

ODYSSEY OF LOCAL GOVERNMENT CREATION: AN EXAMINATION OF THE CONSTITUTIONALITY OF THE ALLOCATION OF LOCAL GOVERNMENTS' REVENUE FROM THE FEDERATION ACCOUNT

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Introduction

Nigeria operates a system whereby all the revenue collected by the Federal Government is paid into a special account called "the Federation Account" ("the FA") and distributed among the Federal, States and Local Government Councils.¹ While the Constitution unequivocally states that the FA shall be maintained by the "Federation" which is defined in section 318 of the Constitution as the "Federal Republic of Nigeria",² *the Allocation of Revenue (Federation Account, etc.) Act*³ vests the power to distribute the revenue in the FA exclusively in the Federal Government thus giving the false impression that the Federal Government is the owner of the revenue in the FA.⁴

The Federal Government had used its vantage position over the years to introduce certain practices in the management of the FA to the detriment of other beneficiaries of the account. This notwithstanding, the beneficiaries have had a settled expectation of a regular stream of revenue from the account.⁵ The

¹See section 162 of the Constitution of the Federal Republic of Nigeria 1999 (hereinafter called "the 1999 Constitution" or simply "the Constitution").

²See section 318 of the 1999 Constitution

³Cap 16 Laws of Federation of Nigeria (L.F.N.), 1990 as amended by *Allocation of Revenue (Federation Account, etc.) Act* Cap 106 of 1992

⁴The Supreme Court held in the recent celebrated case of *AG Federation and AG Abia States & 35 Ors.* [2002] 6 N.W.L.R. (pt.764) 542 popularly known as "the Resource Control Case" that the Federal Government is a trustee of the revenue in the FA and that like all trustees, it must account for the revenue to all the beneficiaries.

⁵For instance certain revenue were being deducted from the FA as first line charges before distribution of the residue among the three levels of governments. Such deductions were recently declared null and void in *A G Federation and A G Abia States & 35 Ors. (Supra)*

expectation's of the Local Government Councils in five States⁶ were however violently shaken; recently, when the President of the Federal Republic of Nigeria directed the Ministry of Finance to withhold their statutory allocations for holding election in new Local Government Councils created in those States against the warning of the Federal Government.⁷

The action of the President had been condemned in various strong terms such as "an invitation to anarchy and chaos",⁸ "a declaration war",⁹ "a sabotage" and "subversive of democracy in Nigeria",¹⁰ Federal executive rascality and unconstitutionality".¹¹ The degree of emotion and outrage evoked by the action is understandable when one considers the near total dependence of the three levels of government on the revenue in the FA.¹² The ability of these governments to maintain their services - pay their staff, pay for essential supplies and execute their capital projects depends upon the revenue from the FA.¹³ Tinubu puts the effect of the stoppage pungently thus:

By withholding the allocation of Local Governments, Mr. President will be subjecting millions of families to needless hunger, deprivation and suffering. He will be sentencing thousands of our people to untimely deaths by incapacitating dispensaries. Clinics and health centres in the local councils. The implication of this action is that hundreds of thousands of primary school teachers, primary health care workers, Local Government employees and pensioners will be deprived of their pay. How will teachers teach? How will breadwinners cater for their families? How will primary healthcare attend to the sick? How will local employees clear refuse and

⁶Ebonyi, Katsina, Lagos. Nasarawa and Niger States.

⁷The reasons for withholding the allocation is treated in fair details in Part 1.0 of the per infra.

⁸ See "Much Ado About New Councils" by A. Ekwueme in Sunday Sun, May 2, 2004, p.36.

⁹See "Allocation Withdrawal as Ultimate Blackmail" by A. Ipaye in This Day, Tuesday April 27 2004, p.43

¹⁰See "New LGs: It's too Late to Abort after Delivery" by Ahmed Bola Tinubu in Sunday Sun of May 2 2004, pp. 16&25.

¹¹See "You can't tamper with local government funds, Ekwueme tells FG" by A. Oshiomole in Sunday Punch May 2, 2004, p.42.

¹²For instance, federally collected revenue is the mainstay of the finances of the States accounting for a little over 90 per cent of their total revenue. While underscoring the significance of the FA to State governments Nwabueze said "Their financial viability and creditability as autonomous government units hang upon it For them the sharing is almost like a matter of life and death, exciting the deepest concern and their strongest emotions. Hence, the intensity of the question concerning it." See B.O. Nwabueze, *Federalism in Nigeria under the Presidential Constitution*, Sweet & Maxwell (London) 1983, p. 181

¹³ *Ibid*

perform other essential services? Must primary school pupils be allowed to roam the street idly? Even the immunizations of our children against polio and other deadly diseases will have to stop.

The reasons for withholding the allocation is treated in fair details in Part 1.0 of the

Can we afford to be so insensitive?¹⁴

Although the above statement might have been overtly exaggerated, the controversy generated by this development will undoubtedly have a definite impact on the future of inter-governmental fiscal relationship in Nigeria. If indeed the local government councils could hardly survive without the allocation from the FA, the development poses a real danger to the survival of the local government system in Nigeria.

This paper attempts to examine the legality or otherwise of withholding the allocation of the Local Government Councils from the FA. Five main questions are considered to be decisive to the legal resolution of the controversy. First, what is the consequential Act of the National Assembly under section 8(5) of the Constitution required for and what is the effect of not enacting it? Second, can a State lawfully distribute the Federal allocation for its Local Government among the new Local Governments? Third, is it lawful for the President in the circumstance to withhold the Local Government allocation? Fourth, whether it is correct to claim that the "old" Local Governments have become abolished upon the creation of new ones? Fifth, whether the *Allocation of Revenue (Federation Account, etc) Act* is constitutional in view of the express provisions of section 162(1) of the Constitution?

It is this writer's opinion that the Constitution makes a clear distinction between a "Local Government Council" and a "Local Government Area". Hence, an Act of the National Assembly making consequential provisions under section 8(5) of the Constitution is not required in respect of creation of Local Government Councils. In other words, the provision of section 8(5) of the Constitutions does not in any way limit the power of a State Government to create Local Government Councils and make them operational under its law. Admitting without conceding that

¹⁴ See Sunday Sun of May 2 2004, op. cit. pp. 16 & 25.

"Local Government Areas" is synonymous with "Local Government Councils" and that the newly created Local Government Council are unconstitutional, it is our position that it is *ultra vires* the President to unilaterally determine and impose the 'penalty' for such an infraction. The President cannot withhold a right (to revenue in the FA) expressly granted by section 261 of the Constitution to another level of government in the absence of any express provisions in the Constitution to that effect.

Be that as it may, the provisions of the *Allocation of Revenue (Federation Account, etc) Act No.106 of 1992* which vests the Federal Government with the power to exclusive distribute the revenue in the FA are inconsistent with the provisions of sections 162(1) of the Constitution and therefore *null and void* to the extent of their inconsistencies. The paper calls for an urgent review of the *Revenue (Federation Account, etc) Act No. 106 of 1992* to divest the Federal Government of its power to exclusively manage the FA and make all the beneficiaries or their representatives the joint managers of the account.

Background to the Controversy

There was a Local Government election throughout the Federation on 5th December, 1998 based on the provisions of *Local Government (Basic Constitutional and Transitional Provisions) Act*.¹⁵ The tenure of the Chairmen and Councillors were stipulated in section 7 of the Act as three years. The Act was repealed and the Chairmen and Councillors were sworn in under the provisions of the 1999 Constitution the 29th May, 1999.¹⁶ The swearing in of the Chairmen and Councillors as, therefore, conducted on the same day with that of elected political officers at the State and Federal levels whose tenure was four years.

Ordinarily, the term of office of the Local Government Chairmen and Councillors was supposed to have expired on 29th May, 2002 by which time another election ought to have been concluded. However, the National Assembly enacted the Electoral Act 2001 which purported to increase the tenure of all the Local Governments' elected officials from three years to four years to coincide with the

¹⁵ No 36 of 1998.

¹⁶See the *Constitution of the Federal Republic of Nigeria* (Certain Consequential Repents) Decree No 63 of 1999

tenure of the elected State and Federal political office holders.¹⁷ The constitutionality of certain aspects of the Electoral Act, including the purported enlargement of the tenure of the Chairmen and Councillors to four years was successfully challenged at the Supreme Court in the case of *A. G. Abia State v A. G. Federation*.¹⁸

When it became clear after the Supreme Court's decision that Local Government election could not be organised before the expiration of the tenure of the Chairmen and Councillors in May 2002, the President invited the Governors of all the 36 States to an emergency meeting where they agreed to abolish the Local Government system.¹⁹ Pending the time when the necessary constitutional amendments would be made towards this end, Caretaker Committees consisting of appointees of the Governor were appointed to run the affairs of the Local Governments in the interim. After running an interim caretaker committee for almost 2 years, election into the Local Government Councils throughout the federation was finally held on 27th March, 2004.

Meanwhile, some of the State Governments had commenced the process of creating Local Government Councils and enacted the appropriate law to that effect.²⁰ The representatives of the States in the National Assembly duly notified the National Assembly to enact the consequential Act, which is generally believed to be required under section 8(5) of the Constitution for the purpose of amending the names of the Local Government Areas but the National Assembly refused to act.

¹⁷There is a school of thought that the President and the Legislature deftly delayed the election into the local government councils out of base and selfish consideration totally unworthy of their eminent positions. For the President, it was suggested and argued that since his party lost the 1998/99 election in his pooling station, in his ward and in his local government in Ogun State, he would not want to suffer the same humiliation in 2002 as was bound to be the case were the election conducted under the laws promulgated by an Alliance for Democracy (AD) government and by State Independent Electoral Commission (SIEC) appointed by an A.D. Governor. Such a scenario could be very embarrassing and disastrous to his quest for a second 4-year term, which then seemed to be the consideration the utmost priority. For the National Assembly, some of whose members were keen on unseating the Governor of their States in 2003 election, the conducting election under machinery totally controlled by the governors whom they wished to unseat could in no way conduce to their political ambition. There was therefore a convergence and congruence of self-interests as between the presidency and legislature on the question of postponing 2002 local government election. See A. Ekwuerne, op. cit. p.33

¹⁸[2002]17 W.R.N. 1

¹⁹On the grounds of pervasive corruption and failure of the Local Government Councils to deliver the public goods.

²⁰ See for instance, Law No 5 of 2002 of Lagos

Against this background, there was divided of opinions on whether the election, in the States, should be conducted based on the 'old' or 'new' number of Local Government Councils. The National Working Committee of the People's Democratic Party (PDP) directed the State Governors elected on the platform of the party not to conduct election in the newly created Local Government Councils. Also, the All Nigeria Peoples Party (ANPP) through its National Chairman directed the Governors elected on the platform of the party to conduct elections only in the "constitutionally recognised Local Government areas". However, five States were unrelenting and went ahead with their plan to conduct elections into the new Local Government Councils.

The President reacted by withholding the statutory allocations "pending the time that the political problems are resolved".²¹ The Presidential directive stated that:

No allocation from the Federation Account should henceforth be released to the Local Government Councils of the above mentioned States and any other State that may fall into that category until they revert to their constituent Local Government areas specified in Part 1 of the First Schedule of the Constitution.²²

The President, ostensibly persuaded about the legality of his action, had dared the aggrieved States to challenge his action in the law court. Lagos State Government was the first to pick the gauntlet by filing a suit at the Supreme Court to challenge the constitutionality of the action of the President. The four other States subsequently followed suit.

Legal framework of the issues

The facts leading to this controversy are not in dispute. Hence, a resolution of the controversy therefore requires the interpretation of the provisions of the Constitution, which are set below.

The 1999 Constitution²³ is peculiar in many respects one of which is establishing a rather elaborate provision on Local Governments.²⁴ For instance, the Constitution

²¹*Sunday Punch* May 2, 2004, p.42.

²²*Ibid.*

²³Following the provisions of the CFRN 1979.

guarantees the existence of Local Government whether or not a State needs or can afford them.²⁵ Section 3(6) also states unequivocally that "there shall be 768 Local Government as in Nigeria as shown in the second column of Part I of the First Schedule to this Constitution".²⁶ The Constitution goes further to make provisions for the creation of more Local Governments Areas in section 8. In sum, section 8 requires a *request* for the creation of more Local Governments Areas to be passed by the House of Assembly and 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 and later passed into law.²⁷ Sections 8(5) and (6) which are particularly relevant to the controversy are reproduced low for ease of reference:

8(5) An Act of the National Assembly passed in accordance with this section shall make consequential provision with respect to the names and head quarter of States 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.

(6) 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 return to each house of the National Assembly.²⁸ (Italics are mine)

The Constitution further provides for the funding of the Local Government from the Federation Account and the revenue of the State government thus:

162 (3) Any amount standing to the credit of the 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.

²⁴A federation, as a general rule consists of the federal/national government and the component states/regions/provinces, The federal/national government only relates with the second tier states/regions/provinces, which at their own discretion, in their law, may then chose to create any number or grade of local governments. See R.ACE, Achara, "Can Nigerian Local Government Council autonomously impose rates?", Vol 47 Number2, (2003) J.AL., 242.

²⁵ See section 7(1) of the 1999 Constitution.

²⁶See section 3(6) and Second Column of Part 1 of the First Schedule to the 1999 constitution.

²⁷See generally section 8 of the 1999 Constitution.

²⁸ See section 8(5)-(6) 1999 Constitution.

(4). _____

(5) Any amount standing to the credit of the 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.

(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.

(7). _____

(8) The amount standing to the credit of the 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".²⁹ (Italics are mine)

Our comments on these provisions will be considered in the course of examining the specific five questions raised in the introductory part of paper. Meanwhile, we shall first consider the arguments and counter arguments on the constitutionality of the stoppage of the allocation, which also centre on the provisions.

Arguments For and Against the Stoppage

The President had justified the stoppage of the allocation on the ground that the names of the new Local Government Councils are yet to be reflected in the Constitution while the old ones had been abolished. According to him:

The terms of the Constitution which I swore to an oath stated clearly the numbers of the Local Governments in the country and their names; by doing otherwise, I would have breached the Constitution... The names of the new Local Governments are not in the Constitution and there is no way I can allocate the nation's resources to unconstitutional structure whose

²⁹ See generally section 162 of the 1999 Constitution.

names are not in the Constitution and the Constitution has not been amended to include their names.³⁰

The Lagos State Government had argued that that the failure of the National Assembly to enact the requisite consequential Act does invalidate the existence of the Local Government Councils and that the Local Government Councils should not suffer for the failure of the national Assembly. Relying on the provisions of section 162(5)-(6), it contended that the Federal Government was obliged to distribute the revenue meant for the Local Government Councils to the States and that it was not the business of the Federal Government how the revenue is distributed internally among the Local Government Councils in the State. This is, more particularly so, when the States were not asking the Federal Government for more revenue than their normal revenue based on the old number of Local Government Councils. Hence, the action of President was said to be ill conceived, politically motivated, unconstitutional, *null and void*.

Analysis of the Issues

The major issues highlighted in the introductory part of this paper will now be treated in *seriatim*.

What is the consequential Act of the National Assembly under section 8(5) of the Constitution required for and what is the effect of not enacting it?

There is no dispute that the State Governments have powers to create and had indeed created new Local Government Areas. The phrase "after the creation" which is contained in section 8(6) of the Constitution shows clearly that the returns is required to be made after all the processes for creation had been completed. This is logical because until the proposed Local Government Areas had been created there is really no need for the State House of Assembly to officially inform the National Assembly. It is the returns made to the National Assembly that will now form the basis of the consequential Act of the National Assembly. The contention of the President is that the National Assembly has not made the requisite consequential provisions.

This brings us to the question what are the consequential provisions by the National Assembly required for? The answer to the above question is can be

³⁰ See *Sunday punch* of 2 May 2004, op. cit.

gleaned from the provisions of section 8(5) of the Constitution, To our own mind, the purpose is to amend the names and headquarters of Local Governments areas provided in section 3 and Second Column of the First Schedule to the Constitution. There is no express provision in the Constitution or any Act of the National Assembly that provides that the new Local Government Councils created shall not become operative or be recognised by the Federal Government until the consequential provisions are made. If this had been the intention, the drafters of the Constitution would have stated expressly as they did in relation to alteration of State's boundaries for the purpose of creating new constituencies. Section 115 of the Constitution provides in this regard that:

Where the boundaries of any State constituency established under section 112 of this Constitution are altered, in accordance with the provisions of section 114 of this Constitution that alteration shall come into effect after it has been approved by the National Assembly and after the current life of the House of Assembly.

Apparently conceding that an Act of the National Assembly is required, the State Governments had argued that they could not be held responsible for the refusal of the National Assembly to take appropriate action. The protagonists for the States have made references to the requisite consequential Act as if the National Assembly was bound to make the enactment as soon as the *returns* were made to it. Such reasoning, in our view, ignores the fact that any Act of the National Assembly has to go through the normal processes of law making stipulated in section 58 of the Constitution.³¹ Otherwise, the Constitution would have required a mere confirmation or resolution of the National Assembly instead of an Act. As important as creation of Local Governments might be, it still remains a local matter affecting only five States, which ordinarily should not take precedence over pressing national matters pending before the National Assembly such as the Allocation of Revenue (Federation Account) Bill, the Energy Pension Reform Bill and the Constitution Amendment Bill etc. This perhaps, explains why the State Governments have not considered it expedient to apply for a writ of *mandamus* to compel the National Assembly to enact the requisite Act.

³¹ See section 58 of the 1999 Constitution.

The question, which the State Governments have failed to address, is whether the inaction of the National Assembly in this regard could dispense with the express provisions of section 3(6) of the Constitution if indeed that provision was applicable? The answer is in the negative, in our view. The case would have been different if the Constitution had prescribed a time within which the National Assembly is required to act and it has failed to act within that time.

This therefore brings LIS to the consideration of the main question whether an Act of the National Assembly is required at all to complete the creation of local government councils under the Constitution.

Our answer is in the negative. In sections 7, 8 and 9 above, reference is made to the phrases "local government councils" and "local government areas" more than ten times. This to some extent, demonstrate the appreciation of the drafters of the Constitution that the phrases "local government councils" and "local government areas" mean different things otherwise they would have consistently used only one of the two phrases.

The phrases "local government councils" and "local government areas" and the words "area" and "councils" are not defined in the Constitution. Rather, section 318 of the Constitution merely provides that "local government area or local government council includes an area council". This definition does not by any stretch of imagination mean at that the two phrases are synonymous. Rather, the purport of the definition is make the provisions of the Constitution on local government councils and local government areas applicable to the area councils in the Federal Capital Territory (FCT) the same manner in which section 299 makes the provisions of the Constitution applicable to the FCT as if the FCT were a State.

Oxford Advanced Learner's Dictionary defines area as "part of a place, town, etc., or a region of a country or the world", or "the amount of space covered by a flat surface or a piece of land, described as a measurement".³² The same dictionary also defines a council, *inter alia*, as the organization that provides services in a city or? Country, for example, education, houses and libraries etc.³³ From these definitions, it is crystal clear that the word "council" denotes an institution or

³²Oxford Advanced Learner's Dictionary, ed. S. Wehmeier, 6th ed., p.49.

³³*Ibid*, p.263.

organisation of a local government while the word "area" denotes the geographical area.

Section 3(6) unequivocally stated "there shall be 768 local government areas in Nigeria" and sets out the names of the local government areas within each state the second column of Part 1 of the First Schedule to the Constitution. It is submitted that the pith and effect of section 3(6) of the Constitution is to determine the boundaries of each state by reference to the aggregate number of its local government areas. There is no express provision in the Constitution that prescribes that a local government area must have only one local government councils. Hence, section 3(6), in our view, does not in any way prevent a State Government from creating two or more or as many local government councils as it considers necessary within one local government area within the limits of its resources.

Section 7(1) of the Constitution vests the State with the power to ensure the existence of local government councils under a State law and also provides for the establishment, structure, composition, finance and functions of such councils. Section 7(2) goes ahead to vest in the State Government the power to prescribe the area over which a local government council may exercise authority thus:

"7(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) the traditional association of the community, and

(iii) administrative convenience."

If the provisions of section 3(6), 7(1) and 7(2) are taken together, it is clear that the State has the prerogative of determining the number of local government councils it wishes to establish within a particular local government area and how to finance them. A State Government is, therefore, at liberty to create as many political divisions or subdivisions such as councils, counties, mayoralty etc or

within a local government area without offending the provisions of section 3(6) of the Constitution.

If this reasoning is followed through, it is arguable that section 8(3) and (4) of the Constitution are not applicable in the process of creating new local government councils since the provisions relate to the passage of a "Bill for the purpose of creating a new local government area". It is submitted, therefore, that it is left for each state to make its own laws on the process of creating new local government councils. This is logical since the 'power in the first instance to make law establishing them and determining their structure among others. As the popular *Yoruba* saying goes "it is the same white man that makes a pencil that also makes the eraser".

Can a State lawfully distribute the Federal allocation among the new Local Governments?

The project of creating new Local Governments initially flagged off with the expectation of a possible increase in allocation since the number of Local Government Councils in a State is a factor in allocation of revenue in the FA. The Federal Government however made it clear that it will continue to recognise only the 768 Local Government Councils, which according to it are, listed in the Second Column of Part I of the First Schedule of the Constitution. The States eventually moderated their expectations and settled for the plan to (re)distribute the revenue allocated to their Local Government Councils among the 'old' and 'new' Local Governments without asking the Federal Government for any extra finance. It was based on this settled expectation that the State Governments went ahead to conduct election in the newly created Local Government Councils.

The question however is whether the internal distribution of the Local Government Councils' share of the revenue in the FA is exclusively within the discretion of a State? In other words, can a State lawfully distribute the share of the FA for the Local Government Councils in its State among the new Local Government Councils after the creation of more Local Governments? A School of Thought believes that a State has the power to distribute the allocation among the new Local Government Councils. This School of Thought posited that:

"Section 162 subsection 8 of the Constitution bears the above assertion right since the provisions states that "the amount standing to the credit of

the 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". And 'a Local Government Council of a State' is one whose creation has been done in accordance with section 8 subsection 3 and the law creating it has been duly assented to by the Governor of the State".³⁴

Ipaye defends this position more clearly when he said:

"The distribution of funds to Local Government authority within a State is not at all the business of the Presidency, the Federal Government or indeed the National Assembly. Section 162(1) provides that the amount standing to the credit of the Local Government Councils in the Federation Account shall be allocated to States for the benefits of their Local Government Councils on such terms and in such manner as may be prescribed by the National Assembly. It means that the Federal Government does not allocate money to Local Government Councils but to States. And this is where the Federal touch ends. The actual distribution among the Local Government authorities within a State is governed by section 162(8) - "The amount standing to the credit of the 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".³⁵

Another School of Thought, however, contends that a State Government can distribute the share of the FA for the Local Government Councils in its State only for the benefit of the Local Government Councils are listed in the Constitution. Hence, it is illegal, for instance, for a Government to distribute the allocation meant for a particular 20 Local Government Councils among the 57 'new' Local Government Councils until the new Local Government Councils have been listed in the Constitution. A protagonist of this school of thought stated thus:

It is very clear from the provisions of the 1999 Constitution that neither the Governor of the State nor the House of Assembly has the power to redistribute funds coming from the Federation Account for Local

³⁴ O.J Onwe, *op cit.*

³⁵ A. Ipaye *op. cit*

Government Councils. These funds are only allocated to twenty Local Governments in Lagos State and these are listed in the 1999 Constitution. What is meant for each of the twenty states is already predetermined by applying the revenue allocation formula produced by the Revenue Allocation and Mobilization and Fiscal Commission. This factor has taken into consideration such factors as population, terrain and the land mass of each Local Government council, the number of hospital beds available and the number of primary schools enrolment in each Local Government council and so on. It is thus illegal for Lagos State Government to take funds meant for Ikeja Local Government Councils from the Federation Account and redistribute it to Onigbongbo Local Government or Ojodu Local Government.³⁶

Which of these two views is correct? It is noteworthy that the allocations to the States are meant "for the benefit of their Local Government Councils"³⁷ and not their local government areas". Since the Constitution does not provide a list of the names of the local government councils, the number of local government councils within a State must be determined based on the law of each State. Consequently, section 162(8) provides:

162(8) The amount standing to the credit of the 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".³⁸ (Italics are mine)

It is therefore the prerogative of each state to determine how the aggregate revenue accruing to its local government areas will be distributed among all its local government councils according the criteria and priority set in a law by its House of Assembly. Hence, it should not be the business of the Federal Government, whether the local governments' allocation to a State is ultimately shared among a higher number of local governments within the State, provided that the States are not asking for extra allocation to finance the new local governments.

³⁶See "Our Response to the Misleading Statement of Lagos State Government" by the Chairman, Peoples Democratic Party, and Lagos State in *The punch* of April 30 2004, p. 48

³⁷See section 162(5) of the 1999 Constitution

³⁸See generally section 162 of the 1999 Constitution

Is it lawful for the Federal Government to withhold Local Government's allocation?

Section 162(5) imposes a duty on the Federal Government to distribute the revenue in the FA thus:

162(5) Any amount standing to the credit of the 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.*(Emphasis mine).

Hence, the revenue in the FA does not belong exclusively to the Federal Government. This has received the judicial approval of the Supreme Court in *A. G Federation and A. G Abia States & 35 Ors.*³⁹Where it was held that the Federal Government is a trustee of the revenue in the FA and that like all trustees, it must account for the revenue to all the beneficiaries.

Granted that the National Assembly has the power to make law prescribing the terms and manner of the allocation to the States, it is yet to make any law, which authorises the Federal Government to withhold the allocation of any level of government in any circumstances. And if it does, the constitutionality of such a law will be in doubt. Beyond alleging that the creation of the new local governments councils were unconstitutional, the President had not cited any specific provisions of the Constitution or Act of the National Assembly in support of his action. Assuming, without conceding, that it was unconstitutional to hold election in the new Local Government Councils, the Constitution or any Act of the National Assembly had not provided for the consequences of such an infraction. Such a drastic power, which can 'destroy' or threaten the existence and well being of other levels of government cannot be implied into the Constitution⁴⁰. In any case, it must first be established in law court that there is a breach of the Constitution before the sanction, if any, can be imposed, It could not have been the intention of the drafters of the Constitution that the revenue of a level of government could be withheld for any infraction of the provisions of the

³⁹ [2002]6 N.W.L.R. (Pt.764) 542

⁴⁰ For the rationale and limits of the doctrine of implied power see *See Mc Culloh v Maryland*, 4 Wheat. 316 (1819), *A. G v Great Eastern Railway* (1880) 5 App. Cas 473, *Doherty v Balewa* [1963] 1 W.L.R. 949, *Gov of Kaduna State v House of Assembly*[1981] 2 NCLR 444 and section 10(2) *Interpretation Act, Cap. 192 LFN, 1990.*

Constitution, Otherwise, what will happen where the Federal Government itself is the aberrant?

Are the old Local Government Councils become abolished?

The President's partial justification for withholding the allocation was that the old Local Governments had become abolished. The President had asked rhetorically:

"Where is Alimosho Local Government? Where are Mushin and Island Local Governments? All the old Local Governments have been abolished while their names have been replaced by the State Government without any amendment in the Constitution".⁴¹

Is the above statement that the old Local Government Councils have been abolished a correct statement of law?

While the Constitution makes express provisions for the creation of new Local Government areas and adjustment of boundaries, no provision is made for the process of abolishing an existing one, the question now is at what stage is a new Local Government created and at what stage is an existing one abolished. A careful reading of the provisions of section 8 of the Constitution will reveal that a new Local Government is created after the bills for the creation of the new Local Government and boundary adjustment have been passed in accordance with the provisions of section 8(3)-(4) of the Constitution, If one argues that no new local government councils can be created until they have been incorporated into the Constitution, then it will be fallacious to claim that the old Local Government Councils have been abolished until this final stage is completed. It is a trite law that a law or an act of a State cannot override the express provisions of the Constitution, in this case, section 3(6) of the Constitution. And, if indeed, the old Local Government had been abolished, as claimed by the President, on what basis is their revenue being kept for them "until their political problem is resolved". The appropriate thing to do in the circumstance would have been to distribute their revenue among all the existing ones under the Constitution.⁴² Therefore, the act of keeping the revenue of the old local government councils for them is suggestive that the President had acted mainly for political reasons to arm twist

⁴¹See "Obasanjo, Tinubu in war of words" in, *Sunday Punch*, May 2.2004, p.34.

⁴²See sections 1 (1) and 4(5) of the 1999 Constitution entrenching the principles of supremacy of the constitution and inconsistency.

the States to revert to the old structure. Interestingly, the four out of the five States that had complied with the suggestion of the President had since been given their allocations.

Is the management of the FA exclusively by the Federal Government constitutional?

The ultimate question, and remarkably, the one, which poses real challenge to the self-righteous arrogance of the Federal Government is whether the management of the FA exclusively by the Federal Government is constitutional. As we have seen, the revenue in the FA belongs to the "Federal Republic of Nigeria"⁴³ and not the "Federal Government" which is just one of the federating units. How then did the management of the FA become exclusively vested in the Federal Government? This section is devoted to a critical examination of the legal framework, which afforded the Federal Government the opportunity to withhold the allocation meant for the Local Government Councils.

The genesis of the supremacy of the Federal Government can be traced to the power granted to the National Assembly in section 162(3) of the Constitution to, *inter alia*, prescribe the "terms" and "manner" of allocation to the beneficiaries of the revenue in the FA.⁴⁴ Pursuant to this provision, the National Assembly in the Second Republic enacted Allocation of Revenue (*Federation Account etc.*) Act, which vested the Federal Government with the power to distribute the revenue in the FA based on the formula prescribed in the Act. The Act gives no role whatsoever to the State Governments with regards to the distribution of the revenue in the FA. The Federal Government solely constitutes the membership of the Revenue Mobilisation Allocation and Fiscal Commission,⁴⁵ which advises the President on the proposal to be submitted to the National Assembly on the basis of distributing the revenue in the FA. The Commission consists of a Chairman and one member from each State to be appointed by the President, Commander-in-Chief of the Armed Forces.⁴⁶

⁴³ See sections 162(1) and 318 of the 1999 Constitution.

⁴⁴ See section 162(3) of the 1999 Constitution.

⁴⁵ See Revenue *Mobilisation Allocation and Fiscal Commission Act*, Cap 392 L. F. N. 1990.

⁴⁶ See section 2 of Cap 392, L.F.N. 1990 Section 7 however provides that the Commission shall be an independent and autonomous body and shall not be subject to the direction and control of any other authority or person in the exercise of its power, in real life, it is not likely that the President will appoint persons who will be not amenable to his direction.

A question may be asked whether the above arrangement is consistent with section 162(1) which provides that "the Federation shall maintain" the FA? The answer to our mind is in the negative. If section 162(3) which vests the National Assembly with the power to prescribe the terms and manner of the distribution of the revenue in the FA is read in conjunction with the express provisions of the Constitution in section 162(1), it will be clear that the power of the National Assembly in this regard is not absolute. The National Assembly, in the exercise of its power, cannot prescribe terms that are inconsistent with the Constitution.

It is remarkable to note, therefore, that the terms prescribed by both *the Allocation of Revenue (Federation Account etc) Act* and *Revenue Mobilisation, Allocation and Fiscal Commission Act*⁴⁷ have turned the FA into the Federal Government's Account instead of a joint account of the federating units, as envisaged by section 162(1). Against this background, it is submitted that it is ultra vires the National Assembly to exclusively vest the management of the FA in the Federal Government of Nigeria. To that extent, the Allocation of Revenue Act is inconsistent with the provisions of the Constitution and therefore null and void.

- Conclusion

The lingering fiscal battle between the Federal and State government is to a large extent attributable to the features of the 1999 Constitution, which are antithetical to the well-established principles of federalism. For instance, the Constitution provides a framework for certain aspects of Local Government such as the number and name of local government areas, finance and functions of local government councils etc. While, the constitutional arrangements might have worked fairly well during the military regimes, experience since the 1999 Constitution has revealed that the arrangement is crisis prone during civilian rule.⁴⁸ The present fiscal structure raises a fundamental question of the

⁴⁷ Cap 392 L.F.N. 1990

⁴⁸ Since the commencement of the 1999 Constitution, there have been many controversies on the scope and limit of the federal and State powers over the local government, which often exacerbated inter governmental friction. Such controversy centered on the questions whether the Federal Government can determine the salary of elected and appointed political officers, whether the Federal Government can extend the tenure of local government elected officers, whether the Federal Government can bypass the States to make the statutory allocation directly to each local government. Some of these issues have been judicially determined in *A G Federation v A. G Abia State & 35 Ors (Supra)*, *A. G Abia State v A. G Federation (Supra)*. Currently, there is a brewing controversy on whether the National Assembly can prescribe certain pre conditions for the distribution of the local government allocation

proprietary of financing Local Government Councils mainly with allocation from the FA. A situation where allocation from the FA is used to pay the salaries and emoluments of the employees' and political office holders of the Local Government Councils is uneconomical, administratively inefficient, counterproductive and politically unacceptable. Such expenditures should ordinarily be met from the internally generated revenue of local governments while federal transfers in form of either grants or loans should be used for specific capital projects that will impact meaningfully on the lives of the people.

Our analysis of the main legal questions involved in the controversy has revealed that the Federal Governments might have on an odyssey for which it is least prepared. In our view, the *Allocation of Revenue (Federation Account etc) Act* sooner or later runs the risk of being declared unconstitutional, *null and void* on the ground that it vests the management of the FA exclusively in the Federal Government instead of making all the stakeholders joint managers of the account. Although this is not one of the main issues in the suits pending before the Supreme Court, there is a new gale of consciousness among the States on the need to curb the overbearing influence of the Federal Government on fiscal and budgetary matters.⁴⁹ If this trend continues, it is predictable that the States might seek to plug the fundamental defect in the legal framework that gave the Federal Government the opportunity to ride fiscal roughshod on the constituents units ostensibly for political reasons. The Federal Government must, therefore sooner or later, be prepared to lose its exclusive control over the FA and brace up for the dynamics of joint management of the FA by all the stakeholders.

However, for there to be an enduring structure of Local Government system in Nigeria, the country must jettison the idea of a monolithic Local Government

to the states. Such pre conditions include the furnishing of a proof that the State governments have remitted previous allocation to the local government promptly and fully.

⁴⁹Recently, the 36 State Governors started agitating on the status and roles of the Accountant-General of the Federation in the discharge of his functions. The Governors are of the view that the Accountant-General of the Federation, being an appointee of the Federal Government of Nigeria is pandering to the wishes of the Federal Government, instead of protecting the interests of all the federating units that make up Nigeria. In order to address the perceived problems, a private member Bill was initiated in the Senate to "establish the office of the Accountant-General of the Federation". Senator Kolawole Adewale recently initiated See the Title of the Bill Office of the Accountant- General of the Federal Republic of Nigeria Bill. 2004. See generally. "Strengthening the Office of the Accountant-General". The Guardian, Thursday. April 29. 2004, p.16.

structure throughout the country and make all aspects of Local Government affairs purely residual to the States. Each State will then, in its own law, determine the number of Local Government it desires, if any, their structure and composition and how to finance them.

The above suggestions will require the amendment of the Constitution by deleting all the provisions relating to the Local Government Councils from the Constitution such as section 3(6), 8(3)-(6), 162(3), (5),(7). The State Local Government laws should be structured in such a way that will guarantee the stability of the revenue of the Local Government Councils and accountability. Otherwise, we would have replaced the political meddlesomeness of the Federal Government with that of the State to the disadvantage of the Local Government system and the populace. It suffices to say in the final analysis that, no matter how 'perfect' the various Local Government laws might be in terms of structure, finance and provisions, a good dose of goodwill .and cooperation of the political operators at the different levels of government is still required for the laws to work efficiently.