

Mandatory Vaccinations in the Age of COVID-19: A Clash of Autonomy and Beneficence

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ABSTRACT

A coronavirus outbreak in Wuhan, China that then spread to other parts of the world focused international attention to would be pandemic which has so far claimed the lives of 0.0125% of Kenyans. This paper focuses on constitutional questions arising out of forced vaccinations by first discussing the ethical theories that guide medical practitioners. It argues that a person's autonomy must be exercised to its greatest extent and it cannot be overridden by public interest beneficence for protecting the general population without laws being put in place in that regard.

Keywords: Coronavirus; Vaccinations; Age; COVID-19

INTRODUCTION

In December 2019 the first case of COVID-19, caused by coronavirus, among humans was reported in Wuhan China. The virus was linked to a food market where some of the employees, regular visitors and owners of stalls later turned out to be positive. COVID-19 is 'a communicable respiratory disease caused by a new strain of coronavirus that causes illness in humans.' According to Africa CDC, COVID-19 "spreads through infected air droplets that are projected during sneezing and coughing, contact with hands or surfaces that contain the virus and touching eyes, nose or mouth with contaminated hands.' It soon after explosively spread over the world with the first case in Africa being recorded on 15th February 2020 in Egypt whereas the first in Kenya was reported in March 2020 [1].

In response to what would later turn out to be a pandemic, governments introduced a raft of measures to mitigate the novel coronavirus. For instance, the government of Kenya introduced measures which included but were not limited to closure of schools, dusk to dawn curfew, club closures and non-essential businesses, partial lockdowns and suspension of international flights. The containment measures brought with them severe socioeconomic consequences on the population of Kenya. Vulnerable households were the most hit as they could not easily cope with the incidental shock of the pandemic. It is estimated that the rate of unemployment increased from 5% to 17% ten months after the pandemic struck [2].

With time global pharma was able to come up with vaccines for

treating COVID-19. Sooner governments issued circulars that made vaccination mandatory for civil servants albeit free of charge. Other members of the public were encouraged to voluntarily visit designated health facilities to receive the Covid jab. However the arrival of the mandatory jab raised ethical issues, to wit, invasion of bodily integrity of the people and public interest, which are the focus of this paper.

LITERATURE REVIEW

It goes without say that ethics plays a fundamental role in medical practice since all medical decisions must be made based upon some moral thought. Ethics has been defined as the 'application of ethical reasoning to medical decision making.' It is therefore imperative to thus far to explore the various medical theories that health professionals apply when faced with a dilemma in the course of their practice [3].

Consequentialism

As the name suggests, consequentialism, concerns itself with the consequences or rather the results of an action or an omission. A consequentialist was defined as 'someone who thinks what determines the moral quality of an action is its consequences.' Therefore to a consequentialist the most favorable action is that which results into a greater utility after weighing both the good and bad consequences.

Jeremy Bentham, the proponent of the 'greatest happiness' school argued that the most morally favorable act is that which produces

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the greatest happiness for the greatest number. Suppose a medical professional were to kill a healthy person to save ten patients. Would this be ethically right? To Bentham such medical professional is justified to kill the person in order to save the ten patients since that would make ten families happy.

Consequentialism is critiqued on the ground that it is a herculean task predicting the results of an action. For instance, if a heart is planted into a patient there is no assurance that the transplant will be successful. It is also argued that it leads to injustice.

Deontology

Deontology looks at the rightfulness or wrongfulness of an act. A little earlier I referred to killing a person to save ten patients. To deontologists such an act is inherently wrong since life is sacrosanct and such action would mean that the person killed is used as a means to an end. Deontology is closely related to the neighbor principle in the law of torts as enunciated by Lord Denning in *Donoghue v Stevenson*.

It follows therefore that when one considers whether an action is wrong or not regard must be had to the duties of the person doing the act since every person has a duty to act morally. Questions such as is it legally right to kill another person should be asked.

Immanuel Kant a proponent of this school posited that a person should be treated as an end in himself but not a means to an end.

Principlism

It is based on four principles i.e. Autonomy, beneficence, non-maleficance and justice, and was put forward by Beauchamp and Childress.

Autonomy

This principle posits that a patient should be treated with the dignity that befits him/her. Its foundation can be found in the constitution at article 10 which provides for human dignity as a national value and principle of governance. Further Article 28 not only gives every person the right to inherent human dignity but also the right to have that dignity respected and protected. The other underpinning of autonomy is to be found in the Hippocratic Oath which states 'I will remember that I do not treat a fever chart, a cancerous growth, but a sick human being, whose illness may affect the person's family and economic stability.'

The right to dignity gives a patient the right to withhold consent to treatment where such person has the requisite capacity. Therefore if a Jehovah Witness refuses blood transfusion doctors have the duty to respect such wish and hence cannot impose treatment upon such patient. In other words, the common adage in the medical field that a 'patient is always right' comes into play.

Closely associated with the principle of autonomy is the Kantian deontological thought that a person should not be used as means to an end. However, autonomy does not mean that every choice must be respected but only those choices that are competent. For instance, a doctor can override a child's choice not to be given an injection since the child might not be competent enough to understand the nature of treatment.

Beneficence

In the Hippocratic Oath, doctors do make oath and state that they will 'apply for the benefit of the sick, all measures which are required, avoiding those twin traps of overtreatment and therapeutic nihilism.' What is gleaned from the oath is that doctors have a positive duty to do good to their patients.

Jesus Christ of Nazareth is recorded in Mark 2: to have said to the scribes and Pharisees literally that "they that are not whole (read healthy) have no need of the physician, but they that are sick." To Jonathan Herring 'doctors are under a special duty to put the interests of patients above even their own interests.'

The duty to do good to a patient applies even if such duty shortens the life of a patient. In *Airedale NHS Trust v Bland*, 20 Lord Goff had the following to say; "A doctor may, when caring for a patient who is, for example, dying of cancer, lawfully administer pain killing drugs despite the fact that he knows that an incidental effect of that application will shorten the patient's life."

Non maleficance

This principle imposes a duty on doctors and other medical practitioners not to inflict pain on their patients. According to this principle it is wrong to kill one healthy person in order to help ten sick persons. In *McFall v Shimp*, a patient needed a bone marrow transplant. The patient's cousin consented to extraction of the bone marrow from him but later withdrew the consent. The patient therefore sought orders from the court to compel his cousin to donate the bone marrow, the court refused the application and the patient later died.

In the case the court had to balance the donor's right to autonomy and the patient's corresponding beneficence. Forcing the donor to donate his bone marrow to the patient would have meant that harm must be caused to him and that would have been against the principle of non-maleficance.

In *R v Cox*, Dr. Cox gave a patient a drug which had no therapeutic value. The patient was suffering from rheumatoid arthritis and the drug hastened his death. It was held that Dr. Cox had an ulterior motive to kill the patient hence he was convicted of attempted murder. In Lord Ognall's words 'what can never be lawful is the use of drugs with the primary purpose of hastening the moment of death.'

Justice

The principle of justice is to the effect that all equal should be treated as equal and all unequal be treated as unequal in distribution of resources.

Paternalism

Paternalism goes to the fact that medical practitioners have the knowledge and skills to act in the best interests of patients. In situations where there is an emergency and a patient has given no consent or lacks capacity to consent to treatment a doctor has the duty to treat the patient. In such a case paternalism overrides autonomy.

In *Re F (Mental Patient Sterilization)*, the court had to decide whether a sterilization operation for a patient with a mental age of

5 years was lawful. To Lord Goff the defence of necessity applied to such instance hence such sterilization operation was justified.

DISCUSSION

With the advent of vaccines it was the government policy that all civil servants be vaccinated. Joseph Kinyua, the head of public service, stated that civil servants had until 23 August to get vaccinated or face disciplinary action for failure to do so. The Ministry of Health further passed a policy that non vaccinated Kenyans should not access government services. The announcement was made by the Health Cabinet Secretary Mutahi Kagwe on 21 November 2021 but was suspended temporarily by the High Court on December 14th 2021 pending the hearing and determination of a case challenging the policy [4].

The announcements were met with mixed reactions from Kenyans and human rights groups. Human Rights Watch urged the Kenyan government to amend the rules to avoid 'undermining basic rights' since 90% of Kenyans had not received the jab as at 31 November 2021. Human Rights Watch further argued that in as much as it is the government's duty to protect its citizens from health hazards, measures to prevent such threats had to be proportional [5].

The question to be asked is; are the policies making vaccination compulsory constitutional? The rule of the thumb under the common law is that a medical practitioner cannot administer any treatment on a patient without the patient's consent as the medical practitioner risks committing the tort of trespass to person. The consent may be express or implied, for instance, presenting oneself to medical check-up amounts to implied consent.

In light of mandatory vaccinations could it be said that civil servants consent to vaccination by presenting themselves to health facilities to receive the jab? As a general rule consent to treatment must be unequivocal. Mandatory vaccinations make one form the impression that consent to vaccination is coerced. In the circumstances any argument put forth that civil servants consent to vaccination by presenting themselves to health facilities must therefore fall since such Covid vaccination results to involuntary treatment [6].

On the issue of denial of government services to those who are not vaccinated it is submitted here that in addition the rights to dignity and privacy, every person has the freedom of conscience, religion, thought, belief and opinion. A person therefore cannot be denied access to any institution or employment because of the person's belief or religion. In other words, as a person has the right to self-determination, latitude must be granted to the person to elect whether to receive the jab or not and should not be condemned in cases where he or she elects not to receive the jab.

Autonomy requires that a person's wishes be respected whether we agree with such wishes or not. In *Re T (Adult Refusal to Treatment)*, a patient whose mother was a Jehovah Witness declined blood transfusion. A declaration for the conduct of the blood transfusion was sought by the doctor. Lord Donaldson Master of the Rolls expressed himself as follows;

'Every adult has the right and capacity to decide whether to accept or decline treatment, even where the refusal would lead to permanent injury or death. Such a refusal can be rational or irrational, unknown or even not in existence.'

Compulsory vaccination would mean that the right to dignity which should be protected and promoted is infringed by the fact that treatment is imposed on a person without his or her informed consent. Consent runs to the root of any medical treatment except in the most extreme cases which cases must be provided in law. In *Schoelendorff v New York Hospital Cardozo J* stated that "every human being of adult years and sound mind has a right to determine what shall be done to his body."

This does not however mean that public interest's beneficence be trumped as the rights to human dignity, privacy and freedom of conscience and religion are not absolute but a balance must be struck between the two competing interests. This is by ensuring that laws that limit the rights are put in place so that compulsory vaccinations can stand the test of constitutionality. In *Jacobson v Massachusetts* it was held that a state may put in place laws that make vaccination compulsory with the aim of protecting public health [7-9].

In Justice Harlan's words; 'There is, of course, a sphere within which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human government, especially of any free government existing under a written constitution. But it is equally true that in every well-ordered society charged with the duty of conserving the safety of its members rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.'

To that extent Charles Wamae and Caxtone Kigata argue that 'the government should remember that the people are supreme and the constitution is anchored on social values based on the rule of law, public participation and respect to the people' in coming up with policies on mandatory vaccinations.

Basil Varkey warns of the danger of preferring beneficence over autonomy. He says 'giving it (beneficence) primacy over patient autonomy is paternalism that makes a physician-patient relationship analogous to that of a father/mother to a child.' He continues 'a father/mother may refuse a child's wishes, may influence a child by a variety of ways-non-disclosure, manipulation, deception, coercion etc., consistent with his or her thinking of what is best for the child.'

Put differently, Basil argues that putting beneficence above autonomy in the pecking order would mean that the state has unfettered power to decide what is best for its citizens which at times may not be true in normal circumstances.

How then do we find a common ground? Pallegrino and Thomasma offer a solution. They posit that public interest beneficence and patient autonomy could be amalgamated since 'the best interests of the patients are intimately linked with their preferences.

CONCLUSION

The government's compulsory vaccination policy is a consequentialist thought as it is premised on the ground that if a person does not get the jab then the person shall die or rather infect others. Nonetheless, there is no certainty that that would be so in the absence of empirical evidence. The argument this paper advances is that a person, oblivious to the danger he/she is exposed to, should be allowed to choose whether to get the vaccine and not being forced to get the vaccine without proper laws in place.

REFERENCES

1. Dong E, Du H, Gardner L. An interactive web-based dashboard to track COVID-19 in real time. *Lancet Infect Dis.* 2020;20(5):533-4.
2. Kakodkar P, Kaka N, Baig MN. A comprehensive literature review on the clinical presentation, and management of the pandemic coronavirus disease 2019 (COVID-19). *Cureus.* 2020;12(4).
3. Jin X, Lian JS, Hu JH, Gao J, Zheng L, Zhang YM, et al. Epidemiological, clinical and virological characteristics of 74 cases of coronavirus-infected disease 2019 (COVID-19) with gastrointestinal symptoms. *Gut.* 2020;69(6):1002-9.
4. Mahase E. COVID-19: Death rate is 0.66% and increases with age, study estimates. *BMJ.* 2020;369.
5. Guan WJ, Liang WH, Zhao Y, Liang HR, Chen ZS, Li YM, et al. Comorbidity and its impact on 1590 patients with COVID-19 in China: A nationwide analysis. *Eur Respir J.* 2020;55(5).
6. Bayod RP, Forsuelo EJ, Morante JP, Guerra MC. Bracing for the new normal or post-normal? Challenges and aspirations of indigenous parents for education of their children. *Eubios J Asia Int Bio.* 2021;31(3):161.
7. Onyema EM, Eucheria NC, Obafemi FA, Sen S, Atonye FG, Sharma A, et al. Impact of Coronavirus pandemic on education. *J Edu Pract.* 2020;11(13):108-21.
8. Talidong KJ, Toquero CM. Philippine teachers' practices to deal with anxiety amid COVID-19. *J Loss Trauma.* 2020;25(6-7):573-9.
9. Zhong L, Sun S, Law R, Li X, Yang L. Perception, reaction, and future development of the influence of COVID-19 on the hospitality and tourism industry in China. *Int J Environ Res Pub Heal.* 2022;19(2):991.