

## Reflections from the COVID-19 Vaccine Mandate in Nigeria: Balancing Public Health and Human Rights

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### Abstract

The introduction of mandatory COVID-19 vaccinations in Nigeria sparked significant debate regarding the balance between public health imperatives and human rights. It is not clear the extent of public health emergency that permits the derogation or limitation of human rights for the protection of public health in Nigeria. There is a need to find reasonable ways to balance these competing values in the light of available options. It is obvious that COVID-19 pandemic is not only a threat to public health but is also a threat to human rights. As public health measures are being taken to combat the spread of the virus, measures should also be taken to protect the rights of persons. The strict protection of human rights amidst public health emergencies like COVID-19 pandemic may be detrimental to public health; likewise, the gross abuse of human rights during a public health emergency and global pandemic. This article aims to find a balance through the lens of the proportionality principle. The degree of infringement and limitation of human rights for public health interventions must be proportional to the degree of expected benefits. For COVID-19 vaccine mandate to be justified, the principle of proportionality must be considered to ascertain if the human right limitation is rational and proportionate to the public health threat posed. Vaccine mandates is a limitation of human rights; and such limitation of rights ought not be left at the discretion and mercy of government or policy makers. Rational and minimally intrusive strategies should be adopted in public health policies. This article explores the application of the proportionality principle in assessing the legality and ethicality of vaccine mandates in Nigeria.

### Introduction

The World Health Organization declared COVID-19 outbreak as a public health emergency of international concern on January 20, 2020.<sup>3</sup> The first confirmed case of COVID-19 infection in Nigeria was on 27 February 2020, when an Italian residing in Nigeria tested positive on returning to Nigeria from Milan.<sup>4</sup> Some of the COVID-19 emergency measures affected even the inalienable rights of people in Nigeria. The National Human Rights Commission reported that whereas COVID-19 has led to the death of 11 patients as of 14 April 2020, law enforcement agents had extrajudicially executed 18 persons in enforcing the regulations. The Nigeria Correctional Service was responsible for eight deaths; the Nigeria Police Force for seven; the Nigeria Army for two and the Ebonyi State Task Force on COVID-19, Afikpo South Local Government Area was responsible for one death.<sup>5</sup> Vaccine mandate gave rise to legal and ethical controversies and arguments that vaccine mandates infringe upon unvaccinated peoples' human rights and liberties. The Federal Government of Nigeria made mandatory COVID-19 vaccination declaration in the peak of COVID-19 pandemic; some state government in Nigeria also made mandatory vaccine policies.<sup>6</sup> The Federal Government of Nigeria declared COVID-19 vaccination compulsory for all its employees. All Federal Government employees by this declaration were required to show proof of COVID-19 vaccination or present a negative COVID-19 PCR test result done within 72 hours.<sup>7</sup> Mandating vaccinations for COVID-19 in Nigeria raises complex legal and ethical questions. Opponents of COVID-19 vaccine mandate argue that COVID-19 vaccine mandate is a gross

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<sup>3</sup> World Health Organization, 'TimeLine: WHO's COVID-19 Response' (2019) [www.who.int/emergencies/diseases/novel-coronavirus-2019/interactive-timeline](http://www.who.int/emergencies/diseases/novel-coronavirus-2019/interactive-timeline). accessed May 21 2022.

<sup>4</sup> Nigeria Center for Disease Control, 'First case of coronavirus disease confirmed in Nigeria (28 February 2020)' <https://bit.ly/3xbDU18>. accessed 2 May 2021.

<sup>5</sup> National Human Rights Commission, 'Press Release on COVID-19 Enforcement So Far: Report on Incidents of Violations of Human Rights' (15 April 2020) <https://bit.ly/2TN2Bn2>. accessed 23 July 2020.

<sup>6</sup> Abiodun Odusote, 'Compulsory COVID-19 Vaccination in Nigeria? Why It's Illegal, and a Bad Idea' (8 September 2021) *The Conversation* <[theconversation.com/ca](http://theconversation.com/ca)>.

<sup>7</sup> Joseph Erunke, 'COVID-19: FG Approves Vaccine Mandate Policy for All Staff' (27 November 2021) <[www.vanguardngr.com/2021/11/covid-19-fg-approves-vaccine-mandate-policy-for-all-staff/amp/](http://www.vanguardngr.com/2021/11/covid-19-fg-approves-vaccine-mandate-policy-for-all-staff/amp/)>.

violation of human rights, especially the right to personal autonomy, and the right to dignity of human person.<sup>8</sup> Restricting people's access to work, transportation, education, social life, based on their COVID-19 vaccination status disproportionately impacts on their rights as human beings.<sup>9</sup> Just as the strict protection of human rights amidst public health emergencies may be detrimental to public health; likewise, the gross abuse of human rights during a public health emergency and global pandemic is also detrimental.

The right to autonomy or personal liberty may be limited for the protection of public health and safety; however, the limitation of individual rights must be in accordance with law; and necessary for the protection of public health and safety.<sup>10</sup> There is need for a balance and a standard to ascertain when it is justifiable to invoke and use the protection of public health as an excuse for the limitation of human rights, particularly in the context of COVID-19 vaccine mandate. The section 45 of the Nigerian Constitution allows for limitation of rights, when it is in accordance with law and for the protection of public health where there is real and grave threat to public health and safety; however it is important to examine the application of the proportionality principle, a legal doctrine that requires any limitation on individual rights to be necessary, appropriate, and balanced against the public interest. This article examines the proportionality principle as a framework for evaluating the justification of vaccine mandates in Nigeria, highlighting the need for a balanced approach that respects individual rights while promoting public health.

### **Vaccine Mandates and Human Rights Limitation**

Vaccine mandate is a public health requirement that a person must be vaccinated against a particular disease, to take a specific action covered by the mandate, such as attend school, work, travel, etc.<sup>11</sup> Vaccine mandates often come with stipulations regarding the consequences of non-compliance. Contemporary forms of mandatory vaccination make vaccination a condition to work in a particular job or setting such as healthcare, attending school or participating in certain activities; and typically permit a limited number of exceptions.<sup>12</sup> Individuals who refuse vaccination may face restrictions on their ability to participate in certain activities, such as attending public events, travelling, enrolling in educational institutions, or receiving certain services. The World Health Organization advised against both immunity certificates and vaccination certificates.<sup>13</sup> COVID-19 vaccine mandates and COVID-19 certificates impact a range of human rights and liberties. Vaccine mandate compel vaccination by either direct or indirect threats of restrictions in cases of non-compliance.<sup>14</sup> Vaccine mandate typically requires individuals to receive the vaccine or face some restrictions in the kind of activities they partake in; such activities like travelling, access to public facilities like educational facilities, health facilities, etc. Ethical principles suggest that mandatory vaccination policies in adults should usually be the 'last resort'.<sup>15</sup> The rationale behind vaccine mandates is rooted in the need to protect public health, particularly during a public health emergency.

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<sup>8</sup> Wale Odunsi, 'NBA Official Ubani Declares Compulsory Vaccination Illegal, To Sue Nigerian Government' (17 October 2021) Daily Post <[dailypost.ng/2021/10/17/nba-official-ubani-declare-compulsory-vaccinationillegal-to-sue-Nigerian-govt/](https://dailypost.ng/2021/10/17/nba-official-ubani-declare-compulsory-vaccinationillegal-to-sue-Nigerian-govt/)>.

<sup>9</sup> Ibid.

<sup>10</sup> The 1999 Constitution of the Federal Republic of Nigeria, s 45.

<sup>11</sup> Alexandra Benisek, 'What to Know About Vaccine Mandates' (25 October 2022) WebMD <[webmd.com/vaccines/covid-19-vaccine-mandates](https://webmd.com/vaccines/covid-19-vaccine-mandates)>.

<sup>12</sup> World Health Organization, COVID-19 and Mandatory Vaccination: Ethical Considerations Policy Brief (30 May 2022) online: WHO <[www.who.int/publications-detail-redirect/WHO-2019-nCoV-Policy-brief-Mandatoryvaccination-2022.1](https://www.who.int/publications-detail-redirect/WHO-2019-nCoV-Policy-brief-Mandatoryvaccination-2022.1)>.

<sup>13</sup> World Health Organization (WHO), 'Immunity Passports in the Context of COVID-19' (24 April 2020) <<https://www.who.int/news-room/commentaries/detail/immunity-passports-in-the-context-of-covid-19>>; World Health Organization, 'Interim Position Paper: Considerations Regarding Proof of COVID-19 Vaccination for International Travellers' (5 February 2021) <<https://www.who.int/news-room/articles-detail/interim-position-paper-considerations-regarding-proof-of-covid-19-vaccination-for-international-travellers>>.

<sup>14</sup> K Gravagna et al., 'Global Assessment of National Mandatory Vaccination Policies and Consequences of Non-compliance' (17 November 2020) Vaccine (2020) 38:7865-7873, doi: 10.1016/j.vaccine.2020.09.063, Epub 2020 Oct 21, PMID: 33164808; PMCID: PMC8562319 <<https://pubmed.ncbi.nlm.nih.gov/33164808/>>.

<sup>15</sup> AC Mastroianni, JP Kahn & NE Kass, 'Public Health Programs and Policies: Ethical Justifications' in AC Mastroianni, JP Kahn & NE Kass (eds), The Oxford Handbook of Public Health Ethics (8 January 2019) online: Oxford Handbooks <[doi.org/10.1093/oxfordhb/9780190245191.001.0001](https://doi.org/10.1093/oxfordhb/9780190245191.001.0001)>.

Vaccine mandate infringes upon unvaccinated peoples' human rights and liberties;<sup>16</sup> most especially the right to personal autonomy. Autonomy is expressed as the right of competent adults to make informed decisions about their own medical care. Mill<sup>17</sup> summarized the essence of the right to autonomy and the circumstance where the right to autonomy may be limited as follows:

'The only purpose, of which power can be rightfully 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 sufficiently warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because in the opinion of others, to do so would be wise or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with evil in case he does otherwise. To justify that, the conduct from which it is desired to deter him be calculated to produce evil to someone else. . . ., each is the proper guardian of his own health, whether bodily, or mental and spiritual.' The pertinent question from Mill's summary is whether COVID-19 vaccine prevents harm to others to justify the vaccine mandate and the limitation of human rights. If the question is answered in the affirmative, then vaccine mandate is justified; after which the question of proportionality arises. What degree of harm to others is necessary to justify mandates and human rights limitation? Will any degree of harm to others suffice to justify human rights limitation? Since the implementation of vaccine mandates raises important legal and ethical questions, particularly concerning human rights and autonomy. It is essential that such mandates are grounded in law and adhere to principles of necessity, proportionality, and non-discrimination. It is important for mandates to allow for reasonable accommodations to respect individual beliefs and circumstances while still promoting public health goals.

#### **The Need for a Balance through the Proportionality Principle**

Section 35 of the Nigerian Constitution provides that every person shall be entitled to his personal liberty and no person shall be deprived of such liberty except in accordance with a procedure permitted by law in execution of the sentence or order of a court in respect of a criminal offence of which he has been found guilty; by reason of his failure to comply with the order of a court to secure the fulfilment of any obligation imposed upon him by law; for the purpose of bringing him before a court in the execution of the order of a court or upon reasonable suspicion of his having committed a criminal offence; in the case of a person who has not attained the age of eighteen years, for the purpose of his education or welfare; in the case of a person suffering from infectious or contagious disease, persons of unsound mind, persons addicted to drugs or alcohol or vagrants, for the purpose of their care or treatment or the protection of the community or; for the purpose of preventing the unlawful entry of any person into Nigeria or of effecting the expulsion, extradition or other lawful removal from Nigeria of any person or the taking of proceedings relating to it.<sup>18</sup> The rights to personal liberty, privacy, and freedom of movement may be restricted if such restrictions are provided by law and are necessary for the protection of public health.

The principle of autonomy entails that persons have intrinsic and unconditional worth and should have the power to make rational decisions and moral choices, and each should be allowed to exercise his or her capacity for self-determination.<sup>19</sup> This also entails the right to decide whether he or she wants to be vaccinated or not. Relevant information is important to exercise and enjoy the right to autonomy. Section 23 of the National Health Act 2014 provides that every healthcare provider shall give user relevant information pertaining to his state of health and necessary treatment relating to his state of health except in circumstances where there is substantial evidence that the disclosure would be contrary to the best interest of the user; the range of diagnostic procedures and treatment options generally available to the user; the benefits, risks, costs and consequences generally associated with each option; and the user's right to refuse health services and explain the implications, risks, or obligations of such refusal. The information provided shall where possible, be in the language that the user understands and in a manner which takes into account the users' level of literacy.<sup>20</sup>

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<sup>16</sup> S Todd, 'Do Mandatory Vaccines Violate Human Rights?' (5 August 2021) online: QUARTZ <[qz.com/2042743/do-mandatory-vaccines-violate-human-rights](https://www Quartz.com/2042743/do-mandatory-vaccines-violate-human-rights)>.

<sup>17</sup> J S Mill, *On Liberty* (New York: Everyman edition, 1859) 72.

<sup>18</sup> Constitution of the Federal Republic of Nigeria, 1999, s 35 (1).

<sup>19</sup> P Guyer, 'Kant on the Theory and Practice of Autonomy' (2003) 20:2 *Social Philosophy and Policy* 70-98.

<sup>20</sup> National Health Act 2014, s 23

For COVID-19 vaccines, this process involves explaining the vaccine's purpose, benefits, risks, side effects and alternatives, and ensuring individuals understand the implications of refusing the vaccine. Clear communication of the risks and benefits of COVID-19 vaccines is essential to ensure individuals make informed decisions without feeling coerced.

Ethical debate on vaccine mandates suggests that unless all other reasonable means have failed or likely to fail to increase vaccine uptake or reduce transmission of disease, mandates should not be implemented.<sup>21</sup> The ethical acceptability of vaccine policies are dependent on factors like disease severity, vaccine effectiveness, safety, target population and other social, cultural and political considerations.<sup>22</sup> Mandatory COVID-19 vaccination policies has been shown to compel people to receive a largely unproven vaccine that might not be safe and efficacious and may even increase the severity of the disease.<sup>23</sup> The ethical and prudent course is to follow voluntary vaccination programs, such as positive incentives, effective presentation of developing vaccine information, ensuring accessibility of the vaccine, and accommodating medical and religious exemptions. Vaccine mandates should be adopted only as a policy of last resort.

The World Health Organization (WHO) agrees that vaccine mandates may be ethically justified, as they may be crucial to protect the health and wellbeing of the public; though it may come into tension with individual liberty and autonomy.<sup>24</sup> The Organization issued a statement that national authorities and conveyance operators should not require COVID-19 vaccination as a condition of international travel.<sup>25</sup> The policy brief highlighted some of the considerations to be evaluated through an ethical analysis by governments and institutional policy makers considering COVID-19 vaccine; and recommends that mandatory vaccination should only be considered if it is necessary for and proportionate to the achievement of one or more important societal or institutional objectives, typically public health objectives. If such objectives can be achieved with acceptable less intrusive policy interventions and within an acceptable time frame, the ethical justification for a mandate would be weaker, since achieving those objectives with less restriction of individual liberty and autonomy tends to yield more favourable balance between the values of protecting the health and wellbeing of the public and individual liberty and autonomy. When safety data are lacking or when they suggest the risks associated with vaccination outweigh the risks of harm without the vaccine, the mandate would not be ethically justified. Policy makers must ensure that vaccines meet an evidentiary threshold for safety sufficient for a mandate; as exposure of the population to a potentially harmful product via a mandate would violate the ethical obligation to protect the public from unnecessary harm if the harm caused by the product outweighs the degree of harm that might exist without the product.<sup>26</sup> Supply of the authorized vaccine should be sufficient and reliable, as a condition to implement a mandate, this is in line with the ethical principle of justice. The absence of a sufficient supply, free access, and meaningful barrier-free opportunities to be vaccinated, would create a burden and unfair demand on those who are required to be vaccinated but are not able to access the vaccine.<sup>27</sup> The Federal Ministry of Health through its Department of Food and Drug unveiled the first edition of Nigeria vaccine policy in September 2021.<sup>28</sup> The Nigeria Vaccine Policy provides that the highest level of ethics shall be applied in every aspect of the policy through the observance of human rights and dignity while assuring confidentiality and

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<sup>21</sup> M C Navin et al, 'Vaccine Mandates, Value Pluralism, and Policy Diversity' (2019) 33:9 *Bioethics* 1042-1049 <online: doi:10.1111/bioe.12645; pmid:http://www.ncbi.nlm.nih.gov/pubmed/31389050>.

<sup>22</sup> H Boas et al, 'Between Individualism and Social Solidarity in Vaccination Policy: The Case of the 2013 OPV Campaign in Israel' (2016) 5:64 *Isr J Health Policy Res* 1-11 <online: doi:10.1186/s13584-016-0119; pmid:http://www.ncbi.nlm.nih.gov/pubmed/28031784>.

<sup>23</sup> S Jiang, 'Don't Rush to Deploy COVID-19 Vaccines and Drugs Without Sufficient Safety Guarantees' *Nature* (2020) 579:321.

<sup>24</sup> World Health Organization, *COVID-19 and Mandatory Vaccination: Ethical Considerations Policy Brief* (30 May 2022) <online: www.who.int/publications-detail-redirect/WHO-2019-nCoV-Policy-brief-Mandatory-vaccination-2022.1>.

<sup>25</sup> World Health Organization, *Interim Position Paper: Considerations Regarding Proof of COVID-19 Vaccination for International Travellers* (Geneva: World Health Organization, 2021) <online: www.who.int/news-room/articles-detail/interim-position-paper-considerations-regarding-proof-of-covid-19-vaccination-for-international-travellers>.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid

<sup>28</sup> Federal Ministry of Health, *Nigeria Vaccine Policy*, 1st Edition (2021).

respect of different cultural orientations.<sup>29</sup> The Policy serves as a guide to key stakeholders regarding their responsibilities relating to vaccines security and conformity with local and international best practices in demonstrating efficiency in the development of vaccines.

### Application of the Proportionality Principle

Proportionality principle is a doctrinal tool for the resolution of conflicts between a right and a competing right, at the core of which is the balancing stage that requires the right to be balanced against the competing right or interest.<sup>30</sup> The proportionality principle implies that the policy interfering with the right must pursue a legitimate goal; must be a rational connection between the policy and the achievement of the goal; the law must be a suitable means of achieving the goal; there is no less intrusive but equally effective alternative; and the law must not impose a disproportionate burden on the right holder.<sup>31</sup> Proportionality is an essential tool for balancing rights and public interests.<sup>32</sup> Proportionality examines the relationship between the value of the right invaded and the extent of the invasion of that right. An interference with a basic right is warranted only if it pursues a legitimate objective compatible with the law and is justified by overriding reasons of public interest. It must be suitable to secure the attainment of the objective which it pursues, and not go beyond what is necessary to attain it. Proportionality is an inquiry into whether the state's power is exercised in the least invasive manner possible.<sup>33</sup>

In the proportionality review, the test of suitability, necessity, and proportionality *stricto sensu* should be checked. The first component of the proportionality analysis is the suitability test, sometimes referred to as the rational connection test,<sup>34</sup> is understood as the requirement that the means used by the limiting law can realize or advance the underlying purpose of that law; in essence that the use of means would rationally lead to the realization of the law's purpose.<sup>35</sup> For the suitability test, COVID-19 vaccine mandate should be appropriate and suitable to the aim pursued. The necessity test or minimum impairment test,<sup>36</sup> checks and rejects the reviewed policy or regulation as unnecessary if there is a hypothetical alternative means that can advance the purpose of the limiting law and the hypothetical alternative means limit the constitutional right to a lesser extent than the means used by the limiting policy or regulation. The lesser extent is determined among others, by examining the scope of the limitation, its effects, its duration, and the likelihood of its occurrence.<sup>37</sup> The rationale is that where a government measure infringes upon a right unnecessarily, then the right has not been optimized.<sup>38</sup> The necessity test entails the determination of whether COVID-19 vaccine mandates is necessary to achieve the legitimate aim pursued or whether among the existing appropriate measures, it constitutes the least restrictive measure. It should be established whether less restrictive measures in terms of human rights can achieve the same objective as the measure, and if so, the choice should be in favour of the least restrictive measure.<sup>39</sup> This is in line with the principle of least infringement in public health policy,<sup>40</sup> which states that when confronted with several measures, the option that least infringes on human rights should be chosen. For proportionality *stricto sensu*, in order to justify a limitation on a constitutional right, a proper relation

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<sup>29</sup> Ibid, 14.

<sup>30</sup> K Moller, 'Proportionality: Challenging the Critics' (2012) 10:3 *International Journal of Constitutional Law* 709-731 <[doi.org/10.1093/icon/mos02](https://doi.org/10.1093/icon/mos02)>.

<sup>31</sup> Ibid

<sup>32</sup> A Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press 2012) p 457; M Klatt and M Meister, *The Constitutional Structure of Proportionality* (Oxford University Press 2012) p 2-3.

<sup>33</sup> E Engle, 'The History of the General Principle of Proportionality: An Overview' (2012) 10 *Dartmouth Law Journal* 1 at 11.

<sup>34</sup> A P Brady, *Proportionality and Deference under the UK Human Rights Act: An Institutionally Sensitive Approach* (Cambridge University Press 2012) p 54.

<sup>35</sup> A Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press 2012) 303.

<sup>36</sup> A P Brady, *Proportionality and Deference under the UK Human Rights Act: An Institutionally Sensitive Approach* (Cambridge University Press 2012) p 55.

<sup>37</sup> A Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press 2012) 323.

<sup>38</sup> A P Brady, *Proportionality and Deference under the UK Human Rights Act: An Institutionally Sensitive Approach* (Cambridge University Press 2012) p 55.

<sup>39</sup> W Sauter, 'Proportionality in EU Law: A Balancing Act?' (2013) TILEC Discussion Paper 2013-003 <<https://ssrn.com/abstract=2208467>>.

<sup>40</sup> R G Upshur, 'Principles for the Justification of Public Health Intervention' (2002) 93(2) *Canadian Journal of Public Health* <<https://link.springer.com/article/10.1007%2FBF03404547>>.

should exist between the benefits gained by fulfilling the purpose and the harm caused to the constitutional right from obtaining that purpose.<sup>41</sup> There is the possibility that even the least intrusive measure would still not be justified, because it would cause more harm to constitutional rights than benefits in terms of pursuing the public interest.<sup>42</sup> In the assessment of the benefit or harm, several criteria are recognised; especially the Alexy's weight formula, which consist of the intensity of interference with a fundamental right and the degree of the fulfilment of the conflicting rights or public interests; the abstract weight of the rights and public interests at stake; and an assessment of the uncertainty regarding the epistemic preconditions for the application of the rule in question.<sup>43</sup> To pass the proportionality test, the benefits of the regulation or policy must have a higher abstract value, greater intensity or higher probability than its cost in terms of interference with fundamental rights. For proportionality *stricto sensu*, the measure must not be manifestly disproportionate in terms of the cost and benefits balance.<sup>44</sup> Interventions which significantly restrict individual rights to liberty or autonomy is justified only if they are expected to produce substantial public health benefits, such as prevention of transmission; and other methods of achieving the same result are not as effective. Efforts should be made to adopt rational, less intrusive, and proportionate means.

Public health measures that limit individual rights must pass the proportionality test to be justified; so that an attempt is not made to crack a nut with a sledgehammer. Mandatory vaccination may be ethically justified for the protection of public health, where the threat to public health is grave, the confidence in safety and potency of the vaccine is guaranteed, the expected utility of mandatory vaccination is greater than the alternatives and the penalties for non-compliance are proportionate.<sup>45</sup> Mandatory vaccine policies should be used only as a last resort. To be justified, the intrusion into individual rights for the protection of public health; particularly combating the spread of coronavirus must be proportionate.<sup>46</sup> Encouraging voluntary COVID-19 vaccine uptake is unlikely to infringe human rights, but where COVID-19 vaccination is mandated, the proportionality principle should be applied.

The proportionality test will require that a measure infringing guaranteed rights must be proportionate, necessary, prescribed by law, and pursue a legitimate aim. It is necessary where there is a pressing need, and the measure is rationally connected to that aim and is the least restrictive alternative; and proportionate if it strikes a fair balance between the importance of the goal and the burden it places on the individual. Whilst the legitimate aim of containing a risk to public health can justify measures that restrict human rights, it may not be an appropriate measure. Adopting vaccine mandates and vaccine certificates as a precondition for access to certain privileges would amount to a vaccination obligation, which can only be proportionate and legally accepted if supported by strong scientific evidence of the efficacy of the vaccines. The uncertainty surrounding the efficacy of COVID-19 vaccine makes it difficult to establish that vaccine mandates is appropriate, necessary and suitable in order to fulfil the objective of protecting public health during the pandemic; moreover, COVID-19 vaccine mandates cannot be said to be the least restrictive measure for protecting public health in Nigeria; also, the transmission rate in Nigeria is not as escalating as to trigger vaccine mandate.<sup>47</sup> There are less restrictive suitable alternatives with similar public health alternatives.<sup>48</sup>

Article 4 of the International Covenant on Civil and Political Rights (ICCPR) provides for state parties to take measures derogating from their obligations under the covenant as necessary in times of 'public emergency which threatens the life of a nation' permits the limitation of some of these rights and freedoms in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the Covenant may take measures derogating from their obligations under the Covenant to the extent strictly required by

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<sup>41</sup> A Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press 2012) p 340.

<sup>42</sup> A P Brady, *Proportionality and Deference under the UK Human Rights Act: An Institutionally Sensitive Approach* (Cambridge University Press 2012) p 57.

<sup>43</sup> R Alexy, 'Proportionality and Rationality', in V Jackson and M Tushnet (eds), *Proportionality: New Frontiers, New Challenges* (Cambridge University Press 2017) p 17-18.

<sup>44</sup> R Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2002).

<sup>45</sup> J Savulescu, 'Good Reasons to Vaccinate: Mandatory or Payment for Risk' (2021) 47(2) *BMJ* 78 at 80 <<https://jme.bmj.com/content/47/2/78>>.

<sup>46</sup> H D Gunnarsdottir et al, 'Applying the Proportionality Principle to COVID-19 Antibody Testing' (2020) 7(1) *Journal of Law and Biosciences* Isaa058 <<https://doi.org/10.1093/jlb/Isaa058>> (accessed 4 August 2021).

<sup>47</sup> Worldometer, *Nigeria COVID-Coronavirus Statistics* <[www.worldometers.info/coronavirus/country/Nigeria/](http://www.worldometers.info/coronavirus/country/Nigeria/)>.

<sup>48</sup> H D Gunnarsdottir, M S Sinha, S Gerke and T Minssen, 'Applying the Proportionality Principle to COVID-19 Antibody Testing' (2020) 7(1) *Journal of Law and Biosciences* <<https://doi.org/10.101093/jlb/Isaa058>>.

the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

The Siracusa principle<sup>49</sup> emerged from the need for adequate interpretation of the limitation and derogation provisions in the ICCPR. The introductory part of the principle recognised that the likelihood of abuse necessitated closer examination of the conditions and grounds for permissible limitations, and derogation, so as to ensure that the rule of law is upheld. The ICCPR like the Nigerian Constitution guarantees various rights and freedoms like the right to life, the right to self-determination, freedom from torture, cruel or inhuman treatment, the right to liberty, the right to privacy, and freedom of thought, conscience and religion.<sup>50</sup> Part 1 of the Siracusa principle outlines general interpretative principles regarding limitations to be imposed during public emergencies. Limitation clauses must be interpreted strictly in line with the right concerned, must be provided for by law and must be compatible with the objects and purposes of the Covenant, and that a limitation must be applied only for its intended purpose and not in an arbitrary manner.<sup>51</sup> According to the African Commission on Human Rights, states may take measures to address the pandemic, however such measures must be consistent with their obligations under the Charter. The Commission emphasized that measures adopted by states to curtail the pandemic must not interfere with the socio-economic rights of the people; and urged states to give special attention to the needs of the vulnerable and marginalised groups, particularly warning that while the Commission requires states to take measures to address the pandemic, the right to non-discrimination must be preserved.<sup>52</sup> In assessing Nigeria's response to COVID-19 pandemic and its compliance to the constitutional provisions, human rights and the Siracusa principle; some of the restrictions and mandates imposed by the government no doubt pursue the legitimate aim of preventing the spread of the COVID-19 pandemic. However, the means used to operationalize these measures were not the least restrictive and intrusive possible. Some of these measures affected the freedom of movement and liberty and had severe consequences on the people's livelihood and access to healthcare, food, work, education, etc.

### **Recommendations for COVID-19 Vaccination Policies in Nigeria**

To ensure that COVID-19 vaccine mandates in Nigeria are both effective and human rights compliant, the following recommendations are proposed:

#### **a. Comprehensive Legislation and Regulatory Framework:**

There is need for comprehensive legislation that clearly outlines the conditions under which vaccination mandates can be implemented, ensuring adherence to the principles of necessity and proportionality; and a regulatory framework that governs the implementation of vaccine mandates, including provisions for exemptions and accommodations for individual beliefs and circumstances.

#### **b. Sufficient Evidence of the Safety and Efficacy of the Vaccine:**

When safety data are lacking or when the risks associated with vaccination outweigh the risks of harm without the vaccine, the mandate would not be ethically justified. Policy makers should specifically consider whether vaccines meet an evidentiary threshold for safety sufficient in vaccine mandates.

#### **c. Justice in Access and Availability of the vaccine**

In making vaccine policies, it is important to avoid the exacerbation of inequity, especially amongst disadvantaged population. Special attention should be given to marginalized groups to ensure that vaccine mandates do not disproportionately impact those already facing systemic disadvantages. The absence of a sufficient supply and free access opportunity to be vaccinated, will create an unfair demand on the population required to be vaccinated, but unable to access the vaccine.

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<sup>49</sup> The Siracusa Principles on the Limitations and Derogation Provisions in the International Covenant on Civil and Political Rights, E/CN.4/1985/4 at the 41st session of the Commission on Human Rights, 28 September 1984.

<sup>50</sup> Article 6, 1, 7, 9, 17 and 18, Siracusa Principles.

<sup>51</sup> Clause 7, Siracusa Principles.

<sup>52</sup> African Commission on Human and Peoples' Rights, 'Press Statement on Human Rights Based Effective Response to the Novel COVID-19 Virus in Africa' <<https://www.achpr.org/pressrelease/detail?id=483>> (accessed 29 May 2023).

### **Conclusion**

COVID-19 pandemic made the conflict between human rights and protection of public health more glaring. In adopting mandatory vaccine policies, proportionate and less intrusive measures should be adopted, and voluntary vaccine uptake encouraged, before contemplating mandatory vaccination. Mandatory vaccine policies should be used as a last resort and must meet the principle of proportionality. It is obvious that while the protection of public health is paramount, it must not come at the expense of fundamental human rights. The proportionality principle serves as an important guideline, ensuring that any limitations on individual liberties are justified, necessary, and the least restrictive means available to achieve public health goals. COVID-19 pandemic is not the last public health emergency. There is need to confirm the necessity, reasonability and proportionality of COVID-19 vaccine mandates, else vaccine mandates will become the order of the day; and an accepted policy response for future pandemics, irrespective of whether the policies are necessary, proportional, truly effective, legally, or ethically justifiable.