

Constitutional Challenges of Creating New Local Government Areas in Nigeria

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Abstract

Local government is purposely established by law to provide grassroots development. In federal states, it is usually created by law of the federating units, and in unitary states it is created by central government. However, since the entrenchment of local government as a third-tier level of government in the 1979/1999 federal constitutions of Nigeria, there have been a lot of difficulties in creating new local governments. This paper examines the dynamics of this structure and the challenges posed to the orderly creation of new local government areas in Nigeria. The paper adopts secondary methods of data collection and analysis. It finds that the conflicting constitutional provisions which vest in the state and federal governments powers to create new local government areas have created many controversies in the polity. It recommends that the creation and statutory finance of local government councils in Nigeria should be expunged from the federal constitution.

Keywords:

Federal Constitution, New Local Government Area, National Assembly, House of Assembly, Federal Statutory Allocation.

Introduction

According to the United Nations Office for Public Administration (Ogunna 1996:1), local government is a political sub-division 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 and work towards prescribed purposes. The governing body of such an entity is elected or otherwise locally selected. It may be seen as a political authority which is purposely created by law or constitution to administer public affairs of local communities within the limits of the laws/ constitution that created it. It is a unit or level of government created by

law or constitution to provide grassroots opportunity for political participation and provision of certain basic services.

In Nigeria, local government is the third tier level of government and as stated in the Guidelines for Local Government Reform, 1976, it is a level of government exercised through representative councils established by law, with specific powers within defined areas. These powers should give the councils substantial institutional and financial powers to initiate and direct the provision of services and determine and implement projects, so as to complement the activities of the state and federal government in their areas and, through active participation of the people and their traditional institutions, to ensure that local initiatives and response to local needs are maximized (Guidelines for Local Government Reform, 1976:1).

It should be noted that in Federal States such as the United States of America, Switzerland, Canada, Germany, India, Australia, Nigeria (before the Local Government Reform, 1976), local government is created by the laws of the constituent units of the Federation usually known as states, provinces, cantons or regions. In unitary states, such as Britain, France, Israel, New Zealand, local government is created by laws of the central/ national government.

In Nigeria, with the introduction of *Guidelines for Local Government Reform*, 1976, and the subsequent promulgation of the 1979 Constitution of the Federal Republic of Nigeria, the creation of a new local government areas/council became a national issue requiring the involvement of the federal government, state government, and any existing local government councils. Under civilian rule, this tends to make the creation of new local government areas very cumbersome and complicated, and has even resulted to legal battles in the Supreme Court of Nigeria between some state governments and the federal government. A classical example is the case *A.G. Lagos State vs A.G Federation* (2004) (The News June 13, 2005:19-32). This tends to hamper harmonious and co-operative inter-governmental relations in the country.

It was only under Military rule that federal military government easily and single-handedly created new local government areas/councils through promulgation of Decrees for creation of New Local Councils.

Constitutional Entrenchment of Local Government in Nigeria

Even though Nigeria was amalgamated in 1914, the first national legislation on local government administration, the Native Authority Ordinance of 1916, was enacted in 1916

under the governorship of General Sir Fredrick Lugard. This Ordinance which replaced all indigenous pre-colonial systems of local administration empowered the governor to appoint a Native Authority for any area for local administration. The Native Authority system (Indirect Rule) incorporated traditional authority and institutions, and it revolved around traditional rulers who alone or in collaboration with others constituted a Native Authority. Where none was in existence, the British created warrant chiefs, particularly in the Eastern region, to bring the people under a central authority. The main duty of the Native Authority was the maintenance of law and order (Ogunna,1996).

The Richards Constitution of 1946 restructured the country into three regions namely, Eastern, Northern and Western Regions, and the regions assumed responsibility for the reorganisation of local government system. The Eastern Region in exercise of its power over local government under the Richards Constitution, embarked on the reformation of the Native Authority System in 1948. This resulted to the enactment of the Eastern Nigeria Local Government Law, 1950. This introduced a three tier system of local government (county, district and local councils) in the region. The Western Region followed suit and enacted its Local Government Law, 1952 and the Northern Region enacted a Native Authority Law, 1954 (Ogunna,1996).

With the adoption of the Federal System in 1954, each region continued to enact separate legislation to administer local governments. However after the emergence of Military rule in 1966, several radical changes were introduced in the administration of local government system in the regions and later states. (Nigeria Local Government Yearbook, 1998: IV, 1, 2).

The 1976 Local Government Reform and Local Government in Nigeria.

The groundwork for the constitutionalisation of local government in Nigeria was the 1976 Local Government Reform. As the then Chief of Staff, Supreme Headquarters, Brigadier Shehu Musa Yar'adua stated in the Forward to the Guidelines for Local Government Reform (1976: Forward:1)

..... the Military Government was essentially motivated by the necessity to stabilize and rationalize Government at the Local level. This must of necessity, entail the decentralization of some significant functions of the State Government to Local level in order to harness local resources for rapid development. The Federal Military Government has therefore decided to recognize local Government as the third tier of governmental activity in the nation. Local government should do precisely what the word government implies i.e governing at the grassroots or local level (Guidelines for Local Government Reform,1976,Forward:1).

The decision of the Federal Military Government to reform the local government was consequent upon the myriad problems that bedevilled the previous local government systems in the country. The Forward observes that the

Defects of the previous local government systems are too well known to deserve further elaboration here. Local Governments have over the years suffered from continuous whittling down of their powers. The state governments have continued to encroach on what normally has been exclusive preserve of local governments. Lack of funds and appropriate institutions had continued to make local government ineffective. Moreover, the staffing arrangements to ensure a virile local government system, had been a divorce between the people and government institution at their most basic level (Guidelines for Local Government Reform 1976: Forward: 1-2)

It was to reverse this ugly condition of local governments in Nigeria, that necessitated the 1976 reform agenda, in order to make local government an effective and efficient instrument for mobilization of human and material resources for national development and a crucial element in the Federal Military Government's political transition programme.

The highlights of the landmark 1976 local government reform agenda include;

1. The first holistic reform by the Federal Government of local Government throughout in Nigeria;.
2. Introduction of a uniform system of local government in all states of the Federation;
3. The funding local government by Federal Government through statutory allocations from the Federation Account;
4. Recognition of local government was recognized as a third tier of government;
5. Preparing the ground for the entrenchment of local government in the 1979 Constitution of Nigeria;
6. Creation of single-tier all-purpose local government councils all over the country;
7. Designation of local government council jurisdictions as Local Government Areas;
8. Prescribing a population size of between 150,000 and 800,000 people for local government councils except in special cases.
9. Streamlining local government services in line with the service conditions as obtained in the state and Federal government services. The Local Government Services Board and staff training programme were also introduced.
10. Democratising local government, which this drastically weaken the exalted position of traditional rulers within the system.

11. Creation of full-time local government chairman and supervisory councilors and payment of a fixed salary to councilors instead of sitting allowances (Guidelines for Local Government Reform, 1976)

The 1979 Constitution and Local Government in Nigeria

A constitution is “a set of rights, powers and procedures regulating the structure of, and relationships among the authorities and the citizen” (Idike 1995:8). It is a body of broad, fundamental laws, a ground-rule regulating the behaviour, conduct and relationships between and among public authorities and the populace. A constitution may be written or unwritten, rigid or flexible. Nigeria, being a federal state, has written constitutions of which the 1979 constitution was particularly important.

The return to national legislation on local government in Nigeria came with the return to civilian rule under the 1979 Constitution of the Federal Republic of Nigeria. The departing Federal Military Government led by General Olusegun Obasanjo enshrined the landmark provisions of the 1976 Local Government Reform into the 1979 Constitution. The Constitution recognized local government as the third tier of government in the country. Extracts are given below:

Extracts: Section.7, Constitution of the Federal Republic of Nigeria (1979 &1999)

- 7 (1) The System of local government by democratically elected local government councils is under this constitution guaranteed; and accordingly, the Government of every state shall ensure their existence under a law which provides for the establishment, structure, composition, finance and functions of such councils.
- 7 (2) The person authorized by law to prescribe the area over which a local government councils may exercise authority shall define such area as clearly as practicable and
 - a. 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
- 7 (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.
- 7 (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.
- 7 (5) The functions to be conferred by law upon local government councils shall include those set out in the Fourth Schedule to this constitution.

- 7 (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,

With regard to the number and names of local government councils, Section 3(2) of the Constitution states:

- 3 (2) Each state of Nigeria named in the first column of part 1 of the First Schedule of this Constitution shall consist of the areas shown opposite thereto in the Second Column of that Schedule.

It should be noted that Part 1 of the First Schedule to the Constitution listed names of local government areas in each state of the Federation. Also item 30 in the Exclusive Legislative List in Part 1 of the Second Schedule to the Constitution barred the Federal Government from winding up local government councils directly established by a law enacted by a House of Assembly of a State.

The 1979 Constitution's provisions on Local Government seem contradictory. Although the Constitution did not expressly prevent the creation of new local government areas, the fact that the First Schedule of the 1979 Constitution listed names of local government areas which were established in 1976 suggests that the number of local government councils cannot be increased without a Constitutional amendment as provided in Section 9.

The term 'establish' as used in section 7(1) seems incontrovertible that the states have legal responsibility for creation of local government (Gboyega, 1980:69), but procedurally, it can be imputed that the states' actions in this regard were wrong and therefore a violation of a very vital legal process necessary for the creation of local government councils. Their actions as stated by Idike (1996:10) were *ultra vires* (beyond state powers) and the newly created local government councils were null and void and rightly wound up.

This state of affairs has generated two schools of thought. The first school includes Omoruyi (1985), Adamolekun (1983) and Olowu (1982) who in Ogunna (1996:149) opine that the number of local government councils for each state was entrenched in the Constitution and could not be altered except by Constitutional amendments. According to Omoruyi in Ogunna (1996:14-150) "The 1979 Constitution provides statutory guarantee for the existence of local government as a third-tier of government and that a central organ, the National Assembly, has a role to play in establishing and rationalizing local governments".

The second school of thought which includes Gboyega (1980) Smith and Owojaiye (1981) Nwabueze (1983), and the State Governors of the Second Republic, “argued that under Section 7 of the Constitution, state governments were empowered to create local governments” (Ogunna, 1994:149). This informed the decision of the Second Republic State Governors to increase the number of local government councils for selfish and political reasons.

These contradictory provisions in the Constitution imply that

State Governments possessed the power to create and control local governments but these powers were limited by the provisions of the 1979 Constitution. This, in effect means that the Constitution recognizes that local government as a third level of the government in Nigeria with an added implication of the Federal Government having a significant role to play in local government affairs (Ogunna, 1996:150).

The 1999 Constitution and Creation of Local Government in Nigeria

The 1999 Constitution with regard to establishment, composition, structure, finance and functions of local government councils, has similar provisions with the 1979 Constitution with minor variations. Section 7 (1-6) of the two Constitutions were the same, but Section 3(6) and 8 (3, 5 and 6) of the 1999 Constitution differ from the 1979 Constitution with regard to the number of local government councils and creation of new local government areas respectively.

Extracts: Sections 3 and 8, Constitution of the Federal Republic of Nigeria (1999)

- 3 (6) There shall be seven hundred and sixty-eight local government areas in Nigeria as shown in the Second Column of Part 1 of the First Schedule to this Constitution and six area Councils shown in Part II of that Schedule.
- 8 (3) 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 new local government area) in each of the following, namely-
 - i. The House of Assembly in respect of the area and
 - 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.

Section 8 (3) apparently gives the powers to create new local government areas to the state government through the State House of Assembly.

However, Sections 8(5) and 8(6) required the involvement of the Federal Government through the National Assembly in the process of creating new local government areas in the country.

Extracts: Section 8, Constitution of the Federal Republic of Nigeria (1999)

- 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 states or local government areas as provided in Section 3 of this Constitution and in Parts 1 and II of the First Schedule of this Constitution.
- 8 (6) For the purpose of enabling the National Assembly to exercise to 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 National Assembly.

Section 8 (5 and 6) seems to be a mere formality with regard to the role of the National Assembly in creating new local government areas in Nigeria. However, the reality on the ground proved otherwise. This covert contradictory and contentious provisions clearly manifested themselves when some state governments such as Lagos, Ebonyi, Katsina, Nassarawa, Niger, Yobe, under the 1999 Constitution exercised their constitutional powers to create new local government areas. The most celebrated case was between Lagos State Government and the Federal Government over the former's creation of 37 new local government areas in 2002. These were in addition to the 20 listed local government areas in Part 1, First Schedule of the 1999 Constitution without the National Assembly acting as stipulated in Section 8(5) and 8(6). As aptly stated by Obianyo in Alli (2005:187).

The different interpretations being given by the two parties to Section 8 (5) and 8 (6) as to whether Lagos State has satisfied or fulfilled the provisions of the Constitution in relation to the afore-stated Sections has led to a Constitutional crisis. This crisis is significant in view of the refusal of the Federal Government to release the Federal allocation to Local governments in Lagos State on grounds of violation of the 1999 Constitution.

In April 2004, President Olusegun Obasanjo announced during the meeting of the Federation Account Allocation Committee (FAAC) that

No allocation from the Federation Account should henceforth be released to the local government councils of the above mentioned states (and any other that may fall into that category until they revert back to their local government areas specified in Part one of the First Schedule of the Constitution)(Obianyo,2005:187).

The affected states were Lagos, Ebonyi, Kastina, Niger and Nasarawa.

The President's action generated a lot of controversy and the critical question was whether he acted constitutionally in stopping the statutory allocation from the Federation Account to these states because they created new local government areas.

It is pertinent here to note the Constitutional provisions on the Federal Statutory allocation to the local government councils as provided in Section 162(3)(5)(7) and (8) of the 1999 Constitution

Extracts: Section 162, Constitution of the Federal Republic of Nigeria (1999)

- 162(3) 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.
- 162(5) Any amount standing to the credit of Local government councils in the Federation Account shall also be allocated to the states for the benefits of their local government councils on such terms and in such manner as may be prescribed by the National Assembly.
- 162(6) Each state shall maintain a special account to be 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.
- 162(7) Each state shall pay to local government councils in its area of jurisdiction such proportion of its total revenue on such terms and in such manner as may be prescribed by the National Assembly.
- 162(8) The amount standing to the credit of local government councils 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.

It is important to note that the Federation Account and any amount standing therein do not belong to Federal Government of Nigeria but to the Federation, and thus the three tiers of Government (Federal, State and Local) are of right statutory beneficiaries, and no tier has power to deny another its own share. A combined reading of Sections 3,7,8,162 and Parts I and II of the First Schedule of the 1999 Constitution, indicates that the Federal Government acted *ultra-vires*, illegally and unconstitutionally in withholding Federal statutory allocations to the Constitutionally created and recognized local government areas.

The decision of the Supreme Court of Nigeria in the celebrated case instituted by *the Attorney-General of Lagos State vs. the Attorney-General* of the Federation in 2004 supported this view (The News, June, 2005). The judgment noted that the Lagos State Government prayed the Court (Supreme Court) to determine

Section. 1 whether or not there is power vested in the President of the Federal Republic of Nigeria (by executive administrative action) to suspend or withhold for any period whatsoever the statutory allocation due and payable to the Lagos State Government, pursuant to the provision of Section 162(5) of the Constitution of the Federal Republic of Nigeria 1999.

The Supreme Court on Friday 10th of December 2004, held that

- (a) The Federal government has no power either by executive or administrative action, to suspend or withhold for any period whatsoever, the statutory allocations due and payable to Lagos State government pursuant to the provision of Section 162(5, 8) of the 1999 Constitution.
- (b) Such withholding of due allocations is unlawful and contrary to the provisions of the 1999 Constitution.

The Chief Justice of Nigeria (CJN), Justice Uwais (as he was then) maintained further that the creation of new local government areas or councils is supported by the provision of the Constitution (Obianyo, 2005:188)

The News(June,2005:19-32) notes that other Justices of Supreme Court such as Uwaifo, Tobi, Kutigi ruled thus; It does not appear to me that there is any power conferred on the President to withhold any allocation on the basis of a conceived breach of the Constitution (Uwaifo). Tobi asks “does the President have right to stop the release of funds to the councils? I think not”. He observes that

Section 162(5) of the Constitution or any other Section for that matter does not provide for the stoppage of allocation from the Federation Account to the Local government councils of Lagos State or any other state”. Kutigi rules that “Nowhere in the Constitution is the President expressly or impliedly authorized to suspend or withhold the statutory allocations payable to Lagos State pursuant to Section 162(5) of the Constitution, on the ground of complaints made against Lagos State by the Federal government in this Section or any ground at all. If the President has any grievance against any tier of Government, he should go to court. He cannot kill them by withholding their allocations (The News, June 13, 2005: 19-32).

On the main concern of this paper, which is the challenge of creating new local government areas under the 1979/1999 Constitutions, the Supreme Court in 2004, held that by virtue of the Lagos State creation of New Local Government Areas Law No. 5 of 2002 and as amended on October 6, 2003, the Lagos State government is constitutionally empowered by Sections 7(1) and (4) and 8 (3) of the 1999 Constitution to create 37 new local government areas in addition to the existing 20 local government areas, and to conduct elections of the chairmen and councillors into the new local government councils, which Lagos State Government did on 27th March, 2004.

The Court further held that the 57 newly created local government areas are constitutional, even though they were inchoate in view of the fact that the National Assembly had not made the consequential listing of the new local government areas as required by Section 8(5) of the Constitution. However, Justice Uwaifo observed that by virtue of Section 8(3) and Section 8(6) of the Constitution, the National Assembly has no basis to refuse the consequential listing of the new local government areas in the Constitution. The Court orders the federal

government to release the withheld fund to the Lagos state government for onward distribution to the twenty local government councils.

Relying on the aspect of the judgment which stated that the new 37 Local government areas were inchoate, President Obasanjo refused to release the fund, arguing that the 37 new local government areas were unconstitutional and the old 20 local government areas no longer exist because their boundaries have been altered by the Lagos State Government upon the unconstitutional creation of 57 local government areas.

It is the considered view of this writer with due respect, that the view of the former President is wrong and illegal. It was a clear case of disobedience to the order of Court of competent jurisdiction. This is contempt of Court and a clear manifestation of executive lawlessness. The right course of action by the president would have been to file an action in the Supreme Court to challenge the constitutionality of the new local government areas, but he chose the resort to self-help, thereby undermined the rule of law and overheated the polity.

It should be noted that the attitude of the former president in this matter depicts double standards and bias against Lagos State. This is so because the president did not withhold the statutory allocations to other states that created new local government areas. They simply changed the names of the local government areas to 'Development Areas'. Lagos State did the same, yet her case was different.

Conclusion and Recommendations

The decision to entrench Local government in the Federal Constitution of Nigeria as a third tier level of Government and other provisions of Local Government seem to be a reactive measure to resolve the myriad problems encountered by local government before the 1976 Local Government Reform. This decision contradicts the standard practice in other federal states, where matters of local governments are left to the state, regional, provincial or canton government to legislate and superintend. In Nigeria, the resultant effect of entrenchment of local government provisions in the constitution, leads to is the constitutional crisis arising from creation, funding and even functions of local government, and the attendant drawbacks to the country. The constitutional entrenchment of local government in Nigeria particularly with regard to creation of new local governments tends to have more negative than positive effects. A classical example of this ugly effect is the celebrated case in 2004 of the Supreme Court of Nigeria between the Lagos State and Federal Governments over the creation of new 37 local government areas in addition to the 20 named in the Constitution without consequential listing by the National Assembly, and the consequent withholding of the

Federal Statutory allocations to the 20 LGAs in Lagos State by former President Olusegun Obasanjo. This caused a lot of hardship to the local government workers and residents.

Therefore it is a considered recommendation of this paper that local government affairs should be expunged from the Federal Constitution and be left to the state governments to handle as is the practice in the country before 1976 and in other federations. This recommendation is considered apt because the underline issue fueling the Constitutional crisis over creation of new local government areas is the Federal statutory funding/allocation to Local Government Councils. The saying that 'he who pays the piper dictates the tune' comes into serious play here. The more the local government areas in a state, the more the statutory allocations to the state. This makes creation of new local government areas under the 1999 Constitution very difficult because no state would like be left behind in the race to create/proliferate new local government areas as was the case in the Second Republic under the 1979 Constitution, and have more funds/allocations from the Federation Account.

Let each state government create number of local government areas required for its area, and the amount standing in the Federation Account as provided in Section 162 should be shared between the Federal and State governments in accordance with Sections 162 (2) and 162(4) of the constitution.

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