

**AN INVESTIGATION INTO THE CONSTITUTIONALITY OF VACCINE  
MANDATES**

**IN SOUTH AFRICA**

by

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## **ABSTRACT**

This research investigates the constitutionality of vaccine mandates in South Africa against the backdrop of the COVID-19 pandemic. Since the WHO declared COVID-19 the global pandemic in 2020, efforts have been taken to implement vaccination programmes to combat the spread of the pandemic. One of the strategies implemented to improve vaccination rates has been to make vaccinations mandatory – either directly or indirectly. This has prompted debates about the constitutionality of vaccine mandates. The vexed question is whether vaccine mandates are constitutional in South Africa. The research emphasises the need for a tenuous balance between individual human rights and public health imperatives.

The Bill of Rights contains human rights such as the right to bodily integrity, human dignity, and privacy, which must be weighed against the state's duty to protect public health. The absence of legislation (law of general application) regulating vaccine mandates, as demanded by section 36 of the Constitution, raises concerns about their compliance. Limitations on the right to bodily integrity and religious freedom are conceivable under certain circumstances, allowing for the implementation of vaccine mandates. However, such limitations must align with constitutional principles, ensuring a fair, democratic, and justifiable approach. Key findings underscore that vaccine mandates, in the absence of a law of general application, may not align with the Constitution. Violations of bodily integrity and religious rights are identified, necessitating a nuanced approach to balancing individual freedoms and public health. The study concludes that any potential limitations must adhere to constitutional requirements and be implemented transparently and fairly.

Methodically, the study is qualitative. It uses the content analysis of primary and secondary literature such as the Constitution, case law, books, journal articles and international instruments.

**Keywords:** Vaccine mandates; human rights limitations; ethical considerations; bodily integrity; freedom of religion and conscience.

## **DECLARATION**

I declare that the mini-dissertation hereby submitted to the University of Limpopo, for the degree of Master of Laws in Development and Management Law has not previously been submitted by me for a degree at this or any other university; that it is my work in design and in execution, and that all material contained herein has been duly acknowledged.

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**Date**

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## LIST OF ACRONYMS

ABA	American Bar Association
BOR	Bill of Rights
COVID-19	Coronavirus Disease of 2019
CPA	Criminal Procedure Act
ECHR	European Convention on Human Rights
HIV	Humane Immunodeficiency Virus
ICCPR	International Covenant on Civil and Political Rights
SAHRC	South African Human Rights Commission
SANCF	African National Christian Forum
SARS-COV-2	Severe Acute Respiratory Syndrome Coronavirus 2
UK	United Kingdom
WHO	World Health Organisation
XDR-TB	Extensively Drug Resistant Tuberculosis

# CHAPTER 1: THE INTRODUCTION OF THE STUDY

## 1.1 Introduction

Since the World Health Organization (WHO) declared the coronavirus disease 2019 (COVID-19) pandemic a worldwide emergency on March 11, 2020, the pandemic has become a serious concern for people worldwide. National and international efforts have been made to spread vaccines and encourage public vaccination in response to the pandemic. To ensure vaccine uptake and public health safety, however, both before and after the pandemic, vaccine reluctance among the general population has been a significant roadblock.<sup>1</sup> A delay in vaccination uptake, hesitation to immunise, or outright refusal to vaccinate are all examples of vaccine hesitancy.<sup>2</sup> The complex array of factors that influence vaccine refusal includes inconvenience or difficulty in obtaining vaccines, complacency or a lack of faith in a vaccine's efficacy and safety, the method of delivery, and/or the medical personnel and policymakers who developed the vaccine.<sup>3</sup>

There has been little vaccination uptake among the general public in South Africa, despite extensive public awareness campaigns, the availability of free and easily accessible COVID-19 vaccines, and strong encouragement from the government, medical community, and civil society leaders. During the pandemic, there was an excess of vaccines that were not used.<sup>4</sup> The constitutionality of vaccine mandates has been questioned despite calls for their implementation in South Africa. Conversely, others have argued that citizens of South Africa are protected under the constitution against being forced to get vaccines.<sup>5</sup> Some have argued that vaccines

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<sup>1</sup> Machingaidze S and Wiysonge CS 'Understanding COVID-19 Vaccine Hesitancy' (2021) 27 *Nature Medicine* 1338.

<sup>2</sup> MacDonald, NE 'Vaccine Hesitancy: Definition, Scope, and Determinants' (2015) *Vaccine* 4161.

<sup>3</sup> World Health Organization, 'Ten Threats to Global Health' (2019) < <https://www.who.int/news-room/spotlight/ten-threats-to-global-health-in-2019> > Accessed 20 April 2023.

<sup>4</sup> Matrass N, Seekings J 'Government Made Three Critical Mistakes During the Ongoing Vaccine Rollout' (2021) Daily Maverick <<https://www.dailymaverick.co.za/article/2021-12-06-government-made-three-critical-mistakes-during-the-ongoing-vaccine-rollout/>> Accessed 20 April 2023.

<sup>5</sup> Calitz, T 'Constitutional rights in South Africa protect against mandatory COVID-19 vaccination' (2021) 1 STJ < <http://www.scielo.org.za/pdf/stj/v7n1/35.pdf>> Accessed 20 April 2023.



are a constitutional requirement the government enforces to protect the populace.<sup>6</sup> These conversations take place in the context of a long-standing institutional and governmental mistrust in South Africa, which has been passed down through the generations and has shaped the attitudes and perceptions of even the youngest family members.<sup>7</sup>

Section 12(2) of the South African Constitution provides for the right to “bodily integrity”.<sup>8</sup> In all areas of life, everyone has the right to bodily integrity. In the context of healthcare, this right entails providing (or withholding) informed permission prior to the start of any operation or other process that will impact one's body.<sup>9</sup> Herring emphasises that this right should not be construed too broadly, using the example that a patient has the freedom to decide whether or not to get treatment but not the right to pick the precise course of action required.<sup>10</sup> The right protected by section 12(2) is not the only one that vaccination requirements will violate. Section 15 of the Constitution safeguards the freedom of religious belief and expression. According to Section 23(1) of the Constitution, “everyone has a right to fair labour practices”.<sup>11</sup> In accordance with section 36 of the Constitution, these rights may be restricted. Therefore, they are not unqualified: restrictions on rights must be “reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom” and ought to be appropriate for the reason they are being enforced. These limitations should not be capricious, unfair, or unreasonable.<sup>12</sup>

The better benefit of others frequently forces governments to act in ways that contradict human rights. In *Minister of Health v Goliath*,<sup>13</sup> all respondents had XDR-TB, which was resistant to “first-line drugs” and several other medications. They had all disobeyed the voluntary treatment plan that had been outlined for them and were

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<sup>6</sup> Moodley, K ‘Why COVID-19 Vaccines Should be Mandatory in South Africa’ (2021) <[https://theconversation.com/why-covid-19-vaccines-should-be-mandatory-in-south africa-165682](https://theconversation.com/why-covid-19-vaccines-should-be-mandatory-in-south-africa-165682)> Accessed 26 April 2023.

<sup>7</sup> Esau, MV et al ‘Socialisation and its Effect on Youth Trust in Government: A South African Perspective’ (2018) 46 *Politikon* 122.

<sup>8</sup> Section 12(2) of the Constitution of the Republic of South Africa, 1996 contains that “Everyone has the right to bodily and psychological integrity, which includes the right— (a) to make decisions concerning reproduction; (b) to security in and control over their body; and (c) not to be subjected to medical or scientific experiments without their informed consent.”

<sup>9</sup> Carstens, PA and Pearmain, D ‘Foundational Principles of South African Medical Law’ (2007) *LexisNexis* 30.

<sup>10</sup> Herring, J ‘Medical Law and Ethics’ (2010) *Oxford University Press* 21.

<sup>11</sup> Section 23(1) of the Constitution of the Republic of South Africa.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Minister of Health of the Province of the Western Cape v Goliath and Others* 2009 (2) SA 248 (C).

all contagious. All of them were infectious, and they disobeyed the voluntary treatment plan that had been set up for them. Because two of the initial four respondents had already passed away, the Minister of Health requested an order forcing the remaining respondents to be remanded in a tuberculosis hospital for treatment.<sup>14</sup>

In response, the respondents asserted that the detention violated their constitutional rights under section 12 of the Constitution—including their rights to freedom, security of the person, and bodily integrity—(paragraph 14).<sup>15</sup> The Court considered several factors, including the toxicity and associated side effects of the drugs required to treat XDR-TB, the minister's responsibility to prevent and control the spread of infectious diseases, and the fact that the respondents could spread the disease but had disobeyed the voluntary program.<sup>16</sup>

## 1.2 Problem statement

With the recent emergence of the covid-19 pandemic, there has been a growing debate in the legal fraternity and society in general around the constitutionality of vaccine mandates in South Africa. While vaccine mandates have been implemented in other parts of the world, there has been reluctance in South Africa to enact legislation regulating vaccine mandates in line with constitutional requirements. Hence, there are concerns that vaccine mandates under the current legal frameworks are not compliant with the South African constitutional framework.

Vaccine mandates are complex and involve balancing individual rights and public health considerations. In South Africa, the Constitution guarantees certain rights, such as the right to bodily integrity, human dignity, and privacy. These rights must be carefully weighed against the state's duty to protect public health. Vaccine mandates can be seen as a means to achieve this goal by ensuring that a sufficient proportion of the population is vaccinated to achieve herd immunity and protect the vulnerable members of society. However, any such mandates must be implemented in a manner

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<sup>14</sup> *Ibid* 2.

<sup>15</sup> *Ibid* 2.

<sup>16</sup> *Ibid* 2.

that is consistent with the Constitution.

The Constitution allows for limitations on individual rights in certain circumstances, but such limitations must be justifiable in an open and democratic society based on human dignity, equality, and freedom. Any vaccine mandate would, therefore, have to meet several constitutional requirements, such as being necessary to achieve a legitimate aim, being proportionate to that aim, and not being arbitrary or discriminatory. The South African government must consider these constitutional requirements when implementing any vaccine mandate. It would also need to consider other relevant factors, such as the availability of vaccines, the potential impact on vulnerable populations, and the need to ensure that any mandate is implemented fairly and transparently. Ultimately, the issue of vaccine mandates in South Africa is complex and requires careful consideration of the constitutional framework and other relevant factors. Any mandates implemented must comply with the Constitution and be implemented fairly and transparently.

### **1.3 Literature review**

#### **1.3.1 *The notion of vaccine mandates***

Ministerial Advisory Committee Chairman Prof Barry Schoub said in a television interview: “[i]t’s (the introduction of compulsory vaccination) now on our agenda. Mandatory vaccination was done before for Hepatitis, so there is nothing new here. We still have not discussed it with the government, but we recommend it”.<sup>17</sup> He continued by saying that people who oppose vaccinations and cite their constitutional rights as justification must also remember that those who have received vaccinations also have rights and should be safeguarded from those who have not.<sup>18</sup> Sibanda says: “[t]he government of South Africa will be derelict in its constitutional duty to protect the public from a health pandemic should it not impose mandatory

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<sup>17</sup> Gwala N, ‘Mandatory Vaccination: Which Way Will SA Go?’ (2021) JFPH<<https://health-e.org.za/2021/09/02/mandatory-vaccination-which-way-will-sa-go/>> Accessed 15 March 2023.

<sup>18</sup> *Ibid.*

vaccination”.<sup>19</sup> He further quotes a statement from an article published by the American Bar Association (ABA) written in the American context. However, he asserts that the position is similar to the South African context, and the statement says: “[w]hile there is a lot of sound and fury these days about mandatory vaccination against the COVID-19 virus, it should ultimately signify nothing. Mandatory vaccination is 100% constitutional and has been for over a century”.<sup>20</sup>

Moodley asserts:

“As a bioethicist, I have no doubt: ethically, vaccine mandates are justifiable on multiple levels, based on the common good and a public health ethics framework. This framework, which researchers have outlined, is based on the principles of solidarity, effectiveness, efficiency, proportionality and transparency. It intends to achieve three things in a public health emergency. First, to save lives. Second, to use limited resources efficiently. And, finally, to create social cohesion in the public interest and to build public trust”.<sup>21</sup>

Moodley further argues that “it is no longer a matter of whether vaccine mandates should be introduced in South Africa, but when. The country’s Constitution and several pieces of legislation provide for this, in certain circumstances and with several factors considered”.<sup>22</sup> Dhai, who is a leading authority in bioethics, asserts that the concept or culture of *Ubuntu* is relevant to the issue of herd vaccinations that is because “*Ubuntu* is the concept of I am because You are. I have to take the vaccine, not to protect myself only, but you as well”.<sup>23</sup>

### **1.3.2 Constitutional and Legislative framework for vaccine mandates in South Africa**

The United Nations Economic and Social Council adopted the Siracusa Principles in 1985, which addressed the restrictions and exceptions to the International Covenant

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<sup>19</sup> Ellis, E ‘Mandatory Vaccine Policies Will Survive a Constitutional Challenge — Legal Expert Halton Cheadle’ (2021) <<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjWhcnqm5SDAxVUVkEAHRxVABgQFnoECBYQAQ&url=https%3A%2F%2Fobiter.mandela.ac.za%2Farticle%2Fdownload%2F15405%2F19608%2F92152&usg=AOvVaw3gjj31kTbpZjzyk470yST&opi=89978449>> Accessed 15 March 2023.

<sup>20</sup> *Ibid* 3.

<sup>21</sup> Moodley, K ‘Why COVID-19 Vaccines Should be Mandatory in South Africa’ (2021) <<https://theconversation.com/why-covid-19-vaccines-should-be-mandatory-in-south-africa-165682>> Accessed 26 April 2023.

<sup>22</sup> *Ibid*.

<sup>23</sup> *Ibid* 5.

on Civil and Political Rights. In the present day, these concepts are firmly established in international human rights law and standards. According to them, the law must support any limitation on human rights. Section 36 of the Constitution of the Republic of South Africa, which is accepted as the limitation of rights, reflects these principles. It also applies because the National Health Act<sup>24</sup> has laws governing medical issues that must be reported. The Disaster Management Act does the same. The rights of individuals are not arbitrarily restricted by vaccination. According to South African law, they must be founded on an acceptable goal and necessary to accomplish the policy goal. In the case of COVID-19, avoiding infection transmission is clearly in the public interest. The South African government must justify any human rights restrictions, and the least intrusive and restrictive methods must be employed.

The South African Bill of Rights (section 36) specifies that any limitation must be "reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom." Additionally, the limitation must be compatible with the objective of the limitation. Therefore, the potential for restricting individual rights increases as the risk to public health increases. Most importantly, any limits must be supported by research. They shouldn't be capricious, prejudiced, or irrational. Globally, billions of doses of the COVID-19 vaccine have been given out, and the safety data show that they are generally effective in preventing serious illness and death. Only a small percentage of people with underlying risk factors have reported experiencing serious adverse effects. The unvaccinated comprise the bulk of fatalities in the United States. South Africa has seen a similar trend. Given these facts, vaccine mandates are appropriate in light of the circumstances.

It is clear that, based on its existing legal framework, South Africa can legitimately introduce a mandatory vaccination policy for specific occupational environments and leisure activities. Everybody has the right to fair labour practices, for instance, according to Section 23 of the Constitution. Since it protects everyone, a policy requiring vaccinations could be considered a fair labour practice. A secure work environment is a human right. Those who have received their vaccinations may have a valid point of view against working with unvaccinated individuals. There are also

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<sup>24</sup> Act 61 of 2003.

COVID-19 provisions under the Disaster Management Act.<sup>25</sup> In particular, regulation 14(3) specifies that "anyone who knowingly exposes another person to COVID-19 may be prosecuted for an offence committed, including assault, attempted murder, or murder."<sup>26</sup> Section 36 of the Constitution will be crucial to consider since it will be the one most often used to restrict rights entrenched in the same Constitution, the rights that people may use to contest being vexed or receiving a vaccination should vaccinations be required.

Section 36 was applied in *Minister of Safety and Security v Gaqa*.<sup>27</sup> While committing a robbery and murder, the respondent was allegedly shot by one of the two victims. The bullet became trapped near the femur in the respondent's left thigh. He was inconsistent in his description of the apparent injury, and the District Surgeon's X-rays amply demonstrated the existence of a bullet in the thigh flesh.<sup>28</sup> According to expert witnesses, the bullet may have been shot from the same gun the victim used to shoot the attacker and may have even been of the same calibre.<sup>29</sup> Additional expert testimony revealed that the process needed to extract the bullet was comparatively secure and simple.<sup>30</sup> The applicants cited several clauses in the Criminal Procedure Act to try to establish why the defendant should be made to undergo surgery.<sup>31</sup> For this discussion, it is sufficient to say that the applicants relied on the clauses enabling the use of force when performing a search and assessing a person's condition or appearance.

In its ruling, the Court determined that having surgery without the accused's consent constitutes a serious violation of their bodily integrity, privacy, and dignity<sup>32</sup> It then relied on the American case of *Winston v Lee*,<sup>33</sup> wherein the US Supreme Court stated that the reasonableness of forced surgery must be assessed by balancing the interests

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<sup>25</sup> Mokofe, WM and van Erk, S 'COVID-19 at the Workplace: What Lessons are to be Gained From Early Case Law?' (2022) 55 *De Jure Law Journal* <<https://www.saflii.org/za/journals/DEJURE/2022/11.pdf>> Accessed 26 April 2023.

<sup>26</sup> Moodley, K 'Why COVID-19 Vaccines Should Be Mandatory In South Africa' (2021) <<https://theconversation.com/why-covid-19-vaccines-should-be-mandatory-in-south-africa165682>> Accessed 26 April 2023.

<sup>27</sup> *Minister of Safety and Security v Gaqa* 2002 (1) SACR 654 (C).

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

<sup>31</sup> Sections 27, 37 Act 51 of 1977.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Winston v Lee* 470 US 753 1985.

of the individual (specifically, their privacy and bodily integrity) and the interests of society (the need to gather evidence to prosecute crime), wherein this statement was made under very similar circumstances. As a result, weighing the rights is required to decide whether the Court should order the surgery. Several circumstances in this particular case favoured the surgery going forward, including the fact that the case was under investigation for a grave crime (both robbery victims passed away from their wounds), there was no other evidence connecting the accused to the crime, and the required procedure posed only minor risks.<sup>34</sup> These factors led the Court to conclude that the investigation of serious crimes was more important to the public interest than the respondent's interest in maintaining his bodily integrity, privacy, and dignity. The Court thus ordered the respondent to give his consent to the surgery, failing which the sheriff was to do so on his behalf.<sup>35</sup>

### **1.3.3 International trends on vaccine mandates and human rights**

Several countries have sought to impose vaccine mandates to combat COVID-19. The Austrian government introduced a bill to the parliament on December 9, 2021, that would make COVID-19 vaccinations mandatory for all citizens of the country.<sup>36</sup> This action was taken in response to the Greek Prime Minister's decision that residents 60 and older who refuse COVID-19 immunisation will be fined.<sup>37</sup> Australia, Brazil, Canada, France, Indonesia, Italy, and the UK are just a few countries considering similar mandates or already implementing them in some workplace situations.<sup>38</sup>

It is common knowledge that, no significant constitutional or international court has determined that a vaccine requirement infringes on any fundamental right to liberty. Many of these regulations have been upheld in Court. The Grand Chamber of the European Court of Human Rights determined in April 2021 regarding a pre-COVID-19 law that a Czech law requiring children to receive compulsory vaccinations against nine diseases did not violate the Article 8 right to physical integrity because the

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<sup>34</sup> *Minister of Safety and Security v Gaqa* 2002 (1) SACR 654 (C).

<sup>35</sup> *Ibid.*

<sup>36</sup> Murphy, F 'Austria Set to Make COVID Shots Compulsory after Bill Clears Parliament' (2022) 6 REUTERS < <https://www.reuters.com/world/europe/austria-introduces-lottery-covid-vaccine-incentive-2022-01-20/>> Accessed 28 April 2023.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

program was a proportionate method of preserving public health. Courts have made the same or similar decisions in several other countries, including the US Supreme Court's decision in *Jacobson v Massachusetts*,<sup>39</sup> more recent COVID-19-specific decisions for programs in New York, USA, and Brazil, and pre-COVID-19 judgments that uphold mandatory vaccination programs in France, Italy, and Chile. In most of these cases, the courts determined that the plans had respect for the right to health.<sup>40</sup>

This study seeks to elucidate the legal frameworks surrounding vaccine mandates within the South African context, which remains relatively unexplored. By analysing existing legislation, judicial precedents, and constitutional principles, this study provide clarity on the legality and enforceability of vaccine mandates in the country as this issue of vaccine mandates remains a pressing issue which the country has no specific regulation. Furthermore, the study offer insight into acceptability and effectiveness of vaccine mandates in South Africa. This study further contributes valuable knowledge to the ongoing discourse surrounding vaccination policies and public health intervention in South Africa.

#### **1.4 Research questions**

The questions that this research has investigated are:

- (a) Are vaccine mandates compliant with the Constitution of South Africa?
- (b) Do vaccine mandates violate specific rights under the Constitution, such as the rights to bodily integrity, consent to medical procedures, religion, and conscience?
- (c) Does section 36 of the Constitution permit the imposition of vaccine mandates?

#### **1.5 Rationale and purpose of the study**

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<sup>39</sup> *Jacobson v Massachusetts* :197 U.S. 11 (1905).

<sup>40</sup> King, J et al 'Mandatory COVID-19 vaccination and human rights' (2022) 399 MPC < <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8700276/>> Accessed 22 November 2023.



### **1.5.1 Purpose of the study**

The study aims to examine the legal and constitutional basis for vaccine mandates in South Africa. Specifically, the study investigates whether vaccine mandates are consistent with the South African Constitution, which guarantees certain fundamental rights and freedoms, including the right to bodily integrity, equality, and access to healthcare.

### **1.5.2 Justification of the study.**

The study analyses relevant legal frameworks, such as the National Health Act, the Occupational Health and Safety Act, and other applicable legislation, as well as relevant case law and judicial precedent. It also examines vaccine mandates' policy and practical implications, including potential benefits and risks to public health, individual autonomy, and privacy. Ultimately, the study's goal is to provide insights and recommendations for policymakers and stakeholders to make informed decisions about the legality and feasibility of vaccine mandates in South Africa.

### **1. 5.3 Aims and objectives.**

This research aims to investigate the constitutionality of vaccine mandates in South Africa by analysing the legal framework governing vaccine mandates, identifying potential conflicts with constitutional rights, and evaluating the position of foreign and international human rights law on the issue. The specific objectives of the study are:

- a) To examine the legal framework governing vaccine mandates in South Africa, including relevant legislation, regulations, and case law.
- b) To identify the potential conflicts between vaccine mandates and constitutional rights, such as the right to bodily integrity, consent to medical procedures, religion, and conscience.
- c) To analyse the scope and limitations of section 36 of the Constitution in justifying the imposition of vaccine mandates.
- d) To evaluate the position of foreign and international human rights law on vaccine mandates and their compatibility with South African constitutional principles.
- e) To provide recommendations on the constitutionality of vaccine mandates in

South Africa, considering the legal framework and constitutional principles.

## **1.6 Hypotheses**

*Hypothesis 1:* Vaccine mandates tentatively violate bodily integrity, religion, and conscience rights.

*Hypothesis 2:* Without a law of general application for vaccine mandates, they may not be saved by section 36 of the Constitution.

## **1.7 Research methodology**

The research is qualitative. Qualitative research is concerned with qualitative phenomena such as quality or variety. Such research is typically descriptive and more difficult to analyse than quantitative data. In qualitative research, non-numerical data is examined in depth. The methodology used in this study is primarily a desktop literature review of books, journal articles, case laws, newspaper articles, online articles, and international conventions within this context.

## **1.8 Ethical considerations**

This research adheres to ethical principles, including protecting the privacy and confidentiality of the research participants. As this is a desktop research study, no human subjects are involved. However, care is taken to ensure that all data used in the study is obtained legally and ethically.

## **1.9 Scope and limitations of the study**

Scope and limitations: The research focuses on the constitutionality of vaccine mandates in South Africa, particularly in the context of the COVID-19 pandemic. The

study examines relevant laws, court cases, and constitutional principles to evaluate vaccine mandates' legal and ethical implications. Additionally, the study does not delve into the effectiveness or safety of vaccines, as it is outside the scope of the research question.

## **1.10 Chapter outline**

### *CHAPTER 1: INTRODUCTION TO THE STUDY*

In Chapter 1, the focus of the research is to introduce the research field that has been researched, and it gives the background and context of vaccine mandates in South Africa, the purpose and significance of the study, and the Research questions that the research attempts to answer.

### *CHAPTER 2: CONCEPTUAL FRAMEWORK*

In Chapter 2, the discussion solely focuses on the constitutionality of mandatory vaccination under the South African Constitution, analysis of the limitations on individual rights for public health purposes, the role of the state in protecting public health, the legality of vaccine mandates in the workplace and educational institutions and further looks into the impact of vaccine mandates on vulnerable populations.

### *CHAPTER 3: VACCINE MANDATES AND HUMAN RIGHTS: THE RIGHT TO BODILY INTEGRITY, RELIGION AND CONSCIENCE*

The chapter begins by providing an overview of vaccine mandates, including their history and current use in various countries. The chapter then delves into the ethical and legal considerations surrounding vaccine mandates and human rights. Specifically, the right to bodily integrity is explored, examining the tension between individual autonomy and the public good. The chapter also considers the potential impact of vaccine mandates on religious and conscientious objections and how these objections can be accommodated. The chapter draws on various literature and case studies to comprehensively overview the issues at play. The chapter lastly considers alternative approaches to vaccine mandates that may better respect human rights while promoting public health.

## CHAPTER 4: CONCLUSION AND RECOMMENDATIONS

Chapter 4 will be the last chapter of the study. It shall summarise the key findings and conclusions of the research and the recommendations for policy and legal reform related to vaccine mandates in South Africa based on the research findings.

## CHAPTER 2: CONCEPTUAL FRAMEWORK

### 2.1 Introduction

The first reports of SARS-CoV-2, otherwise known as COVID-19, came in December 2019. The pandemic drastically impacted how societies function globally.<sup>41</sup> Many countries introduced stringent public health interventions such as quarantines, travel restrictions and national lockdowns to prevent the virus from spreading.<sup>42</sup> However, governments' actions and effectiveness in responding to the pandemic have varied considerably, particularly in light of the lack of information about the virus and the drastically changing epidemiological and data landscape.<sup>43</sup> In this context, evaluating the impact of public health responses and determining whether the human rights limitations accompanying them were justified has been challenging.<sup>44</sup>

South Africa's response to the COVID-19 epidemic was swift.<sup>45</sup> "On 15 March 2020, just ten days after the country's first case was diagnosed, the government announced its plan to implement a national lockdown under powers provided by the Disaster Management Act 57 of 2002".<sup>46</sup> The regulations promulgated under this Act provided for the adoption of expansive public health measures during the lockdown.<sup>47</sup> They

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<sup>41</sup> Burki, T 'China's Successful Control of COVID-19 Lancet Infectious Diseases' (2020) 20 *Newdesk* < <https://www.thelancet.com/action/showPdf?pii=S1473-3099%2820%2930800-8>> Accessed 18 September 2023.

<sup>42</sup> *Ibid.*

<sup>43</sup> Blavatnick School of Government Coronavirus Government Response Tracker (2020) < <https://www.bsg.ox.ac.uk/research/covid-19-government-response-tracker>> Accessed 18 September 2023.

<sup>44</sup> Karim, SA and Kruger, P 'Which Rights? Whose Rights? Public Health and Human Rights through the Lens of South Africa's COVID-19 Jurisprudence' (2021) 11 *Constitutional Court Review* 533.

<sup>45</sup> *Ibid.*

<sup>46</sup> National institute of Communicable Diseases 'Declaration of a National State of Disaster: Disaster Management Act 57 of 2002 in GN 313 GG 43096' ('Declaration of National State of Disaster') (15 March 2020) < <https://www.nicd.ac.za/first-case-of-covid-19-coronavirus-reported-in-sa/>. > Accessed 18 September 2023.

<sup>47</sup> Karim, SA and Kruger, P 'Which Rights? Whose Rights? Public Health and Human Rights through the Lens of South Africa's COVID-19 Jurisprudence' (2021) 11 *Constitutional Court Review* 533.

include prohibiting public gatherings, suspending most economic activities other than essential services, and introducing mandatory testing, with compulsory isolation and quarantine for those who test positive or have been in contact with others who have tested positive.<sup>48</sup>

Regulation 11(l)(2) provides for the imposition of a fine and/or six months imprisonment for the contravention of specified lockdown regulations.<sup>49</sup> The government response to the pandemic was couched almost entirely within the Disaster Management Act.<sup>50</sup> The government's decision to utilise the Disaster Management Act rather than declaring a state of emergency in terms of the Constitution<sup>51</sup> meant that constitutional rights were not suspended during the disaster. Consequently, the limitation of these rights resulting from the COVID-19 pandemic needed to be justified in terms of section 36 of the Constitution.<sup>52</sup> In terms of the section, all the limitations need to be reasonable and justifiable in an open and democratic state based on values such as democracy, human dignity, equality, and freedom.<sup>53</sup>

The Hola Bon Renaissance Foundation brought the first case challenging the validity of the national lockdown. It was filed in the Constitutional Court within a few days of implementing the first lockdown.<sup>54</sup> It was the first of many cases related to the lockdown and its implications for constitutional rights.<sup>55</sup>

The debate about the implications of public health interventions for human rights has a complex and unclear history that has grown more pronounced with each new human rights catastrophe. The COVID-19 pandemic is expected to serve as a test case for

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<sup>48</sup> Regulations issued in terms of s 27(2) of the Disaster Management Act, 2002 in GN 318 of GG 43107 (18 March 2020). Also see SS Abdool Karim 'The South African Response to the Pandemic' (2020) 382 *New England Journal of Medicine* 95.

<sup>49</sup> *Ibid.*

<sup>50</sup> Declaration of a National State of Disaster.

<sup>51</sup> Section 37(1)(a)–(b) of the Constitution of the Republic of South Africa, 1996.

<sup>52</sup> Section 36 of the Constitution provides that: (1) "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including– (a) the nature of the right; (b) the importance of the purpose 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."

<sup>53</sup> Karim, SA and Kruger, P 'Which Rights? Whose Rights? Public Health and Human Rights through the Lens of South Africa's COVID-19 Jurisprudence' (2021) 11 *Constitutional Court Review* 533.

<sup>54</sup> *Hola Bon Renaissance Foundation v The President of the Republic of South Africa and others* (Constitutional Court case number: CCT52/2020).

<sup>55</sup> Karim, SA and Kruger, P 'Which Rights? Whose Rights? Public Health and Human Rights through the Lens of South Africa's COVID-19 Jurisprudence' (2021) 11 *Constitutional Court Review* 533.

defining the place of human rights in contemporary infection control, just as the HIV epidemic profoundly influenced the majority of the previous 40 years regarding the connection between human rights and public health.<sup>56</sup>

This chapter marks a departure from the comprehensive background on the pandemic found in Chapter 1. Instead, the focus here narrows to the critical conceptual issues arising from the intersection of public health responses and human rights during the COVID-19 crisis. Furthermore, the study expands the lens to encompass the critical issue of vaccine mandates in South Africa. This investigation raises complex questions about the constitutionality of vaccine mandates and their ethical, effective, and equitable implementation.

One key conceptual issue in this inquiry is the tension between individual civil liberties and autonomy and the imperative to protect public health. Vaccine mandates may be seen as infringing on individual civil liberties and autonomy, which are important ethical principles.<sup>57</sup> Balancing these principles with the pressing need to protect public health forms a central theme of this analysis. South Africa faces the substantial challenge of vaccine hesitancy, a critical issue that must be addressed for any mandate to succeed.<sup>58</sup> Understanding the underlying reasons for vaccine hesitancy and crafting strategies to increase vaccine uptake are paramount in the study's examination.

In the context of vaccine mandates, unintended consequences are a significant concern.<sup>59</sup> These consequences may include amplifying vaccine hesitancy or fostering an environment where reactance effects are heightened. The task at hand is to consider these unintended outcomes carefully and explore measures to mitigate them effectively. Constitutional rights occupy a prominent place in this study. The Constitution of South Africa explicitly safeguards against mandatory COVID-19

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<sup>56</sup> *Ibid.*

<sup>57</sup> Couch, M et al 'Integrating civil liberty and the ethical principle of autonomy in building public confidence to reduce COVID-19 vaccination inequity in Africa, Hum Vaccin Immunother' (2023) 19 T&FOnline <<https://www.tandfonline.com/doi/full/10.1080/21645515.2023.2179789>> Accessed 04 October 2023.

<sup>58</sup> Cooper, S et al 'COVID-19 vaccine hesitancy in South Africa: how can we maximize uptake of COVID-19 vaccines?' (2021) 20 T&FOnline <<https://www.tandfonline.com/doi/full/10.1080/14760584.2021.1949291?scroll=top&needAccess=true>> Accessed 18 September 2023.

<sup>59</sup> Bardosh, K et al 'The unintended consequences of COVID-19 vaccine policy: why mandates, passports and restrictions may cause more harm than good, BMJ Glob Health' (2022) 7(5) MBJGH <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9136690/>> Accessed 18 September 2023.

vaccination without adequate legislation.<sup>60</sup> It is essential to assess the constitutionality of vaccine mandates.<sup>61</sup> Unravelling the reasons behind hesitancy among healthcare workers and crafting targeted solutions to enhance vaccine uptake is essential to the inquiry. Equity remains a foundational principle throughout the study's exploration.<sup>62</sup> South African's must diligently consider how vaccine mandates could impact existing disparities in vaccine access and uptake, ensuring that they do not disproportionately affect marginalised communities.

This chapter provides a comprehensive framework for this study, merging the critical conceptual issues arising from the pandemic's intersection with human rights and the specific challenges posed by vaccine mandates in South Africa. The study's examination aims to contribute to a nuanced understanding of the ethical, effective, and equitable deployment of vaccine mandates within the context of infectious disease control while upholding democratic values and individual rights.

## 2.2 Covid-19

COVID-19 is an infectious disease caused by the SARS-CoV-2 virus.<sup>63</sup> It is a respiratory illness that can cause various symptoms, from mild to severe, and can lead to lasting health problems in some who have survived the illness.<sup>64</sup> The virus can be spread from person to person through respiratory droplets and particles that contain the virus.<sup>65</sup> Anyone infected with COVID-19 can spread it, even if they do not have

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<sup>60</sup> Calitz, T 'Constitutional rights in South Africa protect against mandatory COVID-19 vaccination' (2021) 1 STJ <<http://www.scielo.org.za/pdf/stj/v7n1/35.pdf>> Accessed 20 April 2023.

<sup>61</sup> George, G et al 'Understanding COVID-19 Vaccine Hesitancy among Healthcare Workers in South Africa Vaccine' (2023) 11 MPDI <<https://doi.org/10.3390/vaccines11020414>> Accessed 18 September 2023.

<sup>62</sup> Couch, M et al 'Integrating civil liberty and the ethical principle of autonomy in building public confidence to reduce COVID-19 vaccination inequity in Africa, Hum Vaccin Immunother' (2023) 19 T&FOnline <<https://www.tandfonline.com/doi/full/10.1080/21645515.2023.2179789>> Accessed 04 October 2023.

<sup>63</sup> World Health Organisation 'Coronavirus Disease (COVID-19)' (2021) <[https://www.who.int/health-topics/coronavirus#tab=tab\\_1](https://www.who.int/health-topics/coronavirus#tab=tab_1)> Accessed 18 September 2023.

<sup>64</sup> John Hopkins Medicine 'What is Corona Virus' (2022) <<https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus> > Accessed 18 September 2023.

<sup>65</sup> Centers For Disease Control and Prevention, 'What is Covid19' (2023) <<https://www.cdc.gov/coronavirus/2019-ncov/your-health/about-covid-19.html> > Accessed 18 September 2023.

symptoms.<sup>66</sup> The severity of COVID-19 symptoms can range from mild to severe, and some people may have only a few symptoms.<sup>67</sup> Older people and those with underlying medical conditions like cardiovascular disease, diabetes, chronic respiratory disease, or cancer are more likely to develop serious illnesses.<sup>68</sup> To prevent infection and slow transmission of COVID-19, it is recommended to get vaccinated when a vaccine is available, stay at least 1 meter apart from others, wear a properly fitted mask when physical distancing is not possible or when in poorly ventilated settings, and choose open, well-ventilated spaces over closed ones.<sup>69</sup>

The global pandemic of the novel coronavirus disease 2019 (COVID-19) severely affects the global health system. There has been no treatment available for COVID-19 yet.<sup>70</sup> Since the World Health Organization announced the COVID-19 pandemic, many countries have announced new social distancing and lockdown rules to control the spread rate of the deadly COVID-19 virus. According to the International Health Regulation monitoring and evaluation framework, some African countries such as South Africa, Egypt, and Algeria have demonstrated the highest risk of importation rate and an average risk profile to fight against highly contagious diseases.<sup>71</sup> African countries, with previous experiences with the outbreaks of other infectious diseases and pandemic situations, including HIV, malaria, and Ebola, have limited financial, physical, and medical resources. In addition, there have been major problems related to the weak public healthcare and healthcare management systems in African countries.<sup>72</sup> In many low- and middle-income countries, the lockdown strategy was implemented to decrease the rate of the COVID-19 outbreak. Although lockdown strategies across many countries have effectively decreased the spread rate of contagious viruses, other negative impacts have been reported globally; these concerns have worsened in countries across Africa, including South Africa. For

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<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*

<sup>68</sup> World Health Organisation 'Coronavirus Disease (COVID-19)' (2021) < [https://www.who.int/health-topics/coronavirus#tab=tab\\_1](https://www.who.int/health-topics/coronavirus#tab=tab_1)> Accessed 18 September 2023.

<sup>69</sup> *Ibid.*

<sup>70</sup> Hatefi, S et al 'COVID-19 in South Africa: lockdown strategy and its effects on public health and other contagious diseases' (2020) 185 NIH < <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7303625/>> Accessed 24 August 2023.

<sup>71</sup> Mehtar, S 'Limiting the spread of COVID-19 in Africa: one size mitigation strategies do not fit all countries' (2020) 94(1) JMLA <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1324783/>> Accessed on 18 September 2023.

<sup>72</sup> Karamouzian M., Madani N 'COVID-19 response in the Middle East and north Africa: challenges and paths forward. *Lancet Global Health*' 886.



example, it has been reported that HIV care has been negatively affected by the current COVID-19 pandemic.<sup>73</sup>

In many low- and middle-income countries, the lockdown strategy was implemented to decrease the rate of the COVID-19 outbreak. Although lockdown strategies across many countries have effectively decreased the spread rate of contagious viruses, other negative impacts have been reported globally; these concerns have worsened in countries across Africa, including South Africa.<sup>74</sup> For example, it has been reported that HIV care has been negatively affected by the current COVID-19 pandemic. In addition, HIV transmission accelerated among poorer people and young women during lockdown.<sup>75</sup> There are also psychological problems associated with long-term lockdown strategies.<sup>76</sup> In South Africa, the government announced a nationwide lockdown to manage the pandemic situation and decrease the spread rate of the COVID-19 outbreak. However, the lockdown levels have been eased twice due to limited available resources and the negative impacts of the lockdown strategy. With regard to the current global situation during the COVID-19 pandemic, different concerns in the public health system of South African people have been raised. The major concerns are summarised in the following paragraphs.<sup>77</sup>

First, South Africa's national lockdown started on the 15<sup>th</sup> of March 2020. Owing to various deficiencies, limited resources, and financial means, the South African government had no other option but to ease the lockdown strategy and related rules. The level of lockdown in South Africa was at level three of five levels of severity. However, according to South Africa's National Institute for Communicable Diseases, the spread rate of the COVID-19 outbreak was increasing.<sup>78</sup>

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<sup>73</sup> Hatefi, S et al 'COVID-19 in South Africa: lockdown strategy and its effects on public health and other contagious diseases' (2020) 185 NIH <  
<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7303625/>>Accessed 24 August 2023.

<sup>74</sup> *Ibid.*

<sup>75</sup> Hargreaves, J 'Three lessons for the COVID-19 response from pandemic HIV' (2020) 7 *Lancet HIV*: 5.

<sup>76</sup> Robertson, T 'Early estimates of the indirect effects of the COVID-19 pandemic on maternal and child mortality in low-income and middle-income countries: a modelling study'. (2020) 8 *Lancet Global Health* 7.

<sup>77</sup> Hatefi, S et al 'COVID-19 in South Africa: lockdown strategy and its effects on public health and other contagious diseases' (2020) 185 NIH <  
<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7303625/>>Accessed 24 August 2023.

<sup>78</sup> *Ibid.*

Second, the lockdown strategy, social distancing rules, and community containment measures for COVID-19 have negatively impacted the diagnosis and treatment of other contagious diseases, including HIV and malaria.<sup>79</sup> In addition, in this pandemic situation, allocating resources for HIV care, including antiviral medication, and allocating hospital beds for patients with HIV would be more limited.<sup>80</sup>

Thirdly, more than 1000 children aged younger than nine years had tested positive for COVID-19. The COVID-19 pandemic was severely affecting the young population of South Africa, including newborn and infant children.<sup>81</sup> Fourthly, South Africa was at the beginning of the winter season. Studies undertaken at the time reported a correlation between sunlight and the rate of COVID-19 recovery;<sup>82</sup> the studies suggested that sunlight exposure increased the rate of recovery in patients with COVID-19. Therefore, a longer recovery period for patients was anticipated.

With regard to the concerns raised and the results of analysed data, it was predicted that the situation of South Africa in fighting against COVID-19 would become worse in the future. The daily fatality rate and the number of daily confirmed COVID-19 cases were starting to increase dramatically. Therefore, global collaboration was necessary to provide essential resources and develop novel solutions to fight the COVID-19 pandemic in South Africa. All governments and organisations were advised to start an international collaboration to maintain healthcare plans worldwide to avoid disrupting routine healthcare services.<sup>83</sup>

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<sup>79</sup> Dittrich, S 'Diagnosing malaria and other febrile illnesses during the COVID-19' pandemic (2018) 16 *Lancet Global Health* 183.

<sup>80</sup> Jiang, H; Zhou, Y and Tang, W 'Maintaining HIV care during the COVID-19 pandemic' (2020) 7 *Lancet HIV* < [https://www.thelancet.com/journals/lanhiv/article/PIIS2352-3018\(20\)30105-3/fulltext](https://www.thelancet.com/journals/lanhiv/article/PIIS2352-3018(20)30105-3/fulltext)> Accessed 24 August 2023.

<sup>81</sup> Robertson, T 'Early estimates of the indirect effects of the COVID-19 pandemic on maternal and child mortality in low-income and middle-income countries: a modelling study' (2020) 8 *Lancet Global Health* 7.

<sup>82</sup> Asyary, A and Veruswati, M 'Sunlight Exposure Increased Covid-19 Recovery Rates: a Study in the Central Pandemic Area of Indonesia' (2020) 185 *NIH*< <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7303625/>> Accessed 24 August 2023.

<sup>83</sup> Hafezi, S et al 'COVID-19 in South Africa: lockdown strategy and its effects on public health and other contagious diseases' (2020) 185 *NIH* < <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7303625/>> Accessed 24 August 2023.

## 2.3 Human rights implications of covid-19 response

The realisation of public health goals and the protection of individual human rights frequently clash.<sup>84</sup> Sometimes, to meet public health goals, measures taken in reaction to outbreaks can limit human rights.<sup>85</sup> For example, restricting trade and movement during a lockdown to prevent the spread of illness and limit human mobility violates human rights.<sup>86</sup> This was especially common in the conventional approaches to public health that addressed infectious diseases.<sup>87</sup> One example of the harsh measures that caused these conflicts is the 40-day isolation of ships and the people on board during the 1300s to stop the Black Death from spreading. This isolation included withholding access to food and water.<sup>88</sup> Leper colonies that are underserved and stigmatised are another example.<sup>89</sup> However, Modern disease control methods acknowledge that efforts to promote public health and human rights can be complementary, particularly when those efforts are directed towards achieving the right to health. Better infrastructure and health care accessibility, better disease surveillance and reporting, and better ways to stop the spread of illness are all possible outcomes.<sup>90</sup>

Some human rights standards, like the right to health, mandate that states react to and contain outbreaks of disease both inside and, some argue, outside of their borders.<sup>91</sup> Thus, it is possible to view the pursuit of human rights as an adjunct to public health measures aimed at combating communicable illnesses. After all, healthy people can more completely enjoy their rights to life, health, physical integrity, and dignity in areas where public health goals are met.<sup>92</sup> Nonetheless, there may be conflicts between some human rights and contemporary public health objectives and associated strategies.<sup>93</sup>

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<sup>84</sup> *Ibid.*

<sup>85</sup> Meier, BM; Evans, DP and Phelan, A 'Rights-Based Approaches to Preventing, Detecting, and Responding to Infectious Disease' (2020) 82 *Infectious Diseases in the New Millennium* 217.

<sup>86</sup> Karim, SA and Kruger, P 'Which Rights? Whose Rights? Public Health and Human Rights through the Lens of South Africa's COVID-19 Jurisprudence' (2021) 11 *Constitutional Court Review* 533.

<sup>87</sup> Gostin, LO and Wiley, LF 'Public Health Law: Power, Duty, Restraint' (3rd Ed, 2016) 13-5.

<sup>88</sup> Sehdev, PS 'The Origin of Quarantine' 35 (2002) *Clinical Infectious Diseases* 1071.

<sup>89</sup> Levison, JH 'Beyond Quarantine: A History of Leprosy in Puerto Rico, 1898–1930s' (2003) 10 *História, Ciências, Saúde-Manguinhos* 225.

<sup>90</sup> Meier, Evans & Phelan (45 above) at 253.

<sup>91</sup> *Ibid.*

<sup>92</sup> Karim, SA and Kruger, P 'Which Rights? Whose Rights? Public Health and Human Rights through the Lens of South Africa's COVID-19 Jurisprudence' (2021) 11 *Constitutional Court Review* 533.

<sup>93</sup> *Ibid.*

In South Africa, disseminating false information about COVID-19 is illegal. Despite this restriction on one's freedom of speech, section 36 of the Constitution justifies it in light of the possible harms—such as the threat to public health—that could result from the dissemination of false information. Therefore, the public health measure must be justified in accordance with the national laws of the country executing it. Thus, laws, policies, customs, practices, and liberties that are part of the current legal frameworks interact with public health initiatives. Public health programmes occasionally restrict or violate other human rights even when they support other rights.<sup>94</sup> Although this tension has always existed since the creation of modern public health regulations and quarantine laws, it was first observed during the HIV epidemic through the lens of the human rights framework, when the right to privacy was invoked to stop discrimination against vulnerable groups, such as homosexual men.<sup>95</sup>

Global disease transmission has been a major worry in recent years, and in some places, efforts to contain an outbreak have frequently resulted in panic.<sup>96</sup> Due to this, unduly severe public health measures have been implemented, including trade and travel bans and intrusive quarantines for travellers.<sup>97</sup> During the COVID-19 epidemic, “the South African government also introduced criminal offences that sanctioned those who exposed people to the SARS-CoV-2, a measure that had a disproportionate impact on poorer communities who could not observe social distancing and hygiene measures due to overcrowding and poor sanitation infrastructure”.<sup>98</sup> Measures like these, if not implemented properly, can frequently prolong the stigmatisation and discrimination linked to infectious illness outbreaks. There are further conflicts surrounding public health initiatives that seek to identify illnesses. Testing under force may go against informed consent standards, and sharing such information may violate someone's right to privacy.<sup>99</sup>

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<sup>94</sup> *Ibid.*

<sup>95</sup> Meier, Evans & Phelan (note 45 above) at 253.

<sup>96</sup> Hodge, G et al ‘Global Emergency Legal Responses to the 2014 Ebola Outbreak: Public Health and the Law’ (2014) 42 *The Journal of Law, Medicine & Ethics* 595.

<sup>97</sup> Fidler, DP ‘From International Sanitary Conventions to Global Health Security: The New International Health Regulations’ (2005) 4 *Chinese Journal of International Law* 325.

<sup>98</sup> Abdool, K (note 53 above) at 110, 112.

<sup>99</sup> Karim, SA and Kruger, P ‘Which Rights? Whose Rights? Public Health and Human Rights through the Lens of South Africa’s COVID-19 Jurisprudence’ (2021) 11 *Constitutional Court Review* 533.

When efforts to increase testing in South Africa included making testing mandatory during the COVID-19 pandemic, this caused concerns.<sup>100</sup> Thus far, this study has covered the ways in which measures aimed at curbing the transmission of infectious illnesses may violate or restrict personal freedoms. It is imperative to acknowledge that these measures, although they curtail the personal freedoms of impacted individuals, simultaneously serve to safeguard multiple other rights, especially those associated with the social determinants of health. These include the rights to life, work, education, and dignity, as well as the communal right to health of the larger populace.<sup>101</sup> The right to health places certain obligations on states to respect, protect and fulfil the health of individuals.<sup>102</sup> According to this framework, a state is obligated to prevent, detect, and control infectious disease outbreaks inside its borders, help prevent the diseases from spreading outside of it, and possibly help other states prevent, detect, and control outbreaks inside their borders when help is required.<sup>103</sup>

In order to fulfil these responsibilities, states must be able to identify outbreaks, report them locally, regionally, nationally, and internationally, and take appropriate action by providing treatments, vaccinations, and other public health measures. But it is also important to consider how these public health measures may affect human rights. The implementation of public health measures must complement human rights obligations, as states are critical in ensuring the realisation of the human right to health. This means that the least restrictive measures necessary to achieve the necessary public health goal must be adopted with the least possible impact on individual rights. This entails taking action by adopting evidence-based policies that, to the greatest extent feasible, respect the rights of each individual.<sup>104</sup> This strategy minimises the effects of human rights violations, such as stigma and mistrust of public health institutions, that might jeopardise attempts to promote public health. It also guarantees that there is minimum interference with human rights.<sup>105</sup>

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<sup>100</sup> Kruger, k 'Compelled Testing for the Novel Coronavirus'(2020) 110 *South African Medical Journal* 1.

<sup>101</sup> Mann et al (see 50 above) at 8.

<sup>102</sup> Universal Declaration of Human Rights (1948); Constitution of the World Health Organisation (1946).

<sup>103</sup> Gostin, L *et al* '70 Years of Human Rights in Global Health: Drawing on a Contentious Past to Secure a Hopeful Future' (2018) 392 *Lancet* 2731.

<sup>104</sup> Karim, SA and Kruger, P 'Which Rights? Whose Rights? Public Health and Human Rights through the Lens of South Africa's COVID-19 Jurisprudence' (2021) 11 *Constitutional Court Review* 533.

<sup>105</sup> Meier, Evans & Phelan (note 11 above) 253; Mann et al (note 45 above) at 8.

## 2.4 Vaccine mandates

Vaccine mandates refer to requirements for individuals to be vaccinated to work, travel, or attend a concert.<sup>106</sup> While vaccinations are effective against this disease, vaccine reluctance indicates worries about both short- and long-term side effects, as well as adverse events such as post-inoculation mortality. Mandatory vaccination offers herd immunity, but it is debatable because it violates people's autonomy and fundamental rights. Moreover, the research demonstrates that vaccination cannot ensure against infection or re-infection, which fuels public anger towards this coercive approach while post-inoculation fear persists.<sup>107</sup> Many countries started implementing "vaccination passports," also known as immunity licences, as a way to attest to a person's immunisation against, immunity against, or current lack of COVID-19 infection when the coronavirus disease 2019 (COVID-19) vaccines were widely distributed.<sup>108</sup> The introduction of this certification has sparked a discussion on the morality of vaccination acceptance and access, vaccine hesitancy, privacy issues, actual and perceived abuses of human rights, and the development of "perverse incentives" for people to seek out infections..<sup>109</sup>

Mandatory vaccination is a very questionable idea if these requirements (necessary and adequate) are not met. Coercion is a top-down strategy that involves threats and erodes public confidence in the legitimacy of the government and the healthcare system. Since a vaccine is an invasive precaution, a coercive measure that violates personal freedoms to protect public health may only be implemented if it satisfies three requirements:<sup>110</sup> it must be the most effective, exclusive, and unquestionable method; it must also be necessary; and it must be proportionate. The explanation above suggests that the vaccinations currently on the market are unlikely to meet these

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<sup>106</sup> Benisek, A 'Vaccine Mandates: What to Know' (2022) WebMD <<https://www.webmd.com/vaccines/covid-19-vaccine/vaccine-mandates> > Accessed 14 August 2023.

<sup>107</sup> Cheng, FK 'Debate on mandatory COVID-19 vaccination' (2022) 21 EMPH <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8784578/>> Accessed 24 July 2023.

<sup>108</sup> Cludia, J and Juan, M 'Perspectives of healthcare workers in South Africa on COVID-19 vaccination passports' (2022) 27 HealthSA <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9082080/>> Accessed 14 August 2023.

<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.*

conditions. The World Health Organisation<sup>111</sup> emphasises that “mandatory vaccination is not unconditionally compulsory; criminal sanctions should not be used to penalise non-compliance and should not be a condition of international travel by national authorities and transportation operators. A vaccine passport is a certificate which enables vaccinated people to travel restriction-free, albeit scientific, ethical, and legal challenges are encountered”.<sup>112</sup> It obstructs their freedom of movement and demonstrates prejudice against those who have not received vaccinations.<sup>113</sup> However, it inhospitably impedes cross-border travel, economic recovery, human interaction, and cultural interchange.

Instead, because individuality does not conflict with collectivism, voluntary involvement might reduce tensions between the public interest and individual freedom. It involves the interconnected self with common interests, after all.<sup>114</sup> Being a part of the communal self does not always mean that the individual self is the only version of the self. In other words, self-preservation during a pandemic benefits society and should come first for each individual. Suppose those who are apprehensive about vaccinations take the necessary precautions. In that case, they will fulfil their civic obligation even if they refuse the injection out of concern for the unknown and potentially long-lasting adverse effects of the injection.

On the other hand, a mandatory shot disregards their anxieties and unjustly forces individuals to forgo their bodily and mental well-being, which is equivalent to group bullying. Coercing them under the guise of civic duty amounts to moral bullying. Mandatory vaccination is an example of the abuse of power by the government, endangering solidarity and escalating conflicts between personal and public health. Thus, decision-makers ought to exercise caution while deciding on a contentious policy.

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<sup>111</sup> World Health Organisation ‘COVID-19 and mandatory vaccination: ethical considerations and caveats: policy brief’ (2021) <<https://apps.who.int/iris/handle/10665/340841>> Accessed 20 August 2023.

<sup>112</sup> Pavli, A and Maltezou, C ‘COVID-19 vaccine passport for safe resumption of travel’ (2022) 21 PMC<<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8784578/>> Accessed 20 August 2023.

<sup>113</sup> Sesa, G et al ‘COVID-19 vaccine passports and vaccine hesitancy: freedom or control’ (2021) BMJ Opinion <<https://blogs.bmj.com/bmj/2021/03/30/covid-19-vaccine-passports-and-vaccine-hesitancy-freedom-or-control/>> Accessed 20 August 2023.

<sup>114</sup> Lu, J et al ‘Collectivism predicts mask use during COVID-19’ (2021) 118(23) PNAS <<https://www.pnas.org/doi/10.1073/pnas.2021793118>> Accessed 20 August 2023.

## 2.5 Human rights and constitutionality

The Constitution of South Africa is the supreme law. At its essence lies a moral perspective that views individuals as autonomous moral agents with the capacity for rational self-determination.<sup>115</sup> At this point, it may be argued that a vaccination mandate will destroy this ideal.<sup>116</sup> Bioethicist Moodley claimed in a recent paper that any restriction on rights, such as a vaccination mandate, must be proportionate to the reason for the restriction, which in this case is public health protection, as mandated by South Africa's Constitution. The extent to which an individual's rights may be limited increases with the risk to public health. Therefore, the argument continues a vaccine mandate is justified, given the significant risk to public health.

But when it comes to restricting rights, the Constitution also mandates that the least restrictive methods be used. Without a doubt, COVID-19 represents a serious risk to public health. Nevertheless, it is argued that mandatory vaccinations are not the least restrictive way to safeguard the public's health against COVID-19.<sup>117</sup> In South Africa, a plethora of other policy alternatives, including incentive programmes, remain unexplored. Although there is a lack of research on vaccine incentives, initial findings point to potential benefits. Numerous states have previously implemented various incentives, including cash rewards, lotteries with cash or other prizes, and complimentary or reduced-price meals. Before considering the path of a vaccine mandate, South Africa must thoroughly investigate these incentives in conjunction with other tactics to encourage vaccine uptake.<sup>118</sup>

In South Africa, the Constitution is a vital legal document that guarantees human rights. The Bill of Rights, part of the Constitution, enshrines various fundamental rights that apply to all individuals within the country's jurisdiction. The rights to life, dignity, and access to healthcare services are among these rights. A difficult balancing act

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<sup>115</sup> Shozi, B and Thaldar, D 'Why a COVID-19 vaccine mandate is not the best policy option for South Africa' (2021) <<https://theconversation.com/why-a-covid-19-vaccine-mandate-is-not-the-best-policy-option-for-south-africa-166195>> Accessed 20 August 2023.

<sup>116</sup> Gumbis, J et al 'Do Human Rights Guarantee Autonomy?' (2021) 62 University of Vilnius, Lithuania <<https://www.corteidh.or.cr/tablas/r26750.pdf>> Accessed 20 August 2023.

<sup>117</sup> Donrich, T and Shozi, B 'Why a COVID-19 vaccine mandate is not the best policy option for South Africa' (2021) THE CONVERSATION <<https://theconversation.com/why-a-covid-19-vaccine-mandate-is-not-the-best-policy-option-for-south-africa-166195>> Accessed 20 August 2023.

<sup>118</sup> *Ibid.*



between individual rights and public health needs would determine whether vaccine mandates in South Africa are constitutional. Courts would likely consider factors such as the severity of the health risk, the effectiveness of vaccines, and the availability of alternatives to mandates.<sup>119</sup>

Considering the public's confidence in the government and the science behind the COVID-19 vaccination is critical. Mandating vaccinations is a strong policy that could be ineffective and have unintended repercussions. First, public trust in it is low because of the government's (mis)handling of the epidemic thus far. Second, many people in South Africa are reluctant to get vaccines, which may be affected by the government's mistakes throughout the vaccine rollout process.<sup>120</sup>

The right to freedom and security of a person is enshrined in section 12 of the Constitution. More specifically, section 12(2) provides that “every person has the right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction, to security in and control over their body, and not to be subjected to medical or scientific experiments without their informed consent”. No person shall be denied the protection that section 12 offers. It is clear from a plain reading of section 12(2) that each and every individual has the preponderant right to decide what medical interventions and treatments are best for them, including whether or not to receive the vaccination.<sup>121</sup> Without sufficient legislation requiring mandatory COVID-19 vaccination of the South African populace, it was anticipated that the nation may be seriously at risk of additional transmission.<sup>122</sup>

Even though COVID-19 is extremely contagious and fatal, there is not enough data to support the need for mandatory immunisation. While the disease has claimed lives and caused suffering for the populace, numerous other ailments such as diabetes, lung infections, cancer, HIV/AIDS, TB, and many others have also done the same. Instead of compelling the vaccine uptake, less restrictive means should be used to reduce the transmission of the virus. Although the government stated that vaccines would not become mandatory and that forcing someone to be vaccinated would violate

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<sup>119</sup> Constitution of the Republic of South Africa Act, 1996.

<sup>120</sup> *Ibid.*

<sup>121</sup> Calitz, T ‘Constitutional rights in South Africa protect against mandatory COVID-19 vaccination’ (2021) 1 STJ < <http://www.scielo.org.za/pdf/stj/v7n1/35.pdf> > Accessed 20 April 2023.

<sup>122</sup> *Ibid.*

section 12 of the Constitution, the government has the authority to reverse course if public safety takes precedence above individual liberty and rights.<sup>123</sup>

## 2.6 Conclusion

In this chapter, the study navigated the intricate landscape of conceptual issues arising from the intersection of public health responses, human rights, and the specific challenges posed by vaccine mandates in South Africa during the COVID-19 pandemic. The exploration in this study has unveiled a series of ethical, practical, and constitutional dilemmas that demand careful consideration in formulating policy decisions. The tension between civil liberties and public health imperatives remains a central theme in this analysis. The study has grappled with the delicate balance between safeguarding individual autonomy and the compelling need to protect the collective well-being of society. This balancing act underscores the complex ethical choices inherent in implementing vaccine mandates.

Furthermore, the spectre of vaccine hesitancy looms large, posing a formidable challenge to achieving high vaccination coverage. By understanding the roots of hesitancy and crafting targeted interventions, the aim is to enhance vaccine acceptance and, in turn, the effectiveness of any mandates. The possibility of unintended consequences, such as the reinforcement of vaccine hesitancy or the exacerbation of reactance effects, must not be underestimated. The inquiry emphasises the importance of foresight and risk mitigation strategies when considering mandates. In parallel, the study underscored the constitutional dimensions of vaccine mandates, with South Africa's legal framework explicitly protecting against mandatory COVID-19 vaccination without adequate legislation. The careful assessment of constitutionality is paramount in the study's examination. Moreover, the issue of healthcare worker vaccine hesitancy further complicates the landscape. By delving into the reasons behind hesitancy among healthcare professionals and proposing tailored solutions, the study aim to bolster vaccine uptake within this critical cohort.

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<sup>123</sup> *Ibid*

Throughout this exploration, the principle of equity has remained a guiding star. The potential to exacerbate existing disparities in vaccine access and uptake must be vigilantly addressed to ensure that mandates do not disproportionately affect marginalised communities. This chapter recognises that the conceptual issues that have been outlined serve as signposts for the subsequent study chapters. They frame the context within which the constitutionality of vaccine mandates in South Africa will be evaluated. The objective is to provide a holistic understanding of the complex interplay between public health responses and human rights, focusing on vaccine mandates' ethical, effective, and equitable deployment. In doing so, it endeavours to contribute to the development of sound, rights-respecting policies that navigate the challenges of this generation while upholding the values of democracy, human dignity, equality, and freedom that are at the heart of constitutional ethos.

## CHAPTER 3: VACCINE MANDATES AND HUMAN RIGHTS: THE RIGHT TO BODILY INTEGRITY, RELIGION AND CONSCIENCE

### 3.1 Introduction

The history of bodily integrity in South Africa is closely tied to the country's legal and human rights developments.<sup>124</sup> The right to bodily integrity is guaranteed by the South African Constitution of 1996, and it encompasses the right to be left alone and the right to refuse medical treatment.<sup>125</sup> The legal analysis of this right has been the subject of scholarly writings, case law, and ethical guidelines in South Africa.<sup>126</sup> Recognising bodily integrity in South Africa necessitates a strict adherence to specific prescripts and preserving the integrity or credibility of medical records.<sup>127</sup> Furthermore, the right to bodily integrity has implications for medical interventions, making medical intervention without consent unlawful.<sup>128</sup>

The right to bodily integrity is enshrined in the South African Constitution, specifically in section 12(2), which states that “everyone has the right to bodily and psychological integrity, including the right to make decisions concerning reproduction, to security in and control over their body, and not to be subjected to medical or scientific experiments without their informed consent”. This recognition of bodily integrity is a significant aspect of South Africa's human rights culture and reflects the country's commitment to individual autonomy and safety.<sup>129</sup> The concept of bodily integrity has also been linked to specific legal reforms in South Africa. For instance, the legalisation of abortion in 1996 was a crucial development that aimed to improve women's health

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<sup>124</sup> Karim A ‘The South African Response to the Pandemic’ (2020) 382 *New England Journal of Medicine* 95.

<sup>125</sup> Njotini, M ‘Preserving the integrity of medical-related information - How "informed" is consent?’ (2018) 21(1) *Potchefstroom Electronic Law Journal* 1.

<sup>126</sup> Bailey, K and Neinaber, A ‘The right to physical integrity and informed refusal: Just how far does a patient's right to refuse medical treatment go?’ (2016) 2 SAJBL <<http://www.sajbl.org.za/index.php/sajbl/article/view/472>> Accessed 23 November 2023.

<sup>127</sup> Njotini, M ‘Preserving the integrity of medical-related information - How "informed" is consent?’ (2018) 21(1) *PELJ Potchefstroom Electronic Law Journal* 1.

<sup>128</sup> Vurgarellis, V and Zimu, M ‘COVID-19: The legal basis for medical intervention against a person's Will’ (2020) *LAWTONS AFRICA* <<https://www.lawtonsafrica.com/post/covid-19-the-legal-basis-for-medical-intervention-against-a-person-s-will>> Accessed 23 November 2023.

<sup>129</sup> Njotini, M ‘Preserving the integrity of medical-related information - How "informed" is consent?’ (2018) 21(1) *PELJ Potchefstroom Electronic Law Journal* 1.

and prevent deaths among women.<sup>130</sup> This reform aligns with the broader goal of upholding bodily integrity by granting individuals the right to make decisions concerning their reproductive health.<sup>131</sup> Furthermore, South Africa's recognition of bodily integrity extends to preserving medical-related information and the need for informed consent in healthcare settings. This demonstrates the nation's dedication to granting people autonomy over their bodies and the ability to make informed choices about the medical treatment they receive.<sup>132</sup>

In like manner, the right to freedom of conscience, religion, thought, belief, and opinion is guaranteed in the South African Constitution, as outlined in Chapter 2, section 15. This right encompasses the freedom to manifest one's beliefs in private or public, including religious observances at state or state-aided institutions, provided such observances follow the rules established by the appropriate public authorities.<sup>133</sup> The intersection of these rights is evident in scenarios where individuals decide on their bodies based on their religious or conscientious beliefs. For instance, the right to freedom of religion and conscience may influence decisions related to reproductive health, medical treatments, or participation in medical procedures, reflecting the complex interplay between personal beliefs and bodily autonomy.<sup>134</sup> Overall, the South African Constitution recognises and protects both the right to freedom of conscience, religion, thought, belief, and opinion, as well as the right to bodily integrity, highlighting the importance of individual autonomy, decision-making, and the manifestation of beliefs within the framework of human rights and legal protections.<sup>135</sup>

The primary purpose of this chapter is to critically examine the complex interplay between vaccine mandates and fundamental human rights, with a particular focus on the right to bodily integrity, freedom of religion, and freedom of conscience. Considering the growing importance of vaccine mandates as a public health tool, this chapter seeks to explore the ethical and legal dimensions surrounding individual

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<sup>130</sup> Favier, M 'Safe abortion in South Africa: We have wonderful laws, but we don't have people to implement those laws.' (2018) 143 WILEY ONLINE LIBRARY <<https://obgyn.onlinelibrary.wiley.com/doi/pdf/10.1002/ijgo.12676>> Accessed 22 November 2023.

<sup>131</sup> Mhlanga, R 'Abortion: developments and impact in South Africa' (2003) 67 *National Library Medicine* 115.

<sup>132</sup> Njotini, M 'Preserving the integrity of medical-related information - How "informed" is consent?' (2018) 21(1) *PELJ Potchefstroom Electronic Law Journal* 1.

<sup>133</sup> The Constitution of the Republic of South Africa, 1996.

<sup>134</sup> *Ibid.*

<sup>135</sup> *Ibid.*

autonomy and rights. By addressing the intersection of public health imperatives and human rights principles, the chapter aims to contribute to a nuanced understanding of the challenges and considerations inherent in implementing vaccine mandates within the framework of a rights-based society.

The chapter introduces vaccine mandates and their implementation across various contexts, sparking a contentious debate on the delicate balance between public health interests and individual freedoms. The discussion unfolds across several dimensions: examining the tension between vaccine mandates and bodily integrity, probing religious and conscientious objections, proposing alternative approaches to mandates, and scrutinising the compatibility of vaccine mandates with the South African Constitution. The chapter weaves together legal considerations, ethical perspectives, and real-world case studies, offering a comprehensive analysis of the multifaceted issues surrounding vaccine mandates concluding with a call for inclusive dialogues that respect human rights while navigating the complexities of public health challenges.

## **3.2 The right to bodily integrity**

### **3.2.1 Content of the right**

The entitlement to bodily integrity refers to an individual's fundamental right to have control and autonomy over their own body, free from unwanted interference or intrusion by others.<sup>136</sup> This principle encompasses the idea that every person has the authority to make decisions regarding their own body, including medical treatments, procedures, and physical boundaries, without coercion or imposition from external parties. It essentially upholds the notion that individuals have the ultimate say in what happens to their bodies and that their choices should be respected and protected.

In the South African context, the tension between individual autonomy and the public good is a key consideration when examining the impact of vaccine mandates on bodily integrity. The South African Constitution guarantees the right to physical integrity, and

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<sup>136</sup> Fenwick, H and Kerriga, K *Civil Liberties and Human Rights* (Publisher 2011).

every person has the preponderant right to make decisions on health and medical interventions and treatment, which includes the acceptance or rejection of the vaccine.<sup>137</sup> Section 12 of the Constitution guarantees the right to personal freedom and security.<sup>138</sup> Section 12(2) affirms that every individual possesses the right to bodily and mental well-being, encompassing the authority to make choices regarding reproduction, maintain control over their body, and avoid undergoing medical or scientific experiments without informed consent.<sup>139</sup> The protection offered by Section 12 cannot be denied to any individual.<sup>140</sup> A straightforward interpretation of section 12(2) clearly indicates that every individual possesses the dominant right to make choices regarding their health, medical procedures, and treatments, including the decision to accept or decline vaccination.<sup>141</sup>

The right to physical integrity, as established in section 12(2)(b) of the South African Constitution, serves as the foundation for law on patient autonomy, including the freedom to refuse treatment. The court dealt with the right to bodily integrity in the well-known case of *Stransham-Ford v Minister of Justice and Correctional Services and Others*.<sup>142</sup> The applicant in this case, Mr Robert James Stransham-Ford, was a highly skilled attorney who had been diagnosed with fatal stage 4 cancer that had progressed to his kidneys, lymph nodes, and lumbar spine. Due to renal metastases, he had excruciating pain, nausea, vomiting, stomach cramps, constipation, disorientation, weight loss, appetite loss, elevated blood pressure, increasing weakness, and frailty.

He was unable to move from his bed, required infusions and injections, experienced anxiety, needed morphine or other medicines to fall asleep, and found that using painkillers made him drowsy. Nothing that he had attempted, including palliative care and a number of conventional and alternative medications, had lessened his agony. With barely weeks to live, he passed away from natural causes shortly before the judge issued his ruling.<sup>143</sup> The court had to determine whether a doctor could legally assist Mr Stransham-Ford to end his life. The court allowed advocate Robin

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<sup>137</sup> Calitz, T 'Constitutional rights in South Africa protect against mandatory COVID-19 vaccination' (2021) 1 STJ < <http://www.scielo.org.za/pdf/stj/v7n1/35.pdf> > Accessed 20 April 2023.

<sup>138</sup> Section 12 of the Constitution.

<sup>139</sup> *Ibid.*

<sup>140</sup> Calitz, T 'Constitutional rights in South Africa protect against mandatory COVID-19 vaccination' (2021) 1 STJ < <http://www.scielo.org.za/pdf/stj/v7n1/35.pdf> > Accessed 20 April 2023.

<sup>141</sup> *Ibid.*

<sup>142</sup> *Stransham-Ford v Minister of Justice and Correctional Services and Others* 2015 (4) SA 50 (GP).

<sup>143</sup> *Ibid.*

Stransham-Ford to ask a doctor to help him end his life and declared that the doctor who did so would not be acting illegally and would not be rescinded, even though he died two hours before the order was granted. The ruling, in this case, is viewed as a victory for patients' autonomy and their right to choose their own medical care, including the option to refuse treatment, as well as for those who support competent adults' rights to seek euthanasia under certain conditions actively.<sup>144</sup> The right to bodily integrity extends across all aspects of life. In healthcare, this right entails providing (or withholding) informed permission before any operation or other process affecting one's body begins. On the presumption that the patients would have given consent, Chima claims that more than 50% of doctors acknowledge treating patients without permission.<sup>145</sup>

In the case of *Castell v De Greef*,<sup>146</sup> the court dealt with the issue of informed consent. A procedure known as a subcutaneous mastectomy was performed on the plaintiff on August 7, 1989. The plastic surgeon who filed the lawsuit carried out the procedure. The plaintiff sought for damages after it was unsuccessful. In this case, the plaintiff's mother, and probably also her grandmother, died of breast cancer. In 1982, the plaintiff underwent surgery for the removal of lumps in the breast. In 1989, further lumps were diagnosed. Given the plaintiff's family history, her gynaecologist recommended a mastectomy as prophylaxis and referred her for this purpose to the defendant, who saw her on 14 June 1989. It is common cause that on this occasion, the plaintiff and her husband discussed the operation with the defendant at some length. What was proposed was a surgical procedure involving the removal of as much breast tissue as possible with the simultaneous reconstruction of the plaintiff's breasts using silicone implants. Following the discussion, the plaintiff decided to go ahead with the operation. The plaintiff was admitted to the Panorama Medi-Clinic Hospital in the late afternoon of Sunday, 6 August 1989. The following day, the procedure was carried out. Bilateral breast tissue excision was followed by the repositioning of the areolae and nipples and the implantation of a 280 ml prosthesis behind the pectoral muscle on each side. The procedure used to move the areolae involved making a superior pedicle or flap on each

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<sup>144</sup> *Ibid.*

<sup>145</sup> Chima, S 'Evaluating the quality of informed consent and contemporary clinical practices by medical doctors in South Africa: An empirical study. *BMC Med Ethics* 14' (2013) 14 BMC <<https://doi.org/10.1186/1472-6939-14-S1-S3> > Accessed 22 November 2023.

<sup>146</sup> *Castell v De Greef* 1993 (3) SA 501 (C).



breast, which was then folded back on itself. This allowed the areolae to be moved about 3 cm above their original location.<sup>147</sup>

The issues that the court had to investigate are: (a) whether a reasonable person in the patient's position, if warned of the risk, would be likely to attach significance to it; or (b) the medical practitioner is or should reasonably be aware that the patient need not give consent in certain circumstances. The court adopted a 'reasonable doctor' test in that it found no firm judicial pronouncements in South Africa to the effect that disclosure had been unnecessary because a reasonable doctor faced with the problem would not have warned the patient.<sup>148</sup> The court was furthermore of the view that the 'reasonable doctor' test does, in fact, have the effect that the standard of disclosure is determined by medical judgment and that there is not only a justification but also a necessity for introducing a patient-orientated approach to disclosure. With regard to the patient-orientated approach, two patient standards could be applied: the 'objective or reasonable-patient' standard, based on the informational requirements of the hypothetical 'reasonable patient', in what the medical practitioner knows or should know to be the patient's circumstances, or the 'subjective patient' standard, whereby the medical practitioner must disclose information which he knows, or ought to know, that his particular patient in his particular situation, the court confirmed that beneficence does not constitute a legitimate ground to force a patient to undergo treatment.<sup>149</sup> Neinaber opined that at all times, the right to bodily integrity is pivotal in any health-related context and should not be lightly disregarded.<sup>150</sup>

"Forced treatment as opposed to the right to physical integrity (and the ethical duty of respect for autonomy) captures an age-old conflict for medical practitioners: to treat the patient or to respect their wishes regardless of the negative consequences that their choice may have on their health. Control by the state, medical practitioners, family, or others should be allowed only in the most limited of circumstances. It should be the norm that patients' decisions to refuse treatment stand unless the interests of justice or the community permit otherwise."<sup>151</sup>

If a patient declines treatment, it's not the healthcare provider's or others' responsibility to persuade them otherwise or ignore their choice as long as the patient refuses

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<sup>147</sup> *Ibid.*

<sup>148</sup> *Ibid.*

<sup>149</sup> Carstens, P and Pearmain, D 'Foundational Principles of South African Medical Law Durban' (2007) *LexisNexis* 30.

<sup>150</sup> Bailey, K and Neinaber, A 'The right to physical integrity and informed refusal: Just how far does a patient's right to refuse medical treatment go' (2016) 9(2) *S Afr J Bioethics Law* 472.

<sup>151</sup> *Ibid.*

treatment with informed consent and while in a rational state of mind, typically, there's no basis to question their decision, even if it's challenging to acknowledge.<sup>152</sup>

### 3.2.2 Limitation of the right

It is commonly understood that the right to bodily integrity and other human rights outlined in the Bill of Rights can be limited or revoked in specific situations.<sup>153</sup> This restriction of rights is essential for a well-operating and efficient governmental system. However, this limitation of rights must not happen randomly or in the absence of proper regulation. By guaranteeing that any governing body or other entities limiting rights are held accountable and must comply with certain requirements before any measures limiting rights can be deemed lawful, Section 36 of the Constitution safeguards individual rights.<sup>154</sup>

Section 36 of the Constitution provides that:

“(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom, considering all relevant factors, including—

- (a) the nature of the right;
- (b) the importance of the purpose 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.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”<sup>155</sup>

Section 36 serves as a broad limitation clause that applies to all the rights listed in the Bill of Rights.<sup>156</sup> It outlines the acceptable ways in which these rights can be limited.

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<sup>152</sup> *Ibid.*

<sup>153</sup> *Ibid.*

<sup>154</sup> *Ibid.*

<sup>155</sup> Section 36 of The Constitution.

<sup>156</sup> *Ibid.*

When there's a consideration or an actual instance of limiting an individual's physical well-being, the courts can assess whether this limitation aligns with Section 36. This process ensures that any such restrictions comply with the principles outlined in the Constitution.<sup>157</sup> *Harksen v Lane*<sup>158</sup> was a landmark constitutional court case in South Africa in 1997 that involved equality and discrimination issues. The case revolved around Glen Harksen, an insolvent individual who challenged the constitutionality of certain Insolvency Act provisions<sup>159</sup> on the grounds of discrimination.<sup>160</sup> In this case, the Constitutional Court established a two-step procedure for determining whether a statute or other provision improperly discriminates. The applicant had to prove in the first phase that the law makes distinctions between individuals or groups of individuals. In the second phase, the court had to decide if this kind of differentiation amounted to unfair discrimination.<sup>161</sup>

The South African courts have not yet had the chance to make rulings on the issue of compulsory vaccinations, but they have made multiple other judicial pronouncements on the limitation of "section 12 rights: the right to bodily and psychological integrity".<sup>162</sup> The decisions show that, in some instances, the public interest outweighs individuals' right to bodily and psychological integrity.<sup>163</sup> For instance, section 37(3) (a) and (b) of the Criminal Procedure Act<sup>164</sup> provides that "a criminal court may order the taking of a blood sample from an accused (whose trial is pending before the court of law) to determine the state of the accused's health,<sup>165</sup> or to ascertain whether the accused bears any mark, characteristic or feature".<sup>166</sup> The section allows the Police force to use reasonable force when the accused refuses to cooperate. The Criminal Procedure Act is another legislation that the state can look at when they want to limit the right to bodily integrity justifiably. In other words, it can be used as a reference, not to say the right to bodily integrity in terms of this legislation per se, will be limited. The

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<sup>157</sup> *Ibid.*

<sup>158</sup> *Harksen v Lane* 1998 (1) SA 300(CC).

<sup>159</sup> Insolvency Act 24 of 1936.

<sup>160</sup> *Ibid.*

<sup>161</sup> *Ibid.*

<sup>162</sup> Tanya, C 'Constitutional Rights in South Africa Protect Against Mandatory COVID-19 Vaccination' (2021).

<sup>163</sup> *Ibid.*

<sup>164</sup> Act 51 of 1977.

<sup>165</sup> Section 37(3) of the Criminal Procedure Act 51 of 1977.

<sup>166</sup> *Ibid.*

constitutionality of the above assertion was challenged in the famous case of *S v Orrie*.<sup>167</sup>

This case involved two brothers who were charged with two counts of murder, housebreaking to commit murder, and robbery with aggravating circumstances. The legal issues in this case revolved around the admissibility of evidence obtained by taking blood samples from the accused.<sup>168</sup> The court considered the right to bodily integrity in the context of the reasonableness of taking fresh blood samples and the admissibility of evidence obtained in violation of an accused's constitutional rights.<sup>169</sup> The court's principles included considering whether the admission of the evidence obtained in violation of an accused's constitutional rights would render the trial unfair or detrimental to the administration of justice, as stipulated in Section 35(5) of the South African Constitution.<sup>170</sup>

The court also considered the requirement that the admission of evidence obtained in violation of an accused's constitutional rights would render the trial unfair and found guidance in recent Canadian cases, keeping in mind the similarities between section 35(5) of the Constitution and its Canadian counterpart.<sup>171</sup> In this very case, the Court held that, although it amounted to a limitation of the accused's bodily integrity, drawing blood against the consent of the accused was a minimal infringement of that right. The Court also held that the limitation was justified in the circumstances, being necessary to procure potential evidence and thus in the interests of justice and being sanctioned by legislation.<sup>172</sup>

In *Winston v Lee*,<sup>173</sup> a certain Ralph Watkinson, who was a shopkeeper, was shot during an attempted robbery, but he was also carrying a gun, so he appeared to have wounded his attacker in the left side, and the attacker fled the area. Rudolph Lee was discovered eight blocks from the scene of the incident by police officers, suffering from a gunshot wound to his left chest area, shortly after Watkinson was sent to a hospital. He was also taken to the hospital, where Watkinson identified him as the robber. After an investigation, the police charged Lee with, inter alia, attempted robbery and

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<sup>167</sup> *S v Orrie and Another* 2005 (1) SACR 63 (C).

<sup>168</sup> *Ibid.*

<sup>169</sup> *Ibid.*

<sup>170</sup> *Ibid.*

<sup>171</sup> *Ibid.*

<sup>172</sup> *Ibid.*

<sup>173</sup> *Winston v Lee* 470 U.S. 753 (1985).

malicious wounding. Thereafter, the Commonwealth of Virginia filed a motion in state court to have Lee have surgery to remove a bullet that was embedded in his left collarbone, asserting that the bullet would provide evidence of Lee's guilt or innocence. However, Lee expressed resistance toward this procedure.<sup>174</sup> The basis of expert testimony is that the surgery would require an incision of only about one-half inch, which could be performed under local anaesthesia and would result in "no danger on the basis that there's no general anaesthesia employed."<sup>175</sup>

The legal question in this case was for the court to determine whether a state may compel a surgical intrusion into a suspect's body for evidence. The Supreme Court in Winston applied the test developed in *Schmerber v California*<sup>176</sup> to determine whether a state may compel a surgical intrusion into a suspect's body for evidence. In *Schmerber v California*,<sup>177</sup> the United States Supreme Court adopted a balancing test of "reasonableness" to determine whether the state may intrude into the human body to recover evidence under the Fourth Amendment. While recognising the individual's right under the Fourth Amendment to protect personal privacy and bodily dignity against unwarranted intrusions by the state, the Court offset this right against the state's interest in gathering evidence necessary to determine the accused's guilt or innocence.<sup>178</sup> Supreme Court employed the Schmerber framework in ruling that a state may not compel an armed robbery suspect to undergo surgery requiring a general anaesthetic to remove an object thought to be a bullet lodged approximately one inch deep in the muscular tissue of his chest.<sup>179</sup>

The United States Supreme Court unanimously affirmed the appellate court's decision, holding that to compel surgery would be an unreasonable search under the Fourth Amendment and would violate Lee's right to be secure in his person. Justice Brennan delivered the court's opinion. He relied heavily on Schmerber's analytic framework to determine the constitutionality of state-compelled surgical intrusions. Justice Brennan found the procedure in Winston to be an example of the "more substantial intrusion" cautioned against in Schmerber. Justice Brennan stated that compelling surgery may

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<sup>174</sup> Gitles, J 'Reasonableness of Surgical Intrusions--Fourth Amendment: Winston v. Lee, 105 S. Ct. (1985) 76 *J. Crim. L. & Criminology* 972.

<sup>175</sup> *Ibid.*

<sup>176</sup> *Schmerber v. California* 384 U.S. 757 (1966)

<sup>177</sup> *Ibid.*

<sup>178</sup> *Ibid.*

<sup>179</sup> *Ibid.*

be unreasonable even if criminal evidence would likely be produced because it implicates such high privacy and security expectations. He further determined that "reasonableness" depends upon a case-by-case approach in which an individual's privacy and security interests are balanced against society's interest in performing the procedure to gain evidence to attempt to determine guilt or innocence more fairly.

Section 7(1)(d) of the National Health Act provides for circumstances in which treatment may be administered without the patient's consent. It again includes a case where a failure to treat the patient would lead to a severe public health or safety risk.<sup>180</sup> Section 7(1)(d) was put into practice in the context of XDR-TB in the case of *Minister of Health v Goliath*.<sup>181</sup> The respondents in this case had all been diagnosed with XDR-TB, which was resistant to 'first-line drugs' and to certain other drugs. They were all contagious, and all had failed to comply with the voluntary treatment regimen prescribed for them.<sup>182</sup> The Minister of Health applied for an order compelling the surviving respondents to be detained in a specialist tuberculosis hospital for treatment.<sup>183</sup>

The respondents, in turn, claimed that the detention represented a violation of their rights in terms of section 12 of the Constitution, including their rights to freedom and security of the person and bodily integrity.<sup>184</sup> The court considered various factors, including the Minister of Health's duty to prevent and control the spread of communicable diseases that the respondents were capable of spreading the disease but had failed to adhere to the voluntary programme and the toxicity and associated side effects of the drugs necessary to treat XDR-TB.<sup>185</sup> Judge Griesel ruled, based on these considerations, that the detention and treatment of the respondents, although a breach of their section 12 rights, were both necessary and mandated by section 7(1)(d) of the National Health Act because of the public interest.<sup>186</sup>

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<sup>180</sup> Section 7(1)(d) of the National Health Act 16 of 2003.

<sup>181</sup> *Minister of Health v Goliath* 2009 (2) SA 248 (C).

<sup>182</sup> *Ibid* at para 16 and 17.

<sup>183</sup> *Ibid* at para 5 and 6.

<sup>184</sup> *Ibid* at para 14.

<sup>185</sup> *Ibid* at para 27.

<sup>186</sup> *Ibid*.

### 3.2.3 Justifiability of vaccine mandates as a limitation on the right

The justifiability of limitations on the right to bodily integrity in the South African constitutional context, as outlined in section 36 of the Constitution, has been a subject of legal analysis and court decisions.<sup>187</sup> The right to physical integrity, as enshrined in section 12(2)(b) of the Constitution, forms the foundation for jurisprudence concerning patient autonomy and the right to refuse medical treatment. The courts play a crucial role in assessing the proportionality and reasonableness of limitations on rights, emphasising the need for reasonableness and justifiability in any such limitations.<sup>188</sup>

The procedural method with two stages is outlined in the *S v Zuma* case.<sup>189</sup> This case was the first decided by the Constitutional Court of South Africa after it was established in 1995. The case dealt with a provision of the Criminal Procedure Act that required the defence in criminal cases to prove that a confession made before a magistrate was coerced rather than requiring the state to prove that it was not coerced. The court held that this reverse onus provision was unconstitutional because it violated the right to a fair trial under section 25 of the Interim Constitution.<sup>190</sup> The judgment was delivered on 5 April 1995 by Kentridge AJ. The case arose from a criminal trial before Hugo J in the Natal Provincial Division and was heard with the case of *Mhlungu and Four Others v The State*.<sup>191</sup> The Constitutional Court found section 217(1)(b)(ii) of the Criminal Procedure Act to violate the right to a fair trial.<sup>192</sup> This case is significant in developing South African constitutional law and protecting individual rights in criminal proceedings. It must be established if a protected right has been violated in the Constitution. Subsequently, the assessment turns to whether this contravention is justified under section 36, the limitation clause. The reasonableness test evaluates competing rights and values through a proportional weighing process.

Based on the information above, it is clear that there is no outright restriction of the right outlined in section 12. Courts are required to consider broader societal and

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<sup>187</sup> Bailey, K and Neinaber, A 'The right to physical integrity and informed refusal: Just how far does a patient's right to refuse medical treatment go' (2016) 9(2) *S Afr J Bioethics Law* 472.

<sup>188</sup> Lles, K 'A fresh look at limitations: unpacking section 36' (2007) 23 *Sabinet* <<https://hdl.handle.net/10520/EJC53236> > Accessed 17 September 2023.

<sup>189</sup> *S v Zuma and Others* 1995 (4) BCLR 401 (SA).

<sup>190</sup> *Ibid.*

<sup>191</sup> *Ibid.*

<sup>192</sup> *Ibid.*

governmental interests when weighing conflicting rights.<sup>193</sup> The South African courts have not yet addressed the issue of mandatory vaccinations, but they have issued several rulings on section 12.

The South African courts have not yet addressed the issue of mandatory vaccinations, but they have issued several rulings on section 12. In *Minister of Safety and Security and another v Gaqa*,<sup>194</sup> the court was dealing with the aftermath of a botched robbery resulting in the deaths of two victims at a tavern in Khayelitsha, Cape, Inspector Ivan Jacobus van den Heever, the investigating officer, discovered R90,000 in cash in the victims' car, suggesting robbery as the motive. An eyewitness reported that one of the assailants had been shot and injured during the incident. Sizwe Alfred Gaqa, the respondent, was later identified as a suspect based on information from an informer. Gaqa, found with bandaged thighs, claimed he was injured in a scuffle at Zama Tavern due to interference with his girlfriend. He was arrested on two murder charges, revealing bullet wounds on his thighs, with an X-ray showing a visible bullet, possibly from a .38 or .357 calibre. The case revolves around the applicants' request for the court's approval to surgically remove a bullet lodged in the respondent's leg, suspected of his involvement in a fatal robbery.

Critical legal issues include interpreting sections 27 and 37(1)(c) of the Criminal Procedure Act 51 of 1977, which the applicants argue authorises the use of reasonable force, including surgical procedures, for searches and bodily examinations. Additionally, the applicants assert their constitutional duty to investigate crimes under section 205(3) of the Constitution. On the other hand, the respondent raises concerns about potential violations of his constitutional rights, such as the right to a fair trial section 35(3)(d), dignity, freedom and security of the person, and bodily and psychological integrity section 12(2)(b).

The court, after careful consideration, granted the application and mandated the surgical removal of the bullet. The court interprets sections 27 and 37(1)(c) of the Criminal Procedure Act purposively, affirming the authority of the police to use reasonable force, including surgical procedures, for searches and examinations. Emphasising the state's constitutional duty to investigate crimes, as outlined in section

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<sup>193</sup> *Ibid.*

<sup>194</sup> *Minister of Safety and Security and Another v Gaqa* 2002 (1) SACR 653 (C).



205(3) of the Constitution, the court underscores the potential hindrance to law enforcement without the bullet as evidence. While acknowledging the intrusion on the respondent's constitutional rights, the court applies section 36(1) of the Constitution, which allows for rights limitations if reasonable and justifiable in a democratic society.

The court meticulously balanced the competing interests, finding that the refusal to assist the applicants could impede justice in solving serious crimes, tipping the scale in favour of the state's duty to investigate. Drawing on precedent from a US Supreme Court case, *Winston v Lee*, the court concludes that the reasonableness of surgical intrusions depends on a case-by-case assessment, weighing individual privacy against societal needs for evidence. In the final order, the court emphasises the exceptional circumstances of the case, involving g serious crimes and the crucial need for evidence, justifying the intrusion on the respondent's rights.<sup>195</sup>

### **3.3. Religious and conscientious objections**

#### **3.3.1 Content of the right**

The content of the right to religious and conscientious objections in relation to the implementation of vaccine mandates in South Africa is a complex and multifaceted issue. Vaccine mandates are typically controversial as they entail limitations of individual liberties for the sake of the collective good. There is a reasonable disagreement about the extent to which one person should be required to do things to prevent harm to others or contribute to collective goods from which they benefit.<sup>196</sup> There are several views of conscience, making it difficult to understand what one means by freedom of conscience. In one view, conscience is a human faculty similar to the intellect, the will and imagination. The intellect discerns truth, while the object of the will is goodness and that of imagination beauty.<sup>197</sup> In this view, the object of

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<sup>195</sup> *Minister of Safety and Security and Another v Gaqa* 2002 (1) SACR 653 (C).

<sup>196</sup> Giubilini, A et al 'Vaccine mandates for healthcare workers beyond COVID-19' (2023) 49(3) *Journal of Medical Ethics* 211.

<sup>197</sup> Leach, D 'Transcendent professionalism: keeping promises and living the questions' (2014) 85(5) *National Library of Medicine* 699.

conscience is to discern moral truths, like a window of the mind that observes morality in the world or a compass that directs an agent's action towards moral truths.<sup>198</sup>

In South Africa, the Constitution provides for freedom of religion and belief and prohibits discrimination based on religion. The government does not require religious groups to register. However, there have been instances where religious leaders and organisations have opposed vaccine mandates, citing violations of the Constitution's guarantee of religious freedom.<sup>199</sup> For example, in March, the International Federation of Christian Churches rejected the government's COVID-19 Risk Adjusted Strategy, which included a vaccine mandate, violating the Constitution's guarantee of religious freedom.<sup>200</sup>

Conscientious objections against vaccine mandates are not unique to South Africa. Comparative analyses between the US and European approaches have been conducted to analyse conscientious claims against vaccine mandates.<sup>201</sup> Additionally, there are discussions on the ethical balance between protecting patients and coercing individuals through vaccine mandates.<sup>202</sup>

### 3.3.2 Limitation of the right

Limiting the right to religious and conscientious objections concerning vaccine mandates in South Africa is a complex issue involving balancing individual liberties, public health, and ethical considerations. In South Africa, the Constitution provides for freedom of religion and belief and prohibits discrimination based on religion. However, there have been instances where religious leaders and organisations have opposed vaccine mandates, citing violations of the Constitution's guarantee of religious

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<sup>198</sup> Symons, X 'Two conceptions of conscience and the problem of conscientious objection' *J Med Ethics* (2017) 43(4) *National Library of Medicine* 245.

<sup>199</sup> Office Of International Religious Freedom 'Report on International Religious Freedom: South Africa' (2022) < <https://www.state.gov/reports/2022-report-on-international-religious-freedom/south-africa/>> Accessed 21 November 2023.

<sup>200</sup> *Ibid.*

<sup>201</sup> Madera, A 'Mandatory Vaccination Conscientious Objections: A Comparative Analysis between the US and the European Approach' (2023) < [https://www.boe.es/biblioteca\\_juridica/anuarios\\_derecho/abrir\\_pdf.php?id=ANU-E-2023-10012900188](https://www.boe.es/biblioteca_juridica/anuarios_derecho/abrir_pdf.php?id=ANU-E-2023-10012900188)> Accessed 21 November 2023.

<sup>202</sup> Giubilini, A et al 'Vaccine mandates for healthcare workers beyond COVID-19' (2023) 49(3) *Journal of Medical Ethics* 211.

freedom.<sup>203</sup> Generally, the right to conscientious objection is not absolute and can be limited in certain circumstances. For example, in the context of reproductive health, a woman's constitutional right to reproductive health is limited by section 15(1) of the Constitution of South Africa.<sup>204</sup>

To further support instances where the right to religion was restricted, it was evident in January 2020 when law enforcement acted against a gathering of approximately 250 individuals who defied regulations by assembling for a church service in Sebokeng.<sup>205</sup> Two leaders of the church were apprehended for violating level 3 lockdown regulations. Additionally, a 62-year-old woman faced charges for a similar violation and an added accusation of public violence. Rev Kenneth Meshoe, the president of the ACDP, expressed discontent, stating that it was unjust for churches to be prohibited from operating while casinos, restaurants, movie theatres, and shopping malls were permitted to open.<sup>206</sup>

### 3.3.3 Justifiability of COVID vaccine mandate as a limitation of the right

Vaccination and differing belief systems often spark contentious debates, but common ground might be reached if advocating harmful vaccination principles results in accountability, whether it's on the part of the government, an employer, or a religious organisation.<sup>207</sup> Historically, safeguarding the rights of personal and shared conscientious beliefs has been a longstanding source of conflict in the context of infectious diseases. This is particularly evident when vulnerable communities have faced discrimination and severe violations of individual freedom, such as instances of

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<sup>203</sup> Giubilini, A et al 'Which Vaccine? The Cost of Religious Freedom in Vaccination Policy' (2021) 18(4) JBI < <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8696246/>> Accessed 21 November 2023.

<sup>204</sup> Fritz, E 'What has Kant got to say about conscientious objection to reproductive health in South Africa?' (2023) < <https://onlinelibrary.wiley.com/doi/full/10.1111/dewb.12416>> Accessed 21 November 2023.

<sup>205</sup> *Ibid.*

<sup>206</sup> Bhengu, C 'From church gatherings to alcohol- 5 lockdown rules that've left you p\*\*sed' (2021) < <https://www.timeslive.co.za/news/south-africa/2021-12-23-from-church-gatherings-to-alcohol-5-lockdown-rules-thatve-left-you-psed/>> Accessed 22 November 2023.

<sup>207</sup> Estelle, E 'Mandatory vaccine policies will survive a constitutional challenge — legal expert Halton Cheadle' (2021) < <https://www.dailymaverick.co.za/article/2021-11-10-mandatory-vaccine-policies-will-survive-a-constitutional-challenge-legal-expert-halton-cheadle/>> Accessed 22 November 2023.

racially motivated immunisation and the sterilisation of women with a medical history.<sup>208</sup>

The International Covenant on Civil and Political Rights (ICCPR) stipulates that “no one shall be subject to coercion which would impair his/her freedom to have or to adopt a religion or belief of his/her choice”, which entrenches volition as an essential element of “the right to freedom of thought, conscience and religion”.<sup>209</sup> Religious freedom represents an impartial standard, suggesting a level of trust is extended to religious principles, and the secular state refrains from delving into the specifics of these religious beliefs. However, it is important to note that religion must still recognise the existence of formal legal regulations.<sup>210</sup>

In South Africa, the issue of mandatory COVID-19 vaccination has become increasingly contentious, with significant legal and moral facets that must be considered. The European Convention on Human Rights (ECHR) recognises that the right to physical integrity can be limited “for the protection of health.”<sup>211</sup> However, the South African courts have not yet had the opportunity to decide on the issue of compulsory vaccinations, and it is uncertain whether the government can and will enact legislation or other measures to compel COVID-19 vaccinations.<sup>212</sup>

The issue of COVID-19 vaccine mandates has been a subject of debate in relation to the right to religious freedom. The 2022 Report on International Religious Freedom by the US State Department mentions that in March, the International Federation of Christian Churches rejected the government’s COVID-19 Risk Adjusted Strategy, including a vaccine mandate, violating the Constitution’s guarantee of religious freedom.<sup>213</sup> The South African National Christian Forum (SANCF) approached the Constitutional Court to urgently interdict the government from declaring the COVID-19 vaccination mandatory, arguing that the government had an obligation to protect the constitutional rights of all citizens regardless of their decision to take or not take the

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<sup>208</sup> Parmet Populations, Public Health, and the Law 112.

<sup>209</sup> Art 18(2) of the ICCPR.

<sup>210</sup> Torfs 2015 Insight Turkey 98.

<sup>211</sup> See Article 3 and Article 15 of the European Convention on Human Rights, read together with the case of *Pretty v United Kingdom* (1997) 24 HRR 423.

<sup>212</sup> Calitz, T ‘Constitutional rights in South Africa protect against mandatory COVID-19 vaccination’ (2021) 1 STJ < <http://www.scielo.org.za/pdf/stj/v7n1/35.pdf>> Accessed 20 April 2023.

<sup>213</sup> Office Of International Religious Freedom ‘Report on International Religious Freedom: South Africa’ (2022) < <https://www.state.gov/reports/2022-report-on-international-religious-freedom/south-africa/>> Accessed 22 November 2023.

vaccine.<sup>214</sup> However, the North Gauteng High Court in South Africa held that the COVID-19 regulations that prohibited religious worship in places of worship were a reasonable and justifiable limitation to the rights to freedom of religion, movement, and association, as they were implemented to limit the spread of the coronavirus.<sup>215</sup> The case of *Mohamed and Others v President of the Republic of South Africa and Others*<sup>216</sup> was heard in the North Gauteng High Court in South Africa on April 30, 2020. The applicants, Muhammed Bin Hassim Mohamed, Anas Mohammed Chothia, and the As Saadiqeen Islamic Centre, sought a declaration that the COVID-19 regulations that prohibited religious gatherings were overbroad, excessive, and unconstitutional. The applicants argued that the regulations violated their right to freedom of religion, movement, and association.<sup>217</sup>

The court held that the COVID-19 regulations that prohibited religious worship in places of worship were a reasonable and justifiable limitation to the rights to freedom of religion, movement, and association, as they were implemented to limit the spread of the coronavirus. The court emphasised that the COVID-19 pandemic was a disaster, calling for drastic and urgent measures and that the government had done all it could in a short time to issue the regulations concerning the lockdown.<sup>218</sup> The court dismissed the application.<sup>219</sup> In *Minister of Health of the Province of the Western Cape v Goliath and Others*,<sup>220</sup> the court-mandated treatment for tuberculosis for the surviving respondents, even against their will. These verdicts illustrate that the public interest can outweigh individuals' right to bodily and psychological integrity in certain situations.<sup>221</sup> It is imperative to consider the cultural values and beliefs, the human rights approach for people born with variations in sex characteristics, and the ethical challenges in deciding whether to vaccinate individuals lacking the decision-making capacity needed to provide informed consent during a public health emergency like COVID-19.<sup>222</sup>

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<sup>214</sup> *Ibid.*

<sup>215</sup> *Mohamed and Others v President of the Republic of South Africa and Others* 2020 (5) SA 553 (GP).

<sup>216</sup> *Ibid.*

<sup>217</sup> *Mohamed and Others v President of the Republic of South Africa and Others* 2020 (5) SA 553 (GP).

<sup>218</sup> *Ibid.*

<sup>219</sup> *Ibid.*

<sup>220</sup> *Minister of Health of the Province of the Western Cape v Goliath and Others* 2009 (2) SA 248 (C).

<sup>221</sup> *Ibid.*

<sup>222</sup> Couch, M et al 'Integrating civil liberty and the ethical principle of autonomy in building public confidence to reduce COVID-19 vaccination inequity in Africa, Hum Vaccin Immunother' (2023) 19 T&FOnline <<https://www.tandfonline.com/doi/full/10.1080/21645515.2023.2179789>> Accessed 04 October 2023.

The unintended consequences of COVID-19 vaccine policy, such as mandates, passports, and restrictions, may cause more harm than good and undermine core principles of public health ethics.<sup>223</sup> Therefore, when examining the tension between individual autonomy and the public good in the South African context regarding vaccine mandates, it is important to balance the right to bodily integrity with the public good and the integrity of individuals while considering the cultural values and beliefs, human rights, and ethical challenges.<sup>224</sup>

The potential impact of vaccine mandates on bodily integrity is a complex issue that has been debated in various contexts. Vaccine mandates may be perceived as an infringement on bodily integrity and autonomy.<sup>225</sup> Vaccine mandates may be considered discriminatory and excessively coercive, which may undermine the right to bodily integrity.<sup>226</sup> The potential impact of vaccine mandates on bodily integrity is a complex issue that requires balancing individual autonomy and the public good. While vaccine mandates may be seen as a justifiable intrusion on bodily integrity and autonomy, they may also be perceived as discriminatory and excessively coercive.<sup>227</sup> When examining their potential impact on bodily integrity, it is important to consider the ethical, legal, and cultural implications of vaccine mandates.

Wilkenfeld argues that vaccine mandates are ethically justified if they benefit the person being vaccinated, minimise harm to vaccinated individuals, and the vaccination benefits outweigh any potential burdens.<sup>228</sup> A systematic review of the ethical challenges involved in COVID-19 vaccine mandates for children found that vaccine

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<sup>223</sup> De Figueiredo, K et al 'The unintended consequences of COVID-19 vaccine policy: why mandates, passports and restrictions may cause more harm than good' (2022) 7 *BMJ* <<https://gh.bmj.com/content/7/5/e008684>> Accessed 04 October 2023.

<sup>224</sup> Calitz, T 'Constitutional rights in South Africa protect against mandatory COVID-19 vaccination' (2021) 1 *STJ* <<http://www.scielo.org.za/pdf/stj/v7n1/35.pdf>> Accessed 20 April 2023.

<sup>225</sup> Wilkenfeld, D and Johnson, C 'Defence of Vaccine Mandates: An Argument from Consent Rights' (2022) 15 *Public Health Ethics* <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9383732/>> Accessed 04 October 2023.

<sup>226</sup> Giubilini, A et al 'Which Vaccine? The Cost of Religious Freedom in Vaccination Policy' (2021) 18(4) *JBI* <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8696246/>> Accessed 21 November 2023.

<sup>227</sup> Rodger, D 'COVID-19 Vaccination Should not be Mandatory for Health and Social Care Workers' (2022) 28 *Multidisciplinary Journal of Biotechnology and the Body* 27.

<sup>228</sup> Wilkenfeld, D and Johnson, C 'Defence of Vaccine Mandates: An Argument from Consent Rights' (2022) 15 *Public Health Ethics* <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9383732/>> Accessed 04 October 2023.

mandates are justifiable and in line with public health ethics, which involves fairly minimising individual and communal harms at the expense of individual autonomy.<sup>229</sup>

Giubilini argues that vaccine mandates for healthcare workers are ethically proportionate when they balance risks, benefits, and restrictiveness. The authors suggest that such mandates might be justified even when general population mandates are not.<sup>230</sup> A literature review published in *BMJ Global Health* outlines a comprehensive set of hypotheses for why mandatory COVID-19 vaccine policies may ultimately be counterproductive and harmful. The authors argue that current vaccine policies may erode core principles of public health ethics and place medical professionals in an awkward position, blurring the lines between voluntary and involuntary vaccination.<sup>231</sup>

Figueiredo, when examining whether vaccine mandates would be lawful and ethical and whether they could boost vaccine uptake, suggests that linking vaccinations as a condition of providing service could be an effective incentive for vaccination, but mandates can undermine public support, creating a backlash and even reducing vaccine uptake.<sup>232</sup> Fujiwara examines the legality of mandatory vaccination in times of epidemic. The authors argue that the state has the right to choose between opposing medical theories and refer the matter to a board composed of persons residing in the affected location qualified to decide. The courts do not become involved in legislation formed under the state's police power if it relates substantially to public health, morals, or safety and is not a plain, palpable invasion of rights secured by the fundamental law.<sup>233</sup>

These case studies and literature reviews provide insights into vaccine mandates' ethical, legal, and cultural implications. They highlight the need to balance individual

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<sup>229</sup> Alahmad, G 'Ethical Challenges Involved in COVID-19 Vaccine Mandates for Children: A Systematic Review' (2023) 11(3) *MDPI journals* 601.

<sup>230</sup> Giubilini, A et al 'Which Vaccine? The Cost of Religious Freedom in Vaccination Policy' (2021) 18(4) *JBI* <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8696246/>> Accessed 21 November 2023.

<sup>231</sup> De Figueiredo, K et al 'The unintended consequences of COVID-19 vaccine policy: why mandates, passports and restrictions may cause more harm than good' (2022) 7 *BMJ* <<https://gh.bmj.com/content/7/5/e008684>> Accessed 04 October 2023.

<sup>232</sup> Gostin, L et al 'Mandating COVID-19 Vaccines' (2021) 325(6) *JAMA* (2021) <<https://jamanetwork.com/journals/jama/fullarticle/2774712>> Accessed 04 October 2023.

<sup>233</sup> Fujiwara, S 'Is Mandatory Vaccination Legal in Time of Epidemic?' (2006) 8(4) *AMA JOURNAL OF ETHICS* <<https://journalofethics.ama-assn.org/article/mandatory-vaccination-legal-time-epidemic/2006-04>> Accessed 04 October 2025.

autonomy and the public good when considering vaccine mandates and to consider the potential unintended consequences of such policies.

### 3.5 Conclusion

Every right in the Bill of Rights may be limited in terms of the law of general application.<sup>234</sup> Currently, no law of general application limits the right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction and security in and control over one's body and the right to freedom of religion, conscience, thought, belief, and opinion as enshrined in the constitution,<sup>235</sup> by imposing vaccine mandates. However, the (SAHRC) has stated that a general law mandating COVID-19 vaccination in South Africa would not be an infringement on the right to bodily integrity.<sup>236</sup> The SAHRC's position is that the right to bodily integrity is not absolute and can be limited in certain circumstances, such as during a pandemic.

The right to bodily integrity, religion and conscience can also be limited in terms of section 36 of the Constitution to impose vaccine mandates on the citizens. Since COVID-19 poses a significant risk to public health, the vaccination can be made mandatory for all South Africans. When COVID-19 was still a new thing in South Africa, there were limited rights in the Bill of Rights, like the right to freedom of movement, association, and many others. So, even the right to religion and bodily integrity may be limited to give way to mandatory vaccines. The debate surrounding vaccine mandates and their potential impact on human rights, particularly the right to bodily integrity, religion, and conscience, is complex. Balancing public health imperatives with individual freedoms is a delicate task that requires careful consideration. Vaccine mandates have been implemented to safeguard public health, particularly in the face of contagious diseases that can have devastating consequences. In this context, governments and public health authorities argue that these mandates are a reasonable limitation on individual rights, as they protect the broader community from

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<sup>234</sup> Section 36 of the Constitution.

<sup>235</sup> The Constitution of the Republic of South Africa, 1996.

<sup>236</sup> South African Human Rights Commission, 'Mandatory Covid-19 vaccination not really infringement on your rights' (2021) SAHRC < <https://www.sahrc.org.za/index.php/sahrc-media/news/item/2850-mandatory-covid-19-vaccination-not-really-infringement-on-your-rights-sahrc> > Accessed 05 December 2023.



harm.<sup>237</sup> The balance between vaccine mandates and human rights is dynamic, evolving with the changing circumstances of public health threats. Societies need to engage in thoughtful and inclusive discussions that respect diverse perspectives while striving to find common ground in the interest of public health and individual freedoms. This dialogue should be grounded in respect for human rights and should continually seek ways to mitigate the potential conflicts between the right to bodily integrity, religion, and conscience and the imperative to protect public health.

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<sup>237</sup> Bayer, R 'The continuing tensions between individual rights and public health. Talking Point on public health versus civil liberties' (2007) 8(12) EMBO <  
<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2267241/>> Accessed 12 October 2023.

## **CHAPTER 4: CONCLUSION AND RECOMMENDATIONS**

### **4.1 Introduction**

In this chapter, the focus is on exploring the key findings of the study, which are the heartbeat of the chapter and the study as a whole. The key findings are presented clearly and concisely in this chapter, highlighting the most important aspects of the study. These findings are carefully analysed and interpreted, providing insights into the research questions and hypothesis. The chapter integrates and summarises the results from the previous chapters, providing a comprehensive understanding of the research questions and hypothesis. Following the presentation of key findings, the chapter transcends into a discussion of the implications of these findings, exploring the significance of the findings in the research questions and hypothesis context. In conclusion, the chapter provides a detailed and comprehensive overview of the study's key findings, analysing their implications and making recommendations.

### **4.2 Reflection on the purpose of the study: research questions and the hypothesis**

This study aimed to scrutinize the legal and constitutional underpinnings of vaccine mandates in South Africa, focusing on their alignment with the rights enshrined in the South African Constitution. These fundamental rights encompass bodily integrity, equality, and access to healthcare. The study delves into pertinent legal frameworks, such as the National Health Act and the Occupational Health and Safety Act, along with applicable legislation, case law, and judicial precedents. Additionally, it explores the policy and practical ramifications of vaccine mandates, evaluating potential impacts on public health, individual autonomy, and privacy. Ultimately, the study aspires to furnish policymakers and stakeholders with informed insights and recommendations, facilitating decisions regarding the legality and viability of implementing vaccine mandates in South Africa.

The emergence of the COVID-19 pandemic has sparked a legal and societal discourse in South Africa regarding the constitutionality of vaccine mandates. While such

mandates have been adopted globally, South Africa has hesitantly enacted legislation aligning with constitutional requirements. Concerns arise that existing legal frameworks may not be in harmony with the country's constitutional principles.

The debate over vaccine mandates in South Africa involves a nuanced balance between individual rights and public health imperatives. The Constitution guarantees rights such as bodily integrity, human dignity, and privacy, which must be carefully weighed against the state's obligation to safeguard public health. Implementing vaccine mandates is perceived as a strategy to attain herd immunity and protect vulnerable segments of society. However, any such mandates must adhere to constitutional standards, necessitating justification for their necessity, proportionality, and avoidance of arbitrariness or discrimination. The South African government must meticulously navigate these constitutional requirements and consider factors like vaccine availability, potential impacts on vulnerable populations, and the imperative of fair and transparent implementation. Ultimately, the complexity of the issue demands a thoughtful and constitutionally compliant approach to any vaccine mandate in South Africa.

### 4.3 Key findings of the study

The first key finding of the study is that vaccine mandates are not as of yet compliant with the Constitution as they may violate the right to bodily integrity and that of religion and conscience. The legal framework for bodily integrity is anchored in section 12(2) of the constitution and serves as a cornerstone for patient autonomy and the freedom to refuse treatment. Legal cases, such as *Stransham-Ford v Minister of Justice and Correctional Services*<sup>238</sup> and *Castell v De Greef*,<sup>239</sup> have shown the significance of respecting patients' rights, particularly the right to refuse treatment. The centrality of the right to bodily integrity in a health-related context is evident, cautioning against lightly disregarding this fundamental right. However, there have been cases where the right to bodily integrity has been limited, such as *Minister of Health v Goliath*,<sup>240</sup> which

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<sup>238</sup> *Stransham-Ford v Minister of Justice and Correctional Services* 2015 (4) SA 50 (GP).

<sup>239</sup> *Castell v De Greef* 1993 (3) SA 501 (C).

<sup>240</sup> *Minister of Health of the Province of the Western Cape v Goliath and others* 2009 (2) SA 248 (C).

has shown that the court's consideration of factors such as the duty to prevent and control the spread of communicable diseases, balancing public health needs against individual rights. However, the finding made in this study was that in the current constitutional status quo, vaccine mandates do not comply with the constitution due to the violation they may impose on other constitutional guaranteed rights, and research has suggested a case by-by-case approach as emphasised in the *S v Zuma*<sup>241</sup> to determine the constitutionality of limitations.

The second key finding made in this study is that if vaccine mandates were to be implemented, they would violate the right to bodily integrity enshrined in section 12(2) and the constitutionally guaranteed right of freedom of conscience, religion, thought, belief, and opinion, as per Chapter 2, Section 15. There may be some other constitutional rights that vaccine mandates may violate, but the study focused on the stipulated two of which vaccine mandates would violate if they were to be implemented.

The third and final key finding made in the study is that without a law of general application specifically for vaccine mandates, they may not be saved by section 36 of the constitution. This was visible in the case of *Minister of Health v Goliath*,<sup>242</sup> a case that was of great relevance to the study in which the Minister employed or implemented The National Health Act, specifically, section 7(1)(d),<sup>243</sup> which allows for treatment without patient consent in cases where failure to treat poses a severe public health or safety risk. The use of this legislation instead of section 36 informs us that without a law of general application, vaccine mandates will not be saved by section 36 of the constitution.

#### **4.4 Recommendations**

Based on the findings of the research on the constitutionality of vaccine mandates in South Africa, several recommendations emerge. Firstly, there is a pressing need for the South African government to enact clear and comprehensive legislation explicitly

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<sup>241</sup> *S v Zuma and others* 1995(1) SACR 568.

<sup>242</sup> The National Health Act 16 of 2003.

<sup>243</sup> *Ibid.*

addressing vaccine mandates. Such legislation should delineate transparent conditions for imposing mandates, ensuring justifiability, proportionality, and temporariness. Prioritising alternative measures, such as vaccine incentives, public education, and awareness campaigns, is recommended before considering mandatory vaccination. This approach aligns with the nuanced perspective required by South Africa's Constitution, which prioritises individual autonomy and rights, especially for vulnerable populations.

Additionally, the dynamic nature of public health threats requires continuous evaluation and adaptation of strategies. Governments should proactively assess evolving evidence and circumstances to ensure that measures are proportionate and evidence-based. A comprehensive review of existing laws is recommended to address the absence of a law of general application limiting rights through vaccine mandates, ensuring compatibility with constitutional principles, including the right to bodily integrity. Implementing vaccine mandates necessitates rigorous human rights oversight and inclusive discussions. Societies must engage in thoughtful and inclusive dialogues that respect diverse perspectives while striving to find common ground in the interest of public health and individual freedoms.

Furthermore, considering the potential limitations on rights, particularly the right to bodily integrity, it is recommended to explore legislative measures that can temporarily limit these rights during pandemics. Such legislation should be carefully crafted, respecting the principles of necessity, proportionality, and legitimacy. These recommendations aim to provide a balanced approach, upholding constitutional principles while safeguarding public health in the context of vaccine mandates.

## **4.6 Conclusion**

In conclusion, exploring the constitutional landscape surrounding vaccine mandates in South Africa illuminates the intricate dynamics between individual rights and public health imperatives. The central argument emerges in favour of the constitutionality of vaccine mandates. An analysis of legal and legislative frameworks supports the contention that these mandates do not necessarily contravene the Constitution. The right to bodily integrity, enshrined in the 1996 Constitution, is a testament to the

commitment to individual autonomy and safety. From reproductive rights to the freedom of conscience and informed consent, the constitutional guarantees weave a tapestry of rights that necessitate delicate balances. The cases analysed underscore the significance of respecting these rights, with section 36 providing the necessary flexibility to limit rights under specific circumstances.<sup>244</sup>

The absence of specific rulings on mandatory vaccinations leaves room for future legal analyses, emphasising a case-by-case approach. The intersection of religious and conscientious objections with vaccine mandates adds complexity, urging a delicate balance between individual liberties and collective well-being. The contentious nature of COVID-19 vaccine mandates, rooted in historical conflicts around infectious diseases, further highlights the nuanced considerations required. As the country grapples with the multifaceted dimensions of this debate, it is important to adopt a balanced and nuanced approach. The call for clear and comprehensive legislation, prioritising alternative measures, continuous evaluation of strategies, and exploring legislative measures during pandemics reflects a commitment to upholding constitutional principles while safeguarding public health. The ongoing dialogue, inclusive discussions, and human rights oversight underscore the necessity for a dynamic and adaptive approach to navigate the evolving landscape of vaccine mandates. Finding common ground becomes imperative in this complex interplay of human rights, religion, bodily integrity, and public health. The South African government, stakeholders, and society are urged to engage in thoughtful and inclusive dialogues, respecting diverse perspectives to strike a balance that respects human rights, upholds constitutional principles, and safeguards public health during these challenging times.

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<sup>244</sup> *Minister of Safety and Security and Another v Gaqa* 2002 (1) SACR 653 (C).

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