

**A COMPARATIVE ANALYSIS OF THE ROLE OF SUB-NATIONAL PARLIAMENTS IN INTERNATIONAL
HUMAN RIGHTS LAW IN NIGERIA AND SOUTH AFRICA**

**SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS OF THE LLM
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DECLARATION

I, **Okunbolade, Ajibike Yemisi** declare that the work presented in this dissertation is original. It has never been presented to any other University or Institution. Where other people's works have been used, references have been provided. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfilment of the requirements for the award of the LL.M Degree in Human Rights and Democratisation in Africa.

Signed.....

Date.....

Supervisor: Professor Nico Steytler

Signature.....

Date.....

DEDICATION

To God, to my family and to Segun Adefami

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LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ACRWC	African Charter on the Rights and Welfare of the Child
ANC	African National Congress
APRM	African Peer Review Mechanism
AU	African Union
CEDAW	Convention on the Elimination of all forms of Discrimination against Women
CRC	Convention on the Rights of the Child
ECJ	ECOWAS Court of Justice
ECOWAS	Economic Community of West African States
FCT	Federal Capital Territory
FGM	Female Genital Mutilation
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
IHRL	International Human Rights Law
NCOP	National Council of Provinces
NHRC	National Human Rights Commission Nigeria
SADC	Southern African Development Community
SAHRC	South African Human Rights Commission
UN	United Nations
UPR	Universal Periodic Review
USA	United States of America

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CHAPTER ONE

INTRODUCTION

1.1. Background to the study

Foreign policy has generally speaking been the traditional ‘responsibility of national governments’. This is particularly true of states with unitary systems of governments but is less true in federalist states.¹ Federalist states are states which have adopted a system of government whereby ‘powers are divided and shared between constituent governments and a general government having certain nation-wide’ responsibilities’.² Federalism is often adopted by pluralistic societies to ensure a system of uniformity while accommodating differences³ and to maintain national security and economic unity.⁴ By their nature, federalist states share responsibilities and powers between the central and constituent units.

Since 1945, a body of international rules and principles known as ‘international human rights law’ have been developed to regulate the relationship between states and individuals and to safeguards individual interests by ensuring that states do not do as they please.⁵ Again at the forefront of its development were national governments who acted because of the need to ensure uniformity.⁶ This is not to say that sub-national governments have not played any role. In general international law, sub-national governments have been known to negotiate and participate in areas such as culture,⁷ foreign trade and investments.⁸ Their participation is also seen in areas which fall under their functional mandate⁹ such as criminal law, family law which are all parts of new areas of developments in international human rights law (IHRL).¹⁰

¹ H Michelmann *Foreign relations in federal countries* (2009) 3.

² J Kincaid ‘Introduction’ in AL Griffiths (ed) *Handbook of federal countries* (2002) 7.

³ n 2 above, 8.

⁴ N Steytler ‘Federal homogeneity from the bottom up: provincial shaping of national HIV/AIDS policy South Africa’ (2003) 33 no 1 *Publius The Journal of Federalism* 59.

⁵ PJ Spiro ‘The states and international human rights law’ at http://heinonline.org/HOL/Page?handle=hein.journals/flr66&div=25&g_sent=1&collection=journals#583 (accessed 20 August 2010).

⁶ Michelmann (n 1 above) 3.

⁷ Examples are Quebec in Canada, Basque in Spain. See J Kincaid ‘Foreign relations of sub-national units : Constituent diplomacy in federal systems’ in R Blindenbacher & A Koller (eds) *Federalism in a changing world - learning from each other* (2003) 92-94.

⁸ See Michelmann (n 1 above) 3.

⁹ C Bosire ‘The role of provincial legislatures in negotiation and ratification of international human rights treaties in

Sub-national governments also influence central governments in some areas of international human rights law which lie within the centre's responsibility. For instance the United States of America (USA) Congress has been known not to ratify treaties unless they conform to state practices. Thus, component states of the USA are not forced to conform with international human rights standards.¹¹

In Africa, sub-national parliaments in Nigeria are saddled with the responsibility of domesticating treaties which fall within their area of competence i.e. matters not in the exclusive federal legislative list.¹² Thus by this provision, Nigeria's state Houses of Assembly can domesticate IHRL treaties as human rights is not included in the exclusive legislative list.¹³ Similarly, in South Africa, the National Council of Provinces (NCOP) which represents provincial interests has the duty to approve IHRL treaties before they become operational.¹⁴ The participation of provinces in this process is ensured through the principle of co-operative government.¹⁵ Such provisions as this readily afford sub-national governments the opportunity of being involved in promoting IHRL obligations.

There are good reasons for sub-national governments to be involved in the making and implementation of IHRL treaties and to conduct a study on it. First, IHRL has made an in-road into their traditional areas of competence. Second, sub-national parliaments are closer to the people in the scheme of governance. Their proximity to the people places them in a position where they are more attuned to the local needs and human rights violations on ground than national governments or the elite diplomats who negotiate IHRL treaties. Third, the representative nature of sub-national parliaments and the ability to use tools such as oversight presents an avenue for ensuring the implementation of IHRL obligations by sub-national executives especially where it borders on their jurisdiction. Fifth, sub-national parliaments provide avenues for debating and criticising acts of sub-national governments which are not in tandem with IHRL.

Finally a study is warranted because sub-national parliaments seem not to have developed the capacity for promoting human rights. In certain instances, violations of human rights occurred because of laws enacted

South Africa' unpublished paper, Community Law Centre, University of Western Cape, 2010.

¹⁰ Spiro (n 5 above).

¹¹ As above.

¹² Section 12 Constitution of the Federal Republic of Nigeria 1999 (Nigerian Constitution or 1999 Constitution).

¹³ O Nwankwo 'Briefing on the domestication of the Convention on the Elimination of all forms of Discrimination against Women (CEDAW)' at <http://www.aacoalition.org/domestic_cedaw.htm> (accessed 17 August 2010). See also second schedule of the 1999 Constitution.

¹⁴ Section 231(2) Constitution of the Republic of South Africa 1996 (South African Constitution).

¹⁵ Chapter 3 South African Constitution.

by them.¹⁶ Protection of state subjects cannot be adequately guaranteed if sub-national parliaments fail to give effect to IHRL obligations through ratification, domestication or implementation of treaties. To sum it up, sub-national parliaments are, as Griffith, Ryle and Wheeler-Booth say, the ‘custodian of the liberties of the people’¹⁷ and should therefore be afforded greater roles in IHRL.

This study therefore examines and compares the sub-national parliaments of Nigeria and South Africa with a view of identifying their role, or possible role, in negotiating, ratifying, domesticating and implementing IHRL treaties. The choice of South Africa and Nigeria is based on their status as countries with federal and federal-type constitutions.

1.2. Problem Statement

In an increasingly globalised world, foreign treaty making and implementation is still the federal preserve. However, sub-national governments can and have in fact played roles in international relations. The question therefore is: What role can sub-national parliaments play in relation to IHRL and is there justification for this role?

1.3. Research Questions

The study seeks to address three sets of questions:

The first set of questions deal with negotiation and ratification of IHRL treaties:

- (a) What is the role, or what should be the role, of sub-national parliaments in negotiating and ratifying IHRL treaties in Nigeria and South Africa?
- (b) How have this role been played, or how should this role be played?
- (c) Is there justification for this role?

The second set of questions deal with domestication:

- (a) What role, or what should be the role, of sub-national parliaments in domesticating IHRL treaties in Nigeria and South Africa?
- (b) How has this role been played or how should it be played?

¹⁶ In Nigeria, the death penalty is executed in the states and under state laws. For instance, in Katsina state, Amina Lawal was condemned to death for allegedly committing adultery contrary to the shari’a law. See <http://www.europa-eu-un.org/articles/en/article_1603_en.htm.AminaLawal> (accessed 24 August 2010).

¹⁷ JAG Griffith, M Ryle & MAJ Wheeler-Booth *Parliament: Functions, practice and procedures* (1989) 7.

The third set of questions deal with implementation:

- (a) What role, or what should be the role, of sub-national parliaments in the implementation of IHRL treaties in Nigeria and South Africa?
- (b) How has this role been played or how should this role be played?

1.4. Significance of study

The role of parliament in relation to international human rights law is often not considered as much as the role of the executive and judicial arms of government. Where it is considered, it is often the role of national parliaments only. The study attempts to contribute to knowledge by bringing to fore the potentials of sub-national parliaments and the possibility of their involvement in international human rights law. It makes a case for greater utility of the sub-national parliament in treaty making and implementation. By comparing Nigeria and South Africa, best practices are highlighted.

1.5. Conceptual clarification

Sub-national parliaments

The term ‘sub-national parliament’ refers to parliaments of the constituent units of a federal state. These are called ‘Houses of Assembly’ in Nigeria and ‘provincial legislatures’ in South Africa.¹⁸ A House of Assembly in Nigeria consists of ‘three or four times the number of seats which a state has in the federal House of Representatives’.¹⁹ The number of seats is not less than 24 or more than 40.²⁰ The electoral body is required to divide the state into constituencies for the purpose of election into the state House of Assembly.²¹ The Houses of Assembly are empowered to make laws on matters listed in the concurrent legislative list²² and on residual matters. Matters not expressly listed in the exclusive or concurrent lists are residual. State Houses of Assembly have no constitutional authority to negotiate and conclude treaties. However section 12 of the 1999 Constitution permits the Houses of Assembly to play a role in implementation of treaties as will be discussed later in the thesis.

¹⁸ Section 43(b) South African Constitution.

¹⁹ Section 91 Nigerian Constitution.

²⁰ As above.

²¹ Section 112 of the 1999 Constitution.

²² Schedule II, part II of the 1999 Constitution.

The provincial legislature in South Africa consists of between 30 and 80 members.²³ Provincial legislatures can legislate on matters in the exclusive list in Schedule 5 and on matters in the concurrent legislative list in Schedule 4. Provincial legislatures play an indirect role in the ratification of treaties through participation in the NCOP.²⁴ According to Steytler, they play this role even in those matters that do not touch on provinces.²⁵ This serves as a distinction between Nigeria and South Africa because in Nigeria, state Houses of Assembly do not ratify treaties neither do they domesticate treaties which fall outside their functional areas.²⁶

1.6. Literature survey

Federalism and foreign relations have generated academic interests. Equally of interest is the foreign relation of sub-national entities. This has served as themes of conferences and academic works of which the most pertinent²⁷ is referred to.

Contributors all agree that there is an increased involvement of sub-national governments in international relations. Thurer,²⁸ challenges Alfred Escher's nineteenth century statement of 'internal diversity and external unity'. Kincaid²⁹ adduces reasons for the development of sub-national or constituent diplomacy. Interestingly, he mentions human rights and democracy as reasons for engaging in constituent diplomacy. He therefore justifies the relevance of conducting a study in the human rights context, this is even so because most contributors³⁰ focus on areas such as foreign trade and cross-border issues when considering sub-national units' external relations. Contributors such as Polaschek³¹ whose work on sub-national units' foreign relations relate to human rights, focus on countries except in Africa. These contributions are

²³ Section 105(2) South African Constitution.

²⁴ N Steytler 'Cross-border external relations of South Africa provinces' in Rudolf Hrbek (ed) *External relations of regions of Europe and the world* (2003) 247. See section 231(2) South African Constitution.

²⁵ As above.

²⁶ See section 12(3) Nigerian Constitution.

²⁷ I.e. R Blindenbacher & A Koller (eds) *Federalism in a changing world – learning from each other* (2003). It consists of papers presented at the International Conference on Federalism 2002.

²⁸ D Thurer 'Federalism and foreign relation' in Blindenbacher & Koller (eds) (n 27 above) 28.

²⁹ J Kincaid 'Foreign relations of sub-national units: Constituent diplomacy in federal systems' in Blindenbacher & Koller (eds) (n 27 above) 75-76.

³⁰ E.g. WJ Hopkins 'Foreign relations of sub-national units' in Blindenbacher & Koller (eds) (n 27 above); N Steytler 'Cross-border external relations of South Africa provinces' in Rudolf Hrbek (ed) (n 24 above) 247 -256.

³¹ MF Polaschek 'Implementation of international and supra-national law by sub-national units' in Blindenbacher & Koller (eds) (n 27 above) 169 - 176.

relevant to this study mainly because the problems of federalism are the same everywhere. However, the Euro-centric approach leaves a gap in knowledge as to practices in Africa.

Steytler and Bosire³² have attempted to fill this gap through their work on the role of sub-national parliaments in relation to IHR treaties in South Africa. Their work is of importance to this study. This study builds on their work but more importantly it goes further to aid the learning experience by comparing South Africa and Nigeria.

1.7. Assumptions underlying study

The study is based on the assumption that sub-national parliaments have no express role in the negotiation and conclusion of treaties in Nigeria and South Africa. The study will therefore argue for an implied role because there are legitimate basis for assuming that sub-national parliaments have a role to play in the making and operation of international human rights treaties.

1.8. Methodology

The study is carried out using the comparative approach. Key methodologies include literature survey, internet and other electronic sources.

1.9. Delineation and Limitation of study

The study is limited to state parliaments in Nigeria and provincial legislatures in South Africa. It does not examine the councils at the local governments or municipal spheres. No detail as to the history of parliaments is provided. The focus is on treaty obligations of international human rights law. The framework for comparing the sub-national parliament of both countries is limited to their role in the negotiation, ratification and domestication of treaties. Their role in implementation is with regards to oversight and other legislative tools. At the time of research for this study, amendments to Nigeria's 1999 Constitution had been made. Amendments mostly relate to electoral matters and therefore they are not included in this study.³³

³² C Bosire & N Steytler 'The role of provincial parliaments in international human rights law in South Africa' unpublished paper, Community Law Centre, University of Western Cape, 2010; Bosire (n 9 above); see also Bosire 'International human rights law and the oversight role of provincial legislatures in South Africa' unpublished paper, Community Law Centre, University of Western Cape, 2010; Bosire 'The role of provincial legislatures in domestication and implementation of international human rights treaties in South Africa' unpublished paper, Community Law Centre, University of Western Cape, 2010.

³³ There is an ongoing controversy as to whether the amended constitution is law in Nigeria. This is because there is

1.10. Overview of chapters

Chapter one is the background to the research and justification for the study.

Chapter two examines the federal structure of Nigeria and South Africa. It discusses the similarities and differences between both countries and concludes that the differences justify a comparison.

Chapter three focuses on the role of the Nigeria and South Africa's sub-national parliaments in relation to IHRL law. It deals with their role in negotiating, ratifying and domesticating international human rights treaties. It attempts to justify this role as well as compares how this role has and/or should play out in both countries.

Chapter four examines the role of the sub-national parliaments of both Nigeria and South Africa in relation to implementation of IHRL treaties. Focusing majorly on oversight the chapter compares how the role has played out or should play out in relation to IHRL obligations.

Chapter five is the conclusion and recommendation. The chapter draws out best practices and gives recommendations which take the peculiar situation of both countries into account.

dispute over Presidential assent. Court actions on this issue are pending. See 'Amended constitution in the throes of controversy' *The Punch* 19 September 2010 at <<http://www.punchng.com/Articl.aspx?theartic=Art201009190395818>> (accessed 13 October 2010). See also 'Constitutional amendment: Abuja Federal High Court receives 2 suits' *Daily Trust* 13 August 2010 at <http://www.dailytrust.com/dailytrust/index.php?option=com_content&view=article&id=1062:constitution-amendment-abuja-federal-high-court-receives-2-suits&catid=18:inside-politics&Itemid=19> (accessed 26 August 2010).

CHAPTER TWO

THE FEDERAL STRUCTURE OF NIGERIA AND SOUTH AFRICA

2.1. Introduction

Federalism is a tool of state organisation which has gained acceptance all over the world. In Africa, countries such as Ethiopia have adopted federalism. Most federal countries are organised as ‘constitutional democracies’.³⁴ Constitutional democracies base the foundations of their democracy on a constitution. The constitution is an instrument which establishes the form and character of the state, the institutions involved in the ‘decision making process’, the procedure and limits of these institutions thus guaranteeing them in advance.³⁵

‘Federalism’ is defined as ‘a state form in which the autonomy of sub-national units and their participation in government at the centre are constitutionally guaranteed’.³⁶ A characteristic feature of federal states is that their constitution defines and determines their sub-units.³⁷ Federal states with constituted democracies limit the central power through their constitution, this limitation guarantees a balanced self-determination by securing the participation of the sub-units in the decision making process especially if there is cultural diversity.³⁸ The process of division of powers is known as ‘divided sovereignty’.³⁹

In relation to international relations, most federal states hold the principle of ‘internal diversity, external unity’.⁴⁰ Along with the recognition that states are the bearers of rights and obligations in international law, federal states adhere to the belief that only the central authority should participate in international decision making processes.

With the advent of globalisation, some federal constitutions no longer vest power over international rights and obligations in the federal government alone.⁴¹ Such constitutions empower sub-national units to

³⁴ B Ehrenzeller, R Hrbek, G Malinverni and D Thurer all maintain that federalist systems are always founded on a constitution. See ‘Federalism and foreign relation’ in Blindenbacher & Koller (eds) (n 27 above) 55.

³⁵ T Fleiner & LRB Fleiner ‘Theoretical aspects of the organisation of the modern state’ in *Constitutional democracy in a multicultural and globalised world* K Le Roy trans (2009) 354.

³⁶ Fleiner & Fleiner (n 35 above) 529.

³⁷ As above.

³⁸ Fleiner & Fleiner (n 35 above) 512.

³⁹ Fleiner & Fleiner (n 35 above) 457.

⁴⁰ Fleiner & Fleiner (n 35 above) 553.

⁴¹ Y Lejeune ‘Participation of sub-national units in the foreign policy of the federation’ in Blindenbacher & Koller (eds) (n

interact with external powers. In keeping with this such federations devolve their powers thereby broadening the authority of their sub-national units to participate in international affairs.⁴²

Nigeria and South Africa are classified as federal countries with constituted democracies. Section 2(2) of the 1999 Constitution of Nigeria establishes Nigeria as a federation consisting of states and a federal capital territory (FCT). No express provision in the South African Constitution establishes South Africa as a federal state. Rather, the position is implied from the provisions of the constitution. The statement receives support from academic writers⁴³ and it is generally perceived that South Africa is a 'hybrid' or 'highly centralised' type of federation.⁴⁴

Both countries constitutions find a common ground in that they establish the national and sub-national (state/provinces, local/municipal) governments.⁴⁵ Both countries are *prima facie* similar in many respects. For instance:

- (a) Both countries have a federal or federal-type constitution.
- (b) Both countries are dualist countries⁴⁶ which require domestication for international treaties to have a binding legal effect. However, the South African Constitution has monist elements. In this regard, section 39 of the South African Constitution mandates the courts to consider international law when interpreting the bill of rights while section 231(4) excludes self-executory treaties from the requirement of domestication.
- (c) In terms of historical development both share a history of human rights violation, South Africa under the apartheid rule and Nigeria under military rule. The commonality between apartheid rule in South Africa and military rule in Nigeria however ends there. The nature of apartheid and the nature of military rule differ. Apartheid was a racial rule which encouraged the systemic violations of the rights of the black majority and operated under the guise of democracy.

27 above) 97.

⁴² Fleiner & Fleiner (n 35 above) 554.

⁴³ JVD Westhuizen 'South Africa' in AL Griffiths (ed) (n 2 above) 285; C Murray and SA Nakhjavani 'South Africa' in H Michelmann (ed) *Dialogue on foreign relations in federal countries* (2007) 212; Steytler (n 24 above) 247.

⁴⁴ Steytler (n 24 above) 247.

⁴⁵ Sections 2(2), (3) Nigerian Constitution.

⁴⁶ See section 12 Nigerian Constitution and section 231 of the South African Constitution.

Apartheid rule had all the trappings of constitutions,⁴⁷ elections and parliaments which catered for the needs of the white minority. Under Nigeria's military rule elections were abolished, constitutions⁴⁸ were suspended and parliament was dissolved.

(d) With regards to political development both have relatively young democracies⁴⁹ with relatively new sub-national parliaments. Whereas South Africa's parliament under apartheid rule was not fully representative due to the exclusion of blacks; Nigeria's democratically elected parliament was dissolved under military rule. The system of government adopted by both countries differs. Whereas South Africa operates the parliamentary system of government, Nigeria operates the presidential system of government.

(e) In terms of social background, both countries are pluralistic societies. Nigeria has about 350 ethno-linguistic groups,⁵⁰ while South Africa has diverse racial and ethno-linguistic groups.

2.2. Federal structures of Nigeria and South Africa distinguished

2.2.1. History and background of federalism in Nigeria

Nigeria gained independence on 1 October 1960 and was admitted as the 99th member of the United Nations (UN) on 7 October 1960. As a member of the United Nations, Nigeria is signatory to the United Nations Charter and recognises the Universal Declaration of Human Rights. It has ratified many IHRL instruments in the UN body such as the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC).

Nigeria is a member of regional bodies such as the African Union (AU) and the Economic Community of West African States (ECOWAS). As a member of the AU it has ratified and domesticated the African

⁴⁷ South Africa's previous constitutions were the 1910, 1961 and 1983 constitutions.

⁴⁸ The 1963 and 1979 constitutions of Nigeria are examples of constitutions that were suspended by the military.

⁴⁹ South Africa achieved democracy in 1994 while Nigeria's democracy came in 1999.

⁵⁰ JB Ejobowah 'Integrationist measures in Nigeria's constitutional engineering: Successes and failures' in S Choudhry (ed) *Constitutional design for divided societies: Integration or Accommodation* (2008) 234.

Charter on Human and Peoples' Rights (ACHPR). As a member of the UN Nigeria has served as a non permanent member of the Security Council of which it ascended the presidency in July 2010.

Nigeria is perhaps the oldest and most resilient federal system in Africa. As a federal country, it is known to have weathered through the storms of a civil war, ethno-religious conflicts and military rule. The foundations of Nigerian federalism were set in 1914 when the British amalgamated the Northern and Southern protectorates of Nigeria.⁵¹ What appeared to be the beginning of federalism was strengthened under the 1946 Constitution with the creation of three regions namely, North, East and West. Sub-national parliaments were also created during this period. By granting each region some autonomy the 1954 Constitution strengthened Nigeria's federalism. Since independence on 1 October, 1960 Nigeria has continued to maintain its federal character. It is worthy of mention that Nigeria's federalism has survived all military governments but one.⁵² In all its periods of democracy i.e. 1960 - 1966, 1979 -1983 and 1999 - date, Nigeria has maintained its federal character.⁵³

The current constitution is the 1999 Constitution. It is a creation of the military and is patterned after the old 1979 Constitution. The 1999 Constitution provides that Nigeria is a federation consisting of 36 states and a FCT.⁵⁴ Power is structurally divided between the federal government, 36 states and the local governments. Federal legislative power is vested in the bicameral National Assembly which consists of the 'Senate' and the 'House of Representatives'.⁵⁵ State legislative power is vested in the Houses of Assembly of the 36 states of the federation.⁵⁶ The power to negotiate and conclude treaties in Nigeria falls on the executive; however, implementation of treaties through domestication falls on the National Assembly.⁵⁷

For the purpose of implementing a treaty, the National Assembly can legislate on matters within and outside the exclusive legislative list. Where treaties fall outside the exclusive legislative list, the National Assembly can still make laws for the purpose of implementing. Such laws, however, need to be 'ratified' by a majority of all the state Houses of Assembly.⁵⁸ The role of the state Houses of Assemblies in the ratification of treaties will be discussed later in chapter three.

⁵¹ FC Nze 'Nigeria (Federal Republic of Nigeria)' in AL Griffiths (ed) (n 2 above) 221-223.

⁵² General Aguiyi Ironsi's abolished federalism in 1966. However this lasted until another military coup.

⁵³ As above.

⁵⁴ Section 2(2) 1999 Constitution; section 2(3) lists the 36 states.

⁵⁵ Section 4(1) 1999 Constitution.

⁵⁶ Section 90 1999 Constitution.

⁵⁷ Section 12 1999 Constitution.

⁵⁸ Section 12(3) 1999 Constitution.

It should be noted that the 1999 Constitution provides for interaction between the Senate and House of Representatives (the two arms of the bi-cameral national legislature) through ‘joint sittings’ or joint committees⁵⁹ but it does not provide any means of interaction for the National Assembly and the Houses of Assembly. For the purpose of domestication and implementation of treaties therefore, each legislative level acts individually and according to ‘perceived interests’.⁶⁰

2.2.2. History and background of federalism in South Africa

South Africa is a member state of the UN and a signatory to several UN instruments.⁶¹ Unlike Nigeria (and most African countries) South Africa is one of the 51 founding members of the UN. South Africa is also a member state of the AU⁶² as well as regional bodies such as the Southern African Development Community (SADC).⁶³

Due to its policies of apartheid, South Africa’s membership of the UN was suspended on 12 November 1974. It was however re-admitted in 1994 following democratic elections.⁶⁴ South Africa has served as a non permanent member of the UN Security Council and has been re-elected for the position in 2011.

Following the advent of democracy, South Africa’s federalism was proposed under its interim constitution of 1993. Under the 1996 constitution, it is not categorically stated that South Africa is a federal state but, as earlier stated, most analysts view the constitution as federalist.⁶⁵ The 1996 constitution of South Africa adopts a federal system consisting of three spheres of government namely, national, provincial and local.⁶⁶ Although the constitution provides for three spheres of government, it is the case in practice that the national government wields more power than the provinces.⁶⁷ The provincial government consists of nine provinces.⁶⁸ The federal legislative power is vested in a bicameral parliament which consists of the

⁵⁹ Sections 53 and 59(2) 1999 Constitution.

⁶⁰ E Osieke ‘The Federal Republic of Nigeria’ at
<<http://www.federalism.ch/files/categories/IntensivkursII/Nigeriag3.pdf>> (accessed 24 August 2010).

⁶¹ UN Charter, ICESCR, ICCPR, CRC and CEDAW.

⁶² <<http://www.southafrica-newyork.net/pmun/>> (accessed 10 September 2010).

⁶³ As a member of this organisation it has ratified ACHPR.

⁶⁴ n 62 above.

⁶⁵ See n 45 above.

⁶⁶ R Calland (ed) *The first five years: A review of South Africa’s democratic parliament* (1999) 9.

⁶⁷ Steytler (n 24 above) 247.

⁶⁸ Eastern Cape, Free State, Gauteng, KwaZulu-Natal, Limpopo, Mpumalanga, Northern Cape, North West, and Western Cape provinces. See section 103 South African Constitution.

National Council of Provinces (NCOP) and the National Assembly. The NCOP is similar to the Nigerian Senate but it is quite distinct in certain aspects namely:

- Whereas Nigerian senators are directly elected by popular votes, the members of the South African NCOP are nominated from the provincial legislature.
- Although in theory, members of the Nigerian Senate should represent their states, practice shows that they represent their respective constituencies rather than the state as a whole.⁶⁹ The situation in South Africa is different as members of the NCOP represent their province's interests.⁷⁰
- The South African NCOP consists of ten nominees from each province; six of the ten nominees are permanent members while the remaining four are members of provincial parliaments dealing with the issues under discussion at the NCOP.⁷¹

At the provincial sphere in South Africa legislative power is vested in the provincial legislatures.⁷² For the purpose of legislating for the provinces, Schedules 4 and 5 of the Constitution provides for concurrent areas of legislation⁷³ and exclusive areas of legislation respectively. Matters on the concurrent legislative list lie within the mandate of both national and sub-national legislatures. With regards to the exclusive legislative list, a distinction between Nigeria and South Africa lies. Whereas in Nigeria, matters on the exclusive legislative list⁷⁴ are the exclusive preserve of the National Assembly, in South Africa, matters on the exclusive legislative list are the exclusive preserve of provincial parliaments.

As in Nigeria, negotiation and signing of international treaties in South Africa is the responsibility of the national executive.⁷⁵ However, such international treaty cannot be binding unless it is approved by a

⁶⁹ For the purpose of election, each state is divided into three senatorial districts by the electoral body. Each state is therefore represented by three senators based on the principle of equality of states. See sections 71 and 72 of the 1999 Constitution and Osieke (n 60 above).

⁷⁰ JVD Westhuizen 'South Africa' in AL Griffiths (ed) (n 2 above) 287; section 42(4) of the South African Constitution.

⁷¹ Calland (ed) (n 66 above) 22.

⁷² Section 43(b), (c) South African Constitution.

⁷³ Matters on the concurrent list include: agriculture, cultural matters, disaster management, education, health services, housing, indigenous law and customary law subject to chapter 12 of the constitution, language policy, nature conservation, police, pollution control, tourism, welfare licensing and welfare services.

⁷⁴ Matters on the exclusive list include: ambulance services, provincial planning, provincial cultural matters, provincial recreation and amenities.

⁷⁵ Section 231(1) South African Constitution.

resolution of the National Assembly and the NCOP.⁷⁶ The difference between Nigeria and South Africa in this regard will be highlighted later in chapter three of the study.

A final distinction in both countries' federal structure is that in South Africa, the constitution adopts a principle of co-operative government and intergovernmental relationship among the three spheres of government.⁷⁷ In Nigeria, this principle is sadly lacking.⁷⁸

2.3. Conclusion

The chapter has examined the federal structures of Nigeria and South Africa. It identifies that on the surface, there are similarities in both federal structures. However a deeper analysis reveals that the two structures are different enough to justify a comparison of the role of their sub-national parliaments in negotiating, ratifying, domesticating and implementing IHRL treaties. The next chapter therefore engages in a comparative analysis of the role of the sub-national parliaments of both countries in negotiating, ratifying and domesticating IHRL treaties.

⁷⁶ Section 231(2) South African Constitution.

⁷⁷ Chapter 3 South African Constitution.

⁷⁸ IA Ayua & DCJ Dakas 'Federal republic of Nigeria' in J Kincaid & GA Tarr (ed) *A global dialogue on federalism: Constitutional origins, structure, and change in federal countries* (2005) 266.

CHAPTER THREE

THE ROLE OF SUB-NATIONAL PARLIAMENTS IN THE NEGOTIATION, RATIFICATION AND DOMESTICATION OF INTERNATIONAL HUMAN RIGHTS LAW (IHRL) TREATIES

3.1. Introduction

In this chapter, the role of the sub-national parliaments in the negotiation, ratification and domestication of IHRL treaties under the federal constitutions of Nigeria and South Africa are considered. The chapter reveals that one of the two constitutions allows for the participation of sub-national units in this regard to a greater extent than the other. In determining true functioning, the practice of both countries' sub-national parliaments in relation to negotiation, ratification and domestication of IHRL treaties is considered.

3.2. The sub-national parliaments of Nigeria

3.2.1. The role of sub-national parliaments in the negotiation of IHRL treaties in Nigeria

The negotiation of treaties is the exclusive preserve of the executive in Nigeria. Although these powers are not expressly mentioned or conferred on the executive under the 1999 Constitution, section 148 of the 1999 Constitution allows the president, the vice president and all the ministers to determine the 'foreign policies of the government of the federation'.

Under the 1999 Constitution also, there is no express duty conferred on sub-national governments to negotiate treaties. However, section 192 allows the governor and deputy governor along with the commissioners of a state to determine the 'policies of the state'. The 'policies of a state' are not defined or qualified. This perhaps justifies the involvement of sub-national executives in external relations conducted mainly for the purpose of promoting culture, trade and investments, 'external borrowing', 'technical assistance' and 'manpower development'.⁷⁹

Although there is no express constitutional backing, it is the case in practice that the national executive has been involved in negotiation of IHRL treaties in Nigeria. As explained by Professor Ben Nwabueze the practice is justified if one considers that the power to negotiate treaties is 'inherent in every

⁷⁹ I Gambari 'Federalism and the management of external relations in Nigeria: Lessons from the past and challenges for the future' (1991) 21 4 *The Journal of Federalism* 120.

independent sovereign state' which are held on its behalf by the 'head of state'.⁸⁰ The view of the learned author has received backing from the Supreme Court of Nigeria which also gave effect to this practice in the case of *Abacha & others v Fawehinmi*.⁸¹ The Court citing *Higgs v Minister of National Security & Others* said that 'the right to enter into treaties was one of the surviving prerogative powers of the Crown' (executive).

It is not the practice for state executives to be involved in the negotiation of IHRL treaties. IHRL treaties are negotiated and concluded by the national executive without consultations with parliament both at the national and sub-national sphere.

3.2.2. The role of sub-national parliaments in ratification of IHRL treaties in Nigeria

The Vienna Convention of the Law of Treaties (Vienna Convention) defines ratification as 'the international act so named whereby a state establishes on the international plane its consent to be bound by a treaty'.⁸² Lord Templeman defines it as 'the obtaining of approval of parliament for a treaty'.⁸³

Ratification however defined, is the sole preserve of the executive in Nigeria. There is no requirement of parliamentary approval for treaties to be ratified under the 1999 Constitution. In practice, the national executive ratifies IHRL treaties without the involvement of the federal or sub-national parliaments even where the matter falls within their jurisdiction.

It is the case in Nigeria that the term 'ratification' has been confused with 'domestication' of treaties. The confusion has led to a face-off between the National Assembly and former President Olusegun Obasanjo over the latter's failure to consult with it before ratification of the 'Greentree Agreement' which ceded Bakassi to Cameroon in compliance with the judgment of the International Court of Justice (ICJ).⁸⁴ Although the Greentree Agreement is not an IHRL treaty, the controversy generated by the ratification is of significance. The genesis of the controversy was that the National Assembly of Nigeria relying on

⁸⁰ *Federalism in Nigeria under the Presidential Constitution* (1983) 254 in Egede 'Bakassi: Critical look at the Greentree Agreement' at <http://works.bepress.com/cgi/viewcontent.cgi?article=1007&context=edwin_egede> (accessed 9 September 2010).

⁸¹ SC 45/1997 at <<http://0-www.nigeria-law.org.innopac.up.ac.za/General%20Sanni%20Abacha%20&%20Ors%20%20V%20%20Chief%20Gani%20Fawehinmi.htm>> (accessed 16 September 2010).

⁸² Article 2 Vienna Convention.

⁸³ S Templeman 'Treaty-making and the British parliament' in SA Riesenfeld & FM Abott (eds) *Parliamentary participation in the making and operation of treaties: A comparative study* (1993) 157-158.

⁸⁴ *Land and Maritime Boundary between Cameroon and Nigeria*, ICJ Reports (2002).

article 12 of the 1999 Constitution claimed that the President acted ‘unilaterally and unconstitutionally’⁸⁵ by signing and ratifying the Greentree Agreement which recognised Cameroon’s sovereignty over Bakassi. While the Senate confused ratification with implementation the House of Representatives legitimately argued that boundary adjustment could only be done in accordance with section 8 of the 1999 Constitution.⁸⁶ Section 8(2) (b) provides that a proposal for boundary adjustment is to be approved by the Senate and the House of Representatives and by members of the state House of Assembly. The Greentree Treaty is a classic example of an international agreement whose implementation fell within the area of function of the sub-national parliaments. However there was no consultation with them during the entire process of negotiation and ratification of this agreement by the national government.

3.2.3. The role of sub-national parliaments in domesticating IHRL treaties in Nigeria

Nigeria is a dualist country which makes a distinction between international law and domestic law. For international laws to have binding effect in Nigeria, parliament has to enact legislation into law through the process of domestication.⁸⁷ The 1999 Constitution does not distinguish between self executing treaties and non-self executing treaties for this purpose. Section 12 of the 1999 Constitution which deals with the implementation of treaties provides as follows:

- (1) No treaty between the federation and any other country shall have the force of law except to the extent to which any 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 presented to the President for assent, and shall not be enacted unless it is ratified by a majority of all the Houses of Assembly in the Federation.

The above provision allows sub-national parliaments to play a role in the domestication of a treaty but only on matters which fall outside the exclusive list⁸⁸ i.e. matters on the concurrent list⁸⁹ and residual

⁸⁵ See ‘senate of the federal republic of Nigeria order paper’ of Thursday 22 November 2007 at http://www.nass.gov.ng/nass/ordersenate.php?pageNum_vps=11&totalRows_vps=378 (accessed 9 September 2010).

⁸⁶ ‘UN summons Nigeria, Cameroun’ over Bakassi at <http://www.punchontheweb.com/Articl.aspx?theartic=Art200711282335929> (accessed 9 September 2010); ‘house of representatives votes and proceedings’ of Thursday 3 July 2008 at http://www.nassnig.org/nass2/votesenate.php?pageNum_vps=10&totalRows_vps=488 (accessed 9 September 2010).

⁸⁷ See *Abacha & others v Chief Gani Fawehinmi* (n 81 above).

⁸⁸ Part I of the second schedule of the 1999 Constitution contains the exclusive legislative items. 68 items are contained in this list they include extradition, arms, defence, external relations, citizenship, prisons etc. Only the national parliament can legislate on matters on this list.

⁸⁹ Part II of the second schedule of the 1999 Constitution lists items on the concurrent legislative lists. These matters

matters.⁹⁰ It needs to be reiterated that the concurrent list contains matters on which both the national and state assemblies can legislate, while matters on the residual matters are the state's exclusive preserve.

Human rights is not listed in the exclusive legislative list nor does it fall within the concurrent legislative list it could therefore be categorised as a residual matter which would fall within the legislative competence of sub-national parliaments. Sub-national parliaments therefore have a role to play in the domestication process.

In practice this has been demonstrated by the recent domestication of the CRC and the African Charter on the Rights and Welfare of the Child (ACRWC) in Nigeria. Though the National Assembly passed the Child Rights Act into law in 2003, it had no applicable effect in the federation because of the requirement of section 12(3). The law was therefore applicable only to Abuja the FCT but not to any state of the federation until passed into law by their Houses of Assembly.

The 1999 Constitution does not establish the procedure for the domestication of treaties by the Houses of Assembly but two ways have been suggested. The first suggestion is that the National Assembly would pass such treaty into law while the state Houses of Assembly would do same 'individually'. The second is that the "National Assembly would refer the harmonised copy of the bill to the state Houses of Assembly for their 'ratification' before it can be enacted into law".

The first approach was used in domesticating the Child Rights Act while the second procedure was adopted in the just concluded constitutional amendment exercise where the draft bill was presented to the state assemblies through the chairman of the 'Conference of State Assemblies'.⁹¹

It seems that the intention of the drafters of the constitution is to employ the second approach. According to Egede,⁹² a bill to implement a treaty would be enacted if it is ratified by the majority of sub-national

relate to allocation of revenue, monuments, archives, collection of taxes, electoral law, electricity, film exhibitions, industry, commerce and agriculture, science, technology, statistics, topographic surveys and education. Both national and sub-national parliaments can legislate on this list.

⁹⁰ Residual matters are not listed in the constitution they are general items which are not otherwise listed in the exclusive and concurrent legislatures in the second schedule of the 1999 Constitution.

⁹¹ *Newswatch Magazine* available online at http://www.newswatchngr.com/index.php?option=com_content&task=view&id=2201&Itemid=1 (accessed 13 September 2010).

⁹² E Egede 'Bringing human rights home: An examination of the domestication of human rights treaties in Nigeria' (2007) 51 no 2 *Journal of African law* at http://works.bepress.com/cgi/viewcontent.cgi?article=1006&context=edwin_egede (accessed 17 September 2010).

parliaments and passed on to the president for assent. The effect of the second approach is that a bill which is ratified by the majority would apply on any dissenting state.⁹³

In exercising the power to domesticate treaties, the 1999 Constitution is silent on whether the state Houses of Assembly can modify such treaty. In *Abacha v Fawehinmi*⁹⁴ the Supreme Court of Nigeria citing the case of *Chae Chin Ping v United States* (130 US. 181) stated that ‘treaties ... may be modified or repealed by Congress ... and whether such modification or repeal is wise or just is not a judicial question’.⁹⁵

Treaties have been modified by the state Houses of Assembly in practice. For instance in Niger state of Nigeria, section 27 of the domesticated Child Rights Law subjects the law to the Islamic personal law where a conflict arises between the two. This could be seen as a unilateral effort by a sub-national parliament to reserve this treaty if one considers that ‘reservation’ has the effect of modifying ‘the legal effect of certain provisions of the treaty’⁹⁶ in its application.

This form of reservation is prohibited under international law.⁹⁷ As Nigeria did not reserve the CRC when it entered into this treaty this modification would constitute a breach of its responsibility under the treaty. Also, the reservation would be invalid because it is not in accordance with the procedures established under the Vienna Convention. The Vienna Convention allows reservations ‘by a state’ when ‘signing, ratifying, accepting, approving or acceding to a treaty’ and not at the domesticating stage. It is standard procedure that reservations must be entered into in writing and communicated to the contracting states.⁹⁸

In conclusion therefore, it is the case in Nigeria that sub-national parliaments are empowered to participate in the domestication of IHRL treaties by the constitution and that in practice they have exhibited this power by domesticating and even modifying the provision of these treaties.

⁹³ As above.

⁹⁴ n 81 above.

⁹⁵ See also Egede (n 92 above).

⁹⁶ Article 1(d) Vienna Convention.

⁹⁷ Article 19(a) Vienna Convention.

⁹⁸ Article 23(1) Vienna Convention.

3.3. The sub-national parliaments of South Africa

3.3.1 The role of sub-national parliaments in negotiating IHRL treaties in South Africa

Section 231(1) of the South African Constitution expressly provides that ‘the negotiating and signing of all international agreements is the responsibility of the national executive’.⁹⁹ This provision marks a distinction between Nigeria and South Africa; Nigeria’s Constitution contains no such provision as it remains silent on the issue.

There is no express role for the national and sub-national parliaments in the negotiation and signing of IHRL treaties, however, it is argued however that there should be an implied or indirect role for the participation of sub-national parliaments in the negotiation of treaties.¹⁰⁰ This is hinged on the principle of co-operative government which is entrenched in chapter 3 of the South African Constitution. While the principle of co-operative government recognises that all spheres of government should not assume any power or functions not conferred in terms of the constitution,¹⁰¹ it also recognises that all spheres of government must ‘inform one another of’, and ‘consult one another on, matters of common interest’.¹⁰²

It would therefore not be unfounded for the national executive to involve the national parliament and sub-national governments in the negotiation of treaties by informing or consulting with them in matters of common interest such as IHRL. This should be even so in areas which fall within their exclusive jurisdiction. Once consultation has taken place at the sub-national sphere parliament can debate on the provincial position on such a matter. They can also oversee the executive to ensure that they represent the provincial position during consultations. In practice, sub-national parliaments have not played this role,¹⁰³ Steytler attributes this to lack of knowledge and skills and political factors such as African National Congress’ (ANC) party dominance.¹⁰⁴

⁹⁹ This has been pronounced upon by the Constitutional Court in the case of *President of Republic of South Africa & others v Nello Quaglini & others* 2009 ZACC para 23-24.

¹⁰⁰ Steytler (n 24 above) 247. See also Bosire (n 9 above).

¹⁰¹ Section 41(1) (f) South African Constitution.

¹⁰² Section 41(1)(h) South African Constitution.

¹⁰³ Steytler (n 24 above) 248.

¹⁰⁴ As above.

3.3.2. The role of sub-national parliaments in ratifying IHRL treaties in South Africa

Section 231(2) of the South African Constitution requires the national parliament to ratify treaties. The bicameral national parliament consists of the National Assembly and the NCOP. The Constitution makes it mandatory to secure a resolution of ratification to allow for accountability and transparency.¹⁰⁵ For the purpose of ratification, the Constitution makes a distinction between treaties of ‘technical’, ‘administrative’ or ‘executive’ nature for which parliamentary ratification is not required.¹⁰⁶ The Constitution does not define the terms ‘technical’, ‘administrative’ or ‘executive’ treaties however, Dugard¹⁰⁷ says they are understood as ‘of a routine nature, flowing from the daily activities of government department’. It suffices to say that IHRL treaties which are by nature substantive would require parliamentary ratification.

No constitutional provision directly involves sub-national parliaments in ratification of treaties. Apart from the exempted treaties, the participation of sub-national parliaments in the ratification of IHRL treaties is indirect as it comes through the NCOP.¹⁰⁸ The Constitutional Court has however pronounced in *President of Republic of South Africa & others v Nello Quagliani & others*¹⁰⁹ (*Quagliani case*) that the legislature has a ‘margin of appreciation’ in deciding their procedures provided such procedures comply with the constitution. The argument canvassed therefore is that provincial delegates to the NCOP should get a mandate from their provincial parliaments before approving IHRL treaties in accordance with the constitutional principle of co-operative government.¹¹⁰

It is not clear in practice whether provincial parliaments are consulted before bills are ratified by the NCOP.¹¹¹ However, in the *Quagliani case*,¹¹² one of the applicants (Mr Stratton) challenged the validity of the NCOP’s resolution of approval for an extradition treaty. His challenge was based on the fact that the NCOP delegation failed to consult with the provinces before approving a resolution ratifying the extradition treaty. Unfortunately the Constitutional Court could not pronounce on the validity claim partly because evidence given was the applicant counsel’s hearsay evidence. Counsel’s attempt to produce fresh

¹⁰⁵ Dugard *International law: A South African perspective* (2005) 59.

¹⁰⁶ Section 231(3).

¹⁰⁷ Dugard (n 105 above) 59.

¹⁰⁸ See also Bosire (n 9 above).

¹⁰⁹ n 99 above para 30.

¹¹⁰ Bosire ‘The role of provincial legislatures in domestication and implementation of international human rights treaties in South Africa’ unpublished paper, Community Law Centre, University of Western Cape, 2010.

¹¹¹ Steytler (n 24 above).

¹¹² n 99 above, paras 60-70.

evidence in the case was also rejected. The following discussion on the counsel's attempt is embarked on for the sole purpose of giving an insight into practice at the provinces.

In order to produce fresh evidence, the applicant's counsel wrote to the speakers of the nine provinces to indicate whether or not they had given their provincial mandate to the NCOP to ratify the treaty. Of the nine provinces only the legislatures of Mpumalanga and Western Cape responded that they had not given any mandate to their NCOP delegates. Three provinces failed to respond while one (Free State) denied receipt of the letter. As earlier stated this evidence was rejected by the Court because it was not produced to time and because no explanation for delay was given.

Notwithstanding the lack of pronouncement, it is argued that the NCOP needs to seek the mandate of their provincial parliament before approving a resolution of ratification. This would bring the provincial parliament more directly into the ratification process.

3.3.3. The role of sub-national parliaments in domesticating IHRl treaties in South Africa

South Africa is a dualist state whose constitution provides that 'any international agreement becomes law when it is enacted into law by national legislation.'¹¹³ This rule is, however, qualified as an exception is created for self-executing provisions of treaties which merely require ratification¹¹⁴ to become binding law. An IHRl treaty may cover matters listed under Schedule 4 or Schedule 5 of the Constitution. It needs to be reiterated that matters in Schedule 4 are within the concurrent jurisdiction of both national and sub-national parliaments while matters in Schedule 5 are the exclusive preserve of the sub-national parliaments. Therefore no matter what schedule an IHRl treaty covers the involvement of sub-national parliaments will be required for domestication.

An IHRl treaty falling within Schedule 4 may be introduced as a bill for domestication at the national parliament. Such a bill may affect provinces in which case a procedure stipulated under section 76 of the constitution is followed. Where it does not affect the provinces, a section 75 procedure is followed. Section 76 of the Constitution provides that when the National Assembly passes a bill, it must be referred to the NCOP. The NCOP in turn has to consult with provincial parliaments.¹¹⁵

The NCOP has been known to consult with provincial parliaments with respect to section 76 bills. The practice is well developed in the KwaZulu-Natal¹¹⁶ and Gauteng provinces. In both provinces, the

¹¹³ Section 231(4) South African Constitution.

¹¹⁴ Section 231 (4) South African Constitution.

¹¹⁵ Calland (ed) (n 66 above) 26.

¹¹⁶ See <http://www.kznlegislature.gov.za/> (accessed 13 October 2010).

provincial legislatures have extended the mandate to be consulted in section 75 bills too.¹¹⁷ The procedure in KwaZulu-Natal is worthy of note. In this province, a standing committee known as the ‘National Council of Province Standing Committee’ (NCOP committee) refers section 76 bills to the relevant portfolio committee. This portfolio committee in turn considers a bill and votes or determines changes to be made to the bill. The bill is then referred to the NCOP committee which takes into account any comment or votes of the portfolio committee. Finally, the NCOP committee determines the negotiation and voting mandate on behalf of the KwaZulu-Natal legislature. Their position determines how the provincial legislature will vote at NCOP’s sitting.

Finally, provincial parliaments may also pass legislation within Schedules 4 and 5 as part of their legislative duties in section 114 of the Constitution.¹¹⁸

3.4. Comparative analysis

It is evident that there is no express duty on the sub-national governments of both countries to be involved in the negotiation of IHRL treaties however, in the case of South Africa, an indirect duty may lie if one adopts the principle of co-operative government.

In Nigeria, there is no duty on parliament in theory and in practice to ratify IHRL treaties while in South Africa the Constitution demands the ratification of treaties by parliament. The provincial parliaments of South Africa may therefore participate in the ratification process indirectly through the NCOP.

There is an express duty for sub-national parliaments’ involvement in the domestication of IHRL treaties in Nigeria. This is true where these treaties affect their area of jurisdiction. Participation of sub-national parliaments in this regard is direct in Nigeria but not in South Africa where it is through the NCOP. Provincial legislatures may however, pass such domesticated legislation for their provinces.

For the purpose of domestication, the South African Constitution distinguishes between self-executing provisions of treaties which need no domestication besides ratification. There is no such distinction under the Nigerian Constitution. Whereas, section 76 of the South African Constitution provides a procedure for the adoption of bills to be enacted, section 12 of the 1999 Constitution provides no such procedure. As a matter of fact there is lack of clarity on the procedure.

¹¹⁷ Calland (ed) (n 66 above) 27.

¹¹⁸ Section 114(1) South African Constitution provides that provincial legislatures may ‘initiate or prepare’, ‘consider, pass, amend or reject’ any bill before them.

It is the case in Nigeria that the executive may ratify a treaty while the sub-national legislature would modify it thus depriving ‘citizens of benefits’.¹¹⁹ There seem to be no room for this in South Africa as both arms of government are involved in the ratification process.

3.5. Justification for participation in the negotiation and ratification of treaties

It is important for all levels of government to be involved in the process of negotiation and ratification of IHRL treaties. As Habegger¹²⁰ says, the realities of today do not correspond with the ‘conventional wisdom of a clear division between a domestic and a foreign sphere of foreign policy’.

IHRL treaties might impact on the sub-national governments and their parliaments’ areas of function especially as regards implementation. To avoid incurring state responsibility (as in the Niger state of Nigeria’s case), or failure of implementation of IHRL treaties (as in the Greentree Agreement) it is necessary for sub-national governments to be consulted when treaties are being negotiated.¹²¹ This would guarantee their co-operation during implementation. As Kellenberger notes, the more sub-national governments are involved in the negotiation of treaties, the more willing they are to implement.¹²² Had Nigeria consulted with states where Islam is predominant, fears relating to domestication of the Child Rights Act could have been allayed and the problems with domestication would not have arisen.

Human rights treaties are known to import ‘new values’ into a society, these values, according to Polaschek, can lead to political, ethical and religious tensions which may undervalue international human rights law.¹²³ This has been witnessed in Nigeria. It is therefore important to secure the co-operation of sub-national governments. Sub-national parliaments as representatives who are closer to the people can ensure the ‘soft-landing’ of the new values.

Sub-national parliaments can debate and resolve potential areas of conflict if consulted during negotiation process.¹²⁴ The conflict and international embarrassment which the issue of reservation of Niger state’s Child Rights Law would undoubtedly generate in Nigeria could have been avoided. More importantly, Nigeria could have avoided responsibility by entering a reservation on behalf of any of its Islamic states as Canada sometimes does for its Quebec province.

¹¹⁹ See Egede (n 92 above).

¹²⁰ B Habegger ‘Participation of sub-national units in the foreign policy of the federation’ in Blindenbacher & Koller (eds) (n 27 above) 159.

¹²¹ See also Habegger (n 119 above) 167.

¹²² Kellenberger ‘Federalism and foreign relations’ in Blindenbacher & Koller (eds) (n 27 above) 191.

¹²³ Polaschek (n 31 above) 159.

¹²⁴ J Kincaid, (n 29 above) 90.

The principle of transparency, accountability and co-operative governance which are essentials of good governance demand that there should at least be consultations with sub-national governments particularly when negotiating treaties which fall under their area of function.¹²⁵

Consulting with sub-national governments in the process of treaty negotiation allows them to exercise their rights (as institutions) to internal self-determination.¹²⁶ Internal self-determination means that they are allowed to ‘participate in the government of the state’.¹²⁷

Finally sub-national governments’ knowledge, as close representatives of their citizens, can serve as a veritable source of information for generating home grown values and rights which can be expressed at international level during the negotiation of IHRL treaties.

3.6. Conclusion

A comparison of the role of the sub-national parliaments of Nigeria and South Africa in the negotiation, ratification and domestication of IHRL treaties has been carried out in this chapter. The comparison reveals a difference in law and practice in both countries. The South African Constitution seems to afford more participation of sub-national parliaments although in an indirect fashion while the sub-national parliaments of Nigeria have a role in domesticating only.

The sub-national parliaments of Nigeria should be allowed to play a role in the process of negotiating because of the above justifications. Nigeria could adopt the South Africa model in this regard. A framework for intergovernmental relationship needs to be adopted in Nigeria. This would allow interactions between the spheres of government and ensure unity of purpose. It would also avoid a situation where the same treaties would be domesticated differently within a country. The procedure for domestication of treaties particularly where it involves the national and sub-national parliaments needs to be clarified as done by South Africa.

South Africa could ensure that the practice of involving sub-national parliaments in the negotiation and domestication of treaties is developed. The next chapter focuses on the role of the sub-national parliaments of both countries in the implementation of treaties.

¹²⁵ Bosire (n 9 above).

¹²⁶ *Reference re Secession of Quebec* (1998) 37 ILM.

¹²⁷ Dugard (n 105 above) 106.

CHAPTER FOUR

THE OVERSIGHT ROLE OF SUB-NATIONAL PARLIAMENTS AND IMPLEMENTATION OF IHRL TREATIES

4.1. Introduction

In the previous chapter, the role of sub-national parliaments in the negotiation, ratification and domestication of IHRL treaties was considered. This chapter considers their role in implementation through the exercise of oversight and other means in Nigeria and South Africa.

4.2. Constitutional democracies and oversight

Parliamentary oversight gives effect to the principles of separation of powers and checks and balances. It is the tool by which parliament monitors and reviews the actions of the executive arm of government. The practice of separation of powers, checks and balances differs according to the system of government in a country. Countries could operate a presidential system of government by which executive power is vested in separate persons outside the legislature or a parliamentary system whereby members of the legislature also form part of the cabinet. It is the perception of scholars that separation of powers is ‘implemented more strictly’¹²⁸ in the presidential system than in the parliamentary system. While Nigeria operates the presidential system of government, South Africa operates the parliamentary system.

It is not the aim in this chapter to compare these systems of government rather the chapter investigates the law and practice in Nigeria and South Africa as to the exercise of oversight in the context of IHRL treaty implementation. It examines how this role has played out or should play out through the exercise of oversight over the executive, budget approval, state reporting and implementation of recommendations and concluding observations on state reports.

4.3. Implementation of IHRL treaties in Nigeria

4.3.1. Separation of powers in sub-national governments

The sub-national governments of Nigeria consist of the states and the local governments. At state level, executive power rests in the governor¹²⁹ who together with the deputy governor¹³⁰ and commissioners

¹²⁸ Fleiner & Fleiner (n 35 above) 402.

¹²⁹ Section 176 1999 Constitution.

carries out executive responsibilities.¹³¹ The governor and deputy governor of a state are directly elected into office by popular vote. For elections, the state is regarded as a constituency and every citizen who is registered may vote at the elections.¹³²

A commissioner's office is established by the governor subject to the confirmation of the House of Assembly of the state.¹³³ The only exception is the office of the Attorney General and commissioner for Justice¹³⁴ which is established by the constitution. Provisions are made as to judicial powers of the state.¹³⁵

Power is strictly divided between the executive and the legislature because the Constitution expressly provides for their separate functions.¹³⁶ To ensure the strict separation of powers, the 1999 Constitution provides that where a member of the House of Assembly is appointed as a commissioner, he is deemed to have resigned his membership of the House of Assembly upon swearing the oath of office as commissioner.¹³⁷

4.3.2. Oversight under the 1999 Constitution

The term 'oversight' is not expressly used in the 1999 Constitution albeit the Nigerian parliaments at the national and sub-national levels perform oversight functions over the executive and other agencies of government. The oversight functions of both national sub-national parliaments relate to audit of public accounts,¹³⁸ confirmation of appointments,¹³⁹ investigative powers, and powers of impeachment.¹⁴⁰ These will be dealt with later in the chapter. The oversight functions of the House of Assembly may be carried out at plenary or committee level. For instance, in the consideration of government agencies' administrative bills the legislature can look into the affairs of agencies.¹⁴¹

¹³⁰ Section 186 establishes the office of the deputy governor.

¹³¹ Section 193 1999 Constitution.

¹³² Section 178(4), (5) 1999 Constitution.

¹³³ Section 192 1999 Constitution.

¹³⁴ See section 195 1999 Constitution.

¹³⁵ For details see sections 6 and 270 - 284 1999 Constitution.

¹³⁶ Sections 4, 5 and 6 of the 1999 Constitution provide for the legislative, executive and judicial powers.

¹³⁷ Section 191(3) 1999 Constitution.

¹³⁸ Section 85 (2), (3), (4), (5) and section 125(4) and (5) 1999 Constitution.

¹³⁹ Sections 86, 126, 147(2), 192(2), 231, 256, 261 1999 Constitution.

¹⁴⁰ Sections 143 and 188 of the 1999 Constitution.

¹⁴¹ O Oyewo 'Constitutionalism and the exercise of oversight functions of the legislature in Nigeria' at www.publiclaw.uct.ac.za/usr/public_law/Nairobi/Oyewo_ConstitutionalismOversightNigeria.doc (accessed 9 October 2010).

With regards to committees, section 103(1) provides that the House of Assembly ‘may appoint a committee of its members’. Committees may be appointed for special or general purposes, the Assembly may delegate functions to the committee as it deems fit. Section 103(2) contains provisions relating to membership of the committee, term of office and quorum. This is to be fixed by the individual House of Assembly.

In practice, committees differ from state to state. While there is no uniformity of practice, it is usual for most states to have standing committees for budgets.¹⁴² In relation to human rights, some state Houses of Assembly have a human rights committee.¹⁴³ The number of committees also varies, some Houses of Assemblies have as many committees as members.

4.3.3. Oversight of budgets and implementation of IHRL obligations

Section 121 of the Constitution allows state Houses of Assembly to pass the budget bill known as the ‘Appropriation Bill’. Section 121(1) mandates the governor to cause the estimates of revenues and expenditure of the state to be laid before the state House of Assembly. In passing this Bill, sub-national parliaments can determine the sum of money to be allotted to fulfil international human rights obligations. For instance, Nigeria has ratified the ICESCR, some provisions of the ICESCR relate to health care which is a functional area of sub-national parliaments. The Commentary of the Committee on Economic Social and Cultural Rights (CESCR)¹⁴⁴ states that the normative content of the right to the highest attainable standard of health entails availability of functioning health care facilities and essential drugs. In approving budgets the House of Assembly can give effect to IHRL obligations by approving sufficient funds to enable the fulfilment of the normative content of health care.

The oversight function does not end here. The House of Assembly can conduct an inquiry into poor budget performance or investigate the level of implementation of the state budget. Practical examples show that this has been done at the national and sub-national levels. At the national level, the National Assembly conducted an inquiry into the low level of performance of the 2009 budget and the resulting

¹⁴² E Okon & A Essien *Law making processes in Nigeria at the national and state houses of assembly* (2005) 48.

¹⁴³ Abia state, Edo state, Rivers state have human rights committees. In Rivers state, the committee on human rights is a standing committee. Others such as Kogi and Delta states have committees on areas where human rights have made inroads e.g. committees on women affairs.

¹⁴⁴ General Comment No 14 of 2000 at <http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/40d009901358b0e2c1256915005090be?Opendocument> (accessed 13 October 2010).

inability to meet the Millennium Development Goals.¹⁴⁵ In Rivers state the chairman of the House Committee on Appropriation, Social Welfare and Rehabilitation, Pilgrims Board and State Independent Electoral Commission identified ‘non-release of funds’ to ministries and agencies by the executive governor as the reason for poor implementation of the 2009 budget.¹⁴⁶ These examples are few and, on the whole, sub-national parliaments perform poorly in budget review.¹⁴⁷

Parliament should use its powers to promote human rights obligation and it is equipped to do so with tools such as budget oversight. The danger lies where the tool is use for self aggrandisement to the detriment of service delivery. This is happening in practice. In 2007 the National Assembly reduced executive budgetary allocations for health and education and increased its own. While not faulting the National Assembly for the exercise of oversight on budget, the reduction of budget for health care and education may be faulted considering that there is a need for greater advancement of these rights in Nigeria.¹⁴⁸ The increment in the National Assembly budget should not have taken precedence over health care and education.

4.3.4. Legislative questions

The House of Assembly may invite a commissioner to explain the conduct of his ministry. This power can be exercised particularly, ‘when the affairs of the ministry are being discussed’.¹⁴⁹ The avenue for questioning should provide an opportunity for engaging with such commissioners on the implementation of IHRL obligations.

¹⁴⁵ See <<http://thenationonlineng.net/web2/articles/26994/1/Budget-2010-How-far-can-it-go/Page1.html>.

¹⁴⁶ http://www.riversassembly.org/index.php?option=com_content&view=article&id=168%3A2009-why-ministries-others-dont-perform-well-in-rivers&catid=4%3Anews&Itemid=19> (accessed 14 October 2010).

¹⁴⁷ Oyewo (n 141 above).

¹⁴⁸ Whether or not the national and state Assemblies can reduce budget estimates is subject of academic debate. See Oyewo (n 141 above) 11. State legislatures also reduce budget estimates. The Lagos Assembly reduced the 2010 budget of the executive and recently rejected the supplementary budget. Critics say this would affect service delivery in the state. See ‘Lagos Assembly reduces 2010 budget by N40bn’ at <<http://www.punchng.com/Articl.aspx?theartic=Art20100224302117>> (accessed 13 October 2010); ‘supplementary budget: we are not fighting Fashola – Lagos Assembly’ at <<http://www.punchng.com/Articl.aspx?theartic=Art201009093114481>> (accessed 13 October 2010).

¹⁴⁹ Section 108(2) 1999 Constitution.

4.3.5. Conduct of investigations

The House of Assembly has powers to direct an inquiry or investigation.¹⁵⁰ Section 128(1) of the 1999 Constitution provides that the House of Assembly may direct an inquiry or investigation into:

- (a) any matter or thing with respect to which it has power to make laws; and
- (b) the conduct of affairs of any person, authority, Ministry or government department charged, or intended to be charged, with the duty of or responsibility for
 - (i) Execution or administering laws enacted by that House of Assembly and
 - (ii) Disbursing or administering moneys appropriated or to be appropriated by such House.

Applying the above to IHRL, it means that sub-national parliaments can direct investigations into matters of human rights. They can inquire into the conduct of persons, authorities, ministries or government departments charged with executing human rights obligations and administering money appropriated for this purpose. In accordance with the Constitution, such investigations or inquiries are to be conducted for reasons of law making, exposing corruption, inefficiency or waste while executing laws within the Assembly's legislative competence (such as human rights).¹⁵¹

For the purpose of conducting investigation, section 129(1) of the 1999 Constitution provides that the House of Assembly or its committees have powers to examine witnesses, require evidence, summon any person to give evidence or to produce documents and can issue warrants to compel the attendance of any person. The warrant may be served by the police or by any person authorised to do so on behalf of the Speaker of the House of Assembly.

In practice, the national parliaments have conducted investigations in relation to human rights violations by persons in authority. Currently, the 'Senate Committee on Ethics and Petition' is investigating one of its members, Ahmed Yerima, on allegations of contracting marriage with a 13 year old Egyptian child in contravention of IHRL treaties and section 21 of the Child's Rights Act.¹⁵² The Senate could so act because the marriage was contracted in the Abuja the FCT where the National Assembly also assumes responsibility as a sub-national parliament.

In recent times, sub-national parliaments have conducted investigations into the affairs of the executive on allegations of corruption and this has led to the impeachment of some executive governors in some states

¹⁵⁰ Section 128(1) 1999 Constitution.

¹⁵¹ Section 128(2) 1999 Constitution.

¹⁵² The section provides that no person under the age of 18 years is capable of contracting a valid marriage and accordingly makes any such marriage null and void.

in Nigeria.¹⁵³ In Lagos State, the state House of Assembly set up an investigative panel to investigate the governor on allegations of corruption. In Ogun state government officials have been summoned to explain recent moves by the state to raise funds from the stock market. In Rivers state, the state legislature initiated probe of local governments in the state. In all three cases, the judiciary was involved as court actions were instituted to restrain these parliaments from initiating probes.¹⁵⁴ These examples show a marked improvement in legislative practice. It signifies a departure from the practice at inception of democracy in 1999 when sub-national parliaments who were in the same party as their executives refrained from exercising their oversight powers.

On the whole, there is some evidence of subservience to the executive so much that some state Houses of Assembly record ‘harmony’ with their executives as legislative achievements.¹⁵⁵ In Benue state an ex-speaker of the Assembly was quoted to have said at a press conference: ‘co-operation with the governor was so harmonious that at a point I was accused of sacrificing the autonomy of the legislature and breaching the principles of separation of powers’.¹⁵⁶

¹⁵³ Governors Alamesieagha, Fayose, Dariye of Bayelsa, Ekiti and Plateau states were impeached on allegations of corruption. The impeachment of the governor of Plateau was voided by the Court because due process was not followed, however, he never returned to office. See *Diapalong v Dariye* (2007) 8 MJSC 140.

¹⁵⁴ See ‘A.G. Ogun Assembly sues Assembly over abuse of oversight functions’ *Nigerian Compass* at <http://www.compassnewspaper.com/NG/index.php?option=com_content&view=article&id=21580:a-g-sues-ogun-assembly-over-abuse-of-oversight-functions&catid=43:news&Itemid=799> (accessed 13 October 2010); ‘RVHA lacks powers to investigate LGAs-High Court’ at <http://www.riversassembly.org/index.php?option=com_content&view=article&id=161%3Arvha-lacks-powers-to-investigate-lgas-high-court&catid=4%3Anews&Itemid=19> (accessed 13 October 2010); ‘Lagos lawmakers object court’s order over probe of Fashola’ *Nigerian Compass* at <http://www.compassnewspaper.com/NG/index.php?option=com_content&view=article&id=41254:lagos-lawmakers-object-courts-order-over-probe-of-fashola&catid=672:top-stories&Itemid=794> (accessed 13 October 2010). In Lagos state the Court ordered that the probe be stopped. Following this court order, the House of Assembly set up a fresh committee to investigate the governor the case is now on appeal. See also ‘Court fixes November 1 for judgement of Fashola’s probe’ *The Punch* <<http://www.punchontheweb.com/Articl.aspx?theartic=Art201009290533364>> (accessed 13 October 2010).

¹⁵⁵ See Kano state House of Assembly website at <http://kanohouseofassembly.org/index.php?option=com_content&task=blogcategory&id=1&Itemid=30> (accessed 4 October 2010); Kogi State House of Assembly website <http://www.kogistatenigeria.org/house.htm> (accessed 4 October 2010).

¹⁵⁶ JI Omenka ‘Legislative oversight and socio-economic development in Benue state’ unpublished PhD thesis, University of Jos, 2008 159.

4.3.6. State reporting

State reporting is one of the mechanisms used to assess compliance with international human rights obligations. Several IHRL treaties establish treaty bodies to which reports are to be made. Examples of treaty bodies are the African Committee of Experts on the Rights and Welfare of the Child (African Committee) and the African Commission on Human and Peoples' Rights. Besides treaty bodies, there are Peer Review Mechanisms such as the African Peer Review Mechanism (APRM) and Universal Periodic Review (UPR) to which states are to transmit periodic reports.

In practice, state reports are prepared by the national executive and agencies. However, there is evidence that some reports are prepared with the input of the National Assembly. For instance, members of the National Assembly were part of the committee involved in the drafting of the 2008 UPR report.¹⁵⁷ It is not clear if there is any involvement of sub-national parliaments in state reporting. There is clearly no evidence of sub-national parliaments' involvement in the consultation or in the drafting process of the 2008 UPR report.

Sub-national governments should be consulted as stakeholders in the state reporting process. Consultations should be held with them especially in areas which touch on their functions. Their involvement may be necessary during the drafting process because their proximity to the populace guarantees that they have access to information and data which the national government may not have being so far from the populace. Involvement may further be justified if one considers that recommendations and concluding observations of a treaty body may lie within their area of jurisdiction. For example, the recommendations of the African Committee (Committee) on the initial periodic report of Nigeria bordered on the functions of sub-national parliaments, the Committee made calls for the re-enactment of the Child's Rights Act by states which were yet to do so, the abolition of female genital mutilation (FGM) in the northern states, correction of the age of marriage and education.¹⁵⁸

Re-enactment of Child Rights Act, correction of marital age under customary and Islamic law¹⁵⁹ and abolition of FGM fall squarely within the jurisdiction of sub-national parliaments because they are

¹⁵⁷ <http://lib.ohchr.org/HRBodies/UPR/Documents/Session4/NG/A_HRC_WG6_4_NGA_1_E.pdf> (accessed 10 October 2010).

¹⁵⁸ 2006 report on the status of implementation of the African Charter on the Rights and Welfare of the Child at <<http://www.africa-union.org/root/ar/index/Nigeria.pdf>> (accessed 10 October 2010).

¹⁵⁹ The National Assembly may legislate on formation, annulment and dissolution of marriages other than marriages under Islamic law and customary law and matrimonial causes relating thereto under item 61 of the exclusive legislative list. See part I of the second schedule of the 1999 Constitution.

residual matters not listed in the exclusive and concurrent legislative lists. Education¹⁶⁰ is listed as a concurrent matter over which both federal and state legislatures can exercise jurisdiction. Implementation of these concluding recommendations is therefore the direct responsibility of sub-national governments.

Sub-national governments can participate in the state reporting process as members of the reporting delegation. Through participation sub-national governments can experience firsthand how seriously the international community treats issues of human rights violation. The experience would aid their understanding of international human rights process which otherwise, have been distant, high sounding and difficult to relate to.

4.3.7. Sub-national parliaments and the National Human Rights Commission

As part of its obligations under IHRL, Nigeria has established the National Human Rights Commission (NHRC) in terms of the National Human Rights Commission Act of 1995. At inception, the NHRC had its office in Abuja but it has opened more offices in each geo-political zone of Nigeria. The geo-political zones in Nigeria are not creations of the Constitution but have developed as a framework for achieving equitable distribution where it is impracticable to reach all sub-national units. There are six geo-political zones in Nigeria namely: North-West, North-East, North-Central, South-West, South-East and South-South. Each geo-political zone consists of a group of states, for instance, the South-West zone consists of six states.¹⁶¹ It is not easily ascertained how the NHRC interacts with states but it needs to be said that the available offices are insufficient to cater for the large population. There is therefore a need to further de-concentrate the NHRC.

In this regard, it is suggested that sub-national parliaments working together with the NHRC can create state human rights commissions which would be a prototype of the NHRC. In turn, the sub-national parliaments can exercise oversight over the state human rights commissions as they would any other agency of government.

4.3.8. Sub-national parliaments and implementation of international judgment

There is no sub-national responsibility for violations of human rights in international law. However Spiro¹⁶² has hinted that the practice of sub-national responsibility is developing. In practice, no case has been instituted against sub-national authorities before international tribunals. Decisions¹⁶³ which lie in the

¹⁶⁰ See items 29 and 30, part II of the second schedule of the 1999 Constitution.

¹⁶¹ These are Ondo, Ogun, Oyo, Osun, Lagos and Ekiti states.

¹⁶² Spiro (n 5 above).

¹⁶³ *Land and Maritime Boundary between Cameroon and Nigeria (Bakassi judgment)*, ICJ Reports (2002); *SERAC v*

area of jurisdiction of sub-national governments have however been handed down. In implementing these decisions, there has to be consultations with sub-national governments. For instance in implementing the ICJ judgment in the *Land and Maritime Boundary between Cameroon and Nigeria (Bakassi judgment)*, the provision of section 8(2) of the 1999 Constitution¹⁶⁴ cannot be ignored. The section provides that boundary re-adjustment has to be done in consultation with the House of Assembly of the state affected. In this regard, it is important for the Cross River state House of Assembly (the state affected by the Bakassi judgment) to be consulted at every stage of implementation so that their co-operation can be gained.

It is worthy of mention that court actions may soon be instituted by Social Economic Rights and Accountability Project against the Rivers state governments before the ECOWAS Court of Justice (ECJ) for violations of the right to housing.¹⁶⁵ It remains to be seen what the outcome of the case would be, perhaps it might set a new precedent for protection of human rights and Spiro's argument would be proved right.

4.3.9. The role of sub-national opposition in promotion of IHRL obligations

The role of the opposition in parliament cannot be overemphasised. As Griffith, Ryle and Wheeler-Booth say:

The Opposition must ... look critically at all policies and proposals brought before the House by the Government and then oppose and, if possible, delay or even prevent the implementation of those proposals it considers undesirable.¹⁶⁶

Opposition especially at the sub-national level could be a veritable tool in promoting IHRL obligations because it can ensure that policies are in conformity with IHRL and that they do not represent sectional interests. Through questioning, the opposition can scrutinise policies to ensure that they are in accordance

Nigeria 2001 AHRLR 60. In the *SERAC* case, the federal government was requested to stop all attacks on Ogoni community by the Rivers state internal securities task force.

¹⁶⁴ Section 8(2) provides that 'an act of the National Assembly for the purpose of boundary adjustment of any existing state shall only be passed if (a) a request for the boundary adjustment, supported by two-thirds majority of members (representing the area demanding and the area affected by the boundary adjustment) in ... the House of Assembly in respect of the area ... is received and (b) a proposal for the boundary adjustment is approved by ... a simple majority of members of the House of Assembly in respect of the area concerned.'

¹⁶⁵ 'Bundu waterfront killing: Amnesty, SERAP demand justice' at <http://www.punchng.com/Articl.aspx?theartic=Art201010120431684> (accessed 13 October 2010).

¹⁶⁶ Griffith et al (n 17 above) 338.

with IHRL obligations. Scrutiny in this regard carries more weight than they might for same party scrutiny.

The opposition can also promote IHRL obligations by ensuring that they do not veto, oppose or delay the passage of bills aimed at promoting human rights. Finally, the existence of opposition in parliament is in itself a way of implementing IHRL obligations.

In practice most members of sub-national parliaments belong to the same party as the executive. In cases where they do not, they defect to the party of the governor. Rather than defecting, the potential of the opposition should be explored for promotion of IHRL. By assigning a greater role for the opposition, parliament would also be fulfilling IHRL obligations.

4.4. South Africa

4.4.1. Separation of powers in South Africa

At the provincial level, the Westminster parliamentary system is followed. Executive power is vested in the Premier,¹⁶⁷ who is elected from among the members of the provincial parliament.¹⁶⁸ There is thus no strict separation of powers. The Premier is also the head of the province's delegation to the NCOP. To assist in the performance of executive duties, the South African Constitution establishes the Executive Council which consists of five to ten members of the provincial parliament. The members of the Executive Council are appointed and dismissed¹⁶⁹ by the Premier who also assigns their powers and functions.

4.4.2. Oversight under the South African Constitution

Unlike Nigeria, the South African Constitution expressly mentions the oversight power of the provincial legislature. Section 114(2) provides for the power of oversight as follows:

A provincial legislature must provide for mechanisms to ensure oversight of the exercise of provincial executive authority in the province, including the implementation of legislation; and any provincial organ of the state.

Although the NCOP represents 'provincial interests at the national level', it has no express oversight role in the constitution.¹⁷⁰ The argument has been advanced that the NCOP would exhibit oversight if the provisions of section 92(2) are interpreted broadly.¹⁷¹ Section 92(2) provides that 'members of the

¹⁶⁷ Section 125 of the South African Constitution.

¹⁶⁸ Section 128(1).

¹⁶⁹ Section 132 South African Constitution.

¹⁷⁰ Calland (ed) (n 66 above) 9.

¹⁷¹ As above.

Cabinet are accountable collectively and individually to parliament for the exercise of their powers and the performance of their functions.’ As ‘parliament’ in this quote consists of both the National Assembly and the NCOP, the latter can also perform the oversight functions.

Sub-national parliaments exercise their oversight functions at plenary or at committees. They can also embark on ‘site visits’. The committees may summon persons to give evidence or request a report, they may compel compliance with any summon issued, they may also receive petitions.¹⁷² Calland notes that committees have the ‘ability to monitor, investigate, enquire into and make recommendations relating to any aspect of the legislative programme, budget ... of government department or departments falling within the category of the assigned committee.’¹⁷³ As is the case in Nigeria, the number of committees at the provinces varies from province to province.

4.4.3. Oversight of budgets and implementation of IHRL obligations

Sub-national parliaments in South Africa exercise oversight over budgets, the oversight is exercised at plenary and at committees. Section 120 of the Constitution contains provisions relating to the money bills of the provinces. For the exercise of oversight in finances most provinces have a Public Accounts Committee. As a matter of practice, more than one committee deal with budgets in provinces. For instance, the Western Cape Parliament has a Budget Committee and a Standing Committee on Public Accounts. All committees involved in the budgetary process may generate reports as to the budget.

In approving budgets, the provincial legislature may not make changes to the budget. This is different from the situation in Nigeria where parliament has been known to make changes to budget estimates. To sidestep this restriction, the Gauteng province allows its finance and economic affairs committee to examine budget drafts as part of its oversight function. The committee ensures that departmental priorities meet with ‘developmental policies’.¹⁷⁴ However, the role assigned by the Constitution is restricted to approval or rejection of budgets. Budgets are mostly approved. Rapoo¹⁷⁵ reports that it is rare for provinces to reject budgets. The role of the provincial legislatures also extends to monitoring the implementation of budgets. Provincial parliaments must further consider the Auditor-General’s audit reports.

¹⁷² Section 115 South African Constitution.

¹⁷³ Calland (ed) (n 66 above) 31.

¹⁷⁴ TJ Rapoo ‘Room to manoeuvre: Understanding the development of provincial government in South Africa. 1999-2004’ unpublished PhD thesis, University of Witwatersrand, Johannesburg 174.

¹⁷⁵ Rapoo (n 174 above) 172.

4.4.4. Conduct of investigations

Sub-national parliaments are empowered to conduct investigations. As earlier stated, this affords them the opportunity of investigating matters relating to IHRL. Rapoo¹⁷⁶ reports that in the past, conduct of investigations was hindered because parliamentarians had little knowledge about the issue at hand. In some instances, investigations were obstructed for political reasons. However, as is the case in Nigeria, there have been marked improvements since.¹⁷⁷

4.4.5. Legislative questions

Question times are frequently used in the provinces.¹⁷⁸ The premier and other cabinet members may be questioned by members of their provincial legislature. Often such duties are eagerly performed by the opposition. Questions can be asked at plenary or at committees. The relevance of question time is that it affords an opportunity for the members of parliament to question cabinet members on programs aimed at implementation of IHRL obligations, or to question them on failure to implement IHRL obligations.

4.4.6. State Reporting

There is no constitutional provision involving parliament in the process of state reporting, although, it is essential that both national and provincial legislatures be involved. Involvement is of two folds: First through participation in the drafting of state reports and in the actual reporting process. Second, is by ensuring implementation of recommendations and concluding observations made on the reports.

As participants in the drafting process, sub-national parliaments can provide information. The 2006 ‘Harmonised Guidelines on Reporting Under the International Human Rights Treaties, Including Guidelines on a Core Document and Treaty-Specific Documents’ (Harmonised Guidelines)¹⁷⁹ requires that states should provide information on sub-national parliaments’ ‘role and activities in promoting and protecting human rights including those in international treaties’. Such a report cannot be produced if sub-national parliaments are not consulted for information in this regard.

It is doubtful whether consultations with sub-national parliaments occur in practice, besides, South Africa is yet to fulfil most of its state reporting obligations.¹⁸⁰ However, it cannot be denied that provincial

¹⁷⁶ Rapoo (n 174 above) 106.

¹⁷⁷ Rapoo (n 174 above) 108 -109.

¹⁷⁸ Rapoo (n 174 above) 114.

¹⁷⁹ Document HRI/MC/2006/3 of 10 May 2006.

¹⁸⁰ For details see ‘South Africa: State of state reporting under international human rights law’ unpublished reader,

parliaments have a role to play in the process of state reporting. It is therefore imperative to develop a procedure to secure their participation. A way out is to send draft copies of state reports to sub-national parliaments for their inputs.

It is also important to include members of the sub-national parliaments as part of state reporting delegates especially where human rights situations peculiar to their provinces have attracted international attention. As an illustration, if the impact of xenophobia is felt in one province than in others, delegates from the parliament of such a province may be part of the national delegate to the body treating such a report on xenophobia. The experience can be beneficial as they can benefit from comments and recommendations at such meetings.

On the second level of involvement, the Harmonised Guidelines recommend the establishment of structures ‘to co-ordinate follow-up to concluding observations’. The Guidelines provide that this mechanism should allow the involvement of sub-national governments. In South Africa, it is not clear if comments are brought to provincial parliaments’ notice as a matter of practice. Besides, as earlier stated, South Africa is yet to fulfil most of its reporting obligations.¹⁸¹

However as the Harmonised Guidelines recommend, there is a need to work out a procedure for bringing such comments to the sub-national governments’ notice especially where comments fall within their jurisdiction. In this regard, recommendations and concluding observations of treaty bodies could be sent to sub-national parliaments so that they can oversee their executives and ensure the implementation of these recommendations and concluding observations.

4.4.7. South African Human Rights Commission

In the grand scheme of things, sub-national parliaments have a role to play in promoting implementation of IHRL obligations. The same goes for the South African Human Rights Commission (SAHRC). Both institutions for instance, have a duty to ensure the ‘progressive realisation’ of socio-economic rights. There is the need for sub-national parliaments to interact with the SAHRC as partners in the realisation of human rights. As partners, they can exchange information and ideas relating to implementation of IHRL obligations.

Community Law Centre, University of Western Cape, 2010.

¹⁸¹ As above.

4.4.8. The role of sub-national opposition in promoting IHRL obligations

The South African Constitution accords clear recognition to the role of the opposition.¹⁸² At the provincial level, sub-national parliaments have the practice of making a member of the opposition chairman of the Public Accounts Committee. This affords the opposition the opportunity of monitoring the implementation of budgets and ensuring that implementation meets with IHRL and other developmental goals.

4.5. Comparative analysis

When comparing the roles of sub-national parliaments in Nigeria and South Africa similarities and differences are apparent. The similarities reveal the following:

- Irrespective of the system of government, sub-national parliaments can and should play a role in implementation of IHRL obligations.
- Implementation of IHRL obligations can be realised using tools such as oversight over budgets, legislative questions, investigations and inquiries.
- Sub-national parliaments in both countries can and should play a role in implementing IHRL obligations in respect of state reporting.
- Both countries' practices reveal that there are no inputs to state reports by the sub-national parliaments.
- Sub-national parliaments in both countries can and should play a role in implementing concluding observations and recommendations of treaty bodies.
- Opposition in sub-national parliaments can be a veritable tool for drawing attention to IHRL obligations.
- In both countries, practice reveals that the potential of sub-national parliaments in implementing IHRL obligations has remained largely untapped and that there is need to realise this potential.

Differences identified are the following:

- Due to the structure of federalism and the system of government in Nigeria, sub-national parliaments can play a broader role in ensuring the implementation of IHRL treaties than in South Africa through enforcement of international judgments.

¹⁸² Section 116(2)(d).

- In Nigeria, there is a trend towards ‘sub-national responsibility’ for human rights violations. This is unlike in South Africa. If this form of responsibility is accepted by international tribunals, sub-national parliaments would have the mandate to oversee the implementation of judgments in this regard.

4.6. Conclusion

The study has identified the role (or what should be the role) of sub-national parliaments in the implementation of IHRL treaties. While acknowledging that human rights situation have improved since inception of democracy in both countries, there is a need for further improvement. The problems with regards to implementation arise partly because sub-national governments and their parliaments are not consulted in the process of treaty making.¹⁸³ This problem is peculiar to both countries. Lack of consultation leaves sub-national governments with no sense of ownership and therefore a lesser need to account for IHRL implementation.

Lack of awareness and lack of institutional capacity hinders the implementation of recommendations and concluding observations on state reports. Failure of implementation can also be attributed to sub-national parliaments’ subservience to their political parties and in the case of Nigeria subservience to state executives.

Other problems which contribute to poor exercise of oversight mandate in relation to IHRL implementation include failure of opposition in Nigeria and judicial interference. In South Africa, failure of state reporting also contributes to non-implementation of IHRL treaties.

It is important for IHRL treaties to be implemented. Implementation of IHRL treaties leads to the advancement of human rights. In this regard, the problems identified above must be dealt with. In dealing with them, it is important for each country to adopt a solution best suited to their peculiar situation. More importantly, both countries can compare best practices and draw lessons from each other. The next chapter therefore considers recommendations in this regard.

¹⁸³ Kellenberger (n 122 above) 191.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1. Introduction

Failure of implementation of IHRL treaties by states has become a recurring problem. This is because stakeholders in the implementation process are often excluded in the making of such treaties. The saying ‘no man is an island’ rings true in multi-level constitutional democracies. The national executive cannot continue to exercise its treaty making powers without regard to parliament both at the national and sub-national levels.

The study has examined the role of sub-national parliaments in the making and implementation of treaties. In examining this role it made a case for their involvement in Nigeria and South Africa. This chapter contains the summary of conclusions drawn from the entire study and makes general recommendations as well as country specific recommendations.

5.2. Conclusion

The study has examined the role or potential role of the sub-national parliaments in negotiating, ratifying and domesticating IHRL treaties within the context of Nigeria and South Africa. The position in law and practice was examined to determine true functioning. The study revealed that no role was played in the negotiation and ratification of IHRL treaties in Nigeria whereas an indirect role could be implied in South Africa.

With regards to domestication, both countries’ laws and practices revealed that sub-national parliaments had a role to play in areas which lie within their jurisdiction. The study further revealed that the domestication process by sub-national parliaments in Nigeria is flawed because of lack of clarity in established procedure and because of reservation excesses. South Africa has a well organised procedure under its Constitution and as revealed by practices in some provinces. A case has been made for an increased role in the making and domestication of treaties not only for sub-national parliaments but also for national parliaments and sub-national governments. The justifications for an increased role in this regard have been clearly outlined.

The role of sub-national parliaments in relation to implementation of IHRL treaties was also considered. The study revealed that irrespective of the systems of government operated in the two countries of focus, oversight and other parliamentary tools can and have (in some instances) been used in ensuring

implementation of treaties. An examination of both countries' practices reveals that the system of government operated in Nigeria allows sub-national parliaments to play a greater role in ensuring the implementation of IHRL treaties and that more roles may emerge if sub-national responsibility takes root. Finally the study revealed that the potential for implementing IHRL treaties using tools available to sub-national parliaments is yet to be fully tapped in both countries.

The overall submission in the study is that national executives need to consult with national parliaments and sub-national parliaments in the negotiation and ratification of IHRL treaties if implementation is to be guaranteed. Consultation by the national executives should not be seen as a threat to the powers of the executive rather, it should be seen as a way of aligning with democratic principles, such as transparency, co-operative government and self-determination all of which international law supports.

5.3. Recommendations

5.3.1 Nigeria

There is no constitutional provision expressly providing for the executive's role in negotiation and ratification of treaty. Although judicial pronouncement approves the practice there is still a lacuna in the law. That lacuna should be filled. It is recommended that in filling the lacuna, national executives should be allowed to consult with stakeholders such as national parliaments and provincial governments during the process of negotiation. Consultation here is qualified as not all treaties would require such consultation. For instance, defence treaties may not require consultations. For this purpose, treaties of technical, administrative or executive nature may be excluded as is the case in South Africa. The parameters for determining treaties of technical, administrative or executive nature should be defined. In case of IHRL treaties and other treaties which fall under the jurisdiction of states, consultation should be mandatory and devoid of bureaucracy to avoid the delay.

It is imperative for Nigeria to have an intergovernmental framework which would ensure intergovernmental co-operation. This would provide a platform for interaction which could generate uniform ideas. It could also serve as an avenue for generating a harmonised bill for the purpose of domestication of a treaty. The intergovernmental framework would provide a platform through which copies of state reports, recommendations and concluding observations of treaty bodies can be channelled.

A procedure for domestication of treaties should be adopted and stipulated in the Nigerian constitution as is the case in South Africa.

With regards to implementation of IHRL treaties, sub-national parliaments need to be more proactive. They need not wait until pressurised to domesticate IHRL treaties especially where such treaty lies in their jurisdiction. A proactive approach should be adopted in the exercise of the oversight mandate in relation to IHRL treaties. The culture of subservience to the executive should be dropped. Instead co-operation should be developed.

Finally, charity they say begins at home. Sub-national parliaments in Nigeria should not only be seen to implement IHRL principles by overseeing the executives, they should also be seen to implement IHRL in their in-house dealings. In this regard, sub-national parliaments need to accord greater recognition to their members in the opposition. The recognition which the South African system affords the opposition is to be welcomed. Nigeria can adopt a similar approach to solve the problem of defections.

5.3.2. South Africa

The principle of co-operative government gives legal backing to consultations with other spheres of government during the negotiation and ratification of treaties. The challenge to South Africa is to eliminate bureaucracy which may lead to delays.

With regards to implementation of IHRL treaties, the South African government needs to develop the political will to fulfil all reporting obligations for IHRL treaties. Parliament at the national level can exert their influence in this regard. In writing such reports, national parliaments could have an input as is the case in Nigeria. Input should not be limited to national parliaments alone, sub-national parliaments should be consulted too.

A procedure for channelling concluding observations and recommendations of treaty bodies to sub-national governments has to be worked out. Sub-national parliaments should be proactive in overseeing the executive to ensure that concluding observations are carried out.

5.3.3. General recommendations

National executives should develop the political will to consult with all levels of government while negotiating treaties.

There is need to develop the capacity of sub-national parliaments in relation to IHRL. Through capacity development, sub-national parliaments can gain skills which would be useful for any role in the treaty making process. Capacity building could be achieved through trainings. Trainings should be conducted also to enlighten them on the international process.

Members of parliaments should undertake missions to United Nations conferences and other IHRL conferences. Through participation in such conferences they can gain expertise on IHRL matters. Sub-national parliaments should also interact with other parliamentary unions such as the Commonwealth Parliament Association (CPA). Such peer interactions could generate ideas on promoting human rights. On a final note, federal states are challenged to advance human rights by allowing sub-national parliaments to play a greater role in the IHRL process.

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