

GET JOURNAL OF
& BIOSECURITY
ONE HEALTH

PUBLISHED BY:

Global Emerging Pathogens
Treatment Consortium

JOURNAL WEBSITE

www.getjournal.org

COVID-19 Vaccine and the Legal Conundrum of Informed Consent and Public Health Emergency in Nigeria

Adeleke LA

Department of Jurisprudence and International Law, Faculty of
Law, Lagos State University, Ojo, Lagos State, Nigeria

*Corresponding Author: Lateef A. Adeleke PhD
Tel: +2348075139978

Orchid No: <https://orcid.org/0000-0003-0686-5593>

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 principle 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.

Keywords: Covid-19; Vaccine; Informed-consent.

Corresponding Author's Email: dr.lateefadeleke@gmail.com

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 would 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 course. 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. In a study that sought to investigate the willingness of Nigerians to accept COVID-19 vaccine, Bobadoye and Alabi found that religion has a significant influence on the willingness of the respondents to take the COVID-19 vaccine [4]. 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. According to the research, 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 trials, religious beliefs and source of vaccine [4].

Apart from socio-political/ideological inclinations and religious lineage 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 health care 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 guinea 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 strengthened distrust and vaccine hesitancy in Nigeria and other part of the globe, up till COVID-19 vaccination campaign [4].

For instance, the anti-vaccination activism against COVID-19 vaccine in the US has its root in similar experience which the American people had as reported by Marian Olpin'ski [6]. Marian considered April 19th, 1982 as the beginning of the modern history of the U.S. anti-vaccination movement. On the said day, WRC-TV in Washington, D.C., aired a program entitled DPT: Vaccine Roulette. The program singled out the DTP vaccine, especially its pertussis component, of leading to severe brain damage, seizures and delayed mental and motor development. In consonance with the picture painted by this program, many parents in the U.S. and across the globe refused to vaccinate their children [6].

The highest decline in vaccination coverage was recorded in Great Britain, where it led to an epidemic of pertussis and the deaths of many children. Parents whose children were harmed by the vaccine directed class action law suits in the civil courts for huge damages [6]. The lawsuits against vaccine manufacturers were so many and the amount of compensation paid by them was so much that by 1986 one of the last two vaccine manufacturers in the United States withdrew from production [6]. This brought about a real threat to public health in the United States and spur the U.S. Congress to action. By 18th day of October, 1986, the U.S. Congress passed a bill to protect vaccine manufacturers. The act was called the National Childhood Vaccine Injury Act and was signed by President Ronald Reagan two months thereafter [6]. The main 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 [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 opined 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 ethico-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 event 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 borne out of past negative experience is one of the factors that have 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, *Schloendorff 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 influenced 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.

It is instructive to note that this Nigerian case is not a decision on vaccination. It however has contextual relevance, as its *ratio decidendi* is similar to *Schloendorff v. Society of New York Hospital* [11] and the principle of informed consent is common to both. Reference to the case is to establish that the principle of informed consent has taken on a fundamental, if not "sacramental", status in contemporary thought and that, this principle is pervasive in both law and ethics under many guises. This is clearly shown in the *ratio decidendi* of the two case which reads: "every human being of adult years and sound mind has a right to determine what shall be done with his own body". *John Does et al. v. Janet T. Mills, Governor of Maine, et al.* [13] is a case where some health workers refused to accept COVID-19 vaccine based on their religious beliefs. The US Supreme Court held that the Applicant's/Complainant's sincere religious beliefs, affecting their rights to self-determination and personal liberty deserved to be respected. This case is discussed further below, under the heading "right to freedom of religion"

The principle of informed consent as contained in section 564 of the American Food, Drug and Cosmetic Act (FDCA) was directly applied to COVID-19 vaccination. Empowered by section 564(e) (1) (A) (ii) (III) of the Act, Food and Drug Administration (FDA) since December 2020 granted emergency use authorisation (EUA) to some newly produced vaccines to prevent the spread of Covid-19. In each of these

authorisations, FDA imposed the “option to accept or refuse” condition, by making it a requirement to present a Fact Sheet to every potential vaccine recipients. The Fact Sheet states: “It is your choice to receive or not receive the vaccine. Should you decide not to receive it, it will not change your standard medical care” [14].

This provision seems to uphold the principle of informed consent as held by the courts in *Schloendorff v. Society of New York Hospital* and *Medical and Dental Practitioners Disciplinary Tribunal v. Okonkwo*, that “every human being of adult years and sound mind has a right to determine what shall be done to his body”. However Dawn Johnsen, the Acting Assistant Attorney General, office of Legal Counsel, in memo dated the 6th day of July 2021, stated that section 564 of the FDCA does not prohibit public or private institutions from imposing vaccination requirements, even when the only vaccines available are those authorized under EUAs [15].

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 unwillingness of Nigerians to accept the COVID-19 vaccine. This include: lack of trust in government, financial reasons, non-involvement of Nigerians in the vaccine trails, religious beliefs and source of vaccine. Religion also has a significant influence on the willingness of Nigerians to take the COVID-19 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 proof 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. In many jurisdictions, fundamental right of personal liberty and bodily integrity has been sacrosanct, in the US, the Supreme Court in *Union Pac. Ry. Co. v Botsford* [16] found that “No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.” Also in *Washington v. Harper* [17], the court held that “The forcible injection of medication into a non-consenting person’s body represents a substantial interference with that person’s liberty.”

Applying *Jacobson v. Massachusetts* [9] to the modern day and personal liberty concerns, leading scholars at Boston University, George Annas, Wendy Mariner, and Leonard Glantz wrote in the following golden letters:

Public health programs that are based on force are a relic of the 19th century; 21st century public health depends on good science, good communication, and trust in public health officials to tell the truth. In each of these spheres, constitutional rights are the ally rather than the enemy of public health. Preserving the public’s health in the 21st century requires preserving respect for personal liberty [18].

The foregoing position of the trio of George Annas, Wendy Mariner, and Leonard Glantz came about as a result of the abusive application of the principle of compulsory vaccination and self defence of the State, entrenched in *Jacobson v. Massachusetts* [9] to other spheres of personal health privacy of the people. For instance, in 1927, the US Supreme Court in *Buck v Bell*, upheld a Virginia law that authorised the involuntary sterilisation of “feeble minded” persons in state institutions [19]. During this period (1920s and 1930s), theories of eugenics enjoyed some medical and scientific support [20]. Leaning on the precedent in *Jacobson v. Massachusetts* [9] the Court in *Buck v Bell* found that, the law served the public health and welfare because “mental defectives” would produce degenerate criminal offspring or imbeciles who “sap the strength of the state” [19].

In a frightening dictum, Justice Oliver Wendell Holmes, leveraging on the precedent in *Jacobson v. Massachusetts* [9] concluded that:

Society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. *Jacobson v. Massachusetts*, 197 US 11. Three generations of imbeciles are enough [19].

With above decisions appearing to constitute the Court's imprimatur of involuntary sterilization laws, more than 60,000 Americans, mostly poor women, were sterilized by 1978 [18]. This is the extent to which *Jacobson v. Massachusetts* [9] was used as an instrument of denial of personal liberty, caused ripples in the still water of public trust and laid the foundation of anti-vaccination movement and agitation for personal liberty.

In Nigeria, the principle of personal liberty is provided for, in section 35 (1) of the 1999 Constitution of the Federal republic of Nigeria as amended. The section reads 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 prevents the people from exercising their right to personal liberty, choice and self-determination as held in *John Does et al. v. Janet T. Mills, Governor of Maine, et al.*[13]. 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. It is for this reason some Nigerians are hesitant to be

vaccinated. Some even challenged mandatory vaccination in court.

The Edo State government in September 2021, announced the policy of mandatory vaccination for every citizen of the state, else, their social life will be restricted. The official statement reads:

"From the second week of September, people may not be allowed to worship in churches and mosques without showing proof of their vaccination cards at the gates. Similarly, people will not be allowed to event centres, receptions or parties without showing proof of their vaccination cards" [21]

However, one Charles Osaretin secured an injunction from the Federal High Court sitting in Port Harcourt, restraining the State government from enforcing the mandatory vaccination policy. The plaintiff had earlier filed a legal action with suit number FHC/PH/FHR/266/2021 to challenge the action of the State government as contravening the right of the citizens to personal liberty.

In the circumstance of the foregoing, the provision of section 35 (1) (e) of the 1999 Constitution rather applies to the right of government or health officials to quarantine people suffering from infectious or contagious diseases. Further still, the practice of lockdown, 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* [22] a Chicago woman issued a writ of habeas corpus against the local health officials on the ground that she 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 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. It is noteworthy that this right is not absolute and could be derogated from as provided in section 45 (1) (a) of the 1999 Constitution. In the contentious COVID-19 case of *John Does et al. v. Janet T. Mills, Governor of Maine, et al.* [13] the US Supreme Court held that Laws that single out sincerely held religious beliefs or conduct based on them for sanction are "doubtless unconstitutional." The Applicants/Complainants approached the Court for

an injunctive relief to protect them from losing their jobs and professional practice, on account of their refusal to accept COVID-19 vaccine, based on their religious belief. The facts according to the Court are as follows:

Maine has adopted a new regulation requiring certain healthcare workers to receive COVID-19 vaccines if they wish to keep their jobs. Unlike comparable rules in most other States, Maine's rule contains no exemption for those whose sincerely held religious beliefs preclude them from accepting the vaccination. The applicants before us are a physician who operates a medical practice and eight other healthcare workers. No one questions that these individuals have served patients on the front line of the COVID-19 pandemic with bravery and grace for 18 months now. Yet, with Maine's new rule coming into effect, one of the applicants has already lost her job for refusing to betray her faith; another risks the imminent loss of his medical practice [13].

The Applicants therefore brought a petition for certiorari and prayed the Court for an injunction restraining the State from applying the new regulation on them. In a judgment delivered on the 29th day of October, 2021, the Supreme Court of the US held *inter alia* thus:

Maine does not dispute that its rule burdens the exercise of sincerely held religious beliefs. The applicants explain that receiving the COVID-9 vaccines violates their faith. Under this Court's precedents, a law fails to qualify as generally applicable, and thus triggers strict scrutiny, if it creates a mechanism for "individualized exemptions." That description applies to Maine's regulation. The State's vaccine mandate is not absolute; individualized exemptions are available, but only if they invoke certain preferred (nonreligious) justifications. Under Maine law, employees can avoid the vaccine mandate if they produce a "written statement" from a doctor or other care provider indicating that immunization "may be" medically inadvisable. Nothing in Maine's law requires this note to contain an explanation why vaccination may be medically inadvisable, nor does the law limit what may qualify as a valid

“medical” reason to avoid inoculation [13].

About double standard and discrimination against religious belief on COVID-19 vaccines, the Court held:

So while COVID-19 vaccines have Food and Drug Administration labels describing certain contra-indications for their use, individuals in Maine may refuse a vaccine for other reasons too. From all this, it seems Maine will respect even mere trepidation over vaccination as sufficient, but only so long as it is phrased in medical and not religious terms. That kind of double standard is enough to trigger at least a more searching (strict scrutiny) review [13].

About neutrality of the Maine’s vaccine mandate law, the Court held:

Strict scrutiny applies to Maine’s vaccine mandate for another related reason. This Court has explained that a law is not neutral and generally applicable if it treats “any comparable secular activity more favorably than religious exercise.” And again, this description applies to Maine’s rule. The State allows those invoking medical reasons to avoid the vaccine mandate on the apparent premise that these individuals can take alternative measures (such as the use of protective gear and regular testing) to safeguard their patients and co-workers. But the State refuses to allow those invoking religious reasons to do the very same thing. No one questions that protecting patients and healthcare workers from contracting COVID-19 is a laudable objective. But Maine does not suggest a worker who is unvaccinated for medical reasons is less likely to spread or contract the virus than someone who is unvaccinated for religious reasons. Nor may any government blithely assume those claiming a medical exemption will be more willing to wear protective gear, submit to testing, or take other precautions than someone seeking a religious exemption. A State may not assume “the best” of individuals engaged in their secular lives while assuming “the worst” about the habits of

religious persons. If human nature and history teach anything, it is that civil liberties face grave risks when governments proclaim indefinite states of emergency [13].

While granting the prayer of the Applicants/Complainants, the Court per Justice Gorsuch, in this lead judgment, and their Lordships, Justice Thomas and Justice Alito concurring, concluded that:

This case presents an important constitutional question, a serious error, and an irreparable injury. Where many other States have adopted religious exemptions, Maine has charted a different course. There, healthcare workers who have served on the front line of a pandemic for the last 18 months are now being fired and their practices shuttered. All for adhering to their constitutionally protected religious beliefs. Their plight is worthy of our attention. I would grant relief [13].

Although the freedom of religion and freedom to manifest one’s religious belief in public is a constitutional right, it is not an absolute right and could be derogated upon for public interest. Coincidentally, this decision also establishes the principle of informed consent and self-determination as discussed earlier in this paper.

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 [23] 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]. It is noteworthy, that reference to Pfizer case here is not because the incident has to do with vaccination directly; its relevance is to the effect that, it is an unpleasant experience that contributes to general distrust in the government and health institutions in times of public health emergency. 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 [23].

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 course 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 [23].

Promotion of Trust

An important goal of informed consent is to foster “mutual trust and education between a doctor and his patient” [24]. 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 [25]. 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 [25]. 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 could 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.

LIMITATION

One obvious limitation of this work is the dearth of Nigerian cases, as the culture of litigation in health related disputes is not as much as that of the developed world. Nonetheless, few Nigerian cases, sections of the Constitution and relevant statutes and decisions from other jurisdictions came handy.

REFERENCES

[1] Alvin NE, Michelle T Robert K, Jonathan EF. Ethical Issues Concerning Vaccination Requirements. *Public Health Rev.* 2013; 34 (1):1-20 Available from: <https://publichealthreviews.biomedcentral.com/track/pdf/10.1007/BF03391666.pdf> (Accessed 27th March 2022)

[2] Iyaniwura W. The Growth, Decline and Demise of Marxism as a Legal Theory and Political System. *Abuja LAWSAN Jurist.* 2013; 14

[3] Johnson NF. Anti-vaccine Movement Might Undermine Pandemic Effort. *Nature.* Available from: <http://doi.org/ggvvjx> (2020)

[4] Bobadoye A, Alabi I. Understanding Factors that Influence COVID-19 Vaccine Acceptability in Nigeria GET Technical Paper, Vol. 2. 2021

[5] Jegede AS. What Led to the Nigerian Boycott of the Polio Vaccination Campaign? *PLoS Med.* 2007; 4(3): e73. <https://doi.org/10.1371/journal.pmed.0040073>

[6] Ołpin'ski M. Anti-Vaccination Movement and Parental Refusals of Immunization of Children in USA' *Pediatrica Polska.* 2012; 87:381–385

[7] Adewale T, Ifeolu J. *Jurisprudence and Legal Theory in Nigeria.* Lagos: Princeton. 2019.

[8] Diekema DS, Marcuse EK. Ethical issues in the vaccination of children. Bayer R, Gostin LO, Jennings B, Steinbock B, editors. In: *Public Health Ethics: Theory, Policy and Practice.* New York, NY: Oxford University Press; 2007; 279-288.

[9] *Jacobson v. Massachusetts*, 197 U.S. 11, 12-13 (1905). Available from: <https://supreme.justia.com/cases/federal/us/197/11/> (Accessed 27th May 2022)

[10] *Zucht v. King*, 260 U.S. 174 (1922) Available from: <https://supreme.justia.com/cases/federal/us/260/174/> (Accessed 27th May 2022)

[11] *Schloendorff v. Society of New York Hospital* 105 N.E. 92 (N.Y. 1914) Available from: <https://biotech.law.lsu.edu/cases/consent/schoendorff.htm> (Accessed 27th May 2022)

[12] *Medical and Dental Practitioners Disciplinary Tribunal v. Okonkwo* (2001) FWLR, (Pt.44) 542 Available from: <https://www.globalhealthrights.org/wp-content/uploads/2013/02/SC-2001-Medical-and-Dental-Practitioners-Disciplinary-Tribunal-v.-Okonkwo.pdf> (Accessed 27th May 2022)

[13] *John Does et al. v. Janet T. Mills, Governor of Maine, et al.* 595 U. S. 1-9 (2021) Available from: https://www.supremecourt.gov/DocketPDF/21/21A90/197418/20211025111923898_2021-10-25 (Accessed 27th May 2022) (Accessed 27th May 2022)

[14] Pfizer Factsheet. Available from: <https://www.fda.gov/media/144414/download> (Accessed 27th May 2022)

[15] <https://www.justice.gov/olc/opinion/whether-section-564-food-drug-and-cosmetic-act-prohibits-entities-requiring-use-vaccine> accessed 27/5/2022

[16] *Pac. Ry. Co. v Botsford*, 141 U.S. 250, 251 (1891). Available from: <https://supreme.justia.com/cases/federal/us/141/250/> (Accessed 27th May 2022)

[17] *Washington v. Harper*, 494 U.S. 210, 229 (1990)

[18] Mariner WK, Annas GJ, Glantz LH. Jacobson v Massachusetts: It's Not Your Great-Great-Grandfather's Public Health Law. *Am J Public Health*. 2005; 95(4):581-590.

[19] *Buck v Bell*, 274 US 200 (1927) Available from: <https://supreme.justia.com/cases/federal/us/274/200/> (Accessed 27th May 2022)

[20] Lombardo P. Genes and Disability. Defining Health and the Goals of Medicine: Taking Eugenics Seriously: Three Generations of

Imbeciles are enough? *Fla State University Law Rev*. 2003; 30:191-218

[21] *Charles Osaretin v. Governor of Edo State & Ors* suit number FHC/PH/FHR/266/2021 (unreported) and <https://businessday.ng/news/article/court-restrains-obaseki-from-imposing-covid-vaccination-in-edo/> (Accessed 27th May 2022)

[22] *Barmore v Robertson* 302 Ill. 422 - 433 (Ill. 1922) Available from: <https://cite.case.law/ill/302/422/> (Accessed 27th May 2022)

Available from: <https://supreme.justia.com/cases/federal/us/>
[23] Wendy EP, Informed Consent and Public Health: are they Compatible when it comes to Vaccines? *J Health Care Law Policy*. 2005; 8(1): 71-110

[24] Alan MA. "Dignitary Tort" as a Bridge between the Idea of Informed Consent and the Law of Informed Consent, *16 L Med. Health Care*. 1988; 210, 212

[25] *Canterbury v. Spence* 464 F.2d 772, 782 (D.C. Cir. 1972) Available from: <https://www.casemine.com/judgement/us/5914c729add7b049347e06bb> (Accessed 27th May 2022)