

Relooking at *Vaccination-Differentiated* Safe Management Measures

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The COVID-19 pandemic has brought about unprecedented changes in the way the world functions, like how seemingly normal daily activities in the pre-pandemic era became a privilege only for the vaccinated under the Vaccination-Differentiated Safe Management Measures (VDS). With the pandemic restrictions currently suspended in Singapore, this article will relook at the various VDS that were previously in place, and the impact they had on Singaporean society.

Most countries implemented some form of VDS since the pandemic started. The specific divide in treatment between the vaccinated and unvaccinated differed vastly from country to country, but there were common elements. For example, the ease of freedom to travel, work, socialise and engage in leisure activities was determined by one's COVID-19 vaccination status.¹ Government policies were generally faced with an ethical trilemma between personal liberty, equality and public health safety, and it was seen in some countries that any imbalance in policy-making between the trilemma factors could potentially lead to riots and protests.²

Ethical principles

The four main ethical principles that most doctors are familiar with are autonomy, non-maleficence,

beneficence and justice.³ However, it can be argued that these four principles are more suitable for the individual doctor-patient context rather than public health, as the principle of autonomy runs contrary to mandatory vaccination policies. Furthermore, broad ethical principles such as utilitarianism and deontology are more apt when it comes to allocating limited healthcare resources rather than applying them towards VDS. Therefore, it can be argued that the ethical principles of reciprocity and proportionality should instead play key roles when it comes to VDS.

Reciprocity refers to rewarding one positive action with another. One example of this principle is giving vaccinated people access to sporting or entertainment events that are off-limits to the unvaccinated (even if the unvaccinated test negative for COVID-19). The principle of reciprocity supports a possible tie-breaker role for factoring in one's vaccination status when two patients have equivalent survival benefit from a scarce healthcare resource. Proportionality, on the other hand, is the principle that any reaction should be proportional to the magnitude of the original action.⁴ For example, a universal exclusion of the unvaccinated from life support during a pandemic surge would fail the test of proportionality.

Comparing Singapore and the rest of the world

At the time of writing, although COVID-19 vaccination is not legally mandatory in Singapore, the velvet glove approach adopted by the Singapore Government for the unvaccinated before restrictions were lifted was almost "pseudo-mandatory" due to the implementations of the various VDS. Some commentators have in fact even argued that the strict VDS were better than a mandatory vaccination approach.⁵ The justification for Singapore's paternalist approach was that since unvaccinated individuals made up most of the severe ICU cases, implementing the various VDS would help to protect the unvaccinated. At that time, the unvaccinated were not allowed to enter shopping malls, dine in even at coffeeshops, or take part in higher-risk/mask-off activities.⁶

Furthermore, on 8 December 2021, the Government also stopped footing COVID-19-related medical bills of those who were unvaccinated by choice to encourage unvaccinated individuals to get vaccinated by imposing financial deterrence.⁷ Previously, the unvaccinated could also rely on a negative Pre-Event Testing result to bypass the vaccination requirements, but that loophole was closed on 1 January 2022.⁸ The unvaccinated were also not allowed to

use the vaccinated travel lanes, which was a major disincentive in terms of personal mobility. In addition, it was announced on 1 January 2022 that for unvaccinated employees whose work cannot be performed from home, employers had to either place them on no-pay leave or, as a last resort, terminate their employment (with notice) in accordance with the employment contract. If termination of employment was due to employees' inability to be at the workplace to perform their contracted work, such termination of employment would not be considered as wrongful dismissal.⁹

From a global perspective, the strictness of Singapore's VDS was considered to be on the upper half of the scale. Singapore's measures were not as extreme as Austria's, which at one point of time restricted the unvaccinated from even leaving their own house,¹⁰ nor did we reach the stage of enforcing mandatory vaccinations and imposing recurring monthly fines for those who refused without a medical reason as in Greece.¹¹ However, our VDS at its peak were much stricter than those of countries like the UK and the US.¹² Our VDS could even be said to be stricter than those of the other ASEAN nations, as none of the other ASEAN countries had differential healthcare billing in place for the unvaccinated.

Across the world, especially in more litigious societies, numerous court cases were started in various countries challenging some of these VDS for breaches of human rights, unfair discrimination and more.^{13,14} In Europe, proportionality was one of the main principles used to scrutinise the actions adopted by national authorities that restricted rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms. However, in Singapore, in the case of *Chng Suan Tze*,¹⁵ it was held by the courts that the proportionality principle had not been established as a separate ground of judicial review.

Singapore adopts a *sui generis* approach when it comes to constitutional interpretation, as confirmed in the case of *Ong Ah Chuan*.¹⁶ *Sui generis* essentially means that the courts will adopt their own unique way of constitutional interpretation and can take various factors, such as whether the law is irrational (also sometimes called *Wednesbury unreasonableness*) into consideration.¹⁷ *Wednesbury unreasonableness* applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it.

Part IV of the Singapore Constitution governs the concept of Fundamental Liberties.¹⁸ Article 9 (liberty of the person) and Article 12 (equal protection) in particular may provide some basis for legal challenges for the various VDS in place. For example, on one extreme end, it would be clearly unconstitutional if the Singapore Government were to pass a law that is exceedingly unreasonable, like sending all the unvaccinated to jail. Yet on the other hand, a law that requires vaccination before one is able to take part in certain high-risk mask-off events is likely to be viewed as being constitutional. In a rare move, there were at least two controversial groups in Singapore that planned to launch separate judicial reviews against the various VDS with the support of crowdfunding. However, at the time of writing, these applications have either been withdrawn or dismissed.¹⁹

Vaccination status of children

Initially, unvaccinated children under 12 years old were exempted from the VDS. Since then, the Singapore Government approved the Pfizer and Moderna COVID-19 jabs for children of various age groups. It remains to be seen if the VDS will be extended to this age group should restrictions be reinstated, if the pandemic worsens due to the emergence of potent variants in future.²⁰ While most adults have no

major concerns regarding themselves or their older children receiving mRNA vaccines, studies have found that parents tend to be more risk-averse, especially with regard to physical safety and health, when deciding for their young children, and this may therefore lead to vaccine hesitancy in the younger age groups.²¹

Currently, the strongest justification for adult COVID-19 vaccination is that it will help to prevent serious illness, and that medical resources are disproportionately being utilised by the unvaccinated adults.²² On the other hand, various studies have shown that children generally have milder COVID-19 symptoms and rarely require ICU care. Therefore the justification for COVID-19 vaccinations appears to be less robust for the younger age groups.²³ Furthermore, under the Infectious Disease Act (IDA), there are only two compulsory diseases which a child needs to be vaccinated against legally: measles and diphtheria.²⁴ As mentioned above, if the VDS are eventually extended to the younger age groups – for example, if they will not be allowed into childcare centres and primary schools if they are not vaccinated against COVID-19 – it is submitted that the IDA should be amended officially for COVID-19 vaccination to be made mandatory for schools in order to hold a stronger legal justification.

Future implications

While TraceTogether and SafeEntry are no longer in use for the time being,²⁵ it is submitted that it is better to keep in place the current system as a contingency plan for the following reasons. Firstly, under current regulations, the fully vaccinated status of an individual will expire after one year.²⁶ It remains to be seen what future VDS the Singapore Government will adopt for vaccinated individuals who have hit the one-year limit, should the VDS system be reinstated subsequently. Will the arbitrary one-year limit be removed and the previous two-tiered

VDS between the unvaccinated and the vaccinated be reintroduced, or will it evolve into a three-tiered system between the unvaccinated, the vaccinated and the boosted? Will the vaccinated be allowed to take part in lower-risk activities like dining-in with family members while the boosted enjoy the highest tier of freedom? Or will the VDS system shift to a new two-tiered system between the non-boosted (comprising the unvaccinated and those vaccinated more than one year ago) and the boosted as seen in Israel?²⁷

With Omicron still lurking in the background and various reports suggesting that booster shots are effective against the Omicron variant,²⁸

it is likely that the Singapore Government will adopt the latter approach. Lastly, China is finally appearing to be loosening its zero-COVID-19 policy after unprecedented protests erupted nationwide in November 2022. It is predicted that, given the spread of the highly transmissible Omicron variant in the world's most populous country, a new super variant will be bound to emerge from this shift in policy.²⁹ How VDS ultimately will evolve remains debatable, given the highly fluid situation of the COVID-19 pandemic. Thus lies the conundrum: should VDS remain guided by the ethical principles of reciprocity and proportionality in the future? ◆

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