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**AN ANALYTICAL STUDY OF LOCAL GOVERNMENT SYSTEM UNDER
THE 1999 CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA**

Lateef Ogboye*

Abstract

The concept of local government involves a philosophical commitment to democratic participation in the governing process at the grassroots level. This implies legal and administrative decentralisation of authority, power and personnel by a higher level of government to a community with a will of its own, performing specific functions as within the wider national framework. The term local government has been variously defined by different scholars in the field of Social Sciences and Law. According to McKenzie, local government is a political subdivision of a nation, or a federal system, which is constituted by law and has substantial control of local affairs, including the power to impose taxes or exact labour for prescribed purposes.¹ It has also been defined as an integral part or aspect of government at the local level, administered by the representatives of the people in that area, in relation to matters affecting that locality alone.²

The Rationale for the Creation of Local Governments.

The main essence of Local Government system is to bring government nearer to the people. In order to serve its purposes therefore, it must have legal personality distinct from the State and Federal Governments thereby enjoys substantial autonomy.³ Thus the system of Local Government as a third tier level of government was first introduced into Nigeria governmental structure in the 1979 Constitution. The reform conceives local

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¹ W.J.N. McKenzie, "Theories of Local Government" (London: Sweet & Maxwell, 1964) p.5.

² K. Mowoe, "Constitutional Law in Nigeria" (Lagos: Malthouse Press Ltd, Lagos) p. 194.

The 1976 Local Government Reform gives a comprehensive definition of local government as government at local level exercised through representative council established by law to exercise specific powers within defined areas. These powers should give the council substantial control over local affairs as well as the staff and institutional and financial powers to initiate and direct the provision of services and to determine and implement projects so as to complement the activities of the State and federal governments in their areas, and to ensure, through devolution of these functions to these councils and through the active participation of the people and their traditional institutions, that local initiative and response to local needs and conditions are maximized.

³ This implies the ability to make its own laws, rules and regulations; formulate, execute and evaluate its own plans and the right to recruit, promote, develop and discipline its own staff.

government as separate, and independent from the State Governments.⁴ The constitutional provision with respect to the autonomous status of local government has since been retained in the subsequent Constitution of the Federal Republic of Nigeria.⁵ The introduction was a clear departure from what obtained under the 1963 Constitution when the local governments were subordinates to the Regional Governments or simply put, were appendages of the Ministry of Local Government in the Regions.⁶

Many reasons have been advanced for the creation of local governments. Some of which include the need to decongest government at the centre thereby facilitating co-ordination and expediting action on local issues,⁷ to increase the local people's understanding and to enlist their support for social and economic developmental activities, to make programmes that would foster social and economic betterment at the local level, to train local people in the act of self government, as well as to strengthen nationality.⁸ It has also been suggested that the creation of local governments is premised on the presumed superior capacity of local people to understand and conduct their local affairs.⁹ However, in order to reap the full benefit of its creation, local government should be granted considerable autonomy and independence.⁹ It is however unfortunate that contrary to the apparent spirit and intent of the 1996 Reform and the constitutional framework in creating a separate, independent entity of governance at the local level, reverse is the case in practice. The current level of local government autonomy has so far failed to translate into grassroots development potentials of the third tier of government. This study therefore takes an analytical view of various provisions of the 1999 Constitution relating to local government. These include procedure for local government creation, the problem of autonomy, means of finance, conduct of election into the local councils, mode of finance and functions among others. We consider each of them in *seriatum*.

⁴S.7 of the 1979 Constitution of the Federal Republic of Nigeria (1999 Constitution). The same provision is repeated verbatim in section 7 of the 1999 Constitution.

⁵The same provision is repeated verbatim in section 7 of the 1999 Constitution as altered.

⁶The innovation was borne out of the 1976 Local Government Reforms that was introduced by the then Federal Military Government. The said reforms have been applauded and described as one of the most important legacy of the Military Government. See B. O. Nwabueze, *Federalism in Nigeria*, under the Presidential Constitution (1983) Sweet & Maxwell, London, p. 125.

⁷Garuine Albert, 'The Utilization of Local Government for National Development' *Journal of Local Administration Overseas*, Vol. V, No.4 Oct, 1965, p.225.

⁸R.O.F. Ola, *Some Thoughts on Local Government in Developing Countries (Nigeria) in Local Government in West Africa Since independence* (Adamolekun, Oluwu and Lateye (1988) Ibadan, University of Ibadan Press) p. 5.

⁹J. A. Yakubu, *Constitutional Law in Nigeria* ((2003) Nigeria, Demyars Law Book 5) p. 330.

Creation of New Local Government Areas in Nigeria

The method of creating a new local government as provided in the Nigerian Constitution is manifestly problematic. This is because the 1999 Constitution under section 7(1) expressly provides that it is the duty of the State Government, subject to section 8 of the Constitution to ensure the existence of the local government councils under a law which provides for the establishment, structure, composition, finance and functions of such councils. While this section vests the power of creation in the state, the procedure for creation of such new local government area is provided for in section 8(3), (5) and (6) of the Constitution.¹⁰ However, the new local governments so created will still not take effect or come into operation until they are accommodated in section 3(6) and Part 1 of the First Schedule of the Constitution by the National Assembly apparently by the consequential amendment of the above mentioned section and part of the Constitution. This is observed by Edozie JSC in *Attorney-General of Lagos State v. Attorney-General of the Federation*.¹¹

*"It is my view that although by virtue of sections 7(1) and 8(3) of the Constitution, a State Government is vested with the power to create new local government areas within its domain, that power is not absolute but subject to an Act of the National Assembly amending section 3 and Part I of the First Schedule of the Constitution and until such an Act is enacted any new local government area purportedly created by a State Government is inchoate and not properly constituted."*¹²

For the purpose of clarity, the relevant section 8(3) provides that a bill for a law of a House of Assembly for the purpose of creating a new local government area shall only be passed if:

- a) a request supported by at least two-thirds majority of members (representing the area demanding the creation of the new local government area) in each of the following namely
 - (i) The House of Assembly in respect of the area, and

¹⁰ 1999 Constitution as amended.

¹¹ (2004) 18 NWLR (Pt 904) p.1.

¹² Ibid at p. 37.

- (ii) *The local government councils in respect of the area, is received by the House of Assembly;*
- b) *A proposal for the creation of the local government area is thereafter approved in a referendum by at least two-thirds majority of the people of the local government area where the demand for the proposed local government area originated;*
- c) *The result of the referendum is then approved by a simple majority of the members in each local government council in a majority of all the local government councils in the State, and*
- d) *The result of the referendum is approved by a resolution passed by two-thirds majority of members of the House of Assembly.*

Any State Government that intends to create new local government areas must comply with the outlined procedure above. However, after the creation, the State House of Assembly shall make adequate returns to each House of the National Assembly.¹³ The National Assembly after receiving such returns will pass an Act to make consequential provision with respect to the names and headquarters of the newly created local government areas as provided in section 3(6) of the Constitution and in Part 1 of the First Schedule of the Constitution.¹⁴

The first notable anomaly is the fact that these constitutional provisions vest the power to create new local governments in both states and federal governments.¹⁵ Both levels of governments must exercise their separate but complimentary role in order to bring into being a local government. The process will be first initiated by the state governments and has to be completed by the federal government. By implication in reality, unless both federal and state are mutually willing to bring about such creation, no new local government can emerge. This is obviously problematic where different political parties control the Federal and such State concerned.

The second anomaly concerns the issue of making adequate returns to the National Assembly by the State government after it has created new local governments in line with section 8(6) of the Constitution. The section provides that:

¹³Section 8(6) of the 1999 Constitution.

¹⁴S. 8(5) Ibid.

¹⁵Constitutionally and currently, there are seven hundred and seventy four (774) Local Government Council Areas in Nigeria, and they are operating a uniform system of local government administration.

For the purpose of enabling the National Assembly to exercise the powers conferred upon it by subsection (5) of this section, each House of Assembly shall, after the creation of more local government areas pursuant to subsection (3) of this section make adequate returns to each House of the National Assembly

The question is *what* constitutes adequate returns. Since the constitution did not define adequate returns, there is possibility of considering its meaning in a subjective rather than in objective manner. Section 8(6) of the Constitution emphasizes that such returns must be adequate. Who determines the adequacy of the returns? National or State Assembly? Does it mean that the State Assembly after creating local government has to do beyond mere official communication to the national assembly of what it has done? All these are yet to be resolved.

The Wordings of Section 8(5)

Section 8(5) An Act of the National Assembly passed in accordance with this section shall make consequential provisions with respect to the names and headquarters of State or Local government areas as provided in section 3 of this Constitution and in Parts I and II of the First Schedule to this Constitution.

It is only after the National Assembly had received adequate returns that they will pass an Act to make consequential provision with respect to the names and headquarters of the newly created local government areas as provided in section 3(6) of the Constitution and in Part I of the First Schedule of the Constitution.

The third controversial issue relates to the operative word "shall" as used in the above section 8(5). Is the word mandatory or directory? In other words, does it impose obligation on the National Assembly to pass consequential Act or does the word merely directs the National Assembly to do so after it receives adequate returns?

A sober reflection and perusal of the sentence in section 8(5) shows that the word 'shall' is pointing to the Act that is to be passed by the National Assembly rather than commanding the National Assembly to pass such Act. This has been construed by the Supreme Court to be directive rather than mandatory in the case of *Lagos State v Attorney General of Federation*.¹⁶

¹⁶Per Niki Tobi. It is equally our own submission that in view of the fact that the National Assembly has discretionary power to exercise under section 8(6) in the light of the expression 'adequate returns' the word 'shall' in section 8(5) is not mandatory but directory and permissive. Unless so construed section 8(6) will not make any meaning, and it should be so read to make the meaning contemplated by the lawmakers.

Fourth, as a corollary to the above argument, unless and until the National Assembly passes a consequential law as complimentary to accommodate the newly created local government by the state, such local government will be considered inchoate. Supreme court was confronted with the dispute between Lagos State Government and Federal Government in 2002 where Lagos State created 57 new local governments without the National Assembly passing any consequential Act. The Supreme Court emphatically pronounced the process of their creation as "inchoate" and in fact, emphasized that no public fund must be appropriated for the running of the so-called 57 local councils created in Lagos state. In fact, to avoid any ambiguity whatsoever, the Supreme Court ruled that the allocation which the federal government must unconditionally release to Lagos state is to be solely used for the running of the 20 local councils listed for Lagos state in the schedule to the 1999 constitution.¹⁷ In conclusion, this shows that the Constitution provides for a two-tier approach to the creation of new local government areas; the first or State tier procedure and the second or Federal tier procedure. The satisfaction of only the first or state tier procedure is not sufficient to confer or vest legality or validity in the new local government areas created. The second or federal tier procedure must also be satisfied before the exercise can be taken as having been completed.

Conduct of Local Government Elections

Item 11 of the Concurrent Legislative List of the 1999 Constitution empowers the National Assembly to make laws for the Federation for the registration of voters and the procedure regulating elections to a local government council.¹⁸

¹⁷ In this respect, amongst other decisions, the Supreme Court held as follows: (a) The Lagos State Government has the constitutional competence under section 8(3) of the Constitution of the Federal Republic of Nigeria, 1999 to promulgate the Creation of Local Government Areas Law No. 5 of 2002 and to amend it by passing the Creation of Local Government Areas (Amendment) Law 2004 which created the 57 Local Governments. Consequently, they are valid, legal and constitutional but that these Laws cannot be operational and cannot have effect until the National Assembly performs its constitutional duty under section 8(5) of the 1999 Constitution. (b) However, the 57 Local Governments created by the government of Lagos State out of the 20 Local Governments contained in First Schedule Part I of the Constitution of the Federal Republic of Nigeria, 1999 are not operational and cannot take effect until the National Assembly promulgate an Act containing consequential provisions to amend section 3 subsection 6 and First Schedule Part I of the Constitution by increasing the number of Local Governments specified in section 3(6) and particulars of the new Local Governments under Lagos State in First Schedule Part I of the Constitution of the Federal Republic of Nigeria, 1999.

¹⁸ Item 12 Concurrent Legislative List, Part 11 of the 2 Schedule 1999 Constitution. However, the House of Assembly of a State is not precluded from making laws with respect to election to a local government council, so long as such laws are in addition to but must not be inconsistent with any law validly made by the National Assembly.

It needs be pointed out that the power given to the National Assembly by item 11 does not go beyond the registration of voters and regulating of elections, which may include the setting up of a single day to hold the general election for the local government councils throughout the country and the franchise of the electorate. Item 22 of the Exclusive Legislative List specifically excludes the National Assembly from legislating for election to a local government council or any office in such council. This therefore makes such legislation a residual matter, within the purview of the State House of Assembly.

Thus, the State Government is vested with the power to organize elections into the local governments through the State Independent Electoral Commission established by such state.¹⁹ Though states have the power to conduct the elections, such power of the State Government to organize local government elections is limited in the sense that it is dependent on the preparation of register of voters for the election by the Independent National Electoral Commission. If for any reason the register of voters is not prepared, the State Independent Electoral Commission cannot organize the local government elections. Similarly, where such register is not updated at the time of conducting local government election, a free and fair election cannot be guaranteed.²⁰ It must be emphasized that the SIEC is not empowered to review or update the voters' registers and as a result, necessary update, change and review occasioned due to a long interval of time between the compilation of voters register and the date of local government election are not taken care of.

In *Chief Gabriel A. Akanro v. Lagos State Electoral Commission*,²¹ the plaintiff challenged the holding of local government elections on the ground that the register of voters planned to be used was the one that was compiled by FEDECO in 1977/78 for the presidential, gubernatorial and legislative elections in 1979. The register was based on constituencies for the legislative elections which made it clearly unsuitable for use in local government elections that were based on wards. The Court held that until a register has been prepared by FEDECO, the Lagos State Electoral Commission cannot lawfully conduct local government elections in the State. The court therefore made a declaratory order that the holding of local government elections by the State Electoral Commission on the basis of the 1977/78 register of voters would be null and void as being unconstitutional. This is because if the register of voters is used it will deny many voters who became qualified to vote after 1979 the right to vote.

¹⁹Third Schedule, Part 11 Para. B. Sub paragraph 4 of 1999 Constitution.

²⁰ In Nigeria, there is always a long period of time between the date of election conducted by the INEC and that of SIEC. This naturally necessitates updating the register which unfortunately was not done by the SIEC.

²¹(1981) INCLR 51.

Tenure of Office

The 1999 Constitution does not specifically provide for the tenure of the officers of local government councils as it does in respect of the President, Governors and members of the legislative houses. This therefore legally leaves the state government with the power to determine the number of years to be the tenure of office since the constitution in section 7 has invested states with mandate to establish the local government councils and draw up the structure, composition, finance, and functions of such councils.

Failure of the Constitution to specifically mention the tenure of local government councils makes the power a residual power, which only the State House of Assembly can legislate upon. This was why the State Governments challenged the validity of the Electoral Act 2001, which increased the tenure of officers of the local government councils from three to four years as a total invasion of the legislative powers of the State.²² The Court held that by not vesting power under the Exclusive Legislative List to do so, the makers of the Constitution intended that the power to legislate on the tenure of local government councils should not be exercised by the National Assembly but by the House of Assembly of a State.

The apparent loopholes and partial confusion created by this provision have been exploited by State governments to exercise undue power and control over the local governments. Local governments are manipulated in any manner that pleases the state governments. In some instances, local councils are dissolved and caretaker committees are appointed to manage them. This is manifestly contrary to the section 7 of the constitution. Courts have in few instances held that a local government council can only be dissolved by effluxion of time or by the due process of law and not by the whims and caprices of the Governor and that the Governors have no power to replace an elected local government council with a Caretaker Management Committee and that even when the tenure of the council has expired, a new election must be held. Thus, in *Akpan v Umah*,²³ the Court held that since section 7(1) of the 1999 Constitution has guaranteed that local government shall only be administered by democratically elected representatives, it therefore means that the appointment of any caretaker committee to replace same whether during the pendency or upon expiration of tenure is unconstitutional. Similarly in *AG Abia State and AG Federation*, the Supreme Court allowed for the elongation of the tenure of the democratically elected local government councils by the State Governments when elections were yet to be held.²⁴ As Ogundare JSC observed:

²² *A. G. Abia State v. A. G. Federation*, *supra* note 14.

²³ (2002) 7 NWLR (Pt. 767) 701.

²⁴ *A. G. Abia State v. A. G. Federation* (2002) 6 NWLR (Pt 763) 264.

By virtue of the provisions of the Interpretation Act, the tenure of those officers of the local government council remains three years unless increased by the State House of Assembly which has power to do so.²⁵

Finance

Local government derives its revenue from three different sources. First, section 162(3) of the constitution provides that any amount standing to the credit of the Federation Account shall be distributed among the Federal and state Governments and the Local Government Councils in each State on such terms and in such manner as may be prescribed by the National Assembly. Also section 162(5) provides that the amount standing to the credit of Local Government Councils in the Federation Account shall also be allocated to the States for the benefit of their local government councils on such terms and in such manner as may be prescribed by the National Assembly.

The provisions of this section simply implies that the Federal Government is not empowered to make allocations of any amount standing to the credit of the local government councils in the Federation Account directly to the local government councils. It must pay the allocation directly to the State which will in turn pay it into the State Joint Local Government Account from where the money is distributed to the local government councils.²⁶

Any law, which provides for such direct allocation is contrary to section 162(5) and therefore unconstitutional. In *Attorney-General Ogun State v Attorney-General of the Federation*²⁷ the plaintiff sought a declaration that the defendant is not entitled within the proper meaning of section 162(5), (6) and (8) of the 1999 Constitution to pay the amount standing to the credit of the local government councils in the Federation Account directly to the local government councils and that such payments by the defendant is illegal and unconstitutional.

In the lead judgment Onu JSC observed:

The National Assembly cannot validly make a law permitting direct allocation to the local government councils, such money must be allocated directly to the State, which shall in turn pay the same into the State Joint Local Government Account vide section 162(6).

²⁵Ibid, at p. 425.

²⁶ See s. 162(6) of the 1999 Constitution.

²⁷(2002)18 NWLR (Pt. 798), 232.

In *Attorney-General Lagos State v Attorney-General of the Federation*²⁸, the Lagos State acting under section 8(3) of the 1999 Constitution promulgated Creation of New Local Government Areas Law No. 5 of 2002 under which 57 local governments councils were created by breaking the existing 20 local government councils. Consequently, the President ordered the suspension of statutory allocation meant for Lagos State local government. The action of the President was challenged in court.

The Supreme Court held that the President has no power vested in him (by executive or administrative action) to suspend or withhold for any period whatsoever the statutory allocation due and payable to Lagos State Government pursuant to the provisions of section 165(5) of the 1999 Constitution.

Akintan JSC maintained that-

*Nowhere in the Constitution is the President of the Federal Republic conferred with the power to withhold the statutory allocation due and payable to Lagos State Government or any other State, for the benefit of the local government councils in Lagos State or any State, pursuant to the provisions of section 162(5) of the 1999 Constitution...*²⁹

The second source of revenue for the local government is that the State Government is under a constitutional duty to grant a proportion of its total revenue to the local government councils in its area of jurisdiction on such terms and in such manner as may be prescribed by the National Assembly.³⁰ The Allocation of Revenue (Federation Account) Act 1990 as amended by Decree No. 106 of 1992, fixed the proportion at 10%. Section 5(2) of the Act provides that:

Each State should pay into its State Joint Local Government Account 10% of its internally generated revenue to be distributed among the local government councils in the State on such terms and in such manner as the State House of Assembly may prescribe. The third source of Local government's independent revenue is that which is derived from, the functions assigned to the local government councils by the Constitution.³¹ These include rates, radio and television licenses, fees for the use of

²⁸ (2004) 18 NWLR (Pt. 904), p.1.

²⁹ *ibid*, at p. 143.

³⁰ *Sees. 162 (7) Ibid.*

³¹ *See the Fourth Schedule, ibid.*

cemeteries and similar fees or revenue that are locally generated by the local government in the course of carrying out its assigned constitutional functions.

Functions

The 1999 Constitution enumerated in its Fourth Schedule, the functions of the local government council. These include collection of rates, provision of licences, establishment of burial grounds, slaughter houses, motor parks. Others include provision and maintenance of primary, adult and vocational education; development of agriculture and natural resources, other than the exploitation of minerals; provision and maintenance of health services, and such other functions as may be conferred on a local government council by the House of Assembly of the State.

Unfortunately, the constitution does not make these functions of the local government council set out to the Fourth Schedule of the Constitution to be self-executing; they must be conferred upon the local government council by law.³² The word 'law' according to section 318 of the Constitution means a law enacted by a House of Assembly and House of Assembly means the House of Assembly of a State.

This simply means that until the House of Assembly of a State makes a law conferring the above mentioned functions on the local government council, the council cannot validly exercise them. Another uncertainty is whether the State Government can concurrently exercise the above functions with the local government councils, after they have been conferred on the councils. However in practice, state governments do collect fees, issues licences and exercise functions that are constitutionally provided for the local government.

Thus the action of Kano state was challenged in the case of *Knight Frank and Rutley (Nig) Ltd v. Attorney-General of Kano State*,³³ where the Kano State Government entered into a contract with the appellant for the valuation of rateable hereditaments, despite the fact that the local government council had the constitutional power to levy tenement rates under section 7(5) and the Fourth Schedule of the 1979 Constitution. The court held that once the State passes a legislation assigning the function of valuation of tenement rates to the local government, the Constitution has directed, only the local government council will have the power to deal with the subject matter. The State has no power to deal with the matter and the local government council cannot, even if it wants to, divest itself of these powers.

³² Section 7(5) of the 1999 Constitution

³³ (1985)2 NWLR (Pt. 6) p. 211.