

MANDATORY COVID-19 VACCINATIONS AT UNIVERSITIES IN SOUTH AFRICA: GUIDANCE FROM THE UNITED STATES AND THE EUROPEAN UNION

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SUMMARY

During the past two decades, immunisation has saved millions of lives and prevented countless illnesses and disabilities in South Africa. Vaccination is the most important thing we can do to protect ourselves and our children against ill health. Vaccinations prevent up to three million deaths worldwide every year. However, the World Health Organization (WHO) has listed vaccine hesitancy as one of the biggest threats to global health. Vaccine hesitancy entails people with access to vaccines delaying or refusing vaccination. In addition to vaccine hesitancy, many people are of the view that it infringes on their fundamental human right to bodily integrity. However, this article presents findings that suggest that this right can be limited because everyone has a fundamental right to be protected from the spread of the disease. Tensions have increased as more vaccine mandates are implemented. Businesses continue to review and revise their Covid-19 vaccination policies as new mutations emerge and employers may be asking what they can do if workers refuse to get the job. Some employers have dismissed employees or put them on unpaid leave. Others have required unvaccinated employees to submit to weekly testing and take other safety precautions. In terms of the Code of Practice: Managing Exposure to SARS-COV-2 in the Workplace, 2022, the identifiable hazard relating to Covid-19 that workers face is the transmission of virus by an infectious person to others in the workplace. The Regulations for Hazardous Biological Agents, 2022 lists SARS-COV-2 as a hazardous biological agent that places legal responsibilities on employers to mitigate the associated risks. Each situation requires special measures to be implemented by employers in order to prevent the transmission of the virus. Universities in South Africa are also faced with this conundrum regarding the mandating of vaccines. This article examines and discusses mandating vaccines in South Africa, especially at universities, with guidance received from international instruments such as the European Union and countries such as United States. Various legislative and policy frameworks are also analysed.

1 INTRODUCTION

It has been argued that “the elimination of communicable diseases through vaccination [is] one of the greatest achievements of public health in the 20th century”.¹ Consequently, the Centers for Disease Control and Prevention (CDC), in its guidance for institutions of higher education, stated:

“Vaccination is the leading prevention strategy to protect individuals from SARS-CoV2² (covid-19) disease and end the covid-19 pandemic”.³

Universities are unique places with a large number of people gathered and living together in close quarters for months at a time.⁴ As such, there exists a high risk of Covid-19 infection spread and outbreak on university campuses. Subsequently, in line with current legislative and policy frameworks, including the obligations contained in the Occupational Health and Safety Act (OHS Act),⁵ a number of universities in South Africa have made Covid-19 vaccinations mandatory in order to protect the health and safety of employees, students and, by implication, members of the public who come into contact with employees and students.⁶ However, whether mandating Covid-19 vaccinations at universities will pass constitutional muster given the competing interests at play is a noteworthy discussion that one must have. In seeking an answer, this article consults not only South African law but also that of the United States and the European Union. The history of pandemics and vaccine hesitancy in Africa is discussed first. The article further discusses and examines the current South African legislative and policy frameworks in respect of vaccinations. Thereafter, an analysis of the United States and the European Union is conducted in respect of their position on mandatory vaccinations. The article concludes by supporting the mandating of Covid-19 vaccinations in South Africa.

2 HISTORY OF PANDEMICS AND VACCINE HESITANCY IN AFRICA

While some of the earliest pandemics faded by wiping out parts of the population, medical and health initiatives were able to halt the spread of other diseases.⁷ However, as human civilisations flourished so did infectious

¹ *Bruesewitz v Wyeth LLC* 562 US 223 226 (2011).

² SARS-CoV-2 means severe acute respiratory syndrome coronavirus 2, the virus responsible for causing the coronavirus disease 2019 (COVID-19).

³ See for e.g., Centers for Disease Control and Prevention “Guidance to Educational Institutions” (2019) <https://www.cdc.gov/coronavirus/2019-ncov/community/colleges-universities/considerations.html> (accessed 2021-12-18).

⁴ *Klaassen et al v The Trustees of Indiana University* (2021) (USDC IN/ND case 1:21-cv-00238-DRL-SLC document 34 filed 07/18/21 page 81 of 101).

⁵ 85 of 1993, as amended.

⁶ These include the University of Johannesburg, University of the Free State, Rhodes University, University of the Western Cape and University of the Witwatersrand.

⁷ See for e.g., Roos “How 5 of History’s Worst Pandemics Finally Ended” (March 2020) <https://www.history.com/news/pandemics-end-plague-cholera-black-death-smallpox> (accessed 2022-01-20) 1.

disease. Large numbers of people living in close proximity to each other and to animals, often with poor sanitation and nutrition, provided fertile breeding grounds for disease. New overseas trading routes spread novel infections far and wide, creating global pandemics. The five worst pandemics affecting human civilisation are described below.⁸

2 1 Plague of Justinian

The Plague of Justinian arrived in Constantinople, capital of the Byzantine Empire, in 541CE. It was carried over the Mediterranean Sea from Egypt.⁹ Plague-ridden fleas hitched a ride on the black rats that snacked on the grain. The plague decimated Constantinople and spread like wildfire across Europe, Asia, North Africa and Arabia killing an estimated 30 to 50 million people, perhaps half of the world's population. People had no real understanding of how to fight it, other than trying to avoid sick people. As to how the plague ended, the best guess is that the majority of people in a pandemic somehow survive and those who survive have immunity.¹⁰

2 2 Black Death and the invention of quarantine

The plague never really went away and when it returned 800 years later, it killed with reckless abandon. The Black Death, which hit Europe in 1347, claimed an astonishing 20 million lives in just four years.¹¹ As to how to stop the disease, people still had no scientific understanding of contagion, but they knew that it had something to do with proximity. Forward-thinking officials in the Venetian-controlled port city of Ragusa decided to keep newly arrived sailors in isolation until they could prove they were not sick. At first, sailors were held on their ship for 30 days, which became known as *trentino* in Venetian law. As time went on the Venetians increased the forced isolation to 40 days or a quarantine, the origin of the word quarantine and the start of its practice in the Western world.¹²

2 3 The Great Plague of London: Sealing up the sick

London never really caught a break after the Black Death. The plague resurfaced roughly every 10 years from 1348 to 1665, amounting to 40 outbreaks in just over 300 years.¹³ With each new plague epidemic, 20 per cent of the men, women and children living in the British capital died. By the early 1500s, England imposed the first laws to separate and isolate the sick.¹⁴ Homes stricken by the plague were marked with a bale of hay strung

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*

to a pole outside. If you had infected family members, you had to carry a white pole when you went out in public. The Great Plague of 1665 was the last, and one of the worst, of the centuries-long outbreaks, killing 100 000 Londoners in just seven months.¹⁵

2 4 Smallpox: A European disease ravages the new world

Smallpox was endemic to Europe, Asia and Arabia for centuries – a persistent menace that killed three out of ten people it infected and left the rest with pockmarked scars. The death rate in the Old World paled in comparison to the devastation wrought on the population in the New World when the smallpox virus arrived in the fifteenth century with the first European explorers.¹⁶ The indigenous people of modern-day Mexico and the United States had no natural immunity to smallpox and the virus cut them down by the millions. Centuries later, smallpox became the first virus epidemic to be ended by a vaccine. It took nearly two more centuries, but in the 1980s the World Health Organization (WHO) announced that smallpox had been completely eradicated from the face of the earth.¹⁷

2 5 Cholera: A victory for public health research

In the early nineteenth century, cholera tore through England, killing thousands. The prevailing scientific theory was that the disease was spread by foul air known as “miasma”. While cholera has largely been eradicated in developed countries, it remains a persistent killer in third-world countries that lack adequate sewerage treatment and access to clean drinking water.¹⁸

2 6 Mass vaccinations

In the nineteenth century, the first vaccination drives against smallpox took place, especially in the Cape, but these were not extreme projects and ultimately not very successful at eradicating the disease.¹⁹ Vaccination by injection was devised only at the very end of the eighteenth century, which meant that for many decades it was quite novel and open to popular doubt. From the start of vaccinations in South Africa, Muslims avoided it on both political and religious grounds, while many Africans saw it as part of a government plan to kill them.²⁰ It was only in the twentieth century that it gained wider acceptance. For South Africa’s veteran Aids activists, the current Covid-19 vaccination drive evokes memories of the first roll-out of

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ See for e.g., Davis “Epidemics in South Africa: Key Lessons on Mass Vaccination Drives Learnt From History” (July 2021) <https://www.dailymaverick.co.za/article/2021-07-04-epidemics-in-south-africa-key-lessons-on-mass-vaccination-drives-learnt-from-history/> (accessed 2022-01-11) 3.

²⁰ *Ibid.*

antiretroviral treatment (ART) in the mid-2000s. ART came with many challenges as people were confused about its safety. However, the South African HIV programme had many lessons for Covid-19 vaccination drives.²¹ It taught South Africans to be innovative and take the vaccines to people and not rely on centralised sites.

2.7 Vaccine hesitancy in Africa

Vaccine hesitancy in Africa is often rooted in distrust, shaped by a long history of inequality. An effective pandemic response includes addressing those doubts.²² Some fears are rooted in colonialism, oppression and exploitation, which can easily be stirred up in situations like a mandatory vaccination drive, especially in light of the world's vaccine inequity, where some countries have been able to buy up a disproportionate number of vaccines. Hesitancy could mean a longer road to herd immunity and slower economic recovery through a second and third wave.²³ For months, many African governments have struggled to secure vaccines in a system where wealthy countries take the lion's share, which has shone a spotlight on global inequalities. For most of the region, the challenge continues. However, as campaigns have rolled out across the continent, the lingering issue of distrust is coming into sharp focus. The reasons vary. In South Africa, distrust of the weakening, overburdened public health systems, and the government that manages it, runs deep. So does scepticism that people's lives here really matter to the foreign companies and countries behind most Covid-19 research. These are concerns rooted in a long history of inequality.²⁴

The continent's lower number of deaths, compared with many other regions, has given many Africans a false sense of immunity. As recently as December 2021, around a quarter of Africans surveyed felt vaccines will not be safe, according to the Africa Centers for Disease Control and Prevention. A recent survey found that only 61 per cent of South Africans would get a vaccine, lower than any of the other 14 countries surveyed.²⁵ Some concerns about the vaccine safety stem from its quick development, spooked by unverified claims of death following immunisation in Europe. These worries can be countered with accurate targeted information.²⁶ For decades, groups like Rotary International worked to overcome polio vaccine rejection in Nigeria by working with local health workers and volunteers who were known and trusted by their communities and who helped carry out the

²¹ *Ibid.*

²² See for e.g., Lawal "Behind Vaccine Doubts in Africa, A Deeper Legacy of Distrust" (March 2021) <https://www.csmonitor.com/World/Africa/2021/0304/Behind-vaccine-doubts-in-Africa-a-deeper-legacy-of-distrust> (accessed 2022-01-11) 2; Cooper, Van Rooyen and Wiysonge "COVID-19 Vaccine Hesitancy in South Africa: How Can We Maximize Uptake of COVID-19 Vaccines?" 2021 20(8) *Expert Review of Vaccines* 921.

²³ See for e.g., Lawal <https://www.csmonitor.com/World/Africa/2021/0304/Behind-vaccine-doubts-in-Africa-a-deeper-legacy-of-distrust> 2.

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.*

door-to-door immunisation push across the country. The country is now declared polio-free. In South Africa, people are afraid because they need information.²⁷ They need help to understand the science, how vaccines work, and how they are tested. An earlier study on South Africans' vaccine confidence found that the most common reasons for doubts were fear of side effects and concerns about effectiveness. Targeting people with accurate information is now especially important. Activists argue that vaccine scepticism will decline as more Africans are vaccinated, seeing for themselves how a safe and effective procedure (when more broadly offered) could ease restrictions on movement and help reopen economies.²⁸ Nonetheless vaccinations remain one of the most successful, cost-effective public health interventions.

3 CURRENT LEGISLATIVE AND POLICY FRAMEWORK

3 1 Legislation

*3 1 1 The Constitution of the Republic of South Africa*²⁹

(i) Section 12: Right to bodily integrity

Section 12 of the Constitution deals with the right to freedom and security of persons. This right includes the right not to be deprived of freedom without reason and not to be ill-treated by any persons, as well as the right to protection from violence against one's bodily integrity. Section 12(2)(a) deals with the right to make decisions concerning reproduction while section 12(2)(b) deals with security and control over the body.³⁰ The court in *National Coalition for Gay and Lesbian Equality v Minister of Justice*³¹ noted that section 12(2)(b) tests the ability to give a distinct meaning to "bodily and psychological integrity".³² Section 12(2)(b) creates a sphere of individual inviolability with two components, of which "security in" and "control over" one's body are not synonymous.³³ The former denotes the protection of bodily integrity against physical invasions by the State and others, while the latter guarantees the freedom to exercise autonomy or the right to self-

²⁷ See for e.g., NDoH "Strategies to Address COVID-19 Vaccine Hesitancy and Promote Acceptance in South Africa" (2021) <https://sacoronavirus.co.za/2021/04/12/strategies-to-address-covid-19-vaccine-hesitancy-and-promote-acceptance-in-south-africa/> (accessed 2022-01-13) 2.

²⁸ *Ibid.*

²⁹ Constitution of the Republic of South Africa, 1996.

³⁰ Govindjee and Vrancken *Introduction to Human Rights Law* (2016) 99.

³¹ [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 par 22.

³² The issue was whether a law criminalising sodomy unfairly discriminated against homosexuals. The Constitutional Court stated that all of its efforts to interpret our basic law are informed by the recognition that to understand "the other" one must try, as far as is humanly possible, to place oneself in the position of the "other".

³³ Woolman and Bishop "Freedom and Security of the Person" in Woolman and Bishop (eds) *Constitutional Law of South Africa* (2014) ch 40.

determination with respect to the use of one's body.³⁴ This section assumes that individuals are capable of taking decisions that are in their own interests and of acting as responsible moral agents.³⁵ The decision in the Constitutional Court in *S v Jordan (Sex Workers Education and Advocacy Task Force as Amicae Curae)*³⁶ suggests that the court may not be especially sympathetic to uses of body that the majority of South Africans find morally repugnant. *S v Jordan*, when viewed through the lens of section 12(2)(b), supports the right to bodily autonomy and is concerned, not with the welfare of the individual, but with the preservation of an individual's integrity.³⁷

(ii) Section 36: limitation clause

Rights contained in the Bill of Rights are not absolute and may be limited by specific limitation clauses whereby individual rights are subject to limitations set out in individual sections – for example, the provisions of section 9 on equality.³⁸ In addition, the Constitution provides a general limitation clause in section 36, which provides that all rights in the Bill of Rights may be limited in terms of a law of general application and that "limitations must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom".³⁹ Any limitation must therefore be reasonable and may only be made with good cause. Limits should also restrict rights as little as possible.⁴⁰ The courts are empowered to test the validity of a limitation in terms of section 36.⁴¹ Section 36 provides for certain factors that must be considered by the courts when determining whether a limitation is reasonable and justifiable:

- a) the nature of the right;
- b) the importance of the limitation;
- c) the nature and extent of the limitation;
- d) the relation between the limitation and its purpose; and
- e) less restrictive means to achieve the purpose.⁴²

These factors are not limited and other factors that the court may deem necessary may also be taken into account. When the nature of the right is considered, the courts will have to consider the content of the right, the importance of the right and the interest that is protected.⁴³ The Constitution

³⁴ Woolman and Bishop in Woolman and Bishop (eds) *Constitutional Law of South Africa* 40–85.

³⁵ *Ibid.*

³⁶ *S v Jordan (Sex Workers Education and Advocacy Task Force as Amici Curiae)* [2002] ZACC 22; 2002 (6) SA 642; 2002 (11) BCLR 1117.

³⁷ *S v Jordan (Sex Workers Education and Advocacy Task Force as Amici Curiae supra* par 80–81.

³⁸ Rautenbach and Malherbe *Constitutional Law* (2018) 323.

³⁹ *Ibid.*

⁴⁰ Rautenbach and Malherbe *Constitutional Law* 324.

⁴¹ Rautenbach and Malherbe *Constitutional Law* 325.

⁴² Rautenbach and Malherbe *Constitutional Law* 324.

⁴³ Rautenbach and Malherbe *Constitutional Law* 326.

also requires that, rather than limiting the rights of an individual, less restrictive means be considered to achieve the purpose of the limitation.⁴⁴

(iii) What do these sections of the Constitution mean for mandating vaccines?

A plain reading of section 12(2) makes it evident that every person has the important right to make decisions on health and medical interventions and treatments, which undoubtedly include acceptance or rejection of vaccines.⁴⁵ However, constitutional rights are never one-dimensional and rights may be limited when there are justifiable grounds for doing so.⁴⁶ As discussed above, section 36 of the Constitution provides for the limitation of constitutional rights insofar as it is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, and having regard to the five factors listed in the limitation clause.⁴⁷ In *S v Manamela (Director-General of Justice Intervening)*,⁴⁸ it was held that the five factors do not form an exhaustive list or automatic checklist. The courts are encouraged to conduct an overall assessment in order to arrive at a judgment based on proportionality.⁴⁹ According to the Lex-Atlas: Covid-19 (LAC19) project,⁵⁰ a scholarly report and analysis of national legal responses to Covid-19 around the world, proportionality requires that a measure infringing protected rights by a non-state actor must:

- a) be prescribed by law;
- b) pursue a legitimate aim (that is, a “compelling state interest” or a suitable aim);
- c) be necessary in a democratic society (that is, that there be a “pressing social need”; that the measures be rationally connected to that aim; and that they be the least restrictive alternative for achieving the policy); and
- d) be proportionate in the narrow sense that it strikes a fair balance between the importance of the goal and the burden it places on the individual.

The right to bodily integrity can thus be limited by legislation that passes the stringent test of being both “reasonable” and “justifiable”.⁵¹ The two-stage

⁴⁴ *Ibid.*

⁴⁵ See for e.g., Calitz “Constitutional Rights in South Africa Protect Against Mandatory COVID-19 Vaccination” (April 2021) <https://www.hhrjournal.org/2021/04/constitutional-rights-in-south-africa-protect-against-mandatory-covid-19-vaccination/> (accessed 2022-01-15) 4.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ (2000) ZACC 15.

⁴⁹ See for e.g., Calitz <https://www.hhrjournal.org/2021/04/constitutional-rights-in-south-africa-protect-against-mandatory-covid-19-vaccination/> 1.

⁵⁰ King and Ferraz “Legal, Constitutional and Ethical Principles for Mandatory Vaccination Requirements for Covid-19” (1 November 2021) <https://lexatlas-c19.org/vaccination-principles/#b-proportionality> (accessed 30-03-2023) par 32]

⁵¹ See for e.g., Calitz <https://www.hhrjournal.org/2021/04/constitutional-rights-in-south-africa-protect-against-mandatory-covid-19-vaccination/> 1.

approach is set out in the case of *S v Zuma*.⁵² First, it needs to be determined whether there has been a contravention of a guaranteed right in the Constitution, and secondly whether the contravention is justified under section 36. The test of reasonableness involves the weighing up of competing rights and values based on proportionality.⁵³ In *S v Makwanyane*,⁵⁴ it was further held that a right should not be taken away altogether under the guise of limitations and should be limited as little as possible. From the above it is evident that there is no absolute limitation of the right envisaged in section 12 and that the courts ought to consider broader societal and governmental interests when balancing competing rights.⁵⁵ There have been judicial pronouncements on section 12. In *Minister of Safety and Security v Gagra*,⁵⁶ the court relied on the public interest; it conducted a balancing act of rights to conclude that the respondent was forced to undergo surgery, despite the fact that he had never consented to surgery. Similarly in the case of *Minister of Health of the Province of the Western Cape v Goliath*,⁵⁷ the court compelled the surviving respondents to receive treatment for tuberculosis against their will.

These decisions show that in some instances the public interest outweighs individuals' right to bodily and psychological integrity.⁵⁸

3 1 2 Occupational Health and Safety Act

In terms of section 8(1) of the Occupational Health and Safety Act (OHS Act),⁵⁹ every employer shall provide and maintain, as far as is reasonably practicable, a working environment that is safe and without risk to the health and safety of its employees. This obligation applies not only in respect of employees but extends to the general public in terms of section 9 of the OHS Act, which states that every employer shall conduct its undertaking in such a manner as to ensure, as far as reasonably practicable, that persons other than those in its employment who may be directly affected by its activities are not thereby exposed to hazards to their health or safety. The terms "hazard" and "risk" are often used interchangeably and are confused. However, in occupational-health-and-safety terms, they refer to two completely different concepts. In terms of section 1 of the OHS Act, a "hazard" means a source of (or exposure to) danger, whereas in terms of the Occupational Health and Safety Amendment Bill of 2020, a "risk" means the probability that personal injury, illness or the death of the employee or any other person or damage to property will occur. Therefore, although Covid-19

⁵² (1995) ZACC 1.

⁵³ See for e.g., Calitz <https://www.hhrjournal.org/2021/04/constitutional-rights-in-south-africa-protect-against-mandatory-covid-19-vaccination/> 1.

⁵⁴ (1995) ZACC 13.

⁵⁵ See for e.g., Calitz <https://www.hhrjournal.org/2021/04/constitutional-rights-in-south-africa-protect-against-mandatory-covid-19-vaccination/> 1.

⁵⁶ (2002) ZAWCHC 9.

⁵⁷ (2009) (2) SA 248 (C).

⁵⁸ See for e.g., Calitz <https://www.hhrjournal.org/2021/04/constitutional-rights-in-south-africa-protect-against-mandatory-covid-19-vaccination/> 1.

⁵⁹ 85 of 1993, as amended.

can be classified as a hazard (in that it presents a source with a potential for harm in terms of human ill-health in that it spreads through contact and airborne transmission), the level of risk associated with Covid-19 will vary according to the circumstances. In terms of the Code of Practice: Managing Exposure to SARS-COV-2 in the Workplace, 2022 (Code of Practice) issued in terms of section 203(2A) of the Labour Relations Act (LRA)⁶⁰, the identifiable hazard relating to Covid-19 faced by workers,⁶¹ is the virus infecting a worker, the virus transmission by an infected person to other workers in the workplace, and the risk of serious illness or death if infected. Furthermore, in workplaces to which the public has access, the hazard includes transmission of the virus by members of the public. The Regulations for Hazardous Biological Agents, 2022⁶² list Covid-19 as a listed hazardous biological agent, classed as Group 3, which places legal responsibilities on employers to mitigate the risks associated with Covid-19.

In terms of the Code of Practice, employers will have to conduct a risk assessment in line with their obligations under the OHS Act to determine whether mandatory vaccinations should be implemented for all or some employees. This decision must be based on the operational requirements of the organisation in question. In terms of section 213 of the LRA, “operational requirements” is defined as requirements based on the economic, technological, structural, or similar needs of an employer. The term “and similar needs” is used to refer to situations where workplace functionality and safety or commercial relationships are at risk.⁶³ Covid-19 is said to have a negative impact on the functionality and safety of organisations, given its classification as a workplace hazard and the above-mentioned associated risks. If an employer makes vaccination mandatory, a premium is placed on public health imperatives and the efficient operation of the employer’s business. Therefore, in the interests of broader society for the common good and in alignment with the requirements and duties of the OHS Act, tertiary institutions are required to remove and mitigate against any harm to its employees, service providers, contractors, overseas visitors and students.

In terms of section 1 of the OHS Act, when an employer is looking at “reasonably practicable” measures, the following factors need to be considered:

- a) the severity and scope of the hazard or risk concerned;
- b) the state of knowledge reasonably available concerning that hazard or risk and of any means of removing or mitigating that hazard or risk;
- c) the availability and suitability of means to remove or mitigate that hazard or risk; and
- d) the cost of removing or mitigating that hazard or risk in relation to the benefits deriving therefrom.

⁶⁰ 66 of 1995.[Government Notice R1887 of 2022].

⁶¹ In terms of the Code of Practice, “worker” means any person who works in an employer’s workplace, including an employee of the employer or contractor, a self-employed person or volunteer.

⁶² GN R1887 in GG 1887 of 2022-03-16.

⁶³ Cohen, Plessis, Godfrey, Roux, and Singlee *Labour Law in South Africa: Context and Principles* (2020) 248.

When looking at the state of knowledge available concerning the mitigation and removal of Covid-19 from workplaces, current scientific evidence shows that Covid-19 vaccination not only protects against severe symptoms of the disease as well as death, but it is a vital means to minimise the spread of the virus and the rate of infection.⁶⁴ In fact, vaccination remains the single strongest protection against Covid-19. Professor Linda-Gail Bekker, Deputy Director of the University of Cape Town's Desmond Tutu HIV Centre, an infectious diseases specialist and vaccine scientist, stated, in relation to Covid-19 vaccinations mitigating the risk of Covid-19:⁶⁵

"We can control the epidemic, fewer people will get infected, fewer people will get severe illness and in the long run we will save lives. Vaccines save lives. The disease is our enemy ... the intervention is our friend. The vaccine is yet another important tool in the fight against the pathogen."

Covid-19 vaccines are readily available and easily accessible in South Africa. Therefore, it can be argued that the vaccines constitute the most suitable means to mitigate and remove Covid-19 from the workplace. Protective personal equipment, such as masks, are to be used as a last resort and, before these measures are issued, the employer is first under a duty to remove or reduce any danger to the health and safety of its workers. Only when this is not practicable should protective personal equipment be used. The vaccines are currently free of charge and, accordingly there exists no cost to mitigating and removing the hazard of Covid-19. Furthermore, there is sufficient evidence that Covid-19 vaccines, which are an effective intervention for Covid-19 prevention, are safe and effective with adverse side effects being very rare.⁶⁶ Therefore, the benefits, which include the reduction of the risk of being infected, the limitation of the spread of the virus, and the prevention of hospitalisation and death from Covid-19, outweigh the associated costs.

Furthermore, in terms of section 14(a) of the OHS Act, every employee shall at work take reasonable care for their own health and safety and that of other persons who may be affected by their acts or omissions. It is, thus, an obligation of every employee to ensure that, through their actions, they take reasonable care of the health of all persons that they come into contact with or who may be affected by their actions.

⁶⁴ Vitiello, Ferrara, Troiano and La Porta "COVID-19 Vaccines and Decreased Transmission of SARS-CoV-2" 2021 *Inflammopharmacology* 1357 1360.

⁶⁵ Thom, Nortie *et al* "If We All Don't Get Vaccinated, the Alternative is Years of Covid-Induced Death and Suffering" (January 2021) <https://www.dailymaverick.co.za/article/2021-01-23-if-we-all-dont-get-vaccinated-the-alternative-is-years-of-covid-induced-death-and-suffering/> (accessed 2022-02-10) 2.

⁶⁶ Maragakis and Kelen "Is the COVID-19 Vaccine Safe?" (January 2022) <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/is-the-covid19-vaccine-safe> (accessed 2022-02-23) 1.

3 1 3 *The Code of Practice: Managing Exposure to SARS-COV-2 in the Workplace, 2022*

The Code of Practice allows for an employer to make vaccinations mandatory in certain instances as well as to require its employees to disclose their vaccination status and to produce a vaccination certificate. Although the Code of Practice does not definitively answer the question of whether employees can be dismissed if they refuse to take the vaccine even when the employer has adopted a mandatory vaccination policy, it does give some guidance on how to deal with an employee in these instances. If an employee refuses to take the vaccine, the employer must counsel the employee and, if requested, allow the employee to seek guidance from a health and safety representative, worker representative or trade union official, as well as take reasonable steps to accommodate the employee in a position that does not require the employee to be vaccinated. If an employee produces a medical certificate attesting to the fact that they have contra-indications for vaccination, the employer may refer the employee for a medical evaluation for confirmation at the employer's expense. If the employer accepts the medical certificate, or the employee is referred for medical evaluation and that evaluation confirms that the employee has contra-indications for vaccination, it *must* accommodate the employee in a position that does not require the employee to be vaccinated. The Code of Practice, therefore, provides that the employer must reasonably accommodate the employee in accordance with the Code of Good Practice: Employment of People with Disabilities, as published in terms of the Employment Equity Act.⁶⁷ This can include adjustments to the job or working environment in order to allow the employee who refuses to be vaccinated to remain in employment by considering the following:

- a) the possibility of remote working or of working in isolation at the workplace;
- b) adjustment of an employee's duties; and
- c) adjustment of an employee's working hours or locations or making other arrangements to ensure the health and safety of the employee.

Where an employer does implement a mandatory vaccination policy and an employee refuses to be vaccinated, employers must follow the correct procedures to ensure fairness when dealing with such employees. This means that the grounds for refusal be considered fully, and that the employee be consulted. However, where the employer is unable to "reasonably accommodate" the employee and the employee continues in their refusal, an employee can be dismissed for incapacity. This is in line with operational incapacity in terms of which the incapacity arises from circumstances other than poor work performance, ill health or injury and which renders the employee incapable of performing their work.⁶⁸ This was confirmed by the Supreme Court of Appeal in *NUM v Samancor Ltd (Tubatse Ferrochrome)* where the court acknowledged that incapacity

⁶⁷ 55 of 1998.

⁶⁸ Cohen *et al Labour Law in South Africa* 240.

should not be confined to incapacity arising from ill health, injury or poor work performance.⁶⁹

In light of the above, it can be argued that the right to bodily integrity may be limited in certain instances if it is reasonable, proportionate, and justifiable – for example, if it is found that certain employees must be vaccinated to protect the health and safety of themselves and those around them.

In *Mulderij v Goldrush Group*,⁷⁰ the Commission for Conciliation, Mediation and Arbitration (CCMA) was faced with deciding on the substantive fairness of the applicant's incapacity dismissal for refusing to be vaccinated despite a mandatory workplace vaccination policy. She was identified as a high-risk individual who interacted with fellow employees daily while on duty in confined, uncontrollable spaces. This was found to put the applicant at risk and exposed others to the risk of possible infection. The applicant, however, emphasised her constitutional right to bodily integrity in her refusal to be vaccinated. Commissioner Lungile Matshaka stated:

"[i]n my own sense of fairness, I can only conclude that the Applicant is permanently incapacitated on the basis of her decision to not getting vaccinated and implication refusing to participate in the creation of a safe working environment."⁷¹

In *Kok v Ndaka Security and Services*,⁷² the CCMA was called to determine whether the suspension of an employee who refused to be vaccinated against Covid-19 constituted an unfair labour practice in terms of section 186(2)(b) of the LRA. The employee contended that to compel employees to be vaccinated would be contrary to the Constitution, the National Health Act,⁷³ and the Consolidated Directives issued by the Minister of Employment and Labour. The applicant was identified as an employee who was required to be vaccinated in terms of the risk assessment that was conducted, in that he worked in close proximity to fellow employees, clients and the public. It was not possible to allow the applicant to work from home nor in an isolated office. The respondent suspended the applicant because he was not willing to be vaccinated and also no longer wished to present weekly negative Covid-19 results. Commissioner Petrus Michael Venter stated:

"I have very little doubt that the requirement to vaccinate is nothing less than a reasonable practical step that every employer is required and compelled to take."⁷⁴

Therefore, after finding that the respondent followed due procedure in terms of the Consolidated Directive 11 June 2021, the CCMA found that the

⁶⁹ [2011] 11 BLLR 1041 (SCA) par 10.

⁷⁰ GAJB 24054-21.

⁷¹ *Mulderij v Goldrush Group supra* par 27.

⁷² FSWK2448-21.

⁷³ 61 of 2003.

⁷⁴ *Kok v Ndaka Security and Services supra* par 55.

suspension of the applicant was neither unfair nor constituted an unfair labour practice.⁷⁵

3 2 Vaccine policies adopted by universities in South Africa

3 2 1 University of Johannesburg

On 25 November 2021, the University of Johannesburg issued a mandatory vaccination policy. The objectives of mandating vaccines were clearly highlighted in the six-page policy, which acknowledged that the university has limited distance-learning offerings and is an established residential university with contact learning and research.⁷⁶ The university was of the opinion that the mandatory vaccination of staff and students would enhance safe and optimal access to its campuses and facilities, which would enable its core functions of teaching, learning, research and community engagement.⁷⁷ In terms of clause 1.5, the policy is aligned with the requirements and duties of the OHS Act and emphasises that a mandatory vaccine policy protects the health and safety of the university community and by implication, members of the public who come into contact with employees and students of the university, and or who otherwise participate in any activity on university premises. In terms of clause 3.1, the university stipulates that in order to gain access to its campuses and facilities, employees and students will be required to provide their digital vaccination cards to authorised university officials to confirm their vaccination status. The policy also made provision for employees and students to be approved for exemption from vaccinations, as well as reasonable accommodation for employees in terms of the Department of Employment and Labour directive in 2021.⁷⁸ Ultimately the university's mandate is to act in the public interest, which results in the common good for society at large. The universities aim was to mitigate any harm to its stakeholders, including employees, students and external stakeholders of the institution.⁷⁹

3 2 2 University of the Free State

The University of the Free State also mandated vaccines; its guiding principles for implementation were also driven by the fact that the university was a close-contact working environment where instruction occurs primarily

⁷⁵ *Kok v Ndaka Security and Services supra* par 58.

⁷⁶ University of Johannesburg "Mandatory Vaccination Policy" (November 2021) <https://www.uj.ac.za/wp-content/uploads/2021/12/covid-19-mandatory-vaccination-policy-19-nov2021.pdf>.

⁷⁷ University of Johannesburg <https://www.uj.ac.za/wp-content/uploads/2021/12/covid-19-mandatory-vaccination-policy-19-nov2021.pdf> clause 1.2.

⁷⁸ The Directives.

⁷⁹ University of Johannesburg <https://www.uj.ac.za/wp-content/uploads/2021/12/covid-19-mandatory-vaccination-policy-19-nov2021.pdf> clause 36.

through face-to-face lecturing and learning.⁸⁰ The university believed that it was not economically viable or practical to maintain social distancing indefinitely.⁸¹ As a predominantly residential university as well, the viability of consistent remote working and studying conditions was not aligned with the culture of the university. Like its counterpart, the University of Johannesburg, the University of the Free State strives to provide their employees and students with a safe environment to achieve academic outcomes. Like the University of Johannesburg, it provided for exemptions where there was a legally acceptable basis for refusing a Covid-19 vaccination, including medical objections in terms of section 27 of the Constitution.⁸²

3 2 3 *Rhodes University*

Staff and students at Rhodes University were also required to provide proof of vaccination to access the campus in terms of its policy, which came into effect in January 2022. The university made the vaccination requirement a condition for registration for all students as well as employees.⁸³ The university also approved a recommendation for an exemption application process and an alternative health status process for those who cannot take the vaccine on medical or other legitimate grounds. However, these staff and students would have to provide a negative Covid-19 test weekly at the cost of the individual.⁸⁴

3 2 4 *University of the Western Cape*

An interim Covid-19 policy was approved for 2022 by the Council at the University of the Western Cape. It entailed two different mandates. On the one hand, there was a mandate in terms of which all staff and students would have to be vaccinated to enter campus and attend events.⁸⁵ However, students who were not vaccinated would be allowed to register for their relevant qualifications but not be permitted to access campus or attend university events. The other mandate was for students from the Faculty of Dentistry, Nursing and Pharmacy among others. These students had to be vaccinated to register at the university.⁸⁶ Therefore the “softer” mandate

⁸⁰ University of Free State “COVID-19 Regulations and Required Vaccination Policy” (November 2021) https://www.ufs.ac.za/docs/default-source/all-documents/ufs-covid19-regulations-and-required-vaccination-policy-7-dec-2021.pdf?sfvrsn=245b7520_2 clause 5.1.

⁸¹ University of Free State https://www.ufs.ac.za/docs/default-source/all-documents/ufs-covid19-regulations-and-required-vaccination-policy-7-dec-2021.pdf?sfvrsn=245b7520_2 clause 5.

⁸² University of Free State https://www.ufs.ac.za/docs/default-source/all-documents/ufs-covid19-regulations-and-required-vaccination-policy-7-dec-2021.pdf?sfvrsn=245b7520_2 clause 6.8.

⁸³ See for e.g., Career Wise “Universities in South Africa that Require Proof of Vaccination in 2022” (December 2021) <https://careerwise.co.za/university-proof-of-vaccination-2022/> (accessed 2022-01-22).

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

would not apply to those students, as they were required to be vaccinated to register.

3.2.5 *University of the Witwatersrand*

The Council of the University of the Witwatersrand approved a vaccination policy that came into effect on 1 January 2022, to be reviewed regularly.⁸⁷ Staff and students had from 1 January to 1 March 2022 either to be vaccinated or apply for reasonable accommodation. The university could refuse access to campus to any person not vaccinated and/or who had not been reasonably accommodated.⁸⁸ Vaccinated members of the university had to provide proof of their vaccination status, which was linked to their staff or student profile to enable seamless access to university's precincts.⁸⁹

It is clear and acknowledged that the above tertiary institutions have mandated vaccination, and have rightfully done so, taking into account the various legislative directives as discussed above. In this light, it is important to discuss and examine the different international stances taken in respect of mandatory vaccinations from our counterparts, namely the United States and the European Union.

4 GUIDANCE FROM THE UNITED STATES AND THE EUROPEAN UNION

4.1 United States

It has been stated by Edwin C Darden that “when individual rights collide with the state’s authority to provide for the general welfare, the state almost always wins”⁹⁰ and, as such, from the early 1900s in America, “antivaccination lawsuits have been spectacularly unsuccessful”.⁹¹ In 1905, following the outbreak of smallpox, the United States Supreme Court made its first pronouncement on the constitutionality of mandatory vaccinations in *Jacobson v Massachusetts*,⁹² in which it stated:

“[T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint.”⁹³

In this regard, the Supreme Court, holding that mandatory smallpox vaccinations were constitutional to the extent that they did not “go so far

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ Darden “Think Vaccinations Are a Pain? Try Avoiding Them in Court” 2015 *The Phi Delta Kappan* 74–75.

⁹¹ Darden 2015 *The Phi Delta Kappan* 74.

⁹² 197 US 11.

⁹³ *Jacobson v Massachusetts supra* 26.

beyond what was reasonably required for the safety of the public”,⁹⁴ concluded:

“[I]n 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.”⁹⁵

Therefore, in terms of *Jacobson v Massachusetts*, the viability of mandatory vaccination programmes would depend on whether it would be seen by the courts as necessary, reasonable, proportional, and safe for the participants.⁹⁶

In 1922, the Supreme Court, in *Zucht v King*,⁹⁷ was faced with a challenge to an ordinance of the City of San Antonio, Texas, which provided that no child or other person shall attend a public school or other place of education without having first presented a certificate of vaccination. However, the court held that an ordinance that excludes from public schools or other places of education children or other persons not having a vaccination certificate does not confer arbitrary power, but only “that broad discretion required for the protection of the public health”.⁹⁸ Therefore, the court, again, found that the interest of protecting the public was greater than the impositions placed on individuals as contained within the ordinance.

Currently, faced with the dangers of the Covid-19, which the Director of the CDC, Dr Robert Redfield, has stated is the greatest public health crisis to have hit the nation in more than 100 years,⁹⁹ more than 500 colleges and universities in the United States have mandated Covid-19 vaccination¹⁰⁰ by following the guidance from the CDC as well as the American College Health Association, both of which have recommended that higher institutions require Covid-19 vaccinations for all on-campus students.¹⁰¹ In July 2021, the United States District Court, Northern District of Indiana, in *Klaassen et al v Trustees of Indiana University*,¹⁰² was faced with the question whether it

⁹⁴ *Jacobson v Massachusetts supra* 28.

⁹⁵ *Jacobson v Massachusetts supra* 29.

⁹⁶ Blum and Talib “Balancing Individual Rights Versus Collective Good in Public Health Enforcement” 2006 *Medicine and Law* 280.

⁹⁷ 260 US 174 (1922).

⁹⁸ *Zucht v King supra* 177.

⁹⁹ See for e.g., Mondeaux “CDC Director: COVID-19 Is Greatest Public Health Crisis in Over 100 years” (2020) <https://kslnnewsradio.com/1922346/cdc-director-covid-19-is-greatest-public-health-crisis-in-over-100-years/> [<https://perma.cc/3SBH-HZX7>] (accessed 2021-12-18).

¹⁰⁰ See for e.g., Thomason and O’Leary “Here’s a List of Colleges That Require Students or Employees to Be Vaccinated Against Covid-19” (2021) https://www.chronicle.com/blogs/live-coronavirus-updates/heres-a-list-of-colleges-that-will-require-students-to-be-vaccinated-against-covid-19?cid=gen_login_refresh (accessed 2021-12-18) (“The Chronicle has so far identified 583 such campuses”).

¹⁰¹ See for e.g., “American College Health Association Recommends COVID-19 Vaccination Requirements for All On-Campus College Students in Fall 2021” (2021) <https://www.acha.org/ACHA/About/ACHANews/ACHARecommendsCOVID19VaccinationRequirementsforFall2021.aspx> (accessed 2021-12-18).

¹⁰² *Klaassen et al v The Trustees of Indiana University* No 1:21-CV-238 DRL *supra*.

was constitutional for a public university to mandate that its students receive a Covid-19 vaccine. Indiana University, in its Covid-19 vaccine policy, mandated Covid-19 vaccination for all students unless a student received an exemption on medical or religious grounds. These exempt students would be subject to the conditions of wearing masks and testing for Covid-19 twice a week. Eight exempted students contended that these conditions of attendance violated the due process clause of the Constitution's Fourteenth Amendment, which forbids any state to deprive "any person of life, liberty, or property, without due process of law".¹⁰³ The students went on to assert a right to refuse the vaccine, arguing that the mandate infringed on their bodily autonomy and medical privacy.¹⁰⁴

The District Court correctly posed the question: "how should the law respond to state action that infringes on the People's liberties during such times?"¹⁰⁵ The court went on to quote *Reno v Flores*,¹⁰⁶ in which it was held that the Fourteenth Amendment "forbids the government to infringe ... fundamental liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest". The court held that "vaccines address a collective enemy, not just an individual one"¹⁰⁷ and that insisting on vaccinations for its campus communities is rationally related to ensuring the public health of students, faculty and staff.¹⁰⁸ The court stated that the university is not forcing the students to get Covid-19 vaccines.¹⁰⁹ The university is, instead, presenting the students with a choice – get the vaccine or apply for an exemption or deferral, transfer to a different school, forego school for the semester or altogether – but held that this choice does not amount to coercion.¹¹⁰ The court concluded that, "given over a century's worth of rulings saying there is no greater right to refuse a vaccination than what the Constitution recognizes as a significant liberty",¹¹¹ the students' application to extend substantive due process to recognise more than what already and historically exists was declined.

The decision of the District Court in *Klaassen* was taken on appeal to the United States Court of Appeals for the Seventh Circuit. The Appeals Court held:

"[G]iven *Jacobson v Massachusetts*, 197 U.S. 11 (1905), which holds that a state may require all members of the public to be vaccinated against smallpox, there can't be a constitutional problem with vaccination against SARS-COV-2."¹¹²

¹⁰³ 14th Amendment to the United States Constitution § 1.

¹⁰⁴ *Klaassen et al v The Trustees of Indiana University supra* 48.

¹⁰⁵ *Klaassen et al v The Trustees of Indiana University supra* 35.

¹⁰⁶ 507 U.S. 292 (1993).

¹⁰⁷ *Reno v Flores supra* 302.

¹⁰⁸ *Klaassen et al v The Trustees of Indiana University supra* 57.

¹⁰⁹ *Klaassen et al v The Trustees of Indiana University supra* 53.

¹¹⁰ *Ibid.*

¹¹¹ *Klaassen et al v The Trustees of Indiana University supra* 52.

¹¹² *Klaassen et al v The Trustees of Indiana University* No 21-2326 (7th Cir 2021) 2.

The court went on to state that “vaccination protects not only the vaccinated persons but also those who come into contact with them, and at a university close contact is inevitable”.¹¹³ Therefore, the Appeals Court denied the motion for an injunction pending appeal by holding:

“If conditions of higher education may include surrendering property and following instructions about what to read and write, it is hard to see a greater problem with medical conditions that help all students remain safe when learning. A university will have trouble operating when each student fears that everyone else may be spreading disease. Few people want to return to remote education – and we do not think that the Constitution forces the distance learning approach on a university that believes vaccination (or masks and frequent testing of the unvaccinated) will make in-person operations safe enough.”¹¹⁴

Therefore, Blum and Talib have stated:

“[C]onflict between public and individual interests in public health is shaped by the nature of the threat, or the disease in question. Where the threats to a population are most serious, individual rights must be subordinate to the common good.”¹¹⁵

4 2 European Union

On 7 December 2018, the Council of the European Union recognised that vaccination is one of the most powerful and cost-effective public health measures developed in the twentieth century and remains the main tool for primary prevention of communicable diseases.¹¹⁶ In terms of article 12(2)(c) of the International Covenant on Economic, Social and Cultural Rights, “the prevention, treatment and control of epidemic ... diseases” is among the obligations contained within the right to health. As such, the European Convention on Human Rights states that the right to physical integrity under article 8 is a qualified right that can be limited “for the protection of health”.¹¹⁷ Many universities across Europe, particularly in Austria, Hungary, and Italy, require their students to present proof of vaccination against Covid-19 to attend in-person activities. However, mandatory vaccination policies have continually been challenged in terms of their alleged violation of the European Convention on Human Rights (the Convention).¹¹⁸

¹¹³ *Klaassen et al v The Trustees of Indiana University supra* 3.

¹¹⁴ *Klaassen et al v The Trustees of Indiana University supra* 4.

¹¹⁵ Blum and Talib 2006 *Medicine and Law* 274.

¹¹⁶ The Council of the European Union “Council Recommendation of 7 December 2018 on Strengthened Cooperation Against Vaccine-Preventable Diseases” (2018) [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32018H1228\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32018H1228(01)) (accessed 2022-02-24).

¹¹⁷ European Court of Human Rights “Guide on Article 8 of the European Convention on Human Rights” (2021) https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf (accessed 2022-02-24).

¹¹⁸ Council of Europe *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14* (4 November 1950) ETS 5. Adopted: 04/11/1950; EIF: 03/09/1953.

Over 20 years ago in *Boffa v San Marino*,¹¹⁹ the European Court of Human Rights (ECHR) was faced with an applicant who complained that the laws in San Marino making it compulsory for their minor children to undergo vaccinations violated their freedom of thought and conscience as contained in article 9 of the Convention, their right to liberty as guaranteed in article 5 of the Convention, and their right to respect for their private and family life protected by article 8 of the Convention. The ECHR held:

“as regards the aim of the contested legislation, the interference is based on the need to protect the health of the public and of the persons concerned, and so is justified.”¹²⁰

The court thus rejected the complaint stating that the interference of which the applicant complained is proportionate to the aim pursued and is deemed necessary in a democratic society for the protection of health as referred to in article 8 (2) of the Convention,¹²¹ which states:

“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 wellbeing 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.”

Thereafter, in *Solomakhin v Ukraine*,¹²² the Grand Chamber of the ECHR held that, according to its case law, the physical integrity of a person is covered by the concept of “private life” protected by article 8 of the Convention.¹²³ A person’s bodily integrity concerns the most intimate aspects of one’s private life, and compulsory medical intervention, even if it is of minor importance, constitutes an interference with this right.¹²⁴ The court went on to hold that compulsory vaccination amounts to an interference with the right to respect for one’s private life, which includes a person’s physical and psychological integrity, as protected by article 8.¹²⁵ The court, however, noted that such interference, as caused by compulsory vaccinations, pursues the legitimate aim of the protection of health. In the court’s opinion, the interference with physical integrity could be said to be justified by public health considerations and the necessity to control the spreading of infectious diseases.

In 2021, the Grand Chamber of the ECHR had to make a judgment on whether laws in the Czech Republic requiring compulsory childhood vaccination were compatible with the Convention in *Vavříčka v the Czech Republic*.¹²⁶ The court held:

¹¹⁹ 26536/95 (1998).

¹²⁰ *Boffa v San Marino supra* 34.

¹²¹ *Boffa v San Marino supra* 35.

¹²² 24429/03 (2012).

¹²³ *Solomakhin v Ukraine supra* 33.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ 47621/13, 3867/14, 73094/14 *et al* (2021).

“With regard to the aims pursued by the vaccination duty, as argued by the Government and as recognised by the domestic courts, the objective of the relevant legislation is to protect against diseases which may pose a serious risk to health. This 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, relying on the attainment of a high level of vaccination within society at large for protection against the contagious diseases in question. This objective corresponds to the aims of the protection of health and the protection of the rights of others, recognised by Article 8.”¹²⁷

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.¹²⁸ A restriction, in the form of an obligation to vaccinate, may be placed on the applicants’ right to physical integrity in order to “protect the health of all members of society, particularly those who are especially vulnerable with respect to certain diseases”.¹²⁹ Accordingly, the court found that there had been no violation of article 8 of the Convention. The applicants, further, sought to invoke the protection of article 9 of the Convention for their critical stance towards vaccination, not based on religious grounds. However, the court found that a critical opinion on vaccination is not such as to constitute a conviction or belief of sufficient cogency, seriousness, cohesion, and importance to attract the guarantees of article 9.¹³⁰ Judge Lemmens, in his partly concurring and partly dissenting opinion, correctly and importantly states:

“While everyone enjoys fundamental rights in a given society, a fact which must be respected by the State, individuals do not live in isolation. By the nature of things, they are members of that society. Life in society (‘living together’) requires respect by each member of society for certain minimum requirements ... One of these requirements is respect for the human rights of the other members of society ... The Court has since long recognised that in democratic societies it may be necessary to place restrictions on an individual’s freedom in order to reconcile the interests of the various individuals and groups and to ensure that everyone’s rights are respected.”¹³¹

Having taken guidance from the United States and the European Union above, an analysis and discussion of mandatory vaccines in South Africa is considered below.

5 ANALYSIS AND DISCUSSION OF MANDATORY VACCINES

Dr Hans Kluge, World Health Organization Regional Director for Europe, said in a statement that “[v]accines present our best way out of this

¹²⁷ *Vavříčka v the Czech Republic supra* 272.

¹²⁸ *Vavříčka v the Czech Republic supra* 273.

¹²⁹ *Vavříčka v the Czech Republic supra* 279.

¹³⁰ *Vavříčka v the Czech Republic supra* 335.

¹³¹ *Vavříčka v the Czech Republic supra* par 2.

pandemic”.¹³² In its “Global Vaccine Action Plan” published in 2013, the World Health Organization stated:

“[I]mmunization is, and should be recognized as, a core component of the human right to health and an individual, community and governmental responsibility.”¹³³

Mandatory vaccination policies at tertiary institutions are prescribed by law, namely through the Code of Practice: Managing Exposure to SARS-COV-2 in the Workplace, 2022. Their purpose is clearly defined to protect the health and safety of not only employees and students but that of the public at large in line with their obligations under the OHS Act.¹³⁴ This presents a legitimate aim in the protection of public health for the common good and for the return of life to normalcy. The measure of mandating vaccinations is rationally connected to a legitimate aim, as demonstrated by scientific evidence and is, therefore, considered a necessary measure to mitigate the risks associated with Covid-19 in a democratic society such as South Africa. Mandating vaccinations can further be argued to be a proportionate measure in the narrow sense in that it strikes a fair balance between the importance of the goal of the protection of human life and the burden it places on the individual in that the risks of Covid-19 far outweigh the risks of vaccination.

Despite the law allowing for mandatory vaccinations, what this looks like in practice will depend not only on the government but also on the private sector. Arguably, vaccines are more invasive than closing mosques or preventing the sale of alcohol.¹³⁵ Nonetheless, the complex, multi-layered practicalities of enforcing Covid-19 vaccinations mean that vaccination mandates will have to be developed responsibly. In some contexts, such as frontline health care, a hard-line approach may be warranted, and the limitation of individual rights could be justified.¹³⁶ It might not apply in all contexts: some individuals may have valid medical reasons for not being able to take a Covid-19 vaccine, others may object on religious grounds or work in low-risk environments where their decisions not to be vaccinated pose little risk to others. Outside of work environments, vaccine mandates could be used to incentivise rather than enforce vaccinations, without significant intrusions on individual rights.¹³⁷

¹³² World Health Organization “Slow Vaccine Roll-Out Prolonging Pandemic” (2021) <https://www.euro.who.int/en/media-centre/sections/press-releases/2021/slow-vaccine-roll-out-prolonging-pandemic> (accessed 2022-02-24).

¹³³ World Health Organization “Global Vaccine Action Plan 2011–2020” (2013) <https://www.who.int/teams/immunization-vaccines-and-biologicals/strategies/global-vaccine-action-plan> (accessed 2022-02-24).

¹³⁴ Ss 8, 9 and 14 of the OHS Act.

¹³⁵ Karim “Covid Vaccine Mandates Don’t Have to Undermine Your Rights”, (September 2021) <https://www.wits.ac.za/covid19/covid19-news/latest/covid-vaccine-mandates-dont-have-to-undermine-your-rights.html> (accessed 2022-01-25) 2.

¹³⁶ *Ibid.*

¹³⁷ Karim <https://www.wits.ac.za/covid19/covid19-news/latest/covid-vaccine-mandates-dont-have-to-undermine-your-rights.html> 2.

6 CONCLUSION

This article has discussed the history of pandemics and vaccine hesitancy in Africa, focusing on South Africa. In addition, the various legislative and policy frameworks in South Africa in respect of vaccinations have been discussed. An analysis and discussion of the United States and the European Union in respect of their position on mandatory vaccinations was also included. At the time of writing, South Africa's daily rate of new infections had been on a steady decline, although a fifth wave is probably on the horizon and a sixth and a seventh also possible.¹³⁸ This is true of every country in the world. The pandemic will not end with a bang, but one can expect to see a fading-away. Waves might well continue, and even increase in magnitude. However, fatalities will reduce, and severe illness become less common as vaccination rates improve. Unfortunately, it is quite natural to listen to anecdotal evidence and take it seriously when a person is said to die from a heart attack as a result of the vaccine. However, this is not good evidence of a causal relationship. Evidence-based medicine is rooted in large-scale randomised trials with many thousands of people participating.¹³⁹ Both trials and now large-scale rollouts have conclusively shown that vaccines massively reduce people's chances of hospitalisation and death and further that by all standard measures of pharmaceutical safety, that they are not harmful.¹⁴⁰ As South Africans, we must come to terms with the fact that Covid-19 is probably here to stay and that the only way to end this pandemic is to stop the enormous harm it is doing by vaccinating.¹⁴¹

¹³⁸ Hart and Combrink "We Can't Banish COVID-19. But We Can End the Pandemic With Vaccinations" (September 2021) <https://theconversation.com/we-cant-banish-covid-19-but-we-can-end-the-pandemic-with-vaccinations-168294> (accessed 2022-01-26) 2.

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*