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The Legality or Otherwise of Vesting the Power to Impose Tax, Levies and Rate Reserved for the Local Government on the State Government Nigeria; A Legal Appraisal.

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ABSTRACT

The quest and drive to collect more money from other avenues for the state other than from the federal allocation has led to multiplicity or levying on the same person similar tax, levy or rate for the same liability in the state. Following this drive, the state government has often interfered with the powers or functions assigned to the local government under the constitution. This has generated avoidable and unhealthy rivalry between the two governments. The Local Government had always viewed any attempts to usurp their constitutionally guaranteed functions to be ultra vies and checked same with stiff resistance. Currently the state government claims that both levels of government have power concurrently to legislate on the said enumerated functions. This interpretation is a slap on the constitution which has adversely affected the existence and functioning of local government in Nigeria as intended by the drafters of the constitution and is the basis for this paper. Doctrinal method of data collection was adopted and analytical approach used in examining the research materials like the constitution, taxing statutes, judicial decisions, textbooks, journal articles and internet sources. The paper discovered that the interference on the functions of the Local Governments by the state government on the reserved taxing powers have seriously whittled down the operations of the local government as an autonomous entity. Everything is wrong for the state government usurping the functionsof the local. Local government should as a matter of urgency resist any further attempt by the state government to further usurp their powers. The courts should always be ready to declare any such act null and void.

Keywords: Legality, Taxing power, Imposition, *ultra vires*, Tax, Levy.

1. Introduction

The tax structure in Nigeria as stipulated in the constitution purports to make an attempt to classify the spheres of taxing powers or authority among the levels of government in Nigeria. A careful perusal and proper construction of the provisions of the Constitution[1] would reveal that the three levels of government were vested with legislative functions. The National Assembly is vested to the exclusion of any other with respect to the matters specified in Exclusive Legislative List.[2] The House of Assembly of a state has power in respect of any matter in the Concurrent legislative list but legislations made by the National Assembly on matters within the concurrent legislative list enacted by a state might be void either on ground of inconsistency,[3] or of covering the field. Where identical legislations, without any inconsistency, on the same subject matter

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[1] Constitution of the Federal Republic of Nigeria (CFRN) as amended, SS.4 (1), (2), (3), (4), (6) and 7 (5)

[2] CFRN, 1999 as Amended, S.4 (2), part 1, second schedule.

[3] Ibid, S.4 (5)

were validly made by the state and the Federation, in such situation the state's law must give way to the Federal Legislation.[4]

While the constitution requires the federation to control the national economy, it also empowers the state to participate in the development of the economy within the state and a local government in the development of the economy within their area of jurisdiction. The functions assigned to the local government in Nigeria include those set out in the fourth schedule to the constitution.[5]

Although it is within the legislative competence of a state House of Assembly to make a law to regulate the operation of local government council, the state is expected to confer other functions to the local government councils in addition to the ones set out in the 4th schedule to the constitution and not to share the enumerated functions under the 4th schedule to the constitution.

2. **Taxing powers of the State Government:**

The State Houses of Assembly were empowered under the constitution[6] to impose and collect tax on the concurrent legislative list. Subject to the provisions of the constitution, the state shall ensure to the existence of a law that will provide for the establishment, structure, composition, finance and functions of the local government.[7] The states also enjoy the latitude to impose tax on residual matters.[8] This is the reason the local government taxing powers could be described to be impliedly derived from the general provision conferring legislative powers on the state.[9]

It is again important to note that Nigeria is a federation consisting of the federal, states and Federal Capital Territory.[10] This federal arrangement in Nigeria is premised on the distinctive division of powers of the federation between the central (federal) and the states. Matters that fall under the concurrent legislative list are set out in the second schedule to the constitution.[11] But a careful study of the matters enumerated in the concurrent legislative list reveals that the constitution set out the extent of the federal and state powers in respect of those matters. In some of the matters listed in the concurrent list, the constitution specifically enumerated the extent and limitation of the powers to be exercised by the federal and state government respectively. This is to avoid or reduce any possible conflict or friction which may arise between the laws of the federal government and the state government on the same subject matter through the application of the principle of covering the field.[12]

Although the constitution did not expressly mention a list known as residual legislative list, it however, refers to matters which are not covered by the exclusive legislative listed and the concurrent legislative list upon which only the state government can legislate on to the exclusion

[4]*AG. Ogun state v Ag Federation* , (1982) 3 NCLR 166 at 179.
[5]CFRN, as amended, S. 7 (5)
[6] Ibid S.4 (7)

7. *ibid*. s7 (1)
[8]*Ag Ogun State v Aberuagba* (1985) I NWLR (pt3) 395
[9] CFRN, 1999 as amended, S 4 (7)
[10] Ibid, S.2 (2)
[11] *Ibid, part 11 of the second schedule*
[12] Ibid, S.4(5)

of the federal government. In *AG Ogun state v Aberuagba*[13] this residual list was referred to as where the federation does not have powers to make laws upon. The list remains after the exclusive and concurrent lists had been taken out.

The Taxes and Levies (Approved list for collection) Act,[14] provides for the states' sphere of control to include the following;

i. Personal income tax in respect of pay –As-You-Earn (PAYE) and direct taxation (self assessment)
ii. Withholding tax (individuals only)
iii. Capital gains tax (individuals)
iv. Stamp duties on instrument executed by individual.
v. Pools betting and lotteries, gaming and casino taxes.
vi. Road taxes
vii. Business premises registration fee in respect of:
    a. Urban areas as defined by each state, maximum of
        i. N10,000 for registration and
        ii. N5,000 per annum for renewal of registration and
    b. Rural areas
        i. N2,000 for registration and
        ii. N1,000 per annum for renewal of registration.
viii. Development levy (individuals only) not more than N100 per annum on all taxable individuals.
ix. Naming of street registration fees in the state capital.
x. Right of occupancy fees on land owned by the state government in urban areas of the state.
xi. Market taxes and levies where state finance is involved.

In the listing of the federal taxing powers in the exclusive legislative list, the only matters that are within the Exclusive list are matters of customs and excise,[15] export duties,[16] stamp duties,[17] trade and commerce[18] and taxation of incomes, profits and gains.[19]

From the purview of the whole constitution, states are perfectly entitled to regulate the carrying on of any business or trade within their boundaries or even if they think fit, to prohibit particular trade such as the sale and consumption of alcohol. This is more so where each state had an

[13] Supra
[14] Cap T2 laws of the Federation of Nigeria, 2004
[15] CFRN, 1999 as amended, part 1 second schedule, Exclusive legislative list, item 15
[16] Ibid, item 22
[17] Ibid, item 57
[18] Ibid, item 61
[19] Ibid, item D of the concurrent list.

existing state ministry of trade and commerce. It all boils down to the fact that the state can legislate in matters left out or residual to the items in the Exclusive list or Concurrent list. [20] By the provisions of the constitution, it is within the exclusive powers of the federal government to legislate on banks and banking,[21] commercial and industrial monopolies,[22] incorporation of companies,[23] insurance [24] and others. The drafters of the constitution have set out these for the legislative competence of the federal government but there are other areas within the spheres that are left open for the state. This contention is in tandem with the interpretations in *AG Ogun state v Aberuagba*, [25]*UAC of Nigeria Plc x 6 ors v AG of Lagos state x 2 ors*, [26]*AG Lagos State v AG Federation*,[27]*knight, Frank x Rutley (Nig) x Anor v Att Gen. of Kano State*,[28] and others, based on this quest by the state government to expand the frontiers for revenue generation. Following conflicting interpretations by court as highlighted above, the then coordinating minister for Finance and Economy; Dr. Ngozi Okonjo-Iwuala illegally amended the provisions of the schedule to the Taxes and Levies (Approved list for collection) Act.[29] Although, the order amending the Act was later nullified and voided in *Registered Trustees of Hotel owners and managers Association of Lagos (HOMAL) v Attorney-General of the Federation x Anor*.[30] It is interesting to mention certain taxes brought into the jurisdiction of the state governments by said amendment are;

i. Land use charge, where applicable
ii. Hotel restaurant or event centre consumption tax, where applicable
iii. Entertainment tax, where applicable
iv. Environmental (ecological) fee or levy
v. Mining, milling and quarrying fee, where applicable
vi. Animal trade tax where applicable
vii. Produce sales tax where applicable
viii. Slaughter or abattoir fees, where state finance is involved
ix. Infrastructure maintenance charge or levy, where applicable
x. Fire service charge
xi. Property tax, where applicable

[20]*Uwaifo v Ag Bendel* (1982) 7 sc 124 at 184, *Rabiu v state* (1980) 8-11 sc at 195 and *Awolowo v Shagari (*1979) 6-9 sc 51 at 66
[21] Ibid, item 6
[22] Ibid, item 11
[23] Ibid, item 31
[24] Ibid, item 32
[25]*supra*
[26] 6 all NIC 445
[27] (2003) 6 SC (pt 1) 24
[28] (1008) 7 NWLR (pt 556)
[29] Schedule to the taxes and levies (approved list for collection) Act (Amendment) orders, 2015 Federal Republic of Nigeria official Gazette, No. 77 Vol.102
[30] T*he Registration Trustee of Hotel Owners and Managers Association of Lagos (suing for itself and on behalf of all its members) v Attorney general of Lagos state & Anor* (2019) 4 TLRN 1

xii. Economic development levy where applicable

xiii. Social services contribution levy- where applicable

xiv. Signage and mobile advertisement jointly collected by state and local government.

xv. Market taxes and levies where state finance is involved.

With this order, the responsibility for collecting the very many taxes and levies lies with the state government. Apart from the fact to submit that the minister lacks the legislative competence to amend the schedule to the Act, the conduct of the minister does not amount to subsidiary legislation but an alteration of an act of the National Assembly which is *ultra vires*. The minister is not a branch of the National Assembly.[31] It is also worthy of note that the drafters of the amendment did not appreciate the distinction between a tax and other related terms such as fees, levies and charges. A number of user charges and licensing fees contained in the fourth schedule to the constitution would have been made taxes *strictosenso* where the act is not nullified. Some of those charges could be noticed in the assessment notices served on corporate bodies, such as parking fees [32] and mounting or road blocks.[33]

3. **Taxing Powers of the Local Government**.

The constitution denied local governments which it created legislative powers in tax matters.[34] Rather local government was made subordinate to the legislative authority, whims and caprices of the state House of Assembly as contained wherein, it stated in the Constitution,[35]thus;

> *The system of local government by democratically elected local government councils is under this constitution guaranteed, and accordingly, the government of every state shall subject to section 8 of the constitution, ensure their existence under a law which provides for the establishment, structure, composition, finance and functions of such councils.*

It is not in doubt that there is recognition of local government by the constitution as constituting a distinct level of government in Nigeria with defined boundaries, clearly stated functions and provisions for ensuring adequate human and financial resources for the development at the grassroots.[36] In *AG Lagos State v AG Federation*[37] the Supreme Court had course to lend credence to their view when it held that passing of the local government area law No. 5 of 2002 by the Lagos State House of Assembly was not sufficient to give life to the new local government until the National Assembly passes the consequential Act amending section 3 subsection 6 and part 1 of the first schedule to the constitution.

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[31]*NEPA v Ango* (2001) LPELR 59 339,*Tiyaye v Commissioner for local Government of Borno State* (1088) LPELR
[32]*EtiOsa local Government v Mr. Rufus Jegede Anor*, 6 AU NTC 251
[33]*Mobil Producing Nigeria Unlimited v Tai local Government Council*, 5 All NTC 241.
[34] The principle of power sharing between federating units ordinal relates to the legislative power of the federation which is vested in the legislature.
[35] CFRN, 1999 as amended, S. 7 (1)
[36] Ibid, S.3 (6)
[37] (2003) FWLR (pt 168) 909

From the above, the states have insisted that local government was not directly assigned legislative functions in tax matters as while the state legislate on the residual items, after the federal has exhausted its might, the local governments are left with what remains after the state government has legislated.

The local government in Nigeria is left with what was assigned by the constitution[38] and by the virtue of the provisions of the Taxes and Levies (Approved list for collected) Act[39] the following were left for the local government to collect,

a. Shops and kiosks rates
b. Tenement rates
c. On and off liquor license fee
d. Slaughter and slab fees
e. Marriage, birth and death registration fees
f. Naming of street registration fee excluding any street in the state capital.
g. Right of occupancy fees on lands in rural areas, excluding those collectable by the federal and state governments.
h. Market taxes and levies excluding any market where state finance is involved
i. Motor Park levies.
j. Domestic animal license fees
k. Bicycle, truck, canoe, wheel barrow and cart fees other than a mechanically propelled truck
l. Cattle tax payable by cattle farmers only.
m. Merriment and road closure levy
n. Radio and television license fees (other than radio and television transmitter)
o. Vehicle radio licence fees) to be imposed by local government of the state in which the car is registered).
p. Wrong parking charges.
q. Public conveniences, sewage and refuse disposal fees
r. Customary burial ground permit fees.
s. Religious places establishment permit fees.
t. Sign board and advertisement permit fees

[38] CFRN, 1999 as amended, S. 7 (5)
[39] Cap T^2, 2004, S.1 part III the schedule

From the foregoing, the federal, state and local governments shares taxing powers directly or indirectly. For instance, while the constitution requires the federation to control the national economy, it empowers the state to participate in the development of the economy within its area of jurisdiction. This is the reasoning of the court in *UAC of Nigeria PLC v AG Lagos State*[40] that both state and local governments have concurrent powers to legislate in the residual list.

The only worrisome issue is whether the House of Assembly of a state can prescribe for the local government functions that derogate from or lesser or fewer than those assigned by the constitution. More worrisome is the crises that follows certain situations of attempt to take over the enumerated functions for local government by the state government.

4. **The Judicial intervention in the struggle for Taxing Powers**.

The scope of the taxes and levies[41] collectible by each level of government is a serious challenge to tax administration in Nigeria. It is important to note that a few taxpayers have successfully challenged some of the illegal imposition of taxes on the people in court.[42] The review of the cases show that most of the conflicts on who has the authority to collect a particular tax is more visible between states and local governments even though the federal government is not free from the blame in this regard.[43]

Instances of the tussle between the state and local government abound. In *Multi-Purpose Ventures Ltd & 57 Ors v Attorney-General of Rivers State & 3 ors*,[44] the plaintiffs, companies operating in Rivers State applied to court for declaratory reliefs among others, that the government of Rivers State has no right, power or authority to impose taxation of income on properties of the plaintiffs or any other company operating in Rivers State. He further stated that the property tax edict No 1 of 1995 purportedly promulgated by the government of Rivers State is unconstitutional and of no effect whatsoever. On the objection of the defendant challenging the jurisdiction of the court to entertain the suit was struck out on the ground that section 5 of the Constitution (suspension and modification) decree No 107 1993 contains an ouster clause. In *knight, Frank Rutley v AG Kano state*, [45] the crux of the matter was whether the state government had concurrent competence with local government council on property assessments designed eventually to lead to rate collections. The Kano State government signed a contract with two forms of accountants. The agreement was retrospective to cover from 1980 and required these accountants to provide consultancy and training services for the evaluation of specified tenements in and around Kano metropolis. Before the arbitrator relying on the clause could act,

[40] (2011) ALL FWLR (pt. 591) 1540

[41] Taxes and levis (approved list for collection) Act, op cit, gives impression and false one too for that matter , that there are 55 different taxes in Nigeria. Unfortunately the Act is not a taxing statute but only deals with the power to collect and not power to impose taxes. The language of the statute is phrases or words such as collecting, collects and shall assess or collect.

[42] *Ag of Lagos State v Eko Hotels & Anor* (2009) ITLRN 198, *LSBIR v Nigerian Bottling Co. Ltd & Ano*r (2009) ITLRN 214, *MobiL Producing Nigeria unlimited v Tai local government council &2*ors (2004) 10 CLRN 100, Eti-*osa local Government v Mr. Rufus Jegede* (2007) 2 NWLR (pt. 1043) 573

[43] *National inland Waterways Authority v SPDC* (2005) 8 CLRN 150

[44] (1997) A NWLR (pt. 522) 642, *The Guardian Newspapers Ltd v Ag federation* (1995) 5 NWLR (pt.398) 703 at 755.

[45] (1998) 7 NWLR (pt.556) 1 at 209

the Kano State government went to state High Court to nullify the appointment and set same aside on grounds of invalidity of the consultancy agreement. The court held that it was only the local government authorities that could execute the sort of contract that state government had in this case entered into. Upon appeal to the Supreme Court, it was held that the rating and assessment of private houses or tenements for the purpose of levying of rates was one of the said local government functions in both the constitution and under the Kano State legislation.

Following the above, it could be described as judicial recklessness for the court of Appeal to hold in *UAC Nig PLC & ORS AG Lagos State &ors*[46] that the Lagos state structures for signage and advertisement agency law 2007 was only meant to prevent reckless proliferation and indiscriminate erection of outdoor structures such as boards, signage as not to make nonsense of the environmental and physical planning in the state. However, it is more worrisome that the court failed to review and distinguished the decision in *knight, Frank &Rutley case* and the instant case. Even if the constitution conferred on the state the power to control physical planning and development which is a general provision for the imposition of environmental tax, the control of outdoor signage and advertisement is a special provision in the constitution which the state government cannot derogate from.

In *Thompson & Grace Investment Ltd v Government of Akwa-Ibom State & 2 ors*, [47] the imposition of taxes outside the provisions of the Taxes and Levies (approved list for collection) Act was the issue before the court and the court held that a state government cannot impose fees different from those stipulated under the Act and the court nullified the N50,000.00 imposition by the 1st and 2nd respondents to be paid by the applicant as the same is ultra virus. The power of the state government to make laws in tax matters is subject to the enabling law which gives it the power to collect taxes.[48] Any attempt to legislate outside the province of the constitution and part 11 of the Taxes and Levies (Approved list for collection) Act will be futile.

In *Idowu v AG Lagos State & 2 ors,*[49] the provisions of the land use charge law was declared in consistent with the provisions of the constitution. But in Attorney-General cross River State & Anor v Matthew Ojua,[50] the respondent a property owner state of Nigeria was served with four notices of assessment for payment of Urban development tax, tenement rate, sanitation levy and refuse collection charges. With an originating summons the action was challenged that the state urban development law,[51] violates the provisions of the constitution, and the court held thus;

A close look at the urban development law shows that it is the function assigned to the local government council in paragraph 1 (1) of the fourth schedule to the constitution that is being usurped by the state government which deals with the assessment of privately owned houses or tenements for the purpose of levying the rates and collection of same by the commissioner for finance in order to carry out the functions entrusted to urban Development Authority.

[46] (2011) All FWLR (pt.591) 1540
[47] Vol 7 all NTC 199
[48] CFRN, 1999 as amended, S.4 (2), part II, Second schedule, item 7 (6)
[49] (2011) 5 TLRN 86
[50] Vol. 7 All NTC 167
[51] Cap u3 laws of cross River State, 2004

In *Fast Forward Sports v Port-Harcourt Local Council,*[52] the plaintiff was served demand notices in respect of (1) Salvage levy – N 50,000, (2) sign posts/bill boards/advertisement-N50,000, (3) local government support levy – N100,000, (4) operational permit-N100,000 (5) stickers-N50,000 and (6) agricultural development levy for 2008-N35,000. Interestingly the plaintiff further received another demand notice from the River Sate board of internal revenue for 2008 economic development levy of N350,000. The court noted that by the provisions of section 1 and 2 of the law,[53] every company doing business in the state shall pay an annual development levy. Recall that the state is permitted only to levy development levy for individuals within the state and not corporate organizations. The law[54] also spelt out that the money will be spent by the state government for the construction and development of infrastructures for industries, rural, industrial and agricultural development. In *Bamidele v Commissioner for Local Government and Community Development (Lagos State) & Anor*,[55] the state government imposition of market stallage fees was held to be a usurpation of allegedly exclusive local government functions. In *Shell Petroleum v Burutu Local Government Council*,[56] the court of appeal held having regard to item D9 of the concurrent legislative list that the local government council's rating power was (not for imposition) but merely for collection of rates. It has been shown that there cannot be total exclusion or total suppression of local government in Nigeria in the subject matter of taxation in Nigeria.[57]

From the extract above, local government council in Nigeria under the 1999 constitution of the federal Republic of Nigeria[58] are empowered to assess and collect taxes spelt out under the fourth schedule to the constitution. In *Arvan Ventures v Chairman Abuja Municipal Area Council*,[59] it was held that the function of the local government includes the taxes enumerated under the fourth schedule to the constitution again, contrary to the decision in *UAC of Nigeria PLC v Att Gen. Lagos State,*[60] that both state and local government had concurrent legislative powers on the residual list. The better interpretation of the position of the law was made in *AIRTEL v AG Lagos &ors,*[61] the court held that the implication of the phrase "shall include' used in section 7 (5) of the constitution demonstration the fact that the constitutional provisions on the function of a local government council are not exhaustive. It is pertinent to restate the interpretation accorded to enactment where the word "include is employed means that it is not exhaustive. In *Mandara v AG Federation*[62] the court construed the meaning of include when used in an enactment stated as follows;

[52] (2011) 5 TLRN 01
[53] Economic Development levy law of Rivers State, 1999
[54] Ibid, S.6
[55] (1994) 2 NWLR (PT.328) 568
[56] (2000) NRLRI
[57] K.J Bielu, Limitations to the Exercise of Taxing Powers by Local Governments in Nigeria: A critique, IJOCLLEP1 (2) 2019, 141-148
[58] CFRN, 1999 as amended, S 3 (6) AND 7 (5)
[59] (2017) 31 TLRN 65 AT 88
[60] *Supra*
[61] (2017) 32 TLRN 1 at 14
[62] (1984) LPELR (8084) at 12, *Commissioners of Customs & Excise v Savoy Hotel Ltd* (1966) WLR 948 at 954

Including is a word to which parliamentary draftsmen seem considerably addicted, one reason for this may be that in law it can have, according to its context, not only one or other of simple but in essence quit differing effects (for instance, in relation to the words that follow it may be found to have been used simply to enlarge, to limit, to define exhaustively or for the avoidance of doubts to repeat the preceding word or phrase), but is may also be used to secure one and the same occasion more than one of those effects, thus putting the draftsman, but not necessarily the court, in a happy position.

It is translucent that the words "shall include' having been employed in section 7 (5) of the constitution with reference to the functions of a local government, which are to be set in law made pursuant to section 7 (1) of the constitution, is indicative that the functions set out in the fourth schedule to the constitution do not exhaust the functions local government can perform. The term, "shall include' is descriptive of the intention of the makers to the effect that the functions of a local government can by legislation be enlarged beyond what is provided for in the fourth schedule.[63] Moreover, when recourse or cognizance is made of the operative word in section 7 (1) and the fourth schedule, it would appear that the two permissive words of 'main function" and "may" were used in 7 (1), (f), (j), of which it appears that may is merely directory not mandatory. The functions stated with the persuasive heading "main function" therein could be performed without any intervention from the house of assembly. The functions conferred upon the local government are not inconsistent with other provisions of the constitution.

5. Conclusion

The tax structure in Nigeria as stipulated in the constitution made attempt to uphold the concept of federation. It purports a three-tier system of government at the federal, state and local government levels. Under the constitution as shown above each tier of government was granted powers and responsibility in respect of the imposition and collection of taxes.

Local government existence and its taxing status have been guaranteed by the constitution.

The main functions of the local government haven been stated, the local government should be allowed to exercise these powers granted. The arbitrary actions of the state government intervening and whittling down the power of the local government should be checked. Any action by the state arbitrarily outside the ambit of the law should be declared *ultra vires*. The state house of Assembly should not unlawfully exercise taxing power within the functions reserved for local governments as the constitution only vests the legislative powers of increasing the functions already granted under the fourth schedule.

[63]*Nwobosi v ACB Ltd* (1995) LPELR (2121) 1 at 43, *Rabiu v Kano state* (1980) LPELR (2936) 1 at 32, *ARTRA IND. LTD V NBC1* (1997) 1 NWLR (pt.483) 574, *Okesuji v Lawal* (1991) 2 SCNJI