

LEGISLATIVE POWER OVER LOCAL GOVERNMENTS IN A FEDERATION: NIGERIAN AND AMERICAN EXAMPLES

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Abstract:

Local governments are the smallest unit of government in a federation. In Nigerian federation Local government is provided in the Federal Constitution with assigned functions and its existence as a third tier government constitutionally guaranteed. In United States of America (U.S.A) Local Governments are classified as residual matters without a mention in the Federal Constitution. In the assignment of legislative powers in the Constitutions of U.S.A and Nigeria local governments do not have a place in terms of the various legislative fields or items namely – Exclusive, Concurrent or Residual Legislative Fields as a third tier government. In essence, in absence of assignment of legislative powers by the federal Constitutions both the federal and state may seem to exercise some form of legislative control over local governments. It is the province of this paper in comparative terms to examine the legislative power over local governments by the federal and state governments in a federal arrangement using Nigerian and American (U.S.A) federations as examples. It is discovered that local governments in U.S.A exercise delegated powers from state Constitution in somewhat a unitary arrangement. However independent legislative status can be achieved by local governments via Home Rule Provisions. As

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well by is provision of Mandates, such presumable local government independence under Home Rule Provisions can still come under the legislative power of the State governments.

1.1 Introduction:

Local governments have become the inescapable mix in the federal arrangement of nations whether provided in the social compact called Constitution or not. The widening of reach of Federal or State government presence in modern governance notwithstanding there still exist certain peculiar local needs which are addressable by the locals based on familiarity with their peculiarities as people concerned. *Mowoe*¹ described such needs as being “of direct concern to particular localities” and should be “best dealt with locally”. The inevitability of their existence was noted by *Tocqueville* even in presence of great political assemblies established in a nation however rudimentary in form. Local government likened to a village or town or tithing he said is:

[T]he smallest division of a community, must necessarily exist in all nations whatever their laws and customs may be: if man breaks monarchies and establish republics, the first occasion of mankind seems constituted by the hand of God. But although the existence of the township is coeval with man, its liberties are not the less rarely respected and easily destroyed² (emphasis supplied).

¹ K. M Mowoe, *Constitutional Law in Nigeria* (Lagos: Malthouse Press Ltd., 2008) 240.

² Alex de Tocqueville, *Democracy in America, Vols. I and II*; Henry Reeve (ed.) (New York: Bentham Books, 2000) 66.

Local governments to all intents and purposes are therefore a consequence or fall out of systems of government where the sovereignty of the people is recognized. Thus:

In the nations by which sovereignty of the people is recognized every individual possess an equal share of power, and participates alike in the government of the State. Every individual is therefore supposed to be as well informed as virtuous, and as string as any of his fellow-citizens. He obeys government ... because he acknowledges the utility of an association with his fellow – men and ... no association can exist without a regulating force.³

In all, there seems to be a philosophical recognition of municipal independence in local governance as a natural consequence of the principle of the sovereignty of the people in the federal system established under a social contract be it Nigeria or U.S.A for that matter. However it must be noted strongly that in the federal Constitutions of Nigeria and USA, there is no animation of the perceived philosophical sovereignty accorded to Local governments in the nature ascribed to States. In fact, in U.S.A Federal Constitution local governments were not given a mention. So it will seem to be an anomaly to venture into the import of for example ‘Federal legislative Power over Local Governments’ in American federation.

³ *ibid.*, 71.

However, on the contrary despite the seeming constitutional gap, in non affirmative recognition of local governments in the Constitution of USA, Federal legislative powers can equally reach Local governments when they reach the States under the notion of local government instrumentalities. This is so as local governments being creations of State governments in U.S.A are appendages of the States; as such they constitute State instrumentalities. This reasoning is limited to exercise of Federal legislative power over local governments. However, coming to States' legislative control over the same local governments in U.S.A it becomes a different matter. The State in the first place by legislation gives birth to the local government contemplated. It is left for further enquiries on the extent such legislative power continues after the grant of existence and independence. This is the Cruz of the present discourse. Thesaurus

2.1 Source of Authority

Largely it seems to be that Local governments are structured to be an administrative unit of the State governments in U.S.A and not a third tier government as applicable to Nigeria under a federal model. To that extent it can be argued that between the States and Local governments in America the structure of arrangement tilts more towards a unitary set up. The powers exercised by local officials are whether in policy making, financial authority or governance flowed to them by devolution. Essentially in this direction concerns have been expressed with regards to bridging the gap between the increase in administrative responsibilities placed on them by local governments and the diminished power to meet up with those responsibilities.⁴ In any case the state government through the State Mandates continue to

⁴ R. G. Downing "Urban Country Fiscal Stress" Urban Quarterly 27 (December 1991): 3,4-25.

exercise control over Local government. The imposition of mandates no doubt leads to conflict.

In Nigeria, in the contrary, local governments are marked out uniquely, not only by a constitutional provision that guarantees their existence but also, by the Constitution naming all the extant Local governments in the Federation. The number of local government is stated in the First Schedule to the Nigerian Constitution to be 774 in number. If any claim can be laid to Local governments being elevated as a third tier government properly called constitutional wise in the Federations under study it is only in Nigeria that such claim can be laid. Though Nigerian Constitution recognizes existing Local governments, it is the States in Nigeria that are empowered to create new ones. Thus the legislative power over local governments may seem similar in Nigeria and U.S.A. It will hold true to assert that in these respective countries legislative control of Local government is a residual matter as it is the States that are constitutionally empowered to create local governments. The point of divergence may not only seem to be that for legislative power over local governments in Nigeria the federal Constitution and State Statutes provide guide; whereas in U.S.A, States' Constitutions and Statutes-granting charters to local governments provide guide.

3.1 Legislative Control Under Nigerian Constitution

In Nigeria no doubt the Constitution⁵ guarantees the establishment of democratically elected local governments. However, the Constitution left the establishment, structure and compositions, finance and functions of Local governments as

⁵ S. 71 CFRN 1999.

matters to be promulgated upon by the State House of Assembly. In the State legislative Assembly is also the authority to repeal or amend such promulgated laws as the need arises. In *Akan v. Att Gen. Cross River State*⁶ the applicability of the provisions of s. 7(1) of the 1979 Constitution which is in *pari material* with s. 7(1) of 1999 Constitution was called to question. It was declared by *Esin J* of Calabar High Court that:

This section is firstly a declaration by the Constitution of a system of local government by means of democratically elected local government councils and secondly, a mandate or orders to the government of every State to ensure that such councils are established under a law. This is a compulsory non discretionary obligation. No State government can act in this respect under a law that does not provide for councils that are democratically constituted, or rather democratic election.⁷

Flowing from the above sound declaration, the court held that the dissolution of local Government Council's Law No. 4 of 1979 was in conflict with and violated s. 7(1) of the 1979 Constitution of the Federal Republic of Nigeria. In consequence it declared the Dissolution of Local Government Councils Law No. 4 as unconstitutional, null and void. The constitutional guarantee on local governments in Nigeria does not envisage any derogation from the Constitution by the State Assembly conferred with residual legislative power over them. In explaining the purport of

⁶ [1982] 3 N.C.L.R 881.

⁷ *ibid.*,

the guarantee via proviso to s. 7 of the constitution the Nigerian Supreme Court in *Balogun v. Att. Gen. Lagos State*, States that:

The meaning of the Constitutional guarantee of democratically elected local government council must be derived from the history of past practices; and in particular, from the democratic processes existing under “existing laws” as set out for example in the provisions of the local government Edict, 1979 (and the corresponding enactments in the other States of the federation).

Thus in *Akinpelu & Ors v. A.G Oyo State* it was stated that:

A fortiori, the setting up of a caretaker committee to replace a democratically elected council is clearly unconstitutional, illegal and *ultra vires* the powers of the 2nd respondent.

In *Etim Akpan & Ors v. Hon Peter Umah & Ors* the exercise of legislative control over local government by the dissolution of the council and the setting up of a caretaker committee by the Governor via the recommendation of the House of Assembly were called into question. The issues submitted for determination before the Court of Appeal are as follows:

- i. Whether the State House of Assembly cannot make a law to regulate a local government plagued with crises.
- ii. Whether the Governor of Akwa Ibom State was not competent to dissolve the democratically elected government constitutionally guaranteed under s. 7 of the Constitution and replace it with the appellants as caretaker committee members.

In a unanimous decision the Nigerian Court of Appeal per Ekpe J.C.A stated inter-alia.⁸

In as much as I do not doubt the legislative power of the State House of Assembly to make a law to regulate a Local Government Council in the State plagued with crisis or to make a law to prescribe for an even upon which happening a Local Government Council is dissolved or the Chairman or Vice Chairman of a Local Government Council is removed or vacates his office, but about law made by the House of Assembly which provides for nomination of membership of a Council or appointment of an Administrator or Caretaker Committee to replace a democratically elected is inconsistent with the clear and unambiguous provision of s. 7(1) of the 1999 Constitution which guarantees democratically elected Local Government Councils, and is therefore unconstitutional to the extent of the inconsistency.

Section 78 of the Local Government (Administration) Law 2000 ... provides for the appointment of an Administrator ... and also provides for a resolution of two – third majority by the House of Assembly requesting the Governor to dissolve a crisis – ridden council.... Even if the 2nd respondent had complied with the provision of s. 78 of the Local Government (Administration) Law 2000, such appointment would still be unconstitutional because the appointment of an administrator as provided in s. 78 of that law would not be synonymous with the establishment of democratically elected Local Government Councils enshrined

⁸ *ibid.*, 70, 74 – 75.

under s. 7(1) of the 1999 Constitution. In the court of Appeals view s. 78 of Akwa Ibom State Local Government (Administration) Law 2000 is inconsistent with s. 7(1) of the 1999 Constitution and is therefore unconstitutional.

As a result, the courts will see substitution of any other process, like nomination or appointment for consulting any of the component units of the local government authorities as unconstitutional.⁹ Thus, it has been held that a State House of Assembly cannot constitutionally enact a law, which provides for nomination of local government council members.¹⁰ The State governments however reserve the authority to dissolve local government councils provided certain factual basis in existence that is:

- (a) Publication in the official Gazette of the State of Notice of the proposal;
- (b) Notice in writing to the local government councils in areas to be affected calling for their views;
- (c) Written report of the inquiry recommending all or some of the proposals.¹¹

The various Houses of Assembly of the States of the federation have enacted Local Government Laws to provide for the composition, tenure, qualification, election and other matters relating to the operation of local government areas subject to the already existing constitutional provisions. For example, there is the Lagos State Government (Administration) Law.¹²

⁹ See *Adeniji v. Governor of Oyo State* [1982] 3 NCLR 698 HC Lagos State.

¹⁰ *Amodu v. Governor of Oyo State* [1983] 3 NCLR, 881, HC Cross River State.

¹¹ [1981] 2 NCLR 589, HC Lagos State.

¹² Cap. L 73 Vol. 5 2005 Laws of Lagos State.

4.1 Creation of Local Government

In U.S.A local government are structured into five types namely – counties, municipalities, towns, special districts, and school districts. In distinction local government are further classified into ‘General Purpose’ and ‘Single Purpose’ Local Government Labels. Under the ‘General Purpose’ tag such local governments perform a wide spectrum of functions, generally not closed. In this category counties, municipalities townships fit in. In the ‘Single purpose tag’ the functions implies an open and closed situation, established to perform one specific function. Here we find school districts and special districts.

Irrespective of the name tags or purpose tags in U.S.A local governments are the creation of the state. In capturing the relationship between the state government and local governments with the state as the life giver it was stated that:

This relationship is not quite the equivalent of a hospital system, but is isa basic condition of non-national government organization. Local citizens may install a local government with its flavour and its character but the state government makes local government to officials.¹³

In essence Local Governments are creations of the states in U.S.A in their individual sovereign rights. There is therefore no laid down Uniform pattern of local government creations in U.S.A as applicable in Nigeria. In this sense counties and school districts

¹³ A. O. M Bowman & R. C. Kearney, State and Local Government (4th ed., New York: Houghton Mifflin Company, 1999) 20.

serve as good examples of local governments that may be created in an arbitrary way¹⁴. Notably on a different note

Cities, towns and villages are not established arbitrarily by state governments but emerge as people locate in a particular place these local government however, need a charter that is acceptable to the state legislature much as acceptable to congress in order to pass laws and levy taxes and fees.¹⁵

In Nigeria the authority to create local government areas is vested in the House of Assembly by virtue of the provisions of s. 8(3) of the 1999 Constitution. The provisions of the said s. 8(3) are as follows:

- (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 the 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 are originated;

¹⁴ *ibid.*, 139

¹⁵ *ibid.*

- (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.

Upon local government creation, the State House of Assembly involved is to make adequate returns to each House of the National Assembly. This is simply to enable the National Assembly make the necessary adjustments under s.3 of the Constitution and in Parts I and II of the First Schedule to the Constitution.¹⁶ In this process there is no additional input required from the National Assembly or the president in relation to whether or not additional local governments should be created. In other words the creation of Local government is the absolute legislative prerogative of the State House of Assembly; the only rider is that it must be exercised in accordance with the provisions of the Constitution. This further presupposes that creation of local government in Nigeria does not stop at the door step of the State. Upon creation of local government council by the State in line with the constitutional provisions; it is a condition precedent that returns must be made to each House of the National Assembly to

¹⁶ S. 8(5) and (6) of the 1999 Constitution. Under S. 8(5) the National Assembly shall by an act passed make consequential provisions with respect to names and headquarters of state or local government areas as provided in section by the constitution under section 3 and in parts i and ii of the first schedule to the constitution. To activate the said section 8(5) of the CFRN. Section 8(6). Provides subject to the said S.8(5) each house of assembly shall after the creation of more local government areas pursuant to sub-section 3 of this section make adequate returns to each House of the National Assembly.

formalise the process. This they do by a consequential amendment with respect to the names and headquarters of the newly created council and nothing more. The fact that the National Assembly has this nominal part to play in the creation of local government in Nigeria does not amount to legislative control over local government. The role they play in the process of local government creation comes after the completion of the process. The consequential provisions by Act of the National Assembly are only to bring to legal conclusion the fact that new local government councils have been created.¹⁷ Obviously, local government creation under the above terms seems straight forward. However, creation of local government under civilian regime with the attendant political undertones and intrigues will reveal that it is not readily easy to venture into such an enterprise.

4.2 The Lagos State Issue

In 2002 there was an attempt by Lagos State government create some new local government in Nigeria which attempt became an exercise in futility having been clogged by the constitutional templates just discussed above. Indeed, at that material time in 2002 Lagos State government by appropriate legislation gave effect to the creation of 37 additional local government councils,¹⁸ leaving only the enactment of the consequential Act by the National Assembly pursuant to section 8(5) and 8(6) of the 1999 Constitution. Though members of both houses of National Assembly from Lagos State had notified the National Assembly for their legislative blessing as envisaged under the said section

¹⁷ M.O Adediran 'Contemporary Issues in the Local Government System Under the 1999 Constitution' in Desire Ameze Guobadia and Epiohany Azinge (ed) *Current themes in the 1999 Constitution* (1st edn., Lagos: Nigerian Institute of Advanced Legal Studies, (2007).

¹⁸ Law NO. 5 of 2002 of Lagos State.

8(5) and section 8(6) of the Constitution; yet the federal government under the executive control of Obasanjo as president descended heavily on Lagos State by withholding their next statutory allocation. This was effected by presidential directive to the effect that:

No allocation from the federation account should henceforth be released to the local government councils of the above mentioned states and any other states that may fall into that category until they revert to their constitutional local government areas specified in Part 1 of the First Schedule of the Constitution.¹⁹

By this interface between the Lagos State government and the Federal government of Nigeria following the presidential directive, the imbroglio had to be resolved by the apex court in *A.G Lagos State v. A.G Federation*²⁰ suit of the Lagos State challenging directive. The two issues that were submitted to the apex were submitted to the court for resolution were namely (i) the intendment of section 8(3), (5) and (6) of the 1999 Constitution *vis-a-vis* the constitutionality of a State law purporting to create new local areas of council and (ii) whether there is vested in the president constitutional power to withhold statutory allocations from the federation account to State that have created new local government councils without the consequential amendment passed effected by National Assembly.

In resolving the first issue the supreme held that the State law creating new local government was not sufficient to give them life without the consequential Act of the National Assembly

¹⁹ Adeniran (n. 17).

²⁰ [2004] 11-12 S.C 85.

effecting an amendment in line with the Constitution. In the words of Uwais the then CJN:

[T]he passing of the Local Areas law. No. 5 of 2002 by the Lagos State house of Assembly was not sufficient to give life to the new Local Government Areas until the National Assembly passes the Consequential Act amending Section 3 Subsection (6) and Part I of the First Schedule to the constitution. Similarly, the enactment of the New Local Government Areas (Amendment) Law, 2004 by the Lagos State House of Assembly, when this case was pending before us is of no effect and cannot be operative until the National Assembly passes the appropriate Act under Section 8 Sub section (3) of the Constitution appropriately amending Part I of the First Schedule to the Constitution to accommodate the New Local Government Areas.²¹

On the second question of propriety of the Presidential directive, the Nigerian Supreme Court per Kutuji JSC held as follows:

[N]owhere in the Constitution is the president expressly or impliedly authorized to suspend or withhold the statutory allocation payable to Lagos State pursuant to section 165 (5) of the

²¹ *ibid.*, 102.

Constitution on the ground of the complaints made against Lagos State by the Federal Government in this action or any ground at all. If the President has any grievance against any tier of government, he should go to court.²²

Clearly the manner of formation of Nigeria Federation, from unitary system to Federation System still leaves vestiges of unitarism at play. Added to this the protracted presence of the military in governance helped to destroy in great details the templates upon which the Nigerian Federal structure was founded.

In Nigeria's unique federal arrangement, the idea seems to be that as power flows from the centre to the states, it will also move to the local governments. Ultimately each entity in the federal arrangement, Central, State and Local will end up operating independently and cooperatively with mutual trust and respect. In the foregoing light, Anyebe sees as modern trend in a federal arrangement where:

[E]ach of the three levels of government in a federation –the central, the state and the local, needs to be distinctively recognized as an autonomous in its own sphere. Each ought to be involved in the negotiation and in the cooperation process.²³

²² *ibid.*, 122-123.

²³ Pefer. A. Anyebe, "The Constitutional Position of Local Governments; Their Functions and Relationship with Upper Orders of Governments in Nigeria," S.A.M Ekwenze and 3 others (eds) in *Demands for Justice: Essays*

By virtue of 1979 Constitution there was a conscious effort in Nigeria for local government to ascend to that pedestal were it will be categorized as a third tier of government properly so called. Thus Anyebe's perception of autonomy of each level of government in certain spheres yet in cooperative relationship was the character of the new Federal – State – Local relationship foisted on Nigerians by the 1979 Constitution. This character of new Federal relationship in Nigeria is recognized in Adamolekun and Roland studies.²⁴ Thus without hesitancy Niki Tobi JSC²⁵ viewed the action of the Federal government in relation to the exercise of constitutional power in creation of new local governments by Lagos State as capable of breeding anarchy and totalitarianism. For resorting to seek help and not seeking redress in court of law, he sees the Federal government actions as antitheses to democracy. As such, "courts operating the rule of law, life blood of democracy are under a constitutional duty to condemn such action".²⁶ Further holding that in the Nigerian democracy:

[A]ll the governments of the country as well as organizations and individuals must kowtow to the due process of the law and thus they can vindicate the resorting to the courts for redress in the event of any grievance.²⁷

in Honour of Hon. Justice O.J Okeke, KSP, F.C, Arb (eds) (Enugu: Snaap Press Ltd., 2013) 438.

²⁴ Ladipo. Adamolekun and L. Roland *The New Local Government System in Nigeria* (Ibadan: Heinemann Educational Books (Nig) Ltd, 1979) 18.

²⁵ *A.G. Lagos State Case* (n.20) 151

²⁶ *ibid.*

²⁷ *ibid.*

The partisan interference of the Federal government in the first attempt to creation of New Local governments in Nigeria under the 1999 constitutional arrangement was not to see it become a reality but to scuttle it.

Clearly it seemed the federal government could not have achieved that aim if it had decided to rely on the National Assembly alone. The hand of politics and dictates of expediency were equally at play. No doubt the Nigerian federal government is always desirous of being a keen player in matters of legislative control over local government but it lacked the constitutional capacity to do so. Actions have been successfully brought against the federal government of Nigeria when it attempted via the National Assembly to enact a law that would enable it monitor the expenditure of allocations to local government councils in the federation account²⁸. This is not the case in U.S.A. In U.S.A for

²⁸ Save for constitutional limitations and judicial interventions Nigeria's federal government by all manner of designs attempts to exercise legislative control over local government would not have come to no avail. In *A.G. Abia State v. A. G. Federation [2006] 7 SCNJ 1* the Federal Government of Nigeria enacted the Monitoring of Revenue Allocation to Local Government Act of 2005. By section 7 of the Act the Auditor General of the Federation was mandated to report to the National Assembly how the funds in the State Joint Local Government Account are spent by the States and the Federal Capital Territory. The said section 7 prohibited the state government or the federal capital territory from deducting, altering or re-allocating funds standing to the credit of the State joint Local Government account. Though the constitutional duty of the State in the distribution of the funds in the State joint local Government Account may have been honoured more in breach than observance the Supreme Court voided section 7 of the Act for being inconsistent with the Nigerian Constitution. Thus the federal government of

example autonomy can be granted to the local government by state government via Home Rule Mechanism, in Nigeria it is only the federal Constitution that can do that.

5.1 Home Rule Mechanism in U.S.A

In the federal structure of U.S.A, the federal government has enumerated power, state residual power and local units delegated power. This delegated powers exercised by local units do not flow from the Federal Constitution but from the state Constitution noting with reference to U.S.A that local governments possess delegated legislative power, said:

Legislative power also resides in municipal councils, school boards, boards of county commissioners, and boards for other units of local government. Like congress, local units of government possess only those powers delegated to them. Selected powers, out of the full array of state sovereign powers, are given to local units either by the state Constitution or more commonly, through legislation delegating responsibility for policy making on certain issues.²⁹

Flowing from the fact of local units exercise of delegated powers, each local ordinance must be based on a grant of power by the delegating authority – State Constitution. The States in Nigeria do not have individual Constitution as in U.S.A. In Nigeria therefore the federal constitution provides for such delegated

Nigeria lacked the constitutional power to fetter the absolute control of the state over such funds.

²⁹ Jack Davis, *Legislative Law and process in A Nutshell* (3rd ed., Thomson West: 2007) 203.

powers exercisable by local governments. In U.S.A for example it is the state Constitution of which Marks and Cooper wrote that “generally tend to be highly individualistic”³⁰ make similar provisions. This individual tendency can lead to none express provisions relating to local government such as Vermont Constitution and New Hampshire Constitution.³¹ These referred Constitutions are somewhat isolated in U.S.A as “other constitutions thereto contain explicit and detailed provisions, dealing with a myriad of restrictions and regulatory limitations relating to local government”.³² in their further observation they noted that:

[T]he most unusual example of this type of extensive regulation is found in the Oklahoma Constitution. In Section 8 of Article XVII (comprising approximately 35 pages of text) of that constitution the geographical boundaries of all 77 counties located within the state are described in detail³³.

It is unequivocal and therefore not subject to debate that in U.S.A the States in a general sense have absolute legislative power over local government units within them except for constitutional limitations. These local government units are of varied types – they may come in form special purpose or general purpose in which case not a separate entity but off shoots or creatures of the County. A generic reference to local units may be very tasking

³⁰ Marks T. C., and Cooper J. F., *State Constitutional Law in Nutshell* (2nd ed. St. Petersburg: Thomson West, 2003) 219.

³¹ *ibid.*

³² *ibid.*

³³ *ibid.*

given that some creatures of a County for example known as Municipal Purpose Taxing Units may exist as a separate taxing units but not as a separate entities for any other purpose.³⁴ In this direction in *Stilley v. Henson*³⁵ the Supreme Court of Arkansas has held that “a county is a municipal corporation”. In absence of express constitutional grant of certain governmental powers to local governments all local government in U.S.A g/are subject to the plenary authority of the State. In *Merrian v. Moody’s Executors*³⁶ the issue of the authority of a municipal corporation to act was brought to the fore for resolution and the supreme court of Iowa held that Local governments:

Possess and can exercise the following powers and no others: first, those granted in express words; second, those necessarily implied or necessarily incident to the powers expressly granted; third, those absolutely essential to the declared objects and purposes of the corporation-not simply convenient, but indispensable.

Local government it must be restressed at this juncture is government of delegated powers which may be broad or narrow on one hand, uncomplicated or detailed on the other hand. This delegation comes from the state’s Constitution, State’s legislature or a combination of the two. Thus, before implication of a valid exercise of delegated powers, the finding of some explicit or inferable authority authorizing local governments to act in a given area must proceed that imputation.

³⁴ *Gallant v. Stephens* [1978] 358 So. 2d 536.

³⁵ [2000] 342 Ark. 346 [2000] 28 S.W. 3d 274, 220.

³⁶ [1868] 25 Iowa 163, 221.

The question that needs to be addressed now is given that a State legislature possesses plenary power over local government including counties, which power translates to power to create, reorganize and abolish them, are there constitutional possibilities of extricating local government from the clutches of the state government and granting them a modicum of independent legislative control over their affairs to wit autonomy? The answer is yes – there are in the first place the plenary legislative controls over local government by the state legislation are exercised in absence of specific state constitutional provisions to the contrary. To give effect to local autonomy over local affairs it has become the practice of most American State Constitutions in express terms to allocate specific governmental powers to Counties thereby insulating it from the caprice or whim of the state or state legislature. This extrication of absolute domination of local government by the State legislature is achieved as noted earlier via Charter or Home Rule Provisions. As aptly observed “The legal effect of home rule provision is to alter the traditional judicial inquiry”.³⁷ Save for restrictions placed by statutes, there is a presumption that home rule governments are imbued with all the paraphernalia of governmental powers to enable it act as such. In this sense, “the Charter becomes the organic law of the local entity functioning like Constitution.

There is a vivid example in Article xviii, section 3 of the U.S State of Ohio Constitution which provides that municipalities “shall have authority to exercise all powers of local self-government”. In interpreting this constitutional provision the Ohio Supreme Court in *Village of Perrysburg v. Ridgway*³⁸ recognized that the

³⁷ Marks & Cooper (n 30) 236.

³⁸ [1923] 108 Ohio St. 245, it is of note that this case was limited to a situation where “the powers of home rule ought to be exercised were not at

said provisions by allocating all powers of local government to municipalities had invariably deprived the state legislature authority to act in such matters. It was the further conclusion of the court that this power is resident in each municipality and that it is immaterial it had not activated that power by exercising its option under the provision under Article XVII section 7 of the Ohio Constitution to adopt a charter to govern municipal affairs.

6.1 Postscript

In U.S.A it is evident the limitation of States legislative powers over local governments is by home rule provisions which grant autonomy in certain cases to local units over their local matters. The determination of this limitation will necessary involve a distinction between matters of local concern and that of States concern if the particular home rule provisions involves a blanket provision to wit autonomy over local affair.³⁹ There is no doubt that in Nigeria as well, a grant of autonomy to local government under the federal constitution will necessitate a flow of similar legal consequences *mutatis mutandi* as observed in U.S.A over terms of the area granted. In this case a local government can

variance with General Law” as stated in *State v. Wagner* [1960] 17 Ohio St. 297 964 W. E. 2d 274.

³⁹ The Arizona Supreme Court (U.S.A) in the city of *Sapulpa v. Land* [1924] 101 Okla 22, 223, 640. In describing this dichotomy of what qualifies as a matter of state or local interest concluded that “there is a twilight zone wherein it is difficult to discern with positive assurance that legislation is of general concern, or is merely of local or municipal concern” The Supreme Court of Oregon (U.S.A), in state ex rel. *Heinig, v. City of Milwaukie* [1962] 231 Or. 473, 373, p. 2d. 680. On the same issued indicated its decision will be made in formulating a judicial rule on “solely upon the basis of our knowledge of the manner in which local and state governments operate and the relative importance of the function in question to the cities and to the state as a whole” In *City of La Granda v. Public Employees Retirement Board* [1978] 281 or 137, 576 p. 2d. 1204.

challenge any attempt by the State to fetter in absence of mandates as in U.S.A, or legislative control as in Nigeria the delineated area of autonomy granted it over its local affairs. In Nigeria the note sounded by Nwabueze in this pointed word at the threshold of the defunct Nigerians Constitution of 1989 becomes opposite:

As far as legislative power over specified power is concerned, the power of local government which is exercisable by means of bye-laws cannot possibly be exclusive of that of the State Government. For example - the State Legislative can certainly create offences and penalties in relation to those matters. Such State legislations provide indeed the basis for making of bye-laws by a local government, for bye-laws are, after all, only subsidiary legislation...what is intended is that local government should execute the functions only through its local governments... relevant matters pertaining to local governments which are not provided for the constitution may be prescribed or regulated by the State legislature... In the result, therefore, local government has become more or less an independent third tier of government⁴⁰.

Thus as a somewhat third tier government in Nigeria local government can challenge any States infractions of its functions or denial of its constitutionally appropriated revenue flow accruing from the federation account through the State Joint Local Government Account. the Oregon Supreme Court held that

⁴⁰ B.O. Nwabueze, *Ideas and Facts in Constitution Making* (Ibadan: Spectrum Books 1993)

“The Heinig formula should [not] be extended beyond the context of laws for city government in which it was formulated” In this case, the battle will be between the local government and the State. The federal government in this will remain a bye-stander or at best an on worker. This seen to be the rationale for the decision of the court in *A.G. Abia State v. A.G. Federation* that the federal government lacks the legislature competence to question state activities in respect to State and Local governments joint funds. Equally re-affirmed is the tenet of federation in each entities independent spheres of operation and its mutual non interference principle.

7.1 Conclusion Remarks

Largely in U.S.A and Nigeria under study, local governments fall under residual matter. The power of its creation lies with the states. To that extent it could safely be said that the states exercise seemingly overriding legislative power over local governments in the federation under study. However by the constitutional provision in Nigeria’s Federal Constitution that guarantees the existence and continuance of local government were similar provision do not exist in American Federal Constitution, the line is drawn. The drawn line is between legislative power over local government in Nigeria that relies on Federal Constitution as opposed to that of U.S.A that rely on States Constitutions for exercise of legislative power or control over local government. Resident in Nigerian states *de jure* is power to create local government but not to destroy it but in U.S.A there is no limitation of legislative power over local in the federal Constitution because it was not even given a mention. The states can create it and can as well destroy it within framework of each State’s Constitution.

In Nigeria no doubt local governments have assumed the status of third tier government under the Federal arrangement. However, this status does not translate to legislative power sharing under the Federal scheme of division of legislative powers. In similar vein, local governments in U.S.A do not partake in the division of legislative powers under federal arrangements. However, in practice legislative actions of the federal government may recognize the existence of local governments and impact on their activities as states instrumentalities. In Nigeria, however the Federal government exercises a direct legislative action on local government especially in the area of local government creation however nominal. For example local government creation in Nigeria crystallizes upon consequential amendments to the constitution by the federal legislative body reflecting the names and headquarters of a newly created council by the state legislative body. It is clear that states exercise more legislative power over local governments in American and Nigerian Federations as opposed to Federal Government. The difference lies in the fact that in American situation the states are in total control while in Nigeria situation it is not the case.