ABSTRACT
As the Covid-19 continues to ravage human population since December 2019, medical professionals and people from other turfs of human knowledge have remained awake, with a view to nipping the spread of the virus in the bud. As early as 30th January 2020, WHO declared the virus a Public Health Emergency of International Concern (PHEIC) and an epidemic, with relentless efforts to arrest its spread. Yet, the virus nibbled away a large fortune in the global economy. While the virus becomes hydra-headed with its variants, vaccines have been developed to curtail its morbidity and mortality. Vaccinations are acknowledged as one of the most important and successful public health interventions. Nonetheless, there are legal hurdles to be crossed as vaccines are deployed to fight Covid-19 across the globe. Consent and fundamental rights of the individuals to be vaccinated sometimes conflict with the public health emergency needs, resulting in mandatory vaccination of every member of a given population. The two sides of the divide have their respective legal backings as inherent in the two locus classicus of Jacobson v. Massachusetts and Schloendorff v. Society of New York Hospital. The former established the principle of mandatory vaccination on account of public health emergency, while the principles of informed consent and self-determination have their roots in the latter. Subsequent cases, including Nigerian decisions in recent years have upheld the principle of informed consent and self-determination in medical treatment. The main thrust of this paper is to examine the effect of corona virus vaccination and Covid-19 status certificate on self-determination and human rights in Nigeria. The paper concludes that with deep rooted trust and transparency, suspicion and mistrust, which are the bedrock of the anti-vaccination movement will fizzle out and the legal conundrum ease off.

Key words: Covid-19, Vaccine, Informed-consent
BACKGROUND
By dint of his experience over centuries, man seems to have conquered his world by bringing various daunting situations under control, except certain circumstances that defy human intervention. Public health emergency is one of the challenges that constantly confront human communities and which has in the last 200 years been brought under control through vaccination. In critical period of public health emergency, vaccination is made compulsory for every member of the affected community. In the UK, compulsory vaccination commenced with smallpox vaccination law which was made for the first time in England and Wales in 1853 [1]. The law became stronger and more effective in 1867 and 1871 when stiffer provisions for enforcement were added including fines for noncompliance. In the US, smallpox vaccination was first implemented in 1801, soon after Edward Jenner’s discovery. Massachusetts was the first state to enact a law which required the general population to be vaccinated against smallpox in 1809 [1].

When Covid-19 struck in December 2019, it was not unexpected, that health professionals and people in related fields will propose vaccination to curb its spread. However, the idea of vaccination during public health emergency has been seriously contaminated by socio-political ideology and religious inclination on one hand and consistently challenged by the legal conundrum of informed consent on the other. The main thrust of this paper is to harvest the various opinions across socio-political, and ethico-legal inclinations and hunches, with a view to resolving the polemics through a middle cause. For instance, compulsory vaccination in the UK was perceived by Epidemiological Society’s Smallpox Vaccination Committee as a simple conflict between beneficence and autonomy, with beneficence deserving greater consideration. Whereas, for the poor and working classes, smallpox vaccination was not only a potentially dangerous procedure that required the “contamination” of their infant children, but also conflicted with the social class struggle and their aspirations for freedom and liberty [1].

The above position is clearly influenced by Marxism as a socio-political ideology which believes in constant struggle between the two classes into which human society is stratified (the bourgeoisie and the proletariat). The Marxist theory of Law holds that Law is an instrument of oppression in the hands of the ruling class. To the Marxist, one of the functions of law is to obscure power relationships and legitimize or mystify the position of the ruling class in the society [2]. Ultimately, compulsory vaccination is seen as the decision of the ruling class over the less privileged majority.

This belief is a major springboard for the emergence of the anti-vaccination movement who are discouraging people from accepting the Covid-19 vaccination. According to Neil Johnson, a physicist at George Washington University in Washington DC, who is studying the anti-vaccine campaigners’ tactics since 2020, members of the group are small, but their online-communications strategy is worryingly effective and far-reaching [3]. This anti-vaccination campaign has overt and covert negative effects on Covid-19 vaccination across both developed and developing countries including Nigeria [4].

Apart from socio-political ideological inclinations depicted above, other factors which fuel the anti-vaccination activism and hesitancy include, side effects of vaccination (both imaginary and real), general distrust in government and health institutions in charge of vaccination due to past negative experience, discrimination in the healthcare system and unethical medical trial. In 1996, Nigeria had 109,580 cases of meningitis with 11,717 deaths [5]. Pfizer, a U.S. pharmaceutical company, took advantage of the situation to launch a new antibiotic drug, Trovan. Having tested the drug on adults with serious side effects, such as liver problems and cartilage abnormalities, Pfizer decided to test the efficacy of Trovan in pediatric settings.

After one year of this unethical experimentation, 11 out of the 200 children used as experimental genuine pigs died, while many were reported to suffer various disabilities including paralysis and liver failure. An investigation by a panel of experts hired by the Nigerian government found Pfizer at fault in the children’s deaths and guilty of conducting human trials without informed consent. Several legal actions were filed against Pfizer by parents and the Kano state government. The matter was settled out of court and Pfizer was made to pay huge compensation to the families of both the deceased and the disabled children in 2009 [5]. This incidence and similar ones around the world, had subsequently strengthen distrust and vaccine hesitancy in Nigeria and other part of the globe, up till Covid-19 vaccination campaign [4] [6].

Contrary to the foregoing, the utilitarian theory of law rides on the conveyance of the philosophical thought of Jeremy Bentham and John Stuart Mill to posit that, an action is right if it tends to promote happiness and wrong if it tends to produce sadness, or the reverse of happiness, not just the happiness of the actor but that of everyone affected by it [7]. Therefore, vaccination during a Public Health Emergency of International Concern
and an epidemic like Covid-19, is for the good of the majority, as it is aimed at arresting the spread of the virus. Diekema and Marcuse opine that unvaccinated persons can be view as "harming" the community [8].

Perhaps, this is the reason why the utilitarian philosopher, John Stuart Mill held that: "The only purpose for which power can rightfully be exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not sufficient warrant" [8]. Hence, the "harm principle" can be used to justify compulsory vaccination when the interest of the majority or the community is deemed significant. The ethical-legal question that arises is how to determine what is deemed significant and whether the consent of the individual to be vaccinated is not also significant. These issues have been determined by the court in conflicting decided cases discussed in the subsequent paragraphs below.

**Decided Cases on Compulsory Vaccination and Informed Consent**

Massachusetts recorded 284 deaths in 1902, on account of smallpox infection. Responding to this, the Cambridge Department of Public Health enacted an ordinance requiring citizens to be vaccinated or show proof of vaccination. Because of an adverse effect he claimed to have experienced when vaccinated as a child, Henning Jacobson refused to comply. He took his case to the District, State and finally the Supreme Court. Affirming his conviction in the *locus classicus* case of *Jacobson v. Massachusetts* [9], Justice John Marshall Harlan articulated in strong terms, the right of a state to promote vaccination and to require her citizens to be vaccinated. The court held inter alia that the individual liberty guaranteed by the United States Constitution could be derogated from “the safety of the general public may demand” [9].

The judgment was based upon the principle of self-defense, of paramount importance is that, any human community has the right to protect itself against an epidemic of disease which threatens the safety of her members. The learned Judge concluded that vaccination against smallpox, was one of such protections that the state had the right to insist upon for the common good. Although, Jacobson was convicted, this is a clear case of distrust, on account of past negative experience. As mentioned earlier, distrust born out of past negative experience is one of the factors that has kept the flame of anti-vaccine activism burning till today.

In 1922, the US Supreme Court in *Zucht v. King* [10], reaffirmed government agencies right to require compulsory vaccination, when it held in support of a school system that refused to admit an unvaccinated child. In that case, Rosalyn Zucht was excluded from a public school by public officials, because she did not have the required vaccination certificate and refused to submit to vaccination. The officials also caused Rosalyn to be excluded from a private school. This action was in tandem with the Ordinances of the City of San Antonio in Texas, which provided that no child or other person shall attend a public school or other place of education without having first presented a certificate of vaccination. Consequent upon the above, Rosalyn Zucht took a legal action against the officials.

In her suit, she contended that there was then no occasion for requiring vaccination; that the ordinances deprived the plaintiff of her liberty without due process of law by, in effect, making vaccination compulsory; and, also, that they are void because they leave to the Board of Health discretion to determine when and under what circumstances the requirement shall be enforced without providing any rule by which that board is to be guided in its action and without providing any safeguards against partiality and oppression. The action also contained averments to the effect that in administering the ordinance the officials have discriminated against the plaintiff in such a way as to deny her equal protection of the laws [10] Her prayers before the court were for an injunction against enforcing the ordinances, for a writ of mandamus to compel her admission to the public school, and for damages. From the trial court to the apex court, the decisions were in favour of compulsory vaccination and against Zucht. The Supreme Court held *inter alia* that in: the exercise of the police power, reasonable classification may be freely applied and that the regulation is not violative of the equal protection clause merely because it is not all-embracing.

On the contrary, the New York Court of Appeals per Benjamin Cardozo J. held the principle of informed consent as sacred in 1914 in its judgment on, *Schloendorn v. Society of New York Hospital* [11], a case concerning a woman who claimed that she was operated on without her consent. In considering whether the charitable hospital could be liable for an alleged trespass, Judge Cardozo declared thus: "Every human being of adult years and sound mind has a right to determine what shall be done with his own body." This is a pivotal decision upon which the principle of informed consent has been built, as the hospital was found liable in trespass.

In the Nigerian case of *Medical and Dental Practitioners Disciplinary Tribunal v. Okonkwo* [12], the Court of Appeal upheld the principle of
informed consent based on similar ratio to Schloendorff v. Society of New York Hospital [11] i.e "Every human being of adult years and sound mind has a right to determine what shall be done with his own body". The facts of the case are that one Mrs Martha Okorie gave birth to a baby and complication set in soon after. The patient was admitted to a specialist hospital at Onitsha, where the physician on duty recommended blood transfusion. The patient refused, due to her religious belief as a Jehovah witness. On the request of the patient’s husband, she was transferred to another hospital at Enugu after 9 days. In the new hospital, one Dr. Okonkwo, who was also a Jehovah witness respected her wish and did not also transfer her to another hospital. The patient died some days later, her mother laid a complaint before the Medical and Dental Practitioners. The Medical and Dental Practitioners Disciplinary Tribunal found Dr. Okonkwo guilty for breaches of professional ethics and sentenced him to 6 months suspension. His appeal to the court of Appeal succeeded. The court held that Doctor Okonkwo was not influence by his religious belief as a Jehovah witness, his action was rather guided by the wishes of the deceased not to accept blood transfusion as contained in the document signed by the deceased.

The Court in the Nigerian case further held that in the consideration of objection to medical treatment on religious or other grounds, there is the need to balance the three conflicting interests between (1) constitutional rights of the individual, (2) interest of the state to protect and promote public health, safety and welfare of society and (3) the interest of the medical profession to preserve the integrity of medical ethics. Hence, in recent time, the principle of informed consent has taken on a fundamental, if not "sacramental" status, in contemporary thought. This principle is pervasive in both law and ethics under many guises. There is no gainsaying that, these factors are relevant in the Covid-19 vaccination and anti-vaccination conceptions, especially as reflected in various ethico-legal arguments.

**Legal issues in Covid-19 compulsory vaccination in Nigeria**

For over one century, vaccine and vaccination has remained an important intervention during public health emergency in human history. However, Covid-19 vaccine hesitancy is very high across the globe and Nigeria is not an exception. A lot of factors influence the willingness of Nigerians to accept the COVID-19 vaccine. This include: lack of trust in government, financial reasons, non-involvement of Nigerians in the vaccine trials, religious beliefs and source of vaccine. Religion also has a significant influence on the willingness of Nigerians to take the COVID-19 vaccine. The result of a recent research shows that 61.7% of Muslim respondents are willing to take the COVID-19 Vaccine compared to 45.5% of Christian respondent and 25% of traditional worshippers that are willing to take the vaccine [4]. Therefore, covid-19 status certificate, compulsory or mandatory vaccination as a means to curb the spread of the virus did not come as a surprise. This policy is widespread among developed and developing nations including Nigeria. The Federal Government on September 2, 2021, through the Chairman of the Presidential Steering Committee (PSC) on COVID-19, Boss Mustapha, announced vaccination against the virus will be mandatory for federal civil servants from December 1, 2021. Subsequently, federal workers were made to show prove of vaccination before entering their respective offices.

While the government has a duty during a public health emergency as entrenched in Jacobson v. Massachusetts [9] every Nigerian of adult years and sound mind also has a right to determine what shall be done with his own body as depicted by the decisions in Schloendorff v. Society of New York Hospital [11] and Medical and Dental Practitioners Disciplinary Tribunal v. Okonkwo [12]. It is noteworthy that this Covid-19 certification policy runs contrary to certain fundamental human rights of the people as discussed below.

**Right to personal liberty**

The first of such rights is right to personal liberty as provided for in section 35 (1) of the 1999 Constitution of the Federal republic of Nigeria as amended. The section provides thus:

- Every person shall be entitled to his personal liberty and no person shall be deprived of such liberty save in the following cases and in accordance with a procedure permitted by law-
- Sub section (1) (e) of this section (35) which is the only subsection relevant to this paper reads as follows:

  In the case of persons suffering from infectious or contagious disease, person of unsound mind, person addicted to drug or alcohol or vagrants, for the purpose of their care or treatment or the protection of the community;

  Mandatory vaccination prevent the people from exercising their right to personal liberty, choice and self-determination as held in Medical and Dental Practitioners Disciplinary Tribunal v. Okonkwo [12]. Though there are exceptions to this provision, section 35 (1) (e) which is the closest to the issue in contention affects persons suffering from infectious or contagious disease, persons of
unsound mind etc. for the purpose of their care or treatment or the protection of the community. The above provision only restricts the liberty of persons suffering from infectious or contagious disease not healthy Nigerians who have not been in any way confirmed as suffering from Covid-19. The foregoing provision rather applies to the right of government or health officials to quarantine people suffering from infectious or contagious diseases. Further still, the practice of lock down, isolation and quarantine as applied by the Federal government, to prevent the spread of Covid-19, have their roots in the provision of section 14 (2) (b) of the 1999 Constitution of the Federal republic of Nigeria which provides that "the security and welfare of the people shall be the primary purpose of government". The implication of this provision is that personal liberty can be restricted to achieve security and welfare of the people which is the primary purpose of government.

It is in tandem with the above, that section 3 and 4 of the Quarantine Act, Cap Q2 Laws of the Federation of Nigeria 2004, empowers the President to make regulations for the purposes bringing to effect the terms of the prescription as may be necessary for the prevention, spread and the transmission of any dangerous infectious disease such as Covid-19 within Nigeria. It is noteworthy that Nigeria Covid-19 Regulations 2020 was made pursuant to this Act, Cap Q2 Laws of the Federation of Nigeria 2004.

In the US case of Barmore v Robertson [16] a Chicago woman issued a writ of habeas corpus against the local health officials on the ground that he was unlawfully quarantined when she was not ill and thereby barring her from receiving visitors who had not been immunized. The Supreme Court of Illinois held that the quarantine of a seemingly healthy person is good and that it is not necessary that a person is actually sick before being quarantined. The Court further held that the procedure for quarantine is usually applied to prevent the spread of contagious diseases and that the local health authorities have the right to restrain the liberties of the people by a way of quarantine regulations. The community reading of the provision of sections 35 (1) (e), 14 (2) (b) of the 1999 Constitution, sections 3 and 4 of the Quarantine Act, and the Court decision in Barmore v Robertson shows that individual personal liberty can be lawfully restricted during a public health emergency like the Covid – 19 pandemic.

Right to freedom of religion
Another fundamental right infringed by the compulsory vaccination policy is right to freedom of thought, conscience and religion as provided for in section 38 (1) of the Constitution. The section provides as follows:

Every person shall be entitled to freedom of thought, conscience and religion, including the freedom to change his religion or belief, and freedom (either alone or in a community with others, and in public or in private) to manifest or propagate his religion or belief in worship, teaching, practice and observance.

With the above provision, any Nigerian whose religious belief does not permit him to engage in blood transfusion or take Covid-19 vaccine has the fundamental right to manifest his religious belief in any form in the public. In the recent survey referred to above, 61.7% of Muslim respondents are willing to take the COVID-19 Vaccine compared to 45.5% of Christian respondents and 25% of traditional worshippers that are willing to take the vaccine [4]. However, the implication of the compulsory vaccination policy is that any person whose religious belief does not permit vaccination, will have to be vaccinated will-nilly. This is a clear violation of people’s fundamental right to freedom of thought, conscience and religion.

Freedom of movement
The provision of section 41 of the 1999 Constitution provides for the right to freedom of movement. The section provides as follows:

41(1) Every citizen of Nigeria is entitled to move freely throughout Nigeria and to reside in any part thereof, and no citizen of Nigeria shall be expelled from Nigeria or refuse entry or exit therefrom.

It is the argument of the anti-vaccination movement, that the requirement of compulsory Covid-19 vaccination and that of compulsory use of face mask to gain access to official places, infringes the right to freedom of movement of the citizens based on similar provisions across jurisdictions. Nigerians are also similarly affected, especially the federal government workers who were required to present proof of vaccination before entering government offices including their respective offices. This policy infringes the provision of section 41 (1) of the 1999 Constitution as well as article 12 of the International Convention on Civil and Political Rights which provide for freedom of movement of citizens of a country.

Right to work
Article 6 of International Covenant on Economic, Social, and Cultural Rights ("ICESCR") to which Nigeria is a signatory, provides for the citizens' right to work. A core and non-derogable obligation to such right is to ensure non-discrimination and equal protection of employment. The compulsory
Covid-19 vaccination policy is a direct infringement on this fundamental right of the Nigerian workers. Instead of compulsory vaccination, many people could willingly submit to vaccination through informed consent in a public health emergency situation.

Relationship between Informed consent and Public health Emergency
Contrary to general belief, informed consent and public health are not entirely incompatible. According to Wendy Parmet [13], informed consent has four major goals, each of which is important to the protection and promotion of public health. These goals are: compensation of injuries, prevention of injuries, promotion of trust and recognition of choices.

Compensation of injuries
Informed consent is a doctrine of the law of tort. Informed consent is a cause of action that patients can bring against health care providers for failing to give them information material to obtaining their consent to a medical procedure. The failure to obtain informed consent can create a liability on the part of a health care provider that can result in a judgment compensating a patient for a medically-induced injury. For instance, the Pfizer vaccine trial on Nigerian children was settled out of court but Pfizer was made to pay huge compensation to the families of both the deceased and the disabled children in 2009 [5]. Compensation serves as an insurance scheme, reducing an individual's risk and making it more likely that the individual will be willing to undertake the socially desirable action of being vaccinated [13].

Prevention of injuries
In informed consent cases, defendants are found liable only when plaintiffs can demonstrate that the defendant's failure to provide the required information caused a physical injury. Therefore, the informed consent cause of action provides defendants with a theoretical incentive to reduce physical injuries among patients. Because vaccine-related injuries lead people to resist vaccination, informed consent is thus a concept in aid of public health [13].

Promotion of trust
An important goal of informed consent is to foster "mutual trust and education between a doctor and his patient" [14]. By requiring that health care providers inform patients about the risks of particular medical procedures, informed consent seeks to promote a trust relationship between patient and provider. In this circumstance, the provider acts in the interest of the patient and shares with the patient, information necessary for the patient to make informed choices and to feel respected in the course of treatment [15]. This trust is often critical to the success or failure of a therapeutic intervention, such as Covid-19 vaccination. Lack of trust is a long standing factor in the promotion vaccine hesitancy in Nigeria as discussed above. Informed consent will go a long way to mitigate the age long mistrust and vaccine hesitancy.

Recognition of choices
Although the legal doctrine of informed consent has often been criticized for failing to be faithful to a patient's autonomy, both courts and ethicists recognize that patient autonomy is a key goal of informed consent [15]. Informed consent promotes autonomy by providing patients with information necessary to making an informed choice that is properly reflective of their values and outcomes.

Restriction of individual rights during public health emergency
For every law there are exceptions. Section 45 of the 1999 Constitution provides for restriction and derogation from the fundamental rights discussed above under certain circumstances. These circumstances are stated in Section 45 (1) (a) 1999 Constitution as amended. The section provides thus:

45 (1) Nothing in sections 37, 38, 39, 40 and 41 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society-
(a) In the interest of defence, public safety, public order, public morality and public health.

In the interest of defence, public safety, public order, public morality and public health the right to freedom of thought conscience and religion as provided in section 38 of the 1999 Constitution can be restricted. Therefore, Covid-19 vaccine might not be validly rejected on account of freedom of thought, conscience and religion, in the face of public health emergency. In the same vein, Covid-19 vaccine might not be validly rejected on account of right to personal liberty contained in section 35 (1) (e) and right to freedom of movement as provided in section 41 (1) respectively. In a nutshell, the fundamental rights of the citizens as discussed above can be restricted by the Government during a public health emergency, like the current situation presented by Covid-19 pandemic.

CONCLUSION
It is conceded that the Government can impose restriction on human rights during a period of public health emergency, such as the spread of corona virus. However, it must be noted that a
government that emphasizes more coercive measures may have instilled panic in their populations. Certainly, in a wide-spread emergency, voluntary compliance will be essential if for no other reason than the fact that there will not be sufficient resources to compel people to follow public health directives. Informed consent as discussed above, could increase Covid-19 vaccine acceptability by reducing mistrust in the health system. It is also noteworthy, that compulsory vaccination could lead to the procurement of Covid-19 certificate by Nigerians without actually being vaccinated. In other words, Nigerians will get Covid-19 certificate by circumventing the lawful procedure, just to prove that they have been vaccinated and avoid lawful restrictions.

REFERENCES


[4] In a study that sought to investigate the willingness of Nigerians to accept Covid – 19 vaccine, Bobadoye Ayodotun and Alabi Ifeoluwa found as follows: Religion has a significant influence on the willingness of the respondents to take the COVID-19 vaccine. The result shows that 61.7% of Muslim respondents are willing to take the COVID-19 Vaccine compared to 45.5% of Christian respondent and 25% of traditional worshippers that are willing to take the vaccine. Factors that influence the willingness of respondents to accept the COVID-19 vaccine are lack of trust in government, financial reasons, non-involvement of Nigerians in the vaccine trails, religious beliefs and source of vaccine. They conclude that to have successful vaccination process, the government needs to prioritize vaccine acceptance strategies which will include involvement of leaders and influencers such as religious leaders, community rulers. See: Bobadoye Ayodotun and Alabi Ifeoluwa, “Understanding Factors that Influence Covid-19 Vaccine Acceptability in Nigeria”, GET Technical Paper Vol. 2 (2021)


[6] The current anti-vaccination activism against Covid-19 vaccine in the US has its root in similar experience by the American people as reported by Marian Ołpin´ski thus: April 19th, 1982 is considered the beginning of the modern history of the U.S. anti-vaccination movement. On that date, WRC-TV in Washington, D.C., aired a program entitled DPT: Vaccine Roulette, singling out the DTP vaccine, particularly its pertussis component, of causing severe brain damage, seizures and delayed mental and motor development. In response to this program, many parents refused to vaccinate their children, not only in the U.S. but around the world. The largest decrease in vaccination coverage was in Great Britain, where it caused an epidemic of pertussis and the deaths of many children. Parents who thought their children were harmed by the vaccine directed class action law suits in the civil courts for huge damages. Numbers of lawsuits against vaccine manufacturers and the amount of compensation paid by them have increased to such an extent that in 1986 one of the last two vaccine manufacturers in the United States withdrew from production. This caused a real threat to public health in the United States and pushed the U.S. Congress to act. On October 18th, 1986 The United States Congress passed a bill that protected vaccine manufacturers. The act was called the National Childhood Vaccine Injury Act and was signed by President Ronald Reagan two months later. The purpose of the Act was to allow children to be compensated for vaccine damages without suing in state courts; to protect pharmaceutical companies from litigation; and to encourage vaccine makers to produce new vaccines. The institution established to oversee these cases was the National Vaccine Injury Compensation Program (NVICP), better known as Vaccine Court. See: Marian Ołpin´ski, ‘Anti-Vaccination Movement and Parental Refusals of Immunization of Children in USA’ Pediatria Polska 87 (2012) 381–385


[16] Barmore v Robertson 302 III. 422 - 433 (III. 1922)