

PUBLIC HEALTH REGULATIONS ON COVID-19: WHO HAS THE FINAL SAY IN NIGERIA?

The world was recently awakened to the emergence of a new infectious viral disease, described as Coronavirus disease or COVID-19 which is caused by Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV-2) and was first discovered in Wuhan, China. COVID-19 has brought the world to its knees with increasing daily fatalities. It has crippled economic activities and exposed the unpreparedness of national health institutions worldwide to manage a pandemic of this magnitude. Yet, there is no vaccine for COVID-19, though there are several ongoing clinical trials evaluating potential treatments.

COVID-19 has been exported to continents across the globe through human/social interactions. To forestall the imminent threat of the disease to human existence, social distancing, personal hygiene and total lockdown of cities, states and countries *inter alia* have been adopted as potent means of flattening the curve of the rampaging contagion.

Therefore, it is not surprising that when an Italian tested positive for the virus in Lagos, Nigeria on 27th February 2020, the country was thrown into panic mode. Existing measures were upscaled and new measures introduced to curtail the spread of the virus in Nigeria.

To further secure human lives in the federating units of Nigeria, some of the executive Governors took drastic steps by announcing on radio/television broadcasts, various restrictions on movement of persons and public gatherings within their respective States. In essence, the fundamental rights of citizens to freedom of movement, peaceful assembly and association guaranteed by sections 41(1) and 40 of the **Constitution of the Federal Republic of Nigeria, 1999** (“CFRN”) respectively were either suspended or circumscribed.

Some public commentators have argued that the response of the Governors is justified by the “doctrine of necessity” whereas, others argued that the “doctrine of necessity” can only be invoked by the Executive in the absence of legislation or when it is impracticable due to a deadlock or other impediment in operations of the National Assembly,

House of Assembly or the executive of the Federation or a State. The backlash resulting from the procedure adopted by some of the Governors is attributable to the thinking that mere radio/television broadcasts in the absence of a clearly defined legal framework or reliance on extant statute(s) empowering the Governors to so act, violates the fundamental rights of citizens to freedom of movement and peaceful assembly/association. Therefore, the directives of the Governors as announced during the broadcasts were considered advisory and of no legal effect. This perception is supported by the decision of the Court of Appeal in **Okafor v. Lagos State Government** [2017] 4 NWLR (Part 1556) page 404 at pages 442 – 443, paras. H-B and F, wherein their Lordships held that the directives of the Governor of a State do not amount to a written penal law under which any citizen could be arrested, tried, convicted and punished.

Following the criticism, it was not surprising that the public space was inundated with signed copies of Executive Orders issued by some of the said Governors, including the Governors of Lagos, Kaduna and Rivers States, pursuant to section 8 of the **Quarantine Act, Cap. Q2, Laws of the Federation of Nigeria (“LFN”) 2004** (“the Act”), giving effect to their various broadcasts in response to COVID-19. Subsequently, during a national broadcast on 29th March 2020, the President of the Federal Republic of Nigeria *inter alia*, directed cessation of movement and public gatherings in the Federal Capital Territory (“FCT”) and two states of the Federation, *to wit*: Lagos and Ogun States, for an initial period of 14 days. After the broadcast, the President issued a Declaration that COVID-19 is an infectious disease and made Regulations on 30th March 2020 pursuant to sections 2 and 4 of the Act in the terms of his broadcast.

The relevant statutes relied upon in the Executive Orders include s. 45 (1) of the CFRN and the following sections of the Act: -

Sections 2, 3, 4 and 8 of the Act provide:

Section 2 - “**Interpretation**”

In this Act, unless the context otherwise requires-
 “dangerous infectious disease” means cholera, plague, yellow fever, smallpox and typhus, and includes any disease of an infectious or contagious nature which the President may, by notice, declare to be a dangerous infectious disease within the meaning of the Act.

“local area” means a well-defined area, such as a local government area, a department, a canton, an island, a commune, a town, a quarter of a town, a village, a port, an agglomeration, whatever may be the extent and population of such areas.

Section 3 - “**Power to declare any place an infected local area**”

The President may, by notice, declare any place whether within or without Nigeria to be an infected local area, and thereupon such place shall be an infected local area within the meaning of this Act.

Section 4 - “**Regulations**”

The President may make regulations for all or any of the following purposes-

.....

- (c) preventing the spread of any dangerous infectious disease from any place within Nigeria, whether an infected local area or not, to any other place within Nigeria,

.....

Section 8 - “**State quarantine and powers**”

If and to the extent that any declaration under section 2 or 3 of this Act has not been made, and to the extent that regulations under section 4 of this Act have not been made by the President, power to make such declaration and to make such regulation may be exercised in respect of a State, by the Governor thereof as fully as such power may be exercised by the President, and subject to the same conditions and limitations.”

The Governors that issued Regulations also relied on Public Health Laws applicable in their various States.

From the foregoing, there is no doubt that the Act provides ample legal basis for the response of the Federal and State governments to COVID-19. In the executive Orders, both the President and the aforesaid Governors declared COVID-19 a dangerous infectious disease and then proceeded to make Regulations restricting movement of persons and public gatherings, in the FCT, Abuja and in the affected States. The aforesaid Regulations were therefore made in substantial compliance with the Act. This is so because an authority exercising power under the Act may either make a declaration of a dangerous infectious disease or an infected local area or both. Either declaration or both under section 2 and/or 3 of the Act, would fulfil the condition precedent to the making of quarantine regulations pursuant to sections 4 or 8 of the Act.

Therefore, regulations may be made pursuant to section 4 of the Act for the purpose of preventing the spread of any dangerous infectious disease from any place within Nigeria to any other place in Nigeria whether or not the former has been declared an infected local area (s. 4 (c) of the Act). Therefore, the declaration of COVID 19 as a dangerous infectious disease by the President and Governors and the making of regulations to prevent its spread from one place in Nigeria to another constitutes substantial compliance with the provisions of the Act.

Due to the delay by the President in exercising the powers conferred upon him by sections 2, 3 and 4 of the Act and having regard to the exigency of responding promptly to the public health risks presented by COVID-19, some Governors exercised the power(s) conferred on them by section 8 of the Act to make declarations and regulations with regard to the disease. This has resulted in conflicting regulations made by the President and the said Governors regarding the timeframe for movement of citizens within the affected areas and the number of persons that may assemble in public spaces. For example, in Lagos State, the Governor limited the number of people that may assemble in public spaces at any time to 50 and later 20 persons whereas, subsequent Regulations by the President directed the cessation of all movement of persons in the affected States, including Lagos State, for an initial period of 14 days.

Generally, by virtue of section 4 (5) of the CFRN “If any Law enacted by the House of Assembly of a State is inconsistent with any law validly made by the National Assembly, the law made by the National Assembly shall

prevail, and that other Law shall to the extent of the inconsistency be void.” See the cases of **Military Governor of Ondo State v. Adewunmi** [1988] 3 NWLR (Part 82) page 280 and **Olu of Warri v. Kperegbevi** [1994] 4 NWLR [Part 339] page 416, where the Supreme Court of Nigeria applied the principle in section 4 (5) of the CFRN. However, the said principle only applies where conflict arises between an Act of the National Assembly and a Law promulgated by a State House of Assembly. In cases where some Governors relied on the Public Health Laws applicable in their states, any regulation made pursuant to State Laws that is not sustainable under section 8 of the Act would be void to the extent of its inconsistency with the Regulations made by the President pursuant to the Act.

However, if Regulations are made by both the President and the Governor of a State pursuant to the same Federal statute (in this case, the Quarantine Act), the foregoing principle enshrined in section 4 (5) of the CFRN would be inapplicable. This is so because regulations made by a Governor in the foregoing circumstances, would not have been made pursuant to a State Law. Such regulations would have been made pursuant to the same Act of the National Assembly by which the President made his Regulations. As earlier noted, section 4 (5) of the CFRN would be inapplicable in such circumstances.

The Quarantine Act provides in section 8 that if the President has not made any declaration or regulations, a Governor may fully exercise the powers conferred on the President in respect of the State in question. Once the Governor exercises powers conferred upon him by sections 2, 3, 4 and 8 of the Act in the absence of a similar exercise of such powers by the President in respect of the affected State, the Declaration and Regulations made by the Governor acquires force of law and is therefore irreversible by the President, except by Court Order. Thus, where the President, nonetheless, proceeds to make regulations on similar matters in respect of the same State after a Governor has acted pursuant to section 8 of the Act, the regulations made by the Governor in the first instance will prevail in the event of conflict.

For example, on 18th March 2020, prior to the regulations made by the President, the Governor of Lagos State had prohibited public gatherings of more than 50 persons, which was subsequently reduced to 20 persons, before issuing regulations pursuant to the Act on 27th March 2020, wherein its previous actions, including prohibition of certain number of public gatherings, were ratified. In the said regulations,

sections 7 and 8 empower the Governor to restrict or prohibit the gathering of persons in the local area. Thereafter, the President made regulations on 30th March 2020 directing cessation of movement in the State for an initial period of 14 days. The imposition by the President of a total cessation of movement in Lagos is directly in conflict with the earlier directive of the Governor of Lagos State on the prohibition of persons gathering in public spaces. This is because the imposition of a total cessation of movement by the President negates public gatherings of any number of persons, as earlier contemplated by the Governor. In the circumstance, since the directive of the Governor restricting the number of persons in any public gathering and the subsequent regulations made pursuant to the Act ratifying the said directive preceded the regulations made by the President pursuant to the Act imposing a total cessation of movement, the former would prevail over the latter. Thus, the regulations made by the Governor of Lagos State limiting the number of persons who may congregate in public spaces would take precedence over the regulations of the President imposing a total cessation of movement of persons for an initial period of 14 days in Lagos State.

Although the paramount consideration in the dire circumstances is the protection of the lives of citizens of this country, a purpose well served by the regulations made by both the President and the Governors, conflict between regulations made by the President and the Governors in respect of the various States has the potential of creating confusion in the minds of the citizens and predisposing them to inadvertent violations of the conflicting regulations.

Also, it must be emphasized that the procedure under the Act differs from the powers of the President to proclaim a state of emergency in the Federation pursuant to section 305 of the CFRN. By virtue of section 305 (2) of the CFRN, the President is mandated to transmit copies of the Official Gazette of the Government of the Federation containing the proclamation, immediately after publication, to the National Assembly for approval. The circumstances under which a Proclamation may be made are highlighted under section 305 (3) (a) – (g) of the CFRN.

In the instant case, the President did not proclaim a state of emergency pursuant to section 305 of CFRN in any part of the Federation, rather, powers of government to restrict movement and assembly of citizens in public spaces were

exercised in response to COVID-19 pursuant to the provisions of the Act.

In light of the foregoing, it is commendable that the steps taken by both the Federal and State Governments so far, have been in the interest of public health and safety, and have been directed at ensuring the welfare of the people of Nigeria, as required of the “State” by Section 14(2) (b) of the CFRN. The cases of conflict between regulations made by the President and those made by the Governors under the Act are unfortunate and ought to be avoided by the authorities. The various governments should work harmoniously by sharing their plans, strategies, response initiatives and proposed restrictions with each other and synchronising them with a view to achieving the common goal of securing the public health and safety of all citizens of this country against COVID-19.

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