

BOOK REVIEW¹

TITLE: *IDEOLOGICAL BASES OF THE NIGERIAN PRESIDENTIAL CONSTITUTIONS*

(452pages)

AUTHOR: NATHANIEL C. OBIAGBA

EDITORS/UPDATERS: E.O.C. OBIDIMMA, IKENGA K. E. ORAEBUNAM & M.O. IZUNWA

PUBLISHER: GREAT-M PRINTS & IDEAS, Onitsha

YEAR OF PUBLICATION: 2015

1. Introduction

The book is predicated on N.C. Obiagba's Ph.D. dissertation at the School of Law, University of Virginia, USA, as well as his personal experiences as a member of the Constituent Assembly that drafted the 1979 Nigerian Constitution. The study is a search for the jurisprudential foundations of the Nigerian presidential constitutions 1979 and 1999. Since the original dissertation was mainly based on the 1979 Constitution, Obidimma, Oraegbunam and Izunwa had to thoroughly edit and bring the work up-to-date with the 1999 Constitution (as amended) and the current case law. The foundations are expressed in the ideals that the intention or purpose of governance is to meet the needs of the people. This informs the incorporation of the "Fundamental Objectives and Directive Principles of State Policy"[FODP] enshrined as Chapter II in both 1979 and 1999 Constitutions.

The first of the six chapters of the book explores the meaning of "ideology" as well as the justification for incorporating of the FODP in the Constitution. The second chapter discusses the concept of Limited Government. The third discusses the ideals of Social Justice vis-a-vis the FODP. The fourth provides theoretical basis and rationale for the inclusion of Fundamental Rights in the Constitutions. The fifth upholds the "mixed economy" ideology as the economic ideology of the Constitutions. The last chapter delves into the problems and ideals of national unity and stability.

This review prefaced with brief historical tit-bits of the Nigerian Constitutions follows closely the outline of the chapters of the book.

2. Historical Tit-bits of the Nigerian Constitutions

Not minding the adverse and apparently indelible effects of the series of military rule on the Nigerian Constitutional democracy, the Constitution remains the standard that not only defines and delimits the powers of the government but as well prescribes the relations of various state organs among themselves and with the citizens. The constitution remains the very life-wire of a nation; its most solemn, sacrosanct and vital instrument. It is the *grundnorm* (sources of legal order and validity).

With the 1914 amalgamation of the then two Nigerian jurisdictions, that is to say, the Protectorates of Southern Nigeria and Northern Nigeria, Nigeria from 1914 to 1951 was under a unitary government. Everything was about the one almighty central government. The first legislative council was in 1922 (Legislative Council of Nigeria). While the Council was legislating for the colony of Lagos and Southern Nigeria, the Governor directly administered and legislated for the North. Then came the Clifford Constitution of 1922 named after the then Governor General of Nigeria, Sir Hugh Clifford. There followed the Richard's Constitution of 1946 (so called after the Governor, Sir Arthur Richards). This Constitution introduced Regionalism in Nigeria. Each Region (Northern, Eastern and Western) had a Regional House of Assembly merely for discussion but not empowered to manage their own affairs.

In 1951 came the MacPherson's Constitution which empowered the Regional Legislatures to make laws for their Regions on certain enumerated matters. It was the 1954 Federal Constitution that introduced a

¹ By **Justin C. ILEKA, B. Phil. (Hons) (Urban, Rome), B.Th (Hons) (Urban, Rome), LL.B (Hons) (Nig.), BL, LL.M Candidate**, Nnamdi Azikiwe University, Awka. Legal Adviser, Archdiocese of Onitsha, The Law Office, Catholic Secretariat, Basilica of the Most Holy Trinity, Onitsha, Nigeria.

full blown federal constitution and federal system. It was in 1957 that the Eastern and western Regions attained the status of "self-government" while the Northern Region attained hers in 1959. After the Nigerian independence of October 1960, there came the Republican (Parliamentary) Constitution of 1963. This adopted the Westminster-style Government with a President for the Federation and Governors in Regions as heads of states; the heads of governments in the federation and the Regions being the Prime Minister and Regional Premiers, respectively.

After the ugly experiences of the military rule from January 15, 1966 to October 1, 1979 along with the intermittent thirty-month Nigeria-Biafra War of 1967 to 1970, there came the Presidential Constitution of 1979. The term Presidential Constitution is used to distinguish the Constitution from the Parliamentary models which have been in force till 1967 when the military intervened. The Presidential Constitution switched from the 'Westminster model' to the 'Washington Model' Constitution (that is, Executive Presidential System). Thus the Presidential Constitution of 1979 was greatly influenced by the American constitutional jurisprudence and the executive presidential style of government.

After yet another round of military rule from 1983 to 1999 came another Presidential Constitution of 1999. There were also draft constitutions of 1989 and 1995 under General Babangida and General Abacha respectively that were never promulgated. The presidential Constitutions (1979 and 1999) in s. 5(1) (a) provided that the exercise of the executive power by the President shall be subject to laws enacted by the National Assembly. This shows that both Constitutions set out to establish the Executive Presidential system as distinguished from that of the ceremonial President without executive powers. The executive powers however do not mean absolute powers.

3. The Ideological Background of the Presidential Constitutions

Simply put, ideology sets out the basic values and goals of a state. Adherence to this cloaks a regime with some aura of legality. It forms the yardstick for evaluating the performance of any government. It also provides the compass, lifebuoys and rudder for the ship of nation on its dicey and contingent course of national development and stability and sets for it a reliable sense of purpose and direction.

A constitution could be compared to a building. While in a building, a building's 'efficient cause' is the architectural skill of the designer; its 'final cause' is the completed work as conceived by him; the 'material cause' is the bricks and mortar; while the 'formal cause' is its definition. By this analogy, in the Nigerian Presidential Constitution, the 'efficient cause' is the Constituent Assembly; its 'final cause' is the constitutional instrument and its contents; its 'material cause' is the different articles, provisions and sections of the compendium; then the 'formal cause' is the ideology that runs through the Constitution.

There have been different attempts to create an ideology for the nation. One dominant ideology before the era of the Nigerian Presidential Constitutions is 'nationalism' which held that once the national destiny was entrusted into the hands of the indigenous leaders, Nigeria would become a paradise. This unfortunately was never the case. The ideological preference (supreme ideal) of the Nigerian Presidential Constitutions is captured by the maxim "*suprema lex, salus populi*" (the welfare or health of the people shall be the supreme law). This ideology finds expression in the provisions of the very innovative FODP forming chapter II of both 1979 and 1999 Presidential Constitutions. It is an answer to the long search for national ideology. The FODP spelt out in the Nigerian Presidential Constitutions are attempts to meet socio-economic goals of the Nigerian polity. The provisions of the FODP are simply those things Nigerians expect their government to secure for them. The provisions of FODP are however not enforceable or justiciable; yet they remain the ideal that inspires and spurs the government as well as the citizens into action.

The like of FODP is not available in the colonial constitutions that were mainly concerned with the powers and rights of the government. The FODP in capturing the principles, on which the state is organized as well as the ideals and objectives of the social order, clearly spells out and highlights the duties of the government towards the welfare of the people. The FODP are set out under some of the following headings: 'political objectives', 'economic objectives', 'social objectives', 'educational objectives'. These objectives cannot be achieved if the government powers are not defined and limited.

4. The Concept of Limited Government in the Presidential Constitution

Though government is necessary and natural to man, there is need to define and limit government powers to check the danger of abuse and misuse of power and corruption. This is to ensure they are used for the good of the members in society and for the good of the society itself. Without this limit the government becomes arbitrary and capricious. This is the gist of the idea of limited government and it is expressed in various concepts as 'rule of law', 'constitutionalism' and 'constitutional democracy'. These concepts pervaded the Nigerian Presidential constitutions.

Of course, the decision to switch over to the American model of (written) constitution implied commitment to underlying philosophy or political ideologies that sustained that form of government which beforehand create, define, limit and order the government. This concept of limited government also referred to as Constitutionalism which is an antithesis to the arbitrariness of monarchical absolutism or unlimited sovereignty of government was firmly and expressly entrenched in the Presidential Constitutions. The idea of 'constitutionalism' is not just having a constitution as there might be a constitution that does not place limitations on the powers of the government. It rather connotes checking of capriciousness and limiting of arbitrary employment of government power. It is thus antithetical to government at will whereby "what pleases the ruler has the force of law" (*quod principi placuit legis habet vigorem*). Indeed, a government without check or limit is nothing but a despotic government which is a government conducted not in accordance with any verifiable criteria predetermined and promulgated for everyone to see or at least for courts to interpret and apply. The elements in the Nigerian Presidential Constitutions that guarantee and support limited government include: 'supremacy of the constitution', 'federalism', 'separation of powers', 'participatory democracy' and 'guarantee of fundamental rights'.

Supremacy of the Constitution: This is expressed thus in the very first section of both the 1979 and 1999 Constitutions: "This Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria". This clearly appoints the Constitution as the focal determinant of the validity of any act (be it executive, legislative or judiciary) of the government. The Constitution is thus a vital restraint and limitation on the powers of the government as any act of any arm of the government contrary to the Constitution is invalid. The courts have been consistent in upholding that the Constitution of Nigeria is not only supreme when another law is inconsistent with it, but also when another law seeks to compete with it in area already covered by the Constitution. This is the exact position of the Supreme Court in *A.G. Federation v A.G. Lagos State* (2013) 16 NWLR (pt1380) 249. Unfortunately, the court has not been able to put a stop to coup d-etat as once it is successful, it attains *de jure* legitimacy through effectiveness. Be that as it may, the fact that the Constitution *ante factum* makes it clear that taking over government in a manner other than constitutional is illegal (see section 1(2) of both 1979 and 1999 Constitutions) is likely to turn the public opinion and sentiments against the perpetrators of the illegal act.

Federalism: Another check on the government is the concept of federalism whereby powers are shared between one central government and the 36 state governments. The federation in Nigeria is a special breed. In the other jurisdictions like United States it is the federating states that agree on a measure of delegation yet substantially continuing to observe their constitutions which predate the Constitution of the federation. It is also different from the Canadian pattern where the federating states surrendered their original constitutions to accept a new one. Nigeria's Federalism is rather by devolution in the sense that the then unitary government caused parts of its powers to devolve to first, three and later four autonomous governments.

The Nigerian federalism is structured in such a way that while the central government legislates on the matters listed in the "exclusive legislative list", the state governments legislate on the non-enumerated matters (residual issues). Then both the central and state governments have competency to legislate on 'concurrent legislative list'. But in the event of inconsistency or conflict between the laws made by the federal government and those of the state, the federal law prevails and the state law to the extent of the inconsistency becomes void (see section 4(5) of both 179 and 1999 Constitutions). More so, when the federal government has enacted a comprehensive and exhaustive legislation on a concurrent matter,

then the field having been completely covered the state is thereby excluded from entering the field. This is referred to as the doctrine of "covering the field". To remove chances of conflicts, it is not just that matters are enumerated but they are defined in such a way that the extent and mode of operation of the federal government is not same as that of the state. It is only in special circumstances of war or in the implementation of a treaty that the federal government can use residuary powers (see s. 12(2) of both 1979 and 1999 Constitutions). This idea of enumeration of powers entails imposing limitations and checks on government powers.

Separation of Powers: Another way of furtherance of limited government is the concept of separation of powers among the three distinct arms of government. The separation is not however absolute. The distinct arms still co-operate but none is allowed to usurp the powers of the other or act arbitrarily or capriciously. They are 'checks and balances' regulating the relationships among the three arms of government. Thus in some cases powers are assigned to one arm of the government with a view to balancing and keeping in proper check the exercise of the powers vested in the other and vice-versa. One such mechanism is the power to impeach the executive given to the legislative arm in proper cases and subject to conditions clearly laid down in the Constitution. The oversight functions of the legislative as well as Judicial Review of administrative (executive) and legislative acts are among the control mechanisms.

Participatory Democracy: Under the Presidential Nigerian Constitutions, the individual participates in the government of the country in line with the principle of '*quod omnes tangent, debet ab omnibus approbari*' (what touches all ought to be approved by all). Thus the Constitution declared that "sovereignty belongs to the peoples of Nigeria from whom government through this Constitution derives all its powers and authority" (s. 14(2) (a) of 1979 and 1999). It also declared that the Federal Republic of Nigeria shall be a state based on the principles of democracy and social justice (S. 14(1) of 1979 and 1999 Constitutions). Hence, an adult individual who has reached the age of 18 years has the right to vote and in appropriate cases be voted for in all the public elections. By this power of the ballot box, the people decide to control and determine the government of their choice. Again, the individual enjoys the freedom not only to comment on public affairs but also to intervene personally where the guaranteed rights are violated.

Guarantee of Fundamental Rights: The Constitution accords the individual special dignity. Section 14(2) (b) of both 1979 and 1999 Constitutions stipulates that "the security and welfare of the people shall be the primary purpose of government". Again, section 7(2) (b) of both Constitutions stipulates that "the sanctity of the human person shall be recognized and human dignity shall be maintained and enhanced. More definitively, chapter IV of both 1979 and 1999 Constitutions is totally devoted to the recognition and enforcement of fundamental human rights. These are enforceable as distinguished from other rights enjoyed as social beings.

Rule of Law: It is the law that is duly promulgated that is used to govern under the Constitution. The rule is not according to the whims and caprices of those in power, no matter how good they maybe. It is rather the law that is known beforehand that rules. Law defines and limits the rights and duties of the government and the citizens. It also defines and limits the relationship between government and its organs as well as between government and the citizens. The rule of law limits the government and subjects all to the dominion of the law.

5. Social Justice in the Presidential Constitutions

Section 14(1) under Chapter II of both 1979 and 1999 Constitutions declare: "the Federal Republic of Nigeria shall be a state based on the principle of democracy and social justice". Such principle as the 'federal character of Nigeria in the composition of the government and administration of its agencies and national affairs as in section 14(3) and (4) under Chapter II are aimed at ensuring social justice. Indeed, the FODP contained in Chapter II of both Constitutions are designed to usher in the reign of social justice. The concept of justice rings a bell particularly in Chapters II (which deals on the social objective of the country) of the 1979 and 1999 Constitutions. The provisions on the fundamental human rights are founded on the hallowed principles of social justice. When for instance section 42(2) of 1999

Constitution provides that "no citizen of Nigeria shall be subjected to any deprivation or disability merely by reason of the circumstances of his birth," it is all about protecting social justice.

In the face of the foregoing, the author appears not to be comfortable with such legislation as the Land's Use Act which appears not to be serving the ends of social justice. While social justice would assist the citizenry, irrespective of social status, to realize his ambition and aspiration of owning the place where he and his family would live a secure and peaceful life, the Act is capable of depriving the citizenry the realization of the ambition. The worst is that the provisions of the Act are entrenched into the Constitution such that they are so protected as to enjoy the status of the provisions of the Constitution. The interest of social justice would seem to cry for a review of the provisions of the Act mindful of the fact that the poor and those outside the corridors of power would remain disadvantaged in acquiring land in the face of the bureaucracy of government.

The Constitutions still appear to be more on the side of the fundamental rights rooted on the social justice imperative. Thus, where a directive principle of the Constitution which is non-justiciable is in conflict with a fundamental right which is justiciable and enforceable, the fundamental right must prevail over the constitutional objective or directive. This principle was amply demonstrated in the celebrated case of *Archbishop Okogie v Attorney General Lagos State* (1981) 2 NCLR 3-7. This case involves Lagos State government's foiled attempt to ban private schools on the ground that it undermines equality of opportunity to all citizens. The state government exaggerated case for equality of all citizens before the law and equality of opportunity under the pretext of the Chapter II. This exaggeration has not even stopped. It is in view to redress the so called imbalance/inequality that such hurtful terms are still prevalent in Nigeria: "quota system" or "ethnic balancing". The author argued strongly that it would be fiercely unconscionable to require, for instance, students from any particular areas to be denied university admission to make way for others from an area said to be 'under resourced' or 'disadvantaged'. This approach would rather be asking 'equity' to aid the indolent. It is suggested rather that the facilities be expanded. Let more teachers and schools be given to such areas. Lowering the standard of education as a way out would always be counter-productive. To be considered too is that the knowledge that a person was preferentially treated because of his place of origin, religion or political affiliation enforces or reinforces the feeling of inferiority and complexes that lead to tribal jealousy and hatred which has done havoc to Nigeria's national unity.

No doubt, the Presidential Constitutions uphold the primacy of man's humanity and it forms the fulcrum and epicenter of the basic ideology of the Constitutions. This consideration informs the exalted position accorded the fundamental rights in the Constitutions. Thus the Chapter IV provisions on fundamental rights enjoy the highest rigidity of entrenchment in the Constitution and very special procedure has been laid down for their enforcement and protection.

These rights though justiciable and enforceable are of course not absolute. Most of them have restrictive qualifications. For instance, section 45(1) of 1999 Constitution to a great or lesser extent derogates from the rights guaranteed under 37, 38, 39, 40 and 41 to the effect that nothing in them shall invalidate any law that is reasonably justifiable in a democratic society in the interest of defence, public safety, public order or public morality or public health or for the purpose of protecting the rights and freedoms of other persons. Unfortunately, the exact import of the expression "reasonably justifiable in a democratic society" is not given. It is rather too broad and vague making it amenable to speculation and imprecision. It as such appears to be too restrictive a formulation. Be that as it may, the Presidential Constitutions have made improvements on social justice especially with regard to fundamental rights of persons arrested or detained.

6. Economic Ideology of the Nigerian Presidential Constitutions

The economic ideology adopted in the Presidential Constitution is "mixed economy" which is a middle way between the extremes of capitalism and socialism. Socialism in its various forms stresses the need for collective regulation of social and economic affairs. It calls for public ownership of the means of production, distribution and exchange. But the atheistic Marxist socialism including pure communism achieved through violence and revolution to install a classless society and dictatorship of the proletariat

might not be attractive in Nigeria with her deep religious sentiments and respect for elders and traditional rulers. It would also run afoul of the people's culture of both private and communal ownership and enterprise. However, socialism in its mild and qualified forms as 'pragmatic socialism' and 'neo-welfarism' were in the past advocated for by the likes of Dr. Michael Okpara and Dr Azikiwe, respectively.

On the other hand, capitalism as a system characterized by absolute private ownership and control of the means of production, distribution and exchange of wealth with stress on the profit motive would also not be adopted because of its inherent injustices and inequities. In the search for the economic ideology for Nigeria, the Presidential Constitutions uphold the 'personhood' orientation as the authentic parameter of legitimacy of any of its provisions. Thus, it could be said that to the extent that socialism or capitalism conforms to or detracts from this cardinal ideal of 'personhood', to such an extent the ideology and the measures inspired by it would be amenable to the Constitution. Thus, section 16 of the 1999 Constitution adopts the economic ideal and the organizational directives of 'mixed form of economic system whereby public (socialistic) and private (capitalistic) forces are operative in the nation's economy'. Thus, it categorizes economic activities into two, namely (a) the major sectors of the economy managed and operated exclusively by the Government of the Federation, (b) enterprises outside the major sectors of the economy in which all citizens have rights and are encouraged and protected to operate.

The simple implication of this 'mixed economy' is that the Constitution protects the right of private enterprise or freedom of individual participation in the economy outside the major sectors of the economy and at the same time provides for state's regulation especially in major sectors of the economy. Of course, the ideals and directives in Chapter II generally prevent exploitation or concentration of wealth in a few hands. It rather promotes the ideals of equality and social justice. The economic ideology of 'mixed economy' therefore strikes a balance between the common good and the principle of subsidiarity. The principle of subsidiarity is that a higher placed body or organization should not take over or claim for itself the functions which lower organizations (individuals or groups) can perform adequately.

7. Conclusion: Problems and Ideals of National Unity and Stability in the Face of the Presidential Constitutions

The central ideology of the Presidential Constitution has been identified as the welfare of the citizens of the nation. For the laudable objectives in FODP not to remain a toothless bulldog, they would have been made justiciable even to a limited extent such as declaratory judgements from courts so that the performance of governments and political organs could be objectively assessed by the informed citizens. The FODP surely contain provisions aimed at bridging the canyons of disunity, distrust and mutual suspicion between the people. These are unfortunate realities that cannot be swept under the carpet. Yet we cannot but agree with the author that in the task of building a Nigerian nation and encouraging the evolution of national loyalty, we cannot accept a situation in which a man's ethnic or linguistic affiliation is the primary definition of his quality as a human being. This is often the case when attempts to implement the so-called federal character or quota system are without regard to merits and qualifications.

No doubt, the search for the ideology upon which to anchor the Presidential Constitution is invariably a search for national unity and stability. The Preamble of the 1999 constitution proudly states the resolve of the people of the Federal Republic of Nigeria to live in unity and harmony as one indivisible and insoluble sovereign Nation; as well as to consolidate the unity. Given the heterogeneity and diversities of the people of Nigeria composed of ethnic, linguistic and cultural groups, Nigeria is likely to be prone to tensions between loyalty to these basic groups and national loyalty. A flash back to antecedents reveal slim chances of a united Nigerian nation. The author acknowledged that no significant conscious or real effort was made in the past to build the diverse people together and instill into them a sense of 'one nation or one people determined to live together in one united country". Even the erstwhile chief actors and tribal 'tin gods' of Nigerian politics not only had no real faith in the survival of the country as one nation, but most of them rather regretted the fact of Nigeria ever having been put together. Their

premonitions have not been proved wrong. Could a constitution be a magic wand that would do away with the entire psychological complex arising from fear and prejudice and pull down all the ethnic and religious walls? Would that not be demanding too much from a constitution? How would a constitution without the will to operate it with honesty and sincerity even with the best of the ideologies, cure Nigeria's many ills including healing the wounds of the Nigeria-Biafra War of 1967 to 1970? And it does not appear that the people have the will and knowledge to make the provisions of the Constitution work. How, for instance, would effect be given to a provision of a constitution which states: "the state shall abolish all corrupt practices and abuse of power"? (s. 15(5) of 1999 Constitution)

The Constitutions have been presented as instrument of social, political and juristic reconstruction and rejuvenation. How effective an instrument have the Constitutions been? How have the Constitutions been in fact the recipe for the national *sanatio in radice* required as guarantee for the fundamental ideal of nationhood and stability for the Nigerian nation and nationals? These questions cannot be overlooked in the face of progressive decline in the welfare of the citizens and in social amenities. The renewed significant agitations for secession and sovereignty of certain parts of the country are only a tip of the iceberg of the state of the nation sitting on a gun powder.

The author's work is highly praised for its discursive and interpretative candour directed to the underlying ideologies of the Presidential Constitutions. From where the author stopped, there is need to have more analytical or critical approach to the operation of the powerful tool called the Constitution. Indeed, the best of the tools could be misused or underused.