance or termination.

### **Exceptions to Mandatory Vaccination Requirements**

Any policy or law, whether in relation to the private sector or the state, should include legitimate exemptions to the general requirement of vaccination to satisfy the reasonableness and proportionality thresholds. The obvious categories for such exceptions are objection on grounds of religion and medically established health risks because of the vaccine.

#### ***Objections on Religious Grounds***

Exemptions on religious grounds be protected. However, the criteria for such exceptions will be strict. In the case of religious objection, in accordance with case-law, this must be a recognized objection to medical interventions/ treatment based on the established religious belief of the religion, or religious sect, e.g. Jehovah Witnesses' well known objections to medical treatment. An employee could not present as an objection on religious ground an objection to the vaccine in a laissez-faire manner.

Caribbean courts have been liberal with respect to protecting religious freedom. In the constitutional/ public law sphere, good examples are the *Hijab* case in Trinidad and Tobago (*Morraine*), where judicial review principles were used to protect a student's right to wear the hijab and more recently, the cannabis challenge, where Rastafarians successfully challenged the prohibition against cannabis use on grounds of religion, influenced by the Report of the CARICOM Regional Commission on Marijuana.<sup>16</sup>

Notably, however, courts globally have been less generous to religious exemptions in recent years, some fueled by anti-Muslim sentiment since 9-11. Wearing of Muslim garb has been successfully prohibited at workplaces and even the public in Europe and even traditional protections for 7<sup>th</sup> Day Adventists Sabbath have been struck down by UK courts. The reasoning was similar to that identified in the *Bridges* Case, above, in effect, you have a choice not to work here!

While it should be approached cautiously, there is therefore some leeway here too, even in the face of religious exceptions.

Conversely, where a person presents a valid medical rationale for not taking the vaccine, supported by the usual objective factors, e.g. a medical certificate, there is no justification for compelling the vaccine.

#### ***Reasonable Accommodation for Exemptions***

Where exemptions are granted at the workplace, reasonable accommodation at the workplace must be employed. These include, but are not limited to homework, isolation, transfer to areas with less contact,

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<sup>16</sup> *Ras Sankofa Maccabee v COP and AG of Saint Kitts & Nevis*, Claim No. Skbhcv2017/0234, dec'd May 3, 2019 (SC).

stringent safety requirements (PPE etc.). However, if it is demonstrated that such accommodating facilities cannot be safely and effectively employed, the situation would be akin to an employee who is medically boarded. In such exceptional circumstances, an employee may be dismissed as a last resort.

### **Compulsory Vaccination as a Ground for Anti-Discrimination and Undue Hardship**

Most OECS countries now have some protection against anti-discrimination in employment.<sup>17</sup> Discrimination liability only arises if the specific ground of discrimination in employment is specified in the statute. Vaccination in of itself is not a ground of discrimination, so that an employee who is treated differently for vaccine refusal (for safety reasons) cannot claim discrimination. This includes being prevented from accessing the workplace. Disability and religious reasons are however protected characteristics under such legislation. Religious exemption was discussed above.

In terms of disability, it is difficult and unnecessary, as some have sought to do, to attempt to place refusal of a vaccine for medical reasons under the category of a disability, since such a reason should be accepted outright.

Pregnancy can be a valid medical reason for refusal of COVID-19 vaccines and is also a ground of discrimination. Therefore, termination on the ground of pregnancy, for the purposes of refusal to take COVID-19 vaccine, may be deemed harsh and oppressive and contrary to good IR.

Even if a ground of discrimination is successfully used to prevent compulsory vaccination, it is still subject to the exceptions under anti-discrimination law. In general, such exceptions give way to the employer if the employee is unable to fulfil the “inherent requirements of the job”, or if the necessary accommodation imposes an “undue hardship”, or undue financial burden on the enterprise. In such situations, an employee has the flexibility to dismiss the employee.

### **Conclusion**

There is ample provision in OECS constitutions, corresponding jurisprudence and medical data to support mandatory vaccination laws even in the face of counter-arguments alleging violations of rights.

Having demonstrated above that mandatory vaccination is constitutionally appropriate given the leeway granted in favour of public health imperatives, it is submitted that employers could justify a requirement in a pandemic context, at minimum where the workplace is a high-risk environment, such as health-care, or essential services, or for workers more at risk at the workplace, such as frontline workers interacting with the public. It is unlikely that employers would be held to a higher standard than a constitutional standard. This is reasonable both to protect other employees, the interacting public and even the employee himself or herself.

Increasingly, the enduring state of the pandemic and the science is pointing to even more liberal rationales for compelling vaccines at the workplace.

Ultimately, all actions and toward compulsory vaccination must be grounded in a firm belief that they are being done in the interest and sustainability of the economy and enterprise, in the public interest, the interests of ALL workers and as a last resort, necessity. Those core principles will be what justifies actions as being reasonable and proportionate as required, and what will ultimately persuade a court.

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<sup>17</sup> See, e.g. The Labour Code of Saint Lucia, which has an entire section on Equality of Opportunity in Employment, transplanted from the 2001 Act, itself codification of recommendations from the CARICOM Harmonisation of Labour Law Report 1992.

***Medical Ethics supports Mandatory Vaccination***

The legal position mirrors the position emanating from medical ethics, as enshrined in the Nuffield Report – relied on by WHO: Mandatory vaccination “can be ethically justified if the threat to public health is grave, the confidence in safety and effectiveness is high, the expected utility of mandatory vaccination is greater than the alternatives, and the penalties or costs for noncompliance are proportionate . . .”