

NIGERIAN FEDERALISM: LOCAL GOVERNMENT AND ITS RELATIONSHIP WITH THE OTHER TIERS OF GOVERNMENT

Introduction

The 1999 Constitution of Nigeria provides what may be regarded as basic and rather comprehensive legal framework for true federalism. This Constitution has improved on the 1979 Constitution of Nigeria in seeking to promote federalism both in its classical formulation and as a tool for achieving the much needed unity in diversity. The features include, amongst others, a supreme written Constitution, a pre-determined distribution of authority between Federal and State governments, a provision for an amending process with the active participation of both levels of government, some measure of financial autonomy for States and the judiciary exercising powers of judicial review. While providing for the vertical separation of powers among the three arms of Government – the Legislature, the Executive and the Judiciary, the Constitution also provides for the vertical division of powers between the Federal, State and, to a lesser extent, the Local Government. The Constitution thus provides for three tiers of Government with fairly well-defined functions and powers although in some cases, this may be seen to be lopsided. Unfortunately too, it would appear that the constitutional provisions on Local Government system are less copious and have given rise to conflicts, confusion and questions as to the relationship of Local Government with the State and Federal Governments.

Admittedly, the Constitution, like any other human document, is not perfect and to be able to examine this relationship clearly, it is intended to take an excursion into the recent past history of Local Government System in Nigeria as a foundation for our interpretation of the provisions of the Constitution on this subject.

Brief History of Local Government

On noticeable feature of our constitutional development in the past was the attempt of each region to preserve its autonomy with little or no attention given to Local Government relationship within the overall political system of government. One consequence of this, was that local government was subsumed under the State or Region and regarded merely as one of the functions of a State or Regional government with the latter encroaching into what would normally have been the exclusive preserve of Local Government. Needless to say that as a system of Government, Local Government was not truly recognized under our political arrangement until the 1976 Local Government reform. The latter resulted in the Constitutional recognition of the Local Government system as a third tier of government under the 1979 Constitution.

The 1976 Local Government Reform was a national exercise the essential objectives of which were uniformity and effectiveness. It was designed to produce efficiency in the administration of local governments. In addition, it was, amongst others, to effect a constitutionally uniform establishment procedure, composition, functions, structure and finance of local government councils as a third tier of Government below the Federal and State Government. Under the Reform the Local Government was designed to be analogous to, but not equal in all respects in dignity with, the legislative and executive bodies of other levels of government, for whose establishments, composition, structure, functions and financial burdens there were copious provisions under the subsequent Constitutions. To realize the objective of uniformity of Local Government administration in the country as a goal of the national Reform exercise, the Federal Government provided the uniform Guidelines on which State legislation for Local

Governments were based. Knowing that it was a military Government at that time, it is clear that State legislation on local Government could not deviate from those Guidelines as we shall soon demonstrate.

Government intention to change the status of local Government was clear from the following speech by the then Chief of Staff, Supreme Headquarters –

“The defects of previous Local Government systems are too well known to deserve further elaboration here. Local Governments have, over the years, suffered from whittling down of their powers. The State Governments have continued to encroach upon what would normally have been the exclusive preserves of Local Government. Lack of adequate funds and appropriate institutions had continued to make Local Government ineffective and ineffectual. Moreover, the staffing arrangements to ensure a virile local government system had been inadequate. Excessive politicking had made even modest progress impossible. Consequently, there has been a divorce between the people and government institutions at their most basic levels..... The Federal Military Government has therefore decided to recognize Local Government as the third tier of governmental activity in the nation”.

Obviously, this speech summarises the defects of local administration and the objects of the nation-wide reform.

To correct these defects, the Supreme Military Council recognized the Local Government as the third tier of government in this country. To enforce obedience on the States, the Federal Government not only prepared a Model Edict and Guidelines to which all State Edicts must conform but also insisted that, in exceptional cases, where deviation from the guidelines and the standard edict was necessary, the State concerned must obtain a clearance from the Federal Government. This was essential in order to achieve uniformity in the local government system in the country. Although the Federal Government directive was not formalized in a Decree, it was an executive order with the force of law bearing in mind that it was a military regime.

In accordance with the Federal Executive Order, the law-making bodies of the various States created two hundred and ninety-nine Local Government Council areas, which number was by amendment authorized by the Federal Government, later increased to three hundred and one Council areas. Although the Guidelines for the Local Government Reform made allowance for the creation of subordinate councils, yet it was made abundantly clear that only the three hundred and one councils created by the State, should be regarded as the third tier of government. The term “tier” was used in the Guidelines to refer to “a set of local government Authorities with their own identity, powers and sources of revenue established under State legislation and with functions for which they were responsible to the State.

Thus the intention and authority of the Supreme Military Council to carve out identifiable local Authorities, through State legislations as the third tier of government was abundantly clear. On this point, the Army Chief of Staff, Supreme Headquarters said:

“The implications of the guidelines will in fact mean that a fundamental change in the political structure of this country will be brought about. For, with these reforms, a new level of government will be added below the Federal and State Government levels. In fact, thought is being given to guaranteeing the statutory nature of this level of government by embodying it in the new constitution”.

To guarantee the statutory status of these three hundred and one Local Government Authorities, as a third tier of Government, the Constitution Drafting

Committee (CDC) collected a list of local government council areas already constituted from the Cabinet Office of the Federal Government, and embodied them in the first Schedule to the Constitution.

A sub-committee of the CDC was charged with the duty "to examine and make recommendation on the functions of the Local Government Authorities and to determine those functions of Government which can best be performed by such authorities and the extent (if any) to which the constitution should make provision to this effect" The Sub-Committee condemned any practice whereby a Sole Administrator would be appointed to administer a local government area directly as a delegate of a State government. "It is felt that the states should be stopped from cavalierly and whimsically tinkering with the local government organs, dissolving them at will, and setting up some official as sole administrator. The sub-committee also agreed that the functions and finance of Local Government should be made constitutional issues, but these issues would be provided for in the State constitutions. The overall intention was to protect the third tier of government against state interference and also to make the local governments function effectively and efficiently. Thus, the 1976 Local Government reform paved the way for the first all important recognition and guarantee of the Local Government system as the third tier of government under the 1979 Constitution.

Local Government System under the 1999 Constitution

The foregoing brief historical background was necessary to enable us appreciate the rationale and intention for the provisions on local government system under the 1999 Constitution.

Admittedly, there were certain inadequacies under the provisions of the 1979 Constitution which gave rise to certain interpretational problems before the courts. For instance, the Constitution expressly named all the States of the Federation in section 3(1) but merely included the list of existing Local Government Areas in the second column of Part I of the First Schedule to the Constitution. The mere reference to them as "area" in section 3(2) of the Constitution gave rise to the question whether the Constitution meant to recognize them as local Government Areas or just geographical areas merely descriptive of State boundaries.

A second major problem was the failure to provide expressly for state power to create new Local Governments. The absence of an express provision in that regard ignited much controversy on the power of a State to create new Local Government under the 1979 Constitution. The problem was whether the areas listed in Part II of First Schedule Constitution fixed local government areas which could only be changed through constitutional amendment. Luckily the 1999 Constitution has remedied these deficiencies but not without containing other provisions also susceptible as sources potential conflict in the federal arrangement.

Establish of Local Government System

Section 3 of the Constitution which provides expressly for thirty-six states and federal capital territory (by their existing names) also expressly provides for seven hundred and sixty-eight existing local government areas named in the second column of Part I of the

First Schedule to the Constitution thus laying to rest the earlier controversy on this subject under the 1979 Constitution. Section 3(b) of the 1999 Constitution provides:

Section 7 of the 1999 Constitution is very important for this purpose as to be reproduced hereunder. It provides

- (1) The system of local government by democratically elected local government council is under this Constitution guaranteed; and accordingly, the Government of every State shall, subject to section 8 of this Constitution, ensure their existence under a Law which provides for the establishment, structure, composition, finance and functions of such councils.
- (2) The person authorized by law to prescribe the area over which a local government council may exercise authority shall –
 - (a) define such area as clearly as practicable; and
 - (b) ensure, to the extent to which it may be reasonably justifiable, that in defining such area regard is paid to –
 - (i) the common interest of the community in the area,
 - (ii) traditional association of the community; and
 - (iii) administrative convenience.
- (3) 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.
- (4) The Government of a State shall ensure that every person who is entitled to vote or be voted for at an election to a House of Assembly shall have the right to vote or be voted for at an election to a local government council.
- (5) The functions to be conferred by Law upon local government councils shall include those set out in the Fourth Schedule to this Constitution.
- (6) Subject to the provisions of this Constitution –
 - (a) the National Assembly shall make provisions for statutory allocation of public revenue to local government councils in the Federation; and
 - (b) the House of Assembly of a State shall make provisions for statutory allocation of public revenue to local government councils within the State.

Under subsection (1) of this section the Constitution **guarantees** a system of local government by democratically elected local government councils because they were already in existence under the relevant existing laws. What is guaranteed by the Constitution is a system of DEMOCRATICALLY ELECTED LOCAL GOVERNMENT COUNCILS.

The Constitution lays the responsibility for ensuring the continuous existence of this system on the States under their laws. The reference to section 8 under this section is important as it points to the legislative authority of the States to create new local government areas and boundary adjustments of existing local government areas where necessary.

Section 7 has to be read together with section 4 of the Constitution which contains express provisions in respect of the division of legislative powers between the Federal and State legislative authorities – the National Assembly and State Houses of Assembly.

The legislative power of the National Assembly is limited to the Exclusive Legislative List set out in Part I of the Second Schedule to the Constitution and only the National Assembly can legislate on these matters and those that are incidental or supplementary to them under item 68 thereof. This does not include local government.

On the other hand, both the National Assembly and the State Houses of Assembly may make laws on matters contained in the Concurrent Legislative List set out in the first

column of Part II of the Second Schedule to the Constitution. While this does not directly include Local Government as an item, paragraphs 11 and 12 thereof were recently relied upon (albeit erroneously) by the National Assembly to legislate on local government matters including the extension of in the tenure of Local Government Chairmen in the country. The paragraphs provide:

- “11. The National Assembly may make laws for the Federation with respect to the registration of voters and the procedure regulating elections to a local government council.
12. Nothing in paragraph 11 hereof shall preclude a House of Assembly from making laws with respect to election to a local government council in addition to but not inconsistent with any law made by the National Assembly”.

It is clear from this provision that any law of the National Assembly validly enacted on a subject properly falling within the concurrent legislative list would override a state law on the same subject. This is made even more imperative by the express provision of section 4(5) of the Constitution otherwise referred to as the doctrine of covering the field. However, it is to be noted that item 22 of the Exclusive Legislative List specifically excluded the National Assembly from making any law for election to local government councils.

However, the Supreme Court held in the recent case of *Attorney-General of Abia State and others v. Attorney-General of the Federation* (2000 and 2002) that the above paragraphs could not be relied on by the National Assembly to enact the Electoral Act for Local Government elections an area which was expressly reserved for the states by virtue of sections 4, 7, & 8 of the Constitution. Attention was also drawn to section 197 which created the State Independent National Electoral Commission whose functions include the conduct of election to local government councils in the State.

Tenure of Local Government Chairmen

Specifically, the argument that the National Assembly could legislate on the tenure of the Local Government Chairmen was rejected by the Supreme Court in this recent case above. Section 7 of the Constitution did not expressly provide for tenure to be included in State law on Local Government, most probably because this had already been included under the existing law on the existing local government – Local Government (Basic Constitutional and Transitional Provisions) Decree No. 36 of 1988. Unfortunately that law had been repealed by the Constitution of the Federal Republic of Nigeria (Certain Consequential Repeals) Decree No. 63 of 1999, and it was sought to argue that the National Assembly could legislate on local government as an incidental matter under item 68 of the Exclusive Legislative list. This argument was rejected by the Supreme Court. It was held that the power to establish local government under section 7 of the Constitution also implies the power on the part of the State Legislature to make provision for tenure of the office holders particularly where in this case the Constitution is silent on tenure. Secondly, under section 4 of the constitution the State legislature is empowered to make laws on any matter not in the Exclusive Legislative List. Since tenure of Local Government Chairmen was neither in the Exclusive nor Concurrent Legislative Lists, it was therefore a residual matter on which the State Legislature is entitled to make law exclusive of the National Assembly. It is submitted that this decision is sound in law.

However, the question may be asked if the tenure could not have been legally extended in the circumstances without breaching the Constitution?

Appointment of Local Government Transitional Councils

Pursuant to the legislative powers of the State under sections 4 and 7 of the Constitution the States Houses of Assembly made laws for the establishment of a Transitional Council to run the affairs of each Local Government pending the elections into the Councils and the swearing-in of democratically elected members. The reason given for this is that it was not possible to hold elections for elected members to replace those whose tenure had expired. With due respect, it is submitted that this excuse is untenable.

The provision for Local Government Transitional Council for each Local Government is unconstitutional being a fragrant breach of section 7 of the Constitution. That section guarantees only **democratically elected local government Councils** and not an undemocratic Transitional Councils. Accordingly the purported exercise of its legislative authority under section 4 to establish these Transitional Councils is inconsistent with the provisions of section 7 thereof and therefore null and void.

In the absence of elections as prescribed under the existing law, the State legislature ought to have extended the tenure of the elected councilors "until their elected successors in office take the oaths of office" and this would have been perfectly constitutional. It is a pity that this issue was not raised in the court which would have had opportunity to pronounce on it.

Creation of New Local Government Areas and Boundary Adjustments

Section 8 of the Constitution expressly gives power to a State House of Assembly to create new Local Government Areas under its laws. The procedure is well laid down in the section. Similar powers are also vested in the State Legislature for the purpose of boundary adjustment of any existing Local Government area with the procedure clearly outlined.

However, in the spirit of cooperative federalism section 8(5) and (6) enacts the involvement of the National Assembly in the process. Under subsection 5 the National Assembly is empowered by an Act to make consequential provisions with respect to the names and headquarters of the local government areas as provided in section 3 and Part II of the first Schedule to the Constitution. This is not a constitutional amendment as such and therefore will not attract the procedure laid down in section 9(2) of the Constitution. Indeed, this is expressly excluded by the provisions of section 9(2) aforesaid. Section 8(6) enjoins the relevant State Legislature to make adequate returns to the National Assembly to enable it enact the Act as prescribed under section 8(5). It is submitted that it is mandatory on the National Assembly to act under section 8(5) once the State legislature submits adequate returns under section 8(6) unless the exercise by the State is a violation of the Constitution.

Power to Suspend Local Government Chairmen

In the case of Edo State for instance, section 20 of the Local Government Law vests power on the State Governor to suspend any Local Government Council Chairman where he is "satisfied that the Chairman of a local Government Council is not discharging the Councils functions under this law in a manner conducive to the welfare of the inhabitants of the area of its authority as a whole....."

The effect of this provision is to confer very wide discretionary powers on the State Governor. Obviously, the provision was lifted from a previous military enactment on the subject and therefore ought not be allowed in this present democratic dispensation. Such discretion had caused a lot of problems leading to the eventual collapse of the First Republic as revealed in the case of *Adegbemo v. Akintola* (1962).

This provision also runs counter to principle of separation of powers among the three tiers of government recognized under the Constitution and should be expunged from the law as unconstitutional. The provisions for impeachment of an erring Chairman and that for his recall, by his Constituency are sufficient to check possible excesses or faults on the part of the Councillors.

Local Government Finance

Section 162 of the Constitution makes provisions for financial allocation from the Federation Account to the local government. Subsection 3 thereof provides that any amount standing to the credit of the Federation Account shall be distributed among the three tiers of government. The terms and manner of distribution are to be prescribed by the National Assembly. Under subsection (5) the amount standing to the credit of Local Government Councils in the Federation Account shall be allocated to the States for the benefit of their Local Government Councils on such terms and in such member as may be prescribed by the National Assembly. Thus, such Allocation cannot be made directly but through the States. This may be read together with section 7 of the Constitution which empowers the State to make laws on local government finance. Accordingly, under section 162(6) each State shall maintain a special account called "State Joint Local Government Account" into which shall be paid all allocations to the Local Government Councils of the State from the Federation Account and from the Government of the State.

Under subsection (7) each State shall pay to Local Government Councils in its area of jurisdiction such proportion of its local revenue on such terms and in such manner as may be prescribed by the National Assembly. . By subsection (8) the amount standing to the credit of Local Government Council of a State shall be distributed among the Local Government Councils of that State on such terms and in such manner as may be prescribed by the House of Assembly of the State. Thus, the Constitution ensures adequate financial provisions for the local government councils while giving the responsibility for the disbursements to the States. There are other sources of finance for the Local Government Councils resulting from the proper performance of their functions. Unfortunately, the impression has often been created that independence for the local governments is only possible through greater financial reliance on the grants from the Federal and State Governments but emphasis ought to be on greater financial autonomy through self-generated revenue by the local governments.

Investigation of Local Government Affairs

One area in which both the State and Federal Legislatures appear to have concurrent powers over Local Government affairs is in respect of investigation. Section 88 of the Constitution confers on the National Assembly power by resolution published in its journal or in the official Gazette to direct or cause to be directed an 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) executing or administering laws enacted by the National Assembly, and
 - (i) disbursing or administering moneys appropriated or to be appropriated by the National Assembly.
- (2) The powers conferred on the National Assembly under the provisions of this section are exercisable only for the purpose of enabling it to -
- (a) make laws with respect to any matter within its legislative competence and correct any defects in existing laws; and
 - (b) expose corruption, inefficiency or waste in the execution or administration of laws within its legislative competence and in the disbursement or administration of funds appropriated by it.

Similar power is conferred on the House of Assembly of a State under section 128 of the Constitution. Thus, both the National and State Legislatures within their legislative competence, may investigate the affairs of a local government, for instance, in respect of the use of the statutory allocation of revenue to it or to expose corruption, inefficiency or waste in the local government. However, such investigation cannot be carried out at the same time. Accordingly, where the National Assembly is involved in such investigation, the State House of Assembly cannot interfere and *vice versa* in the best interest of the spirit of cooperative federalism.

Conclusion

The result of the foregoing assessment of the relationship of the three tiers of government in Nigeria under the 1999 Constitution may be summarised as follows:

- (j) There is clear provision for division of powers and functions, among the three tiers of government as much as it is politically and legally expedient. To this extent each tier is autonomous within its sphere of influence. .

- (k) There are also areas of concurrent powers and interests recognized under the Constitution where both Federal and State Governments may exercise authority but with the Federal authority being superior where they address the same subject. This is supported by the “doctrine of covering the field”.
- (l) In the case of Local Governments specifically, the Constitution vests supervisory authority on the States with the Federal Government exercising only a monitoring authority where, applicable.
- (m) The purpose of these provisions is to foster cooperative federalism with full participation of all tiers of government especially in Nigeria where promotion of unity in diversity has been one of the primary purposes of our constitutional arrangements.

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