

VACCINE HESITANCY, MANDATORY COVID-19 VACCINATION AND THE RIGHT TO PERSONAL AUTONOMY IN NIGERIA: A CONSTITUTIONAL ANALYSIS

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ABSTRACT

Since countries began vaccine rollout against the COVID-19 virus, all hands have been on deck to vaccinate as many people as possible, in order to achieve a high vaccine uptake towards herd immunity. Though slow, Nigeria just like other countries, has been vaccinating its citizens. However, the vaccination effort, like similar programmes has continued to encounter the familiar foe of vaccine hesitancy. Where vaccine hesitancy becomes an issue, a likely response is for the government to explore the option of mandatory vaccination, either directly or indirectly, with the goal of compelling citizens to be vaccinated, or suffer some jeopardy. Such a move is bound to touch on core human rights, especially the right to personal autonomy. This article examines the extent to which a mandatory COVID-19 vaccination programme in Nigeria, conflicts with the citizen's right to determine what should be done to his/her body. It concludes that rather than forcing vaccines on people, a better option is for government to gain the trust of the people, through multi-layered social engagements.

Keywords: Vaccine, Vaccination, COVID-19, Right, Autonomy, Constitution

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Introduction

In the war against the COVID-19 pandemic, the international community is currently at a major juncture i.e., the phase of mass vaccination towards achieving herd immunity. Herd immunity happens when a large aspect of a target population become immune to a disease, such that the agent causing infection stops spreading.² It is derived from the effects of an individual's immunity upped to the level of the population.³ By late 2020 and early 2021, COVID-19 vaccines were approved for use in a number of jurisdictions.⁴ With time, administration of the vaccines grew and spread across the globe. In the effort at mass vaccination, nothing is being left to chance. For instance, the United States (US) President, Joe Biden, has reiterated his resolve to vaccinate 100 million Americans in his first 100 days in office and so far it appears that goal is within reach.⁵ At the time of completing work on this article, at least 83.9 million Americans have received one or both doses of the vaccine.⁶ In the United Kingdom (UK), the same resilience is at work, as almost 28 million people have received at least one dose of the vaccine with the UK government aiming to offer a first dose of the vaccine to 32 million people in nine priority groups by April 15, 2021.⁷ According to the UK government, almost 85% of persons aged 60 and above have been vaccinated.⁸ These are indeed commendable strides, however, one important issue it throws up is where this leaves the poor and developing countries of the world, most of which are to be found on the African continent. As the

² Monica Neagu, 'The Bumpy Road to Achieving Herd Immunity in COVID-19' (2020) 46 (1) *Journal of Immunoassay and Immunochemistry*, 928 – 945 at 929.

³ Haley E. Randolph and Lius B. Barreiro, 'Herd Immunity: Understanding COVID-19' (2020) 52 (5) *Immunity*, 737 – 741 at 737.

⁴ Nirbachita Biswas, et al, 'The Nature and Extent of COVID-19 Vaccination Hesitancy in Health Workers' (2021) *Journal of Community Health*, 1- 8 at 1.

⁵ Berkeley Lovelace Jr., 'Biden Will Reach Goal of Having 100 Million Covid Vaccine 'shot in Arms' in his first 100 Days as Early as Thursday', *CNBC* (March 18, 2021), <https://www.cnbc.com/2021/03/18/covid-vaccine-biden-to-hit-goal-of-100-million-shots-in-first-100-days-early.html> accessed 24/03/2021; Molly Nagle and Arielle Mitropoulos, 'Biden Says US Will Meet his Promise of 100 Million COVID Vaccine Doses Ahead of Schedule', *ABC News* (March 18, 2021) <https://abcnews.go.com/Politics/biden-us-meet-promise-100-million-covid-vaccine/story?id=76544217> accessed 24/03/2021; Lauren Egan, 'Biden Expected to Hit Goal of 100 Million Vaccination Shots Friday', *NBC News* (March 18, 2021), <https://www.nbcnews.com/politics/white-house/biden-expected-hit-100-million-vaccination-goal-early-thursday-n1261388> accessed 24/03/2021.

⁶ WSP, 'At Least 83.9 Million Persons have received one or both doses of the Vaccine in the US', *The Washington Post*, (March 24, 2021), <https://www.washingtonpost.com/graphics/2020/health/covid-vaccine-states-distribution-doses/> accessed 24/03/2021.

⁷ The Visual and Data Journalism Team, 'COVID-19: How Many People in the UK Have been vaccinated so far?', *BBC News* (March 23, 2021), <https://www.bbc.com/news/health-55274833> accessed 24/03/2021.

⁸ Department of Health and Social Care, 'Half of All Adults in the UK receive first Dose of COVID-19 Vaccine', (March 20, 2021), <https://www.gov.uk/government/news/half-of-all-adults-in-uk-receive-first-dose-of-covid-19-vaccine> accessed 24/03/2021.

World Health Organisation (WHO) has rightly noted, “*lower-income countries could get left behind in the race to vaccinate the world*”.⁹ In the same vein, the United Nations (UN) Secretary-General Antonio Guterres, has branded what he calls ‘vaccine equity’, the biggest moral test of this time.¹⁰

With the high-stake nature of the vaccine-scramble and vaccination-marathon, it has been noted that, “*a successful vaccination programme could reconnect Africa to the rest of the world, while enabling the reorganisation of the continent’s health systems*”.¹¹ At the same time, “*falling short could leave the continent in a kind of Covid-limbo, cut off from its markets and customers, with potentially devastating consequences for countries’ economies and development*”.¹² Given the continent’s limited manufacturing capacity, it is inevitable that it will have to import COVID-19 vaccines.¹³ There is a ray of hope with the international cooperation on vaccine manufacture and distribution, especially the COVAX initiative consisting of Gavi, the Coalition for Epidemic Preparedness Innovations (CEPI) and the WHO.¹⁴ The challenge however is that this may not amount to much, in terms of the vaccine requirement of the continent. Aside this, there is a waiting adversary in the problem of ‘vaccine hesitancy’, one issue that has emerged following the rollout of vaccination programme across the African continent.¹⁵ To resolve the challenge of vaccine hesitancy in context of COVID-19 vaccination, one option open to governments is the imposition of a mandatory vaccination regime. Expectedly, since the mass rollout COVID-19 vaccines, this has become a developing issue, especially with the respect to the constitutionality of such a move, as well as its implication for human rights protection. Countries with large populations such as Nigeria are in this zone. However, any attempt by the government to mull such a move is likely to set it and the people on a constitutional and human rights collision course. Since

⁹ Zoe Magee, ‘Now COVID-19 Vaccinations are Going on a Global Scale’, *ABC News* (January 19, 2021), <https://abcnews.go.com/International/covid-19-vaccinations-global-scale/story?id=75222028> accessed 24/03/2021.

¹⁰ UN, ‘Secretary General Calls Vaccine Equity Biggest Moral Test for Global Community, as Security Council Considers Equitable Availability of Doses’, *United Nations* (February 17, 2021) <https://www.un.org/press/en/2021/sc14438.doc.htm> accessed 24/03/2021.

¹¹ O.B. Sisay, et al, ‘A COVID-19 Vaccination Plan for Africa’, *Tony Blair Institute for Global Change* (November 13, 2020), 1- 30 at 3, <https://institute.global/sites/default/files/articles/A-Covid-19-Vaccination-Plan-for-Africa.pdf> accessed 24/03/2021.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ Dewa Mavhinga and Carine Kaneza Nantulya, ‘Overcoming COVID-19 Vaccine Hesitancy Across Africa’, *Human Rights Watch* (March 7, 2021), <https://www.hrw.org/news/2021/03/07/overcoming-covid-19-vaccine-hesitancy-across-africa> accessed 26/03/2021.

mass vaccination picked up speed, legal scholars have been looking at this issue, with view to balancing the different contestations. Graeber, Schmidt-Petri and Schroder for instance notes that “*a policy of mandatory vaccination would be an extreme solution to solve the potential problem of low vaccine uptake, a lot be said in favour of less extreme policies*”.¹⁶ They therefore argue that vaccine mandates may be prescribes for a certain class of citizens such as physicians, nurses and physiotherapists, persons working in confined places, persons travelling on public transport, etc.¹⁷ They also added that vaccine mandates may also be imposed after time has shown that not many people had been vaccinated.¹⁸ Making a similar point, Moorthy notes that compulsory should only be used as a last resort.¹⁹ Specifically, he notes that:

every reasonable alternative should be exhausted before such policies are implemented, not only because they touch an issue so central in a free society, the right of individuals to make decisions about what is done their bodies, but also because of its practical obstacles, including inevitable legal challenges and widespread anger and resentment that could undermine the country’s ability to effectively combat this crisis and the crisis that lie ahead.²⁰

Engaging this issue with respect to South Africa Moodley et al, notes that:

competing entitlements in the bill of rights can be resolved through appropriate application of section 36 of the Constitution that provides for conditions under which limitation of rights in the interests of public good may occur.²¹

These scholarly interventions help put the focus of this article i.e., the issue of mandatory COVID-19 vaccination and its implications for the right to bodily integrity in

¹⁶ Daniel Graeber, Christoph Schmidt-Petri and Carsten Schroder, ‘Attitudes on Voluntary and Mandatory Vaccination Against COVID-19: Evidence from Germany’, (2021) 16 (5) *PLoS ONE*, 1 – 18 at 15.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ Gyan Moorthy, ‘Compulsory COVID-19 Vaccination/ Only as a last Resort’, (2020) 6 *Voices in Bioethics*, 1 – 8 at 7.

²⁰ *Ibid.*

²¹ K. Moodley, et al, ‘Hard Choices: Ethical Challenges in Phase 1 of COVID-19 Vaccine Roll-out in South Africa’, (2021) 111 (6) *South African Medical Journal*, 554 – 558 at 557. Section 36 of the South African Constitution 1996 which covers ‘limitation of rights’ states that, “*the rights in the bill of rights may be limited only in terms of law of general application to extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including – (a) the nature of the right; (b) the importance of the purpose of limitation; (c) the nature and extent of limitation; (d) the relation between limitation and its purpose; and (e) less restrictive means to achieve the purpose*”.

Nigeria in context. It suggests that, rather than mandatory vaccination, the government should use the tool of social engagement to achieve improved vaccine uptake.

Vaccine Hesitancy: The Nigerian Situation

Vaccines are regarded as among the most potent tools for preventing infectious diseases and extensive vaccination has seen a huge drop in many vaccine-preventable diseases in high and middle-income countries.²² Vaccination has been referred to as “*one of the most effective successful and cost-effective interventions known to improve health outcomes*”.²³ As useful as vaccines are, they can only bring result when used.²⁴ Generally, preventing morbidity and mortality that comes with vaccine-preventable diseases happens when a high vaccination uptake is achieved.²⁵ This means that a high number of the target population must have been vaccinated to bring about the desired goal of herd immunity. Though giving people vaccines is fairly straightforward, a programme of vaccination is very complex endeavour.²⁶ This is because a high vaccination rate is based on a number of factors, such as an understanding of the value of vaccination by the target population, availability of vaccines, as well as ready access.²⁷

One major challenge that continues to confront the goal of high vaccination uptake and herd immunity in any pandemic is the problem of vaccine hesitancy.²⁸ This is because vaccines, notwithstanding their potency, are only effective when the targeted population allows that it be administered on them.²⁹ Vaccine hesitancy occurs when the target population refuses to take vaccines, for different reasons. It may also mean delay in the taking of vaccines by a targeted population, outright refusal, notwithstanding availability.³⁰ Vaccine hesitancy is a complex phenomenon that may vary depending on the type of vaccine, place and time.³¹ It poses a major risk not only to the infected

²² Saad B. Omer, et al, 'Vaccine Refusal, Mandatory Immunisation and the Risks of Vaccine-Preventable Diseases', (2009) 360 (19) *The New England Journal of Medicine*, 1981 – 1988 at 1981.

²³ Juhani Eskola, et al, 'How to Deal with Vaccine Hesitancy?', (2015) 33 *Vaccine*, 4215 – 4217 at 4215.

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ Arthur Allen and Robb Butler, 'The Challenge of Vaccination Hesitancy and Acceptance: An Overview', in *Meeting the Challenge of Vaccination Hesitancy*, *The Sabin-Aspen Vaccine Science & Policy Group* (2020), 1 - 173 at 48

²⁷ Eskola, et al, (n 23)

²⁸ *Ibid.*

²⁹ Carmel Shachar and Dorit Rubenstein Reiss, 'When Are Vaccine Mandates Appropriate?' (2020), 22 (1) *AMA Journal of Ethics*, 36 – 42 at 36.

³⁰ Charles Shey Wiysonge, 'Vaccine Hesitancy, An Escalating Danger in Africa,' *Think Global Health* (December 17, 2019), <https://www.thinkglobalhealth.org/article/vaccine-hesitancy-escalating-danger-africa> accessed 14/07/2021.

³¹ *Ibid.*

individual, but also to the wider community.³² Importantly, it is a major threat to efforts at combatting infectious diseases and breakout of epidemic, as it can seriously undermine and derail vaccination programmes.³³

Several factors have been attributed to vaccine hesitancy. For one, it's been observed that even though vaccine hesitancy is rooted in sordid history of unethical medical practice and research on minority groups such as Africa-Americans, Asians, etc. its current manifestation has been described as symptomatic of the deeper proper of structural racism.³⁴ This refers to a system in which matters such as race and ethnicity are present factors in determining access to medical care, exposure to health risks and other issues.³⁵ It has been stated that what has been referred to as 'vaccine hesitancy is 'vaccine deliberation', in which individuals weight the merits and demerits of evidence of vaccine efficacy alongside related issues such as loved ones lost to the pandemic a long history of racism in medicine.³⁶ In a study by Daly and Robinson, it is reported that in a national sample of US adults, the percentage of persons willing to be vaccinated against COVID-19 dropped from 71% in April 2020 to 54% in October of the same year.³⁷ This study further reports that cases of unwillingness to be vaccinated was more among the segment of the American population with lower levels of education, income, as well as in female African-Americans and younger person.³⁸ As trust is central to medical healthcare, controversies such as the Tuskegee Syphilis scandal and the everyday racism that African-Americans face severely dampened their enthusiasm on vaccination programmes.³⁹ In the US, aside the issue of a distrust, it's also been reported that Americans who are Republicans are less likely to get the vaccine compared

³² Sara Cooper, et al, 'Vaccine Hesitancy – A Potential Threat to the Achievement of Vaccination Programmes in Africa' (2018) 14 (10) *Human Vaccines & Immunotherapeutics*, 2355 – 2357 at 2355.

³³ Oladapo Rasaq Kayode, et al, 'COVID-19 Vaccine Hesitancy: Maximising the Extending Roles of Community Pharmacists in Nigeria in Driving Behavioural Changes in Public Health Interventions' (2021) 7 (4) *Journal of Infectious Disease and Epidemiology*, 1 – 8 at 2.

³⁴ Giselle Corbie-Smith, 'Vaccine Hesitancy as Scapegoat for Structural Racism', *JAMA Health Forum* (March 25, 2021), <https://jamanetwork.com/channels/health-forum/fullarticle/2778073> accessed 30/03/2021.

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ Michael Daly and Eric Robinson, 'Willingness to Vaccinate Against COVID-19 in the US: Representative Longitudinal Evidence from April to October 2020' (2021) *American Journal of Preventive Medicine*, 1 – 8 at 6.

³⁸ *Ibid.*

³⁹ Simar Singh Bajaj and Fatima Cody Stanford', 'Beyond Tuskegee – Vaccine Distrust and Everyday Racism' (2021) 384 *The New England Journal of Medicine*, <https://www.nejm.org/doi/full/10.1056/NEJMp2035827> accessed 30/03/2021.

the Democrats.⁴⁰ Public concerns about the safety of vaccines is also a major driver of vaccine hesitancy.⁴¹ For instance, 70% of persons sampled under the Daly and Robinson study mentioned above, reported being concerned about side effects of the vaccines, while another 40% believed that being vaccinated may lead to long-lasting health problems.⁴² In Africa, vaccine hesitancy is fuelled by several factors such as rumours, misinformation, which can degrade public confidence in vaccine intake.⁴³

To combat the growing threat of vaccine hesitancy, particularly its impact on vaccine intakes and success of vaccination programmes, the WHO Strategic Advisory Group of Experts (SAGE), established the SAGE Working Group on Vaccine Hesitancy in March 2012.⁴⁴ According to the group, the problem of vaccine hesitancy can be understood within the context of the three 3C model of Convenience, Complacency and Confidence.⁴⁵ In its 2014 report, the group noted that while convenience relates to the challenge of logistics available to individuals in accessing vaccines, complacency relates to individual's perception of vaccines and confidence has to do with an individual's trust in the safety and efficacy of a vaccine.⁴⁶ In addition to the SAGE Working Group's report, the outcome of a research conducted in high income countries, show that these determinants have been expanded to five creating the 5C model, with the additional determining factors being risk calculation and collective responsibility.⁴⁷ While risk calculation involves comparing the risk between infection and vaccination, collective responsibility refers to the willingness by an individual to protect others by his taking of the vaccine.⁴⁸

Determining vaccine hesitancy in Nigeria, like other effort at arriving at a consensus on national issues, is fraught with problems. Different studies conducted on the public

⁴⁰ Gillian K. Steelfisher, Robert J. Blendon, and Hannah Caporello, 'An Uncertain Public: Encouraging Acceptance of COVID-19 Vaccines', (2021) *The New England Journal of Medicine*, <https://www.nejm.org/doi/full/10.1056/NEJMp2100351> accessed 30/03/2021.

⁴¹ Daly and Robinson, (n 37).

⁴² *Ibid.*

⁴³ Wiysonge, et al, (n 30).

⁴⁴ 'Report of the SAGE Working Group on Vaccine Hesitancy' *The World Health Organisation WHO*, 1 October 2014,

https://www.who.int/immunization/sage/meetings/2014/october/1_Report_WORKING_GROUP_vaccine_hesitancy_final.pdf accessed 14/07/2021.

⁴⁵ Arthur Allen and Robb Butler, 'The Challenge of Vaccination Hesitancy and Acceptance: An Overview' in *Meeting the Challenge of Vaccination Hesitancy, The Sabin-Aspen Vaccine Science & Policy Group* (2020), 1 - 173 at 48; Oladapo Rasaq Kayode, et al, 'COVID-19 Vaccine Hesitancy: Maximising the Extending Roles of Community Pharmacists in Nigeria in Driving Behavioural Changes in Public Health Interventions' (2021) 7(4) *Journal of Infectious Disease and Epidemiology*, 1 – 8 at 2.

⁴⁶ Allen and Butler, (n 44).

⁴⁷ Wiysonge, et al, (n 30), 2

⁴⁸ *Ibid.*

perception in Nigeria towards a potential COVID-19 vaccine reveals divergent results. A study conducted by Yusuff et al, reveals that 74% of the people are willing to receive the COVID-19 vaccine it becomes available.⁴⁹ When compared with percentages in other countries such as France (59%), Hungary (56%), Poland (56%), Russia (54%), and South Africa (64%), it shows that the acceptance level in Nigeria is high.⁵⁰ The study also showed that Males are slightly more willing to receive the vaccine than females, while young people within the ages of 16 – 30 expressing more readiness towards than elderly people.⁵¹ The study additionally showed people in the south of the country were more willing to receive the vaccine, compared to those in the northern part.⁵²

In another study by Amakiri, et al, 51.1% of Nigerians indicated readiness to receive a potential COVID-19 vaccine, a decision based on their awareness of the preventive nature of other vaccines against infectious diseases.⁵³ This is in contrast to what obtains in other parts of the world such as Australia, Canada and Europe where the vaccine acceptance rates are 85.8%, 57.5% and 73.9% respectively.⁵⁴ It observed that this poor showing may not be unconnected with the low literacy level in the country.⁵⁵ A strong assurance in the efficacy of a vaccine is central to acceptance amongst a wide section of the people.⁵⁶ This is shown in the Amakiri et al study which shows that 74.4% of the people are positive about implementing a potential COVID-19 vaccine in Nigeria as long as it is effective.⁵⁷ Importantly, the study notes about 52% of the people do not agree with a mandatory vaccination of a potential COVID-19 vaccine in the country and this is attributed to the general atmosphere of conspiracy theory connected with the COVID-19 pandemic, trust deficit in the public health significance of the COVID-19 disease and generally reduced vaccine confidence.⁵⁸ This is not entirely strange. In a related study by Agyekum, et al, only 39% of health workers in Ghana are willing to

⁴⁹ Adebayo Adebisi Yusuff, et al, 'When Its Available, Will We take it? Public Perception of Hypothetical COVID-19 Vaccine in Nigeria', *medRxiv: The Preprint Server for Health sciences* (October 26, 2020), <https://www.medrxiv.org/content/10.1101/2020.09.24.20200436v2.full.pdf> accessed 30/03/2021.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ Paschal Chiedozie Amakiri, et al, 'Willing to Accept a Potential COVID-19 Vaccine in Nigeria' (2021) 9 (1) *American Journal of Medical Sciences and Medicine*, 1 – 5 at 3.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*, 4.

⁵⁷ *Ibid.*, 4.

⁵⁸ *Ibid.*, 4.

receive the COVID-19 vaccine when delivered.⁵⁹ The study also showed that issues such as gender, cases of their relatives been diagnosed of COVID-19 and confidence in measures by governments against the pandemic determine vaccination acceptability.⁶⁰ Just like the case in Nigeria, male health workers were also revealed to be more willing to receive the vaccine compared to their female counterparts.⁶¹

With the problem of vaccine hesitancy being one of the most disturbing threats to public health in recent years, a likely response by most governments is to resort to a programme of mandatory vaccination, to compel citizens to get vaccinated or subsequently suffer certain legal jeopardy for refusing to do so. In recent times, this has been a dominant discourse amongst legal and public health scholars, particularly as it relates to the implications of such a move for constitutionally and judicially protected rights such as the right to personal autonomy. The implication of the misalignment on what may indeed amount to level of vaccine acceptance in Nigeria clearly shows that a regime of mandatory vaccination is likely to run into troubled waters.

Covid-19 Vaccination in Nigeria

On March 2, 2021 Nigeria receive its batch of COVAX COVID-19 vaccines, made up of 3.94 million doses of the AstraZeneca/Oxford vaccine, manufactured by Serum Institute of India and shipped from Mumbai to Abuja.⁶² It is the third West African country to receive such supply after Ghana and Cote d'Ivoire, which have both commenced their vaccination programmes.⁶³ The arrival of the vaccines was through the COVAX facility, based on a partnership of CEPI, Gavi, UNICEF and WHO.⁶⁴ The primary agency responsible for the control of vaccine-preventable diseases, through vaccination and immunization guidelines in the country is the National Primary Health Care Development Agency (NPHCDA),⁶⁵ and so the expectation was that with the arrival of the COVAX vaccines,

⁵⁹ Martin Wiredu Agyekum, et al, 'Acceptability of COVID-19 Vaccination Among Health Workers in Ghana', *medRxiv: The Preprint Server for Health sciences* (March 12, 2021), <https://www.medrxiv.org/content/10.1101/2021.03.11.21253374v1.full.pdf> accessed 30/03/2021.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² UNICEF, 'COVID-19 Vaccines Shipped by COVAX Arrive in Nigeria', *UNICEF* (March 2, 2021), <https://www.unicef.org/nigeria/press-releases/covid-19-vaccines-shipped-covax-arrive-nigeria> accessed 24/03/2021; Carley Petesch, 'Nigeria Receives Nearly 4 Million Vaccines from COVAX', *ABC News* (March 2, 2021), <https://abcnews.go.com/International/wireStory/nigeria-receives-million-vaccines-covax-76198417> accessed 24/03/2021.

⁶³ Abraham Achirga, 'First COVID-19 Vaccines Arrive in Nigeria', *Reuters* (March 2, 2021), <https://www.reuters.com/article/us-health-coronavirus-nigeria-vaccines-idUSKBN2AU125> accessed 24/03/2021.

⁶⁴ UNICEF, (n 62).

⁶⁵ Afiong Oku, et al, 'Factors Affecting the Implementation of Childhood Vaccination Communication Strategies in Nigeria: A Qualitative Study' (2017) 17 (200) *BMC Public Health*, 1 – 12 at 2.

the NPHCDA will be enabled to begin the vaccination of all citizens based on prioritizations, starting with frontline health workers.⁶⁶ In his remarks on the importance of this development, the UN Resident Coordinator in Nigeria Mr. Edward Kallon notes that, “*the arrival of these vaccines in Abuja today marks a milestone for the COVAX facility in its unprecedented effort to deliver at least 2 Billion doses of COVID-19 vaccines globally by end of 2021*”.⁶⁷ Commenting on the same issue, the WHO Representative in Nigeria Dr. Walter Kazadi Mulombo states that, “*it is heart-warming to witness this epoch-making event and WHO wishes to congratulate the government of Nigeria for its participation in the global vaccine collaboration (COVAX) efforts and its commitment to protecting Nigerians against this pandemic*”.⁶⁸ Strengthening these two positions, UNICEF Nigeria Country Representative Mr. Peter Hawkins adds that, “*after a year of disruptions due to the COVID-19 pandemic, today we celebrate the efforts being made in getting the vaccines to Nigeria. With more than 150, 000 infected with the virus and over 1, 800 lives lost, the pathway to recovery for the people of Nigeria can finally begin*”.⁶⁹ COVAX is expected to deliver about 90 million doses of this vaccine to the African region in the first quarter of 2021, while also committing itself to scaling the numbers up to 600 million doses by the end of the same year, to cater for 20% of the population.⁷⁰

A common denominator in COVID-19 vaccination plans is the prioritisation of healthcare professionals.⁷¹ Nigeria is not different in this respect as it commenced its vaccination with health workers.⁷² On March 15, 2021 Dr. Yunusa Thairu, a Medical Consultant at the United Nations Nigeria Isolation Centre in Durumi and the University of Abuja Teaching Hospital, Federal Capital Territory (FCT), received the COVID-19 jab as one of the 1 million health workers the government is targeting, in its first phase of vaccination

⁶⁶ UNICEF, (n 62).

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ UNICEF, ‘COVID-19 Vaccines Shipped by COVAX Arrive in Nigeria’, UNICEF (March 2, 2021), <https://www.unicef.org/nigeria/press-releases/covid-19-vaccines-shipped-covax-arrive-nigeria> accessed 24/03/2021.

⁷¹ Rachel Gur-Arie, Euzebiusz Jamrozik and Patricia Kingori, ‘No Jab, No Job? Ethical Issues in Mandatory COVID-19 Vaccination of Healthcare Personnel’, (2021) 6 *BMJ Global Health*, 1 – 5 at 1.

⁷² Nike Adebowale, ‘Updated: Nigeria Commences COVID-19 Vaccination of Citizens’, *Premium Times* (March 5, 2021), <https://www.premiumtimesng.com/news/headlines/446965-just-in-nigeria-commences-covid-19-vaccination-of-citizens.html> accessed 24/03/2021.

rollout.⁷³ As at March 22, 2021 the country has vaccinated over 122, 000 people,⁷⁴ with the ultimate goal being to vaccinate 40% of the population by the end of the year.⁷⁵

Mandatory Vaccination: Public Health versus Right to Personal Autonomy

As far back as 1891, the right to personal autonomy was established as a principle by the US Supreme Court in *Union Pacific Railway Co. v. Botsford*,⁷⁶ where the court observed that, “no right is held more sacred, or is more carefully guarded, by the common law, than the right of every to the possession and control of his own person, free from all restraint and interference of others, unless by clear and unquestionable authority of law”.⁷⁷ Some twenty-three years later, the same contentions came up in *Schloendorff v. Society of New York Hospital*,⁷⁸ where a Physician removed a malignant tumour without the patients’ consent.⁷⁹ Reinstating this right, Judge Benjamin Cardozo quintessentially stated that, “every human being of adult years and a sound mind, has a right to determine what shall be done to his body; and a surgeon who performs an operation without his patient’s consent commits an assault for which he is liable in damages.”⁸⁰ This right has been associated with the tortious acts of battery and trespass, i.e., where one person touches someone else, without legal justification.⁸¹ Elucidating on this position, Strasser notes that:

The right to bodily integrity is firmly entrenched in right to privacy jurisprudence. An individual who has that right violated by being subjected to an unwarranted touching can sue for damages. For example, an individual

⁷³ WHO, ‘Nigerian Health Workers Take Country’s First COVID-19 Vaccine’, *World Health Organisation (WHO) Africa* (March 19, 2021), <https://www.afro.who.int/news/nigerian-health-workers-take-countrys-first-covid-19-vaccine> accessed 24/03/2021.

⁷⁴ Nike Adebowale, ‘COVID-19: Nigeria Vaccinates Over 122, 000 People’, *Premium Times* (March 22, 2021), <https://www.premiumtimesng.com/news/headlines/450545-covid-19-nigeria-vaccinates-over-122000-people.html> accessed 24/03/2021.

⁷⁵ Timothy Obiezu, ‘Nigeria’s Goal: Vaccinate 40% of Population Against COVID-19 This Year’, *VOA* (January 9, 2021), <https://www.voanews.com/covid-19-pandemic/nigerias-goal-vaccinate-40-population-against-covid-19-year> accessed 24/03/2021; Anthony Osa-Brown and Manus Cranny, ‘Nigeria Vaccination Plan Seen as Unfeasible by Critics’, *Bloomberg* (January 14, 2021), <https://www.bloomberg.com/news/articles/2021-01-14/nigeria-plans-covid-19-vaccination-for-40-of-population-in-2021> accessed 24/03/2021.

⁷⁶ 141 US 250 (1891); Mark Strasser, ‘A Jurisprudence in Disarray; On Battery Wrongful Living and the Right to Bodily Integrity’ (1999) 36 *San Diego Law Review*, 997 to 1041 at 998.

⁷⁷ 141 US 251 (1891); See also Caitlin E. Borgmann, ‘The Constitutionality of Government Imposed Bodily Intrusion’, (2014) 4 *University of Illinois Law Review*, 1059 – 1128 at 1064.

⁷⁸ 105 NE 92 (1914).

⁷⁹ 105 NE 92 (1914); J.S. Swindell, Amy L. McGuire and Scott D. Halpern, ‘Shaping Patients’ Decisions’, (2011) 139 (2) *CHEST*, 424 – 429 at 424.

⁸⁰ 105 NE 92 (1914).

⁸¹ Borgmann, (n 77) at 1064.

who receives medical treatment against her will can bring an action for battery, even if that treatment provides a net benefit.⁸²

More importantly, it has been stated that “*the right to be secure in one’s own person is a natural, fundamental right*”.⁸³ The *Botsford* and *Schloendorff* courts’ decisions border directly on the principle of informed consent i.e., which refers to the issue of whether a patient, based on full information, has indeed consented to a form of medical treatment. Referred to by Grady as “*a widely accepted legal, ethical and regulatory requirement for most research and healthcare transactions*”,⁸⁴ informed consent and its corollary i.e., the right to bodily autonomy, are both derivatives of the general concept of personal autonomy i.e., the fact that every human being should be secured in his/her person as well as being able to control his/her choices.⁸⁵ Generally, therefore, current paradigms in medical law and bioethics leans towards the fact that a patient’s decision is autonomous, while his/her choices are to be respected.⁸⁶

An important understanding of personal autonomy can be gleaned from American constitutional development where it has its roots.⁸⁷ Thomas Jefferson, arguably the flagbearer of the American revolution was clear on his position about the individual and his human rights, i.e., he deemed “*human rights as an indissoluble birth right, given by the Creator, and therefore inalienable*”.⁸⁸ This idea he ensured became a core of the American Declaration of Independence 1776, which declares that “*we hold these truths to be self-evident, that all individuals are created equal, that they are endowed by their Creator, with certain inalienable rights, that among these are life, liberty and the pursuit of happiness*”.⁸⁹ Not only was the document designed as a revolutionary instrument of rebellion, it was also a safeguard of unconditional human liberty.⁹⁰ As a matter of fact,

⁸² Strasser, (n 76) at 998.

⁸³ Kristen Ann Curran, ‘Informed Consent: A Right Without Remedy Examined Through the Lens of Maternity Care’ (2012) 21 (1) *Journal of Gender, Social Policy and Law*, 133 – 161 at 135. The right against bodily intrusion has also been addressed in *Skinner v. Oklahoma*, 316 U.S. 525 (1942) and *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

⁸⁴ Christine Grady, ‘Enduring and Emerging Challenges of Informed Consent’ (2015) 372 *The New England Journal of Medicine*, 855 – 862 at 855.

⁸⁵ Paula Walter, ‘The Doctrine of Informed Consent: To Inform or Not to Inform?’ (1997) 71 (3) *St. John’s Law Review*, 543 – 590 at 546.

⁸⁶ Swindell, McGuire and Halpern, (n 78) at 424.

⁸⁷ Bruce J. Winick, ‘On Autonomy: Legal and Psychological Perspectives’ (1992) 37 (6) *Villanova Law Review*, 1705 – 1777 at 1708.

⁸⁸ *Ibid* at 1709.

⁸⁹ *Ibid*.

⁹⁰ *Ibid*.

it was in a further move to safeguard the right to personal autonomy, alongside other blessings of liberty as proclaimed in the declaration, that the US Constitution was enacted.⁹¹ However, some nine years before the *Schloendorff decision*, the seeming absoluteness of the right to personal autonomy had crossed paths with the power of the State to secure the health and wellbeing of the people in *Jacobson v. Massachusetts*,⁹² where the US Supreme Court, faced with the issue of whether a state could mandatorily vaccinate its people, held that state's public health regulations could limit a citizen's enjoyment of his/her right.

It is noteworthy, that informed consent as a moral standard, it is not just peculiar to healthcare transactions alone, but equally extend to other form of interpersonal engagements, while also an integral part of the society's framework.⁹³ Just as the Holy Bible says, "*can two walk together, unless they agree*".⁹⁴ It is clear that every human business goes on, having due regard to the right to personal autonomy of the parties, which is demonstrated in the consent they give. In recent times, the US Supreme Court in cases such *Ingraham v. Wright*,⁹⁵ *Youngberg v. Romeo*,⁹⁶ and *Vitek v. Jones*,⁹⁷ has shown that the right to personal autonomy can be implicated in several other non-medical treatment instances.⁹⁸ Following this line of thought, when considered in a broader context, the informed consent jurisprudence in *Botsford* and *Schloendorff* can serve as a convincing rationale for addressing issues of mandatory vaccination. While not strictly a form of medical treatment, vaccination indeed shares common similarities with the former in some respect, such as for instance both being matters of health, as well as involving the invasion of the body of the patient/recipient. To this end, the decisions in *Bradford* and *Schloendorff* can be regarded as relevant judicial foundations on which the conflict between mandatory COVID-19 vaccination and human rights can be fittingly anchored.

In 1984, the EComHR in *Acmanne and Others v. Belgium*, had noted that "*a requirement to undergo medical treatment or a vaccination, on pain of a penalty, may amount to an*

⁹¹ *Ibid.*

⁹² 197 US 11 (1905).

⁹³ Grady, (n 84) at 855.

⁹⁴ Amos 3:3, The Holy Bible.

⁹⁵ 430 U.S. 651, 674 (1977).

⁹⁶ 451 U.S. 307, 315-16 (1982).

⁹⁷ 445 U.S. 480, 492 (1980).

⁹⁸ Winick, (n 87) at 1721. While *Ingraham v. Wright* and *Youngberg v. Romeo* concerns administering corporal punishment in school and unsafe conditions in a mental facility respectively, *Vitek v. Jones* has to do compelling treatment in a mandatory behaviour modification program.

interference with right to respect for private life".⁹⁹ This was later affirmed by the ECtHR in *Solomakhin v. Ukraine*, where it held that "*compulsory vaccination - as an involuntary medical treatment - amounts to an interference with the right to respect for one's private life, which includes a person's physical and psychological integrity as guaranteed by Article 8 (1)*".¹⁰⁰ In contemporary terms, this position however has not gone unchallenged. Recently, health workers in the US State of New York resisted a state regulation requiring all health workers, who have had direct contact, or may have been exposed to patients with the H1N1 Influenza to get vaccinated.¹⁰¹ They argue that such regulation was a violation of their rights, especially the protection they enjoy under the 14th Amendment to the US Constitution, which guarantees them due process of the law.¹⁰² Notwithstanding the decade's old decision in *Jacobson v. Massachusetts*,¹⁰³ these health workers argue that the New York situation doesn't fall under the *Jacobson rule* as the H1N1 Influenza isn't a health emergency, nor is it as serious as the smallpox epidemic.¹⁰⁴ However this position may have hit a brick wall with a recent decision by the US Court of Appeals for the Second Circuit in *Phillips v. City of New York*.¹⁰⁵ In this case, the plaintiffs argued that mandatory vaccination violated their rights under the equal protection clause and so violated substantive due process. The Court held that matter of due process had been foreclosed by the Supreme Court in *Jacobson v. Massachusetts*.¹⁰⁶

The meaning is that though, the common law right to personal autonomy remains sacrosanct, in certain instances such as for example, situations of mandatory vaccination, the State may enjoy legal justification for its act. For Borgmann, the idea is that in *Jacobson v. Massachusetts*, "*the court sounded the theme of individual sacrifice as a person's dues for enjoying the protection of a well-ordered society*".¹⁰⁷ So here now, we have a dual moral standard framework i.e., that of personal autonomy and that

⁹⁹ Spyridoula Katsonis, 'Do Compulsory Vaccination Against COVID-19 Violate Human Rights?' *Volkerrechtsblog* (December 2, 2021), <https://voelkerrechtsblog.org/do-compulsory-vaccinations-against-covid-19-violate-human-rights/> accessed 30/03/2021.

¹⁰⁰ *Ibid.*

¹⁰¹ Alexandra M. Stewart, 'Mandatory Vaccination of Health Workers', (2009) 361 (21) *The New England Journal of Medicine*, 2015 – 2017 at 2015.

¹⁰² *Ibid.*

¹⁰³ *Supra.*

¹⁰⁴ Stewart, (n 101) at 2016.

¹⁰⁵ 775 F.3d 538, 542 (2nd Cir. 2015); Julie D. Cantor, 'Mandatory Measles Vaccination in New York City - Reflections on a Bold Experiment', (2018) 381 (2) *The New England Journal of Medicine*, 101 – 103 at 102.

¹⁰⁶ *Supra*, Cantor, (n 105).

¹⁰⁷ Borgmann, (n 77) at 1078.

of mandatory vaccination. The issue is whether a programme of mandatory COVID-19 vaccination in Nigeria, towards achieving herd immunity, can be defended on the basis of the *Jacobson* standard?

Mandatory COVID-19 Vaccination in Nigeria: How is the Right to Personal Autonomy to be Construed?

Prior to the outbreak of the COVID-19 pandemic, matters of vaccination in Nigeria was generally covered by the legal framework governing immunisation. While, immunisation is not exactly the same as vaccination, it appears as the closest anyone can get in terms of a vaccination framework in Nigeria. Challengingly, immunisation itself is dealt with in relation to children, as it is required to be taken during tender years. In terms of law, Nigeria's existing framework does not provide for a direct constitutional framework empowering the government with respect to mandatory vaccination, neither does the existing jurisprudence cover such matters. Therefore, issues of vaccinations are matters of legislations both at the federal level and the state level. Within the federal space, a key legislation mandating vaccination is the Child Rights Act 2003 which consist of provisions compelling immunisation.¹⁰⁸ Aside the CRA 2003, legislations have also emerged from states such as Jigawa, Niger and Katsina states criminalising refusal to vaccinate children.¹⁰⁹

Under the Nigerian Constitution, consequent to the grant of executive powers, the President enjoy a wide latitude of powers to make policies for the good and order of the country. Section 5 of the Constitution states that, "*subject to the provisions of this Constitution, the executive powers of the shall be vested in the President, and may subject as aforesaid and to the provisions of any law made by the National Assembly, be exercised by him either directly or through the Vice President and Ministers of the Government of the federation or officers in the public service of the federation*".¹¹⁰ The section adds that, this power, "*shall extend to the execution and maintenance of the Constitution, all laws made by the National Assembly and to all matters to which the National Assembly has, for the time being, power to make law*".¹¹¹ It was in line with this framework, that the President, for instance issued regulations under the 1926

¹⁰⁸ Cheluchi Onyemelukwe, 'Can Legislation Mandating Vaccination Solve the Challenges of Routine Childhood Immunisation in Nigeria?' (2016) 16 (1) *Oxford University Commonwealth Law Journal*, 100 – 124.

¹⁰⁹ *Ibid.*

¹¹⁰ 1999 Constitution.

¹¹¹ *Ibid.*

Quarantine Act, toward taking restrictive containment measures against the pandemic.¹¹²

Also, in line with Section 4 of the same Constitution, the National Assembly which is the principal legislative body at the federal level has, “*powers to make laws for the peace, order and good government of the federation or any part thereof*”.¹¹³ A programme of mandatory COVID-19 vaccination is certainly a matter that comes within the interpretation of “*peace, order and good government of the federation or any part thereof*”. It is therefore legally permissible for Nigeria’s National Assembly to pass a law mandating compulsory COVID-19 vaccination for the people, which the executive branch will be expected to implement. The responsibility of the government in the wise, finds further support in Section 14 (2) (b) of the Constitution, which states that “*the security and welfare of the people shall be the primary purpose of government*”.¹¹⁴ Certainly, ensuring COVID-19 vaccination is not just a matter of “*peace, order and good government*”, but also of “*the security and welfare of the people*”.

However, while direct mandatory vaccination may appear remote under Nigerian law, government policies under different guise may also amount to a form of mandatory vaccination. This will include for instance, policies requiring COVID-19 vaccination before certain rights can be exercised or before some public services can be accessed. It may also extend to policies requiring employees to be vaccinated in order to return to work, etc. Such moves have been frowned at both domestically and internationally. For instance, the WHO has stated that it does not support mandatory COVID-19 vaccination, advising that it prefers that government work on information dissemination and making vaccines really accessible.¹¹⁵ For instance, it issued a position that governments should not require COVID-19 vaccination as mandatory for international travel.¹¹⁶

Beyond the WHO’s warning, and more fundamentally, it is worth stating that both direct and indirect of forms of mandatory vaccination impugn on an individual’s right to personal

¹¹² Cheluchi Oyemelukwe, ‘The Law and Human Rights in Nigeria’s Response to the COVID-19 Pandemic’, *Bill of Health: Examining the Intersection of Health Law, Biotechnology and Bioethics, Harvard Law – Petrie-Flom Center*, (June 4, 2020) <https://blog.petrieflom.law.harvard.edu/2020/06/04/the-law-and-human-rights-in-nigerias-response-to-the-covid-19-pandemic/> accessed 24/03/2021.

¹¹³ 1999 Constitution.

¹¹⁴ *Ibid.*

¹¹⁵ WHO, ‘COVID-19 and Mandatory Vaccination: Ethical Considerations and Caveats’, Policy Brief (April 13, 2021), <file:///C:/Users/oluso/Downloads/WHO-2019-nCoV-Policy-brief-Mandatory-vaccination-2021.1-eng.pdf> accessed 14/07/2021.

¹¹⁶ *Ibid.*

autonomy. To start with, vaccination as a medical procedure necessarily involves a physical interference with the body of the recipient. Such interference has been regarded as a violation of a common law right captured in different expressions such as the right to personal autonomy, self-determination and bodily autonomy. Reiss and Caplan captures this right in clear light, stating that “*autonomy focuses on the right of individuals to govern their own behaviour, and require both ability to comprehend the choice, the alternatives, the consequences and freedom from outside limitations*”.¹¹⁷ Engaging the same right, Braudo-Bahat notes that the individual’s exercise of the right to personal autonomy need not be clean, as to be free from external social influences, but it “*should be consciously and actively formulated, examined and chosen by the person herself*.”¹¹⁸

Under Nigeria’s legal framework, this right as captured by the courts in *Botsford* and *Schloendorff* isn’t a direct and specifically granted right. This notwithstanding, an enjoyment of this common law right, is derived from the application of the common law position in the country, which means that a patient has autonomy over his body.¹¹⁹ Additionally, the enjoyment of the same right can be inferred from the provisions of Section 34 of the 1999 Constitution which covers the right to human dignity. Specifically, Section 34 (1) (a) states that “*every individual is entitled to respect for dignity of his person, and accordingly, no person shall be subject to torture or to inhuman or degrading treatment*”. The case that points to the applicable standard in Nigeria is *Medical and Dental Practitioners Disciplinary Tribunal v. Dr. John E.N. Okankwo*,¹²⁰ where the Nigerian Supreme Court upheld a patient’s right to self-determination as related to his medical treatment. In the apex court’s decision, Uwaifo, JSC observed as follows:

I am completely satisfied that under normal circumstances no medical doctor can forcibly proceed to apply treatment of full age and sane faculty without the patient’s consent, particularly if the patient treatment of a radical nature, such as surgery or blood transfusion. So, the doctor must ensure that there is a valid consent and that he does nothing that will amount to a trespass to the patient. Secondly, he must

¹¹⁷ Dorit Rubenstein Reiss and Arthur L. Caplan, ‘Considerations in Mandating a New Covid-19 Vaccine in the USA for Adults and Children’ (2021) *Journal of Law and the Biosciences*, 1- 9 at 2.

¹¹⁸ Yael Braudo-Bahat, ‘Towards a Relational Conceptualisation of the Right to Personal Autonomy’ (2017) 25 (2) *American University Journal of Gender, Social Policy & Law*, 1 – 154 at 116.

¹¹⁹ Jadesola O. Lokulo-Sodipo, ‘An Examination of the Legal Rights Surgical Patients under Nigerian Laws’ (2009) 1 (4) *Journal of Law and Conflict Resolution*, 79 – 87 at 83.

¹²⁰ (2001) 2 MJSC 67; Lokulo-Sodipo, (n 119).

exercise a duty of care to advise and inform the patient of the risks involved in the contemplated treatment and the consequence of his refusal to give treatment.¹²¹

A similar decision was reached in the South African case of *Esterhuizen v. Administrator, Transvaal*,¹²² where the court held that an individual of sound mind has a right to decline medical treatment, despite that it could occasion death. In fact, further underpinning the right to bodily integrity is the right to human dignity. The importance of this right was highlighted by Lokulo-Sodipe who referred to it as, “*an acknowledgement of the intrinsic worth of human being; human beings are entitled to be treated as worthy of respect and concern*”.¹²³ In jurisdiction such as Canada and South Africa, the same right is referred to as right to the security of the person.¹²⁴

Way Forward

While at the moment vaccine hesitancy is a big problem, any attempt by the Nigerian government to impose a regime of mandatory vaccination is certain to be a bigger problem. While responding to the COVID-19 pandemic is desirable, balancing same with human rights considerations is more important. So delicate is the issue of mandatory vaccination that it can literally bring down any government, where not carefully handled. A proposed mandatory vaccination programme is bound to set in motion a chain of reactions, confrontational in nature, and for which the government may end up paying a huge price, even politically. As a matter fact, such proposal is most likely to end up in the law courts for adjudication. While determining the direction the court may take on such a matter may be premature at this juncture, attempting to glean into what is likely to inform the reasoning of the judges may not really be far-fetched, and this is based on a number of reasons. Firstly, the universal application that human rights matters enjoy today is bound to be a strong factor in this respect and secondly, the fact that the right in issue is one with constitutional flavour, and given that the Constitution is the fundamental law of the land, means that every other law including a proposed mandatory vaccination legislation would be difficult to defend.¹²⁵ Thirdly, the fact that the government proposing such mandatory vaccination legislation, in fact has the responsibility of protecting this right, may be tantamount to the government shooting itself in the foot. The implication is that ‘mandating’ COVID-19 vaccination is likely to be

¹²¹ (2001) 2 MJSC 67.

¹²² 1957 (3) SA 710; Lokulo-Sodipo, (n 119) at 84.

¹²³ Lokulo-Sodipo, (n 119) at 82.

¹²⁴ *Ibid* at 83.

¹²⁵ Section 1 (3) 1999 Constitution.

regarding as a violating the dignity of the recipient and the possible resistance is best imagined. A relevant example is the polio debacle that rocked northern Nigeria close to a decade back. In August 2003, the political leadership in several states in the north banned the federal government sponsored polio vaccination on the ground that it was calculated to sterilise girls in that part of the country.¹²⁶

What is therefore way forward? Scholars have continued to engage the problematic nature of mandatory vaccination and the preponderance of opinions appears to support the notion that it is a matter any government founded on the rule of law should steer clear of. Cooper, et al, while examining the problem of vaccine hesitancy, aptly referred to it as “*complex, shaped by multiple psychological, ideological and contextual factors*”.¹²⁷ It has therefore been argued that there is a need to incorporate knowledge from other intellectual fields such as sociology, psychology and education, towards sustaining demand for vaccination.¹²⁸ Taking this further, Pennings and Symons note that while it is clear that governments have an ethical obligation to arrest the surge of the COVID-19 pandemic and that a safe and effective vaccine could make this happen where everyone is vaccinated; and while it is also clear that not many people will agree to be vaccinated in order to achieve the desired herd immunity, but yet mandatory vaccination is not the way to go.¹²⁹ Rather they argue that persuasion instead of coercion or even incentives, would be most effective in improving vaccination rates.¹³⁰ According to Gostin, Salmon and Larson, since *Jacobson v. Massachusetts*, the judiciary has continued to uphold legal vaccination mandates, such legal mandates are largely common with childhood vaccination, while mandatory vaccination for adults is rare.¹³¹ They note importantly, that such mandate could be counter-productive by undermining public support for vaccinations programmes, create a backlash, especially given that it undercuts the right to personal autonomy.¹³² COVID-19 is largely an adult infectious disease, and correspondingly the vaccine has majorly been administered on adults. It therefore means that in the case of any mandatory vaccination policy, the target is likely

¹²⁶ Judith R. Kaufmann and Harley Feldbaum, ‘Diplomacy and the Polio Boycott in Northern Nigeria’, (2009) 28 (4) *Health Affairs*, <https://www.healthaffairs.org/doi/full/10.1377/hlthaff.28.4.1091> accessed 06/04/2021.

¹²⁷ Sara Cooper, et al, ‘Vaccine Hesitancy – A Potential Threat to the Achievements of Vaccination Programmes in Africa’ (2018) 14 (10) *Human Vaccines and Immunotherapeutics*, 2355 – 2357 at 2356.

¹²⁸ *Ibid*.

¹²⁹ Susan Pennings and Xavier Symons, ‘Persuasion, Not Coercion, or Incentivisation, is Best Means of Promoting COVID-19 Vaccination’, (2021) *Journal of Medical Ethics*, 1 -3 at 1.

¹³⁰ *Ibid* at 2.

¹³¹ Lawrence O. Gostin, Daniel A. Salmon and Heidi J. Larson, ‘Mandating COVID-19 Vaccines’, (2021) 325 (6) *Journal of American Medical Association*, 532 – 533 at 532.

¹³² *Ibid* at 533.

to be adults. Also, engaging the issue of mandatory vaccination for health workers, Kunti et al notes that a regime of mandatory vaccination could end up being discriminatory, cause stigmatisation, and widen the already existing inequalities already manifesting in this pandemic.¹³³

An important area where national governments can be guided is the work of the Strategic Advisory Group of Experts (SAGE) on Immunisation Working Group (WG) on vaccine hesitancy. This problem has remained a concern of stakeholders in global public health management, particularly the WHO which in 1999 established the SAGE group with the mandate of advising the WHO on policies and strategies, as well as providing guidance generally on vaccines and immunisation.¹³⁴ Since its establishment, this group has been confronting vaccine hesitancy in both developed and developing countries.¹³⁵ It admonishes the public health community to work together towards developing and promoting tools to address vaccine hesitancy and this should be done in different settings/populations in different countries, and create opportunities for the opinion of these populations to be factored into the strategies to be developed.¹³⁶

For instance, the group has noted that communication is one instrument can be used to confront vaccine hesitancy.¹³⁷ In April 2011, following reports on concerns by different countries on this problem, the group listed effective communication about vaccines to vaccine-hesitant communities as a major priority.¹³⁸ Another potential tool of dealing with vaccine hesitancy is the Tailoring Immunisation Programme (TIP) developed by the WHO regional office for Europe,¹³⁹ based on social marketing principles and behavioural insight methodology, as a tool that can possibly be applied to vaccine hesitancy.¹⁴⁰ Generally, social marketing principles bring the dimension of brand positioning to immunisation, to the end that immunisation planners deliberately consider the best ways to promote vaccination benefits from the perspectives of vaccine-hesitant

¹³³ Kamlesh Kunti, et al, 'Should Vaccination for Health Workers be Mandatory?' (2021) 114 (5) *Journal of the Royal Society of Medicine*, 235 – 236 at 236.

¹³⁴ Melanie Schuster, Juhani Eskola and Phillipe Duclos, 'Review of Vaccine Hesitancy: Rationale, Remit and Methods', (2015) 33 *Vaccine*, 4157 – 4160 at 4157.

¹³⁵ *Ibid.*

¹³⁶ Juhani Eskola, et al, 'How to Deal with Vaccine Hesitancy?', (2015) 33 *Vaccine*, 4215 – 4217 at 4216.

¹³⁷ Susan Goldstein, Noni E. MacDonald and Sherine Guirguis, 'Health Communication and Vaccine hesitancy', (2015) 33 *Vaccine*, 4212 – 4214 at 4212.

¹³⁸ Schuster, Eskola and Duclos, (n. 133) at 4158.

¹³⁹ Eskola, et al, (n 136) at 4217.

¹⁴⁰ Glen J. Nowak, et al, 'Addressing Vaccine Hesitancy: The Potential Value of Commercial and Social Marketing Principles and Practices' (2015) 33 *Vaccine*, 4204 – 4211 at 4204.

recipients, rather than from their own perspective.¹⁴¹ Using market research and analysis, social marketing also introduces a tactical segmentation of the population in view, by considering things such as demographic and psychographic characteristics, the peoples' subjective experience with immunisation, their medical histories, etc., towards forming a well-rounded picture of potential vaccine recipients beyond the usual healthcare profiling.¹⁴² Going forward, while vaccine hesitancy is an existing problem amongst adults, it may become a bigger problem when it comes to adults vaccinating their children.¹⁴³ All this reveals the deep complexities inherent in any move towards mandatory vaccination.

What is therefore clear is that as against the lure of mandatory vaccination, the right response to the problem of vaccine hesitancy in any country, inclusive of Nigeria, rest in government engaging the people and building a robust social capital based on trust. As aptly noted by Barry Bloom of the Harvard T.H. Chan School of Public Health, '*the most important ingredient in all vaccines is trust*'. Speaking in the same wise, the Organisation for Economic Cooperation and Development (OECD), observes that the overall success of any vaccination programme is driven by factors such as the peoples' trust on the efficacy of vaccines, the competence of government institutions delivering them and the principles that underpins government's decisions and actions.¹⁴⁴ It has additionally been noted that confidence in vaccines is based on trust in healthcare professionals, the health system, and the socio-political environment.¹⁴⁵ To strengthen trust, the OECD has identified matters such as responsiveness, reliability, integrity, openness and fairness, as five key policy initiatives that can help facilitate the peoples' trust in government institutions.¹⁴⁶ Also, the WHO Guidance on Building Trust and Responding to Crisis recommends three things that state members should do – work to build the peoples' resilience against vaccine rumours, install strong programmes to counter any event eroding confidence and respond swiftly to any event designed to erode confidence in vaccination.¹⁴⁷ Essentially, vaccination programmes ride on the political

¹⁴¹ *Ibid* at 4205.

¹⁴² *Ibid*.

¹⁴³ Rebecca Forman, et al, 'COVID-19 Vaccine Challenges: What Have We Learned So Far and What Remains to Be Done?' (2021)125 *Health Policy*, 559 – 567 at 562.

¹⁴⁴ OECD, 'Enhancing Public Trust in COVID-19 Vaccination: The Role of Governments', *Tackling Coronavirus (COVID-19): Contributing to a Global Effort* (May 21, 2021), 1 – 27 at 4.

¹⁴⁵ Pierre Verger and Eve Dube, 'Restoring Confidence in Vaccines in the COVID-19 Era' (2020) 19 (11) *Expert Review of Vaccines*, 991 – 993 at 991.

¹⁴⁶ OECD, (n 144).

¹⁴⁷ WHO, 'Vaccination and Trust: How Concerns Arise and the Role of Communication in Mitigating it', (2017)

World Health Organisation (WHO) 1 – 42 at 35,

https://www.euro.who.int/__data/assets/pdf_file/0004/329647/Vaccines-and-trust.PDF accessed 14/07/2021.

authority of the government to institute public health programmes directed at the benefits of the people.¹⁴⁸ To achieve relative success rate, some countries educate their people on the benefits of vaccination, then leave them to decide, others choose to incentivise the programme, while others make it mandatory to ensure it covers a lot more people.¹⁴⁹

It has also been suggested, that healthcare providers and managers, as frontline workers who understand the quantum of the problem should be at the forefront of the battle.¹⁵⁰ To succeed in this regard, they must deploy their knowledge of the demographic structure and other factors that engender vaccine hesitancy.¹⁵¹ It is important for people in authority to understand how and why people plan to refuse COVID-19 vaccination and their reasons.¹⁵² There must also be broad-based community efforts at increasing the awareness and efficacy of vaccines.¹⁵³ Overall, government public health officials and advocacy groups must join the train of public awareness regarding vaccine literacy.¹⁵⁴ Government institutions saddled with the responsibility of mass sensitization and orientation must equally awake to their job. For instance, in Nigeria, the National Orientation Agency (NOA) ought to be the principal agency facilitating mass awareness and orientation on this matter. This is yet to be seen and predictably the NOA has remained largely in oblivion when it comes to COVID-19 matters.

Conclusion

This article has examined the problem of vaccine hesitancy and the likelihood of a policy of mandatory COVID-19 vaccination in Nigeria. It has also examined how such a move could backfire and fly in the face of the government, in the light of the potential conflict with citizens' right to personal autonomy. It also has examined these issues within the

¹⁴⁸ Elisha P. Renne, 'Polio Vaccination, Political Authority and the Nigerian State', in Christine Holmberg, Stuart Blume, and Paul Greenough (eds.), *The Politics of Vaccination: A Global History*, <https://manchester.universitypressscholarship.com/view/10.7228/manchester/9781526110886.001.0001/upso-9781526110886-chapter-012> accessed 06/04/2021.

¹⁴⁹ Erin Walkinshaw, 'Mandatory Vaccinations: The International Landscape', *Canadian Medical Association Journal (CMAJ)* (November 8, 2011), <https://www.cmaj.ca/content/183/16/E1167> accessed 06/04/2021.

¹⁵⁰ Olorunfemi Akinbode Ogundele, Tolulope Ogundele and Omolola Beloved, 'Vaccine Hesitancy in Nigeria: Contributing Factors – Way Forward' (2020) 18 (1) *The Nigerian Journal of General Practice*, 1- 4 at 3.

¹⁵¹ *Ibid.*

¹⁵² O.C. Ekwebelum, et al, 'COVID-19 Vaccine Rollout: Will it Affect the Rates of Vaccine Hesitancy in Africa?' (2021) *Public Health*, 1 -2 at 2.

¹⁵³ Ogundele, Ogundele and Beloved, (n 150).

¹⁵⁴ Jeffrey V. Lazarus, et al, 'A Global Survey of Potential Acceptance of COVID-19 Vaccine' (2021) 27 *Nature Medicine*, 225 – 228 at 225.

context of leading US case law, taking the analysis from *Union Pacific Railway Co. v. Botsford*, to *Schloendorff v. Society of New York Hospital*, to *Jacobson v. Massachusetts*. Furthermore, it located the issues within the province of Section 34 of the Nigerian Constitution and the Supreme Court case of *Medical and Dental Practitioners Disciplinary Tribunal v. Dr. John E.N. Okonkwo*. The article concludes that while the government has a responsibility to ensure the public health safety of the entire country, it must also realise that the human body must be regarded as the citizen's private space, for which undue intrusion must be limited. A government that respect citizens' personal autonomy, further strengthens its authority to hold fellow citizens, non-state actors, and even enemies of the state, who attempts or in fact does something similar, to proper account. Importantly, government's policies must be decent enough to respect citizens' rights, as a matter of respect for human rights and constitutional norms.

As it turned out, the COVID-19 pandemic has become a referendum on the state of the government's compliance with generally accepted human rights norms. As the COVID-19 pandemic reaches the home stretch and flattening of the curve begins, stakeholders in the polity must begin to ensure that no further inch of human rights protection is touched, else the post COVID-19 era may see a flurry of human rights litigations, particularly from Civil Society Organisations (CSOs). It is therefore important that the right to personal autonomy remain a core value of Nigeria's human rights jurisprudence. This is important to continually ensure that the government is put in necessary checks and not allowed to arbitrarily intrude into citizens' privacy.

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