ENVIRONMENTAL PROTECTION AND THE IMPERATIVE OF DOMESTICATING INTERNATIONAL TREATIES IN NIGERIA

Abstract

Prior to the dumping of about 8000 drums of radioactive waste by an Italian ship in a small town of Koko, Delta State (former Bendel State) in 1988, Nigeria had no comprehensive law for protection of the environment. The Koko incident woke up Nigeria from slumber into taking concrete steps in protecting the environment by enacting the Harmful Waste (Special Criminal provisions) Act through the then Decree 42 of 1988 and Federal Environmental Protection Agency (FEPA) 1988,now known as National Environmental Standards and Regulations Enforcement Agency (NESREA) Act 2007, as both legal and institutional framework for the protection and management of the environment. Despite the two enactments, environmental pollution and degradation have continued unabated in Nigeria. This led this article to critically examine the imperativeness of domestication of international treaties in driving the environmental policy of Nigeria. The finding is that there are challenges militating against domestication of environmental treaties in Nigeria such as the reluctance on the part of the executive arm of government in ratifying treaties made on behalf of the country and non-participation of the National Assembly in treaty making. The research methodology adopted by the researchers is purely doctrinal with analytical and descriptive approaches in recommending the immediate ratification of all environmental treaties by the executive arm of government and the amendment of Treaties (Making Procedure Etc) Act, 2004 to make the participation of National Assembly in treaty-making process compulsory.

Keywords: Environmental Protection, Treaties, Domestication and National Assembly.

3.0 Introduction

In recognition of the import of the environment in the sustenance of human life, the 1999 Nigeria Constitution charges the State with the responsibility of protecting and improving the environment and safeguarding the water, air and land, forest and wildlife of Nigeria.[380]Doing this entails combating environmental pollution which undermines the life sustaining capacity of the environment.[381] Ironically, much of environmental pollution comes from anthropogenic sources.[382]In Nigeria, various measures have been embarked upon with regard to environmental sustainability as an aspect of socio-economic development. This is no doubt connected with the role of the environment in facilitating optimal social functioning and therefore, the need to protect it not just for the present but for the future as well.[383]

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[380]CFRN 1999 S. 20

[381] Jude O Ezeanokwasa, 'Polluter-Pays Principle and the Regulation of Environmental Pollution in Nigeria: Major Challenges' [2018]. *Journal of Law, Policy and Globalization*, p. 45.

[382]*Ibid*

[383] Jo Leke and EN Leke 'Environmental Sustainability and Development in Nigeria: Beyond the Rhetorics of Government' [2019] *International Journal of Development and Management Review* (INJODEMAR), (Vol. 1).

As already stated, the Nigerian environment is bedeviled by pollution which always resulted to loss of biodiversity with its attendant health hazards occasioned by non-domestication of environmental treaties meant to safeguard the environment which Nigeria is a state party. Section 12(1) of 1999 Constitution provides for the implementation of any treaty by way of domestication. However, the executive arm of government has not shown enough zeal in treaty ratification for the protection of the environment as only 36 out of 85 environmental treaties applicable to Nigeria have been ratified[384] while the National Assembly whose duty it is to domesticate treaties has equally shown no serious commitment in discharging the task of domestications as only 10 out of 400 international agreements have been domesticated.[385] This development has robbed the Nigerian environment the requisite protection derivable from undomesticated international treaties which eventually resulted in unmitigated environmental problems. Undomesticated treaties have no force of law in Nigeria, but only constitute mere persuasive authority for the Nigerian courts like other sources of international law. International treaties will continue to be mere documents in countries that are signatories to them if their significance is not felt by the people. It is not enough for a sovereign state to ratify a treaty in the international plane, but more efforts must be made to adopt it into her domestic legal system.

The last decades of the last century saw the movement of concerns for the human geographical environment from a subject of social activism to a global agenda. This was a result of the realization that one of the consequences of human activities was the accumulation of Green House Gases (GHG) in the earth's atmosphere which leads to climate change and its negative consequences, and the environmental degradation resulting from that could 'harm humanity, fauna and flora, biodiversity, ecosystems and many others'.[386] For Nigeria and other African countries, the situation of socio-economic development at the heart of the environmental discourse, fell surely in line with what is already considered the main agenda of the African States; development. Increased problems of water shortages, floods, drought and desertification which threaten food security and human survival have become symptomatic of the effects of the ailing status of the environment on the Nigerian society.[387]

In the face of these clear and present dangers of environmental degradation, the Nigerian state has responded through agencies, policies, programmes and laws aimed at the protection of the environment and to ensure sustainable development.Some of these intentions are clearly in a plethora of documents, laws and establishments which traverse the entire Nigerian administrative system from sections 16(2) 17(2) and 20of the 1999 Constitution with its provisions for the protection of the environment, the National Policy on Environment (1989), the Millennium Development Goals Project, to the many international conventions which the country is a signatory.[388]

From the foregoing, this study aims at answering the following research questions:

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[384] AA Taiwo, *Environmental Law* (National Open University of Nigeria, 2010) P. 24.

[385] CE Okeke and MI Anushiem, 'Implementation of Treaties in Nigeria: Issues, challenges and the way forward [2018] (9) (2), *NAUJILJ*, P. 217.

[386] E Ifeanyi, 'Environmental Impact Assessment as a Tool for Sustainable Development: The Nigerian Experience [2002] Proceeding of the fig XXII International Congress, Washington D.C., U.S.A, P. 13.

[387] *Ibid*

[388] *Ibid*

- ✓ What is domestication of a treaty?
- ✓ What institutions are necessary for domestication of treaties?
- ✓ What are the benefits of the domesticationof environmental treaties in environmental protection?
- ✓ How can domestication of international environmental treaties be facilitated in Nigeria?
- ✓ What are the factors militating against effective domestication of environmental treaties in Nigeria?

The basic aim of the study is to press the point that non-domestication of many international environmental treaties militates against environmental protection in Nigeria and her environmental protection responsibility in the comity of nations.

4.0 Conceptual Clarifications

Environmental protection:This is the practice of protecting the natural environment by individuals, organizations and government. It includes programmes that are aimed at reducing risks to the environment from contaminants such as hazardous materials and wastes, fuels and oils.[389] Nigerian environment has been bedeviled by a multiplicity of issues and challenges resulting from human activities with grave implications for socio-economic development of the nation. There is the need for effective monitoring and enforcement of environmental laws by institutions that regulate the environment in ensuring that the laws are sufficiently robust, comprehensive and consistent through provision of a range of sanctions including criminal sanction to help compliance. Also, provision of institutional capacity and resourcesnecessaryto undertake enforcement action, wider socio-political plan and governance are the prerequisitesfor effective enforcement of the environmental laws.[390] It is very clear that sustainable environment is a necessary prerequisite to a sustainable socio-economic system which implies that actions that remove threats and foster environmental sustainability should contribute to such a system.

Domestication of International Treaties:This is the process of giving a treaty the force of law withina country. It is the subjection of treaties made on behalf a country to the legislative process like other municipal legislation.[391]It is the incorporation of the provisions of environmental treaties into the extant laws of a country to give it the force of law.Treaty is an international agreement concluded between states and other subjects of international law which is in a written form and governed by international law whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.[392] Thus, domestication of environmental treaties means the process of giving environmental treaty the force of law within the country.

In Nigeria, environmental treaties do not automatically become law without legislative approval. Section 12(1) of the 1999 Constitution provides for the domestication of all treaties

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[389] Environmental Protection/Environmental Health and Safety http://ehs.edu accessed on 25 June 2021.

[390]SGOgbodo, 'Environmental Protection in Nigeria: Two decades after the Koko incident' <https://www.researchgate.net> accessed on 16 February 2021.

[391] AB Oyebode, *Treaty-making and Treaty Implementation in Nigeria: An Appraisal,* (Bolaby Publications 2003), p. 322

[392] Vienna Convention, 1986.

before they can apply within the country. Thus, treaties validly concluded between Nigerian and other subjects of international law do not transform into Nigeria law without legislative intervention – they must be specifically enacted into law by the National Assembly in accordance with the Constitution. Examples of domesticated treaties are African Charter on Human and Peoples Rights (Ratification and Enforcement) Act 1983 and Oil in Navigable Waters Act 1968.

5.0 Domestication of Environmental Treaties in Nigeria

Nigeria adheres to a dualist approach to application of international law - a practice which is common in common law countries.[393] Environmental treaties must first be domesticated before they can apply within the country. The relevance of environmental treaties in the enhancement of national environmental policy and fulfillment of environmental obligations at the internationalplane cannot be overemphasized. For countries operating a monist system of treaty implementationlike France, Switzerland, Netherlands and Ethiopia, there is no provision for domestication before enforceability of a treaty. In France, ratified treaties upon publication prevail over domestic laws.[394]

In Nigeria, international environmental treaties do not automatically have the force of law after ratification by the executive arm of government. There is a constitutional requirement for every international treaty to be domesticated before it can have the force of law. Section 12(1) of the 1999 Constitution of the Federal Republic of Nigeria (as amended) stipulates that no treaty between the federation and any other country shall have the force of law except to extent to which any such treaty has been enacted into law by the National Assembly'.[395]In *AbachavFawehinmi*, the Supreme Court held that:

> It is therefore manifest that no matter how beneficial to the country or the citizenry, an international treaty to which Nigeria has become a signatory may be, it remains unenforceable, if it is not enacted into the law of the country by the National Assembly.[396]

Nigeria is a signatory to the Vienna Convention on the Law of Treaties which regulates international agreement between states. Membership of this convention symbolizes Nigeria's intention to be bound by its provisions, yet it is quite surprising that Nigeria engages in actions that are geared towards defeating the objectives of the convention (VCLT) by its unreasonable delay or failure to domesticate some of its international treaties. The principle of '*pactasuntservanda*' as incorporated in the VCLT requires that 'every treaty in force is binding upon the parties to it and must be performed by them in good faith.'[397] This leads us to inevitable conclusion that prolonged delay or failure by state parties in domesticating international treaties amounts to bad faith irrespective of how good such a reason may be. Articles 17 – 23 of the VCLT provide an opportunity for state parties to make reservations if

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[393]CE Okeke and MI Anushiem*(n 8) 217*

[394] S Eke, 'Non-Domestication of Treaties in Nigeria as a Breach of International Obligation'<https://www.mondaq.com> accessed on 15 June 2021.

[395]*Ibid*

[396] (2000) FWLR (Pt.4) 553 at 586.

[397]VCLT, 1969, Article 26.

they do not agree with any provision in a treaty. It is therefore quite baffling that a state party will go through the entire process of becoming a party to a treaty only to end up dumping the treaty in its archives under the guise of non-domestication[398]

The International Court of Justice (ICJ) has long frowned at the use of the defence of domestic law as a reason for a state party's non-performance of its obligations under a treaty. It has come much tougher for member states to evade their liabilities under international law by invoking the provisions of its municipal law as a justification for failure to perform an obligation under treaty.[399] This point was amply made clear in the case *Cameroun v Nigeria*[400] where the International Court of Justice held as follows:

> While in international practice, a two-step procedure consisting of signature and ratification is frequently provided for in provisions regarding entry into force of a treaty, there are also cases where a treaty enters into force immediately upon signature.

Consequently, the court rejected Nigeria's argument that the Maroua Declaration, a bilateral treaty between Cameroun and Nigeria, was invalid under international law because it was signed by the Nigerian Head of State of the time but was never ratified.[401]

There is no doubt of thepoor implementation of environmental treaties in Nigeria as only about 36 out of 85 environmental treaties applicable to Nigeria have been ratified by the executive arm of government.[402] Also, the National Assembly has not manifested enough zeal in the domestication of treaties as it always claims that the executive arm does not carry them along during treaty making process because the constitution does not assign any role to the National Assembly in respect of treaty making in Nigeria.[403]The National Assembly, further, claimed that it is only aware of the existence of treaties when they are presented to it for domestication. There is the need for cooperationon the part of both the Executive and Legislative arms of government on speedy ratification and domestication of environmental treaties to improve the quality of both the national and global environments.

2.3.0 Role of Environmental Treaties in Municipal Environmental Protection.

The United Nations Conference on the Human Environment, having met at Stockholm from 5th to 16thJune, 1972, considered the need for a common outlook and for common principles to inspire and guide the peoples of the world in the preservation and enhancement of the human environment.Principle II of the convention provides:

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[398]*Ibid*
[399]*Ibid*
[400]Land and Maritime Boundary between Cameroun and Nigeria (2002) ICJ Report, p. 264.
[401]*Ibid*
[402]*Ibid*
[403] See *Attorney General of the Federation v Attorney General of Abia State &Ors* (2002) FWLR (pt. 102) 1 at 92 – 93.

> The environmental policies of all States should enhance and not adversely affect the present or future development potential of developing countries nor should they hamper the attainment of better living conditions for all, and appropriate steps should be taken by States and international organizations with a view to reaching agreement on meeting the possible national and international economic consequences resulting from the application of environmental measures.[404]

A growing class of environmental problems, because they are regional or global in extent or because they affect the common international realm, will require extensive cooperation among nations and action by international organizations in the common interest. This cooperation is in form of treaties, protocols, conventions and agreements for the sole purpose of preserving and enhancing the quality of both the national and international environments.

From the foregoing, the role of international environmental treaties in municipal environmental protection cannot be overemphasized in the sense that:

(1) They set the pace for Municipal Legislation;
Environmental treaties provide the roadmap for municipal law to follow in ensuring the protection of the environment. The international law principle of *pactasuntservanda*which means treaties in force must be obeyed with utmost good faith applies to parties in an international agreement. International environmental treaties set the pace for local or municipal legislations to follow in the quest for sustainable environment.

(2) Domestication leads to full benefits from treaties;
Undomesticated treaties deprive the nation and her citizens the benefits from such treaties. It also portrays a nation as being hypocritical when it fails to domesticate treaties it is a party to. On the other hands, domestication of environmental treaties opens the nation for the full benefits they portend which is the protection and preservation of the environment.

(3) Participation at the global stage for the protection of the environment;
Domestication of treaties affords the nation the opportunity to participate at the global stage through cooperation in safeguarding not only the municipal environment but also the universal environment. Countries will be undermining the global efforts towards the protection of the environment when treaties are not domesticated in their various domains.

(4). *Creation of Symbiotic relations with other nations in safeguarding the environment*

Domestication of the provisions of treaties creates symbiotic relations with other nations of the world in the global fight against environmental degradation in a manner that benefits the municipal and the universal environments.

4.2 Factors militating against Domestication of Environmental Treaties in Nigeria.

There are several factors militating against domestication of environmental treaties in Nigeria. They are as follows: -

[404] 1972 United Nations on Human Environment (Stockholm), Principle 11.

i. *Non-challant attitude of the Executive arm of government*. The executive arm of government, whose duty it is to negotiate and ratify treaties, has not shown reasonable quantum of commitment in discharging this all important task. Treaty – making forms part of foreign affairs which is specifically placed in the exclusive list of the Constitution.[405] According to Dinah Shelton, 'in all federal states, foreign affairs, including issues relating to international law are generally considered matters for the national government'.[406] Moreover, under the ViennaConvention on the Law of Treaties, only central governments have the legal capacity to validly conclude treaties on behalf of sovereign states.[407]

ii. *Non-participation of the National Assembly in treaty-making process*: The non-inclusion of the relevant committee of the National Assembly in the treaty – making process militates against domestication of environment treaties. The National Assembly is always sidelined by the executive in the negotiation of treaties because the Constitution does not assign any role to the National Assembly in respect of treaty-making in Nigeria. Usually, the National Assembly becomes aware of the existence of most treaties many years after their ratification or when they are brought before it for domestication.

iii. *Poor Documentation of Treaties by the Federal Ministry of Justice*: No treaty could be enacted into domestic law if no record is kept of its existence.[408] Section 4 of the Treaties Act provides that the Federal Ministry of Justice shall be the depository of all treaties entered into between the Federation and any other country for record purposes. This section is complemented by section 5 which provides that the Federal Ministry of Justice shall prepare and maintain a register of all treaties which Nigeria is a party to. The Act also mandates the Ministry to notify the Federal Government Printer of any new treaty ratified by Nigeria for the purpose of publication.[409] The reality reveals that United Nations records showed that Nigeria has ratified about 400 treaties, but the local records show that Nigeria is a party to only 200 treaties which eloquently expressed the level of poor documentation of treaties by the Federal Ministry of Justice.[410]

iv. *The negative impact of Section 12(1) of the 1999 Constitution*: Nigeria adheres to the dualist doctrine on treaty domestication which demands that treaties shall not form part of domestic laws unless they are specifically enacted into laws by the municipal legislature. However, the National Assembly has over the years shown little interest and commitment in carrying out this constitutional task. As a matter of fact, out of about 400 treaties[411] which Nigeria is a party to, only 10 have been duly domesticated by the National

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[405]*Attorney General of the Federation v. Attorney General of Abia State &Ors(2002) FWLR (Pt.102) 1 at 92-93.*

[406] DL Shelton, *Introduction to International Law and Domestic Legal Systems: In corporation, Transformation and Persuasion* (Oxford University Press 2011) p. 21.

[407]*Ibid*

[408]*Ibid*

[409]Treaties (Making Procedure ETC) Act 2004, s. 4.

[410]*See the motion on the need for the domestication and ratification of all treaties and agreements entered into by the Federation sponsored by Hon. Dayo Bush-Alebiosu and adopted by the House of Representatives on May 7, 2013, available at http://www.nassnig.org/document/download/3222> accessed 17 October 2021.*

[411] IA Yusuf, 'Nigeria loses billions due to non-compliance with bilateral agreement, *The Nations,* (Lagos November 3 2013) available https://thenationaonlineng.net/nigeria-loses-billion- due-non-compliance-bilateral-agreements/ (accessed on 20 June 2021).

Assembly.[412] This scenario is quite disheartening and must be reversed for the benefits of our environment.

5. Conclusion and Recommendations

Environmental treaties are veritable instrument made to protect and preserve the local environment in particular and universal environment in general, through the domestication process against degradation from human activities. Unfortunately, a good number of these treaties are yet to be domesticated by the National Assembly which has undermined the efforts made at the global stage in ensuring the safety of our environment. Non-participation of the relevant committee of the National Assembly in treaty-making, non-challant attitude of the executive arm in ratification of environmental treaties, poor documentation of ratified treaties by the Federal Ministry of Justice and the adverse effect of section 12(1) of the 1999 Constitution are some of the challenges standing in the way of effective environmental protection in Nigeria.

From the foregoing, the following recommendations will ensure the effective utilization of environmental treaties for the protection of the Nigerian environment:

(c) Outright repeal of Section 12(1) of the 1999 Constitution to make every environmental treaty, to which Nigeria is a state party to,is enforceable within Nigeria without the need for domestication.

(d) The executive arm of government must commence immediate ratification of all outstanding environment treaties to which Nigeria is a state party so that Nigeria will reap the full benefits of such treaties.

(e) The inclusion of the relevant committee of the National Assembly in treaty-making process is highly required. This goes to show that the Constitution and the Treaties Act should be amended to accommodate this recommendation.

(f) There must be effective documentation of environmental instruments which Nigeria is a party to by the Federal Ministry of Justice, so as to have accurate records of ratified treaties at all times.

Environmental protection and sustainability will be achieved in Nigeria if the environmental treaties applicable to Nigeria are effectively ratified and domesticated by the relevant authorities as recommended above.

[412] *Ibid.*