



**RECONSIDERING STATE OBLIGATIONS IN PUBLIC
HEALTH EMERGENCIES**

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Abstract

Global systems have, in the last decade suffered series of emerging/infectious diseases in mega pandemic proportions. In the first few years of the twenty first century, the SARS raved in the Orientals; about the mid-decade, it was the Ebola infectious disease and COVID-19 that topped public health security agenda in 2020 and 2021. Lassa fever has been a recurring decimal in the infectious disease in parts of Nigeria as a domestic concern. The latest of the recent bellwethers is the monkey pox outbreak which, like other infectious diseases of global proportion, knows no boundary and has brought a rethinking of the role of states in protecting their nationals/home security. It also sets public health at the epic-center of decision. COVID-19 outbreak has made it too clear that individuals alone, cannot protect themselves making states to assume the role of public security man. This calls for a renewed enthusiasm for a stronger governmental effort at safeguarding national security. In analysing state obligations towards their nationals in public health emergencies, this paper utilizes the fiduciary obligation theory of human rights as a philosophical ground for a derogatory regime in the use of police power. The purpose of the law is to honour the dignity of individuals while securing the rights and freedoms of all persons.

Keywords: public health emergencies, fiduciary, obligation

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Introduction

In the past two decades, the exercise of power of the state in public health emergencies¹ has come under intense scrutiny of disapproval and resistance except in cases of visible health threat as experienced, for instance, during the 2020 COVID-19 infectious outbreak. During the global outbreak, private, international, regional and national response to the epidemic was robust.² Several states responded to control the pandemic through the use of mandatory legislations to enforce various measures including punitive measures, to enforce compliance. The same can be said of the SARs, and the 2014 Ebola infections where states imposed quarantine and isolation as tools of public health to contain the spread of infectious diseases.³

With the latest monkey pox threat, public health power during health emergencies becomes a prominent issue, bringing up again the controversial issue of the basis of the exercise of state powers especially during public health emergencies. The root of the discord stems from the duties of public health powers of state which clamp down on civil liberties, abrogate personal freedom, paternalism, autonomy and behavioural lifestyle choices. With respect to civil liberties, the use of quarantines, lock downs, isolation and outright ban raises political, legal and ethical issues because of its clampdown on personal liberties. Laws mandating immunization are no less controversial because, "*[t]he power of government to compel individuals to receive approved materials into their bodies and to surrender materials from their bodies is necessary from a public health perspective, and necessarily objectionable from a civil liberties perspective.*"⁴ In the discourse on regulation of Non-Communicable Disease (NCDs), the proposal for the use of laws for the regulation of behavioural lifestyle such as diet and nutrition, while garnering scholarly attention as an important tool for the prevention of chronic non-communicable diseases, is viewed with

¹ WHO. Past pandemics. Pandemic influenza; 2020. <https://www.euro.who.int/en/health-topics/communicable-diseases/influenza/pandemic-influenza/past-pandemics>. Accessed 27 July 2022 at 2.45pm.

² World Health Organization. 2020. COVID-19 Public Health Emergency of International Concern (PHEIC) Global research and innovation forum available on [https://www.who.int/publications/m/item/covid-19-public-health-emergency-of-international-concern-\(pheic\)-global-research-and-innovation-forum](https://www.who.int/publications/m/item/covid-19-public-health-emergency-of-international-concern-(pheic)-global-research-and-innovation-forum) assessed 27 July 2022 at 1.35pm.

³ Abayomi et.al. 2021. From Ebola to COVID-19: emergency preparedness and response plans and actions in Lagos, Nigeria. *Globalization and Health* 17:79.

⁴ Bernard M. Dickens. 2002. A tool for teaching and scholarship: A review of Lawrence Gostin's Public Health Law: Power, Duty, Restraint, 30 J.L. MED. & Ethics 162, 168

suspicion as a Trojan horse to further tilt the balance of state power over individuals. It has generated both ethical, economical and constitutional objections. Ethically, objections to regulation draws upon liberal assumptions that individuals are in the best position to determine their own good⁵ because, state policy to regulate is paternalistic in nature. The only ground J.S. Mill's harm principle exempts state power to regulate is where it is to prevent harm against a third party⁶, but “....if no third party interests are directly involved, the state can hardly be permitted to declare an individual's philosophical convictions unsound or sick and prevent them from practicing them”⁷ Underlying a constitutional argument is the balancing of competing rights of expression of businesses in the least restrictive manner. Recognising these trade-offs, therefore, this article develops a proposal that mandates states to safeguard the welfare of her nationals beyond the traditional avenues.

The primary purpose of this article is to enhance an understanding of state obligation beyond the traditional jurisprudence of public powers by promoting a robust concept of public law fiduciary duty centered upon its *raison d'être* and strengthened by Millet J's reasoning in *Bristol and West Building Society v Mothew*⁸ that, a fiduciary ‘is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary’. To develop this article, the paper will explore the concepts of fiduciary relationships albeit from a public perspective, recognizing that fiduciary relationship stems from a traditional private agency precinct. Bearing this in mind, it will explore the concept from a purely philosophical standpoint of Evan Fox-Decent's conception of states as fiduciary in his seminal thesis on Sovereignty Promise.⁹ The conception of fiduciary status to sovereigns is not a recent idea but dates back to Cicero when he states that, ‘[t]he guardianship of the state is a kind of trusteeship’¹⁰ Locke, too, alludes to this when he described the powers of legislative bodies as fiduciary in nature.¹¹ Similarly, Jeremy

⁵ Beauchamp, D. 1980. Public health and individual liberties. *Annual Review of Public Health*, 121-136

⁶ Mill, J.S. 1959. On liberty. om

⁷ Feinberg, J. 1971. Legal paternalism. *Canadian Journal of Philosophy*. 105-124 at 115

⁸ [1998] Ch 1, [1996] 4 All ER 698 at 18, 711–712

⁹ Evan Fox-Decent. 2011. *Sovereignty's Promise: The State as fiduciary*. Oxford University Press.

¹⁰ Cicero, *On Moral Obligation*, trans John Higginbotham (Berkeley: University of California Press, 1967) (first published in 44 BC), ch 25, p.69.

¹¹ John Locke, *Second Treatise on Civil Government*, as reproduced in *Social Contract* (Oxford: Oxford University Press, 1948) (first published in 1690), pp 125–6, ch13, para 149.

describes political power as fiduciary in nature.¹² The nature of fiduciary duties is such that fiduciaries are protectors of trust and confidence in relationships and not just a form of legal protection for the property rights or powers invested in that relationship, this form of duty will include solicitor and client¹³, agent and principal¹⁴, company director and company¹⁵; trustee and beneficiary¹⁶ etc Fiduciary obligation is not absolute as it may be stretched to unconfined realities, like in this case, in to the domain of public law and state-citizen relationship. From this standpoint, this paper will argue that the legal basis of a fiduciary duty of a private nature can be extended to state-citizen relationship. This is particularly important in public health law where the state is conferred with the powers and duty to safeguard the interest of the public.

Definitions

Fiduciary’ is derived from the Latin word *fiduciarius*, and it means ‘one who holds anything in trust’ The Latin *fiduciarius* allows a person in position of fiduciary to hold property on behalf of another person in trust, for another named the beneficiary.¹⁷ However, the legal term ‘fiduciary’ is devoid of a consensual definition. The fiduciary concept is better described, as it is elusive, abstract and rather complex. Thus, an attempt at a traditional definition may be difficult. As the court stated in the case of *LAC Minerals v International Corona Ltd*¹⁸ ‘there are few legal concepts more frequently invoked but less conceptually certain than that of the fiduciary relationship’ because it is “one of the most ill-defined, if not altogether misleading terms in our law”¹⁹ However, it can be appreciated as a concept that guides the relationship and interactions between parties. As it has been pointed out above, the fiduciary concept protects relationships of high trust²⁰ and preserves relationship and confidence.²¹ It is against this light that Millet LJ stated the position of a fiduciary in the traditional trust relationship in the following terms: *A fiduciary is someone*

¹² Jeremy Bentham and John Bowring, *The Works of Jeremy Bentham* (Edinburgh: Tait, 1843), ch 14 ‘View of a Complete Code of Laws’, p 182; Edmund Burke, *On Empire, Liberty, and Reform: Speeches and Letters*, ed David Bromwich (New Haven: Yale University Press, 2000).

¹³ See the Nigerian cases of *Ukah v. Onyia & ors.* [2016] NGCA 111 *Bristol and West Building Society v Mothew* (supra)

¹⁴ *Kelly v Cooper* [1993] AC 205

¹⁵ *Guinness v Saunders* [1990] 2 AC 663

¹⁶ *Keech v Sandford* (supra)

¹⁷ Leonard I. Rotman. 2017. Understanding Fiduciary Duties and Relationship Fiduciarity *McGill LJ* 62:4 :975

¹⁸ La Forest J in the Supreme Court of Canada *LAC Minerals v International Corona Ltd* 1989 CanLII 34 (SCC),, 2 SCR 574

¹⁹ Finn, P.D. *Fiduciary Obligations*. Sydney: Law Book Co (1977), p. 1

²⁰ Leonard I Rotman, *Fiduciary Law* (Toronto: Thomson Carswell, 2005) at 58–61 at page 250

²¹ Rotman Leonard. 2005. *Fiduciary Law*. Toronto. Thomson Carswell. @56-61

who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence.²² Evans J. and Fox-Decent in their work define fiduciary²³ duty as a relationship being imposed where there is a power imbalance between a fiduciary and a beneficiary such that the fiduciary has power to affect a beneficiary's legal or practical interest. It is also trite that the frontiers of duty are constantly evolving and keeps stretching, but in certain instances, may be codified as seen in director's duties under the sections 279 – 287 Companies and Allied Matters Act.

An irreducible core in a fiduciary obligation is the concept of trust and confidence in every fiduciary relationship. The cases of *Keech v. Sandford*²⁴ and *Phibbs v. Boardman* show the extent of the trust and confidence reposed in a fiduciary relationship. In *Keech v. Sandford*, the court firmly established fiduciary principles, namely that the trustee stands in the position of a fiduciary to the beneficiary and owes a number of fiduciary duties to the beneficiary. Just as the cases of trust relationship are not closed, so is the precincts of the duty of fiduciary clear-cut. However, what is commonly agreed is the jurisprudence of the fiduciary obligation. The next section discusses the nature of fiduciary obligations, paramount of which is that, the fiduciary must always act in the best interest of the beneficiary(ies).

Elements of fiduciary relationship

Under the law of trust, the fiduciary relationship gives rise to duties or obligations from which arises liability in cases of breach. This is captured in Hohfeld²⁵ when he observes that where there is a duty to act honestly and selflessly in utmost good faith, there is a duty to rely on the fulfilment of these duties without inquiry. Although the range of fiduciary duties are poorly defined, there is still some consensus on its essence. At the heart of the fiduciary law is the duty of loyalty²⁶, also described as the duty of unselfishness.²⁷ It is a duty whereby the fiduciary owes a duty of undivided and undiluted loyalty to the interests of the beneficiaries at all times. DeMott succinctly captures this duty as follows: "[i]f a person in a particular relationship with another is subject to a fiduciary

²² *Bristol and West Building Society v Mothew* [1998] Ch 1, [1996] 4 All ER 698 at 18, 711–712

²³ Evans J. Criddle and Evans Fox Decent 2009. "A Fiduciary Theory of Jus Cogens" 34 *Yale Journal of International Law* 331 @ 349

²⁴ *Keech v. Sandford*. *Supra*.

²⁵ Wesley N. Hohfeld. 1913. "Some fundamental legal conception as applied in judicial reasoning". 23:1 *Yale L.J.* 16 @ 30

²⁶ Panesar, Sukhinder. 2017. *Equity and Trust*. Harlow, England ; New York : PEARSON Education. 3rd edition

²⁷ See Lord Chelmsford in *Coleman v Myers* [1977] 2 NZLR 225

obligation, that person (the fiduciary) must be loyal to the interests of the other person (the beneficiary)²⁸

The loyalty duty is expressed in two forms – the *no conflict rule* and the *conflict of duty rule*, essentially prohibiting any act of disloyalty to the beneficiary. In other words, a fiduciary must always act in the beneficiary’s sole interest. This stringent obligation is reinforced by a ‘no further inquiry rule’ i.e. with no reasoning, except what is solely in the best interest of the beneficiary²⁹. This extension is based on the fact that there is an element of vulnerability and reliance of the beneficiary on the fiduciary, such that, the law will not do or permit any act that negatives the interest of the beneficiary.³⁰ Equally distinctive in a fiduciary relationship is the element of utmost good faith in acting within the best interest of the beneficiary.³¹ Even though good faith as a notion has been criticized as a vague concept³², good faith is a concept that is heavily conditioned by its context.³³ In the context of fiduciary obligation, it is an obligation that requires the fiduciary divests himself of every self or working in his own interest and channels its decisions and exercise of discretion towards the best interest of the beneficiary or beneficiaries.³⁴

The purpose of fiduciary concept

Equity places special priority on the protection of a trusting relationship because it is a principle of humanity³⁵ which exists for the preservation of mankind.³⁶ Also, it has been argued that the purpose of fiduciary obligation is to facilitate the dependence of beneficiaries on fiduciary by placing the burden of compliance on fiduciary holding power. This, he argues, extends beyond the

²⁸ Deborah A DeMott, “Beyond Metaphor: An Analysis of Fiduciary Obligation” (1988) 37:5 *Duke LJ* 879

²⁹ Deborah A. DeMott. 2021. The Domains of Loyalty: Relationships between Fiduciary Obligations and Intrinsic Motivations. *William & Mary Law Review* Vol. 62. (2020-2021 issue 4 Article 3

³⁰ Millet J in *Bristol and West Building Society v Mothew* supra.

³¹ Millet L.J in *Bristol and West Building Society v Mothew* [1986] [1998] Ch. 1, [1996] 4 All ER 698 at 18, 711–712A fiduciary is someone who has undertaken to_ act for or on behalf of another in a particular matter in circumstances which gives rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. The core liability has several facets. A fiduciary must act in good faith

³² See for instance, Nolan and Conagler in their observation that: ‘the notion of an obligation to act posited on good faith alone is open to more fundamental objections. Good faith is simply too vague a concept to direct and judge action with any acceptable degree of predictability. It is impossible to say with any clarity what behavior is mandated by good faith alone’

³³ R Nolan and M Conaglen, 2010/ “Good Faith: What Does It Mean for Fiduciaries and What Does It Tell Us About Them?” in E Bant and M Harding (eds), *Exploring Private Law* 26

³⁴ *Bristol and West Building Society v Mothew*. supra

³⁵ *Hylum v Hylton* (1754) 2 Ves Sen 547

³⁶ *Welles v Middleum* (1784) 1 Cox 112

traditional private law limitations. This distinction places fiduciary law beyond the traditional parameters of civil rights and obligation such as in the realm of torts, contract and trust, and as this work aims to do, rely on the mutability of the concept to extend its reach to public law discourse. The application of fiduciary duty to public law is made all the more possible by the nature of the duty of a fiduciary. As noted, ‘Fiduciaries do not require permission to exercise fiduciary powers, nor are they under the authority of others with greater power absent a situation of permissible delegation.’. The only situation in which a greater power may deter the state from acting is through acts of national assembly, binding treatise or international law. In essence, the core purpose of fiduciary is as follows: ‘(a) the maintenance of integrity of socially and economically important or necessary relationships of high trust and confidence (b) that creates beneficiaries’ implicit dependency and particularly vulnerabilities to (c) fiduciaries implicit of honesty, integrity, fairness, and utmost good faith that (d) establish the parameters of fiduciary elements of interactions’³⁷

Fiduciary law in public health discourse

The aim of this section is to export/extend the fiduciary theory to the realm of state legal authority to administer law and other correlative duty of obedience required of beneficiaries. To do this, this section will argue that the State owe a duty to consider the overall best interest of its citizens as well. This relationship is premised on the law-giver/subject or state-citizen relationship.

(i) A short primer on public health

As popular as the term ‘public health’ is, it is a difficult concept to define. According to The Oxford English Dictionary (OED) public health is “the health of the population as a whole, especially as monitored, regulated, and promoted by the state (by provision of sanitation, vaccination, etc.).³⁸’. A somewhat influential definition of public health is Winslow’s 20th definition which is still considered valid today that public health is ‘*the science and art of preventing disease, prolonging life and promoting physical health and efficiency through organized community effort ..*’.³⁹ These two definitions both concur in viewing public health as a collective effort with population focus as opposed to individual interest in mind. In effect, public health lay claims to a communal value

³⁷ Rotman Leonard. 2017. Understanding fiduciary duties and relationship fiduciarity, McGill L.J. 62: 4: 975-1042

³⁸ <https://www.health.state.mn.us/communities/practice/resources/chsadmin/mnssystem-responsibility.html#b>

³⁹ Ahmed F.U. 2011. Defining public health. Indian J Public Health. 55:241-5

with collective control over conditions affecting the common health.⁴⁰ The population focus of public health means that the health of populations qua population is the intrinsic focus of public health. It is population based, emphasizing collective responsibility for health, and above all, recognizes the key role of the state to address the underlying socio-economic and wider determinants of health.⁴¹

The correlates between a private law fiduciary and a public one is the existence of an authority/subject -premised upon exercising discretionary power consisting of a fiduciary. The exercise of discretion lies at the heart of the fiduciary power; as Wilson J. in *Frame v. Smith*⁴² rightly identifies, fiduciary can unilaterally exercise [that] power or discretion so as to affect the beneficiary's legal interest or practical interests. What this means is that a person is a fiduciary because he is subject to the fiduciary obligations of loyalty, fidelity and prudence. That in itself is the reason for fiduciary duties; a fiduciary relationship is one which necessitates those obligations by its very nature. The basic principle is that these are known to be relationships in which certain standards of behaviour are expected with regard to the use of powers granted by a legal relationship with another.

(ii) The state as fiduciary.

This section examines the legitimacy of state action over citizens using the fiduciary lens. Within the conception of sovereign power over persons, we adopt Paul's definition of fiduciary as '*a fiduciary relationship in which one party (the fiduciary) exercises discretionary power over the significant practical interests of another [the beneficiary]*'.⁴³

The definitive properties of this definition is the exercise of power by a fiduciary relative to the beneficiary. The nature of power relates to, among others, to license or permit access, make decisions relating to the health and wellbeing of the beneficiary and to take decisions.⁴⁴ From the definition above, there are different perspectives from which the relationship of the state viz-a-viz

⁴⁰ Dan E. Beauchamp, 1988. *The Health of the Republic: Epidemics, Medicine, and Moralism as Challenges to Democracy* 17

⁴¹ Fairchild, A.L., Rosner D. Colgrove, J. Baer R., Fried L.O. 2010. The exodus of public health. What history can tell us about the future. *Am. J, Public Health.* Jan.100 (1): 54-63.

⁴² *Frame v. Smith* [1987] 2 SCR 99 At 136

⁴³ *Supra* note 2

⁴⁴ *Per* Bing in *Frame v. Smith* *Supra*.

can be conceptualized as fiduciary. A first is the content of sovereignty which presents the conditions, specification, administration and vindication of legal authority to a component referred to as the state for the provision of a legal order which is expressed in Section 1 of the 1999 Constitution on the sovereignty of Nigeria to intervene coercively in matters pertaining to Nigeria. Inherent in the power of the sovereign is the obligation to promote the general welfare of the society in the sphere of health, safety and morals, and these powers are delegated to other tiers of government as laid down in the constitution. Government, may, in order to achieve the common good, regulate, limit, or even eliminate private interests where necessary in the common good and in the best interest of the society. Thus, government power to restrict private rights, especially in public health emergencies which is channeled to diminish the risk of injury and ill-health to others is permissible. Further, the state may apply its discretion to determine what is considered injurious or unhealthful and the manner, in which to regulate, consistent with constitutional protections of personal interests.⁴⁵ This dependence and the power to act through law and legal institutions give rise to a fiduciary relationship. The legislature, executive and the judiciary constitute part of the legal order construct intended to protect rights of persons' subject to their authority. The content of this obligation is the rule of law, which, according to Bentham and Mill's utilitarianism, law is the tool through which progressive social and economic policies were to bring the greatest benefit for the greatest number.

Conceptualising state exercise of power in public health emergencies through the lens of fiduciary relationship creates a legitimate exercise of power. As a fiduciary, the state can exercise power over the citizen even where there is no direct consent from the beneficiaries.⁴⁶ This is a deviation from Kantian and Hobbes position on sovereignty where consent is derived from elections. In terms of the arrangement of the trust, the fiduciary is the focal point for service delivery *for the benefit of the beneficiary*'. It is trite that a trustee must act in good faith in the best interest of the beneficiary in accordance with the trust instrument. The *act of good faith in the best interest of the beneficiary has been described as "a straightforward application of ordinary principles of equity concerning fiduciary duties."*⁴⁷ The potential of this duty was demonstrated in the case of *Software*

⁴⁵ Lawrence Gostin. 2001. Public health theory and practice in the constitutional design. Case Western Reserve University. Volume 11: Issue 2

⁴⁶ Evan Fox-Decent. 2008. Is the Rule of Law Really Indifferent to Human Rights? *Law and Philosophy*. 27:6:533-581

⁴⁷ *Shepherds Investments Ltd. and another v. Walters and others*. [2007] 2 BCLC 202

*v Fassih*⁴⁸ where Lady Justice Arden stated that “the fundamental duty to which a director is subject”⁴⁹ is the duty to act in good faith to promote the interests of the company. However, conceptualizing state as fiduciary does not guarantee that state’s exercise of power is acceptable at all times, suffice that, the power is *fair* and reasonable at all times, which is a standard criticism of Hobbes democratic power in *The Leviathan*.⁵⁰ A similar argument can be made for the justification of state power under human rights law. Human rights are norm arising from a state-subject relationship where it is the primary responsibility of the state to protect human rights. What this means is that, the assumption of the responsibility to protect is a natural consequence of sovereignty. Flowing from this, states have the duty to respect, fulfil and protect human rights of persons in their jurisdiction. The traditional conception of human rights is that they are legal entitlements grounded which inhere to every person by virtue of their humanity as espoused, for example, that “*all human beings are born free and equal in dignity and rights*”⁵¹ These rights have been expressed in various international instruments such as the International Covenant on Civil and Political Rights (ICCPR)⁵² and the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁵³ These instruments apply universally without discrimination as to gender, race or tribe. Within the fiduciary conception, simply put, human rights constitute sovereign’s normative dimension. A state has a fiduciary duty to respect, fulfil and protect the human rights of its subject. These have been summarized as follows: the rights of integrity, i.e the rights must be in the interest of the subjects rather than in the [economic or other] interests of the state or its institutions⁵⁴; states must treat its subjects as co-beneficiaries and lastly, these rights must care and respect the interests of the subjects. It follows that, a state in discharging their fiduciary duty, must seek to protect the health of their subjects through measures to protect them during public health emergencies. Public health powers of states are traceable under international human rights and constitutional law. The common denominator of these instruments and exercise

⁴⁸ [2005] 2 BCLC 91

⁴⁹ *Ibid.*

⁵⁰ Hobbes, T., & Gaskin, J.C.A., 1998. *Leviathan*. Oxford: Oxford University Press. Chicago

⁵¹ Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948) Article 1

⁵² International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Exec. Doc. E,95–2 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR]

⁵³ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S.23 ICESCR].

⁵⁴ Himmy Liu. 2014. *A Fiduciary Perspective on the State's Duty to Protect the Environment*. Auckland University Law Review .

of state power during public health emergencies is that, the best interest of the citizen is the ultimate focus.

Justice Ginsburg wrote separately from the majority opinion in *NFIB v. Sebelius*⁵⁵, emphasizing the government's role in protecting its people as the chief underlying nature of health-based reform. She urged that promoting the health and welfare [of American citizens], rather than what the majority deemed "federal coercion" of mandatory health care, is a power more than appropriately exercised by the legislature. Working in the interest of the health and welfare of the people, Ginsburg urges, includes regulating the economy in the interest of those who labor to sustain it⁵⁶. She states that the Court has long recognized Congress' expansive authority to set the nation's course in the social welfare realm. Congress' power to regulate economic activities extends even to local activities that, viewed in the aggregate, have a significant impact on interstate commerce⁵⁷

Constitutionally, in Nigeria, the power of State to protect the interest of all its citizens, without discrimination, during public health emergencies is grounded under section 45 of the 1999 Constitution which allows for derogation of constitutionally protected rights in times of emergencies in the interest of defense, public safety, public order, public morality or public health.⁵⁸The basis of this power is found in the American case of *Jacobson v. Massachusetts*⁵⁹ wherein the Supreme Court upheld the community oriented focus of public health. Thus, quarantine laws, mandatory immunization and lock down is justified in the interest of public health. State power to act in the interest of the citizen also resides in the President's power to declare a state of emergency where there is an occurrence of imminent danger.⁶⁰ It is arguable, that a restraint to curtail an imminent danger is in the best interest of citizens. Like other fiduciaries in private and public law, states that engage in public health emergencies are conferred with discretionary power over the legal and practical interests of their designated beneficiaries (foreign

⁵⁵ *NFIB v. Sebelius* 567 U.S. 519 (2012)

⁵⁶ *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2609 (2012).

⁵⁷ *NFIB v. Sebelius* supra at 2581–82.

⁵⁸ Section 45 (1) (a)

⁵⁹ *Jacobson v. Massachusetts* 197 U.S. 11 (1905) In *Jacobson's* case, he asserted that 'a compulsory vaccination law is unreasonable, arbitrary and oppressive, and therefore, hostile to the inherent right of every freeman to care for his own body and health in such a way as to him seems best' The argument is based on the natural rights of persons to bodily integrity and decisional privacy.

⁶⁰ Section 305 (3) (e and f) 1999 Constitution

nationals), and they bear a concomitant fiduciary obligation to exercise this power exclusively for their beneficiaries' benefit. The state's primary duty for the health of its citizen is a legitimate expectation of the fiduciary position of the state. Flowing from section 1 and 17 of the 1999 Constitution, the government has primary responsibility to act in the best interest of the public's health and the beneficiary has a legitimate expectation of benefiting from public health services. However, what best serves the population, may not always be in the interests of all its members. In other words, what constitute the 'best interest'?

Under international health regulations, states have the capacity to fulfil their core obligations of detecting, assessing and reporting events which threaten state interest; states have the power to respond promptly through any measure, to public health risks of international concerns.⁶¹ In the case of the current monkey pox breakout, just like past cases of SARS, Ebola and COVID-19, would include the containment of activities, isolation of ill and contaminated persons or affected personal effects so as to contain the spread of identified infection during such period of emergencies.

Conclusion

The fiduciary duty is a complex web of legal obligations arising from an equitable obligation of trust and confidence owed by one party in a fiduciary relationship to another.⁶² As fiduciary, state may exercise all laws and regulations directly or indirectly towards population health through vaccination, isolation and quarantine, outright bans, inspection and abatement of unsanitary conditions. Beyond this however, it has a deeper purpose than the common obligations to fulfil bargains or meet minimum standard of behavior. Harding theorised that this obligation is based on "fidelity"⁶³ that it is in fidelity to the commitment to a set of norms made by entering into a particular relationship that the fiduciary obligation arises on an individual.

⁶¹ IHR2005.Article 5, Annex 1A, on Core Capacities requirements for surveillance and response.

⁶² *Bristol and West Building v. Mothew* (supra)

⁶³ Harding M; "Disgorgement of Profit and Fiduciary Loyalty" in Degeling, S and Varuhas, J ed; *Equitable Compensation and Disgorgement of Profit* (2017, Oxford: Hart)

Cavendish University Law Journal Vol. 1 August 2022

The requirement is that in outward appearance the fiduciary should be devoted to the interests of the beneficiary. In public health law, the conduct that is circumscribed of state as fiduciary, is that the state must serve population health interest above individual health in all cases.