Nigeria's Emergency (Legal) Response to COVID-19: A Worthy Sacrifice for Public Health?

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On 27 February 2020, Nigeria's Federal Ministry of Health (FMoH) reported the first confirmed case in Lagos State of Coronavirus disease 2019 (COVID-19) . This was a case of an Italian who works in Nigeria and who had recently returned from Milan. It was also the first reported case in Africa. Before the confirmation, the Nigerian government, through the FMoH, had started to put in place measures aimed at controlling and containing the outbreak. These measures were to be coordinated by the Nigeria Centre for Disease Control (NCDC) which is the government agency responsible for leading "the prevention, detection, investigation, monitoring and control of communicable diseases." Other measures which were put in place to immediately contain the spread of the virus included the closure of Nigeria borders. However, in spite of these measures, the virus continued to spread steadily in the country with a total 5,621confirmed cases and 176 deaths as of 17 May 2020.

Like many other countries across the world, Nigeria has called upon emergency powers to deal with COVID-19 without, however, having declared a state of emergency. The use of emergency powers in Nigeria in the fight against COVID-19 is not only peculiar but problematic for a number of reasons.

Constitutional and Legal Framework for State of Emergencies

Nigeria belongs to the category of nations with a constitutional framework for emergency powers based on the models posited by Ferojohn and Pasquino in their seminal work. According to section 305 of the Nigerian Constitution, the President can proclaim a state of emergency by an instrument published in the Official Gazette of the Government under any of the following circumstances: the federation is at war, or there is an imminent danger of invasion or involvement in a state of war; there is a breakdown of public order or public safety in part or the whole of the country; there is a situation of imminent danger, public danger or disaster or natural calamity. Finally, a state of emergency can be declared where the President receives a request from a state governor which is sanctioned by a majority in the House of Assembly. The constitution provides a closed list which means it does not admit of circumstances that are not listed.

Because of the high possibility of abuse, emergency powers are usually subject to some constitutional checks. With regard to Nigeria, the Constitution provides an *ex post* control on emergency powers in that the legislature must approve any declaration by the President. In this case, both legislative houses (the Senate and House of Representatives) must, immediately after a declaration, consider the situation and decide whether or not to ratify (section 305(2)). If the legislative houses fail to pass a resolution approving the declaration, then such a declaration shall immediately cease to have effect (section 305(6)). Thus, the Nigerian Constitution only provides for legislative oversight of the process of state of emergency. It may appear that the judiciary plays no role in this process. However, the Constitution permits measures (in times of emergency) which derogate from certain rights only "to the extent that those measures are reasonably justifiable for the purpose of dealing with the situation that exists during that period of emergency"(section 45(2)). It is submitted that it is the judiciary to make such determination and by that, the judiciary also plays a role in limiting emergency powers. In addition, other limitations especially regarding human rights restrictions in times of emergency can be gleaned from Article 4 of ICCPR. Apart from the Constitutional

provision, the Emergency Powers Act 1961 elaborates on the procedure for declaring a state of emergency. In 2016, there was a bill before the legislature to repeal the Emergency Powers Act, 1961 Repeal Bill 2016. The exact status of this Bill is however still unclear since there is no evidence that it has been passed by the legislature.

Emergency powers have been deployed a couple of times in the past in Nigeria especially for the purpose of restoring order in internal conflicts. In recent times, states of emergency have been declared in only parts of the country and not the whole. The most recent use of emergency power was in 2013 when former President Goodluck Jonathan declared a state of emergency in the whole of the North-eastern Nigeria as a result of the onslaught by the *Boko Haram* terrorist group. Calls to declare a state of emergency during the Ebola pandemic, which ravaged many West African countries and is arguably an "imminent danger" or "public danger" as anticipated by the constitution, were rejected. It is therefore no surprise that the President equally did not invoke his emergency powers under section 305 of the Constitution for the purpose of curbing the COVID-19 pandemic. In both the Ebola and COVID-19 circumstances, it is arguable that they do not constitute a danger of "sufficient magnitude" to warrant a declaration of a state of emergency. Although a state of emergency was not declared, other emergency powers were deployed for the COVID-19 pandemic.

Emergency Legal Response to COVID-19 and Human Rights

President Muhammadu Buhari called upon his emergency powers under the extant Infectious Diseases Law – the Quarantine Act 1926. The Act gives the President sweeping powers towards "preventing the introduction into and spread in Nigeria, and the transmission from Nigeria, of dangerous infectious diseases" and to make regulations for associated purposes. The President in pursuance of the Act issued the first Regulation (COVID-19 Regulations 2020) which declared COVID-19 a "dangerous infectious disease" and made lockdown orders in the Lagos, Abuja and Ogun states. The constitutionality of the act of the President has generated legal controversy: questions have been raised regarding the difference between the emergency powers under the Quarantine Act and those provided in section 305 of the Constitution. It is apposite to state that both powers are different. A state of emergency is a unique process as established by the Constitution and this is different from the use of emergency powers as is the case with the making of the Regulations pursuant to the Quarantine Act. In the former, there is the need for legislative approval while the latter is a purely executive function.

The Regulation issued by the President in pursuance of the Quarantine Act effectively suspended a number of rights. For example, it stipulates that inter and intra state movements in the concerned areas were prohibited for an initial period of 14 days and security agencies were instructed to strictly enforce the lockdown order. Citizens of the affected regions were to stay at home so as to "identify, trace and isolate" infected persons. Certain groups of persons were exempted including people on essential duties such as medical workers and journalists. While the seaports were to remain operational, the airports were to be shut. Finally, the Regulation recognized the pains and sufferings of the people in satellite and commuter towns and therefore made provision for relief materials. After the 14 days tenure of the first Regulation, another Regulation was made further extending the order for another 14 days. All the states with confirmed cases also made various lockdown orders similar to that of the federal government.

From the foregoing, several issues arise for human rights and rule of law. This makes one question whether all the sacrifices are indeed worthy for public health. A large section of the Nigerian population still believe that COVID-19 is not real. Besides, the restrictions no doubt inflict untold hardship on the common Nigerian and that may probably be a reason why they are gradually being lifted in spite of the upsurge in confirmed cases. From a human rights perspective, several issues are noteworthy. First, the Regulations have impacted upon the right to life in that security agents enforcing the orders have used this as an

opportunity to unjustifiably kill people. It was reported by the National Human Rights Commission that law enforcement have killed more than 18 people since the commencement of the lockdown in 8 separate incidents of extrajudicial killings. Second, the right to human dignity has also been affected by the series of unjustified punishments inflicted on people who violate lockdown orders by security forces. The are several accounts of people subjected to torture, degrading and inhuman treatments in the enforcement of lockdown orders by security forces. Besides, the lockdown has led to a sharp increase in cases of domestic violence across the country. Third, access to justice is also impacted as the courts were indefinitely closed. This is indeed a huge challenge considering the already longstanding problem of overloaded courts and delays in determination of cases. While measures are being put in place to resume court sittings virtually, it is unlikely that significant progress can be made in view of the gross shortage of infrastructure. Fourth, the COVID-19 Regulations significantly affect freedom of religion since they restrict gathering for religious purposes. This is very critical in that most religious faiths in Nigeria worship by gathering. The violation of human rights especially by security agencies has led to renewed calls by Amnesty International for the government agencies to "adopt a right respecting approach and give clear instructions to security agencies not to abuse their powers".

Perhaps the most impacted human right is the right to movement which obstructs people's sustenance. As rightly noted, most people in the affected regions where lockdown orders are in force "live on daily income with no savings to act as a financial buffer during the lockdown". Staying at home will no doubt cause significant hardship and hunger. Although the President promised support such as the distribution of foodstuffs and other items, such cannot be effective considering Nigeria's size and its population. Indeed, as was reported, only a small fraction of the targeted beneficiaries confirmed receiving any palliatives. Besides, the distribution of these relief materials has been enmeshed in controversy. Questions have arisen regarding the integrity of the process as a whole and the selection of beneficiaries specifically. Identification of beneficiaries for relief also raises its own unique human rights issues since it involves data mining. The Minister of Communications was reported to have said that "the poorest of the poor in the country were identified and offered supports through the SIM registration data mined by the ministry". This is a gross violation of the right to privacy and data protection in a country without a data protection legislation in place. Indeed, while the Nigerian Constitution provides for the right to privacy in section 37, the right to data protection can only be implicitly read into the said section.

COVID-19, Control of Infectious Diseases Bill 2020 and the Rule of Law

The Quarantine Act 1926 which gives the President the powers to make the Regulations is said to be archaic and is subject to a lot of criticism. The Nigerian legislature therefore used the COVID-19 situation as an opportunity to repeal and replace the Act with the Control of Infectious Diseases Bill 2020 (the Bill). This Bill is marred with lots of controversies bothering on the rule of law and constitutionalism.

First, a close examination of the Bill reveals that it grants overwhelming powers to an "unelected executive". In this regard, several sections make the Director General (DG) of the NCDC and the Minister of Health very powerful. For example, the common terminologies contained in provisions granting powers to executive officials are "in his discretion" "where he thinks fit" or "suspects" etc. Furthermore, section 15 of the Bill provides that in order to prevent the spread of an infectious disease, the Minster of Health can declare any premises as an "isolation area". This effectively gives the minister unquestionable powers to expropriate private property and use it as an isolation area without any provision for compensation. The section is more problematic in that it grants the DG of NCDC absolute powers in relation to such isolation area such as restriction of movement of persons and good (section 15(3) (a-f)).

Second, in several sections of the Bill, enforcing officers are given powers to carry out a lot of acts

"without warrant" and sometimes "with such force as may be necessary" to arrest, restrain, search and detain any person in the process of enforcing the Act. For example, section 58 grants a police officer the power to arrest anyone without a warrant in so far as "he has reason to believe" that such a person has committed an offence under certain sections of the Bill.

Third, human rights are severely restricted under the Bill. For example, section 20 restricts the right to freedom of assembly and association by limiting meeting, and other public and social gatherings. It further provides that the law enforcement officer "may take any action that is necessary" to prevent such association. This of course, is especially where it appears to the DG that such association is likely to increase the spread of any infectious disease. The decision lies solely at the discretion of the DG. The Bill also threatens the right to privacy and data protection in that it permits mass surveillance and contact-tracing (sections 14 and 19).

Four, the Bill seemingly provides that the DG and other law enforcers are unaccountable in the exercise of powers under the Bill (section 72). The only check which is available in the provision is that such powers must be exercised "in good faith" and "with reasonable care". Both terminologies are indeed very vague. Another example of a provision which makes the Minister and DG unaccountable is section 20(4) which provides that the decision of the DG prohibiting public/social gatherings can only be appealed to the Minister "whose decision shall be final".

Apart from the substantive part of the Bill, the process leading to the Bill raises lots of constitutional questions. It was introduced in the legislative house and was hurriedly passed through the process of first and second readings. Besides, legislators confirmed that they never got copies of the Bill before the sittings. While some of the foregoing provisions may seem necessary to curtail a pandemic, it must be restated that human rights and the rule of law must not be whimsically sacrificed – especially when emergency powers are exercised without the declaration of a state of emergency. While powers deployed in a state of emergency are subject to checks and controls, this is not always the case for powers derived under legislation such as the Infectious Diseases Bill. The executive (or in the case of the Bill, the "unelected executive") wields absolute powers which has the potential of corrupting absolutely. It is apposite to state that the government must effectively balance its emergency legal response(s) and the need to protect public health *vis-à-vis* other societal demands such as the need for access to food of the common Nigerian.

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