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SHOULD WE LEGISLATE TO VACCINATE?

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THE NOVELTY OF COVID- 19

On March 11, 2020, the World Health Organization (WHO), declared the novel coronavirus (COVID-19) outbreak a global pandemic, the effects of which cascaded unto the citizenry of Trinidad and Tobago. This is evidenced by Proclamation dated 15th May, 2021, wherein Her Excellency Paula-Mae Weekes declared the following:

- a. *“I am satisfied that a public emergency has arisen as a result of the outbreak of an infectious disease [2019 Novel Coronavirus (2019-nCoV)]; and*
- b. *A state of emergency exists in the Republic of Trinidad and Tobago.”*

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Placed in a historical perspective, where the solution to any infectious disease epidemic/pandemic, is mass/widespread vaccinations, controversy is sure to arise on any discussion as to whether vaccinations should be mandatory.

THE SMALL POX PRECEDENT

When Edward Jenner created the first vaccination against smallpox in 1796, it was originally seen as a miracle solution to a disease which caused the death of millions worldwide. However, it was not long before his vaccination began to attract opposition. Ironically, controversy stems from the solution-oriented nature of a vaccine, in that, it is preventative rather than curative and thus there is always the challenge to sometimes convince healthy people as to why they should be vaccinated against something they're not suffering from or not afflicted with. Thus, when governmental bodies in the United Kingdom made the smallpox vaccination compulsory by virtue of the **Vaccination Act of 1853**, the legislation only served to increase resistance and opposition to the very idea of Mandatory Vaccinations. It is imperative to note that the legislation governing and mandating vaccinations came almost 57 years after the vaccine was developed.

As a direct response to the implementation of the UK **Vaccination Act of 1853**, anti-vaccination leagues were quickly formed and they took to the streets to protest against what they deemed as an invasive practice and they raised objections on the grounds of religious and health concerns, as well as Constitutional claims of trampling upon individual rights and Fundamental Freedoms of persons. The public cries led to the legislation being amended decades later, in 1898, to allow for 'conscientious objection' to receiving a vaccine. It is not surprising that the concerns of the anti-vaccination leagues resonate in the cries of present-day Covid-19 vaccine objectors, vaccine-resistors and outright Anti-Vaxxers.

IS VACCINATE, THE NEW NORMAL WAY?

It is globally recognised that Covid- 19 has taken fame for the coining of the phrase “The New Normal”. This “New Normal” has manifested itself in the form of mask wearing in public spaces, social distancing, frequent hand sanitisation, travel restrictions, online academic classes and work from home policies. Though, non-observance of the new normal was primarily credited for spiralling positive cases, if there is any hope of containing the spread of Covid-19 or any opportunity of reverting to what we now know as the “Old Normal,” emphasis must be placed on a viable and rigorously implemented vaccination regime.

Although Covid-19 bears resemblance to smallpox in that it has claimed the lives of millions worldwide and the solution to the spread of the diseases is a vaccine, there are notable differences. The Centre for Disease Control and Prevention (CDC) has since categorised small pox as an epidemic. Generally, epidemic is used to described an unexpected increase in the number of disease cases in a specific geographical area. In contrast, the authority of declaring a disease as a pandemic lies with the World Health Organisation (WHO). A pandemic is declared where the disease’s growth is exponential and not restricted to a specific geographical location. Therefore, the severity of Covid-19 far surpasses that of the smallpox. Thus, to wait for more than half of a century for legislative bodies to develop laws that govern vaccination seems neither practical nor realistic in the current scenario.

LEGISLATE TO VACCINATE?

In mainstream media, many governments are struggling with the mandate to try to achieve mass vaccinations in the face of mounting public opposition to same, and this leads to the persuasion conundrum. Should Governments persuade with the Carrot, or the with Stick? We

have seen various Governments try various types of incentives to induce people to voluntarily vaccinate in this present pandemic, from some States in the US offering free Lottery tickets, some offering free Beer, Uber has offered free rides to persons going to be vaccinated, and in extreme cases we have heard of plots of Land being offered in Antigua/Barbuda as inducement to be vaccinated.

But what if all this fails, what then? As seen in the case of Smallpox, legislated mandatory vaccination receives strong resistance from vaccine objectors who claim that their individual rights are trampled upon. There are those who for their own Religious and/or Health concerns may also object to the idea of being vaccinated. Then for some others, disclosure of the risks and adverse effects of vaccines through negligible and very rare, has also provoked a similar resistance to vaccines by some persons. Keeping this in mind, the pros and cons of legislating Mandatory Covid-19 vaccination will always be a flash-point for heated debate and impassioned discussion and possibly lots of hard-swearing on both sides of the divide. Quite understandably therefore, our current Government Leadership here in Trinidad & Tobago has side-stepped and tap-danced around the issue, for fear possibly, of stirring up that Hornet's Nest.

In assessing whether Trinidad and Tobago should legislate the Covid-19 vaccination as mandatory, reference must be made to the relevant aspects of **Section 4 of the Constitution of Trinidad and Tobago** wherein the fundamental rights of citizens are enshrined. This encompasses the following:

“It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely:

(a) the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law;

(b) the right of the individual to equality before the law and the protection of the law;

(c) the right of the individual to respect for his private and family life;

(d) the right of the individual to equality of treatment from any public authority in the exercise of any functions;

...

(f) the right of a parent or guardian to provide a school of his own choice for the education of his child or ward;

...

(h) freedom of conscience and religious belief and observance..."

The Constitution sets the foundation on which vaccination legislation can be considered. Thus, in contemplating whether Covid-19 vaccines should be legislated as mandatory, consideration must be given to the following areas which have the potential of severely impacting persons and can result in people being adversely affected.

NO JAB, NO JOB?

Section 6 (1) of the Occupational Safety and Health Act Chapter 88:08 stipulates:

“It shall be the duty of every employer to ensure, so far as is reasonably practicable, the safety, health and welfare at work of all his employees.”

Pursuant to this mandate, employers have been using persuasive tactics in advocating for their employees to take the Covid-19 vaccine since it would promote a safe and healthy workplace not just for the individual employee but also for their fellow employees and also for that of their clientele with whom they interact. However, one must be wary that the extent to which an Employer can intervene in an Employee’s personal and private life, has always been a contentious one. Notwithstanding, in some workplaces, the employer’s intrusion into the employee’s health may be justifiable depending on the nature of the employment, for example at a Hospital or Medical/Health Centre, where being medically certified as fit to work is deemed a requirement and clearly the safety precaution of being vaccinated and thus lessening the risk of your Medical Staff contracting or transmitting the disease, by being properly vaccinated, is not only a course of prudence but may also become a practical mandatory requirement. These circumstances are deemed to be reasonable since the employees’ health would affect their ability to perform their jobs and more importantly it has the potential to adversely affect the health of others, if it is that you, as the Medical Professional, have yourself taken no precautions or protections by getting yourself properly vaccinated.

In determining whether it is reasonably justifiable for an employer to mandate the Covid-19 vaccination, consideration must be given to the following legislative framework.

Section 9 of the Equal Opportunity Act Chapter 22:03 enunciates:

“An employer shall not discriminate against a person employed by him—

(a) in the terms or conditions of employment that the employer affords the person;

(b) in the way the employer affords the person access to opportunities for promotion, transfer or training or to any other benefit, facility or service associated with employment, or by refusing or deliberately omitting to afford the person access to them; or

(c) by dismissing the person or subjecting the person to any other detriment.

Therefore, where the operational needs of the workplace do not justify mandating that employees take the Covid-19 vaccine, the general position would be that an employer shall not discriminate against a person employed by him where in the terms or conditions of employment which the employer afforded the person at the time of the commencement of employment did not/could not include a term mandating the Employee to be vaccinated against Covid-19. What however is the position where an Employee could be putting the Health & Safety of other Employees at risk? In the absence of Governmental intervention by mandating vaccination, an Employer is hard-pressed to find effective legal means to deal with such a scenario. There would also be questions as to the empirical scientific proof and the Medical evidence required to establish that this un-vaccinated Employee actually poses a definite and credible threat to the Health and Safety of other Employees; and then even if that hurdle is crossed and such proof established, what course of action can an Employer adopt in such circumstances? Can the Employer terminate the Employee, suspend the Employee, send them on continuous vacation leave? There are no easy solutions to this conundrum.

The President of the Industrial Court, Her Honour Deborah Thomas-Felix at a webinar held on 24th February 2021 weighed in on the issue when she said that an employer cannot alter its terms and conditions of employment to make the Covid-19 vaccination mandatory for employees. She emphasised that the implementation of a mandatory vaccination policy could amount to a unilateral alteration of the terms and conditions of employment which is not in keeping with good industrial relations practice. She however, indicated that Covid-19 vaccine mandatory requirement can be introduced to new employees so that they can decide before accepting the job.

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This is further evidenced in **Communication Workers' Union v National Training Agency Industrial Relations Court - TT 2017 IC 23**, where the following was held:

“...term of employment cannot be changed or altered unilaterally in keeping with the principle of good industrial relations practice. To alter or change such a term requires discussions between the Employer and the worker, where there is no recognized majority union, eventuating in an agreement thereon before implementation.”

Thus, in light of the above, employers cannot unilaterally impose mandatory Covid-19 vaccination policies on their employees. Employers must make an assessment of their workplace and determine whether it is reasonably justifiable in Law to implement a mandatory vaccination policy. However, this ought to be done in consultation with employees or their recognised union and after seeking guidance from medical authorities. This principle was expounded in **Communication Workers Union v Mega Brite Industries Ltd Industrial Relations Court - TT 2005 IC 92** which states:

“...introducing new terms and conditions of service with respect to the worker...in order to do so, the principle of good industrial relations dictates that the Company meets with the Recognised Union and commences discussions to this end.”

Apart from exercising good industrial relations practice, employers ought to be mindful of employees who would refuse the vaccine for reasons of disability and/or religion. The **Equal Opportunity Act** prohibits discrimination in employment based on inter alia, disability and religion.

Section 4 (a) of the Equal Opportunities Act states:

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“This Act applies to—

(a) discrimination in relation to employment, education, the provision of goods and services and the provision of accommodation, if the discrimination is—

(i) discrimination on the ground of status as defined in section 5; or

(ii) discrimination by victimisation as defined in section 6;”

Section 5 of the Equal Opportunities Act details:

“For the purposes of this Act, a person (“the discriminator”) discriminates against another person (“the aggrieved person”) on the grounds of status if, by reason of—

(a) the status of the aggrieved person;

(b) a characteristic that appertains generally to persons of the status of the aggrieved person; or

(c) a characteristic that is generally imputed to persons of the status of the aggrieved person,

the discriminator treats the aggrieved person, in circumstances that are the same or are not materially different, less favourably than the discriminator treats another person of a different status.”

Section 2 of the Equal Opportunities Act elaborates what is meant by status. It states:

“status”, in relation to a person, means—

(a) the sex;

(b) the race;

- (c) the ethnicity;
- (d) the origin, including geographical origin;
- (e) the religion;
- (f) the marital status; or
- (g) any disability of that person”

Thus, in circumstances where an employee refuses to take the vaccine for any disability or medical reasons, an employer cannot adopt a harsh and oppressive approach to penalise the employee whether by passive means or by termination of employment. Instead, an employer can request the employee to revert with a certified medical doctor’s opinion stating the Medical reasons why they cannot be vaccinated.

Additionally, although some religious bodies have commenced and completed investigations into whether the vaccine aligns with their religious mandates, where employees refuse to take the vaccine on the basis of religion, he or she must not be discriminated against, especially where guidance from their religious bodies is still pending. Trinidad and Tobago saw its first religious guidance on the Covid-19 vaccination on 08th June, 2021 from the Darul Uloom Halaal Committee which found the Pfizer-Biontech Covid-19 vaccine, Janssen Covid-19 vaccine, Moderna Covid-19 vaccine and Sinopharm Covid-19 vaccine to be compliant with halaal ingredient requirements and thus concluded that these vaccines are permissible for use by the Muslim community.

In light of the above, employers can implement policies to facilitate equal treatment for religious and medical vaccine objectors by allowing employees an opportunity to raise medical and religious objections with supporting evidence. Furthermore, instead of using mandatory policies which have a tendency to provoke resistance, employers can adopt a persuasive approach to vaccination by allotting time for

employees to be vaccinated or by offering paid time off to employees to vaccinate and recover from the side effects or by subsidizing the cost of fortnightly Covid-19 testing for employees who have presented valid objections to the vaccine.

Due to the novel nature of Covid-19 and its associated vaccine, an employer should adopt a humanitarian approach in dealing with vaccination in the workplace. Employers must consider the pitfalls in mandating a vaccination which is novel, one of these being if an employee gets vaccinated in compliance with its workplace requirement and has a severe reaction or is allergic to the shot, the employer could possibly be held liable for any damages suffered, by having mandated that the Employee gets vaccinated in the first place. This is particularly important where certain production companies for the Covid-19 vaccines have identified blot clots as one of its rare but discernible side effects. Thus, no employer should penalise or terminate his or her employee for refusing to take the vaccine if he or she is not prepared to enter a litigious courtroom situation.

VACCINATION FOR EDUCATION

Section 5 of the Public Health (Nursery Schools and Primary Schools Immunisation) Act

Chapter 28:03 states:

“Where any communicable disease has become epidemic or when an epidemic of any such disease is threatened, the Minister may by Order suspend from attendance at any nursery school or primary school persons to whom a certificate of a medical practitioner certifying that immunisation against any such disease is not advisable on medical grounds was issued pursuant to section 3(1) or refuse entry to any such person to any such school, and the suspension or refusal of entry as the case may be, shall be

effective until the Minister by further Order declares that the epidemic is ended or the threat of the epidemic is past.”

Despite the rights of “a parent or guardian to provide a school of his own choice for the education of his child or ward” as enshrined in **section 4 of the Constitution**, this Act allows for a child to be refused entry to such chosen school or be suspended in the absence of a certificate of a medical practitioner certifying that immunisation against a disease deemed to be epidemic until the Minister of Health by further Order declares that the epidemic is ended or the threat of the epidemic is over.

To date, there has been no communication or credible information from the Food and Drug Administration (FDA) nor the WHO nor PAHO, nor CARPHA, nor the CDC as it relates to internationally accepted standards for Covid-19 vaccinations for children and thus far, none of these international bodies have suggested that it be mandatory for children to be vaccinated.

However, the mere fact that schools have turned to remote conduct of classes as a precaution is indicative that Covid-19 poses a threat to the children of our society and this will only increase a thousand-fold upon the resumption of face-to-face classes, which the Government has touted ambitiously for September 2021. Thus, even if nation-wide mandatory vaccination is not contemplated, the question is this – If the International scientific bodies reach a point where they say that mandatory vaccination of children for Covid-19 is a necessary Health and Safety Protocol, would the Government of Trinidad & Tobago use this provision in the Law to mandate Covid-19 vaccinations for our nation’s school-children?

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Conclusion

Although novel in nature, Covid-19 has had sufficient time to demonstrate the range of its severity, from asymptomatic to life-threatening and its varying threat to different age groups and its evolving variants. These characteristics are likely to be relevant to any argument in favour of developing a legislative framework which would govern mandatory Covid-19 vaccination and of course there would be strenuous arguments against such. However, due to the existence of grey areas of medical uncertainty of the Covid-19 vaccines and the inability to foretell the lasting effects of the vaccine, it may not be prudent to mandate the vaccine by Legislative intervention. Thankfully the GORTT appears to have dodged that bullet by what now appears to be overwhelming enthusiasm for vaccination, as evidenced by massive, uncontrollable crowds at a public call out for walk-in vaccinations. Thus the Government may not even have to contemplate trying to cross this Legislative, Legal, Ethical, Moral, Medical and Social minefield that mandatory vaccination poses for any Governmental organization; and thus it seems for now, Trinidad & Tobago may not have to confront the genie in the bottle, as represented by the pandora’s Box of – Should we Legislate to Vaccinate?

Disclaimer: This article does not constitute legal nor medical advice. Should you require medical or legal advice, please contact an Attorney at Law or a Medical Doctor.