

# MANDATORY COVID-19 VACCINATION: PRIVACY, HEALTH, AND INTERPRETATIONAL BALANCE

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## ABSTRACT

*With the incidence of vaccines that help humanity fight off the Coronavirus, the issue of compulsory vaccination has re-entered the public discourse. To ward off vaccine hesitancy or to restrict the falling vaccination rates, States may resort to mandatory vaccination that forces citizens to take the vaccine. Such a move may have a profound impact on an individual's right to privacy. This paper looks into the various means by which such governmental measures affect the right to privacy, specifically focusing on bodily autonomy and personal medical information. It aims to elucidate the constitutional contours of one's privacy and identifies points of conflict with other rights such as the right to health. Taking inspiration from judicial precedents and international legal frameworks such as the United States and the European Union, the paper attempts to determine the constitutional validity of compulsory vaccination. In doing so, the paper scrutinizes various landmark judgments concerning privacy, proportionality, and those that address the juxtaposition of the right to privacy and the right to health. In this respect, the three recent High Court decisions that have addressed notions of compulsory vaccination, provide key insight into the potential constitutional repercussions of such mandates. The paper further peruses the existing legal regime to put forward a possible constitutional case in favor of compulsory vaccination measures or vaccine mandates. This has then been contrasted with certain interpretational concerns and legal conundrums resulting from discussions surrounding fundamental rights and mandatory vaccination. In this manner, the validity of a potential vaccine mandate is elaborated upon, and its numerous constitutional outgrowths are deliberated.*

**Keywords:** Health, Pandemic, Privacy, Proportionality, Vaccine Mandates.

## INTRODUCTION

The COVID-19 pandemic has been one of the most significant occurrences of the 21<sup>st</sup> century, which is responsible for one of the greatest upheavals of our generation's livelihood. It continues to dominate public discourse and is increasingly becoming a yardstick for judging various governments. To prevent the transmission of the virus, various governments and States have implemented lockdowns and other forms of physical restrictions.<sup>1</sup> Furthermore, with the development of vaccines that afford a certain level of protection against the virus, a majority of the States have actively urged their citizens to take the requisite doses of the available vaccines. However, in the face of this, there is increasing discussion on whether such vaccination should be

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1 Prabhash Ranjan, 'COVID-19, India and Indirect Expropriation: Is the Police Powers Doctrine a Reliable Defence?' (2020) 13 Contemp Asia Arb J 205, 205.

made voluntary or mandatory.<sup>2</sup>

In this respect, it is important to understand what exactly constitutes mandatory vaccination. While vaccination itself may be a voluntary process, when laws require such vaccination to be done and attempt to deter defaulters through penalties, punishment, or force, then such policy of vaccination would be deemed to be compulsory vaccination or a vaccine mandate.<sup>3</sup> These vaccine mandates generally include exemptions on religious and medical grounds.<sup>4</sup> The medical exemptions are largely given as a result of contra indicators such as allergies or a weakened immune system.<sup>5</sup>

In India, the Central government continues to hold that vaccination is not mandatory and is purely voluntary.<sup>6</sup> Furthermore, the Indian judiciary has also weighed in on this debate, with the Meghalaya High Court holding that compulsory vaccination could not be said to be permissible under the Indian constitutional framework.<sup>7</sup> However, in various other countries, certain portions of the populace are mandatorily required to be vaccinated. Countries such as France, Italy, Greece, and many others require health workers to be compulsorily vaccinated.<sup>8</sup> Furthermore, measures have also been taken to ensure that those who attend certain social venues such as shopping malls and movie theatres, etc. are also required to be vaccinated.<sup>9</sup> Such moves, especially in France, have led to mass protests.<sup>10</sup>

Controversy and debate surrounding compulsory vaccination is not a new phenomenon, with resistance to such moves stretching back to the 19th and 20th centuries.<sup>11</sup> Therefore, it is hardly surprising when the same occurs in today's modern

2 Gatha and Tanvi Singh, 'Vaccines Should be Accessible but Not Mandatory' *The Indian Express* (May 7 2021) <<https://indianexpress.com/article/opinion/columns/vaccines-should-be-accessible-but-not-mandatory-7306250>> accessed 28 September 2021; Lee Berthiaume, 'Canadians Divided Over Making COVID-19 Vaccine Mandatory' *National Observer* (28 April 2020) <<http://nationalobserver.com/2020/04/28/news/canadians-divided-over-making-covid-19-vaccine-mandatory>> accessed 28 September 2021.

3 Emma Cave, 'Voluntary Vaccination: The Pandemic Effect' (2017) 37 LS 279, 285.

4 Kyla L Kelch, 'Privacy Implications of Mandatory Immunizations, Exceptions, and Immunization of Information Systems' (2008) 4 ISJLP 851, 862-863.

5 *ibid* 863-864.

6 Sushmi Dey, 'Covid Vaccination is Voluntary, Says Government' *The Times of India* (New Delhi, 19 December 2020) <<https://timesofindia.indiatimes.com/india/covid-vaccination-is-voluntary-says-government/articleshow/79806586.cms>> accessed 28 September 2021.

7 *Registrar General v State of Meghalaya* AIR 2021 Megh 40.

8 Eric Cunningham and Rick Noack, 'France and Greece Mandate Vaccinations for Health Workers Amid Delta Variant Surge' *The Washington Post* (13 July 2021) <<https://washingtonpost.com/world/2021/07/13/coronavirus-latest-updates/>> accessed 28 September 2021.

9 *ibid*.

10 Aurelien Breeden, 'Demonstrations Against France's Vaccine Pass Surge for a Third Weekend, Even as Cases Rise.' *The New York Times* (Paris, 31 July 2021) <<https://nytimes.com/2021/07/31/world/europe/france-covid-pass-protest.html>> accessed 28 September 2021.

11 Edward P Richards, 'A Historical Review of the State Police Powers and Their Relevance to the COVID-19 Pandemic of 2020' (2020) 11 *Journal of National Security Law & Policy* 83, 96-97.

world. This paper hence, examines the potential validity of compulsory vaccination in light of the right to privacy enshrined under Article 21 of the Constitution of India. Part II of the paper highlights the extent of the right to privacy and juxtaposes the parallel right of the right to health conferred under the same provision. In an attempt to understand the effect of such juxtaposition, the part also analyses the landmark judgment of *Mr. X v. Hospital Z*. Part III studies the dynamics of privacy and compulsory vaccination in international jurisdictions such as the United States of America and the European Union. Part IV then evaluates a constitutional case for such imposition of compulsory vaccination, specifically addressing concerns of proportionality and religion. Part V highlights certain constitutional concerns arising from the previous Part and appraises such concerns in the light of the Aadhaar judgment and other precedents addressing the interpretation of conflicts of rights. The paper finally concludes by summarising the various dimensions of the debate involving compulsory vaccinations and civilizational principles involving the individual and the State.

#### HEALTH AND THE RIGHT TO PRIVACY

Privacy, simply put is an individual's requisite space that allows such individuals to constantly improve and develop themselves.<sup>12</sup> The term 'right to privacy' generally denotes the "right to let alone"<sup>13</sup>. Therefore, how this notion plays out vis-à-vis the State in the Indian constitutional context warrants to a certain degree, elaboration and discussion.

#### THE CONTOURS OF THE RIGHT TO PRIVACY

In India, the right to privacy was established to be a part of the rights conferred under Article 21 of the Constitution of India, which ensures that the State cannot arbitrarily deprive any person of their right to life.<sup>14</sup> Justice Chandrachud in the *Justice K.S. Puttaswamy*'s judgment opined that the right to privacy not only imposed negative obligations on the State, restrain its ability to intrude upon an individual's private space but also dictated to the State, the duty to protect the privacy of individuals by taking the necessary measures.<sup>15</sup> He also highlighted the specific extent of the right to privacy which extended to three measures- spatial management which dictated the independence to create one's own space, decisional independence which empowers individuals with the ability to make personal choices, and personal data protection.<sup>16</sup> Therefore, any move of compulsory vaccination would impact two facets of the right to privacy. First, it would be the aspect of privacy that allows decisional independence, especially when it comes to refusing the medical treatment that might

12 Julie E Cohen, 'What Privacy is For' (2013) 126 Harv L Rev 1904, 1906.

13 Samuel D Warren and Louis D Brandeis, 'Right to Privacy' (1890-1891) 4 Harv L Rev 193, 193.

14 *Justice KS Puttaswamy v Union of India* (2017) 10 SCC 1.

15 *ibid* 326.

16 *ibid* 248.

even prolong their life.<sup>17</sup> Second, every vaccination campaign requires that there shall be a certain level of data collection, thereby raising the relevance of personal data protection.<sup>18</sup> In this respect, the reasonable expectation of privacy, which is the standard that is applied to the right to privacy, also extends to an individual's medical information.<sup>19</sup> Thereby, implying not only that forceful collection of such data would hinder an individual's privacy, but also that the data collection also needs to take place in a manner that respects the privacy of the people whose data is being collected.

However, as is the case with every other right conferred, the right to privacy is not absolute and is subject to certain forms of restrictions. The right to privacy as per the *Puttaswamy* judgment is subject to State action, provided that such action satisfies a three-fold requirement. That requires the State action to be under the existence of a law, to have a legitimate State aim, and to fulfil the principle of proportionality that requires a rational nexus between the object and the means of attempting to achieve them.<sup>20</sup> Concerning the COVID pandemic, it would seem that two competing fundamental rights emanate from the singular source of Article 21. All governmental action under the ambit of COVID vaccination is done under the umbrella of the right to health which is enshrined under Article 21, and therefore shall be regulated by the same.<sup>21</sup> It is no doubt that the right to health is an integral facet of Article 21<sup>22</sup>, and that under the same provision, the State is under an obligation to maintain and develop the state of public health and infrastructure in the country.<sup>23</sup> Therefore, it would seem that the prevention of the spread of COVID through mass vaccination campaigns would indeed be a legitimate State aim. Furthermore, since there exists a right to health, there also exists a right to vaccination.<sup>24</sup> Hence, the potential conflict of rights that arises with the introduction of vaccine-related regulations or restrictions, warrants reflection.

#### LESSONS LEARNT FROM MR. 'X' V. HOSPITAL 'Z'

Any discussion on the conflict between the right to health and the right to privacy would be remiss in excluding from its ambit, the infamous Supreme Court judgment delivered in *Mr. 'X' v. Hospital 'Z'*<sup>25</sup>. The facts of the case were that the Appellant was set to be married to a woman. However, the marriage was subsequently called off

17 *ibid* 373.

18 Anja Krasser, 'Compulsory Vaccination in a Fundamental Rights Perspective: Lessons From The ECtHR' (2021) 15 *Vienna J on Int'l Const L* 207, 217.

19 *Puttaswamy* (n 254) 307.

20 *ibid* 325.

21 *In re Distribution of Essential Supplies and Services During Pandemic* [2021] SCC OnLine SC 339.

22 *Consumer Education and Research Centre v Union of India* AIR [1995] SC 922; *Mr X v Hospital Z* [1998] 8 SCC 296.

23 *Vincent Panikurlangara v Union of India* [1987] 2 SCC 165.

24 *Registrar General* (n 247).

25 *Mr X* (n 262).

since the Appellant's blood had tested positive for HIV. It had appeared that the hospital in which he had gotten tested had divulged the result of the test to the fiancée, thereby leading to the calling off of the marriage. The Appellant then sued the hospital, claiming that they had violated the Appellant's right to privacy and the duty of confidentiality imposed upon the doctors. The issue before the Court, therefore, was whether the Appellant did indeed enjoy the right to privacy, thereby meaning that the Hospital had breached its obligation of confidentiality, or whether the to-be spouse had a right to know regarding the condition of her husband. The Court examined various rules regarding the requisite standard of behaviour from medical professionals, the existing legal framework on the right to privacy, and also looked at the right of the fiancée to know about the condition under the ambit of Article 21 which empowered her with the right to lead a healthy life. The Court sided with the hospital. The Court opined that when there is a clash of fundamental rights afforded under the similar ambit of Article 21, the right which would further the public good and morality would be the one that would be protected. In this case, the Court held that since the right of the fiancée to lead a healthy life, and thereby to know about her to-be spouse's condition had greater significance to the public and since HIV was a terrible disease, the patient's right to privacy could not be said to be superior to the former. In examining the Code of Medical Ethics, the Court concluded that the duty of confidentiality could be waived in the public interest, thereby further cementing the inferior role played by the right to privacy. The Apex Court also went on to hold that when a person is suffering from a venereal disease, such a person's right to marry could not be enforced and therefore would be deemed to be a suspended right. This specific observation of the Court was however subsequently overruled, while the portion of the decision concerning the rights of the fiancée and the duties of medical professionals was upheld.<sup>26</sup>

While there was mounting criticism of the judgment concerning the court's views on the right of HIV patients to marry, the portion of the judgment that is significant for current considerations is that which analyses the conflict between the two rights conferred under Article 21. The Court stated that in the event of such conflict, the right which would further the public interest and public morality would be the one that would be enforced. Over the years, the Court has continued to consider societal interest to be of paramount importance when there is intra-conflict of fundamental rights. For instance, while upholding the dictum of the Apex Court in the *Mr. X* case, the Supreme Court has held that when there is such conflict of fundamental rights, the judiciary must attempt to find a balance between the two rights, while testing the same on the anvil of legitimate societal and collective interest.<sup>27</sup>

In this respect, considerations of health have always played a central role in

<sup>26</sup> *Mr. X v Hospital Z* [2003] 1 SCC 500.

<sup>27</sup> *Asha Ranjan v State of Bihar* [2017] 4 SCC 397.

determining such public or societal interest. Whether it be an analysis of Article 21 (individual right to health,<sup>28</sup> maintenance of public health,<sup>29</sup> duty to provide medical aid<sup>30</sup>) or the “*interest of the general public*” under Article 19(6) (health of laborers,<sup>31</sup> protecting public health<sup>32</sup>), societal interest in health has largely been an overriding consideration when it comes to fundamental rights. The question, of course, is not whether societal interest exists but it is regarding the role of such interest in the resultant balancing of rights. In the course of this balancing act, the court cannot be permitted to extinguish either right and must endeavour to strike a balance that protects the right which furthers the community interest, all the while still safeguarding the less preferred right. Therefore, the same principles would be similarly applicable to the current situation under examination.

### **RIGHT TO HEALTH AND RIGHT TO PRIVACY: AN INTERNATIONAL PERSPECTIVE**

While vaccines have not yet been an extremely contentious topic of debate in India, the same cannot be said for other jurisdictions across the world. Historically, vaccine mandates have not always been received with praise and support. This section looks at two specific jurisdictions viz. the United States of America and the European Union, whose past confrontations with vaccine mandates may perhaps continue to give fruitful guidance.

#### **THE UNITED STATES OF AMERICA**

The United States is no stranger to policy measures that require mandatory vaccinations or other restrictions furthering public health concerns. In 1905, a city in the state of Massachusetts mandated compulsory smallpox vaccination and passed an Ordinance to effectuate the same.<sup>33</sup> Fast forward to 2012, and in the face of the H1N1 outbreak, many hospitals required unvaccinated employees to wear a facemask.<sup>34</sup> Such measures generally allow for exemption from the requirement to be vaccinated, on medical or religious grounds.<sup>35</sup> The argument defending the right to privacy does not necessarily concern itself with mandatory vaccination but finds itself opposing facemask requirements for the unvaccinated as such norms lead to personal information such as a person’s vaccination status to be discerned by the public.<sup>36</sup> With respect to mandatory vaccination, the law on the matter is clear.

28 Consumer Education & Research Centre v Union of India [1995] 3 SCC 42.

29 Vincent (n 263).

30 Paschim Banga Khet Mazdoor Samity v State of West Bengal [1996] 4 SCC 37.

31 Bijay Cotton Mills Ltd v State of Ajmer [1955] 1 SCR 752.

32 State of Maharashtra v Himmatbhai Narbheram Rao [1969] 2 SCR 392.

33 Jacobson v Massachusetts 197 US 11 (1905).

34 Janet S Kim, ‘Masking Your Rights: Facemask Requirements under Mandatory Influenza-Vaccination Policies Violate Privacy Rights of Health Care Workers’ (2016) 53 San Diego L Rev 427, 428-430.

35 Kelch (n 244).

36 Kim (n 274) 445-446.

37 Jacobson (n 273); Emp’t Division, Department of Human Resources of Oregon v Smith 494 US 872, 901 (1990).

Mandatory vaccination policies have generally been received in a positive light by the American judicial system, and have been held on multiple occasions, to be entirely constitutional.<sup>37</sup>

When, as previously mentioned, an Ordinance mandating smallpox vaccination was passed, a defaulter under the same law was fined five dollars.<sup>38</sup> When the case eventually reached the Supreme Court, the Court held in favour of the law, opining that the State's police power would include any reasonable regulations that safeguard public health and safety, provided the same is directly authorised by legislation.<sup>39</sup> The rationale behind this ruling was that of self-defence. The community at large, the Court found, had a right to protect itself against the dangers of the epidemic.<sup>40</sup> In the Court's opinion, if individuals were allowed to be free regardless of the damage they could inflict upon the others in society, then such freedom would invariably result in anarchy.<sup>41</sup> A crucial factor in the resultant validity of the mandate was that the implementation of the mandate would depend on the opinion of the local Board of Health, whose members consisted of residents of that locality.<sup>42</sup>

This judgment continues to be good law as on future occasions the judiciary has affirmed the doctrine espoused in *Jacobson*.<sup>43</sup> In *Employment Division*<sup>44</sup>, the Court was faced with a situation involving a restriction on the consumption of sacramental peyote (a hallucinogen), under laws regulating drugs.<sup>45</sup> The Court found that religious objections could not be given constitutional credence when the restriction was imposed through a neutral and generally applicable law. The judgment also echoed a similar sentiment as that of *Jacobson* in opining that allowing individuals to excuse their actions under the garb of religion would essentially permit citizens to become a law unto themselves.<sup>46</sup> Therefore, unlike the High Court of Meghalaya judgment, the legal position in the United States concerning mandatory vaccinations is settled on the premise that when faced with dangers that affect public health and societal welfare, the individual liberties of a citizen must take a back seat.<sup>47</sup>

### THE EUROPEAN UNION

The right to privacy in the European context arises from two possible sources. Firstly, Article 8(1) of the European Convention on Human Rights (hereinafter 'EU

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38 *ibid.*

39 *ibid.* 25.

40 *ibid.* 27.

41 *ibid.* 26.

42 *ibid.* 27.

43 Lawrence O Gostin, *Public Health Law: Power, Duty, Restraint* (2nd edn, University of California Press 2008) 130; *Zucht v King* 260 US 174 (1922).

44 *Department of Human Resources of Oregon* (n 277).

45 *ibid.*

46 *ibid.*; *Reynolds v United States* 98 US 145 (1879).

47 *Kim* (n 274) 440.

Convention') empowers the individual to have his private life and family life respected which in turn largely entails a restriction on State interference in personal decisions.<sup>48</sup> Secondly, a right to privacy is also discerned from Article 8 of the Charter of Fundamental Rights of the European Union (hereinafter 'EU Charter') which provides for the protection of personal data as a matter of right.<sup>49</sup> While the latter gains significance with respect to data collection and processing through vaccination campaigns, the former is relevant to the abstraction of the right to privacy implicitly held by individuals. Regarding Article 8 of the EU Charter, the problem with mandatory vaccination is that there is coercive collection of personal data that is generally needed to be collected for better efficacy of the policy, and for better awareness as to the percentage of the populace that has been vaccinated.<sup>50</sup> However, given that there exist reasonably adequate institutional safeguards in the form of the General Data Protection Regulation,<sup>51</sup> such concerns are largely academic when faced with the task of balancing competing interests.

It is important to note, however, that the right provided for under Article 8 of the EU Convention is not absolute. Article 8(2) provides for certain valid grounds upon which there can be justified interference with the right conferred under Article 8(1), thereby providing a balance between private and public interests.<sup>52</sup> Since the grounds that are explicitly provided for under the clause include public safety and protection of health, it is not up for significant debate that a mandatory vaccination policy would interfere with the right conferred under Article 8(1).<sup>53</sup> The issue would be whether the same could be justified under the succeeding provision.

The European Court of Human Rights was faced with a circumstance of compulsory vaccination when a case came before it regarding compulsory vaccinations to ward off cases of diphtheria.<sup>54</sup> The Court as expected agreed that the same measure by the government would amount to interference with the Article 8 right. However, the same would be justified given that it had been done under law and had a legitimate state aim. The same court was recently confronted with a situation wherein the government of the Czech Republic had imposed a statutory duty on parents to get their children vaccinated with the requisite set of vaccines.<sup>55</sup>

48 Krasser (n 258) 209-210.

49 Charter of The Fundamental Rights of the European Union [2012] OJ C326/391.

50 Krasser (n 258).

51 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons With Regard to The Processing of Personal Data and on The Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1.

52 Nick Maciolek, 'Defining Privacy and the European Court of Human Rights: Assessing the Court's Application of Article 8(1) ECHR' (2009) 15 UCL Jurisprudence Rev 94, 97.

53 *Acmanne v Belgium* App No 10435/83; *YF v Turkey* App No 24209/94 (EtCHR, 22 July 2003).

54 *Solomakhin v Ukraine* App No 24429/03 (EtCHR, 15 March 2012).

55 *Vavříčka v Czech Republic* App No 47621/13 (ECtHR, 8 April 2021).

The Court held that the measures adopted by the Czech Republic did not violate Article 8, as the measures remained within the “wide margin of appreciation”<sup>56</sup> that is afforded to States when it comes to policies of vaccination. What is of crucial consideration in *Vavříčková* is the proportionality analysis done by the Court in determining the validity of the imposition. The Court in such analysis, decided to disregard the possibility of a less restrictive measure and solely focused on the balancing of the concerned rights.<sup>57</sup> Although the case has been made that relying on the former standard of proportionality does not preclude the validity of compulsory vaccination based on a purposive reading of vaccination,<sup>58</sup> the following of this paper looks to a harmonious interpretation of the interests at play to best fulfil all standards of the test of proportionality.

### THE CASE FOR MANDATORY COVID-19 VACCINATION

Given the legal background already enumerated, the possible case for mandatory vaccination in India becomes patently clear. However, it is important to draw out the various dimensions of such a policy, and its possible impacts. Therefore, while this part would shore up the case for the government, the next part would proceed to find points of vulnerability and concern in the government’s theoretical and constitutional arsenal.

### PRELIMINARY REMARKS: THE ‘ROOTS’ OF POLICE POWER

With the incidence of the COVID pandemic, the Indian government has taken various measures to curb the spread of the virus. These measures include lockdowns and restrictions such as quarantines,<sup>59</sup> and with development of the vaccine against the Coronavirus, would also include vaccination measures. While there seem to be no signs of vaccine mandates being imposed in India, the issue has been one that has created considerable debate and discussion. Furthermore, there have been some instances of local governments punishing communities that have reservations regarding vaccinations and those that have refused to take them. One such instance was when the electricity supply to a village in Uttar Pradesh was cut off due to a significant portion of their populace refusing to take the vaccine.<sup>60</sup> Furthermore, vaccination has been made a service condition for employees of the Indian Air Force to

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56 *ibid* 310.

57 *ibid*.

58 Anna Nilsson, ‘Is Compulsory Childhood Vaccination Compatible with the Right to Respect of Private Life? A Comment on *Vavříčková and Others v. the Czech Republic*’ (2021) 28 *Eur J Health L* 323, 332-334.

59 Harish Verma, ‘Lockdown and Quarantine during Coronavirus Pandemic in India: Untangling a Tangle of Socio-Economic and Legal Concerns’ (2020) 11 *Indian J L & Just* 46, 48.

60 Piyush Srivastava, ‘Uttar Pradesh: Village Refuses Covid Vaccine, Power Supply Goes Off’ *The Telegraph India* (Lucknow, 05 June 2021) <<https://www.telegraphindia.com/india/coronavirus-outbreak-village-in-kannauj-refuses-vaccine-power-supply-goes-off/cid/1817818>> accessed 29 September 2021.

adhere to.<sup>61</sup> While the necessity of the provision of such powers is not a question that is up for debate, the constitutional and legal roots from which such police power arises are worthy of consideration.

To begin with, the imposition of the lockdown was done under the provisions of the Disaster Management Act, 2005.<sup>62</sup> Section 6 of the said Act empowers the National Disaster Management Authority to take numerous measures to manage disasters including those which are necessary to prevent or mitigate disasters.<sup>63</sup> Since there are no specific phrases that define what are the specific measures that the State is permitted to take to manage disasters, the justifications that apply for lockdowns and other measures, would equally apply for any future mandate of COVID vaccination. Coming back to the imposition of lockdowns, lockdowns fundamentally restrict an individual's freedom of movement, since they aim at curbing most forms of public movement.<sup>64</sup> Such impositions, therefore, draw the ire of Article 19(1) which guarantees various freedoms including that of the freedom to move freely throughout India's territory,<sup>65</sup> and freedom of trade.<sup>66</sup> Nevertheless, such freedoms are subject to reasonable restrictions provided in subsequent provisions of Article 19. One of the primary grounds on which restrictions can be imposed is that of the interest of the general public.<sup>67</sup> Health falls under such justification for imposing restrictions.<sup>68</sup>

### **THE CONSTITUTIONAL 'CANOPY': PRIVACY, PROPORTIONALITY, RELIGION**

It is now necessary to specifically address the constitutional concerns surrounding COVID-19 vaccinations. Mandates of vaccination in general, tend to violate an individual's right to privacy, as it forces individuals to undergo medical procedures without their consent. But internationally, such moves have been largely upheld by quoting legitimate State interests such as health, as a justifiable ground. The same is the case in India, with the *Puttaswamy* judgment adopting a similar approach with respect to the general ambit of restrictions on the right to privacy. Furthermore, one's right to privacy is subservient to another's right to lead a healthy life.<sup>69</sup> Even by the standard laid down in the *Puttaswamy* judgment, the three-fold requirement is also

61 Press Trust of India, 'IAF Sacks Staffer for Refusing to get Vaccinated Against COVID-19' *The Hindu* (12 August 2021) <<https://thehindu.com/news/national/other-states/iaf-sacks-staffer-for-refusing-to-get-vaccinated-against-covid-19/article35870974.ece>> accessed 29 September 2021.

62 Verma (n 299) 60.

63 The Disaster Management Act 2005.

64 Verma (n 299).

65 The Constitution of India 1950, art 19(1)(d).

66 The Constitution of India 1950, art 19(1)(g).

67 The Constitution of India 1950, arts 19(5) and 19(6).

68 *Municipal Corporation of the City of Ahmedabad v Jan Mohammed Usmanbhai* [1986] 3 SCC 20.

69 *Mr X* (n 262).

largely met. The lockdown in India was imposed under Section 6(2)(i) of the Disaster Management Act, 2005.<sup>70</sup> Measures imposing compulsory vaccination would also have similar origins, given that the provision affords to the Central Government, the power to take any other measure for the prevention of disaster.<sup>71</sup> Such measures are taken to further legitimize the State's aim of ensuring the improvement of public health.<sup>72</sup>

The discussion then must come around to the third requirement of proportionality. A measure of the State is said to be proportional if it satisfies four conditions viz. the existence of a legitimate goal, the adoption of suitable means for the furtherance of such goal, the absence of an equally effective and less restrictive substitute, and finally, the absence of a disproportionate impact on those whose rights are being impacted.<sup>73</sup> Once again, the legitimacy of the goal is not in doubt. The next prong of the analysis entails analysing whether vaccination mandates constitute a suitable means for furthering the goal espoused. The adoption of compulsory vaccination as a means to maximise the vaccination within populaces is generally deemed to be a suitable means to prevent the spread of disease.<sup>74</sup> The Supreme Court of India has also recognised the suitability of vaccination as a means of curbing the spread of COVID-19.<sup>75</sup> Therefore, it cannot be the case that a move to make vaccination compulsory would be inconsistent with the second prong of the test of proportionality. The availability of an equally effective alternative would be determined by the times in which the vaccine mandate has been imposed. Historically, compulsory vaccination measures are taken in response to falling vaccination rates as evidenced by the mandates being enforced after falling smallpox vaccination rates in England and Wales.<sup>76</sup> If such an eventuality arose, then the circumstances themselves would answer the question regarding the lack of an effective alternative. The final requirement of the test laid down by the Apex Court of India, endeavours to look at those who are affected by the State's action, and constitutes the most important aspect of the test of proportionality.<sup>77</sup> When one examines the nature of the restrictions, one must examine them from an objective standpoint i.e., from the point of view of the general public, and in the interest of the general public.<sup>78</sup> While it is indeed the case that the right of privacy of the individual would be violated to the extent of his freedom of choice, his right to lead a healthy life is further improved. It would seem that COVID vaccination reduces the probability

70 National Disaster Management Authority Order 2020, No 1-29/2020-PP (Pt II).

71 The Disaster Management Act 2005.

72 *Vincent* (n 263).

73 *Puttaswamy* (n 254).

74 *Vavříčková* (n 295).

75 *In re Distribution of Essential Supplies and Services During Pandemic* 2021 SCC OnLine SC 355.

76 *Cave* (n 243).

77 *Puttaswamy* (n 254).

78 *Subramanian Swamy v Union of India* (2016) 7 SCC 221.

of hospitalisation,<sup>79</sup> thereby improving access to health services to those more vulnerable. Moreover, when there is such a clash of fundamental rights, the right that furthers the interests of the general public must be the one that is enforced.<sup>80</sup> Therefore, it is entirely possible for vaccine mandates to withstand judicial scrutiny in India, much like it has throughout history in various other jurisdictions.

Any discussion on vaccination and choice would be remiss in excluding the impact that religion has had on the same. In the United States, various states have allowed exemption from mandatory vaccination on religious grounds.<sup>81</sup> However, it is not the case that mandatory vaccination without any explicit exemption on religious grounds would be deemed to be invalid.<sup>82</sup> Furthermore, the courts have even gone to the extent of striking down religious exemptions to mandatory vaccination laws.<sup>83</sup> As far as the European Union is concerned, there is neither any explicit recognition of an exemption nor is there the prohibition of religion as a ground for exemption. But the overarching attitude of the European Commission of Human Rights, which has since been echoed by the European Court of Human Rights,<sup>84</sup> has been that vaccinations do not interfere with the right of an individual to practice their religion, since the protection does not extend to every act that has a religious motivation.<sup>85</sup> Similarly, in India, the right to practice religion has been explicitly held to be inferior and amenable to the rights conferred under Article 21, especially those concerning health.<sup>86</sup> Not to mention the fact that the right to practice religion under Article 25, is in itself subject to restrictions imposed on certain grounds including public order and health.<sup>87</sup>

#### **'WEEDS' OF CONFLICT: INTERPRETATIONAL BALANCE AND THE AADHAAR PRECEDENT**

Although it is possible for the vaccine mandates to pass the constitutionality test, there are, however, lingering concerns that might hinder such attempts of the State. These concerns are perhaps why there has been relatively substantial oscillation from the Indian judiciary regarding the potential validity of compulsory COVID vaccination. While on one end of the interpretational spectrum, it is viewed that

79 Bibhudatta Pradhan, 'Vaccinations Reduce Chance of Covid Death in India to 0.4%' *Bloomberg* (16 July 2021) <<https://www.bloomberg.com/news/articles/2021-07-16/about-0-4-died-of-covid-19-after-vaccination-in-delta-hit-india>> accessed 29 September 2021.

80 *Mr X* (n 317); *Asha Ranjan v State of Bihar* [2017] 4 SCC 397.

81 Jonathan T. Scott, 'The Difficult Road to Compelling Vaccination for Sexually Transmitted Diseases - How Gardasil and Those to Follow Will Change the Way that States Require Inoculation' (2008) 97 *KyLJ* 697, 706.

82 Erwin Chemerinsky and Michele Goodwin, 'Compulsory Vaccination Laws Are Constitutional' (2016) 110 *Nw UL Rev* 589, 607.

83 *ibid* 608.

84 *Vavříčková* (n 295).

85 *Boffa v San Marino* App No 26536/95 27.

86 *Arjun Gopal v Union of India* [2019] 13 SCC 523.

87 The Constitution of India 1950, art 25(1).

coercive measures to impose vaccination would be inconsistent with the philosophy of the Constitution,<sup>88</sup> the other end is hesitant to recognise the potential right to refuse vaccination.<sup>89</sup>

### **'ARBOREAL' AMBIGUITY: INTERPRETING RIGHTS IN CONFLICT**

The juxtaposition of public health and other fundamental rights, including that of liberty, was recently done by the Meghalaya High Court while determining the validity of State action requiring shopkeepers to vaccinate themselves before resuming their trade.<sup>90</sup> It was opined that the right of personal liberty under Article 21 included the right to choose not to get vaccinated, as the same was in the exercise of an individual's autonomy. The judgment further highlights the need for striking a balance between individual rights and societal rights or public interest. The Court held that a "...harmonious and purposive construction of the provisions of law and principles of equity, good conscience and justice reveals that mandatory or forceful vaccination does not find any force in law...", and finally concludes by holding that such a move would be *ultra vires*.

The Court was of course completely correct in noticing that with respect to compulsory vaccination, there is indeed the complete extinguishment of the privacy and liberty of individuals. This holding of the Meghalaya High Court has found an ally in its Guwahati counterpart. The Guwahati High Court echoed such sentiments when it struck down an executive instruction that disallowed unvaccinated individuals from leaving their houses.<sup>91</sup> It based its decision on the notion that both vaccinated and unvaccinated persons could spread the Coronavirus, and hence, only restricting unvaccinated persons would constitute an arbitrary State action. The intended effect of the instruction, it observed, was similar to mandating vaccination.<sup>92</sup> Therefore, it may be necessary for the courts to re-examine the interplay of the right to privacy and the right to health, especially in the environment of a pandemic.

It is not merely the autonomy of an individual that is impacted when it comes to his right to privacy. Informational privacy also becomes highly relevant during the enforcement of a vaccine mandate. While the State can store the information gathered in the process of vaccination, various measures that enforce a vaccine mandate require the vaccination status of an individual to be conveyed to other members of the public. For instance, France requires public spaces such as museums and movie theatres to make vaccination certificates or a negative COVID test a prerequisite for entry.<sup>93</sup> The new Biden policy aims at fighting rising COVID numbers by requiring

88 *Registrar General* (n 247).

89 *M Karpagam v Commissionerate for the Welfare of Differently Abled* 2021 SCC OnLine Mad 2592.

90 *Registrar General* (n 247).

91 *Re Dinthar Incident v State of Mizoram* 2021 SCC OnLineGau 1313.

92 *ibid*.

93 Michele Barbero, 'Macron's Big Vaccine Gamble' (*Foreign Policy*, 27 July 2021) <<https://foreignpolicy.com/2021/07/27/france-macron-covid-vaccination-mandate-gamble/>> accessed 29 September 2021.

employers employing 100 or more workers to mandate negative tests, or mandating vaccination.<sup>94</sup> This, therefore, would allow members of the public, especially those in charge of such venues, to access or ascertain information of a personal medical nature. Privacy with respect to such vaccination partly arises from the ability to consent to the same.<sup>95</sup> This is the ability to consent is curbed by imposing vaccine mandates.

The resultant issue that arises is the extent to which the public can know one's vaccination status, and whether such right would encompass the type of vaccine that was administered. Various vaccines have different efficiencies and some have greater efficiency than others.<sup>96</sup> This, therefore, creates in some sense, a vaccine hierarchy which inevitably leads to discrimination.<sup>97</sup> States that prefer certain vaccines over others have already been witnessed with respect to international travel.<sup>98</sup> Constitutionally, however, *Mr. X* judgment makes it clear that this implicit right to know overrides the right to privacy in light of the pressing social interest. Once again, the dilemma of interpretation and proportionality haunts this discussion. The contours of this domination of one right over the other are not clear in the least. In such a scenario, perhaps it is best not to completely sacrifice the right to privacy at the altar of another fundamental right.

#### **THE AADHAAR DISSENT AND JUDGMENT: APPLICATIONS AND LIMITATIONS**

Another source of challenge to mandatory vaccinations in India can perhaps be derived from the Aadhaar judgment.<sup>99</sup> While the judgment upheld the larger biometric identification scheme of Aadhaar, it struck down the mandatory

94 Kevin Liptak and Caitlan Collins, 'Biden Announces New Vaccine Mandates That Could Cover 100 Million Americans' (*CNN*, 10 September 2021) <<https://edition.cnn.com/2021/09/09/politics/joe-biden-covid-speech/index.html>> accessed 29 September 2021; Maggie Astor, 'Vaccine Mandates Are an American Tradition. So is the Backlash.' *The New York Times* (9 September 2021) <<https://nytimes.com/2021/09/09/us/politics/vaccine-mandates-history.html>> accessed 29 September 2021.

95 Ignacio Cofone, 'Immunity Passports and Contact Tracing Surveillance' (2021) 24 *Stan Tech L Rev* 176, 192.

96 Kathy Katella, 'Comparing the COVID-19 Vaccines: How Are They Different?' (*Yale Medicine*, 24 September 2021) <<https://yalemedicine.org/news/covid-19-vaccine-comparison>> accessed 29 September 2021.

97 A Kayum Ahmed, 'The Human Right to Vaccines: Preventing Discrimination Against the Unvaccinated' (*Health and Human Rights Journal*, 15 February 2021) <[www.hhrjournal.org/2021/02/the-human-right-to-vaccines-preventing-discrimination-against-the-unvaccinated/](http://www.hhrjournal.org/2021/02/the-human-right-to-vaccines-preventing-discrimination-against-the-unvaccinated/)> accessed 17 December 2021.

98 Saad Hasan, 'India Questions EU Refusal to Approve Covishield Vaccine' (*TRT World*, 1 July 2021) <<https://trtworld.com/asia/india-questions-eu-refusal-to-approve-covishield-vaccine-47984>> accessed 29 September 2021; Sheikh Saaliq, 'India Calls New UK COVID-19 Vaccine Rules 'Discriminatory'' (*ABC News*, 21 September 2021) <<https://abcnews.go.com/Health/wireStory/india-calls-uk-covid-19-vaccine-rules-discriminatory-80143526>> accessed 29 September 2021.

99 *Puttaswamy* (n 254).

requirement of linking Aadhaar numbers with private enterprises including those involved in banking, telecommunications, etc.<sup>100</sup> The dissent of Hon'ble Justice D.Y. Chandrachud is particularly significant for the purpose at hand. His dissent held that the Aadhaar scheme and the legislation upon which it was based as unconstitutional on multiple grounds. Out of these numerous grounds, a few have a significant bearing on the current matter at hand. The Aadhaar Act, 2016 was held to be unconstitutional as firstly, it had been made mandatory to avail social benefits and subsidies. In this respect, the opinion concluded that the State had failed to provide a less intrusive measure than the mandatory enforcement of the scheme. On an interpretational level, the judgment while acknowledging the existence of precedents that prioritise the right which furthers public interest in the event of a conflict between fundamental rights, also advocates that one right cannot be sacrificed at the altar of the other without the State proving the necessity to do so.<sup>101</sup> Furthermore, it is opined that any denial of social benefits by any scheme due to Aadhaar in any manner, would violate the constitutional scheme. It is important to note that such a conclusion was reached based on the authentication problems witnessed within the Aadhaar scheme.<sup>102</sup> Finally, the dissent also echoed the majority decision in stating that making private entities eligible to use Aadhaar numbers, could lead to commercial exploitation, thereby contributing to violating Article 14 and Article 21 of the Indian Constitution.

While other grounds of unconstitutionality such as the passing of the Aadhaar Act, 2016 as a Money Bill did exist, those issues that have been previously enumerated have a direct bearing on the validity of vaccine mandates. The enforcement of mandatory vaccination could require private establishments to only admit into their establishment, those who carry proof of their vaccination much like the health passes of France.<sup>103</sup> Furthermore, vaccine mandates could include the denial of access to various amenities such as electricity, as has already been witnessed in Uttar Pradesh (in the absence of a vaccine mandate). Therefore, the effectiveness of a vaccine mandate would rest in its proclivity to deny numerous freedoms<sup>104</sup> and social benefits, to those who do not adhere to the mandate. There is also some historical precedent to suggest that vaccine mandates consequently lead to greater restrictions on the liberty of individuals and larger transgressions of the principle of proportionality.<sup>105</sup> Hence, it would perhaps be safe to err on the side of a method that balances the two rights, as is indeed required by the harmonious interpretative approach.

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100 Sonal Chhugani, 'India's Aadhaar Card - A Violation of Indian Citizen's Right to Privacy' (2021) 4 *Cardozo Int'l & Comp L Rev* 733, 744.

101 *Puttaswamy* (n 254) 813-814.

102 *ibid* 935.

103 *Barbero* (n 333).

104 *Registrar General* (n 247).

105 *Cave* (n 243) 293-294.

Furthermore, there are certain problems with the application of Hon'ble Justice Chandrachud's dissent to mandatory vaccination. Significantly, the information gathered through Aadhaar and for vaccination is in no manner similar. While Aadhaar information includes biometrics and other information that contributes towards ascertaining an individual's identity,<sup>106</sup> no such data is collected in the process of vaccination. The only data that is collected is the medical information regarding the number of vaccine doses that a person has undergone. Furthermore, voluntary schemes as a substitute to mandatory vaccination, may not necessarily constitute a valid and effective alternative. This is because if at any time in the future, the State decides to implement vaccine mandates, it would largely be due to the failure of the voluntary schemes. As palpable in India, the State is reluctant to make vaccination mandatory for the larger public, given the current vaccination rates in the country. This stance of the government would only change when the voluntary scheme begins to slow down the rate of vaccination. When such an eventuality occurs, continual emphasis on voluntary schemes of vaccination would be completely futile. Finally, the point of vaccine certificates and passes is entirely lost if they are only meant to be used for governmental services, as was contemplated for Aadhaar by the Supreme Court. Therefore, the necessitous extension of such passes to private entities might violate the Aadhaar judgment, but may not necessarily be a violation of the proportionality test.

#### CONCLUSION

As of the end of August 2021, India had to its name, around 3.68 lakh active Coronavirus cases.<sup>107</sup> Vaccines offer a ray of hope of getting out of the mire of the pandemic. However, the policy and State action surrounding such COVID vaccination are not without their share of sandpits and quagmires. India boasts a respectable performance when it comes to vaccinating its populace, as it crossed the mark of 60 crore vaccinations at the back end of August 2021.<sup>108</sup> Therefore, as long as the voluntary vaccination campaign continues to yield results, there is no cause for alarm. However, if slowing down of vaccination rates were to become an eventuality, then in such instances, the government might look to the tool of vaccine mandates to get the job done. Such compulsory vaccinations have lasting repercussions for the privacy and health jurisprudence of India. Such mandates not only require data collection on an enormous scale which not only introduces the elements of data privacy and personal data protection but also impacts the autonomy of an individual and his right to the same under Article 21 of the Indian Constitution.

106 Chhugani (n 340) 734.

107 Aditi Ghosh, 'Coronavirus Highlights: 42,909 Cases in India, 380 Deaths in Last 24 Hours' (NDTV, 31 August 2021) <<https://www.ndtv.com/india-news/coronavirus-live-news-update-45-083-coronavirus-cases-in-india-2523195>> accessed 29 September 2021.

108 Sumana Nandy (ed), 'India Vaccination Cross 60 Crore Doses, 32% Coverage At This Rate By December' (NDTV, 26 August 2021) <<https://www.ndtv.com/india-news/india-vaccinations-cross-60-crore-doses-32-coverage-at-this-rate-by-december-2518423>> accessed 30 September 2021.

Another aspect worthy of reflection would be the extrapolation of the aforementioned logic to other forms of mandates such as mask mandates. The theoretical legal roots of lockdowns and vaccine mandates have already been pointed out to be similar, and would probably follow suit for mask mandates as well. However, the difference between the mask mandates and compulsory vaccination arises from the fundamental difference between masks and vaccines. Masks are simply temporary face coverings that are largely used in public spaces.<sup>109</sup> It is rarely advocated for masks to be worn inside houses, or in one's personal spaces. Vaccines, however, are largely permanent to the extent that they are a part of the individual regardless of his environment. While it is possible for individuals to remove their masks if needed, the same is not possible for vaccines. Therefore, similar privacy concerns and justifications may not necessarily be suitable, although other concerns may exist.

Through its various parts, the paper has attempted to draw out the various aspects of the debate on compulsory vaccinations and their constitutional impacts. Compulsory vaccination forces an individual to undergo a medical procedure without his consent, and thereby hinders his right to privacy. There is fundamentally no dispute as to whether there is a hindrance or interference in the exercise of such a right. The ambiguity arises, however, when confronted with the question of the validity of the restrictions imposed. Questions of proportionality are all largely answered in the affirmative, favouring the State. Given that the right in question is subject to the interests of the general public, and that the mandates would be done to further yet another right conferred under Article 21 viz. the right to health, the actions of the government may indeed withstand judicial and constitutional scrutiny. Nevertheless, the interplay of fundamental rights serves as a significant barrier towards gaining constitutional approval of such coercive measures.

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109 Robert Gatter and Seema Mohapatra, 'COVID-19 and the Conundrum of Mask Requirements' (2020) 77 Wash & Lee L Rev Online 17, 18-20.