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An examination of environmental federalism under the 1999 constitution

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Abstract
The Nigerian federal structure seems skewed against both the state and local governments. The federal government in Nigeria wields greater powers on crucial constitutional issues. Both the state and local governments are completely excluded on any matter specified in the Exclusive Legislative List. The sub-units of government appear completely weak in all fundamental matters enshrined in the Exclusive Legislative list under the 1999 constitution. The dominance of the Federal Government on divergent constitutional issues seems have also snowballed into environmental matters in Nigeria. Although there are different arguments for and against the supremacy of the federal government on environmental legislation, however this writer opines that decentralization of powers in respect of environmental matter is most ideal to enthrone environmental federalism in Nigeria. This paper examines the practicability of environmental federalism under the 1999 Constitution. The doctrinal approach is adopted in this work. Primary and secondary materials were analysed. The paper concludes that there is a serious structural imbalance of environmental federalism under the 1999 Constitution of Federal Republic of Nigeria (CFRN) (as amended). Nigerian federalism does not reflect a true federal state. In fact, the 1999 CFRN (as amended) can be likened to a unitary constitution masquerading itself as a federal constitution. It is doubtful if environmental federalism can be attained under the present 1999 CFRN (as amended).

Keywords: Environment, federalism, exclusive legislative list, concurrent list

Introduction
The 1999 CFRN (as amended) provides for the devolution of powers among the three arms of government. The federal government, State Governments and Local Government all have basic constitutional obligations in respect of the environment. It seems however that the national government, that is the federal government, in Nigeria is a towering overload over the component states on different constitutional matters, much to the dissatisfaction of the component units [1]. The 1999 CFRN (as amended) appears to concentrate enormous powers on the Federal Government even in respect of environmental issues, though the component states also have the legislative competence to enact laws but where there is a conflict between both laws the federal law prevails [2]. The term environmental federalism should be understood to refer broadly to the study of the normative and positive consequences of the shared role of national and subnational units of government in controlling environmental problems [3]. The term 'environmental federalism' connotes different meanings to different scholars. A learned writer has posited that all efforts which assumed that a decentralized approach to environmental policy will yield better results than a more centralized approach are misguided [4]. Esty relied on the works of Stewart [5] in justifying a centralized control of environmental issues.

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[1] N.A Igbedion and E. Omoregie, "Federalism in Nigeria. A Re-Appraisal (2015) (1) *Journal of Commonwealth Law and Legal Education* 69-83
[2] See the Concurrent Legislative List of the 1999 CFRN (as amended)
[3] W.M. Shobe and D. Burtraw, Rethinking Environmental Federalism in a Warming World, Discussion Paper, January, 2012
[4] D.C. Esty, "Revitalizing Environmental Federalism" (1996) 95(570) *Michigan Law Review*, 570-575
[5] R.B. Stewart, "The Development of Administrative and Quasi Constitutional Law in Judicial Review of Environmental Decision Making: Lessons from the Clean Air Act, (1977) 62 *Iowa Law Review* 713; See also R.B. Stewart, Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy" (1977) 86(1196) *Yale Law Journal*, 12101220.

Although he later argued for a multitier regulatory structure in tackling environmental problems, yet Esty still condemned arguments for decentralization of environmental policy despite the sweeping support for environmental devolution [6].

In Nigeria, the federal legislature has the power to make laws on matters within their competence [7]. This legislative competence also extends to making laws for the protection of the environment. Similarly, the state House of assembly also has powers to enact laws within its legislative competence [8]. The local governments are also constitutionally empowered to establish, maintain and regulate markets, motor parks and public conveniences [9]. In addition, the local government is to provide and maintain public conveniences and refuse disposal [10]. All these governmental obligations are supposed to demonstrate some form of environmental federalism under the 1999 CFRN (as amended). Sadly however, the state and local governments are somewhat excluded in the execution of some fundamental environmental issues in Nigeria. This is antithetical to the tenet of genuine environmental federalism. In a true environmental federalist state, the component units share power equally with the federal government on environmental issues. The component units are not subservient to the central government.

This work is divided in six parts. Part I is the general introduction. Part II interrogates the legislative dominance of the federal government over environmental issues. Part III discusses the legislative influence/power of the state legislature over environmental issues. Part IV
examines the basic functions of the local government especially in respect of environmental matters. Part V appraises the practicability of environmental federalism under the 1999 CFRN (as amended). Part VI is a general conclusion and the recommendation

2. **Domineering Nature of the Federal Government on Environmental Matters and the Impact on State and Local Government in Nigeria** [11]

The 1999 CFRN (as amended) provides that "the state shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria [12]. The foregoing constitutional provision guarantees not only protection of the Nigerian environment in its various aspects but also the improvement of such environmental aspects with their flora and fauna. This provision also provides a frame work for national environmental standards on land, water and air [13].

In a Federal system of government where the scope of the legislative powers by the federal and states governments including the local government, are expressly or impliedly defined by the country's constitution, one may inquire as to who has the requisite authority to make law especially on environmental issues. Is it the federal or state that are empowered to legislate on a selected matter? [14]. In ascertaining the tier of government which has power to legislate in matter relating to environmental protection an appropriate approach is to examine the substantive ambience of the environment [15]. The environment consists of various natural and anthropogenic factors and some of these are enshrined under the Second Schedule to the 1999 CFRN (as amended). It is however submitted that true federalism does not envisage that a single legislative branch should for all time and purposes singularly set rules and regulations to administer the parameters of environmental problems to which the various sectors of the national life are susceptible to. It is also not contemplated that there will be a total exclusion of the other legislative branch of government in tackling environmental problems [16].

Under the 1999 CFRN (as amended), matters in the Exclusive Legislative List are only meant for the National Assembly, to enact law on them. Besides, in the Concurrent Legislative list, if the federal government had made law on a specific matter contained in the concurrent list, any law made by a state House Assembly, which is inconsistent with a federal enactment, the state law shall, to the extent of the inconsistency, be void [17] This provision may deprive some states in Nigeria the power to enact laws on some fundamental environment problems in their states often times, this has led to conflict between the federal and state government [18].

The legislative arrangement is potential area of conflict between the federal and state governments in respect of environmental legislations [19]. It is however presumed that the doctrine of convering the field could resolve the conflict between both tiers of government. In the case of *Attorney General of Ogun State v. Attorney General of the Federation*, [20] the learned Chief Justice of the Supreme Court, Fatai Williams (as he then was) noted thus:

It is of course, settled law based on the doctrine of covering the field….that if parliament enacts a law in respect of any matter in which both parliament and a Regional legislature are empowered to make laws, and a Regional legislature enacts an identical law on the same subject matter, the law made by Parliament shall prevail, that made by the Regional legislature shall become irrelevant and therefore, impliedly repealed. In addition, section 4(5) of the 1999 CFRN (as amended) provides: if any law enacted by the House of Assembly of a state is inconsistent with any law validly made by the National Assembly the law made by the National Assembly shall prevail, and that other law shall to the extent of the inconsistency be void.

The effect of the foregoing is that a state may be deprived of the constitutional power to make law on environmental issue if the National Assembly had already enacted identical law on the same environmental issue. For instance,

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[6] D.C. Esty (n.4).
[7] See the 1999 CFRN (as amended), s. 4.
[8] See the 1999 CFRN (as amended), s.4.
[9] Ibid; Fourth Schedule, para. (e).
[10] Ibid; para. (h).
[11] A. K Usman, *Environmental Protection Law and Practice* (Ababa Press Ltd, 2012) 6-55
[12] CFRN 1999 (as amended); s. 20.
[13] A.K. Usman (n. 11).
[14] M.T Okorodudu--Fubara, Law of Environment Protection (Caltop Publication (Nigeria) Ltd, 1999) 1-50.
[15] Ibid.
[16] M.T. Okorodudu –Fubara (n. 14).
[17] See *Attorney General, Ogun State and Ors* v. *Attorney General, Federation and Ors* (1982) 2 N.C.L./R 166
[18] *Supra.*
[19] A.C. Osundu, *Our Common Environment: Understanding the Environment Law and Policy* (University of Lagos press 2012) pp192-224
[20] *Supra* (n.17)

sometime in 1964, the Lagos State Government enacted the Poisons and Pharmacy Law [21] in order to regulate the sale and distribution of drugs and poisons. But shortly afterwards, the federal legislature also passed the Food and Drugs Act [22]. Due to the conflict between both laws, the Lagos State Poisons and Pharmacy Law cannot stand in the face of an identical law made by National Assembly. This is primarily because the federal Act does not only intend to cover the field, but it also particularly focused on repealing existing state laws on identical subject matter.

Under the 1960 and 1963 Nigerian constitutions, items such as national parks, drugs and poisons used to be listed under the concurrent legislative list. Accordingly, both the National Assembly and the then regional or state Houses of Assembly had concurrent powers to make laws on them. But this position changed under the 1979 and 1999 constitutions. Now items such as the national parts, drugs and poisons have been taken to the Exclusive Legislative list thereby empowering only the federal legislature to enact laws on such items. This makes the federal legislature much more powerful over the state and local governments. This could be detrimental to environmental federalism as some states may not have power to curtail environmental problem because some of the items may exclusively fall within the Exclusive Legislative list.

It seems the federal government has overriding powers over the state government in environmental law related matters especially if it constitutes part of the items on the exclusive legislative list [23]. In my view if the federal legislature firmly exercises their power over items enshrined under the Exclusive Legislative list and Concurrent Legislative list, the components states' environment legislation may be ineffective. This does not augur well for environmental federalism. A learned author [24] has suggested that since the federal government is in physical occupation of only the Federal Capital Territory, Abuja, its jurisdiction should be within the FCT not extending outside the FCT to other states especially on environmental matter. The argument of the learned author is premised on the fact that an environment is better protected by the inhabitants of such an environment not by dishing out commands from a central government that is not closer to the people.

The dominance of the federal government on environmental matter can be seen in the diverse laws on environment enacted by the National Assembly [25]. The State and local government make few laws on environmental matters when compared the numbers of environmental statutes made by the National Assembly. However, under a true environmental federalist state, the central government and the component units are supposed to have equal powers on environmental matters but sadly this is not the case under the CFRN 1999 (as amended)

[21] See No 26, 1964 now Cap. P8, Revised Edition Laws of Lagos state, 2003.

[22] Cap F 32 Revised Edition Laws of Federation of Nigeria, 2004.

[23] E.I. Amah "Federalism Nigerian Federal Constitution and the Practice of Federalism: An Appraisal: (2017) 8(3) *Beijing Law Review*, 287-310.

[24] A.C. Osondu (n-19).

[25] L. Atsegbu, V. Akpotaire and F. Dimonwo, *Environmental Law in Nigeria:Theory and Practice* (Ababa Press, Lagos, 2004) 1-36.

3. Legislative Competence of the State Government on Environmental Matters under the 1999 Constitution

There seems not to be explicit constitutional provisions on states environmental legislative powers. Although the Land Use Act 1978 vests land in the state government [26] but in reality, the governors have limited powers to effectively implement federal environmental law which is in force within its territory. Happily, in the case of *Attorney General of Lagos State v. Attorney General of the Federation and 35ors*, the Supreme Court of Nigeria held that section 20 of the Constitution does not authorised the federal government to legislate on town/urban and regional planning matters, that is within the legislative competence of the state government which makes laws for the physical layout and development of any town or region in the country. But the federal government can enact laws on general environmental, protection issues. I think this decision is *in tandem* with the tenet of environmental federalism [27].

Under the Nigerian federal system, the state components are allowed to enact laws under the concurrent and residual legislative lists, subject to federal law [28]. The various Houses of Assembly in different states have enacted environmental laws in respect of management and protection of the environment [29]. Fagbohun has criticized the overbearing power of the federal government on the state government in respect of environmental issues which happen in different states [30]. Although the states House of Assembly can enact environmental laws to checkmate any environmental problem within their domain, but this power is significantly limited by some provisions enshrined in the 1999 CFRN (as amended). These limiting constitutional provisions are stated below

1. The Constitution expressly claims supremacy over all authorities and persons under the federation and any inconsistent law shall be rendered void to the extent of the inconsistency; [31]
2. The laws enacted by the National Assembly enjoy superiority over the laws made by the state House of Assembly shall be declared void to the extent of the inconsistency [32]
3. The legislative powers of the state House of Assembly is permanently barred from making law on any item on the Exclusive Legislative list of the constitution [33]

From the foregoing, a learned writer [34] observed that though significant environmental activities take place at the state level of the federation which necessitates prompt and

[26] Land Use Act, 1978; s.1.

[27] 2003 FWLR (Pt. 168) 909.

[28] See 1999 CFRN (as amended) s. 4(5); See also, S.G Ogbodo, "Environmental Protection in Nigeria. Two Decades after the Koko Incident" (2009) 15 (1) *Annual Survey of International & Comparative Law*

[29] See for example the Lagos State Environmental Protection Agency (LASEPA); See also the Enugu State Waste Management Agency Law of 29th July 2004.

[30] O. Fagbohun, "Reappraising the Nigerian Constitution for Environmental Management" (2002) 1 (44) *Ambrose Ali University Law Journal*.

[31] See the 1999 CFRN (as amended), s.1 (1) and (3).

[32] Ibid; s.4(5).

[33] See the 1999 CFRN (as amended) s. 4.(5).

[34] S.G. Ogbodo (n. 28).

realistic legislative responses, but the state most time suffer from constitutional, constraints (or could even be handicapped) in its legislative competence due to the restrictive constitutional provisions [35]. This seems to be contrary to environmental federalism and could pose environmental danger for state which cannot take immediate action to resolve environmental problems. In my opinion, it is becoming evident that the state government appears rather too subservient to the federal government on environmental matter.

In spite of chequered history of environmental federalism in Nigeria, many states in Nigeria have enacted state laws to curtail environmental danger within their territories[36] Nearly all the states in the federation have their own State Environmental Protection Agency (SEPA) [37]. In my opinion, section 24 of the federal environmental protection agency Act, 1988 promotes a measure of environmental federalism in that it empowered both the state and local government council to establish their own environmental protection bodies with a view to maintaining good environment quality in the area of pollution. It is important to state that under the Lagos State Environmental Sanitation Edict, a Special Offences Court was established to try any person who breaks any provision of the edict, and appropriate sanctions are imposed upon conviction. Similarly, in Edo State, there are mobile courts whose jurisdiction is to try environmental offences [38]. Other states of the federation have environmental laws within their domain.

It has been observed that in federating units like Nigeria, both the state and local government constitute the environmental theatre where the "substantial degree of activities" are conducted, as such both tiers of government should be given large autonomy in the implementation of environmental laws within their territories. The 1999 CFRN (as |amended) seems to stifle and usurp the power of both arms of government thereby putting both state and local government at a great environmental disadvantage.

4. Environmental Federalism in the Local Government.

Local governments make laws in form of bye-law with respect to environmental management. In fact, both the 1979 and 19999 Constitutions recognized the functions of the local government. The functions of the local government are enshrined in the Fourth Schedule of each of these constitutions. The environmental obligations of the local government include: the provision and maintenance of public conveniences sewage and refuse disposal, drains, roads, streets, street lightings, panes, gardens open space, markets, slaughter houses, slaughter slabs, markets, motor parks etc.[39]

Under the 1999 Constitution their legislative sphere is restricted to only items on the residual legislative list [40] though most of the activities damaging to the environment occur in the remote parts of the county, that is in the local government areas, [41] yet the constitution does not give (them) local government greater autonomy to curtail environment dangers consequently the local government face serious legislative constraints which hamper its ability to combat environmental problems. Local governments are responsible for urban waste disposal but it appears that some local governments in some states in Nigeria are not living up to expectation. This may be due to lack of financial resources shortage of workmen and importantly absence of environmental federalism among the three tiers of government in Nigeria.

5. Practicability of Environmental Federalism in Nigeria and Its Prospects

One of the most controversial issues affecting environmental regulation in Nigeria is the regulatory issues associated with the federal system of government and its three tiers of government [42] In defining the lawmaking boarder between the different tiers, environmentalist occasionally argue in favour of a stronger federal government overriding state autonomy, while at other times, the support is for the authority of states to impose more environmentally protective requirements [43]. Apart from the constitutional provision enshrined in section 20 of the 1999 CFRN (as amend), there is no express provision or specific references in the constitution as to the power of the federal government of any lower level of government to make laws with respect to the environment.

Since the word 'environment' is not specifically stated in both the exclusive and concurrent lists, a learned writer[44] has suggested that environmental protection should be treated as a residual matter and as such it should come within the sphere of the State Houses of Assembly so they can legislate on environmental issues under their territory. By virtue of section 4(7) of the 1999 CFRN (as amended), the state assembly are empowered to make law for the peace, order and good governance of the state or any part thereof. This statement has broad implications [45]. By extension, one can infer that the state governments are also given powers to make laws on environmental matters though the word "environment" is not specifically stipulated under their constitutional roles. In an ideal federalist state, the federal government cannot completely usurp the powers of the confederating units. In the case of *Attorney-General of Lagos StateV. Attorney General Federation* [46] Uwaifo JSC (as he then was) expressly said,

The national Assembly cannot in the exercise of its powers to enact specific laws, take the liberty to confer authority on the federal government or any of its agencies or engage in or be concerned with town planning matters, or to grant permits, licenses or approvals which ordinarily ought to be

[35] O. Fagboun (n. 30).

[36] See for instance, Lagos State Environmental Protection Agency (LASEPA); Edo State Environmental Sanitation Edict of 1994; Lagos State Environmental Sanitation Edict 1998.

[37] This is in pursuance to section 24 of FEPA Act which encourages state and local government council to set up their own environmental protection bodies for the purposes of maintaining good environment.

[38] L. Atsegbu, V. Akpotaire and F. Dimonwo (n. 25).

[39] Items 1 (a), (c), (e) (f) and (h) of the Fourth Schedule to the 1979 and the 1999 CFRN (as amended)

[40] *Ibid.*

[41] O.Fagbohun (n. 30).

[42] O.A Fagbohun, Mournful Remedies, Endless Conflicts and Inconsistencies in Nigeria's Quest For Environmental Governance. Rethinking the Legal Possibilities for Sustainability Inaugural Lecture, (Nigeria Institute Of Advanced Legal Studies 2012).

[43] *Ibid.*

[44] *Ibid.*

[45] O.A Fagbohun (n. 42).

[46] (2003) 12 NWLR 1 at 195.

the responsibility of a state government or its agencies, this is because such pretext cannot be allowed to the federal government… to encroach upon the exclusive constitutional authority conferred on a state under its residual legislative power a law of that type will be declared unconstitutional to the extent of such enrichment.

The purport of the foregoing is that the principle of autonomy is operational within a federal system and so it frowns at any attempt by one of the tier of government, be it federal or state, encroaching on the functions of another tier or imposing burdens on the functionaries of the other tiers without their consent [47]. Different theories have been propounded on environmental federalism. Some of these theories are briefly examined. First of all, the political scientist's perspective which centres on constitutional division of powers may not be suitable for a discourse on environmental federalism. The other theory is the economic theory of environmental federalism [48]. The central theme of this theory is to maximize economic efficiency and to ascertain whether the costs and benefits of efforts to protect the environment extend beyond local (or state) boundaries.

In Nigeria, most decisions on environmental matters are taken at the federal level and the states may not be effectively represented [49]. The consequence of that is that there could be jurisdictional overlap between the two tiers of government in respect of environmental issues and it could also lead to constant friction. In a bid to avoid such conflicts, His lordship Uwaifo (JSC as he then was) observed in the case of *Attorney General, Lagos State v. Attorney General, Federation* [50] that:

Section 2 (2) of the 1999 constitution re-enacts the doctrine of federalism. This ensures the autonomy of each government. None of the government is subordinate to the other. This is particularly of relevance between the state governments and the federal government, each being able to exercise its own will in the conducts of its affairs within the constitution, free from direction by another government [51].

It may view it will be better if environmental issues can be decentralized. This work opines that the federal government should allow the state legislators play prominent role in the concurrent lists.

6. **Conclusion and recommendation**

What can be deduced from the discussion above is that the 1999 CFRN (as amended), does not provide suitable conditions for environmental federalism to thrive. The 1999 Constitution has made the federal government extremely powerful and superior to both state and local government in virtually all important constitutional matters including environmental matters. This has put the other tiers of government in serious disadvantage thus making states and local governments to be very prone to recurrent environmental challenges.

It is recommended that the 1999 CFRN (as amended) should be modified in order to allow for decentralization of powers to the components units especially on environmental issues.

It is also recommended that some items in the Exclusive Legislative list should be taken to the Concurrent Legislative list. This could reduce the overbearing power of the National Assembly. Similarly, certain items in the Concurrent Legislative list should be taken to the residual list of the local government. This will give the local government more autonomy especially over environmental issues.

[47] See O.A Fagboun (n. 42)

[48] See the Congress of the United States Congressional budget office, 'Federalism and environmental protection. case studies for drinking water and ground level Ozone Available at http://www/cbo.gov/ftpdoc/2xx/doc250/drinkinwat.pdf>accessed13 July, 2021

[49] O.A Fagboun (n. 42)

[50] Supra

[51] Supra at 1006-1007.

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