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## AN ANALYSIS OF THE LEGAL RAMIFICATIONS OF MANDATORY VACCINATION IN THE LIGHT OF RIGHTS TO LIFE AND HEALTH: THE CASE OF SRI LANKA

### *Summary*

*The consistency of the decision of making Covid-19 vaccination mandatory with the rights to life and health of the citizens has initiated a heated debate in Sri Lanka. The enjoyment of the rights to physical and mental health includes the citizens' right not to be exposed to situations or substances that pose or appear to pose threats to their life and health. However, the counter-premise that mandatory vaccination guarantees a person's immunity against the virus, uplifting his as well as others' physical fitness and mental confidence, is an equally valid argument. In Sri Lanka, during a fast-spreading pandemic, decisions to ensure and safeguard individual rights and liberties of all persons in all situations, while maintaining public health and its standards, is a challenge; adoption of and providing for one view might require limiting or rejecting others. In the absence of solid medical evidence of the effects and after-effects of vaccination, as well as its capability to prevent the spread of the Covid-19 virus – at least beyond reasonable doubt – whether treating vaccinated and non-vaccinated differently can be construed as a violation of individual rights to life, personal health and equality is a matter that requires a thorough consideration of facts. Hence, this paper, referring to international conventions and treaties on human rights and health, investigates and analyses the legal ramifications of the mandatory Covid-19 vaccination in Sri Lanka. The study recommends maintaining the status quo in general, and application of mandatory vaccination policies to settings and persons that require immunity against the virus – such as health personnel – immediately, and holding its application as a method of preventing the spread, until research and medical evidence affirm the capabilities and side effects of the vaccination, with solutions. This approach minimizes unnecessary conflicts between individual rights and interests, and the state's responsibilities during the pandemic.*

**Keywords :** Covid-19, mandatory vaccination, human rights, right to life.

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## 1. INTRODUCTION

The Covid-19 virus, beyond its impact on public health in Sri Lanka society, initiated a range of unprecedented legal matters, particularly in relation to individual rights and liberties. Covid-19 vaccination was probably the most debated matter in terms of both its medical and legal ramifications, particularly in the light of certain isolated incidents and legislative-level decisions<sup>1</sup> to make the vaccination card – and thereby vaccination – compulsory to take part in various social events as well as to enter into public places. On the face of it, steps for vaccination mandates were perceived as a step to recognize and establish the right to health by improving the immunity of citizens against a hazardous virus; i.e., Covid-19. However, immediately, this decision prompted much controversy and debate, as the enjoyment of the rights to physical and mental health also includes the citizens' right not to be exposed to situations or substances that pose or appear to pose threats to their life and health. The World Health Organization (WHO), the Sri Lankan government, or any responsible medical institution failing to guarantee that the vaccine will prevent reinfection or the spread of the virus, posed more questions as to the efficacy of the vaccine. Further, no institution or government denying the possibility of allergic responses or deaths due to Covid-19 prevention vaccine intensified the debate. Hence, the argument that the vaccination that provides a person with the immunity against Covid-19 virus can be construed as a step to ascertain a person's right to health, is just as valid as the argument that it can be construed as a violation of a person's right to health as, when compelled or forced, it breaches the bodily integrity of a person by injecting him with a substance, and thereby posing a threat to his good health. However, everyone agrees that Covid-19 has undoubtedly and unquestionably crippled economic and social functioning, leading economies and social smooth functioning into chaos, and therefore an immediate solution is essential to reinstate the social and economic order. This paper, from the vantage point of the above mentioned argument, investigates the legal ramifications of mandatory Covid-19 vaccination in Sri Lanka, in order to recommend the most viable and practical solution to continue with the battle against the Covid-19 virus, safeguarding health rights and minimizing the risks of human rights violations.

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<sup>1</sup> The Gampaha District Covid Committee decided to make the full Covid vaccination record card mandatory to attend weddings and concerts in the Gampaha District (Gamini Gunaratna, 2022); "Beginning 01<sup>st</sup> January 2022, #COVID19SL vaccination cards will be made mandatory to access public spaces in Sri Lanka. If you haven't already received it, I urge you to get vaccinated now," Health Minister of Sri Lanka, Minister Keheliya Rambukwella tweeted. (Sri Lanka makes vaccination card mandatory after Omicron detection | *EconomyNext*, 2022).

## 2. THE RIGHTS TO LIFE AND HEALTH AND COMPULSORY VACCINATION

The right to health has been affirmed by several international conventions; what affects Sri Lanka the most is the Universal Declaration of Human Rights (UDHR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), both of which have been ratified by Sri Lanka. Article 25 of the UDHR and Article 12 of the ICESCR recognize the right to physical and mental health and well-being as one of the fundamental rights of an individual. In Sri Lanka, although the right to health is not recognized as a fundamental right by the constitution, health care is included as an obligation of the provincial councils,<sup>2</sup> and health care is, in principle, free, as same as education. While the Supreme Court of Sri Lanka has decided in several cases<sup>3</sup> that the legal relevance of the Declaration and the Covenants is only relevant in the field of interpretation, the influence of such treaties as a guide for the states to give priority to citizens' health rights is undeniable. Similarly, regardless of being a country with a dualist legal system in which a legislative act or a judgment is required to adopt the content of such treaties into domestic law, as a signatory of the treaties, Sri Lanka is obliged in general to recognize the rights laid down therein and, hence, the right to physical and mental health care.

Assuming that Sri Lanka does respect and recognize the right to health-care, it is necessary to understand that it includes not only the treatments, care, and medication after a person is affected by a particular illness or medical condition but also the right to prevent and avoid any conditions, situations or substances that pose a risk to a person's current health or life. The latter is twofold. In the light of a disease called 'A', it is a person's right to prevent or avoid any situations that will expose him to disease A, and at the same time if any steps to treat or prevent exposure to disease A leads him to disease B, it is also his right to avoid that preventive step; it is in the light of this second scenario that the fundamentals of mandatory vaccination are questioned. Certain persons, due to various medical, health, and even religious and other reasons may refuse the breach of bodily integrity through vaccination. The paper encompasses the health-related ramifications of Covid-19 vaccination. Assuming that a person refuses to be vaccinated due to his fear or hesitation to put his health or life at risk, whether making vaccination mandatory or tacitly compelling people to be vaccinated by restricting the

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<sup>2</sup> Article 154 G, read with the Nineth Schedule (Provincial Council List 1) of the Constitution of Sri Lanka.

<sup>3</sup> W.M.K. *Silva v. Piyasena Senaratne*, (1988) S.C. App 7; *Visvalingan v. Liyange*, (1984) FRD (2) 529; *Chelliah v. Paranage*, 2 Sri Lanka Law Reports 132.

access of the non-vaccinated can, therefore, be a limitation to his right to health. Nevertheless, whether such a limitation construes a violation of his fundamental rights depends on main objectives intended to be achieved by making vaccination compulsory.

The main intention behind the attempts to make vaccination mandatory, as reported in the Sri Lankan setting, is to encourage the public to be vaccinated (Gamini Gunaratna, 2022), on the grounds that vaccination protects them against the Covid-19 virus (BBC News Sinhala, 2022). The National Institute for Public Health and the Environment of the Ministry of Health, Welfare and Sport – Netherlands (RIVM) (2022) states that, in a study where the Pfizer/BioNTech vaccine was used to protect mobility of the elderly individuals living at home against Covid-19 from January 26, 2021, fully vaccination persons in this group had the lowest probability of developing Covid-19 by 82% and that vaccination provided 96% percent protection to those who are between 75 to 79 years of age, 87% percent to individuals between 80 to 84 years of age, and 72% to those who are 85 years and above three weeks after the second dose. In more recent research by Zheng et al., (2022), the findings suggest that, in the real-world setting, vaccine effectiveness against severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) infection, Covid-19–related hospitalization, admission to the intensive care unit, and death are, consecutively 89.1%, 97.2%, 97.4%, and 99.0%. Medical evidence supports the fact that vaccination will be a more reliable solution in strengthening human immunity against the virus, and a vaccinated person is stronger against the virus compared to a non-vaccinated.

However, these findings fail to justify the rationale behind restricting non-vaccinated entering public places. Studies by many researchers, including Singanayagam et al., (2022) and Wilder-Smith (2022) consolidate that transmission or circulation of the Covid-19 virus does not differ due to being vaccinated. The World Health Organization (2022) and the Ministry of Health Sri Lanka also state that “there is also still a chance that [a vaccinated person] could also pass the virus on to others who are not vaccinated” (WHO, 2022) and that the vaccinated may not have any manifestation of disease and be completely asymptomatic due to their vaccine protection (Ministry of Health, 2022). Hence, in the light of medical evidence, vaccination provides only an individual protection, and as far as the spread is concerned, both a vaccinated and non-vaccinated carrier of the virus make a similar impact. In other words, vaccination does not make an impact on the community spread, which makes steps to make Covid -19 vaccination mandatory redundant.

In the endeavour of safeguarding human rights, which in this matter is the right to health, the state’s role is to recognize, respect and facilitate the enjoyment

of such rights rather than forcing citizens to enjoy or reap the benefit of a right. If a citizen chooses not to enjoy or gain the benefit of a particular right, the state may not interfere with it, as long as the consequences are not extended to the community at large in a negative manner. For instance, in the case of a disease, if a citizen chooses not to be treated, the state can rest, unless the disease not being treated or contained may result in transmission within the community, jeopardizing the health of other citizens, in which case the state has to intervene.

At this juncture, one may argue that the burden of a non-vaccinated community on the economy and society provides reasonable grounds for a state to intervene and ensure protection through vaccination, by making it compulsory. Provided that vaccination is, so far, the most reliable solution in fighting against the Covid-19 virus, it is certain that the state will have to bear a considerable cost for the healthcare of the non-vaccinated community, who are weaker in immunity, compared to the vaccinated. Moreover, assuming that the confidence of a vaccinated person, in terms of his health and immunity against the Covid-19 virus is much higher than a non-vaccinated person, he can engage in his daily activities with assurance and make a significant contribution to the economy and production by engaging in his daily activities and employment more confidently than a non-vaccinated. Hence, making vaccination compulsory, based on these arguments, on its face, makes out a valid case. However, identifying whether these grounds can essentially justify an act so controversial and contentious as restricting human rights linked with health, assembly, association of several other rights, requires consideration of facts from a broader perspective; not only a comparative assessment of the actual economic and social risks associated with a vaccinated and non-vaccinated community but also the actual impact on public confidence by vaccination in the time of pandemic should be considered.

Medical findings discussed above proved that immunity improvements provided by vaccination, so far, is the best solution to fight against the Covid-19 virus. Hence, based on ostensible evidence, one may argue that the healthcare budget allocated to a non-vaccinated community, undoubtedly, is less compared to that of a vaccinated community, as the latter needs more medical attention due to deficiencies in their natural immunity against Covid-19 virus. Nevertheless, a community being vaccinated, should not be considered a simple generalization or a “free pass” to reduce or downgrade the medical attention and healthcare facilities provided to them. Medical evidence suggests that infections and hospitalizations are still possible, even if a person is vaccinated with a Covid-19 prevention vaccine.

A study by Fathima et al. (2022), based on Covid-19 hospitalizations in Aga Khan University Hospital, Karachi, Pakistan, states that among a cohort of

434 patients hospitalized with infections of the Covid-19 virus, 37.7%, 6.6%, and 55.5% were fully vaccinated, partially vaccinated, and unvaccinated, respectively. Further, Steele (2020), in her study based on US hospital records that, from September 1<sup>st</sup> to September 30<sup>th</sup>, 2021, it has been estimated that the vaccination prevented only 52% of expected infections, 56% of expected hospitalizations, and 58% of expected deaths in adults 18 years or older. Both these studies suggest that vaccination itself has not been sufficient to reduce the rates of infections or hospitalizations. The statistics and medical research contend that releasing or relaxing health policies or budget, under the presumption that vaccination prevents Covid-19 pandemic and severe consequences of infections, is by no means advisable or recommendable. Hence, the mere fact that the public is vaccinated – with or without their willingness – does not absolve the state of its responsibility in terms of public health, and therefore it is very unlikely that a state may restructure or reallocate the budgets allocated for healthcare during the Covid-19 pandemic if the state's ultimate goal is to ensure public health, which it should be.

Further, the risks and side effects associated with the Covid-19 vaccination have been discussed in various settings, research, and studies. The World Health Organization, in its general and approximate view, states that severe allergic reactions such as anaphylaxis are “extremely rare” and “less common” side effects reported for some Covid-19 vaccines, which is also the view of the Directorate of Healthcare Quality and Safety of Sri Lanka. However, the views of medical experts provide a more comprehensive picture of the side effects and after-effects of covid vaccination. While the most common short-term side effects such as fatigue, fever, and soreness at the injection area are short-term effects that last only a few days and are comparatively less life-threatening, the probability of long-term effects of Covid-19 vaccination should also be inquired. National Institute for Public Health and the Environment, Netherlands, discusses thrombosis with thrombocytopenia syndrome (TTS), which is a combination of blood clots (thrombosis) with low levels of blood platelets associated with the Astra-Zeneca and Janssen vaccines (RIVM, 2022). Further, Esba and Al Jeraisy (2021) report five serious adverse cases following the administration of Covid-19 vaccination at the King Abdulaziz Medical City in Riyadh, Saudi Arabia from December 2020 to 13 April 2021, including two cerebral venous sinus thrombosis cases, two pulmonary embolism cases and one cardiac arrest that resulted in death. Coronavirus Vaccines Summary of Yellow Card Reporting (2022), published by the Medicines & Healthcare products Regulatory Agency of the United Kingdom, reports that the Covid-19 Vaccine Pfizer/BioNTech and Covid-19 Vaccine Moderna are known to carry a minor risk of myocarditis and pericarditis in people under the age of 18, both in the UK and globally. Center for Disease Control

and Prevention of the United States mentions reports of myocarditis and pericarditis following Covid-19 immunization vaccine including Pfizer-BioNTech or Moderna. (mRNA COVID-19 vaccines) (2022). As reports and studies confirm, the long-term side effects, and deaths, which the World Health Organization and the Australian Academy of Science claim are ‘extremely rare’ and ‘one-in-a-million chance’ (AAS, 2022), are still possibilities of Covid-19 vaccination. Hence, in light of such risks associated with the virus, even if the vaccination is made compulsory and those who hesitate to be vaccinated are given the Covid-19 vaccination doze outside their will, whether the confidence in health and life the Sri Lankan government intends to improve and elevate among the public is achievable is highly questionable.

Moreover, the Sri Lankan health authorities offer the citizens only the vaccine brand available at the vaccination centre at the time a person is vaccinated, and it is not possible to choose one vaccine brand over another. Currently available vaccines in Sri Lanka are delivered in two doses (Ministry of Health, 2022). The Sri Lankan government also mentions that the second dose must be from the same brand of the vaccine as the first, but contrarily states that Pfizer can be offered as the second dose to those who had the Covishield/AstraZeneca as the first dose, in case of a shortage (Ministry of Health, 2022). A person being disallowed the option to select the vaccination brand, compelled to choose a vaccine brand he is not willing to be injected with, and compelling him to take whatever vaccine brand “available” at the vaccination center constitutes a *prima facie* violation of a person’s right to health, as such denial is not based on medical opinion or policy but merely on the availability and manner of distribution of the vaccines. The absence of a uniform policy in terms of first, second, and booster dose brands considerably undermines public confidence and willingness in terms of vaccination.

The rights are not immune restrictions, and in fact, such restrictions and constraints are necessary in addition to the recognition and promotion of one’s right to mental and physical health if the interests of all people or the common good are to be safeguarded. Some human rights are and have been subject to limitations, for the purpose of, *inter alia*, national security, public order, economic well-being, public health or morals, and the rights and freedoms of others in the society. Any convention or declaration of human rights ratifies and permits such restrictions<sup>4</sup>. Furthermore, the Siracusa Principles, a non-binding statement adopted by the United Nations Economic and Social Council in 1985, dictate those limitations to human rights should be on the grounds of being essential, legitimate, reasonable, not arbitrary or discriminatory, and based on solid evidence

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<sup>4</sup> UDHR (n 8) art. 29; ICCPR (n 8) art. 12(3), 21, 22(2); ICESCR (n 8) art. 8; ECHR (n 8) art. 2(2), 8(2), 11(2).

are permissible<sup>5</sup>. Several cases, including, but not limited to, *R v. Oakes*<sup>6</sup>, *Leo Hertzberg et al., v. Finland, Communication*<sup>7</sup> and *Saranapala v. Solanga Arachchi, Senior Superintendent of Police and Others*<sup>8</sup>, have also reiterated imposing restrictions to human rights, on the same grounds.

However, although vaccination remains the best solution to fight against the Covid-19 virus, the public order and confidence as well as the economic benefit expected to be achieved through vaccination, at least at this moment, remain unclear and uncertain, in the light of the lack of medical and social evidence. As a result, at this moment in the debate, such sanctions based on vaccination status inevitably become baseless and unjustifiable, and cannot be justified or brought within the purview of “essential, legitimate or reasonable” restrictions.

### 3. CONCLUDING REMARKS

As the origin of a state is the citizen, the rights of all citizens constitute the interests of the state, and the state is therefore under the obligation to recognize, respect, and promote the rights of each individual separately, as long as the enjoyment of rights does not interfere with or infringe those of another or many; it is in case of the latter that the state intervention is required. In the matter of Covid-19 prevention, a person not wearing a mask being denied entrance to a public place is based on strong and proven medical evidence that the person wearing a mask can not only be protected against the Covid-19 virus in the air of the public places, but also prevents the release of Covid-19 infected droplets of the infected. In contrast, Covid-19 vaccination provides self-protection only. With no medical proof that the vaccinated person will not be reinfected or that the vaccination impedes the transmission of the virus, a non-vaccinated man is no more a threat to public health than a vaccinated person. On the contrary, as the risk of side effects and death, even though extremely rare, are still a possibility, forcing a person directly or indirectly to take that risk outside his will is a graver threat to the individual liberties of that citizen; not only the right to health but also the freedom of movement, peaceful assembly, the right to equality and right to life will also be

<sup>5</sup> United Nations Economic and Social Council UN Sub-Commission on Prevention of Discrimination and Protection of Minorities: The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, Annex (1985). U.N. Doc. E/CN.4/1985/4.

<sup>6</sup> [1986] 1 SCR 103

<sup>7</sup> [1985] No. 61/1979, U.N. Doc. CCPR/C/OP/1 at 124

<sup>8</sup> [1999] 02 SriLR 170

at stake. Uncertainties and threats to individual rights may lead to lesser public activities, drops in social mobility, and mass migration, resulting in much worse social, political, and economic consequences, compared to the consequences of a portion of the workforce being unhealthy, or the cost Sri Lanka will have to bear on Covid-19 healthcare.

Therefore, the analysis above suggests that, as long as medical assurance is not maintained, restricting fundamental or human rights to facilitate mandatory vaccination, either explicitly or implicitly, is no longer legal or justifiable. More information on the effects of the vaccine and its reactions to different medical conditions, as well as treatments for its side effects and abnormalities, are to be identified properly beyond reasonable doubt. It is therefore important that the status quo is maintained, until enough evidence on various negative effects of vaccination and possible solutions to them are identified, and they are made accessible to the public. Rather than investing legislative and financial effort in forcing the vaccination, such efforts can be diverted to promote vaccination among persons willing to be vaccinated and ensure their post-vaccination medical security. Further, in order to determine the effects of vaccination, consistency in research and testing – on both vaccines and vaccinated persons – should continue, with the purpose of identifying suitable treatment options. Before deciding to get vaccinated, people with general or special medical problems, such as pregnancy, cancer, respiratory illnesses, and cardiovascular disease, and public awareness should be raised about the potential effects of vaccination on them via meticulous medical care and counseling. Along with these activities that deal with various medical and health aspects of the virus, immunization, and public safety, general preventative measures and monitoring should continue. Assuring that health policies, choices, treatments, and experiments are legal and within the framework of law is essential for maintaining the delicate balance between human rights and public health as well as public confidence. The only way to defeat a pandemic as unpredictable as Covid-19 without leading to much worse situations that endanger the whole society is to retain this balance and certainty.

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## ANALIZA PRAVNIH POSLEDICA OBAVEZNE VAKCINACIJE U SVETLU PRAVA NA ŽIVOT I ZDRAVLJE: SLUČAJ ŠRI LANKE

### Sažetak

*Doslednost odluke da se vakcinisanje protiv kovida 19 učini obaveznim, sa aspekta prava na život i zdravlje građana, pokrenula je žestoku raspravu u Šri Lanki. Uživanje prava na fizičko i mentalno zdravlje uključuje pravo građana da ne budu izloženi situacijama ili stvarima koje predstavljaju ili se čini da predstavljaju pretnju njihovom životu i zdravlju. Međutim, protivpremissa da obavezna vakcinacija jemči imunitet osobe protiv virusa, podižući njegovu, ali i tuđu fizičku spremnost i mentalno samopouzdanje, jednako je valjan argument. U Šri Lanki, tokom pandemije koja se brzo širi, odluke o osiguravanju i zaštiti ličnih prava i sloboda svih osoba u svim situacijama, uz održavanje javnog zdravlja i njegovih standarda, predstavljaju izazov; usvajanje i pružanje jednog pogleda može zahtevati ograničavanje ili odbacivanje drugih. U nedostatku čvrstih medicinskih dokaza o učincima i posledicama vakcinacije, kao i njenoj sposobnosti da spreči širenje virusa kovida 19 – barem izvan razumne sumnje – da li se različito postupanje prema vakcinisanim i nevakcinisanim može tumačiti kao kršenje individualnih prava na život, lično zdravlje i jednakost, pitanje je koje zahteva temeljno razmatranje činjenica. Stoga ovaj rad, pozivajući se na međunarodne konvencije i ugovore o ljudskim pravima i zdravlju, istražuje i analizira pravne posledice obavezne vakcinacije protiv kovida 19 u Šri Lanki. Studija preporučuje održavanje statusa quo generalno i primenu politike obavezne vakcinacije na okruženja i osobe kojima je potreban imunitet protiv virusa – poput zdravstvenog osoblja – odmah, i zadržavanje njegove primene kao metode prevencije širenja virusa do dobijanja rešenja istraživanja i medicinskih dokaza koji potvrđuju mogućnosti i neželjene efekte vakcinacije. Ovakav pristup minimizira nepotrebne sukobe između prava i interesa pojedinca i odgovornosti države tokom pandemije.*

**Ključne reči :** kovid 19, obavezna vakcinacija, ljudska prava, pravo na život.

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