

CONSTITUTIONAL STATUS OF LOCAL GOVERNMENT UNDER THE 1999 CONSTITUTION: AN APPRAISAL *

1.1 INTRODUCTION

Local government have in recent times excited a lot of interest especially because of the enormous revenue which they seem to be getting from the federation account and whether or not the state government have an absolute control over their affairs. It is indeed an honour to examine such important topic.¹ The main focus of this paper is to consider the legal and constitutional status of the local government, raise issues in the hope that it will provoke further discussions in our quest and desire to properly understand and appreciate the constitutional status of Local Government under the 1999 Constitution. For the avoidance of doubt all views or errors expressed in this paper are mine and I fully accept responsibility for them. The writer will however graciously accept corrections whenever or wherever they are pointed out if they were based on superior arguments or latest legislation on the issue which could have been gloss over. On the views or opinion expressed there is no claim to either their finality or exhaustiveness on any matter raised or examined. Consequently the discussion will initially be predicated on comparative analysis of the status of Local Governments under the 1979 and 1999 Constitutions,² the legal and constitutional relationship between the Federal, State and Local Governments, the function of the local governments under the 1999 Constitution, Finances of local governments and their constitutional responsibilities.

2.2 COMPARATIVE ANALYSIS OF CONSTITUTIONAL STATUS OF LOCAL GOVERNMENTS UNDER THE 1979 AND 1999 CONSTITUTIONS

Before the Local Government Reforms of 1976, the relationship between the federal, state and native administration were not clearly defined which resulted in the overlapping of functions and encroachment / direct interference upon the preserve of another government. This was particularly obvious in the relationship between the state and local government so much so that there appeared to be only two effective governments in operation i.e. federal and state. The local administration referred as "native or local authorities" were merely an extension of the state government's administration.

Under ordinary circumstances, a local government should exist to provide services to the people with the ultimate goal of uplifting the economic situation of the people at the base of the social strata. The Local Governments Reforms of 1976 were introduced with this objective in mind and to bring the government closer to the people and possibly establish it as a third tier of government. The 1979 Nigerian Constitution which came into force on October 1, 1979 had formally incorporated the local government thereby vesting it a recognition as a possible third tier of government within the Nigerian Federal Structure under section 5.

At the Constituent Assembly Debates of 1978 there was a controversy on the question whether local government should be established as a separate tier of government or allow the *status quo* to remain undisturbed. When a motion was proposed to amend the draft and establish local government in the same section that established the offices of President, Vice President, Governor and Deputy Governor, the mover boldly asserted that the Chairman and the Deputy Chairman were the “structural equivalents” of the President, Vice President, Governor and Deputy Governor.³ This brings out quite clearly the conceptual premise on which the amendments were based. This amendment would have made it necessary to define the area of authority of a local government, its executive authority, qualifications and disqualifications of candidates for election, method of elections, tenure of the office of the Chairman, his removal etc for inclusion in the Constitution, as in the case of federal and state governments. Finally none of the proposed amendments found their way into the “clean” copy of the Constitution.

It is humbly submitted that in view of the above and notwithstanding the provisions of section 5 and other sections of the 1979 Constitution which established the Executive Office of the Chairman of the Local Government Council and Schedule Four which provides for the functions of the Councils that local governments, *are not* independent third tier of government. There is no gainsaying that the collective interpretation of the key provisions of the 1979 Constitution as it affects local governments must lead to the inescapable conclusion that state governments have power over local governments. Perhaps a little examination of these provisions at this juncture is necessary to accentuate, illustrate, buttress this contention.

Under the general principles of federalism in the context of the nature of division of powers under the 1979 Constitution local governments were not (except on certain aspects) mentioned in the body of the Constitution or in the Exclusive or Concurrent Legislative Lists or as being within federal competence. As a residual matter therefore it lies within the exclusive authority of the state governments.⁴ Thus the authority of states over local governments was derived from the fact that it is a residuary matter, and not as commonly supposed, from the provision of the Constitution requiring every state government to ensure the existence of democratically elected local government councils under the law which provides, “for their establishment, structure, composition, finance and functions.”⁵ That provision is not a grant of power rather it assumed that a state government has power over local governments under some other provisions of the Constitution.

Section 7(1) of the 1979 and 1999 Constitution appears to be central to the status of Local Government vis-a-vis the state government. Professor Nwabueze quite rightly asserted that,

The provision is an explicit recognition by the Constitution that the power to establish local governments, to define its structure, composition and functions belongs to the state government... If only the state government has the

constitutional power to establish local government, define its structure and functions . it clearly follows that *LOCAL GOVERNMENT IS NOT AN INDEPENDENT TIER OF GOVERNMENT*,⁶ but only an agency or creation of the state government.

To further buttress this argument there is no limitation on the power of the State House of Assembly to prescribe the organizational structure of a local government in terms of the functionaries appropriate to it, prescribe how many councillors should compose it, their qualification, terms of office and removal of Chairmen and Councillors. This view is reinforced by section 8 subsection 3 which exclusively vested in State House of Assembly the power to create local governments. The only obligation imposed on the state after such creation is render "adequate returns" to the National Assembly under subsection 6. The basis for making such "returns" was simply to enable the National Assembly exercise the powers vested in it under subsection 5 i.e. make consequential provisions relating to the names and headquarters of the local government areas as provided under section 3 of the Constitution and in Part I and Part II of the First Schedule to this Constitution. It is therefore unfortunate that the National Assembly was reported to have "allegedly rejected" the local governments created by a number of states house of assembly in the federation. This action and opinion were misconceived as the Constitution has not vested any power of "approval" or "rejection" on the National Assembly.

From the above perspective it is my considered view that there is nothing legally wrong or reprehensible in the idea of a state Governor removing a local government Chairman from office subject to only two conditions. Firstly the Governor must possess the powers under the relevant Local Government Laws of the state to effect such removal . Secondly in the exercise of such powers the Governor must comply with the procedures that may be laid down by the law no matter how difficult they are or may be. Otherwise, the action may be declared illegal and unconstitutional for procedural *ultra vires*. However the determination of whether a power had been exercised legally or constitutionally is the absolute prerogative of the Courts. Once these conditions were fulfilled, the removal of such a chairman will be legal and constitutional. Complying with these two conditions are necessary in order to completely avoid or insulate the action from being declared, if challenged in court, as *ultra vires* either for want of authority or procedural defects.

It is conceded that while state governments may have power over local governments but such powers are not without restrictions. The 1999 Constitution under Section 7(1) imposed an obligation on state governments to ensure their existence under a law which provides for the laid down constitutional standards. In addition the Constitution unequivocally guaranteed the system of local government to be "democratically elected."⁸

It is submitted that the inter-governmental relation between the states and local governments is an important political issue on which the success or failure of local

government to a considerable extent depends. For so many years perhaps owing to the nature of military rule state governments have, for all intents and purposes, been the custodian of local governments. They states monitor the activities of these councils very closely and in many cases imposed some restrictions in public interest e.g. placing ceiling in their expenditure unless approval was sought for. It is against this background that a number of institutions primarily engaged in the business of monitoring them were created. e.g. Ministry of Local government Affairs, Local Government Service Commission which are constantly playing a supervisory role over the Councils on behalf of the state government. It must be emphasized that these bodies were not set up to interfere with the operations of the local governments but as reinforcement tools to their success in operations.

3.3 **FEDERAL/LOCAL GOVERNMENT RELATIONS**

There appears, under the current constitutional dispensation, to be a controversy as to the exact nature and scope of the federal government powers especially the National Assembly in its relationship with the local government . For instance the Independent National Electoral Commission Bill 2001 (hereinafter referred to as the Bill) currently before the National Assembly contained some curious provisions which we shall examine briefly. Specifically Part IV of the Bill entitled *Election to Local Governments / Area Councils* which spanned form sections 113 - 148 dealt exclusively with local governments .One wonders whether on the basis of foregoing powers examined and the creation of the State Independent Electoral Commission and their powers under section 195 and 197 of the Constitution the National Assembly should contemplate making Electoral law for the states to regulate local government elections.

Under the 1999 constitution the provisions relating to the establishment of the offices and executive powers of the Chairman and Vice Chairman equivalent to section 5 (3) of the 1979 Constitution was conspicuously omitted. With the fundamental deletion of this key provision section 114(1) of the Bill established the Office of the Chairman and Deputy Chairman for each Local Government/Area Council in the Federation. Sub section 2 equally provides for the election of a councillor for each ward of a local government councils and Area Councils respectively.

It was partly in reaction to this Bill that the Association of Local Governments of Nigeria (ALGON)⁹ made a very strong representation to the National Assembly to elongate the tenure of local government councils to four years on the basis and / or argument that all other elected bodies established by the 1999 constitution were prescribed a four year tenure. This representation galvanized the State Governors to challenge the constitutionality of the powers of the National Assembly to make law in respect of Local Government Councils in the Supreme Court Of Nigeria. Prior to that the Presiding Officers Conference¹⁰ had challenged the constitutionality of that part of the Bill on the ground that all matters of local government under section 7 of the 1999 constitution and the residue subject matters exclusively vested in the States House of Assembly.

In addition a new Forum for the State Independent Electoral Commissions¹¹ rejected the attempt by the National Assembly to vest in the Independent National Electoral Commission powers which, in their view, contradict the provisions of the Constitution. The forum specifically rejected the provision of section 115 of the Bill which vested in the INEC the power to delimit wards for the purposes of election into the Local Government Councils. The Forum, quite rightly argued, that since the Third Schedule Part II Clause B section 3(a) of the Constitution vested in the States Independent Electoral Commission, the power to conduct elections into the Local Government Councils in each state, the scope of that power must be interpreted to extend to the exercise of all necessary incidental powers to enable the Commission to discharge its constitutional functions.¹² One of the most important part of this powers must be the power to delimit wards for the purposes of election into the Local Government Councils. It is certainly absurd for one body to be vested with the power to conduct election while a completely different body is vested with the power to determine the territorial unit of that electoral constituency . There are other controversial sections but suffice to say at this juncture that it is difficult to rationalize the action of the National Assembly in attempting to legislate on matters that are purely within the constitutional purview of the state. Generally the intergovernmental relations between the federal and local governments for all intents and purposes are very remote or at best through the states. Apart from the monthly grant that were normally directly paid into the State Joint Local Governments Account¹³ from the Federation Account there is hardly any other connection except perhaps the execution of some federal projects in particular local governments.

4.4 **FUNCTIONS OF LOCAL GOVERNMENT**

One of the most important duties imposed on the Local Government could be found under section 7 subsection 3 which provides that,

It shall be the duty of a local government council within the state to participate in economic planning and development of the area referred to in subsection 2 of this section and to this end an Economic Planning Board shall be established by a law enacted by the House of Assembly of the State.

This appears to be the most important obligation of the local government council but regrettably never exercised. The intention of conferring this important power appears to be for the local government to consider the economic well being of their people as a number one priority. Furthermore the Fourth Schedule to the 1999 Constitution provides for the functions of Local Government Councils. Section 7(5) of the 1999 constitution provides that,

“...the functions to be conferred by law upon local Government Council SHALL include those set out in the Fourth Schedule to the Constitution.” While the Constitution

recognised the power of the state government to provide for additional functions by law to the local governments, this must be *in addition* to those already spelt out in the Fourth Schedule. Part IV section 318 of the Constitution define “function” to include “power and duty.” A word of caution must be sounded here because no local government can assume any of the enumerated functions by right of a constitutional grant they must first be conferred by law. A state government is however duty bound to confer these functions on its local governments. The only question that remained unanswered is whether the State House of Assembly can be compelled to make the necessary law. In other words could an order of *Mandamus* lie against a State House of Assembly for wilfully or by default refusing to make the necessary law on local government.?

The main functions of a Local Government Council under the Constitution are as follows:

- a) the consideration and making of recommendations to a state commission on economic planning or similar body on
 - i) the economic development of the state, particularly in so far as the area of authority of the council and of the state are affected, and
 - ii) proposal made by the said commission or body;
- b) Collection of rates, radio and television licences;
- c) establishment and maintenance of cemeteries, burial grounds and homes for the destitute or infirm;
- d) Licensing of bicycles, trucks (other than mechanically propelled trucks), canoes, wheel barrows and carts.
- e) establishment, maintenance and regulation of slaughter houses, slaughter slabs, markets, motor parks and public conveniences;
- f) construction and maintenance of roads, streets, street lightings drains and other public highways, parks, gardens, open spaces, or such public facilities as may be prescribed from time to time by the House of Assembly of a State;
- g) naming of roads and streets and numbering of houses;
- h) provision and maintenance of public conveniences, sewage and refuse disposal;
- i) registration of all births, deaths and marriages;
- j) assessment of privately owned houses or tenements for the purpose of levying such rates as may be prescribed by the House of Assembly of a State; and
- k) control and regulation of:-
 - i) out-door advertising and hoarding,
 - ii) movement and keeping of pets of all description,
 - iii) shops and kiosks,
 - iv) restaurants, bakeries and other places for sale of food to the public,
 - v) laundries, and
 - vi) licensing, regulation and control of the sale of liquor.

2. The functions of a Local Government Council shall include participation of such council in the government of a state as respects the following matters
 - a) the provision and maintenance of primary, adult and vocational education;
 - b) the development of agriculture and natural resources, other than the exploitation of minerals;
 - c) the provision and maintenance of health services; and
 - d) such other functions as may be conferred on a local government council by the House of Assembly of the State.

From the wordings of Paragraph 1 of the functions it appears that the state shall hands off most of these functions. If one examines these functions closely, it is clear that most of the subject matters/issues enumerated therein are essentially or purely of local concern. Professor Nwabueze forcefully put the argument thus:

Paragraph 1 must therefore be construed as not obliging a state government to confer upon its local government authority to regulate these matters: the obligation cast on it is only to delegate to the local government power to execute any regulation which it may make on them. It follows therefore that only the executive authority of the state government in respect of these matters is excluded by the delegation of ... them to the local government....¹⁴

Furthermore it appears that there are a number of obligations imposed upon the Local Government Council under this paragraph. A closer examination of items (c),(e),(f),(h) will unambiguously indicates that if a local government should commit its entire resources to discharging these basic obligations the social and economic situation of our people will be greatly lifted. Armed with this power a politician seeking for any elective local council office need not to draw any campaign manifestoes because the constitution has already drawn one for him. It will be difficult to conceive of any promises more relevant to the people's life outside this framework. It is now intended to briefly consider how the local government councils could secure their finances in order to discharge these responsibilities.

5.5 LOCAL GOVERNMENT FINANCES

It is beyond dispute that no basic governmental responsibility could be discharge without a steady means of income because government and governmental responsibility is a continues process. Against this background the Constitution attempted through some provisions to provide for a constitutional source of funding the Local Government Councils. In other words the local governments have complete financial independence from the state government. There are basically 3 sources of funds for the local government:

- a) Section 162(3) of the Constitution which gives them a direct share of the federally collected revenue – although the amount and terms of such disbursement

amongst the groups of the local governments in the various states are left with the National Assembly to determine by law.¹⁵ Furthermore Section 7(6)(a) of the Constitution provides that the National Assembly shall make provisions for statutory allocation of public revenue to the local government councils in the federation. The share due to the local government in each state is paid not directly to them but to the state joint local government account established under section 162(5) and (6) of the 1999 Constitution. The payment made to the state government is in its position as a Trustee for distribution to its local governments in accordance with the formula to be prescribed by a law of the House of Assembly as provided under section 162(8) and section 7(6)(b) of the Constitution.¹⁶

- b) Secondly, Section 162(7) of the constitution imposed an obligation on the State to pay to the local government councils in its area of jurisdiction such proportion of its total revenue on such terms and such manner as may be prescribed by the National Assembly. As a control measure it appears that some state government have imposed a general control over expenditure from the local government account i.e. approval of the state Governor must first be obtained.
- c) Thirdly there is the local government independent revenue base which is directly derived from the Constitution. For instance apart from any bye-laws or regulations which the local government may design or make for the purposes of raising revenue, items (b), (d), (i), (j), (k) of Paragraph 1 of the Fourth Schedule to the Constitution are clearly powers vested for the purposes of raising revenue for the Local Government Councils. The revenues raised here is within the exclusive preserve of the local governments to decide how to apply them.

6.6 CONCLUSION

From the foregoing discussion it is clear that local governments are constitutionally placed to make the greatest impact on the lives of the people. Perhaps the constitutional structures and protection afforded them via the various constitutional provisions especially on the issue of finances is because it is the government closest to the people. Moreover the other obligations imposed upon the local government by paragraph 2 of the Fourth Schedule was supposed to be participatory, i.e. in conjunction with the state governments.

In view of the enormous resources available to the local governments through the federation allocation, the Councils were duty bound to make a positive impact on the life of the people in their locality. The stories coming out of the Councils however sing different tunes. A number of local governments officials stand accused of serious financial improprieties especially in the Northern States of Nigeria. The Councils had by design been turned into a gold mine for the officials to dig and appropriate public fund for private aggrandisements and other irresponsible misconduct. The recent experience in Kaduna State in which about 11 Council's Chairmen were suspended from office for

alleged corruption is still fresh in our memory to be recounted here. It is regrettable that the President of Nigeria Olusegun Obasanjo had, on a number of occasions repeatedly accused the Local Government Chairmen of corruption.

Finally there is necessity for the state government to safeguard the public funds in the custody of local governments and more closely and monitor them capriciously to ensure that such funds did not find their way into private pockets. In other words funds meant for developmental purposes *MUST* be applied for that purposes and that purpose *ONLY*. After all since the Council's members are now sufficiently and adequately remunerated there is absolutely no basis for anyone to steal from public coffers. The Local Government Chairmen and other elected officials must be reminded that they swore to an oath of office to discharge their duty "honestly" and in accordance with the laws and provisions of the Constitution of the Federal Republic of Nigeria. It is incumbent upon them to work consciously and assiduously to erase the impression created in the mind of an average citizen of Nigeria that "membership of a local government council is easiest way to loot public treasury.

END NOTES AND REFERENCES

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Constitutions of the Federal Republic of Nigeria.

CONSTITUENT ASSEMBLY DEBATES (March 1, 1978), Col. 6140.

See Section 4(7), 5(2) of 1979 Constitution similar to section the same section
under the 1999 Constitution.

See Section 7(1) of 1979 Constitution similar to the same section under the
1999 Constitution.

Emphasis supplied.

FEDERALISM IN NIGERIA UNDER THE PRESIDENTIAL CONSTITUTION
(1983)p.129.

See Section 7(1) and (4) of the 1999 Constitution

A voluntary Association of all Local Government Councils of Nigeria (made
principally of the Chairmen) dedicated to the promotion and advancement
of Local Government Councils throughout the Federation formed in the
year 2000.

An organization of all Speakers of the Houses of Assembly of the Federation,
equally established in the year 2000.

This Forum was formed by all the States Independent Electoral Commission
in order to ensure uniformity of all matters relating to Local Governments
Elections throughout the Federation.

This interpretation is consistent with the doctrine of implied power or
ancillary powers recognized and applied by the Supreme Court of Nigeria.

See Section 162(6) of the 1999 constitution.

Ibid at p.138 - 139.

See Section 162(2) of the 1999 Constitution.

The state is not entitled to keep any part of this money for its own use
otherwise it will be committing an unconstitutional Act.