

# *Ante-factum* legislative general vaccination mandates as a solution to legal hypocrisy in pandemics

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## Abstract

With the next pandemic likely not far off, the debate over the suitability of a broad, general vaccination mandate (GVM) goes on. This essay proposes a novel argument in favor of GVM—one based on the reality that left to its own devices, executive power, from governments to the local administration and even corporations, tends anyway to impose on the nonvaccinated restrictions of such harshness that vaccination becomes *de facto* mandatory. The most coercive measure was banning the nonvaccinated from the workplace, which was done—despite the fundamental importance of the right to work to the human being—without any genuine examination of the elements of balancing (necessity, proportionality) required whenever a right is limited by the authorities. Mandating vaccination *de jure*, by parliaments, before the next pandemic strikes would have the merits of avoiding legal hypocrisy and would be achieved following national public debate and a thorough process of balancing the rights at stake.

## KEYWORDS

balancing, general mandatory vaccination, health and human rights, legal hypocrisy, pandemic, proportionality, right to work, rule of law

## Key points

- “No jab, no job” policies adopted by executive power in pandemics make vaccination *de facto* mandatory.
- These policies are highly coercive, as joblessness is an unreasonable alternative to vaccination.
- *De facto* mandatory vaccination eludes the requirement of proportionality and rights balancing.

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- Especially the use by private executive power (business) of such coercion is unacceptable.
- *De facto* mandatory vaccination is a case of legal hypocrisy.
- Legal hypocrisy is harmful to democracy and the rule of law, and erodes trust in legal and political institutions.
- General *de jure* mandatory vaccination, adopted before the pandemic by parliaments, is therefore preferable.

## INTRODUCTION

This paper is part of the conversation ongoing in the medicine, law, and governance literature regarding the suitability of mandating vaccination for the entire population in times of pandemics. The debate reached the peak during the COVID-19 pandemic, especially on compulsory immunization of health care workers (e.g., Gordon et al., 2022; Khunti et al., 2021; Maltezou et al., 2019). In parallel, numerous authors tackled the subject from a wider angle, assessing the merits and drawbacks of general mandatory vaccination (GMV) rather than vaccination of a specific professional group (e.g., Franco, 2021; Giubilini, 2020; King et al., 2022). Not surprisingly given the ideological underpinnings of either position—a utilitarian focus on the common good for GMV supporters, and a rights-based focus on autonomy in the case of opponents—the debate did not have a clear winner.

The diversity of arguments in favor of GMV is impressive. To justify recourse to the utilitarian account and the corresponding dimming of individual freedom of choice, various analogies have been proposed in the literature. Imposing a GMV has been for example analogised to imposing taxes (Giubilini, 2020) and to mandating the use of seat belts (Giubilini & Savulescu, 2019)—both, policies that killed personal choice for the benefit of the individual and the community. The risk-avoidance element present in the seat belt analogy is even more poignant in a study arguing that prohibiting vaccine refusal is similar to prohibiting celebratory gunfire (Flanigan, 2014). Further, in an application of the self-defense doctrine, it has been argued that the majority has a right to defend itself against the virus, a “serial killer,” and against those opposing vaccination (Beatty, 2022).

Not all pro-GMV arguments have been built on common good and justificatory analogies. A creative argument blending consequentialism and positivism was that, if we admit that reaching herd immunity is the objective, then paradoxically, less restrictive policies can be more discriminatory than GMV (Horák & Dienstbier, 2023). Finally, there have been arguments anchored in normative rather than consequentialist foundations. Examples are a study building its argument around the universal value of solidarity (Yeh, 2022), and one arguing that people who refuse vaccinations violate the moral principle of clean hands, which prohibits people from participating in the imposition of unjust harm (Brennan, 2018).

With such a display of academic creativity, it may appear that there is nothing to add in support of the GMV cause. Yet this article proposes a new argument: authorities should make vaccination mandatory because vaccination is already mandatory, just not in a government-sanctioned, *de jure* form.

Accordingly, the main purpose of this article is to show that preventing healthy people from coming to work if unvaccinated amounts to *de facto* general mandatory vaccination. While one may live for a few weeks or even months without meeting their friends or attending their church, the impact of losing one's job is a much more devastating experience, which means that for most people, there is no real choice there; vaccination is *de facto* mandatory when employment depends on it.



The article goes beyond this intuitive assertion and puts the argument on theoretical foundations built around the unique traits of the right to work. Placing restrictions to such an essential right in the shadow of the law, rather than within the ambit of law, should be avoided, as it limits the opportunities for public contestation of rights and obligations that should characterize a democratic society. Making a rule mandatory while claiming it is not amounts to legal hypocrisy, with toxic effects on public trust in legitimacy of institutions and in the power of law. Ultimately, legal hypocrisy corrodes the foundations of the rule of law.

## DE FACTO GENERAL VACCINATION MANDATES IN PANDEMICS

Public policy is any course of action taken by the government to attain goals and objectives for the resolution of a certain problem, or matter of concern to society (Anderson, 1975, p. 3). When the problem is a pandemic, the goal is the protection of population, with objectives which, especially in the initial (pre-vaccine) stage, are centered around “interrupting chains of viral transmission, preventing morbidity and mortality, protecting at-risk populations and preserving the capacity of acute health care systems or other critical infrastructure the reduction of transmission” (World Health Organisation, 2022, p. 2). Lockdowns are the most common policy tool aimed at fulfilling these objectives. Later, once reliable vaccines become available, the main objective becomes attaining herd immunity by having a high enough percentage of the population vaccinated (Mallory et al., 2018). How to get people to the vaccination centres is a complex matter, requiring difficult public policy choices along the continuum from no action to fully coercive action. Indeed,

... [w]hen we face a public problem, there are really only four sorts of things that we can do about it. (...) Which we will decide to employ depends largely on how much freedom and how much compulsion we think as appropriate in the particular situations.

1. Market mechanisms. We can let the outcome depend on what individuals decide to do, without any interference or direction from government.
2. Structured options. We can create government programs... that individuals are free to use or not as they see fit.
3. Biased options. We can devise incentives and deterrents, so that individuals will be guided, voluntarily, toward the desired ends of public policy.
4. Regulation. We can directly control, setting up constraints and imperatives for individual action, backed by the coercive powers of government. (Anderson, 1975, p. 56).

This general taxonomy is further fine-tuned when the goal of public policy is to protect public health. As public health is one of the areas of governance most prone to conflicts between the common good and individual rights, public policy must be guided by the principle of least infringement on individual rights (Childress et al., 2002, p. 173). This has been operationalised via the so-called “intervention ladder”: ranking possible public health measures according to their degree of restrictiveness of individual autonomy. According to the intervention ladder proposed by the Nuffield Council (2007), possible action for public health purposes is as follows, from least to most coercive measures: do nothing or simply monitor the current situation ⇒ provide information ⇒ enable choice ⇒ guide choices through changing the default policy ⇒ guide choices through incentives ⇒ guide choice through disincentives ⇒ restrict choice ⇒ eliminate choice. A later list, based on the Nuffield



Council's, was conceptualized as comprising persuasion  $\Rightarrow$  nudging  $\Rightarrow$  financial incentives  $\Rightarrow$  disincentives  $\Rightarrow$  outright compulsion (Giubilini, 2019). Ideally, public policy tools employed should be on the lower rungs, but only under the condition that they are effective as well. As far as vaccination in pandemics is concerned, the highest rung (eliminate choice/outright compulsion) is not used in democracies, where citizens are not vaccinated by force.

Somewhere in the middle-high segment of the ladder is the most common form of vaccination mandate used in democratic countries during the COVID-19 pandemic: that imposed on healthcare workers (e.g., Italy, Greece, Australia, USA). This is a type of selective mandate, with selection based on profession; some countries mandated vaccination for educators as well, some for all the public sector employees, and so forth. In its most radical forms, job-related mandatory vaccination was imposed in only a few jurisdictions, for instance Western Australia and the Northern Territory of Australia, where workers in *all* sectors were required to vaccinate. Selective mandates based on criteria other than profession were usually related to age. General (as opposed to selective) mandatory vaccination (GMV)—legal imposition of vaccination on every citizen, absent a medical exception—was avoided in democratic countries, with very few exceptions.

At least, officially avoided. An examination of the definition of mandatory vaccination against the policy tools used to get people vaccinated suggests that, while political leaders kept reassuring the population that GMV will not be imposed, the executive power (public and private) imposed restrictions of such harshness that vaccination became *de facto* mandatory.

Mandates are a tool of coercion in the hands of the government. Coercion is about pressuring someone to do something that they would not otherwise do (Nozick, 1969), with pressure generally understood in governance theory as involving “a threat, or an expression of some undesired consequence to be brought about if, but only if, the addressee fails to do as commanded” (Edmundson, 2012, p. 452). Translated in the area of vaccination policy, this means (e.g., King et al., 2022; Leigh, 2023; WHO, 2022) that vaccination can be made mandatory via two distinct policy tools: either by the imposition of a direct penalty for failure to vaccinate (like the fines imposed by Austria in their mandatory vaccination statute), or by prohibiting the nonvaccinated from attending certain public places like restaurants, buses, or the workplace. Importantly, the latter can be imposed either by the state directly, or by private actors, at the state's command or with its permission.

The former are clear-cut: if there is a public authority requirement to vaccinate backed with a sanction, this is a mandate. The latter requires some unpacking, because mandates limit individual choice by threat of an inconvenient repercussion, but so do disincentives, another form of interference affecting individual freedom. It is a matter of the degree of pressure, combined with the degree of undesired-ness of the consequence of acting as directed. On the ladder of intervention, the highest rung is forcible vaccination, deemed unacceptable in democratic countries. Below this level of intensity, coercion in the name of public health is permitted, and the question is what is the precise threshold above which we can talk about a vaccination mandate. The answer, according to King et al. (2022, p. 220), is that vaccination is mandatory when it cannot be “avoided without undue burden.” This is consistent with definitions of coercion as proposals that prevent the subject from “exercising free will and judgment,” leaving “no reasonable choice,” or “no acceptable alternative” (Wertheimer, 1989, p. 30).

So something is a mandate if the authorities use coercion, and coercion occurs when the subject has no genuine alternative but to choose the line of action required by the authorities, even though in theory, the choice remains. In the COVID-19 pandemic, people were banned from a variety of activities and places, as making vaccine costly or inconvenient was at the heart of provaccination policies. But an element of reasonable choice remained for most of these: the pubgoer had the option to drink at home, the



churchgoer could dispense with the priest's service for a while and speak to the Divinity directly, the shopper could shop online or ask a friend to shop for them, and so on. When it came to “no job, no jab” policies, however, things were more nuanced. It is this paper's contention that some limitations (periodic testing, or even temporary unpaid no-fault suspension) may have still been acceptable, however dismissal as an alternative was not. There was no real choice there, despite contrary views of the US automotive industry, representatives of which stated that “[w]ork relationships are free-market exchanges voluntary agreements to meet certain obligations in exchange for money and other benefits. If one of the parties changes the terms of the deal, the other party is free to accept the change or to reject it and part ways” (Automotive News, 2021, p. 12).

It is fair, under these circumstances, to say that those who accepted vaccination under the threat of permanent joblessness (and would have not taken the vaccine, absent this threat) were coerced, threatened with an undue burden. This means that all the employers who banned the unvaccinated from the workplace made vaccination mandatory. In countries where this was widespread, the sum of (selective) mandates of this sort amounted to general mandatory vaccination. The other condition, that the state imposes or condones the measure, was fulfilled as well, usually in the form of condoning, in fact even encouraging.

To exemplify, in France, President Macron said that his vaccination strategy is to “piss off” people who have not had coronavirus jabs by continuing to make daily life more and more difficult for them (Henley, 2022). In Canada, Prime Minister Trudeau praised the mandatory vaccination rules for federal employers, together with the travel restrictions, as being “some of the strongest in the world” (Scherer & Gordon, 2021), while in Australia, Prime Minister Morrison vowed to make vaccination “as mandatory as you can make it” (Oliveri, 2020).

In the absence of statutes or regulations making vaccination mandatory for the entire population, the summative effect of all the selective mandates, encouraged by political power and mass media to be as severe as possible, amounted to *de facto* general mandatory vaccination. While arguably efficient in combating the pandemic, this strategy should be still avoided in the future, for the two reasons explained in the next section: first, *de facto* policies are hypocritical and affect democracy and the rule of law, and second, leaving a too important role to private executive power leads to an improper (if any) rights-balancing exercise.

## THE PROBLEMS WITH *DE FACTO* MANDATORY VACCINATION

### It affects democracy and the rule of law

Claiming that something mandatory is not mandatory is a case of legal hypocrisy. Hypocritical uses of the law to accomplish illicit ends, such as the *de facto* segregation of African Americans in the United States in the first half of the last century, have already been exposed and criticized. It has been shown in this context that legal hypocrisy is harmful to the rule of law, with the harm extending to both the victims of hypocrisy—since a *de facto* practice is more difficult to challenge—and the hypocrite authorities, whose foundation of trust and authority are weakened when hypocrisy is exposed (Yankah, 2019, p. 4).

Legal hypocrisy is often meant to shield legal wrongs from public scrutiny, such as denying that institutionally sanctioned torture is practised in American prisons. As such, the already negative semantic load of the noun “hypocrisy” gets an even darker shade with the addition of the evil motive underlying the practice and its denial. But legal hypocrisy is toxic even when its causes are not evil. A study exposing legal hypocrisy in the WTO system of



dispute resolution, where the Appellate Body panels rely on precedents although officially the doctrine of precedent does not apply, found the causes to be benign: “(1) an express link in the ITO Charter to the ICJ, (2) the influence of 19th century commercial arbitral practice and of the civil law, and (3) the international legal culture” (Bhala, 2000, p. 976).

Similarly, in the case of GMV there is no illicit, or at least no evil end. The claimed and laudable reason behind the avoidance of GMV is the noble desire of the authorities to abide by the principle of proportionality and avoid the upper rungs of the intervention ladder. Additionally, and less laudably, democratic governments could also be hesitant in imposing a measure that is rejected by a significant proportion of their electorate (Saunders, 2022). Nothing evil here either, but the effects of legal hypocrisy are still pernicious, with negative impacts on the rule of law in liberal societies.

Indeed, in the absence of a legal mandate for vaccination, the climate of “everything goes” sanctioned with candor and good intentions by political leaders cited in this article is conducive to overzealous action at executive level, both public (national agencies, local administration) and private (employers). This political muscle flexing is in contradiction with the quintessential requirement of the rule of law, that citizens cannot be subjected to state power except on the basis of law. The terror unleashed by bureaucracies and corporations left to their own devices, invited by leaders like those cited above to take the most drastic measures, and the risk of a slippery slope toward tyranny it creates, are aptly described in a recent study on vaccination policies:

If current policies are to continue, public health associated bureaucracies and society will have to increase coercion to address current and future resistance and, in the process, come to leverage strategies more consistent with policing than public health. We may also see political forces double down and use people who have chosen not to get vaccinated as a collective, psychological and political tool to scapegoat and reinforce a false notion of safety among vaccinated people as they yearn to resume social and economic life (Bardosh et al., 2022, p. 10).

Studying legal hypocrisy in the context of WTO, Bhala (2000, p. 978) found the following benefits of renouncing hypocrisy:

If we admit the hypocrisy (...) and if we move to a *de jure stare decisis* regime, we might well enhance the certainty, predictability, and fairness of WTO adjudication. We might lower the transactions costs, and increase the transparency, of this adjudication. We might increase the harmonization of world trade law at the international level, and avoid problems with customary international law as a source of obligation. (...) We might bolster the legitimacy of the WTO. We might even ensure the long-term viability of international trade law (...)

All of the benefits of renouncing legal hypocrisy, mentioned in the quote above, apply to the case at hand. Fairness of adjudication for example is impossible to achieve with *de facto* vaccination mandates, since *de facto* practices are hard to challenge: “by obscuring the harm inflicted on certain persons and communities, legal hypocrisy robs its victims of their voice, rendering their complaints unrecognizable” (Yankah, 2019, p. 14). Institutional legitimacy is also relevant to the case at hand, as legal hypocrisy cannot be concealed, and ends up eroding the citizenry trust in the major institutions of the state. How can the citizen believe in a system that publicly honors the fundamental liberal value of personal autonomy, while at the same time dismisses it in practice?



## It avoids a proper rights-balancing exercise

To protect public health in pandemics, governments must make difficult choices between a variety of individual and collective rights in conflict. The international human rights law acknowledges the imperative of action in the interest of the common good and the inevitable consequent sacrifice of individual rights, but prescribes that the process of derogating from individual rights must be done following a process of balancing, and respect the rule of proportionality. If balancing is the act of “assessing whether and when the government may override the rights” (Gardbaum, 2006, p. fn67), proportionality is the test, the analytical principle ensuring that the balancing act is not conducted arbitrarily, and that limitations to rights are themselves limited. To be useful in its role of preserving the substance and meaning of human rights, proportionality requires a precise application, which most of the authors see as a series of steps culminating with the four-part proportionality test comprising legitimacy, suitability, necessity, and proportionality *stricto sensu*. The latter is also referred to as the Law of Balancing, enunciated as follows by one of the main voices in proportionality theory: “The greater the degree of nonsatisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other” (Alexy, 2014, p. 55).

The right to work is recognized internationally since the nineteenth century, with the creation in 1889 of the International Association for the Protection of Workers. The human right to work was given explicit recognition in the Universal Declaration on Human Rights in 1948 (“Everyone has the right to work, to free choice of employment, to just and favorable conditions of work, and to protection against unemployment”) and was later on enshrined in the International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 6 of which reads, in its first paragraph: “The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.” Numerous international instruments, mostly at the United Nations and European Union level, clarify the contours and importance of this fundamental right.

The detriment to the right to work, in pandemics, is massive at both prevaccine and postvaccine stage, albeit differently: quantitative as an effect of lockdowns, in the initial stages, and qualitative after the vaccine becomes available, with the “no job, no jab” policies meant to increase vaccination rates. Indeed, the right to work is multifaceted, having both a quantitative dimension, referred to as the right to work (guaranteeing sufficient jobs for as many as possible in society) and a qualitative one, or rights at work (decent wages and working conditions, nondiscrimination, the right to join trade unions, protection from unfair dismissal). Correspondingly, when referring to the nature of the obligations of states in relation to various socioeconomic rights, the ICESCR employs three different levels of undertaking, situated along a continuum: respect, recognize (or fulfill), and ensure (or guarantee). The most common obligation laid down in the ICESCR is the quantitative one: to fulfill a right, which has to be read in conjunction with ICESCR Article 2(1), saying that each state party undertakes “to take steps ... to the maximum of its available resources, with a view to achieving progressively the full realization of the [economic, social and cultural] rights.” The undertaking to take steps for the progressive realization of rights has exposed the ICESCR to much criticism for its vagueness and aspirational character, but even so, post-COVID-19 human rights literature (e.g., Radavoi & Quirico, 2022) indicated that COVID-19 lockdowns amounted to a breach of the right to work in its quantitative dimension. The argument was that, while aspirational and vague as to the obligation to take positive steps, the ICESCR is clear in its prohibition of retrogressive measures—steps back, which the lockdowns were, as far as the right to work is concerned. Indeed, the governments' restrictions in response to the initial COVID-19 panic reduced the job market worldwide by one-third in 2020, with the most dramatic impacts in the Global South: according to surveys



by Gallup, the percentages of people who lost their jobs or businesses ranged from over 60% in the Philippines, Kenya, and Zimbabwe, to a low of 3% in Switzerland (Ray, 2021).

Radavoi and Quirico's (2022) argument was mostly meant to shed light on hidden impacts of lockdowns, rather than to challenge them. Given the need for timely action under high urgency and uncertainty, lockdowns were not questioned through the lenses of the balancing requirement, despite the serious breaches of human rights of various sorts, including the right to work; it is assumed that the danger to population and to the national health systems could be so severe that no precaution, however damaging to other human rights, is too high when what is at stake is the right to life. But the situation changes when a safe and effective vaccine becomes available.

At this stage, the state's qualitative obligations to respect and protect (Alston & Quinn, 1987, pp. 184–186) become relevant. With regard to “no jab, no job” policies, *respect* would mean refraining from interfering with the right, and *protect* would mean ensuring that no excessive action is taken by private employers. But neither occurs in practice, even when the most radical version of the policy—dismissal of the unvaccinated, without offering them alternatives—is applied. First, with regard to respect, many states interfered with the right to work of healthcare, aged care, and education workers. Even though the need to protect vulnerable categories like the ill, the elders, the children is paramount, restrictions of the workers' rights need to be proportionate. The Italian Constitutional Court found (sentence 15 of 2023) a no-fault temporary unpaid suspension imposed by government decree to be proportionate in the case of healthcare workers, based precisely on patients' vulnerability, combined with the fact that suspending the unvaccinated worker would be temporary and no-fault. But mandatory vaccination of *all* workers, irrespective of sector (as imposed, e.g., in two Australian jurisdictions, WA and NT) would be difficult to justify, especially if the consequence for the noncompliant is a direct dismissal.

In Australia, the total ban in WA and NT, in conjunction with wide yet not total work bans in other Australian jurisdictions, led to over a quarter of employers having to sack employees (Australian Human Resources Institute [AHRI], 2021). For most democratic countries however, public power refrained from touching the right to work via coercive power of this extreme sort. It exercised instead another form of power, termed normative power by Etzioni (1975, p. 5), which rests on the allocation and manipulation of symbolic rewards and deprivations. With the support of mass media, this allocation has led, in the COVID-19 pandemic, to depicting the unvaccinated as a danger to society—a danger that needs addressed despite the lack of an official GVM policy. The climate of fear and blame promoted by politicians, the executive, and mass media practically invited private power to step in, since it has been long known that

... in complex, industrialized societies the state or the political system need not be the sole source of extensive and intensive control. (...) [D]ecisions made by private institutions, such as large business corporations and trade unions, will frequently have as constraining an effect on individual conduct as many authoritative allocations made in the political system (Siegel & Weinberg, 1977, p. 5).

Accordingly, employers rushed to sacking noncompliant employees, whether the measure was or not sanctioned by public regulation (see, for the USA, Hardy, 2022, reviewing the situation across states and industries; for Australia, Barnes, 2021, showing that employers were generally sack-happy). Rather than protecting the right to work, the state supported discretionary action by private power. In Australia, the Fair Work Commission found that employer vaccination policies, including dismissal for non-compliance, can constitute a lawful and reasonable direction even in the absence of a Public Health Order underpinning the vaccination policy (Bishop, 2002). In South Africa, decisions of the Labour Court went in the same direction (Botha, 2021). In the United States,





employees fighting contract termination over vaccination refusal similarly lost their cases (Hals, 2021).

The arbitral or court judgments were generally based on employment law (common law and/or statutes, depending on the type of legal system), including the employer's obligation to provide a safe working environment, the employee's obligation to heed to reasonable directions from their managers, and the right of employers to dismiss “permanently incapacitated” workers. In the general climate of pressure and fear, it is perhaps understandable that judges did not want to sabotage concerted efforts in society to increase vaccination rates, and to further weaken an already debilitated (after extensive lockdowns) business sector. The involved courts and tribunals seem to have overlooked the fact that dismissal is a too radical solution—the unvaccinated worker is not permanently “incapacitated,” for one thing. Had a general, national vaccination mandate been stipulated officially, in legislation, a real balancing exercise would have been difficult to avoid during the public debate that would have preceded the law adoption, and would have likely indicated that coercion by the threat of dismissal is unacceptable in any circumstance.

## THE SOLUTION: ANTE FACTUM LEGISLATION MANDATING GENERAL VACCINATION

The quote in the previous section from the analysis on legal hypocrisy at WTO, indicating the benefits of moving to a *de jure* regime in that specific case, suggests the solution to our problem as well. When certainty, predictability, and transparency are the desired traits, the answer is statutory (adopted by parliaments) law. This would lead to harmonization, too, since a calm exchange of arguments is more likely in a frank national debate before the pandemic, than during the dramatic times of confronting the virus. If difficult decisions must be made, it is better, in a democracy and rule of law perspective, that they are made *ante factum* by parliaments.

This has been advocated for in 2022, precisely in the context of executive and private power overreaching in the statutory vacuum. A worldwide network of jurists adopted, towards the end of the COVID-19 pandemic, principles concerning the legality and constitutionality of mandatory vaccination. Known as the LAC19 Principles, these recommended that mandatory vaccination schemes be prescribed by statute, rather than delegated legislation such as regulations, ordinances, by-laws, and so forth (see also King et al., 2022). In other words, mandatory vaccination laws should not leave major policy decisions, like limitations of the individual right to work in the name of public health, to governments (central or local), and to corporations—which is exactly what happened in the COVID-19 pandemic. Corporate overreach, in the form of banning the unvaccinated from the workplace despite the lack of laws requiring this radical measure, is especially concerning given the increased concentration of unchecked power in private hands, in the contemporary globalized world (Barkan, 2013; Robé, 2020).

Further, the LAC19 principles recommend that statutes should be adopted following broad consultations involving subnational governments, political parties, trade unions, legal and health experts, mass-media, and the public. All major questions, including the type and level of coercion to be applied in support of the vaccination mandate, should be addressed in the Bill going through the legislature, allowing for debate and amendments. This would bring the public health response to pandemics in line with a fundamental trait of democracies: meaningful participation in decision making.

Obviously, meaningful debates are lengthy, which is why the LAC19 principles accommodate both a general legislative framework stipulating the principles of mandatory vaccination, and fast-tracked legislation responding to the specificity of each pandemic. For these reasons, adopting statutes making vaccination a priori mandatory—rather than waiting



until the virus strikes, like Austria, Indonesia and a few other countries did in the COVID-19 pandemic—is preferable. This is also the opinion of numerous experts interviewed by the authors of a recent study on “less voluntary” vaccination in Netherlands (Simons et al., 2023). Improved prior legal preparedness for pandemics had also been argued for, in the UK context, by Laurie and Hunter (2009), who show that the existing relevant framework (such as legislation for emergencies in general, for healthcare and safety, and for public health) needs updated with more specific provisions. This, as per the two arguments presented in the previous section, should include a framework for general mandatory vaccination, with provisions adaptable to the epidemiological situation in each pandemic.

Left to its own devices, the national executive will attempt on the one hand to avoid the political costs of an unpopular measure, while on the other hand adopt it nonetheless, as shown above, with the concurrence of private power. If the parliament clarified the matter *ante factum*, the population would have time to understand and accept the necessity of hard choices, and most importantly, those choices would not be harder than needed, since a careful rights-balancing exercise would be undertaken.

As far as the right to work is concerned, the balancing exercise would start from the premise that this is one of the most important socioeconomic rights. Work is much more than the right to do a job and get a salary in return. Not only is work in itself a fundamental value in any society, but it also reflects positively on different planes of individual and societal development: as individuals we obtain an income allowing for a decent life (food, clothing, housing, medicines), but also dignity, self-esteem and social recognition (Kuykendall et al., 2020). A person who is denied the right to work is exposed to the risk of poverty, mental harm, and even suicide (see, among many others, Burgard et al., 2007; Classen & Dunn, 2012; Crayne, 2020). In a broader perspective, societies derive harmony and prosperity from the aggregated work of individuals. For all these reasons, the right to work was called, in one of the important collections on international law in the last century, “one of the most fundamental ... socioeconomic rights” (Jacquart, 1991, p. 1086). Philosopher John Dewey also noted that “[t]he first great demand of a better social order ... is the guarantee of the right, to every individual who is capable of it, to work” (Ratner, 1939, p. 420).

Given the importance of the right to work for the bearer but also for their dependants, the Law of Balancing would require that the importance of the counterbalancing principle was similarly high. The right to health and even to life of the other employees still weigh heavy on the scales of rights balancing, but the supporters of banning the unvaccinated from working would have a hard time justifying necessity and proportionality *stricto sensu*, given the availability of periodic testing on the unvaccinated worker's expense. Admittedly, as the World Health Organisation (WHO) has noted, the vaccinate-or-test policies are not as effective as vaccination mandates that do not have a testing option, because testing may fail to identify infections because of false negatives (WHO, 2022, p. 6). But we should look at both scales in the process of balancing: vaccination itself is not a bulletproof vest, with degrees of efficiency comparable to the degree of testing accuracy (e.g., Subramanian & Kumar, 2021). This means that less restrictive alternatives like vaccinate-or-test should still be preferred to the no-jab-no-job approach, given the second's dramatic impact on the right to work, versus the first's uncertain benefits to the right to health. Further, where social distancing, reallocation of tasks, or remote work are possible, there is no reason not to apply them. And when these are not possible, there is always the more intrusive, yet arguably still reasonable for the employer unwilling to vaccinate, option of a temporary no-fault suspension until the pandemic ends.

## CONCLUSION

The dubious absence of parliaments in the battle against the recent coronavirus pandemic has not escaped scholars' scrutiny. Ewing (2020, p. 24) noted, for the UK, that



... ministerial statements in Parliament have given way to daily briefings by ministers (flanked by government experts) in an empty room with journalists, not MPs, on the receiving end remotely to ask questions. Broadcast live to the nation, the spectacle reinforces the marginalisation of Parliament. The Prime Minister ... and ... other ministerial colleagues speak directly to the people, the newspapers being the sole public guardians with all the problems that this entails. Absent a crisis, this would look like something straight from the populists' playbook.

However, the countries where legislatures tried to intervene were not necessarily successful. Legislating general mandatory vaccination *post factum* risks creating a strong backlash and large-scale protests, as it happened in Austria, who had to repeal its mandatory vaccination law only a few months after adopting it (Bell, 2022). Since leaving the hard choices to local authorities and to private power is also a poor choice, leading to the imposition of *de facto* mandatory vaccination as shown above, it would seem that legislating GMV before the pandemic—a framework, leaving the fine-tuning to the parliaments in charge when the pandemic strikes—is the only option. In a parliamentary debate conducted without pressure, dismissal for vaccination refusal would likely not pass the tests of necessity (since the pandemic is temporary, a temporary suspension would suffice) and proportionality (uncertain benefits in exchange for a very severe blow to a fundamental right).

Given the fundamental importance of the right to work, and the longer effect of restrictions on this than on other rights in pandemics, “vaccination or joblessness” is not a reasonable choice with which to present a worker; it is not like “no job, no pub access,” for example. Yet, in the charged climate of a pandemic, overly zealous action by public and private executive power, including dismissal of the unvaccinated, is widespread. It is better to fence this otherwise laudable zeal by simply making general vaccination *de jure* mandatory, with all the benefits deriving from this official status in terms of setting the proper balance between the rights and interests at stake. Intrusions into the right to work would be inevitable, but dismissal as a coercion tool would not be used.

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## ETHICS STATEMENT

No ethics approval was necessary, as the article is a theoretical one, based on secondary sources only. All the sources relied upon are properly cited, and no material requiring special permission to be reproduced was used.

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