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Treaty-Making Power of the President and the Requirement of Domestication under the Nigerian Constitution

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Abstract
The President has the power to negotiate and ratify treaties on behalf of his country. However in Nigeria and most other countries that operate the dualist system, no treaty between the federation and any other country shall become enforceable unless it is domesticated through a legislative enactment. Therefore treaty-making is purely an executive act which requires subsequent legislative intervention for implementation of the treaty in national courts. This article examines the treaty-making power of the Nigerian President and the justification for the requirement of domestication of treaties. The difficulties posed by the requirement of domestication are also examined. Notwithstanding that Nigeria has ratified several international treaties, the domestication of these instruments is lamentably slow. Though this may prevent the implementation or enforcement of these treaties within the national courts, they non- the less remain binding on the country at the international level with some negative consequences. The article also examines the impact of the Constitution of the Federal Republic of Nigeria (Third Alteration Act) 2010 on treaty implementation in Nigeria and proffers suggestions on how the desired synergy between the executive and the legislature with regard to treaty-making and implementation could be achieved.
Keywords: Treaty, Domestication, Constitution, President, National Assembly.

1. Introduction

International transactions are normally carried out through treaties.[1] Nchi[2] defines a treaty as an agreement under international law between two or more sovereign States to do or forebear to do a thing. The Vienna Convention on the Law of Treaties[3] refers to treaty within the meaning of "an international agreement concluded between States in written form and governed by International Law." However, international customary law does not prescribe the form of treaties, for a treaty may in fact be oral.[4] Treaties can cover almost any subject matter, and every State is competent to enter into treaties regarding matters that fall within its sovereignty.[5]

Nigeria has entered into and ratified so many international treaties. However most of these ratified treaties cannot be enforced within the country because they have not been domesticated as prescribed under the 1999 Constitution of Nigeria.

This article examines the treaty-making powers of the President and the rationale for the constitutional requirement of domestication before implementation of ratified treaties in Nigeria. The status of domesticated treaties vis-à-vis municipal laws and the effect of non-domestication of treaties in Nigeria are also examined. Finally, the impact of the recent amendment of the Nigerian Constitution by the Constitution of the Federal Republic of Nigeria (Third Alteration Act) 2010, relating to treaty implementation in Nigeria is also examined.

2. The President's Treaty-making Power in Nigeria

It is important to state from the outset that in Nigeria, treaty-making as opposed to treaty implementation is purely an executive function. This is consistent with the position in most legal systems, where the Chief Executive or Head of Government, is given the authority, expressly or impliedly to enter into international treaties on behalf of the nation.[6] However, unlike the American Constitution,[7] the 1999 Constitution of Nigeria, like its predecessors, does not expressly grant to the President, the authority to enter into treaties. The source of

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1 Treaties are called by different names, such as Convention, Protocol, Declaration, Charter, Covenant, Pact, Act, Statute, Agreement, Concordat, Modus Vivendi, Exchange of Notes (or Letters), Process Verbal, Final Act and General Act etc. See I.O. Umozurike, *Introduction to International Law* (Ibadan: Spectrum Books Ltd., 2005) p. 163 quoting from S. Rossene "Vienna Convention on the Law of Treaties" in Bernhadt (ed) *Encyclopaedia of International Law* (1984) Vol. 9 at 525 – 533.

2 S.I. Nchi, *Separation of Power under the Nigerian Constitution* (Jos: Greenworld Publishing Co. Ltd., 2000) p. 143.

3 Signed on 23rd May 1969 and came into force on 27th January, 1980.

4 See *Legal Status of Eastern Greenland (Denmark v France)* ICJ (1933) Ser A/B N0. 53; *Nuclear Tests Case, (Australia v France)* ICJ Rep. (1974) 253, (*New Zealand v France*) ICJ. Rep. (1974) 457.

5 The Kimbledon case 192.3, pci 8 series A N0. 1.

6 K.M. Mowoe, *Constitutional Law in Nigeria* (Lagos: Malthouse Press Ltd., 2003) p. 134.

7 US Constitution, Art II section 2 provides that: The President shall have power by and with the advice and consent of the Senate to enter into treaties, provided two thirds of the Senate present concur.

the President's treaty-making power is therefore deduced from certain provisions of the Constitution, Conventions and other statutes. For example, in section 135 of the 1999 Nigerian Constitution, the President, as Chief Executive of the Federal Government, is designated Head of State; and in that capacity, he represents the country in the totality of its international relations, with the consequence that all his legally relevant international acts are considered to be acts of his State.[1]

It is also significant to note that by section 12(1) of the 1999 Constitution of Nigeria, a treaty is made between the Federation and any other country.[2] The term "Federation" is defined as the "Federal Republic of "Nigeria" in section 318 of the 1999 Constitution of Nigeria. Whenever that term is used, even though it generally includes all the arms of the Federal Government, it particularly refers to the President or the Chief Executive as the representative of that Government.[3]

The Vienna Convention on the Law of Treaties also specifies the persons who are eligible to represent a State in the making of Treaties. Thus, Article 7 of the said Convention provides as follows:

1. A person is considered as representing a state for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the state to be bound by a treaty if:
   (a) He produces appropriate full powers; or
   (b) It appears from the practice of the states concerned or from other circumstances that their intention was to consider that person as representing the state for such purposes and to dispense with full powers.
2. In virtue of their functions and without having to produce full powers, the following are considered as representing their state.
   (a) Head of State, Heads of Government and Ministers for foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty.
   (b) Heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State to which they are accredited.
   (c) Representative accredited by states to an international conference or to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that conference, organisation or organ.

From the foregoing, the President of Nigeria is vested with the power to negotiate and ratify treaties between Nigeria and other countries. He also has the power to appoint ambassadors and receive foreign dignitaries. Therefore, subject to certain constitutional restraints, the President has exclusive responsibility for negotiating, ratifying and terminating treaties and other agreements between Nigeria and other countries. In practice, this power is usually delegated to certain public officials in relevant government Ministries such as the Ministry of Foreign Affairs and Ministry of Justice.[4]

3. Domestication of Treaties in Nigeria and Effects

3.1 Domestication of Treaties

Section 12(1) of the Constitution of the Federal Republic of Nigeria, 1999, provides for domestication of treaties entered into between Nigeria and other countries, in terms as follows: "No treaty between the Federation and any 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". Thus, under section 12 of the said Constitution, even where the President has entered into or ratified a treaty, it does not automatically become enforceable in the Nigerian courts; and cannot overrule or become superior to municipal laws. The treaty must be enacted into law by the National Assembly through the normal process of legislation and thereafter presented to the President for assent. This procedure is generally referred to as domestication of treaties, which reflects the inherited common law position that treaty-making is a purely executive act that requires subsequent implementation within the country by way of legislation enacted by the legislature.[5]

Since a treaty can deal with various subject matters which may sometimes be outside the express authority of the Legislature, the Constitution allows the National Assembly to enact into law, treaties relating to

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[1] B.O. Nwabueze, *The Presidential Constitution of Nigeria* (London: C. Hurst & Company (Publishers) Ltd., 1982) p. 254.

[2] See also Treaties (Making Procedure Etc) Act, Cap T 20 LFN 2010, which is an Act to provide, among other things, for treaty-making procedure and the designation of the Federal Ministry of Justice as depository of all treaties entered into between the Federation and any other country.

[3] Nwabueze, *Op. Cit*. p. 135.

[4] See Constitution of the Federal Republic of Nigeria (CFRN) 1999 s. 5(2) empowering the President to exercise executive powers either directly or through the Vice President and Ministers of Government of the Federation or Officers in the Public Service the Federation.

[5] B.O. Nwabueze, *Federalism in Nigeria Under the Presidential Constitution* (Lagos: Lagos State Ministry of Justice, 1983) pp. 225 – 226.

matters not included in the Legislative lists[1] and therefore within the residual legislative powers of the state. In such cases, the bill passed by the National Assembly shall not be presented to the President for assent unless it is ratified by a majority of all the Houses of Assembly in the Federation.[2] Therefore domestication connotes the enactment of the provisions or contents of an instrument as part of municipal laws either wholly or party.[3]

The rationale for domestication of treaties before they could be enforced by the national Courts is primarily predicated on the prohibition of executive law making under the doctrine of separation of powers. Since treaties are negotiated and ratified by the executive, which is not the traditional law-making organ, such treaties cannot have the force of applicable law, unless they are properly enacted as law by the traditional law-making organ-the legislature. This situation is peculiar to countries that operate the Dualist system, which regards international law and national law as two different systems, having different natures and characters; and maintains that for international law to be applied by the domestic courts it must be incorporated or transformed into the domestic system.[4] With particular reference to Nigeria, Egede submits that:

> Nigeria operates a dualist system, whereby treaties, including those dealing with human rights, cannot be applied domestically unless they have been incorporated through domestic legislation. Although not specifically stated in the Constitution, the practice in Nigeria, similar to that of the United Kingdom, is that the executive arm of central government has the exclusive power to enter into an international treaty. For the treaty to be enforceable in Nigeria, under section 12(1) of the 1999 Constitution, it must be enacted as law by the legislative arm of central government.[5]

The legal position in Nigeria is similar to that of Ghana[6] but different from that of America and other countries[7] where treaties are self-executing and when duly ratified, they automatically form part of the law of the land.[8]

On the other hand, the Monist system maintains that international law and municipal law are part of the same system of norms.[9] Thus, in monist States, some treaties have the status of law in the domestic legal system, even in the absence of implementing legislation.[10]

> Commenting on the position under the Namibian Constitution, Ruppel[11] had this to say:
> Besides policy-making, the executive is responsible for negotiating and signing international agreements, which according to article 144 of the Constitution, form part of the Law of Namibia…. The Constitution explicitly incorporates international law and makes it part of the law of Namibia. No transformation or subsequent legislative act is needed. However, international law has to conform with the provisions of the Constitution in order to apply domestically. In case a treaty provision or other rule of international law is inconsistent with the Constitution, the later will prevail. A treaty will be binding upon Namibia in terms of Article 144 of the Constitution if the relevant

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1 CFRN, 1999 Nig.. s. 12(2). See also *Lawson (Adeyinka) v Lawson* (1984) 5 NCLR 576 HC Lagos.

2 *Ibid*., s. 12(3).

3 A.I. Abdu, "Domestic Implementation of International Instruments for Combating Terrorist Financing and Money Laundering in Nigeria", (2014) (2)(3) *International Journal of Business and Law Research* p. 10.

4 I. Brownlie, *Principles of Public International Law* (7th edn. Oxford: Oxford University Press, 2008) pp. 31 – 33. See also A. Glashausser, "Treaties as Domestic Law in the United States" in R.A. Miller and R.M. Bratspies, *Progress in International Law* (Lei Den Boston: Martines NIJHOFF ublishers, 2008) pp. 220.

5 E. Egede, "Bringing Human Rights Home: An Examination of the Domestication of Human Rights Treaties in Nigeria" (2007) (51) (2) *Journal of African Law* 249 – 284, 250.

6 See 1992 Ghana Const., art 75(2). See also A Kodzo Paaku Kludze, "Constitutional Rights and Their Relationship with International Human Rights in Ghana" in (2008) 41 *Isr. L. Rev*. 677 – 702, available at http://ssrn.com/abstract=1333634. accessed 14/6/2015.

7 They include Belgium, Germany, Luxemburg, The Netherlands,Turkey and Namibia, among others.

8 U.S. Const., art. VI, s. 2 ("The Constitution and the Laws of the United States which shall be made pursuant thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land, and the Judges in every State shall be bound thereby…").

9 *Ibid*.

10 See D. Sloss, "Domestic Application of Treaties" (2011) available at http://digitalcommans.law.scu.edu/facpubs/635. accessed on 14/6/2015.

11 O.C. Ruppel, "The Role of the Executive in Safeguarding the Independence of the Judiciary in Namibia", being a paper originally presented at the Conference on the independence of the judiciary in sub-Sahara Africa: Towards an Independent and Effective Judiciary in Africa, organized by the Konrad Adenauer Foundation's Rule of Law Programme for Sub-Sahara Africa, held at Imperial Beach Hotel, Entebbe Uganda 24 – 28 June 2008, available at www.kas.de/upload/auslandshomepages/namibia/.../ruppel.pdf. See also O. Tshosa, *National Law and International Human Rights Law: Cases of Botsivana, Namibia and Zimbabwe* (2001) . 79; G. Erasmus, "The Namibian Constitution and the Application of International Law in Namibia" in Van Wyk, D.M. Wiechers & R. Hill eds. *Constitutional and International Law Issues* (1991) . 94.

international and constitutional requirements have been met.

The requirement of domestication also serves as a veritable mechanism for checking and restraining the exercise of presidential treaty-making and foreign affairs powers. Thus, while it is only the President, as the sole organ of the nation in foreign relations, who can negotiate and enter into treaty with other nations on behalf of his country, no treaty so negotiated and entered into between the Federation and another country or other countries shall have the force of law, unless it is enacted as a law by the National Assembly.[1] The legislature therefore sees the domestication process as a means of checking the activities of the executive; apparently, because law-making function is that of the legislature and not that of the executive.[2]

In *Abacha v Fawehinmi*,[3] the Supreme Court of Nigeria in interpreting section 12 of the 1999 Constitution which requires domestication of treaties stated that: "An international treaty entered into by the Government of Nigeria does not become binding until enacted into law by the National Assembly, an international treaty has no such force of law as to make its provisions justiciable in our courts".

In the case of *Registered Trustees of National Association of Community Health Practitioners of Nigeria & Ors v Medical and Health Workers Union of Nigeria*,[4] the Supreme Court of Nigeria further stressed the precondition of domestication of an international treaty in accordance with section 12 of the Constitution before it could be enforced in Nigerian courts. The apex court, therefore, denied the justiciability of clauses 87 and 98 of the International Labour Organisation (ILO) Convention for non compliance with the provisions of section 12(1) of the Constitution. Although the court conceded that Nigeria was a state party of ILO, it rejected the argument that its Conventions were applicable by virtue of a contextual link with cognate provisions under the Municipal Trade Union Acts and Article 10 of the African Charter. The Supreme Court strenuously asserted that section 12(1) was a necessary pre-condition and the courts must not look beyond the periphery or precinct of the law to interpret it.[5]

An important constitutional development that has recently taken place in Nigeria is the enactment of the Constitution of Federal Republic of Nigeria (Alteration Act) 2010 which deals with the status, powers and jurisdiction of the National Industrial court. The Act introduced section 254(c)(2) into the 1999 Nigerian Constitution and provides as follows:

> Notwithstanding any thing to the contrary contained in this Constitution, the National Industrial Court shall have the jurisdiction and power to deal with any matter connected with or pertaining to the application of any international convention treaty or protocol of which Nigeria has ratified relating to labour employment, workplace, industrial relations or matters connected therewith.

The above provision has effectively rendered the procedure for domestication of treaties in section 12(1)(2) of the 1999 Constitution of Nigeria inapplicable to international labour conventions and treaties that have been ratified by Nigeira. The National Industrial Court is therefore empowered to enforce such international labour conventions and treaties directly without the necessity of a further legislative enactment for domestic application thereof, provided that they have been ratified by the President on behalf of the country.

In the light of this constitutional development, it is obvious that the case of *Registered Trusties of National Association of Community Health Practitioners of Nigeria & Ors v Medical and Health Workers of Nigeria* and similar cases would be decided differently today.[6] In the same vein, the pronouncements of the justices of the Supreme Court in *Abacha v Fawehinmi*[7] on the imperativeness of domestication of treaties in Nigeria before they could be enforced locally, no longer apply to international labour conventions or treaties, ratified by the country.

3.2 Status of Domesticated Treaties in Relation to Municipal Laws

The status of a duly domesticated treaty in relation to municipal laws is dealt with variously in every legal system despite the existence of various theories[8] on what the relationship should be. In Nigeria, once the treaty

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1 CFRN, 1999 s. 12.

2 B.I. Olutoyin, "Treaty-Making and its Application under Nigerian Law: The Journey so far", (2014) 31*International Journal of Business and Management Invention* 31 pp. 7 – 18.

3 (2000) 77 LRCN 1261 – 1262.

4 (2008) 2 NWLR (Pt. 1072) 575.

5 *Ibid.* at 622.

6 See B, Atilola, National Industrial Court and Jurisdiction over International Labour Treaties under the Third Alteration Act, available at nicn.gov.ng/publications… accessed on 8/11/2014.

7 Supra

8 For example, the Monist theory believes that both international and municipal laws belong to a unified science that transcend national boundaries in that they apply to same subjects. In case of conflict, most monist would give primacy to international law, whilst a few would given primacy to municipal law. Another is the dualist theory which believes

has been domesticated, the courts will generally not construe a municipal law in such a way as to bring it into conflict with the treaty. In *Abacha v Fawehinmi*,[1] Uwaifor JSC aptly stated the position of Nigerian courts with respect to the relationship between municipal laws and its jurisprudential acknowledgment of international law when he said that: "There exists a presumption that a statute will not be interpreted so as to violate the rule of international law".[2]

Thus, in *Oshevire v British Caledonian Airways Ltd*.,[3] the court applied and gave effect to the Warsaw Convention of 1929. Similarly, in *Ibidapo v Lufthansa Airlines*,[4] the Supreme Court upheld the applicability of the Warsaw Convention in Nigeria even though it was omitted from the Laws of the Federation of Nigeria 1990. Wali JSC affirmed that Nigeria, like any other Commonwealth country, inherited the English common law rules governing the municipal application of international law.[5] In *United African Company (UAC) Nig. Ltd. v Global Transport*,[6] the Court of Appeal gave effect to the Hague Visby Rules. In all those cases the treaties were given precedence over municipal laws.

In relation to the application of the African Charter on Human and People's Rights which was re-enacted into our laws under military rule,[7] the courts have held that the provisions of the Charter are applicable, and that the jurisdiction of the courts cannot be ousted in relation to them, by a decree of constitutional dimension, which, under military rule, is supreme. Thus, for example, in *Fawehinmi v Abacha*,[8] the Court of Appeal and Supreme Court came to the conclusion that the jurisdiction of the courts in relation to the application of an international law cannot be ousted by municipal law. The Supreme Court in *Fawehinmi v Abacha* made it clear, however, that such international law or treaty can only be superior to other laws and not the Constitution.

4. The President's Treaty-making Power under the American Constitution

In the United States, the President is the sole organ of the Nation in external relations and its sole representative with foreign Nations.[9] This assertion received the imprimatur of the Supreme Court in *United States v Curtiss – Wright Export Corp.*[10] where Southerland J. stated as follows:

> It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations – a power which does not require as a basis for its exercise an act of congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.

The President's power in treaty-making and foreign relations is expressly ordained in Article II, sections 1 and 2 of the American Constitution which provide as follows:

> Article II section 1:
> The President shall receive Ambassadors and other Public Ministers.
> Article 11 section 2:
> The President shall have power by and with the advice and consent of the Senate to enter into treaties provided two-thirds of the Senators present concur, and he shall nominate and by and with the advice and consent of the Senate, shall appoint Ambassadors, other Public Ministers and Consuls.

From the above provisions, it is clear that unlike the system operating in Nigeria, the American Constitution involves both the President and the Senate in treaty-making or ratification process.[11] Pyle and

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that both laws are separate and self-contained. In conflict each has primacy within its domain. In practice most nations have their own theories about the applicability and status of international law.

[1] (2000) NWLR (Pt. 660) 228.
[2] *Ibid*. at 345.
[3] (1990) 7 NWLR, (Pt. 163) 489.
[4] (1997) 4 NWLR, (Pt. 498) 124.
[5] *Ibid*. at 150.
[6] (1996) 5 NWLR, (Pt. 448) 291.
[7] African Charter on Human and Peoples' Rights (Ratification & Enactment) Act Cap A 9 Laws of the Federation of Nigeria, 2010.
[8] (2000) 6 NWLR (Pt. 610). *Ogugu v State* (1994) NWLR (Pt. 366) 1; *Comptroller of Nigerian Prisons v Adekanye* (1999) 10 NWLR (Pt. 663) 424.
[9] See 10 Annals of Cong. 596, 613 – 614 (1800), *Per* John Marshall, see also S.B. Prakash and M.D. Ramsey, "The Executive Power over Foreign Affairs" (2001) 111 *Yale L. J*. 235.
[10] 299 U.S. 304 (1936).
[11] L. Fisher, *Constitutional Conflict Between Congress and the President* (Lawrence: University of Kansas ress, 2007) (noting that from the language of art. 11 section 2 of the Constitution treaty making appears to be done jointly between the two branches, executive and congress).

Pious,[1] assert that the President's authority to make treaties has come to mean the power to negotiate them, to submit them to the Senate, and, if the Senate consents, to make the final decision whether to ratify them on behalf of the United States. However, the President's exclusive right to negotiate treaties has always been recognized. Senate cannot intrude into the field of negotiation, and, indeed, the Congress is powerless to invade.[2] However, in practice, Presidents, in negotiating treaties, retain the discretion to confide in or ignore the Senate as they deem appropriate and sometimes Presidents solicit advice from the Senate; save on occasions when it places a reservation[3] on a negotiated treaty.[4] The Senate retains the right to reject the product of any negotiations that it finds objectionable, irrespective of whether the President kept it informed of treaty negotiations or only key members of the Senate were informed.[5] The requirement of Senate consent does provide a check on the President's power, and an opportunity for sober second thought.[6]

Generally, under Article VI(2) of the American Constitution a treaty is declared as part of the laws of the land. Thus, where the treaty is self-executory, it becomes automatically operational after due ratification. In other cases where it is in the form of a contract, it requires the legislative act of the Senate to make it operational.[7]

The actual conduct of foreign affairs, including negotiation of treaties with other nations, is a presidential monopoly. However, the ultimate power to prescribe the substantive terms of American policy, both foreign and domestic, is, generally, the prerogative of Congress.[8]

5. Challenges to Domestication of Treaties in Nigeria

Unfortunately, in Nigeria and other African countries that operate the dualist system, the pace of domestication of treaties is rather slow and this has resulted in the non-applicability of many ratified treaties in national courts.[9] Notwithstanding that Nigeria is a party to several international and regional human rights instruments by signature, ratification, accession or succession, the domestication of these instruments is lamentably slow. Nigeria has taken no action whatsoever in respect of some international human rights treaties.[10]

Some of the challenges to the smooth domestication of treaties in Nigeria include the failure of relevant Federal Ministries to consult the Federal Ministry of Justice regarding the signing of international agreements; the lack of adequate liaison between the Presidency and the Federal Ministry of Justice regarding the signing of international agreements and the National Assembly's lack of interest in the quick domestication of treaties that have been ratified.[11] In order to address these challenges, it has been recommended that the relevant Ministries and Agencies of the executive branch should priorities all ratified treaties for domestication based on the importance of the treaties to improve the lives of Nigerians and the ease with which the domestication legislation would pass through the legislature.[12]

Indeed, practical experience has proved that it is not easy to have a legislation that domesticates a treaty to pass through the legislature in Nigeria. For example, the Bill which sought to domesticate the Convention on the Elimination of all Forms of Discrimination against Women, which Nigeria ratified on 13th June, 1985, is still pending before the National Assembly. However, many other treaties have been domesticated in Nigeria, one of which is the treaty establishing the African Union, which, after ratification, was given the force of law in Nigeria by the Treaty to Establish the African Union (Ratification and Enforcement) Act, 2003.[13] The African Union treaty was made a Schedule to the Act. The African Charter on Human and People's Rights has not only been ratified but also domesticated by the enactment of the African Charter on Human and People's Rights

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1 C.H. Pyle and R.M. Pious, *The President, Congress, and the Constitution* (New York: The Free Press, 1984) p. 243.
2 See United States v Curtiss-Wright Export Corp., 299 U.S. 304 (1936) Per Sunderland J.
3 The term reservation may refer to a modification of the terms of a treaty by the Senate which then becomes in the nature of a counter offer by the United States, or it may be a particular interpretation of the treaty of a statement limiting its consequences. In any event, reservations usually require renegotiation by the President.
4 A.S. Miller, *Presidential Power* (1977) . 138.
5 H.J. Krent, *Presidential Powers* (2005) . 95.
6 Miller, *Op. Cit.* at 142. On this account Presidents have refused to send to the Senate treaties already negotiated; they have withdrawn treaties from the Senate before it acted; they have refused to ratify treaties to which the Senate concurred; they have refrained from Pressing for Senate consent to treaties submitted by their predecessors. See L. Henkin, Foreign Affairs and the Constitution (1972) . 133.
7 *Froster v Nelson*, 27 U.S. (2 pet.) 253, 314 (1829) per Marshall, C.J.
8 See Miller, *Op. Cit*. at 132.
9 Resolutions and Recommendations of the Second African Regional Conference for Women Judges held in K. Nairobi, on 6 – 8 August, 2001.
10 *Ibid*.
11 Report of Consultative Meeting of the Department of International and Comparative Law of the Federal Ministry of Justice held at Abuja on 14 – 15 March, 2006..
12 *Ibid*.
13 Cap. A 9, Laws of the Federation of Nigeria, 2010.

(Ratification and Enforcement) Act.[1]

6. Domestication of Treaties and International Obligations of Countries

It is significant to note that, Article 27 of the Vienna Convention on the Law of Treaties makes it clear that with respect to treaty obligation, a State may not invoke the provision of its internal law as justification for its failure to perform a treaty.[2]

Thus, while an undomesticated treaty may not be enforceable by the national courts, it remains binding on the Nation at the international level. In the case of *Cameroun v Nigeria: Equatorial Guinea Intervening*,[3] one of the questions that arose for determination was whether a state like Nigeria would be permitted to rely on domestic law to avoid its obligation under a treaty. This case involved a dispute between Nigeria and Cameroun over the land and maritime boundary between them. Cameroun argued that the Yaounde II Declaration and the Maroua Declaration provide a binding definition of the boundary delimiting the respective maritime spaces of Cameroun and Nigeria.

It was argued also that the signing of the Maroua Agreement by the Heads of State of Nigeria and Cameroun on 1 June 1975 expressed the consent of the two States to be bound by that treaty; that they manifested their intention to be bound by the instrument they signed; that no reservation or condition was expressed in the text and that the instrument was not expressed to be subject to ratification.[4] Nigeria on its part stressed that Yaounde II Declaration was not a binding agreement but simply represented the record of a meeting.[5] It was further argued that the Maroua Declaration lacked legal validity, since it was not ratified by the Supreme Military Council after being signed by the Nigerian Head of State[6] as required under the 1963 Nigerian Constitution in force at the relevant time (June 1975). Accordingly, it was contended that the Agreement was subject to ratification.

The International Court of Justice *inter alia* held that: "the court cannot accept that Maroua Declaration was invalid under international law because it was signed by the Nigerian Head of State of the time but never ratified".[7] While rejecting the argument put forward by Nigeria that its constitutional rules regarding the conclusion of treaties were not complied with, the court referred to article 46, paragraph 1 of the Vienna Convention on the Law of Treaties which provides that: "(a) State may not invoke the fact that its consent to be bound by a treaty has been express in violation of a provision of its international law of fundamental importance".[8]

Notwithstanding the foregoing, a country would not deliberately jettison the imperatives of its constitutional provisions in favour of implementing an undomesticated treaty. Thus, the provision of section 12(1) of the Nigerian Constitution has continued to constitute a clog in the process of direct application of treaties, with the embarrassing consequence of the President having to ratify a treaty on behalf of his country without the country honouring its obligations under the said treaty by implementing its provisions because the National Assembly has failed or refused to enact the requisite legislation. Romola[9] still insists that courts in any civil society, by virtue of their pertinent role within the system, cannot afford to disregard the obligation of States with respect to international law. It is also pertinent to stress that the enforcement of an undomesticated treaty by the courts in its effort to uphold State obligation under the treaty would most likely result in the violation of the Constitution as the Supreme law of the land. A balance must be struck to address the situation and some suggestions are proffered below in this regard.

7. Conclusion and Recommendations

From the foregoing, it is clear that legislative control of the President's treaty- making power is indirect as it consists of the failure or refusal, by the legislature, to enact the necessary legislation for the implementation of treaties that have been ratified by the President. The knowledge that the legislature may refuse to enact the implementing legislation should hopefully guide the President in the negotiation and ratification of treaties, and prevent him from entering into international treaties and agreements that may be harmful to the national interest

[1] Cap. A 10, Laws of the Federation of Nigeria, 2010.
[2] A. Romola, "International Law in Nigerian Courts: Circumventing the Firewall of Domestication Before Application," available at http://www.chr.up.ac.za/centre-projects/ildc/papers-2009/Romola.doc., accessed 12/11/2014.
[3] See B.A. Njemanze, *The Legal Battle Between Cameroun and Nigeria Over Bakassi Peninsula* (Owerri: Onii Publishing House, 2003) pp. 27 – 163 (The text of the decision is reproduced therein).
[4] *Ibid*, para 253 at 136. Maroua Declaration/Agreement was treated as bilateral treaty between Nigeria and Cameroun.
[5] *Ibid*, para 257 at 137.
[6] *Ibid*, para 158 at 137.
[7] *Ibid*, para 264 at 139.
[8] *Ibid*, para 265 at 140.
[9] *Ibid*.

in the long run. Legislative checks on treaty-making and foreign affairs powers of the President[1] are therefore necessary to ensure that decisions and agreements made with foreign countries are beneficial to, and in the best interest of, the country. However, it is certain that the failure by the Nigerian legislature to enact the relevant legislation to domestication a ratified treaty may not arise from its deliberate effort to restrain and check the treaty-making power of the executive. Other reasons may be responsible for the failure; one of which may be sheer abdication by the legislature of its constitutional responsibility. Indeed, the slow pace of domestication of ratified treaties recorded by the Nigerian National Assembly is a clear indication that the National Assembly does not give priority attention to this responsibility. The Nigerian legislature must therefore wake up from slumber and discharge its constitutional responsibilities diligently with respect to the domestication of treaties duly ratified by the executive. All administrative bureaucracies and bottlenecks must be removed to ensure proper communication and liaison between the relevant executive departments and the National Assembly.

It is also been shown that the requirement of domestication can create the unhealthy situation where a treaty duly ratified by the President, and, therefore, binding on the nation at the international level is unenforceable locally because it is not domesticated. In such situations, the country would still be bound to honour its international obligation as it is not allowed to invoke the provision of its internal law as justification for its failure to perform the treaty. In order to avoid these unhealthy and embarrassing situations, the involvement of the legislature in the ratification process of some treaties is strongly recommended.[2] By this arrangement, the National Assembly would be afforded the opportunity to scrutinize the proposed treaty and give its consent by way of a resolution before it is ratified by the executive. This however, would not obviate the necessity for subsequent domestication of the ratified treaty by the legislature but would greatly enhance and facilitate the process since the legislature had earlier supported its ratification.

It is also important to stress that the strict classification of countries into monist and dualist nations is no longer realistic and tenable in contemporary international law jurisprudence. The amendment of the Nigerian Constitution which empowers the National Industrial Court to invoke the provisions of any international labour treaty or convention to which Nigeria has ratified, notwithstanding that such instruments have not been domesticated, lends credence to this assertion. The practical effect of this constitutional amendment is that labour law treaties and conventions, ratified by Nigeria, could be enforced nationally, even though they are not expressly domesticated in accordance with the procedure stipulated under section 12(1) of the 1999 Constitution. We believe that this is a welcome development, which should be extended to treaties and conventions on other areas of international law; particularly those on Human Rights. Indeed the strict adherence to the monist and dualist classification is gradually being jettisoned in favour of a hybrid situation. Thus, a country's Constitution can contain both monist and dualist elements.[3]

The South African constitutional position, by which certain treaties require domestication, while others are self executing, and, therefore, come into force without any legislative approval/domestication,[4] seems to address the situation properly, and, therefore, recommended for Nigeria.

[1] CFRN, 1999 s. 12.

[2] Pyle & Pious, *Op. Cit*. at 243, (noting that under the American Constitutional arrangement, the President's authority to make treaties has come to mean the power to negotiate them, to submit them to the Senate, and if the Senate consents, to make the final decision whether to ratify them on behalf of the United States).

[3] See A Aust, *Modern Treaty Law and Practice* (Cambridge University Press: Cambridge, 21007) P. 182 asserting that many national Constitutions contain both dualist and monist elements).

[4] 1996 S. Afr. Const., s. 231.