

THEME

**THE 1999 CONSTITUTION (AS AMENDED)
AND THE STATUTORY FRAMEWORK FOR THE
DEVELOPMENT OF LOCAL GOVERNMENTS
IN NIGERIA**

PRESENTER

Dr. Joseph Nwobike, SAN, FCI Arb (UK), FCTI

THEME: THE 1999 CONSTITUTION (AS AMENDED) AND THE STATUTORY FRAMEWORK FOR THE DEVELOPMENT OF LOCAL GOVERNMENTS IN NIGERIA

PRESENTER: Dr. Joseph Nwobike, SAN, FCI Arb (UK), FCTI

INTRODUCTION

Local Government was defined by the United Nations Division of Public Administration as:

" ... a political subdivision of a nation (or in a federal system, a state) which is constituted by law and has substantial control of local affairs including the powers to impose taxes or to exact labour for prescribed purposes. The governing body of such an entity is elected or otherwise locally selected".

According to Professor R. O. F. Ola (in Some Thoughts on the Role of Local Government in Developing Countries (Nigeria) (1988)), the Local Government is a functional institution and one of the principal justifications for the establishment of local government system is the presumed superior capacity of the local government to understand and conduct local affairs. The place and role of local governments in the pursuit and attainment of social and developmental policies and programmes have for long received its moral and political authority from their proximity to the people. The political structures that existed before the advent of colonialism one way or the other recognized the creation and sustenance of a level of political administration that would organize and articulate the wishes and aspirations of the people at the very local level. Thus, historians are unanimous in finding that the

political structures that existed before the arrival of the colonialists made maximum use of this political methodology to achieve a considerable measure of political tranquility and participation. At the advent of colonialism, various forms of localized administration were put in place as a way of ensuring that Her Majesty's policies were duly communicated to the people and effectively implemented. Although existing structures, where they existed, were utilized to a great extent, the measure of their relevance in terms of policy formulation varied in relation to the subject matters and special circumstances. At the dawn of independence, local government as a form or tier of political administration was entrenched in the various Regional Constitutions with varying nomenclatures. They were central to the economic and political activities of the regional and federal governments. In his book, THOUGHTS ON NIGERIAN CONSTITUTION, Chief Obafemi Awolowo made the following observations at pages 148-149:

“Local governments serve the dual purposes of being the foundation on which the state and the federal governments rest, and the agencies through which the state governments, and occasionally the federal government as well, touch the lives of the people most intimately..... the practice of democracy is much nearer the ideal than either at the state or federal level.”

The above postulation clearly typified the position of the local governments in the First Republic. However, at the time of military interregnum, emphasis on the local government system as a means of effecting meaningful development at the grassroots suffered a conscious abandonment due to the centrality and unitarism associated with statocracies. Most of the powers and functions of local authorities were structured to meet the whims and caprices of the emerging military rulers. This

scenario continued until 1976 when the Federal Government's Guidelines for Local Government Reforms was issued to provide a basis for the restructuring of the local government system to meet the then proposed political administration. Although there existed divergent views as to the purpose and results of that exercise, what remained settled is that the Report provided the policy foundations for the modern day local government administration in Nigeria.

CREATION OF LOCAL GOVERNMENTS

As was pointed out earlier, local government as a form or system of government has received one form of constitutional recognition or the other since Independence. The provisions of the 1979 and 1999 Constitutions on the creation of the system of local government enjoy substantial similarities despite persistent agitation for review by stakeholders. Section 7(1) of the 1999 Constitution provides as follows:

"The system of local government by democratically elected local government councils 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."

This sub-section contains some constitutional declarations in respect of local government administration in Nigeria. The first is that local government administration shall be in accordance with democratic principles. In other words, affairs at the local government levels shall not be conducted in accordance with any other form of political practice or system. The need for this provision may have

arisen from past political experiences where the political administration at the local government level was conducted along cultural or feudalistic lines. The practical implications of this provision is that unelected persons are irrelevant in the conduct of policy, legislative and executive affairs of the local governments. Students of modern political history of Nigeria would agree with me that this provision is a welcome development. It is only by ensuring that the local governments are fully and practically democratized that they can play developmental and supportive roles to the states and federal governments. Again, Chief Obafemi Awolowo had this to say at page 149(supra):

“In short, the importance of local government in fostering a democratic way of life, in promoting good government, and in sustaining the state and federal governments, cannot be over-emphasized. It is imperative, therefore, that it should be strengthened and democratized wherever it is known to be weak and undemocratic.”

This provision came up for consideration in the case of *Etim .A. Akpan & 4Ors vs. Hon. Peter John Umah & 2ors* (2002) 7 NWLR (Pt.767) P.701. In that case, the Executive Governor of Akwa Ibom State, on the recommendation of the State House of Assembly, dissolved Ini Local Government Council and set up a Caretaker Committee consisting of unelected members. The members of the dissolved councils filed an action against the House of Assembly and the Executive Governor. The trial court held that neither the House of Assembly nor the Executive Governor of the state could dissolve the elected local government council. The court also restrained the members of the caretaker committee from parading themselves as members of the Ini Local Government Council. The appeal to the Court of Appeal was dismissed.

In dismissing the appeal, Ekpe, JCA, reading the lead judgment of the court, has this to say:-

“On the other hand, I entirely agree with the submission of the plaintiff/1st respondent that the dissolution of Ini Local Government Council and setting up of the Caretaker Committee by the 2nd respondent (the Governor of Akwa Ibom State) is a violation of Section 7(1) of the Constitution. I hold the view that since Section 7(1) of the 1999 Constitution guarantees a system of Local Government by democratically elected Local Government Councils the dissolution of Ini Local Government Council by the 2nd respondent and the appointment of the Caretaker Committee is inconsistent and therefore null and void. See *Akinpelu & Ors v. A - G; of Oyo State* (1982) 2 FNR 428.”

Apart from establishing the concept and practice of democracy at the local government level, the section further provides for the establishment, by law, of local government councils and provide for their structure, composition, finance and functions. The State Assemblies have been empowered by section 8(3) of the Constitution to create local government councils regardless of the provisions of sections 2(6) and 9 of the Constitution. That power does not seem to be clearly absolute in view of the decision of the Supreme Court in the case of *A - G; Lagos State vs. A - G, Federation* (2004) 18 NWLR (Pt.904) P.1 at P.90 - 100. Despite these powers, it is suggested that State Assemblies should exercise extreme restraint and caution in the exercise of those powers to avoid creating local governments that would not be economically viable or politically sustainable.

FUNCTIONS OF LOCAL GOVERNMENTS

Although the section empowers the states to provide for the functions of the councils in their areas, certain functions were equally assigned to the councils by the Constitution. For example, in section 7(3), the councils are given the power of participating in the economic planning and development of their respective areas. The same sub-section guarantees their membership of the states' economic planning boards. In addition to the above, sub-section (5) of section 7 provides as follows:

“The functions to be conferred by law upon local government councils shall include those set out in the Fourth Schedule to this Constitution.”

The Schedule contains a list of what is described as the main functions of the councils. The functions of local government councils as contained in the said Schedule are as follows:

1. (a) The consideration and the making of recommendations to a State commission on economic planning or any similar body on-
 - (i) the economic development of the State, particularly in so far as the areas of authority of the council and the State are affected, and proposals made by the said commission or body;
 - (b) Collection of rates, radio and television licenses;
 - (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 shall include participation 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 council by the House of Assembly of a State.

See the decision of the Court of Appeal in *Igbokwe vs. Udobi* (1992) 3 NWLR (Pt.228) P.214 at P.223 - 224.

The foregoing provisions clearly show that the local government councils are saddled with the responsibilities that have local coloration and idiosyncrasies. In view of the supremacy of the Constitution, the State Assemblies cannot exercise any of those functions or have any of them altered or diminished except through constitutional amendment procedures as enshrined in the Constitution. The functions that the State Assemblies can confer on the local councils would be determined by the Constitution and no more. It must be pointed out that the laws to be enacted by the State Assemblies for the purpose of the local councils will ordinarily relate to issues like their composition, structure, finance and functions. The only condition is that such laws must not be at variance with the express provisions of the Constitution. Previous attempts at making laws for the councils have shown that such laws

essentially relates to administration and meetings of the councils, employees, ratings, audit, procedures for bye-law making, council and legal proceedings, committee system and miscellaneous matters. It is submitted that local councils have the *locus standi* to institute actions against State Assemblies where laws made by them are in clear conflict with the express provisions of the Constitution. Although the Constitution did not expressly create executive and legislative arms of government for the councils, the necessary implication of establishing a democratic system of government at the local council level is that there must exist for them, the legislative and executive arms of government. Therefore, the state assemblies must, by law, ensure that those arms are created at the local levels. Most of the local government laws enacted by the States Assemblies clearly outline these segmentations; albeit in theory.

The legislative competence of the local councils is governed by section 1 of the Fourth Schedule to the Constitution and any other power that may be conferred on it by a law made by the State Assemblies. The local councils do not have legislative competence over the items contained in section 2 of the fourth Schedule as the section only provides for their joint participation with the state governments. The legislative arm of the local councils must ensure that they exercise their legislative powers in accordance with the Constitution and any law made by the State Assemblies at all times. The legislative arms of the councils will have to adopt applicable legislative rules and procedures in the conduct of their legislative functions. Where the State Assemblies donates them with the power to make such Rules, they have to raise it but where such Rules are made by the state Assemblies, they do not have any option than to adopt them as their Rules. It is very instructive that I point out that the councils can even sponsor bills in the State Assemblies on subjects that they consider

beneficial. Local government councils exercise their legislative powers by the instrumentality of byelaws made by them.

The executive powers of the executive arm of the councils must equally be guided by the instrumentality of the Constitution, laws made by the state assemblies and byelaws made by their legislative arms. The age long principle of *ultra-vires* is applicable to the councils and can constitute a basis for the nullification of executive actions of councils' executive by the courts.

Perhaps the most important principle of law to be considered in relation to the exercise of executive powers of local councils is the doctrine of *ultra vires*. The term *ultra vires* means "beyond the powers". An act is *ultra vires* an authority if it is beyond its powers; the converse term is "*intra vires*". Lord Watson's speech in the celebrated case of Baroness Wenlock v. River Dee Co. (1885) 10 App. Cas. 354 at 396 is very illustrative and succinct. Hear him:

"Whenever a corporation is created by Act of Parliament, with reference to the purposes of the Act, and solely with a view to carrying these purposes into execution, I am of the opinion not only that the objects which the corporation may legitimately pursue must be ascertained from the Act itself, but that the powers which the corporation may lawfully use in furtherance of these objects must either be expressly conferred or derived by reasonable implication from the provisions."

Lord Templeman of the English House of Lords in the case of Hazell v. Hammersmith and Fulham London Borough Council (1991) 2 W.L.R. 372 at 369 made a similar observation when he noted that:

“.....the council cannot ignore their statutory constraints and lawfully exercise in its name a power, which upon the true construction of the statutory powers of the council was not open to the council.”

This doctrine has undergone a lot of judicial interpretations and academic analysis, but what has remained settled is that, unlike a natural person who is conferred with unlimited powers by law, a statutory body, like the local councils, can only do those things that it is authorized to do by statute, directly or by necessary implication. Apart from the application of the doctrine to substantive powers, the doctrine is equally applicable to procedural requirements. Where, for instance, the law requires that before the council takes certain actions or carry out specific functions, a notice of its intention must be given to certain persons, the council will be acting *ultra vires* if such notices are not given. But the effect would depend on whether such a procedural requirement is mandatory or directive. In determining the categorization, regard and reliance must be placed on the statutory provision requiring the notice. The above discussions were informed by the incessant cases of *ultra vires* actions of most local councils.

This will bring us to a consideration of the taxing powers of the local councils. Recent developments have shown that some urban based local councils have been creating all sorts of tax heads without due regard to existing laws on the subject and the Constitution, all in the name of revenue generation. A local council in Lagos State has been imposing what it calls “corporate tax” on companies operating within its jurisdiction. Although this forum is not intended to examine the details of taxing powers of local councils, it must be pointed out that the taxing powers and revenue generation exercise of the local councils must be guided by the provisions of section 1 of the Fourth Schedule to the Constitution. See the decision of the Court of Appeal in

the case of *Eti - Osa Local Government vs. Jegede* (2007) 10 NWLR (Pt.1043) P.537 at P.557 - 558. Thus, any law made by either the State Assemblies or the local councils which seeks to confer on the local councils the right to assess and collect taxes outside the contemplation of those provisions are void and of no effect. The sole responsibility for the assessment and collection of all forms of taxes in Nigeria is vested with the Federal Inland Revenue Service with respect to federal taxes and the various states' Revenue Boards, with respect to state taxes. To that extent, the local councils do not have taxing powers. This will lead us to the next sub-head of this address, which is finance of local councils.

LOCAL GOVERNMENT FINANCE

Generally speaking, Local Government Councils derives their revenue through two main sources. They are Internal sources which are made up of the followings:

- Property rates
- Capitalisation rates
- Cattle rates
- Development rates
- Market/Motor park fees
- Vehicular licences (such as on bicycles, canoes and wheel barrows)
- Liquor licences

The other source is Government grants and loans from either the Federal or State Government. The law does not, however, permit a direct allocation of revenue by the Federal Government to the local government councils. See *A. G; Ogun State vs. A. G., Federation* (2002) 18 NWLR (Pt.798) P.232 at P.267 - 268.

Under the 1999 Constitution (As Amended) the framework for local government council financing is statutory. Section 7(6) of the Constitution provides as follows:

- (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 the statutory allocation of public revenue to local government councils within the State.

Similarly, section 7(1) of the Constitution confers on the State Assemblies the power to make laws for the financing of local government councils within their jurisdiction. Apart from statutory allocations to the local government councils from the Federal and State governments under section 7, the councils also generate revenue from tenement rates, rates, radio and television licenses and returns on their investments. The local government councils grant licenses and permits for the operation of a wide range of commercial and economic activities within their jurisdictions hence they generate revenue from such sources. There is no law restricting the local government councils from receiving financial donations from persons and organizations in so far as they are not inconsistent with any existing legislation. Local government councils may also receive grants-in-aid from any public body. The capacity of local government councils to borrow money either from financial institutions or the stock exchanges would depend on the purpose of the loan and their enabling law. Most Local Government laws existing before the advent of the 1999 Constitution conferred the Councils the right to borrow moneys within Nigeria of such amounts, in such a manner and upon such conditions and for such purposes in fulfillment of their lawful functions as the enabling law may prescribe, and also to secure such loans with the property and the future revenues of the councils. Section 96(1)(2) of Lagos State Local Government Edict, No. 16, 1976 is an example of such laws. It is submitted that since

local councils are not commercial organizations, it would be inconsistent with the Constitution for them to enter into loan transactions without legal backing. However, the local councils may set up business concerns that may enter into such loan contracts.

Every local government council is required to make arrangements for the proper administration of its financial affairs and to charge some of its officers with the responsibility of carrying out functions associated with the administration of its finances. In line with standard financial regulations for public institutions, local government council laws usually provides that all revenues of every local government must be paid into the general revenue of the council and that such funds shall only be applied to the administration, development and welfare of the area constituting the local government council. The laws usually specifies the extent and the manner in which the council may incur expenditure and charge it to its funds. Notable of such areas include the payment of salaries and pensions, maintenance of educational institutions, salaries and other emoluments from the members of the local traditional institutions and financial liabilities arising from the implementation of development and social programmes of the councils. Most of the local government laws existing during the military regime did not provide for the approval of the legislative arms of the council of such expenditures, but it would seem that recent local government laws contains provisions requiring the legislative approvals before expenditures are incurred. This usually takes the form of budgetary or extra-budgetary approvals.

It must be pointed out that the councils cannot incur expenditures for illegal or *ultra vires* purposes. Where the enabling law empowers the local councils to engage in

commercial or investment activities, it is usual for such statutes to provide for the manner by which sums accruing from such investments or undertakings are paid into the fund of the council. In order to ensure strict and uniform financial regulations, most local government laws confer on a designated officer of the State Government the responsibility of raising Financial Memoranda for all the local government councils under it to comply with in the management of its financial affairs.

CONTROL OF LOCAL GOVERNMENT COUNCILS BY STATES AND FEDERAL GOVERNMENTS.

The authors of the Oxford Dictionary of Current English (1998) defined control in terms of power of directing or means of regulating an activity. In the Black's Law Dictionary (5th Edition) control is defined as:

“Power or authority to manage, direct, superintend, restrict, regulate, govern, administer or oversee.”

However defined, the jurisprudence of control clearly involves the power to impose a duty on another and expect compliance. The right of one statutory body to control another must equally be statutory. The statute conferring the right of control also states the extent of such control in order to avoid the excesses inherent in control regimes.

Controls may be directory or regulatory in nature. Whichever is the case, its philosophy and objectives must be easily ascertainable by both the controller and the controlled.

The local government councils are usually by law subjected to one form of control or the other by the Federal and State authorities. Although an audit of the areas of these

controls may be unnecessary here, it will however be apposite to consider some of them. Thus, we shall look at controls by Federal and State Government as well as by the judiciary.

CONCLUSIONS

Our discussions so far shows that even though the 1999 Constitution granted the Local Government Councils powers, functions and autonomy, the councils are still facing certain negating factors. These factors includes environmental factors, slim revenue base, lack of prudent management of finances, shortage of experienced and skilled manpower, political instability and corrupt practices. These factors have largely and will continue to affect the performance of the Local Government Councils irrespective of any legal or constitutional framework that may be put in place.

Throughout this paper, extensive attempts have been made to consider the constitutional and legal elements that interplay in the workings of the local government system in Nigeria.

In conclusion, an amendment of section 7 of the 1999 Constitution is suggested with a view to establishing a more virile local government system in Nigeria. State Assemblies should, in making laws and effecting control measures on the local government councils, guarantee their independence and relevance. The local government councils should equally endeavour to articulate their constitutional rights properly and ensure that they play a major role in the Nigerian political construct.

I believe that the resource persons and participants in this conference will engage in the location of the strategies which would activate development at the local government levels. I do not have any doubt that the faculty of this conference which is made up of distinguished and very experienced lawyers, will serve as the vehicle for the attainment of the foregoing objective.

Thank you.