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CORRESPONDENCE:

All Correspondence should be directed to:

The Editor in Chief

Abuja Journal of Public and International Law

Department of Public and International Law,

Faculty of Law,

University of Abuja, Abuja – Nigeria

Tel: +234 803 588 1016

Email: nnakomi2012@yahoo.com

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Editor's Note

After a long while, the Journal of Public and International Law of the Faculty of Law, University of Abuja is back.

The goal of this publication is to provide answers to challenges being encountered in our modern world through legal research. In this edition, topical issues were discussed. An example is the discussions on the practice of surrogacy and baby factories in Nigeria, refugee burden sharing: A panacea for sustainable peace and development.

I believe that scholars and readers of this journal will find it to be of value.

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JUDICIAL REVIEW OF POLITICAL QUESTIONS: PERCEIVED PITFALLS AND ITS CONSTITUTIONAL PRUDENCE IN THE LIGHT OF THE NIGERIAN EXPERIENCE

Abdulfatai O. Sambo*

Abstract

Judicial review of the actions of the political class is recently more at the centre stage of constitutional discourse. This is expected because judiciary is a corner stone in many constitutional democracies. The courts are the watchdog of basic democratic values like constitutionalism, human rights and political pluralism. Like most watchdog, the courts will ensure that nothing happens prejudicially to these values. Yet, political class have constantly accused the courts of dabbling into political questions or matters of high political contents which are not fit for judicial determination. Against this backdrop, this paper analysed the perceived pitfalls and constitutional prudence or usefulness of judicial review of political questions in Nigeria. The paper adopted both doctrinal and non-doctrinal methodologies. The primary and secondary sources of law used were subjected to content legal analysis. Some stakeholders like judges and political class were interviewed to enrich the legal analysis. The paper found that despite the perceived pitfalls, judicial review is of high constitutional prudence or usefulness. It therefore concluded that courts with appropriate could continue to review political questions although with caution. It suggested that this approach should be sustained in order to sustain Nigeria's fledgling democracy.

Introduction

In recent times, the actions of the judiciary on matters that are political in nature have come under intense public scrutiny. This is not unconnected with the wholesome roles that the courts have been assigned to play in a constitutional democracy. Courts are perceived as custodians of certain fundamental democratic values such as constitutionalism, rule of law, transparency, political pluralism and free speech. Protecting these democratic values require courts to sometimes dabble into the so called political questions. Yet, the political class often critically examines the disinterestedness, political neutrality, and impartiality of the courts in resolving certain high contents political issues. It this neutrality and political disinterestedness that allow make the decisions of the courts adversely affecting the political class tolerable to the politicians.

Nigeria's Constitution allows the courts with appropriate jurisdictions, to resolve political disputes with legal stings, in apt proceedings before it.¹ This establishes a nexus between the political class and the courts.² Nevertheless, scholarly works in Nigeria have tended to ignore a deep analysis of the constitutional usefulness or prudence of judicial review of political questions. This is not amazing because courts have been typically seen as neutral umpire having no role in resolving political disputes.³ Predictably, courts are expected to resolve disputes observing separation of powers and shun fiddling into muddy political questions.⁴ Even judges, until recently, share this wholesome legalistic opinion of the nature of judicial powers.⁵

Moreover, since constitutional democracy has gained high prominence all over the world.⁶ The chore of workable democracy requires cautious judicial decisions on issues or questions which are highly political.⁷ The courts should avoid falling into the certain pitfalls in attempting to resolve political questions.⁸ The courts and other organs of government must abide by the principles of the rule of law.⁹ All these

*LL.M (Unilorin), BL. (Abuja), LL.M (Unilorin), Ph.D. (IIUM, Malaysia), Senior Lecturer, Department of Public Law, Faculty of Law, University of Ilorin, Ilorin, Nigeria. Email: fataisambo@yahoo.com

1. See for instance Section 6 (6) (b) of the Constitution of the Federal Republic of Nigeria, 1999 which provides that the judicial powers shall extend to all matters between persons, or between government or authority and to any person in Nigeria, and to all actions and proceedings for the determination of any question as to the civil rights and obligation of the person. See also Okere, B.O. "Judicial Activism or Passivity in Interpreting Nigeria Constitution" (1987) 36 I.C.L.Q. 790 - 807 at 788.
2. Abel Richard L., *Politics by other means: Law in the Struggle against Apartheid, 1980 - 1994*, NY: Routledge, 1995, p. 7.
3. Jones Bill (ed), *Politics in UK*, NY: Philip Alan, 1991, 473.
4. See the sharing of Power system under Sections 4, 5 and 6 of the Constitution of the Federal Republic of Nigeria, 1999 for the sharing of powers between the three arms of government namely the executive, the legislature and the judiciary. See also Articles 39, 44 and 121 of the Malaysian Federal Constitution for the operation of the doctrine of separation of power.
5. See the dictum of Justice Adenekan Ademola of the Court of Appeal in *Balarabe Musa v Hamza & Ors* (1982) 3 N.C.L.R 229 at 247.
6. See Aden, Abdul Rahman, *From Chaos to a State based on Rule of Law, Essay on Political and Legal Aspect of the Somalia's Thorny: Path to Democracy & Constitution, Law & State*, (1994) Vol. 49-50, at 203.
7. Left-wich, Adrian, "Two Cheers for Democracy", *The Political Quarterly*, (Dec. 1996,) vol. 67 No. 4 334. See also 'The Global Trend' chart on Freedom in the World 2007: Freedom Stagnation Amid Pushback Against Democracy published by Freedom House at <http://cn.wikipedia.org/wiki/democracy> accessed on 13/12/2010.
8. See generally B. O. Nwabueze, *Military Rule and Constitutionalism in Nigeria*, Ibadan Spectrum Book Ltd, 1992.
9. See Justice M.L. Uwais, An address delivered by Hon. Justice M.L. Uwais, Chief Justice of Nigeria at the Opening Ceremony of the 1997 Induction Course for Judges and Khadis, held 12th May, 1997 at the International Conference

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imply that the courts will be often requested to decide on issues that cannot be
cleanly separated from politics.¹⁰

Against the above backdrop, this paper is intended to analyse the perceived pitfalls
and constitutional prudence of judicial review of political questions in Nigeria. To
achieve this, this paper five parts apart from the introduction. The first part will
briefly trace the origin of the theory of political questions. The second part will also
discuss the various definitions and scope of the political questions. The third part
will analyse the judicial attitude towards political questions in Nigeria. The fourth
segment will demonstrate that the perceived pitfalls of judicial review of political
questions are in fact its constitutional prudence or usefulness. The last part
concludes the paper.

Origin of Political Questions

The origin of the theory of political questions can be traced to the pronouncement of
Justice Marshall in *Marbury v Madison*¹¹ where he said:

“...Questions in their nature political, or which are, by the
Constitution and laws, submitted to the executive can never be made
in this Court.”¹²

From the declaration above, Justice Marshall appears to have created the doctrine of
political questions.¹³ This is because the statement recognises the existence of
certain questions that are wholly outside the purview of the courts by the use of the
term 'questions in their nature political.' This statement has however not been to

¹⁰ In fact, one cannot talk about democracy in the words of retired justice of the Supreme Court without thinking seriously
of the institution on which to anchor its concepts and its practice. See Nwokedi P.N., Valedictory Speech, (1991) 11 SCNJ
p. 15.

¹¹ 5 U.S. (1 Cranch) 137, 170 (1803). The extract of an idea in this part of the chapter has been recently published. See
Sambo A. O., and Shamrahayu A. Aziz, “The Court; Insulating Itself from Politics through the Doctrine of Political
Questions: A Critical Exposition” (2012) vol. 4, *Journal of Law, Policy and Globalization*, at 7-15.

¹² The issue in that case was *inter alia* whether the court could review the action of the Secretary of State (Madison) being
an executive. The facts of the case are that President Adams appointed Marbury and others to a federal judicial position
(DC Justice of the Peace). The appointments were approved by the Senate, sealed, but failed to be delivered by the
Secretary of State, John Marshall (the CJ who decided this case). After being sworn in, President Jefferson refused to
acknowledge the appointments. Marbury, based on an act of Congress, approached the US Supreme Court directly to
have a writ of mandamus issued, so that he could secure his position. *Ibid*.

¹³ Shamrahayu A. A. and Sambo A.O., “Internal Affairs of Political Parties and Judicial Review: An Expository Study of

subject to final definition.¹⁴ This statement implies that when these political questions are presented before the courts for determination, it is seen as being within the territory and duty of legislature or the executive, not the courts, to say what the law is. This declaration formed the substance of the so-called 'political questions doctrine'.¹⁵

The above certainly represents Justice Marshall's bigger vision of the constitutional structure in which takes into account the institutional strengths and weaknesses of each branch in resolving particular issues.¹⁶ Nevertheless, the phrase "political question" has created more confusion than creating room for constitutional structure.¹⁷

The Marbury's case actually emanated out of a political controversy.¹⁸ It originated due to the last minute efforts by the defeated Federalists to retain control of the federal judiciary after their defeat in the election of 1800. The behaviour of Federalist judges, especially their enforcement of the controversial Alien and Sedition Acts, had been controversial in the election. Not quite long before the election, the Federalist Congress established six circuit courts with sixteen additional judges to be appointed by the outgoing administration. In addition, President Adams appointed forty two new justices of the peace for Alexandria and the District of Columbia, one of whom was Marbury.

The commissions were to be delivered by the Secretary of State (John Marshall) who was serving in this position while also Chief Justice of the United States. Marshall failed to deliver the commission for Marbury and, when the incoming Jefferson administration refused to provide him with the commission, Marbury instituted an action.¹⁹

14. This was not also defined in the *Marbury's* case (Ibid.)

15. Rachel E. Barkow, "More Supreme Than Court? The Fall of Political Question Doctrine and the Rise of Judicial Supremacy" (2002), 102. *Colum. L. Review*:237. See also Ibrahim Imam, Sambo A.O., Wahab Egbewole and Abdulkadir B.A., "Judicial Activism and Intervention in the Doctrine of Political Questions in Nigeria: An Analytical Exposition," (2011) vol. 1(2), *African Journal of Law and Criminology*, 50-69.

16. Ibid.

17. Henkin submitted that failure to maintain the distinction between the ordinary respect for the courts for substantive decisions of the political branches, and extra ordinary deference to those branches determination... has aggravated confusion and controversy as to whether, and why and when such extra ordinary deference is called for..." see Louis Henkin, "Is there a Political Question Doctrine?" (1976) vol., 85 (5), *Yale L. Rev.*, 597 at 599.

18. For detailed accounts of these occurrence, see James M. O'Fallon, "Marbury", (1992) 44, *Stan. L. Rev.* 219; William W. Van Alstyne, "A Critical Guide to *Marbury v. Madison*," (1969) *Duke L.J.* 1, 1-5. This decision is seen to have created political question. Louis Michael Seidman, "The Secret Life of the Political Question Doctrine," (2004) 37, *The John Marshall L. Rev.*, 441-480.

19. Ibid.

Implication and Scope of Political Questions

Scholars have offered numerous definitions of political questions. An author defined it as a substantive ruling by the justices that a constitutional issue regarding the scope of a particular provision (or some aspects of it) should be authoritatively resolved not by the Supreme Court but rather by one (or both) of governments that are executive and legislature.²⁰ Political questions have also been defined as: "Who gets to decide what the right answer to a substantive constitutional question is?" and "Does the Constitution give a political branch the final power to interpret the Constitution?"²¹ It is similarly defined as questions which the court foregoes their unique and paramount function of judicial review of constitutionality.²² It has also been seen as the culmination of any progression of devices for withholding the ultimate constitutional judgement of the Supreme Court and in a sense their sum.²³

Political question is also defined as questions which the courts will refuse to take cognizance, or to decide, on account of their purely political character or because their determination would involve an encroachment upon the executive or legislative powers.²⁴ It is simply referred to as a non justiciable matter.²⁵ Also, it is described as issues of constitutional law that are more effectively resolved by the political branches of government and not appropriate for judicial resolution.²⁶ It likewise defined as when the court believes it to be a matter more appropriate for resolution by either of the other branches of government or where the court considers itself as incompetent as the matter is not amenable to resolution by judicial processes.²⁷

20. Jesse H. Choper, "The Political Question Doctrine: Suggested Criteria" (2005) 54, *Duke L. J.* 1457 at 1461.

21. Mark Tushnet, "Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine" 80, *N.C. L. Rev.* 1203, 1233 (2002).

22. Louis Henkin, "Is there a Political Question Doctrine?" (1976) 85 *Yale L.J.*, 508-600, at 597.

23. Bickel, *The Least Dangerous Branch*, 1962, 1-14, 46-65.

24. Black's Law Dictionary, IIC Black, USA: West Publishing Co., 1979.

25. Ikenna Nwosu, *Judicial Avoidance of Political Questions in Nigeria*, Author, 2005, 142-158. However, this has also been criticised as it needs a further redefinition of what is non-justiciable. See B. Nwabueze, *Introduction to Nwosu's Judicial Avoidance of Political Questions in Nigeria*, at 36. For further relationship between justiciability and political questions, see Ebegwole W.O., *Determination of Election Petitions by the Court of Appeal: A Jurisprudential Perspective*, (PhD Thesis, Faculty of Law, University of Ilorin, Ilorin, Nigeria, 2009, at 135; Ebegwole W.O., & Olatunji O. A., "Justiciability Theory Vs Political Questions Doctrine, Challenges of the Nigerian Judiciary in the Determination of Electoral and Other Related Cases" (2012) 14, *J. Juris.*, 118-121.

26. Martin H. Redish, "Judicial Review and the 'Political Question'," 79, *Nw. U. L. Rev.* 1031, 1031.

27. Rohde and Spaeth, *Supreme Court Decision Making*, (San Francisco: Freeman, 1976) 156 cited in Ikenna Nwosu, *Judicial Avoidance of Political Questions in Nigeria*, Author, 2005, 142-158.

Therefore, it seems that there is no universally acceptable definition of the doctrine. The clear deductions from several attempted definitions of the theory are that the court will not go into the merit of the case and will refuse judicial review where a matter has to do with political question. It is actually a way of avoiding the determination of certain controversial political issues which is applied in court, it is a way of avoidance because the court defers without reviewing the position taken by the political departments and refuses to comment on the lawfulness of the position.²⁸

Nevertheless, there is dissimilarity between avoidance in political question and avoidance on jurisdictional or procedural ground. The law usually confers each court with jurisdiction on certain matters exclusively. Other courts will therefore not assume jurisdictions in the matter. This is known as avoidance based jurisdictional or procedural ground. But where it is based on procedural ground, such as ripeness, or standing,²⁹ it only affects that particular party, not the constitutional issue. Political question attaches itself to the issue.³⁰ The court assumes jurisdiction but will not determine the issue in controversy.³¹ The two, however, have the same effect because the court will not eventually decide the matter on the merit.

The paper thus focuses on situations where a competent court refuses to decide a case on the merit, not because it does not have jurisdiction on procedural ground but because the controversy presented is non-justiciable being political in nature or encroaching on the powers of the political class.³² Courts have nonetheless given diverse attitudes at different era. This will be the focus of this paper in the next segment of this paper.

The Judicial Attitude to Political Questions

By way of historical background, Nigeria was a colony of Britain and inherited the English common law just as other dependencies of the Queen. So, predictably,

28. Fritz W. Scharpf, "Judicial Review and the Political Question: A Functional Analysis" (1966) vol. 75 (4), *Yale L.J.* 517 at 535.

29. These examples are chosen because whether a matter is ripe for hearing or whether a person has a locus standing to sue is a matter of procedural law.

30. *Ibid.*

31. *Ibid.*

32. For details on this, see A. O. Sambo, "Shielding the Courts from Political Pressure: A Critical Exposition of the Doctrine of Political Questions" (2015) *University of Ilorin Law Journal, (UILJ)*. Vol. 10, 103-129.

English common law exported the paradigm applicable in England to Nigeria. One of the legacies was the one that says it is the duty of the court to merely interpret the law and not to make the law. This formed the bedrock of literal interpretation in England exported to Nigeria. This reflects the initial court attitude to political questions making the court to decline jurisdiction in almost all matters relating to of the court, after independence, especially legislative actions, executive actions, and ouster clauses, the courts declined jurisdiction holding that it was a political question.

All these were because after independence, the court felt that its primary duty was to safeguard the interest of the state and any other matter as far as it was concerned was *non grata*. Thus, a survey of all these decisions from 1960s-66 shows that the courts declined jurisdictions in matters that appear political in nature.

As a result of this, it was almost predictable that the regime was not going to last. Indeed, when the Military struck in 1966, part of their reasons for the incursion into politics was the attitudes of the judiciary to political issues.

This attitude continued up till the period of Second Republic but with some reinvention of the judicial attitude. The courts, now to some extent, with the advantage of hind sight, knew that this attitude was not good for Nigeria's democracy. However, there was no much change in attitude. Thus, with regard to executive actions, there was a slight change in attitude. With regard to legislative actions, the attitude

33. See A. O. Sambo, *Judicial Review of Political Questions in Nigeria and Malaysia: A Comparative Analysis* (Unpublished Ph.D. thesis, April, 2013).

34. See *Adegbenro v Akintola and anor* (1962) WNLR 205, *Williams v Majekodunni* (NO.2) (1962) 1 ALL NLR 328.

35. See *Attorney General of Eastern Nigeria v Attorney General of the Federation* (1964) 1 ALL NLR 224.

36. *Memudu Lagunju v Olubadan-in- Council and another* 12 WACA 233, *Senator Chief T. Adebayo Doherty v Sir Abubakar Tafawa Balewa and others* (1961) NSCC 248; *J.S. Olawoyin v Commissioner of Police* (1961) ALL NLR 203. The court later after the collapse of the 1st Republic, during the Military regime took some bold steps. See *N.A. Adamolekun v Council of University of Ibadan* (1967) NSCC 210; *Lakanmi and Another v Attorney General of Western Nigeria and Another* (1970) NSCC 143.

37. See Interview with Justice XXX, (Justice of the Court of Appeal, Ilorin Judicial Division), Nigeria on 21st June, 2011. (Transcript is on file with the Author).

38. This was the period of 1st Republic in Nigeria.

39. See *Shagaba v Minister of Internal Affairs* (1981) 2 NCLR 459. The plaintiff was declared *persona non grata*. As it were, this was supposed to be a political question. The court however declared the deportation illegal but in the area of directive principles of the government, it was still being decided as a political question. But see *Okogie v Attorney General of Lagos State* (1981) 2 NCLR 337 *Adewole v Jakande* (1981) 1 NCLR 262, *Ehimare v Governor of Lagos State* (1981) 1 NCLR 166 where the courts

remained the same⁴⁰ except issues of legislations and ouster clauses.⁴¹ The courts still held that matters relating to affairs of the political parties were still political questions not within the powers of the courts to decide.⁴²

However, with the ushering of democratic dispensation in the Fourth Republic, there has been a remarkable change in the courts' attitude to political questions.

There has been a bold attitude or reinvention of the judicial attitude. Thus, issues of executive actions such as allocation of revenue,⁴³ allegations of withholding statutory funds by the President,⁴⁴ relationship between the President and the Vice-President where the President purportedly declared the office of the Vice-President vacant,⁴⁵ disqualification of Vice-President from contesting elections,⁴⁶ allegation of breach of fundamental objectives and directive principles, tenure of office of some governors,⁴⁷ management of environment,⁴⁸ truncating of the tenure of local government officers⁴⁹ have all come within judicial review by the courts.

declined jurisdiction on the ground of political questions. See also *Hori v State* (1983) 1 SCNLR 94 on the unlimited power of the Attorney General.

40. *Attorney General of Bendel State v Attorney General of Federation & 22 others* (1982) 3 NCLR 1; *Ezozike v Makarfi* (1982) 3 NCLR 663; *Okwu v Wivus* (1981) 2 NCLR 522; *Governor of Kaduna State v The House of Assembly, Kaduna State* (1981) 2 NCLR 722; *Abraham Adesanya v President, Federal Republic of Nigeria* (1981) 2 NCLR 358; *Musa v Hamza* (1982) 3 NCLR 439; *Balarabe Musa v Speaker, Kaduna State House of Assembly* (1982) 3 NCLR 450; *Balarabe Musa v Kaduna State House of Assembly* (1982) 3 NCLR 463; *Obayiwana v Ali* (1983) 4 NCLR 96; *Poemok Investment Ltd v Hotel Presidential Ltd* (1983) 4 NCLR 122.

41. *Unongo v Akwu* (1983) 2 SCNLR 532 at 340-341 paras. H-D, (1983) 1 SC 129 at 202-203 lines 13-20 where the court declared that section 129 (3) and 140 (2) of the Electoral Act, 1982 which limits the time for disposing of election petitions by the courts were declared *ultra vires* the National Assembly and therefore null and void. See also *Attorney General of Bendel State v Attorney General of the Federation* (1983) 1 SCNLR 239 at 251-252; *Military Governor of Ondo State v Adewunmi* (1988) 1 NSCC 1136.

42. *de Omosho v Okafar* (1983) 2 SCNLR 244; *Okoli v Mbadiwe* (1985) 6 NCLR 724; *Akure v National Party of Nigeria, Benue State* (1984) 5 NCLR 449; *Ogunsan v Oshunride* (1986) 6 NCLR 611; *Rimi and Musa v Peoples Redemption Party* (1981) 2 NCLR 734; *Balarabe Musa v Peoples' Redemption Party* (1981) 2 NCLR 763; *Obayansi v Anagide* (1984) 5 NCLR 425; *Rimi & Anor v Aminu Kano* (1982) 3 NCLR 478.

43. See *Attorney General of Ogun State v Attorney General of the Federation* (2002) 18 NWLR (Pt. 798) 232; *Attorney General of Abia State v Attorney General of the Federation* (2003) 4 NWLR (Pt. 809) 125; *Attorney General of the Federation v Attorney General of Abia State* (2002) 6 NWLR (Pt. 764) 542 at 755 paras. G-H.

44. *Attorney General of Lagos State v Attorney General of the Federation* (2004) 18 NWLR (Pt. 904) 1 at 91 para E-46.

45. *Attorney General of the Federation & ors v Abubakar & ors* (2007) 11 NWLR (Pt. 1046) 436 at 405.

46. *Action Congress & Anor v Independent National Electoral Commission* (2007) 12 NWLR (Pt. 1046) 436 at 405.

47. *Peter Obi v Independent National Electoral Commission & Ors* (2007) 11 NWLR (Pt. 1046) 436 at 405.

48. *Attorney General of Lagos State v Attorney General of the Federation* (2003) 12 NWLR (Pt. 833) at 118-119.

49. *Attorney General of Abia State v Attorney General of the Federation* (2002) 6 NWLR (Pt. 763) 264.

Also, with regard to legislative actions such as suspension of some members of the House of Representatives.⁵⁰ House of Representatives investigation of civil unrest in Jos,⁵¹ impeachment of a State Governor by the legislature,⁵² and legislations on allocation of revenue,⁵³ public contracts⁵⁴ etc; have come under judicial review. Also, the courts have reviewed ouster clauses strictly as if it never existed.⁵⁵

With regard to the affairs of political parties, issues of nomination and substitution of candidates of political parties without cogent and verifiable reasons,⁵⁶ and validity of the nomination and sponsorship of political party's⁵⁷ candidates have come under judicial review.

At the moment, the position is that any question, in so far conceivable, under the provisions of the Constitution can come under judicial review. The current attitude of the court can be conveniently described as judicialisation of political questions.⁵⁸ The courts are now, instead of avoiding political questions, are judicialising them. All the issues identified above as it were, were supposed to be political questions.

However, the courts have found a way of making incursion in order to determine the merits of the cases so that justice would prevail. There is no way the court can run away from them for the simple reason that the courts have been invested with the power of the guardian of the Constitution. Thus, if the court is the guardian of the Constitution, like every watch dog, its duty is to see that nothing happens prejudicially to the Constitution. The courts in Nigeria are even lucky. In America, there was no provision

⁵⁰ *Hon. Dino Melaye & ors v The Speaker, House of Representatives & ors* Suit no.FHC/ABJ/CS/460/2010.

⁵¹ *The Government of Plateau State & Anor v The Speaker of the House of Representatives of the Federal Republic of Nigeria & ors.*

⁵² *Inakoju v Ladoja & others*(2007) All FWLR.

⁵³ *AG Abia v AG Federation* (n, 10).

⁵⁴ *L.S.D.P.C v Adold/Stamm Int. Ltd* (1994) 7 NWLR (Pt 358) 545 at 568-569.

⁵⁵ *Jimoh v Olawoye* (2003) 10 NWLR (Pt. 828) 307; *Inakoju v Adeleke* (2007) 4 NWLR (pt.1025) 423; *Ekpenyong v Umana* (2010) All FWLR (Pt. 520) 1387 at 1397 paras G-H; *Akinmade v Ajayi*(2008) 12 NWLR (Pt 1101) 498.

⁵⁶ *Ugwu and Anor v Ararume* (2007) 12 NWLR (Pt 1048) 367; *Rt. Hon. Rotimi Chubuike Amaechi v Independent National Electoral Commission* (2007) 9 NWLR (pt. 1040) 504.

⁵⁷ *Saidu v Abubakar* (2008) 12 NWLR (Pt 1100), Per Gumel, JCA at 296 para E-G.

⁵⁸ The term judicialisation of politics was stated by a justice of the Court of Appeal during an interview with him. He describes the current judicial practice as judicialisation of politics. However, another justice of the Court of Appeal in an interview prefers to say it is an era of judicial review. I am, therefore, of the view that it is described as judicialisation of political questions. (Transcript is on file with the Author).

for judicial review. It took the stature of Marshall CJ in *Merbury v Madison*⁵⁹ to entrench judicial review in American model. But in Nigeria's case, Nigeria is indeed very lucky. The Constitution expressly empowers the court to review legislative and executive actions.⁶⁰

The court found a way of making incursion because it drew a distinction between what was substantial and what was procedural. If there is a matter within the substantive province of the legislature, there is an ordained procedure for doing it.

Where the procedure is not followed, the court will intervene. This is how the courts have been able to make inroads into such areas because for every substantive provision, there is a procedure for doing it. In *Inakoju's* case,⁶¹ although, the House of Assembly, sitting as a House, its decisions cannot ordinarily be interfered with, since they violated the Constitution, the court interfered. The Constitution that gave this liberty also ordains the way of doing it. So, where the legislature wants to supplant the basis of its own authority i.e. the Constitution, its spirit, letter, and intents, that watch dog i.e. the court must hold it accountable.⁶² In fact, in *Amechi's* case, there was indeed even a pending matter before the Supreme Court. In that case, there was a matter for hearing at the apex court and somebody in contempt of the likely outcome of the case takes a step prejudicial to the decision, the court should be failing in their duties if they do not vacate such exercise. So, because the Constitution is supreme, every other authority must be under the Constitution. That was why the Court took an extra bold decision in *Amechi's* case that notwithstanding that Amechi was not the person who contested the election to install him as the Governor.⁶³ That was how the courts have been able to expand the frontiers. The Court broke down what used to be the unbreakable frontiers of political questions.

Also, the whole chapter II of the Constitution, as it were, was supposed to be a political question since section 6(6) (c) has rendered it non justiciable. However, there is now authority for the view that chapter II of the Constitution is not sacrosanct.⁶⁴ If one amalgamates or marries the provisions with other provisions of

59. Supra.

60. See for instance section 4(8) and section 251(1)(pqr) of the 1999 Constitution.

61. Supra.

62. See the *Peter Obi's* case, Supra. See also *Amechi's* case Supra.

63. See also the issue of internal democracy, in *Ugwu v Ararume*. Supra

64. Nikki Tobi JSC in *Anuche v FRN* (2004) 14 WRN 1 said it cannot be sacrosanct.

the constitution, judicial activity is possible. For instance, section 14(3) says in making appointments, political diversity of the country must be taken into account. So, when a governor in making an appointment which is essentially a political question concentrates his appointment in just one area or to religious class, one can use section 42 and make it justiciable. That becomes a matter of the Constitution. That is how the courts have now broadened the question.

Thus, it appears impossible currently for anybody to hide under the globe of political questions to avoid the determination of his matter except, the provision is so couched in a way which is also very difficult to imagine. Thus, where the removal of the Governor or the President is done in such a way that is inconsistent with the Constitution, the court will void it. INEC's case is also worth examining. The Electoral Act has provided the way of registering political parties. The Independent Electoral Commission (INEC) pursuant to this provision limited the numbers of political parties to two. But, in *Balarabe Musa's* case,⁶⁵ Fawehinmi went to court to challenge the restrictions. Uwaifo J.S.C. speaking for the Supreme Court gave a favourable verdict. This accounts for the reason why we now have so many political parties in Nigeria. This therefore opens political space. Otherwise, Nigeria will be having just one or three political parties now.

Thus, anybody who says that judiciary today is still the judiciary of the 1960s must either be mischievous or expressing his ignorance.⁶⁶ Indeed, if one looks at the current Electoral Act, one will find a reflection of what the courts have been saying i.e. through their pronouncements; the courts have led to the amendment of the Constitution and the Electoral Act. The Constitution has been written to reflect judicial positions. It is no longer possible to say that the court's duties are just to interpret the words of the constitution as they are. That was an ancient doctrine.

The truth of the matter today is that courts now make laws not directly but tactically through their decisions, pronouncements, through interpretation of the words of the statutes to give them meaning.⁶⁷ It is what the courts say that is the law as the Constitution permits this to happen. The makers could make their laws and wait the

⁶⁵ 2003 3 NWLR (Pt. 806).

⁶⁶ See the interview with Justice XXX, (Transcript is in file with the Author).

⁶⁷ It has also been argued that judges really cannot avoid law making. See Davies B. L., "Constitutional Abdication" (2006) 1 *Utah Bar Journal*, at 4.

satisfy itself of the factual premises upon which legislative actions are based.⁷⁸ This, in a way, will prevent absolutism and tyranny in government.⁷⁹

Also, those who argue that the courts should not exercise judicial review based on the doctrine of separation of powers lack a deep understanding of the doctrine itself. There are absolute separation and partial separation. Those criticisms have been offered in terms of 'pure' separation of powers. The partial version of the doctrine lays emphasis on the significance of the checks and balances and this makes the doctrine itself meaningful.⁷⁹

Power of Internal Regulations

Another argument why the court may be prevented from exercising the power of judicial review in respect of legislative actions is that the Constitution has given the legislature the power to determine its rule by regulating its own procedure. This provision is also capable of two interpretations. The first is that since the legislature is given the power to determine its own rule or regulate its procedure, disputes relating to the rule should also be determined by the legislature without any external intervention either from the court or from the executive. The better argument perhaps is that determining its own rule or regulating its own procedure is one thing, power of interpretation of the rule is another.

It is, therefore, submitted that the purpose of the section is to protect the legislature from the control of the executive by allowing the legislature to determine its own rule by creating the rule of procedure to regulate the affairs in the House and not the court. This is because the court even has the power to interpret the statutes which

77. Jesse H. Choper, "Judicial Review and The National Political Process," (1980) 68 where he noted that "the task of custodianship has been and should be assigned to a governing body that is insulated from political responsibility and un beholden to self-absorbed and excited majoritarianism"; Richard H. Fallon, Jr., "The Core of an Uneasy Case for Judicial Review" (2008) 121 *Harv. L. Rev.* 1693, 1706-08; see also Caitlin E. Borgmann, "Legislative Arrogance and Constitutional Accountability" (2006) 79 *S. Cal. L. Rev.* 753, 801; Douglas Laycock, "A Syllabus of Errors" (2005) 105 *Mich. L. Rev.* 1169, 1174 (reviewing Marci A. Hamilton, *God v The Gavel: Religion And The Rule Of Law*). Ruth Bader Ginsburg, "Judicial Independence: The Situation of the U.S. Federal Judiciary" (2006) 85 *Neb. L. Rev.* 1, 13; David L. Faigman, *Constitutional Fictions: A Unified Theory Of Constitutional Facts* (2008) 46, 52; Caitlin E. Borgmann, "Rethinking Judicial Deference to Legislative Fact-Finding," 84 *Ind. L.J.* 1, at 35.

78. Keith E. Whittington, *An 'Indispensable Feature'? Constitutionalism and Judicial Review* (2002) vol. 6, *Legislation and Public Policy*, 21 at 24.

79. Van der Vyver, J., "The Separation of Powers" (1993) 8 *SA Public Law* 177 at 178.

more potency than the rules of procedure of the House. In other words, while the Constitution confers on the legislature the power to determine their own rules, the utmost interpretation and application of the rules are within the inherent powers of the court. It is thus submitted that the fact that the Constitution has textually committed the power to do an act to the political arm of government does not imply exclusivity in respect of the matter. Rather, the court is allowed in deserving circumstances to intervene by not allowing the law to be breached with impunity.

The same argument is also presented in favour of executive actions and internal affairs of political matters. This will not also hold water because the executive arm of government tends to be recalcitrant because of the powers bestowed. Where judicial review is not put in place to check executive excesses, the country will not only be totalitarian, it will definitely lead to lawlessness as people may be eventually fed up with his abuse of power, thereby, leading to all sorts of political volcanoes, military coup, revolution or unnecessary demonstration depending on the nature of abuse of power and the country where this takes place.

With regard to political parties, interviews with judges, legal practitioners and some politicians have clearly revealed that without judicial review in a country such as Nigeria in matters such as internal affairs of political parties is an invitation to anarchy.⁸⁰ They expressed serious doubt on the ability of this political class to manage their affairs. The leadership of the political parties would always want to do things at all cost without regards to law and democratic principles. This would definitely be against the constitution which the courts have sworn to guide and guard jealously. The reason why the court should interfere by interpreting their internal regulation is that the courts act as an unbiased umpire, a neutral party relieved of political pressure to a large extent. Allowing the political class to finally decide their disputes would mean making them judges in their own cause. Thus, the might will always want to have their ways. That is why the House in Nigeria are sometimes rancorous which sometimes lead to fight and even loss of life.

⁸⁰. Transcript is in file with the Author).

Judicial Incompetence

The argument of judicial incompetence is also worth consideration. It argues here that the judiciary lacks the competence to deal with matters having political undertones. In other words, the whole proceedings of the legislature, internal affairs of political parties, executive actions and are filled with political undertones. The judiciary is, therefore, being seen as incompetent to handle issues relating to politics. This is because where the court deals with such issues; the court is likely to find itself in politics which judges are not trained to handle. It is, however, submitted that the duty of the court is to examine the legality or otherwise of the matters brought before it. The court is not and should not be concerned with the political aspect of a view brought before it. This is in line with the long established legal maxim that let justice be done even if the heaven falls. The truth however is that no heaven will fall because justice has been delivered in a particular case. The mere presence of political undertones in a matter should not deter the court from exercising its powers of judicial review in a case.⁸¹

In so far as the constitution has ordained outlined functions, the judiciary in resolving disputes, as earlier stated, does not pretend to usurp or hijack or arrogate to itself the supremacy over other arms of government. It merely calls attention to that organic document i.e. the constitution that first and foremost outlined the functions of each branch and the means of realizing those functions. The main idea being to retain the integrity and sanctity of the document called the constitution. It does not pretend to be a technician or a technocrat to make argument about budget etc. There is a substantive provision on matters of budget. Thus, if it is the duty of the executive to propose appropriation, it is the duty of the legislature to make appropriation i.e. through law. Where the legislature purports to make appropriation, the court will intervene.

It is possible for the court to decide a political question without finding itself in the arena of conflict because it does not pretend to be in the arena. It must always be independent. It works a delicate balancing. The court can never ever purport to usurp the constitutional duties of other arms of government. That would mean it is supplanting the basis of its own authority. This is because the constitution says the

81. All judges interviewed agree to this fact. (Transcript is on file with the researcher).

legislature must not violate the constitution. It presupposes the fact that the court cannot also violate the constitution. That is why the courts have not also spared themselves. In many cases where the courts in arriving at the guilt of the accused violated the clear words of the statute stating how the courts should exercise its function. The court of Appeal or Supreme Court would chastise the lower court.

Even where the courts have violated the right to fair hearing, that is why the appellate courts exist. They have nullified those decisions.

The Possibilities of Institutional Clashes Leading to Unimaginable Situations

Another argument why the court is being urged not to intervene in matters relating to internal affairs of the legislature, executive and political parties are to prevent the occurrence of an unimaginable situation. The highest form of unimaginable situation could be disobedience of the court order, promulgation of laws to oust the jurisdiction of the court, removing judicial powers out rightly from the court, or abolishing the whole of the judiciary.⁸²

It is with respect submitted that all these are not enough to scare the court from deciding the disputes which is the courts main constitutional responsibility anywhere in the world. Firstly, the duty of the court is to pronounce its decision. The duty to enforce the decision of the court lies in the executive. The executive cannot choose which law to enforce and which one not to enforce.

Thus, despite the court deference to the executive, are all the court's decisions enforced? Also, despite the fact of deference to the legislature, do they not nevertheless pass laws to oust the court's jurisdiction? Despite the fact of deference, does it mean that judicial powers are not being allocated to another branch or being taken away from the court? Thus, when the judiciary is totally abhorred, that gives a very clear picture that the government does not observe the doctrine of rule of law. A government cannot and should not pretend

⁸². All the judges and justices interviewed are of the view that disobedience of the courts' orders by the political class cannot scare them and does not stop them from further reviewing their actions when necessary.

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to be ruling under the doctrine of rule of law while in actual fact it is not because almost all the wings of the judiciary have been cut down.

Counter-majoritarian Argument

In some jurisdictions, there is what is called the counter majoritarian doctrine. They oppose judicial review on the ground it is counter-majoritarian. They argue that majority of the people elected their representatives. How come the unelected people i.e. the court can assume the responsibility to nullify the actions of the majority? They, therefore, consider the courts as undemocratic merely because they set aside decisions reached through a democratic process, and that the courts, as a result, act in a counter-majoritarian manner: The major argument is that judicial review is a counter-majoritarian force in a democratic system. Thus, according to them, when the Supreme Court declares unconstitutional, a legislative act or the action of an elected executive, it frustrates the will of representatives of the actual people; it exercises control, not on behalf of the prevailing majority, but against it. That, without mystic overtones, is what actually happens.⁸³

This argument is counterproductive because somebody i.e. an institution must be there to remind the so called representatives of the majority that there is a working document, an organic law that spells out the model of operations.⁸⁴ If this is not done, there would have been chaos all over the place. The argument of counter-majoritarian is further weakened by the fact that sometimes, elected representatives or the political class has much more power than citizens to determine political decisions. In such situations, both the majority and the minority will be better protected by relying on the

83. See Bickel, A., *The least dangerous branch: The Supreme Court at the bar of politics* (1962) at 16 – 7. This objection has received support from other scholars such as Ely, J., *Democracy and distrust* (1980) at 4-5. Ely perceives the effect of judicial review as amounting to the courts telling the people's representatives that they cannot govern as they would like. Bogart has submitted that in socio-economic welfare terms, the legislature and the executive have done more than the judiciary in ensuring poor people's welfare services, which should justify support for democratic institutions. He submits further that history reveals that rather than protect the poor, the courts have been uncaring to them. This, in his opinion, is because state regulation and programmes designed to be responsive to the concerns of the poor have often been cut back by courts under the guise of interpretation. Bogart W., "And the courts which govern their lives": The judges and legitimacy' in Berryman, J., (ed.) *Remedies: Issues and perspectives* Canada: Thomas Professional Publishing 1991, 49-67, at 56. See also Schauer, F., "The calculus of distrust" (1991) 77 *Virginia Law Review* 653, at 664 – 67; Haysom, N., "Constitutionalism, majoritarian democracy and socioeconomic rights" (1992) 8 *South African Journal on Human Rights*, 451 – 463 for opposing view of judicial review on counter-majoritarian ground.
84. See the Interview with Justice XXX and many other judges. (Transcript is in file with the Author).

courts to force their representatives to account to them.¹⁵ Unlike the political class, the judges are insulated from the political pressures and their professional ideals allow them to decide matters in a more dispassionate and impartial manner.¹⁶ They will, therefore, be able to entertain and consider in a more or less impartial manner the complaints of aggrieved members of society who may consider themselves to have been let down by the political process.

Conclusion

From the foregoing analysis, courts in Nigeria have powers of judicial review. These powers have been exercised as it affects political questions. Thus, it reveals that the current doctrine in Nigeria is judicial review of political questions otherwise referred to as judicialisation of political questions. The courts, instead of avoiding the determination of the questions, decided it by making an important distinction between what was procedural and what fell within the substantive powers of the political class.

The courts, therefore, broke what used to be the unbreakable frontiers of political questions. Thus, courts have exercised judicial review power in many areas of executive actions such as allocation of revenue, allegations of withholding statutory funds by the President, relationship between the President and the Vice-President where the President purportedly declared the office of the Vice-President vacant, disqualification of Vice-President from contesting elections, allegation of breach of fundamental objectives and directive principles, tenure of office of some

15. See Abramovich, V., "Courses of action in economic, social and cultural rights: Instruments and allies" (2005) 2 *EUR. International Journal on Human Rights*, 181-216 at 197. Nigeria represents a good example of the deficiencies of representative democracy. By the Nigerian system, the voters cast their votes for political parties with the hope that the political parties will represent their interests. However, the system does not establish clear legal processes through which the voters can hold the political parties accountable to the electorates. Instead, the voters will have to wait for another election to remove those parties that did not fulfil their election promises. Many irremediable wrongs and institutional damage may have occurred during this waiting period. This problem is made worse by the fact that the political parties have been highly hijacked by the elites. Decisions are taken by the political mantle of the party consisting of the elitist leadership. While decisions may be influenced by such pressure groups as labour unions, these pressure groups are highly patronised by the leadership.

16. See Interview with Justice XXX, Justice of the Supreme Court of Nigeria, at his office at the Supreme Court Complex, Abuja, Nigeria on the 10th July, 2011, (Transcript is in file with the Author). See also Interview with Justice XYZ, Judge of the High Court of Justice, Federal Capital Territory Abuja, in his office at the High Court Complex, Wuse Zone 5, Abuja on the 11th July, 2011 (Transcript is in file with the Author) and Justice (Mrs) XYZ, Judge of the High Court of Justice, Kwara State at her office, Kwara State High Court Complex, Ilorin Judicial Division on 25th June, 2011 (Transcript is in file with the Author).