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TOPIC 14 - CONFLICT IN FEDERAL SYSTEMS IN PARADIPLOMATIC AND INTERNATIONAL RELATIONS

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**IMPLEMENTATION OF TREATIES IN NIGERIA: CONSTITUTIONAL PROVISIONS,
FEDERALISM IMPERATIVE AND THE SUBSIDIARITY PRINCIPLE**

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Implementation of Treaties in Nigeria: Constitutional Provisions, Federalism Imperative and the Subsidiarity Principle

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Abstract

Since 1954, Nigeria has been classified as a federation even as the country continues to grapple with many challenges in its operation of the federal system. The major highlight of the country's claim to federation is the distribution of vertical powers between the federal government and the states. Under the country's extant constitution of 1999, the federal government of Nigeria is assigned exclusive powers in 68 items; and concurrent powers in 30 items which it shares with the states. On their part, the states exercise residual powers in items which are neither listed as exclusive to the federal government nor concurrent to them and the federal government. Exceptionally, in section 12 (2) and (3) of the constitution, the federal parliament is conferred powers to initiate and pass legislations in respect of any matter even when not listed as exclusive to the federal government. Invariably, these are powers which are otherwise residual and therefore limited to the states. However, the states are empowered to participate in the process through ratification of legislations initiated pursuant to the section. Despite the involvement of the states in this legislative process, it is apparent that the principle of subsidiarity in the federal system could suffer unduly where the federal government in the guise of implementing treaty obligations directly takes on otherwise states' affairs when, on account of the principle, a better course would be to empower the states to carry out such treaty obligation through federal legislation. In this paper, we examine the federalism and subsidiarity dimension of section 12 (2) and (3) Of the 1999 Constitution of Nigeria and argue that while it is important that Nigeria pass national legislation to implement the country's treaty obligations, it is equally imperative that the federal parliament takes due cognizance of the federalism and subsidiarity implications of such legislations by making appropriate provisions to preserve those imperatives in the quest to implement treaties to which the country is signatory.

Keywords: constitution, federalism, implementation, subsidiarity, treaties.

1. Introduction

Nigeria became a federation in 1954 by the act of British colonial government. In that year, the British promulgated a new constitution which recognized the complex heterogeneous nature of the country by dispersing power in a vertical manner. The British succumbed to the agitation of the indigenous political elites of the time, particularly of the southern part of the country, who after World War II had

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mounted an intense campaign for self rule founded on a federal structure (Elaigwu 2007). Their ultimate goal was to secure independence for the country from British colonial rule within the shortest time possible (Awolowo 1966). Prior to the promulgation of the new constitution, the colonial government had made a token gesture of introducing quasi-federation in the colonial constitution of 1951, but this further accentuated the agitation for federation (Crowther 1962). The colonial constitution of 1954 which eventually designed the country as a federation was the forerunner to the country's federal constitutions of 1960 (the year of independence), 1963, 1979 and the current constitution of 1999.

Each of these constitutions clearly defined the legislative competence of the federal government and the states. The federal government has had conferred on it exclusive legislative powers in respect of certain named items in addition to sharing concurrent legislative powers with the states in respect of certain other named items. Where there is conflict between the federal government legislation and that of the states in the concurrent legislative list, the laws of the federal government prevails.¹ On their part, the states possess sole legislative powers in matters which are not listed exclusively to the federal government or concurrently to both the states and the federal government. The federal government is thus prohibited from exercising legislative authority in respect of such residual matters.

These carefully drawn legislative lines underscore Nigeria's status as a federation, especially given the fact that the powers of the federal government and the states are conferred on them through the instrumentality of the constitution and not at the behest of either of them. Both the federal government and the states therefore share dual sovereignty conferred on them by the constitutional arrangement which recognizes their specific existence as separate governing legal entities under one indivisible country (Nwabueze 1983, Omoregie 2015). As a matter of fact, the current constitution pronounces the people as repository of the sovereign power of the country, which is donated to the federal government

¹ See section 4 (5) of the 1999 Constitution.

and the states to exercise on behalf of the people.² The concomitant of the legislative powers thus distributed is to create a federal system which requires the government of the federation and the states to provide for the security and welfare of the Nigerian people as a primary principle and policy objective.³

One of the exclusive powers conferred on the federal government is the power over “external affairs”.⁴ This legislative power is the municipal normative foundation for treaty making in Nigeria. Nevertheless, the constitution does not clearly state which arm of government has the power to conclude treaty on behalf of the country (Olutoyin 2014). It has been suggested that the President as the “Chief Executive of the Federal Government” has the prerogative to conclude treaties on behalf of the country (Nwabueze 1983, Nwapi 2011). Indeed, this power could be delegated to the President’s subordinates following the constitutional provision in section 5(1) (a) which vests executive powers of the Federation on the President and goes further to stipulate that this power can be exercised “by him either directly or through the Vice President and Ministers of the Government of the Federation or officers in the public service of the Federation”.

The President or his subordinates need not involve members of the legislative branch in the process of treaty making (Egede 2010). The states are not competent to participate in the process of making a treaty even in areas within their legislative competence. This is the net effect of item 26 of the Second Schedule, Part I which confers the legislative power over external affairs exclusively on the federal government. It has been suggested that the policy justification for exclusion of states from treaty making is to avoid conflicts and discordance in the country’s foreign policy (Oyebode 2003). This view echoes the popular opinion that one of the purpose of forming a federation, as opposed to

² See section 14 (2) (a) of the constitution.

³ Ibid.

⁴ This is contained in item 26 of the Second Schedule, Part I made pursuant to section 4 of the 1999 Constitution.

confederation, would be defeated were the states permitted to conclude treaties even in respect of their constitutional legislative competence (Wheare 1963).

Notwithstanding, the states of Nigeria are required to be involved in the process of municipal transformation or domestication of a treaty which covers an otherwise residual or concurrent state competence. While section 12 (1) generally confers the power of transforming a treaty into municipal law on the federal parliament, subsection 2 further grants it the power to make law transforming a treaty which covers matters within concurrent legislative list and those residual to state legislative domain into municipal law. The power conferred under subsection 2 is however restricted by subsection 3 of the section which requires the federal parliament to forward any such bill in respect of concurrent legislative list or residual matters of the states to the states' parliament for ratification before presidential assent.

The provision of section 12 (2) and (3) of the constitution seems to be significant attempt to balance the federal construct of the constitution while maintaining the preeminence of the federal government over foreign affairs. Nevertheless, there seems to be a sticking point brought about by the control of foreign or external affairs which involves at least two processes: the making of treaty and the actual execution of obligations undertaken under the treaty (Wheare 1963). Upon transformation of a treaty which covers an area of state legislative competence, especially those residual to states' legislative competence, what role should the states play in the practical implementation of the treaty?

This question provokes an important inquiry in federalism discourse: the issue of which tier should exercise what power, which is the primary concern of the subsidiarity principle. In this paper, I examine efforts at transforming or domesticating treaties in Nigeria and the extent to which the dictates of federalism and subsidiarity have guided the process of treaty implementation in Nigeria. In the next rubric I discuss the theoretical premise of the paper by offering a brief conceptualization of the federal system and the subsidiarity principle. Next, I identify a number of treaties to which Nigeria is signatory

and extrapolate their federalism and subsidiarity dimensions. I review Nigeria's current efforts to implement some of the treaties and the challenges faced. In light of federalism imperative and the subsidiarity principle, I suggest three ways by which to deal with the challenges of treaty implementation in Nigeria: First, I propose fidelity with federalism imperative. Second, I advocate a nuanced practice of infusing subsidiarity principle in assigning the task of implementing treaty obligations. Third, I prescribe a carefully articulated practice of para-diplomacy which enables the states to be involved in treaty making (in conjunction with the federal government) in their area of legislative competence. I conclude by suggesting that these options hold significant prospects for guaranteeing proper implementation of treaty obligations in Nigeria

2. Conceptual Clarification

It is fitting to clarify the theoretical premise of this paper by discussing the basic principles of federalism and the subsidiarity principle.

I. Federalism

Federalism is perhaps the oldest political devise specially suited for linking separate and distinct national communities together for the purpose of achieving common goal which are problematic to achieve alone, but without undermining the identity of the parties to the territorial compact (Karmis and Norman 2005). Federalism creates what has been described as a "compound republic" underscored by a robust system anchored on plural democracy and democratic participation (Galligan and Walsh 1992, Fenna 2006). From the point of view of normative conceptualization, federalism advocates careful attempt to balance "citizen preference for joint action for certain purposes and self-government for other purposes" (Watts, 1998). Although its origin can be traced further back in time, modern conceptualization of federalism is traceable to about two hundred and thirty years ago when in the Philadelphia Convention of 1787 the founding fathers of the United States of America designed a fresh constitutional framework to replace the contentious Articles of Confederation enacted about thirteen

years earlier in 1776 (McLaughlin 1918, 1932 and Green, 2005). The constitutional design which resulted from the effort is arguably the first federal constitution known to mankind (Wheare 1963).

Despite its numerous models and variants (Watts 1998) the basic defining features of the federal system appear to be well settled. First, the federal system creates at least two levels of government, one for the whole country and the other for the federating units, (variously referred to the world over as “states”, “regions”, “cantons”, or “provinces”, etc) (Anderson 2008) both of which exist at the behest of the people who are the ultimate sovereign (Woods 1969). Second, the system is created in a written constitution which is supreme and which defines the powers possessed and exercisable by the two levels of government, among other provisions (Nwabueze 1983, Wheare 1963). Third, those powers are to be clearly distributed in such a way that each level of government is assigned powers to deliver public good in specified areas (Bednar 2005). Fourth, whenever dispute arises over the domain of powers distributed to the levels of government there must be a defined mechanism for resolution independent of each level (Wheare 1963). Except Switzerland and Ethiopia, judicial review is the most common formal means by which such disputes are resolved (Watts 1998, Fiseha 2005 and Omoregie 2013).

Over a century ago, Dicey (1885) identified division (distribution) of powers as the most central purpose of federalism and that this is founded on the idea that whatever concerns the nation as a whole should be placed under the control of the national government and all matters which are not of common interest should be left for the sub-national governments. Currently, over half of humanity lives under one form of federal formation or the other (Watts, 1998, Abebe 2013). Federalism is popular for its elastic capacity to provide solution to the numerous challenges of keeping people of diverse ethnicity, religious affiliation as well as social and racial differences together, although it is also said that “the very features that makes federal structure appealing for heterogeneous society – decentralization and regional semi-independence – also build in new opportunities for transgression”

(Bednar 2006). Despite this skepticism, federalism remains perhaps the most acceptable options for blunting persistent agitations for independence and secessionist campaign in addition to its inherent quality of engendering efficient government free from the dominance of a single central authority (Clinton 1999, Nivola 2007).

II. Subsidiarity Principle

The subsidiarity principle is framed around the idea of assistance or subsidy. It derives from the Latin word '*subsidium*', which refers to auxiliary troops in the Roman military, deployed to assist the frontline troops in the battle field whenever the need arises. In effect, their role is supportive and only required in time of emergency or extreme handicap among the frontline warriors. They are called in aid to assist, not to seize the initiative (Kersbergen and Verbeek 1995, Rompala 2003).

The subsidiarity principle is said to be axiomatic of federalism (Ben-David 2011) or the “soul of federalism” (Bednar 2013). The idea of federalism and subsidiarity are thought to be inextricably tied together even as the debate about their full amplitude persist (Gamper 2005). Conceptually, the subsidiarity principle postulates that in a federal political order, the powers of government should firstly be distributed to and administered by the federating unit because they possess more competence in solving problems which confront government and have the greatest impact on the people, while the federal or national government should only possess and exercise powers in respect of those matters for which the federating units lack capacity to achieve result acting on their own due to their wide scope, complexity and national effect (Bednar 2013, Calabresi and Bickford 2013). Johannes Althusius is acknowledged to have first articulated the principle when he surmised that the principle addresses the tension between stability and plurality (Follesdal 1998), insisting on the non-interference by the central unit of a political order in matters which lie in lower levels.

The principle has come to political prominence through its articulation in the Maastricht Treaty on European Union, 1992.⁵ Article 3b (2) of the Treaty provides that “In areas which do not fall within its competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can, therefore, by reason of the scale or effect of the proposed action, be better achieved by the Community...” The principle constitutes an integral part of the United States’ federal system (Bayer, 2004), the constitutional design of Germany (Raus 2003), Switzerland, Australia and normative federalism in Canada (Hueglin 2013).

Four virtues have been ascribed to the principle (Calabresi and Bickford 2011). First, subsidiarity ensures sub-national variation in preferences enabling the tastes and local conditions of federating units to determine the direction of decision making processes. Second, it deepens competition for tax payers and business in such a way as to provide incentives to federating units to compete with one another for tax payers, business and other financial resources which could potentially improve better delivery of public goods. Third, subsidiarity enhances experimentation to develop the best set of rules and encourage innovation in provision of public goods enabling federating units to serve as development “laboratory” by which they could have the latitude to “try novel social and economic experiments without risk to the rest of the country”.⁶ Fourth, the principle lowers monitoring cost which results from direct involvement of state officers instead of national officers in ensuring proper delivery of public goods.

A further benefit of subsidiarity is that it boosts the adaptive efficiency of the federal system (Bedner 2013). According to Bednar, to remain relevant, federal systems must adapt to meet changing circumstances. The process of adaptation requires extending the scope of federalism in the quest to improve national and sub-national balance. The value of subsidiarity to “federal system robustness”,

⁵ See Article 3b (2) of the Treaty of European Community

⁶ *New State Ice Co. v. Liebmann* 285 U.S. 262, P. 311 (1932) (Justice Brandeis of the United States’ Supreme Court)

Bednar continues, is not only in dispersal of powers but in generating different ideas about practical solutions to problems at different levels of government, with the sub-national level taking the initiative in policy formulation and implementation. It is in this context I now propose to examine the extent to which Nigeria's federal system has fared in implementing the country's treaty obligations within the context of federalism imperative and the subsidiarity principle.

3. Constitutional Framework for Implementation of Treaties in Nigeria

The appropriate point to begin is to set out the constitutional provisions which prescribe the modality for treaty implementation in Nigeria. Nigeria subscribes to the dualist school of thought in application of treaty in the country. By this it is meant that international conventions or treaties are not self enforcing in Nigeria's municipal legal system even as the country is signatory to them. Rather, to be applicable, they are required to be enacted by parliament as part of the municipal laws of the country. Section 12 (1), (2) and (3) of the 1999 Constitution fully sets out the procedure for transforming an international convention or treaty into a municipal law of Nigeria. The section provides as follows:

“12 (1) No treaty between the Federation and other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly

(2) The National Assembly may make laws for the Federation or any part thereof with respect to matters not included in the Exclusive Legislative list for the purpose of implementing a treaty.

(3) A bill for an Act of the National Assembly passed pursuant to the provisions of subsection (2) of this section shall not be enacted unless it is ratified by a majority of all the Houses of Assembly in the Federation.”

This provision has been interpreted judicially in Nigeria by its apex court in *Abacha v. Fawehinmi*⁷. In that case, the Supreme Court held that “an international treaty entered into by the Government of Nigeria does not become binding until enacted into law by the National Assembly”. Continuing, the court opined that “before its enactment into law by the National Assembly, an international treaty has

⁷ (2000) 77 Law Report of Courts in Nigeria 1261 at 1262

no such force of law as to make its provisions justiciable (sic) in our courts”. In the same case, the Supreme Court clarified the status of a treaty in Nigeria which has been enacted as a valid law in the country when it held that notwithstanding its “international flavor”, such a treaty is subordinate to the Nigerian constitution and could be repealed just like any ordinary legislation.

In enacting an Act to implement a treaty ratified by Nigeria, the National Assembly need not involve the states at all where the subject matter of the treaty is in respect of matters within the legislative competence of the federal government contained in the Exclusive Legislative List shown in the Second Schedule, Part I of the 1999 Constitution. Furthermore, where an Act of the National Assembly is passed to transform a treaty which subject matter is in respect of a matter falling within the Concurrent Legislative List contained in the Second Schedule Part II of the 1999 Constitution without the ratification of the states, such a legislation is not applicable in any state except the Federal Capital Territory of Nigeria.⁸

This is the net implication of section 12 (2) and (3) when read together. Since subsection 2 confers power on the National Assembly to make laws “with respect to matters not included in the Exclusive Legislative List for the purpose of implementing a treaty”, it impliedly means that the power extends to making laws with respect to matters in the Concurrent Legislative List and matters which are otherwise residual for the states, not being listed in the exclusive or concurrent lists. As subsection 3 requires the ratification of such law made by the National Assembly pursuant to subsection 2, it means that without such ratification by the Houses of Assembly of the states, the law is inoperable since subsection 3 prohibits its enactment.

⁸ The Federal Capital of Nigeria is the seat of the Federal Government of Nigeria and is governed in accordance with section 297-304 of the 1999 Constitution. The significant portion of these provisions is section 299 which respectively confer the legislative, executive and judicial powers of the territory on the National Assembly, the President and courts established for the territory.

4. Federalism and Subsidiarity Implications of section 12 (2) and (3) provision

The provision of section 12 (2) and (3) invokes a number of federalism and subsidiarity implications which I now propose to address.

Federalism Implication

Nigeria is a signatory to many international conventions and treaties. A sizeable number of these instruments impose obligations on the country on a variety of matters. As already discussed, the procedure for domestication of such international instruments is clearly laid out in the constitutional framework of the country. Issues of federalism may arise where the matter dealt with by the treaty relates to powers assigned to the states, which as a matter of fact do not possess the power to engage in para-diplomacy and therefore play no role whatsoever in the making of treaties applicable in Nigeria. Despite the non-involvement of states in conclusion of treaties, they do have a constitutional stake in ratifying treaties which bear on their constitutionally assigned competence. The relevant federalism question may therefore be framed thus: Are states merely to ratify treaties where they touch on their assigned powers while the actual task of implementing them is solely reserved for the federal government; or do the states have more than a ratifying role to play in furtherance of federalism imperatives?

Unfortunately, the 1999 Constitution does not specially clarify what role the states are to play in the process of municipal implementation of treaty obligations in Nigeria except the ratification role assigned to the states legislature in section 12 (3) of the constitution. Nevertheless, since the constitution recognizes the states as stakeholders in the process of domesticating a treaty in respect of areas within their legislative competence, whatever is enacted ought to involve the states in the actual task of implementing the treaty obligation. However, the prevailing normative outlook suggests otherwise. In transforming treaties into municipal legislations in matters within state legislative domain, the National Assembly seems to have excluded the states and their local preferences. This has

created the invidious situation of seeming disconnect between the objectives expressed in the law and the processes and mechanisms to achieve them.

Good examples of laws which are suffering this fate are the Child Rights Act and numerous environmental legislations passed by the federal parliament without prior ratification of state legislatures as required by the constitution. The Child Rights Act was promulgated in 2003 in an effort by Nigeria to domesticate the Convention on the Rights of the Child, 1989 as one of the signatories to the convention. The process of domesticating the convention took as long as it did because of religious and cultural issues provoked by some of its provisions including the portion which defines a child as a human being below the age of 18 years (Akinwumi 2010). The definition was fiercely criticized as an attempt to impose western cultural values especially as it relates to marriageable age which is as low as 13 years in Nigeria depending on the cultural setting (Kyari and Ayodele 2014). Many of the provisions of the Act are within the residual powers of the states legislature, such as adoption of children, care and supervision of children and other like matters. The result is that the law took effect as a federal legislation which operates only in the Federal Capital Territory and not in the 36 States.

Although Nigeria is hailed as one of the few countries which have ratified many international conventions on the environment, this status has not manifested in effective application of these conventions in the country's municipal policy or its legal system. Consequently, Nigeria continues to grapple with the challenges of translating treaty obligations undertaken under these international instruments into meaningful implementation strategy at municipal level. This is largely the result of disconnect between both the federal government and the states in environmental matters. The primary normative reason for this disconnect is that "environment" as a legislative item is not listed *per se* in the Exclusive or Concurrent Lists of the constitution. It is therefore a legislative item within the legislative competence of the states in their exercise of residual powers. In effect, many treaties directly dealing with environmental matters require state legislative input to become binding municipal

legislations in Nigeria. These include Convention on Biological Diversity 1992, Rio Declaration on Environment and Development 1992, Stockholm Convention on Persistent Organic Pollutant 2001, Johannesburg Declaration on Sustainable Environment 2002, The Kyoto Protocol 2007, Rio + 20 Declaration 2013, Vienna Convention for Protection of the Ozone Layer 1985 and its Protocol of 1987, Desertification Convention, 1997 and African Convention on the Conservation of Nature and Natural Resources, 1968, among many others. However, despite their strategic importance in environmental jurisprudence, these treaties have remained in abeyance in Nigeria, mainly because they have not scaled the huddle of state legislative ratification.

Subsidiarity Implication

Section 12 (2) of the constitution also raises issues of subsidiarity principle. As already noted, the principle guarantees to sub-national governments the prerogative of first legislative initiative with the national government seizing the initiative only when the sub-national government cannot effectively deal with the matter because of its large scope, complexity and effect (Bayer, 2004). The nature of constitutional distribution of vertical powers in Nigeria's federal system has generated intense debate in the last three decades. After the first military coup of January 15 1966, the country witnessed a steep accretion of the powers of the federal government (Omoriegbe 2013). This was eventually enshrined in the 1979 Constitution promulgated by the military junta. The situation has remained the same even under the extant Constitution of 1999.

The scope of federal power under section 12 (2) of the constitution seems not to be well defined. Thus, given the enormous powers already assigned to the federal government in both the exclusive and concurrent lists of the constitution and the tendency of dominance which it has bred over the years, there seems to be no limit to which the federal government can assume responsibility in seeking to implement a treaty obligation which, for reason of the subsidiarity principle, is better implemented by the states. In the past few years, for instance, the federal government has been encouraged even by

judicial pronouncement to solely assume the task of combating the menace of corruption in Nigeria. This it has done by creating two agencies, the Independent Corrupt Practices Commission (ICPC) and the Economic and Financial Crimes Commission (EFCC) for itself with the mandate to stamp out the problem of virtually intractable and wide spread corruption and malfeasance, especially in the public life of the entire country. The states and localities are shut out from any role in the process.

I have argued elsewhere that this approach compromises the anti-corruption crusade because of its obvious subsidiarity deficit (Omoriegie 2013). The problem of corruption is essentially a localized affair, although it has the potential to assume national and even international dimensions. It is at such a stage when the incident of corruption assumes a national dimension that the federal government ought to feel able to get involved nation-wide and not before or at first opportunity, when the states are better positioned to do so. In other words, the states ought to be left to tackle such problem within their legislative competence, at least.

However, with the shutting out of the states and localities from tackling even the most minor and localized infractions bordering on corruption and malfeasance, Nigeria has been unable to record a significant achievement in its crusade against such vices (Omoriegie, 2013). A similar fate awaits the domestication of the African Union Convention on Preventing and Combating Corruption and United Nations Convention Against Corruption in the circumstances of the current propensity of the federal government to appropriate every conceivable power to itself, irrespective of its lack of adequate capacity to achieve meaningful result in the particular task.

A similar scenario has continued to beset the full realization of the laudable objectives of the Rio Declaration on Environment and Development especially its Agenda 21 which directly centers on the promotion of adequate shelter for all and the improvement of human settlement management in less developed countries such as Nigeria. Although the Declaration has not been domesticated in Nigeria, the federal government of Nigeria can initiate the process of domestication by virtue of section 12 (2)

and (3) of the constitution. However, given the federal government's attitude about the extent of its powers in urban and regional development which tends to focus on retaining the power for itself, it is doubtful if the dictates of the principle of subsidiarity will persuade the federal government to pursue a different course by providing support to the states to directly pursue the goals of the Declaration and realize its objectives. In point of comparison, the states are better positioned to carry out the goals following the four virtues set out by Calabresi and Bickford (2011), yet the dilemma of hap-hazard urbanization and inadequate housing development in Nigeria is that the federal government has continued to adopt a top-down approach to dealing with the challenges rather than the more nuanced bottom-up approach by which the states and localities are supported to devise suitable strategies to effectively tackle those challenges (Jiboye 2011).

5. Resolving the Challenges of Treaty Implementation in Nigeria: The Options of Federalism Imperative, Subsidiarity Principle and Para-Diplomacy

Going forward, the challenges of treaty implementation in Nigeria are not beyond resolution given the right focus and a vigorous pursuit of best practices. Three approaches are proposed in this paper. First is the need to focus on the federalism construct of the country or what I have termed 'federalism imperative'. Second is the need to embrace the dictates of the principle of subsidiarity. This gives a proper direction of which tasks are better left for states' initiative and those better reserved for federal intervention. Third and finally is the resort to the relatively novel and emerging option of para-diplomacy. The last option is significant for the opportunity it offers sub-national units to benefit from linkages resulting from direct interface with the rest of the world. I shall now examine these options in more details.

I. Option of Federalism Imperative

The process of treaty implementation in Nigeria has suffered immensely from the apparent denial of the country's federal construct. Although section 12 (2) of the constitution grants the federal

parliament and by implication the entire federal government machinery the power to enter state legislative domain not just in the concurrent list of the constitution for which the federal government is constitutionally guaranteed overriding powers, but also to legislate and by that token exercise power even in otherwise residual legislative competence of the states. Notwithstanding, in order to keep faith with basic motivation for federal formation aptly surmised by Dicey (1885) or what I have referred to as federalism imperative, it is important for the federal government to limit its involvement in implementation of treaty obligations which have obvious federalism implications for which the states are better suited to handle. I have referred to the challenges of urbanization and housing development in Nigeria, as one of such obvious instances.

The tussle between the federal government and Lagos State, one of the states of the federation, about a decade ago in respect of control over urban and housing matter illustrates the attitude of the federal government to the dictates of federalism imperative in Nigeria. While it was clear from the start of the dispute that the states were the proper vertical unit which could exercise power over urban and housing matters as part of its residual powers (the silence of the constitution on the matter) the federal government sought every conceivable means to stake its claim, resorting even to a policy provision in section 20 of the constitution dealing with the environment which, in point of normative consideration, was irrelevant to the dispute being a provision of the constitution outside the constitutional scope of the powers distributed to the government of the federation and the states.⁹

Fittingly, the federal government was defeated in its attempt when the Supreme Court held in favour of Lagos State deciding that indeed urban and housing matters are within the residual competence of the states. Given the bitter nature of the tussle, where a treaty implementation obligation presents itself, the federal government is more likely to appropriate the power of implementation to itself, due to its well-worn attitude to itch for more power. Yet, this attitude which does not accord with federalism

⁹ See *Attorney General of Lagos State v. Attorney General of the Federation* [2003] 12 NWLR (Pt. 833) 1.

imperative only further weakens the country's federalism credentials and ultimately breeds all the negative outcome of a grossly under-performing federal political system.

Therefore, even as section 12 (2) of the constitution grants the federal government the prerogative to make incursion into states' domain for the purpose of domesticating a treaty, federalism imperative would require that the states be factored in for the purpose of implementing the treaty obligations sought to be accomplished by the domestication. This is perhaps why in subsection 3 the constitutional framers inserted a provision which requires the states to ratify any law initiated under subsection 2. The involvement of the states should go beyond merely acting as instrument of ratification. They ought to be assigned roles to play within the domesticated law.

II. The option of Subsidiarity Principle

In addition to federalism imperative, it is necessary for the federal parliament to consider the dictate of subsidiarity principle in seeking to domesticate a treaty in Nigeria. This will help to determine which tier between both governments should be assigned the task of implementing specific treaty obligations. Whichever has comparative advantage in performing the obligation could be assigned the task. The federal government would have compromised the implementation of a treaty if it takes on a task for which it lacks capacity to accomplish.

Since the Nigerian constitution currently does not coherently articulate the principle of subsidiarity and in fact has been faulted for this normative deficit (Omoriegie 2013), the option can influence policy effort at implementing treaty obligations. In other words, the federal government may choose to donate its powers under a domesticated treaty to the states to exercise because the states stand a better chance to implement the treaty obligation. This donation could be not only in the area of otherwise state competence in which section 12 (2) has permitted the federal government to legislate, it could actually be in areas within the exclusive competence of the federal government under the constitution. Nevertheless, the federal government could retain the latitude to intervene where the implementation

process has assumed a more complex nature, has become wider in scope and has far reaching nation-wide effect.

III. The option of Para-Diplomacy

The option of para-diplomacy in treaty making and implementation is still at its formative stage even in the western world, where it has gained recent prominence. Conceptually, para-diplomacy refers to the participation of sub-national entities in a federation, independent of their national government, “in the international arena in pursuit of their own specific international interest” (Wolff 2007). One way by which this is achieved is by inter-regional cooperation and networking (Keating 2000). Overall, according to Keating, three broad set of reasons motivate sub-national entities to engage in para-diplomacy: political, cultural and economic interests. To demonstrate its increasing relevance, as far back as 2000, Keating disclosed that there were at least 200 sub-national embassies “in Brussels lobbying the European Commission, networking with each other and generally getting involved in the emerging European policy communities” (Keating 2000).

On the contrary, the existing socio-economic and political conditions of the vast majority of African countries, including Nigeria, make the involvement of sub-national governments in para-diplomacy a difficult task (Cornago 2000). Nevertheless, it has been suggested that a “new approach to cross-border relations can also improve ethnic conflict management, and contribute to the better administration of common ecological resources, among other concerns for sub-national entities (Cornago 2000). This can only be possible through a process of para-diplomacy.

In the particular case of Nigeria, the option of para-diplomacy may gain currency in the increasing milieu of wide spread dissatisfaction of citizens with delivery of essential public goods such as electricity supply, adequate healthcare facilities, urban and housing development, road infrastructure, transportation and numerous other essential services. For instance, years after the federal government assumed overriding power in respect of electricity supply, the country has continued to suffer seriously

from inadequate supply of electric power, with current generating capacity at less than 4,000 mega watts for a population of over 150 million people. The same level of inadequacy permeates delivery of essential services in other sectors.

Given the level of discontent of citizens and the perceived ineffectiveness of the federal government to deliver many of these services, some states, particularly of the western part of Nigeria have continued to agitate for some form of regional autonomy to enable them cooperate and find lasting solutions to many of these challenges. Indeed, in the last decade, one of such states, Lagos, had resorted to international networking to deal with the problem of electricity supply in the state. Similar international networking initiative to guarantee adequate electricity supply is ongoing in oil-bearing Rivers State.

However, the current constitutional structure of Nigeria does not permit states to engage in international net-working in the nature of para-diplomacy. The only possible leeway for such practice is if it receives the endorsement of the federal government, which has the exclusive powers over external affairs. This could be by permitting the states to engage in such effort alone or in conjunction with the federal government. Invariably, the outcome of such exercise can only be valid, if treaty-based, by the ratification of the federal government. Given the increasing challenges of the federal government with meeting its public goods obligations to citizens, it is expedient to permit the states to engage in some measure of para-diplomatic initiative especially in matters within their legislative competence under the constitution as seems to be the flourishing practice in many part of the western world.

The federal government has been assigned enormous powers in respect of so many matters which it is expected to deliver for the entire country. Over the year, it has become increasingly obvious that the federal government is overwhelmed by the enormity of the tasks, hence its poor scorecard in delivery of public goods in those matters within its legislative competence. This scenario seems to be compounded by the burden to domesticate treaties and implement them in matters not only within its

legislative competence, but also matters within the competence of the states. A healthy practice of para-diplomacy, devoid of sub-national territorial ambition could strengthen sub-national capacity to seek international support for their public good initiatives and lessen the burden of the federal government in implementing treaty obligations.

6. Conclusion

In this paper, we addressed the challenges of treaty implementation in Nigeria from two main perspectives. We examined the problem of disregard for the federal imperative in Nigeria and the lack of subsidiarity consideration in the process of domestication of treaty in Nigeria. We reasoned that this short-coming are the result of two factors: the separate constitutional provisions which grant overwhelming power to the federal government in treaty making on one hand and apparent overriding powers in treaty implementation on the other. Although the federal government has the exclusive constitutional powers over the “external affairs” of Nigeria, including the power to ratify treaties on behalf of the country, it is a different scenario with the power of treaty domestication and implementation, especially in respect of treaties which cover matters within the concurrent and residual powers of the states. In the latter case, the states are empowered to ratify any law initiated by the federal parliament to domesticate a treaty concluded by the country, although it is not clear if they can play any role in implementation of treaty obligation.

Despite the country’s active role in ratifying treaties in the international arena its municipal performance in domesticating and implementation treaty obligations has been relatively grim. This seems to be the inevitable consequences of a lack of fidelity to the country’s federal construct or what I have termed ‘federalism imperative’ and a severe lack of subsidiarity consideration in treaty implementation underscored by the unending appetite of the federal government to retain and even extend its power over every conceivable matters including those it lacks comparative advantage to actualize. With the provision of section 12 (2), the federal government seems to be further emboldened

to take on treaty obligations in areas which are otherwise states' legislative domain. However, if the federal government embraces federalism imperative and focuses on subsidiarity consideration, it could avoid seizing the initiative in implementing treaty obligation in such matters and instead donate such powers to the states while retaining the prerogative to intervene if the complexity, scope and effect of implementation becomes overwhelming for the states.

Finally, I advocated a resort to para-diplomacy by the states at least from the point of view of policy, since the extant constitutional structure of Nigeria does not legally permit such practice. However, para-diplomatic initiative should not be used to pursue territorial ambition but should be employed to strengthen the capacity of the states in meeting the challenges of delivering public goods in their constitutionally assigned areas of legislative competence. By the involvement of the states in para-diplomacy, it is believed that this will considerably free the federal government from its current burden of solely interfacing with the international community even in residual matters which are outside its exclusive and concurrent legislative competence.

References

- Abebe, A.K., 2013. "Umpiring Federalism in Africa: Institutional Mosaic and Innovation. *African Studies Quarterly*, 13: 4, 54-79.
- Akinwumi, O. S., 2009. "Legal Impediments on the Practical Implementation of the Child Right Act 2003". *International Journal of Legal Information*, 37: 3, 1-13.
- Al-Amin, M. A., 2013. "An Assessment of Nigeria's Preparedness to Environmental Disasters from its Commitment to International Environmental Treaties". *European Scientific Journal*, 9: 32, 242-253.
- Anderson, G., 2008. *Federalism: An Introduction* Ontario: Oxford University Press.
- Awolowo, O., 1966. *Thoughts on Nigerian Constitution* Ibadan: Oxford University Press.
- Bayer, J., 2004. "Re-Balancing State and Federal Power: Towards a Political Principle of Subsidiarity in the United States". *American University Law Review*, 53, 1421-1472.
- Bednar, J., 2005. "Federalism as a Public Good". *Constitutional Political Economy*, 16: 2, 189-205.
- Bednar, J., 2006. *The Robust Federation: Principles of Design* New York: Cambridge University Press.
- Bednar, J., 2013. "Subsidiarity and Robustness: Building the Adaptive Efficiency of Federal Systems" available at www.personal.umich.edu/~jbednar/WIP/nomos2.pdf
- Ben-David, R., 2011. "Federalism, Subsidiarity and Economics: In search of a unifying theory". Paper presented at a conference on *Improving Regulatory Performance*, Victoria, Australia.
- Calabresi, S.G. & Bickford, L. D., 2011. "Federalism and Subsidiarity: Perspective from Law". *Northwestern University School of Law Scholarly Commons*, 1-80.

- Clinton, B., 1999. "Federalism Speech" available at www.uni.ca/clinton99html
- Cornago, N., 2000. "Exploring the global dimensions of paradiplomacy: Functional and normative dynamic in the global spreading of subnational involvement in international affairs" available at www.forumfed.org/libdocs/ForRelCU01/924-FRCU0105-int-cornago.pdf
- Crowther, M., 1962. *The Story of Nigeria* London Faber & Faber.
- Dicey, A. V., 1885. "Federal Government". *Law Quarterly Review*, 1, 80-99.
- Egede, E., 2008. "Bakassi: The Green Tree Agreement (GTA) and Section 12 of the Nigerian 1999 Constitution" available at www.orca.cf.ac.uk/46545/
- Elaigwu, J. I., 2007. *The Politics of Federalism in Nigeria* Jos: Aha Publishing House.
- Fenna, A., 2006. "What Use is Federalism Anyway". Paper presented to the Australasian Political Studies Association conference, University of Newcastle, 25-27 September 2006.
- Fiseha, A., 2005. "Federalism and the Adjudication of Constitutional Issues: The Ethiopian Experience". *Netherlands International Law Review*, 52: 1, 1-30.
- Follesdal, A., 1998. "Survey Article: Subsidiarity" *Journal of Philosophy*, 6: 2, 190-218.
- Galligan, B. & Walsh, C., 1992. "Australian Federalism: Yes or No?". In Graven, G. ed. *Australian Federation: Towards the Second Century*. Calton: Melbourne University Press.
- Gamper, A., 2005. "A Global Theory of Federalism: The Nature and Challenges of a Federal State". *German Law Review*, 6: 10, 1297-1318.
- Greene, J., 1985. "The Imperial Roots of American Federalism". In *This Constitution: A Bicentennial Chronicle* available at www.apsanet3b.inetu.net/imgtest/ImperialRootsAAmericanFederalism.pdf
- Hueglin, T., 2013. "Two (or Three) Tales of Subsidiarity" available at www.cpsa-acsp.ca/papers-2013/Hueglin.PDF
- Jiboye, A. D., 2011. "Urbanization Challenges and Housing Delivery in Nigeria: The need for an Effective Policy Framework for Sustainable Development", *International Review of Social Sciences and Humanities*, 2: 1, 176-185.
- Karmis, D. & Wayne, N., 2005. "The Revival of Federalism in Normative Political Theory" In Karmis D. & Wayne, N. eds. *Theories of Federalism: A Reader*. New York: Palgrave Macmillan.
- Keating, M., 2000. "Paradiplomacy and Regional Networking" available at www.forumfed.org/en/libdocs/.../924-FRCU0105-eu-keatin.pdf
- Kersbergen, V. & Verbeek, B., 1995. *Social Capitalism: A Study of Christian Democratic and Welfare State* London: Routledge.
- Kyari, G. V. & Ayodele, J., 2014. "The Socio-economic Effect of Early Marriage in North Western Nigeria". *Mediterranean Journal of Social Sciences*, 5: 14, 582-592.
- McLaughlin, A. C., 1918. "The Background of American Federalism". *American Political Science Review*, 12: 2, 215-240.
- McLaughlin, A. C., 1932. *The Foundations of American Constitutionalism* New York: New York Press.
- Nivola, P. S., 2007. "Rediscovering Federalism". *Issues in Governance Studies*, 8, 1-18.
- Nwabueze, B. O., 1983. *Federalism in Nigeria under the Presidential Constitution* London: Sweet & Maxwell.
- Nwapi, C., 2011. "International Treaties in Nigerian and Canadian Courts". *African Journal of International and Comparative Law*, 19: 1, 38-65.
- Olutoyin, B. I., 2014. "Treaty Making and its Application under Nigerian Law: The Journey so far". *International Journal of Business and Management Invention*, 3: 3, 7-18.
- Omoriege, E. B., 2013. "Subsidiarity Principle and Judicial Enforcement of Federalism in Nigeria". *NIALS Journal of Constitutional Law*, 1, 69-95.
- Omoriege, E.B., 2015. "Nigeria's Federal System and the notion of Dual Sovereignty: Lessons for the Supreme Court". *International Journal of Power, Politics and Governance* (forthcoming).

- Oyebode, A., 2003. "Treaty Making Power in Nigeria". In Oyebode, A. ed. *International Law and Politics: An African Perspective*. Lagos: Bolabay Publishers.
- Rau, M., 2003. "Subsidiarity and Judicial Review in German Federalism: The Decision of the Federal Constitutional Court in *Geriatric Nursing Act* case". *German Law Journal*, 4:3, 226-236.
- Rompala, J.P. 2003. "Once more unto Breach Dear Friends: Recurrent Themes in Welfare Reform in the United States and Great Britain and what the principle of subsidiarity can do to break the pattern". *Journal of Legislation*, 29, 307-331.
- Watts, R.L, 1998. "Federalism, Federal Political Systems and Federation". *Annual Review of Political Science*, 1, 117-137.
- Wheare, K.C., 1963. *Federal Government* London: Oxford University Press.
- Wolff, S., 2007. "Paradiplomacy: Scope, Opportunity and Challenges". *The Bologna Center Journal of International Affairs*, 10, 1-13.