

Political Question Doctrine and Judicial Attitude to Political Controversies in Nigeria: Implications for Constitutionalism

Ferdinand Okonicha Ottoh*

Department of Political Science, University of Lagos, Nigeria

ABSTRACT: The political question doctrine has become one of the jurisprudential issues in a constitutional democracy, as the courts may not want to exercise judicial review to determine the constitutionality of the action of the other organs of government or a statute before it. As a legal instrument, judicial review has been used to expand or reduce the powers of the governments, but the courts decide to exercise this power discretionarily on the ground that it falls within the province of politics. This study aimed to analyze 'political question' and judicial attitude to political controversies in Nigeria by unraveling how the doctrine of political question has been applied in three main areas—impeachment proceedings, political parties' primary elections, and post-election matters. It also analyzed the judiciary's attitudes to political controversies and evaluated the implications of the political question doctrine to constitutionalism. The study argued that this attitude negates the principle of constitutionalism as it contends that the courts' deliberate avoidance of a political question is typical of the judiciary in Nigeria in most political controversies. Consequently, the courts abuse the issues of discretion and non-justiciable, so that it is imperative to unravel the intricacies of the political question doctrine by undertaking a comprehensive jurisprudential analysis by highlighting the most controversial aspects and how the court's attitude in political controversies undermines its commitment to constitutionalism. Furthermore, it contradicted checks and balances, fundamental human rights, and the rule of law. This study concluded that the doctrine of political question would be judiciously used by the court and not to avoid determining contentious political issues that may likely derail Nigeria's democratic process and stability.

KEYWORDS: Constitutionalism, Judicial Review, Nigeria, Political Question.



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* Corresponding author's e-mail: vonferd@yahoo.com

I. INTRODUCTION

There have been heated debates among scholars on the extent to which the judiciary can determine all legal questions under its jurisdiction, irrespective of whether such questions involve a political question. Since independence, the political question doctrine has been applied even though the 1960 and 1963 Constitutions of the Federal Republic of Nigeria did not explicitly provide for the doctrine not until the Second Republic in 1979, when it adopted a presidential system modeled after the United States system of government.¹ This study joins in the growing debate on judicial attitudes in political controversies in Nigeria because of its contribution to the increasing debate on judicial attitudes in political controversies in Nigeria.

Since this new political dispensation from 1999 to date, every election has attracted several court cases, whereas the court is now in a position to determine the election's outcome. This judicial involvement in resolving electoral disputes and other political issues has led to a barrage of criticisms by legal and political commentators. They see such involvement as a way of politicians using the judiciary to achieve their political aim.² The enforcement of the rule and fundamental rights is imperative for political order, and the judiciary must simultaneously maintain the separation of powers to ensure its independence towards constitutionalism guaranteed in this nascent and fragile democracy. This observance of constitutionalism does not entail abdication of its responsibility of judicial review of the action of the two other political organs of government. While the court has no power to decline jurisdiction on any suit, it cannot exercise discretion on

¹ Enyinna Nwauche, (*Draft Paper*) *Is the End Near for the Political Question Doctrine in Nigeria* (Nairobi, 2007). See Wahab Egbewole & Olugbenga Olatunji, "Justiciability Theory versus Political Doctrine: Challenges of the Nigerian Judiciary in the Determination of Electoral and Other Related Cases" (2012) 117:2 *Journal of Jurisprudence* 1–35.

² See Ferdinand O Ottoh, "Judicialization of Politics and Politicization of the Judiciary in Nigeria, 1999-2011: Implications for democratic Stability" (2015) 11 *University of Lagos Sociological Review* at 88. See also P Nnaemeka-Agu, "Judicial Powers: Quo Tendimus" in TO Elias & MI Jegede, eds, *Niger Essays Jurisprud* (Lagos: MIJ Professional Publishers Ltd, 1993).

matters brought before it for consideration, be it political or otherwise, to avoid the judiciary being embroiled in political controversies.³

Recent studies by a new generation of political scientists have identified the concrete political conditions conducive to the judicialization of mega-politics. In its structuralist guise, this branch of scholarship emphasizes organic features of the political system as conducive to judicialization. For example, the judicialization of collective identity questions may reflect constitutional disharmony caused by a polity's commitment to conflicting values, such as Israel's self-definition as a Jewish and democratic state.⁴ Driesen analyzes the political remedies doctrine of the political question, which explains that courts ought not to adjudicate separation of powers claims until both political branches of government assert their right.⁵ He argues that judges avoid adjudicating the political issue under the rubrics of ripeness, standing, political question, and equitable discretion.⁶ The lower courts hide under this doctrine to justify a refusal to adjudicate certain cases. He posits that the doctrine is applied to shield presidential acts from judicial scrutiny and never to protect acts of legislative function from judicial interference.⁷ However, the author advises against the application of this doctrine except to avoid adjudication of challenges to bipartisan legislation signed by the president.⁸ The author termed "political remedies" when the court refuses judicial review because a political remedy is available. The judicial rulings end politics, and that politics is substituted for judicial decisions when courts dismiss cases.⁹ The doctrine raises questions about the relationship between law and politics. It shows that law and politics exist as separate fields of study.

³ See Ben O Nwabueze, *Nigeria's Presidential Constitution 1979-83: The Second Experiment in Constitutional Democracy* (New York: Longman, 1985) at 19.

⁴ Ran Hirschl, "The Judicialization of Mega-Politics and the Rise of Political Court" (2008) 11 *Annual Review of Political Science* 93-118.

⁵ David Driesen, "The Political Remedies Doctrine" (2021) 71:1 *Emory Law Journal* 1-56.

⁶ *Ibid* at 3.

⁷ *Ibid*.

⁸ *Ibid*.

⁹ *Ibid* at 5.

All previous studies attempt to discuss issues differently from this present study that addresses the behavior of the judiciary in Nigeria. Ben Nwabueze was writing from the experience of the Second Republic of Nigeria when the doctrine was introduced into Nigeria's jurisprudence. At the same time, other works such as Nwosu, Solomon and Essien, and Nwauche focus on the judicial avoidance of 'political question' and judicial involvement in political matters.¹⁰ In contrast, the present study provides a deeper understanding of the political question from a political science perspective since these other studies were from a legal perspective. The fact remains that constitutional issues are both political and legal, and the inseparability of the two areas of study is the motivation for the present study. Hence, this study closes the lacuna in analyzing a political question from a legal point only by extending the debate to political science.

This study aimed to analyze 'political question' and judicial attitude to political controversies in Nigeria by unraveling how the doctrine of political question has been applied in three main areas—impeachment proceedings, political parties' primary elections, and post-election matters. It also analyzes the judiciary's attitudes to political controversies and evaluates the implications of the political question doctrine to constitutionalism. This study contributes to raising public consciousness that each time political matters are before the court and decided upon, they should be interpreted more broadly, not only from the legal perspective. The study also adds to the growing literature on judicial politics and understanding of judicial behavior as it increases our awareness of political and social influences on judicial decision-making.

This paper is structured with four main parts of the discussion. The first part of the discussion is an overview of the doctrine of political question. The second part enquires to what extent the court in Nigeria addressed the political question since independence in the areas of impeachment

¹⁰ *Ibid.* Ben O. Nwabueze, *supra* note 3.; See also Ikenna Nwosu, *Judicial Avoidance of "Political Questions" in Nigeria* (Appa, Lagos: Moorgate Limited, 2005). Ekokoi Solomon & Ekerebong Essien, "The Nigeria Supreme Court and the Political Question Doctrine" (2019) 33:2 Denning Law Journal 123–145.

proceedings, political parties' primaries, and post-election matters. The third part examines the attitudes of the judiciary to political controversies. The fourth part analyzes the implications of applying the political question doctrine for constitutionalism.

II. METHODS

The methodology adopted for this study was the review of the extant literature on political questions, political controversies, and the decisions reached by the courts. The methodology involved desktop research on legal and political issues involving the judiciary. It provided an interpretation and a critical analysis of key political cases determined by the Nigerian courts since its independence in 1960. It recognized that the Constitution of Nigeria did not define what constitutes political question and lacks legal principles to deal with such cases when brought before the court. Finally, the study considered various secondary sources on political question doctrine and judicial avoidance.

Furthermore, this study presented material evidence justifiably interpreted, bringing out the political dimension to court decisions at any point in time. Also, it added to the debate on the political question of how and why the judiciary's attitude to political controversies has had implications for constitutionalism and constitutional rules. It has come from a political science perspective where the idea is to forge the link between law and politics to determine the inseparability of law and political science.

III. THE DOCTRINE OF POLITICAL QUESTION: AN OVERVIEW

The doctrine of "Political question" was first applied in the United States in *Marbury v. Madison*.¹¹ In Nigeria, before the formal adoption of the doctrine in the lexicon of legal jurisprudence, it was informally used in the First Republic. The 1979 Constitution, which adopted the presidential system, formally recognized the political question doctrine. Since the

¹¹ *Marbury v. Madison*, 5 US. (1 Cranch) 137 (1803)

adoption of a presidential system of government modeled after the American type, the country unwittingly adopted the political question doctrine for the determination of some matters which are political and presumed to be better handled by other political organs of government rather than the judiciary. In America, the doctrine is applied in some specific areas, but in Nigeria 1979-1983, the three main areas were namely: impeachment proceedings, internal affairs of the legislature, and political party primaries.¹²

The doctrine was partially applicable in the First Republic when the Supreme Court held in *Attorney General, Eastern Nigeria v. Attorney General of the Federation*¹³ that the determinations of the margin of error in a census exercise were a political matter. It is the foundation on which the doctrine of political question emerged in the legal jurisprudence of Nigeria, and it has gained popularity among political and legal experts.¹⁴

Since the return of democratic rule in Nigeria in 1999, the judiciary has been attracting criticism in the eyes of the storm. Some critics believe that the judiciary is awakened to its constitutional responsibility by upholding constitutional rule in the political system. The country was under military rule for 15 years, within which the judiciary was under the dictate of the military leadership. The issue of judicial independence was relegated to the background as there was no case of a branch of the government presenting itself for judicial scrutiny or interpretation of their action. Naturally, the courts are presumed to be above politics¹⁵ which makes them play an essential role in shaping the government's policies and interpreting the constitution. The process of interpretation of government policy legitimizes or delegitimizes such action. Constitutional courts are instruments of

¹² Enyinna Nwauche, *supra* note 1.

¹³ (1964) 1 ANLR 224.

¹⁴ Joseph M Isanga, "African Judicial Review, the Use of Comparative African Jurisprudence and the Judicialization of Politics" (2017) 49 *George Washington International Law Review* 749–800.

¹⁵ *Ibid.*

political legitimacy and stability of the institutions and impact policy and legal development.¹⁶

There are two contending views on the validity and determination of certain political matters, which may be a political question.¹⁷ On the one hand, the judiciary has no business in matters that involve a political question, as this would undermine the powers of other organs of government (executive and legislature). In contradistinction, withdrawing the powers of the judiciary in determining certain matters would be nothing but an abdication of judicial powers and responsibilities.¹⁸ In other words, it is an attempt to strip the judiciary of its powers to determine what constitutes legal questions adequately brought before it in the name of distinguishing matters involving exclusive political questions.

The term 'political question' is bedeviled with conceptual problems arising from the complexity of the concept in political and legal scholarship.¹⁹ Hence, the concept of political question has no single sentence definition. It is one of the concepts that fall under legal semantics and triviality. Simply put, a political question suffers from analytical clarity as it is restricted to issues of judicial avoidance. The Supreme Court of Nigeria defines it as consisting of two principles: i) there is no objective standard determining the political question as one of the dominant considerations in determining whether a question falls within the category of the political question;²⁰ ii) the appropriateness of attributing finality to the action of the political branch and political parties under the Nigerian Constitution and system of government.²¹

According to Black's Law Dictionary, a political question is a question that a court will not consider because it is purely political and the determination

¹⁶ *Ibid* at 749.

¹⁷ Wahab Egbewole & Olugbenga Olatunji, *supra* note 1.

¹⁸ AAO Okunniga, *Transplants and Mongrels and the Law: The Nigerian Experience*, University of Ife Inaugural Lecture 62 (University of Ife Press, 1983).

¹⁹ John Harrison, "The Political Question Doctrines" (2018) 67:2 *American University Law Review* 1–74.

²⁰ Enyinna Nwauche, *supra* note 1.

²¹ *Ibid*.

would amount to encroachment upon the executive or legislative powers."²² It is debatable whether a matter has to be purely political for it to fall within the purview of political question. This definition may not have captured the true character of what constitutes a political question. The contention is that a matter is considered a political question when it falls under the province of the political branches of government that can easily resolve such dispute instead of the court.²³

Harrison opines that there are erroneous conceptions about the political question.²⁴ He argues that the doctrine of political question does not limit the powers or jurisdiction of federal courts. Instead, it limits the judiciary's powers in relation to political power.²⁵ We can still understand it as an attempt to treat certain legal decisions by political actors as conclusive. It represents an attempt to make legal decisions limited to the extent that they may direct political actors concerning susceptible discretionary decisions, mainly those involving military and security matters. The logic of the argument here is that the doctrine of political question ensures that in some unusual situations, the judiciary leaves the final decision of legal questions within its purview or jurisdiction to non-judicial decision-makers, that is, the executive and legislature. It defends the principle of separation of powers as practiced in a constitutional democracy.

Shehu made a distinction between political questions from political cases.²⁶ He argues that not all constitutional or political matters constitute a political question.²⁷ Hence, some issues have political relevance. As such, an attempt must be made not to view all political and constitutional cases as political questions. What constitutes a political question lies not in the potential effect of a judicial decision but in the political structure of a

²² See Bryan A Garner, ed, *Black Law Dictionary*, 9th ed (2009).

²³ Harold Spaeth & David Rohdes, *Supreme Court Decision Making* (San Fransisco: Freeman, 1976) at 156.

²⁴ John Harrison, *supra* note 19.

²⁵ *Ibid.*

²⁶ Taiwo Shehu, "Judicial Review and Judicial Supremacy: A paradigm of constitutionalism in Nigeria" (2011) 11:1 *International and Comparative Law Review* 45–75.

²⁷ *Ibid.*

country.²⁸ This assertion implies that where the court makes certain decisions, they find expression in legality but lack legitimacy.

From a classical theoretical point, Scharpf argues that an attempt by the court to regard certain issues as a political question is a technique to abdicate its constitutional duty.²⁹ It contradicts the Supreme Court's declaration of certain subjects as a political question. The argument posits that the doctrine of the political question is nothing but an avoidance technique that invariably undermines the power of judicial review vested in the judiciary. Solomon and Essien adopt the theory of institutional dialogue to explain that certain decisions of the court which involve political questions lead to institutional dialogue.³⁰ They maintain that in a constitutional democracy, political questions are within the purview of the political arms of government. Some identifiable factors shape judicial determination of political matters - its deference to the political branches, the necessity or exigencies of the matter, and the doctrine of avoidance. We can also deduce from the above assertion that an attempt by the judiciary to be involved in institutional dialogue to determine which matter is political indicates the hybridity of the judiciary as a legal and political institution.³¹

Theoretically, the classical school of thought maintains that the political question doctrine is a product of constitutional interpretation instead of judicial discretion. This school contends that the power of judicial review rests upon the court's constitutional duty to say what the law is, that is, to interpret and apply the law whenever the outcome of the case depends on it.³² While the prudential theorists postulate that the political question doctrine is a product of judicial caution, political wisdom, and self-restraint by the courts.³³ The function of judicial review is constitutional and will not be politicized. In cases involving the constitutionality of questioned governmental acts, Alexander Bickel's Prudential Theory of judicial action

²⁸ *Ibid*

²⁹ Fritz Scharpf, "Judicial Review and the 'Political Question': A Functional Analysis" (1966) 75:4 Yale Law Journal 1-82.

³⁰ Ekokoi Solomon & Ekerebong Essien, *supra* note 10.

³¹ *Ibid.*

³² Ikenna Nwosu, *supra* note 10.

³³ *Ibid.*

is instructive. Bickel's book *The Least Dangerous Branch* advocates that a court of law should not be too quick to adjudicate political controversies, especially red-ones. However, he should allow society time to work out its balance in the inevitable tension between principle and expediency that is the dynamic of social life.³⁴ The pure theorists argue that politics cannot be divulged from constitutional interpretation.³⁵ The functional theorists maintain that it is when there is a lack of judicially discoverable and manageable standards for resolving political matters.³⁶

This study aligns with Professor Ben Nwabueze's explanation of political questions by looking at the key elements to be considered for a matter to be a political question if there is a lack of legal rules or objective standards, the predominance of extra-legal factors, the nature of the subject matter, and the unamenability of proof by judicial evidence.³⁷ For lack of an agreeable definition of a political question, the political question practice as: "matters which, in the considered opinion of a court, would, for a combination of reasons, be inappropriate for resolution through the judicial process; and matters which a court considers itself functionally incompetent to resolve and/or enforce."³⁸ In a nutshell, a political question simply means a non-justiciable question. Non-justiciable matters are suited for executive or legislative resolution, as was first articulated in *Marbury v. Madison*.³⁹ It leads to the issue of justiciability.

The justiciability principle is that a question brought before a court for determination must touch upon the legal right or obligation in question and may be determined following the procedure appropriate to a court of law and by rules governing proof by judicial evidence. In the justiciable question, the court has an inescapable duty to hear and decide unless an

³⁴ See Ben O Nwabueze, *Nigeria '93: The Political Crisis and Solutions* (Ibadan: Spectrum Books Ltd., 1994) at 92.

³⁵ *Ibid.*

³⁶ *Ibid.*; See Louis Henkin, Gerald L Neuman, & Diane F Orentlicher, *Human Rights*, Leebron David W, ed (New York: Foundation Press, 1999) at 262.

³⁷ Ben O. Nwabueze, *supra* note 3.

³⁸ *Ibid.*

³⁹ See *Marbury v. Madison* *supra* note 11.

ouster clause excludes its jurisdiction in the constitution or other law validly made.⁴⁰

Nwabueze argues that if the doctrine of a political question is a non-justiciable issue, then the doctrine is superfluous and futile.⁴¹ Justiciability determines the court's competence to entertain a question, while legality determines how it is to decide.⁴² Once a justiciable action is brought before a court and is shown to be within the four corners of the enabling law (the constitution and other laws), the court cannot enquire further; its review power is exhausted.⁴³

The refusal of jurisdiction over a question by the court on the ground that there are no judicial or objective criteria which a court is to apply to decide it, as in many of the cases – is an application of the concept of justiciability, not of the political question doctrine whose central thesis is that even when there are rules of law, other objective criteria to apply, a court can still, in its discretion, refuse to hear and decide question brought before it because of its explosive, volatile, hypersensitive nature or because it is otherwise inexpedient or impolitic for the court to embroil itself in it.⁴⁴ The discretion to refuse to hear and decide on an otherwise justiciable question renders it singularly objectionable as the doctrine of opportunism.⁴⁵

Judicial review is the court's power to determine the constitutionality or otherwise of the action of the executive or the legislature to the extent of the inconsistency that declares such action intra-vires or ultra-vires. In other words, judicial review is the court's power to declare any legislation null and void if it is inconsistent with the Basic Law of the Land provisions.⁴⁶ This doctrine gave the courts unlimited jurisdiction over any matter. Despite the constitutional provision of the power of the judicial

⁴⁰ Ben O Nwabueze, *supra* note 34.

⁴¹ *Ibid.*

⁴² Ikenna Nwosu, *supra* note 10.

⁴³ Ben O Nwabueze, *supra* note 34 at xii.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ Ben O Nwabueze, *supra* note 34.

review, the practice of judicial review remains what is described as "constitution without constitutionalism."⁴⁷

There are several competing arguments for applying for judicial review in political matters; two of them are that it is an attempt to strip the other non-judicial arms of government of their powers. On the other hand, it is an attempt to preserve the principle of constitutionalism. In his study of the legal implications of judicial review on political disputes, Sambo argued that the application of judicial review in political disputes is quintessential for constitutional democracy.⁴⁸ Arguably, there is a thin line between what constitutes legal and political matters. It is based on the logic that the political class often deploys the use of judicial instruments to combat their political opponents. Furthermore, constitutional powers of the arms of government are often exercised for political purposes. On the contrary, the court is constitutionally empowered to resolve disputes arising from breach of constitutional powers, regardless of the nature of the disputes at hand. Thus, reviewing the act of political arms of government is not intended to strip the powers of other arms of government but to preserve sanctity, due process, and constitutional democracy.

Following Sambo's argument, Graber contends that judicial review as a judicial instrument is a product of the invention of the ruling class.⁴⁹ As such, elected officials create and maintain it for political purposes. He argues that elected officials create vital political foundations for exercising judicial powers. From Graber's assertion, one can deduce that when the court declares an act by any organ of government null and void, the judiciary does so for political reasons. It is because the political class created a condition under which the judiciary operates—as such, exercising judicial powers in matters involving power play and public interest is valid.

⁴⁷ Joseph M Isanga, *supra* note 14.

⁴⁸ Abdulfatai Sambo, "Legal Implications of Judicial Review on Political Disputes" (2019) 10:2 African Journal Online 85–95 volume: NAUJILJ, Vol.10(2):85-95.

⁴⁹ Graber Mark, "Constructing Judicial Review" (2005) 8:2 Annual Review of Political Science 425–451.

Hirschl argues that in recent terms, the application of judicial review in non-judicial matters may be termed judicialization of politics.⁵⁰ He explains that this is an attempt to expand the powers or jurisdiction of the court.⁵¹ It is reliance on the judiciary to determine public policy or act that is constitutional or illegal. However, his argument aligns with that of Sambo and Graber that the exercise of judicial review is an attempt to protect the constitution, the rule of law, and checks and balances. As such, political actors must create an environment for judicial review to enthrone the rule of law, protect fundamental human rights, prevent abuse of power, and promote checks and balances.

On the contrary, Saikumar argues that the exercise of judicial review in political issues is a usurpation of parliamentary democracy.⁵² He explains that it may be legally right but undermines the legitimacy of institutions.⁵³ An attempt to exercise judicial review in political issues may be termed judicialization of politics. It further boils down to striping the non-judicial arms of government of their powers by intervening in matters that require political solutions.

Similarly, Fagbadebo and Dorasamy, in their qualitative research, argue that the exercise of judicial review in the political process in Nigeria reflects the weaknesses of other arms of government.⁵⁴ Their review of the impeachment procedure of the governors of Oyo, Anambra, and the Plateau States by the Houses of Assembly revealed that the revocation of the impeachment of the three governors by the judiciary reflects the weaknesses of the legislative arm of government, which is constitutionally empowered to perform oversight functions.⁵⁵ Hence, the conclusion is that

⁵⁰ Hirschi Ran, *Judicialization of Political Question* (Oxford: Oxford University Press, 2011).

⁵¹ *Ibid.*

⁵² Rajgopal Saikumar, *The Constitutional Politics of Judicial Review and The Supreme Court's Human Rights Discourse* (India: Excellent Publishers, 2019).

⁵³ *Ibid.*

⁵⁴ Omololu Fagbadebo & Nirmala Dorasamy, "Analysis of The Judicial Review of The Impeachment of Anambra, Oyo, and Plateau in Nigeria's Fourth Republic" (2020) 27:48 *Transylvanian Review*.

⁵⁵ *Ibid.*

using judicial review weakens the powers of the political arms of government.

Fallon, arguing with Fagbadebo and Dorasamy, asserts that the best case for judicial review in politically and morally healthy societies does not depend (as commonly believed) that courts are more likely than the legislature to define the vagueness of rights correctly.⁵⁶ Instead, the legislatures and courts should both be enlisted to protect fundamental rights and, accordingly, both should have veto powers over legislation that might reasonably be thought to violate such rights.⁵⁷ The argument here is that Fallon expresses disgust for the elitist interpretation of elitism as political orientation. Neither does he condemn the judiciary's power to declare an unconstitutional act of any body of government null and void, but such declaration must be made after the committal, not before such was committed. The constitution grants both organs of government powers to protect the rights of individuals. The missing link in the argument is granting more powers to the legislature, thereby defiling the separation of power and constitutionalism.

There exists a broad division among scholars on the right of the judiciary to exercise judicial review power. There are two broad-spectrum identified among scholars. First, judicial review is necessary to protect constitutional democracy and prevent tyranny of non-judicial arms of government. As such, any attempt to politicize the exercise of judicial review under any guise to avoid dabbling in political questions is considered detrimental to the development of constitutional democracy. On the other hand, the exercise of judicial review by the judiciary is an attempt to usurp the powers of the other political organs of government. The political elite has undoubtedly used this legal instrument against themselves in the power struggle. Unfortunately, most works reviewed failed to explain how the power of judicial review was a creation of the political elite. It will be a contradictory and unconstitutional call to remove such power.

⁵⁶ Richard Fallon, "The Core of An Uneasy Case For Judicial Review" (2008) 121:7 Harvard Law Review 1693–1736.

⁵⁷ *Ibid.*

Constitutionalism is the application of the constitution stating the limitation of the government and the governed. Constitutionalism is a general principle that maintains that the exercise of political power is bounded by rules that lay down the procedure and determine the validity of legislative and executive action. The rules are intended to curb arbitrary use of political power in a given political system. Constitutionalism is strict adherence to the principles and provisions of the constitution. The principle sets the limit of the ruler and the ruled.

According to Daniel Bell, "constitutionalism is the common respect for the framework of law, and the acceptance of outcomes under due process."⁵⁸ Nwabueze has lamented that "the problem with man and government has always been how to limit the arbitrariness of political power which man can manipulate in a government."⁵⁹ He continues, "it is the limiting of the arbitrariness of political power that is expressed in the concept of constitutionalism."⁶⁰ K.C.Wheare observes that constitutionalism is "government according to rule ... limited by the terms of the constitution" and not by "the desires and capacities of those who exercise power."⁶¹ The lack of exercise of the power of judicial review by the courts lives the society to dictatorship and authoritarianism.

Hirschl defines judicialization of politics as ever-accelerating reliance on courts and judicial means for addressing core moral predicaments, public policy questions, and political controversies.⁶² In recent years, the judicialization of politics has expanded beyond rights issues or transnational cooperation to encompass what is termed "mega-politics" – matters of outright and utmost political significance that often define and divide whole polities. It addresses fundamental constitutional issues with the

⁵⁸ See Bayo Okunade, "Human Rights and Nigeria's Constitutionalism: Real and Supposed" in SC Tyoden, ed, *Const Natl Dev Niger* (Ibadan: The Nigerian Political Science Association, 1990).

⁵⁹ Ben O Nwabueze, *Constitutionalism in the Emergent State* (Rutherford Farleigh Dickinson University Press, 1973).

⁶⁰ *Ibid* at 1-3.

⁶¹ Kenneth C Wheare, *Modern Constitutionalism*, 2d ed (Oxford: Oxford University Press, 1978) at 137.

⁶² Ran Hirschl, *supra* note 4.

concomitant assumption that courts, not politicians or the public, should resolve them. Aharon Barak, the former proactive president of the Supreme Court of Israel, once said that "nothing falls beyond the purview of judicial review; the world is filled with law; anything and everything is justiciable."⁶³

Many public policy matters remain beyond the purview of the courts. There has been growing legislative deference to the judiciary, an increasing (and often welcomed) intrusion of the judiciary into the prerogatives of legislatures and executives, and a corresponding acceleration of the judicialization of political agendas. These developments have helped to bring about the growing reliance on adjudicative means for clarifying and settling fundamental moral controversies and highly continuous political questions and have transformed national high courts into major political decision-making bodies.⁶⁴

IV. THE APPLICABILITY OF THE POLITICAL QUESTION DOCTRINE IN NIGERIA'S COURTS

Nigeria gained independence in 1960 from the British under a parliamentary system of government. The practice of a parliamentary system of government on the attainment of independence and under a common law legal system did not provide for judicial review of the constitutionality of the action of the other arms of government. The courts exercised the judicial authority, which ranged in hierarchical order, with the Supreme Court at the apex of the hierarchy, the Court of Appeal at the next, the States High Court, the Magistrate Court, and the Customary Court. The High Court is the court of first instant constitutional matters. The appeal then goes to the Supreme Court. The Supreme Court deals with the issues of interpretation of the constitution. The political question could be raised at the High Court. However, in this discourse, an attempt is made to extrapolate some cases in which political question doctrine came to the fore. However, from the jurisprudential analysis of the doctrine in

⁶³ *Ibid* at 95.

⁶⁴ *Ibid*.

Nigeria, we can look at it from three main areas, except for the first republic, where the cases examined here were on the census and unlawful removal from office. In the former, the court approached it from a political question angle, while in the latter, it adjudicated the constitutionality of the action of the two arms of government.

A. The First Republic (1960 -1966)

At this period, the courts considered in *Attorney General Eastern Nigeria v. Attorney General of the Federation*,⁶⁵ the controversy over the census exercise was the first acid test of unconsciously applying the political question doctrine in the Nigerian court. It is unconsciously because the Independence and Republican Constitutions of 1960 and 1963 did not provide for judicial review. The census exercise revealed how the court decided on a very sensitive issue of the census, which is political. Its political dimension is one of the conditions for revenue sharing formula and delimitation of the constituency for federal elections. The more populated an area is, the more constituencies translate to more seats in the House of Representatives. The controversy surrounding this exercise was that the court held that determining the margin of error in census figures was a political question. In invoking the court's doctrine, it did not provide expressly any guidance about the scope of the doctrine. First and foremost, the British inherited legal system did not provide for review of the acts of other arms of government. However, the court felt duty-bound to adjudicate on such a matter to bring constitutional order to Nigeria's new nation.

However, the court in 1962, in a controversial removal of the Premier of Western Region, Chief Samuel Akintola⁶⁶ by the governor of the region and appointed Adegbenro as the new Premier. Akintola contended that there was no previous resolution by the Western Regional House of Assembly. It was a case of procedure that was not followed. The matter went to the High Court of Western Nigeria to Supreme Court. It was a

⁶⁵ (1964) 1 ANLR 224 *supra* note 13.

⁶⁶ *Adegbenro v. Akintola & Anor* (1962) WNLR 205.

question of the constitutionality of the action, and the Supreme Court decided the matter in favor of Akintola. The Supreme Court demonstrated good courage by ruling against the incumbent (the governor). The Supreme Court could have declined to hear the case since it was a political matter. However, it upheld its constitutional mandate to interpret the action of the executive and legislative arms of government.

B. The Second Republic (1979–1983)

The Second Republic was a different scenario as some legal and political commentators pointed out that the development of the political question doctrine was primarily influenced by the constitutional changes in 1979, which brought about the American presidential system of government founded on the principle of separation of powers.⁶⁷ The structure of the court changed with the creation of the Sharia Court of Appeal of the State, which deals with issues of the Islamic religion as it affects the Muslims, the Federal High Court, and the Customary Court of the State. The Supreme Court remained the highest court of appeal on constitutional matters. Political question issues can be raised at the High Court, while the appeal could go to the Court of Appeal and then to the Supreme Court. By looking at the practice of a political question doctrine in some relevant cases, the judiciary found solace by not adjudicating political matters based on the prudential theory.

For instance, in *Balarabe Musa v. Auta Hamza*, the Court of Appeal ruled that the impeachment of the governor of Kaduna State, Balarabe Musa, was a non-justiciable political question.⁶⁸ The governor challenged the procedure for his impeachment by the Kaduna House of Assembly based on Section 170 of the 1979 Constitution of the Federal Republic of Nigeria.⁶⁹ The house relied on Section 170 of the constitution for the impeachment, while the Governor, Balarabe Musa, contention was that the

⁶⁷ Wahab Egbewole & Olugbenga Olatunji, *supra* note 17 at 10.

⁶⁸ (1982) *Balarabe Musa v. Auta Hamza*.

⁶⁹ Section 170 of the 1979 Constitution provides for the impeachment of the Governor, Deputy Governor of a State.

house failed to comply with Sections 170(2) and (5) of the constitution.⁷⁰ The court interpreted Section 170(10) of the constitution as a limitation on its powers to review any proceedings of the House or the Committee.⁷¹

The implication is that the court did not look critically at the governor's impeachment. When the court argued that the judicial intervention in the impeachment process was inappropriate because the matter was a purely political question. The court had closed its eyes to the fact that it has fundamental duty to protect the right of the individual who has come to seek redress for political injustice by unlawfully and purportedly removing an elected governor from office. Democracy stands on a tripod stand – justice, fairness, and equity. The court applied self-restrained because it believed it was a political matter. Justice Ademola said:

....For the court to enter into the political thicket as the invitation made to it implies, in my view, be asking its gates and its walls to be painted with mud; and the throne of justice from where its judgments are delivered polished with mire.⁷²

The court's avoidance of determining the matter on political grounds amounted to applying a political question. Nwauche argues that the *Balarabe Musa v. Auta Hamza* case re-established the principles of separation of powers and political dispute to be resolved by the political branches without subjecting such to judicial review.⁷³

⁷⁰ Section 170(2) provides that whenever a notice of any allegation in writing is signed by not less than one-third of the members of the House of Assembly; Section 170(5) of the constitution states that " within seven days of the passing of a motion under the provisions the Speaker of the House of Assembly shall cause the allegation to be investigated by a Committee of 7 persons who in his opinion are of high integrity, not being members of any political public service, legislative house or political party, and who shall have been nominated and, with approval of the House of Assembly, appointed by the Speaker of the House to conduct the investigation.

⁷¹ (1979) Constitution, Section 170(10) states, "no proceedings or determination of the Committee or the House Assembly or any matter relating to it shall be entertained or questioned in any court.

⁷² See Justice Ademola (J.C.A) *Balarabe Musa v. Auta Hamza* 247.

⁷³ Enyim Nwauche, (2007) 33; Wahab Egbewole and Olugbemga Olatunji (2012) 10-21.

The classical theory of political question affects Nigeria's court's judicial avoidance doctrine. The constitution's deference to the doctrine of separation of powers implies that political branches better resolve political matters without the court interfering or determining such matters. From the prudential point of view, the application of the political question doctrine in Nigeria is predicated on the fact that the court in *Balarabe Musa and Auta Hamza* has established that certain questions are appropriate for judicial review. The court uses appropriate and inappropriate subjects to conjuncture because it can choose any case that it feels has interest and one it does not have an interest in.

The second critical area the court applied the political question was the determination of a matter of political party primary. *Onuoha v. Okafor* was a clear case of political questions in Nigeria.⁷⁴ The basis of the court decision was that it was the right of a political party to choose the candidate for elective offices and not the court and that the court cannot run or manage political parties and politicians because, in doing so, the court would be deciding a political question which it is not fitted to do.⁷⁵ The Supreme Court reasoned that the choice of candidates for election is a constitutional right of the political party based on the party's constitution. The issue of whether a court can justifiably interfere under any guise with the exercise of this function is bestowed on political parties.

Justice Obaseki, who delivered the lead judgment, opined that there were no objective legal criteria for judicial intervention in which candidate a political party ought to choose. The court, therefore, is constrained to exercise any judicial power in the matter. In other words, the matter was

⁷⁴ *Onuoha v. Okafor*, the party nominated Onuoha for a senatorial district seat in Imo State under the National People's Party. However, Okafor was not pleased with the selection of Onuoha by the party's Selection Committee, and he complained to the State Working Committee. The candidacy of Onuoha was nullified, and Okafor was chosen. Onuoha instituted an action in the High Court which ruled in his favor. The ruling was appealed by Okafor on the ground that a court of law ought not to entertain an action to determine whom a political party should sponsor for an elective office. The matter ended up in the Supreme Court.

⁷⁵ *Ibid.*

considered non-justiciable.⁷⁶ It is understandable that Nigeria just adopted the American model of a presidential system of government from which the doctrine of political question emerged. Ironically, Section 236 of the 1979 Constitution states that the court is to determine and hear any civil proceedings in which the existence or extent of a legal right, power, duty, liability, intent, obligation, or claim is in use.⁷⁷

The political party's primary election controversy is a civil matter that bothers on interpreting injustice. The court's abdication of this legal responsibility created a huge legal lacuna. The court merely avoided the determination on the matter for political reasons. Judges are human beings with political interests, and when they sit in the temple of justice, their behavior as political animals borrowing Aristotle's political lamentation, manifest. The court failed to recognize that the credibility of any democratic electoral process depends on how political parties conduct their primaries.

Similarly, the issue of internal affairs of political parties, which the court stands not to interfere with, was demonstrated in *Aper Aku*, the Governor of Benue State, who sought the party's nomination for a second term in office. Mr. Akure challenged him on the ground that Mr. Aku had committed a financial infraction by misappropriation of the funds of the state in his first term in office as governor. The High Court of Benue State declared that the Akure had no *locus standi* to institute an action, and the governor was immune from criminal proceedings. Again, the court maintained, just like other cases involving the action of a political party, that it was inappropriate for the court to determine how the political party manages its internal affairs because such political matters are non-justiciable. The court did not consider the persuasive argument before it, which had to do with a constitutional infraction, maladministration, and

⁷⁶ The non-justiciable matter is presented to a court when the parties seek court adjudication of only political questions. The decision on questions of a political nature is exclusively for the political party and other branches of government to decide.

⁷⁷ Section 236 of the Constitution defined the jurisdictional powers of the court regarding civil proceedings.

criminality. The court dismissed it as fallacious because the plaintiff did not sue Mr. Aper Aku but the party.⁷⁸

Ironically, the court claimed that it was inappropriate for the court to determine the matter because it was political; it argued that the plaintiff did not sue Mr. Aper Aku. The court advised the plaintiff that since the party's constitution bound the party and its members to keep litigation out of the law courts, the option left to the plaintiff was to accept the nomination of Aper Aku or quit the party. Political parties are always circumspect that members would go to court for specific actions taken, that is, more reasons why they should conduct their affairs by the provisions of the party constitution and the law of the land, i.e., the constitution. The members of political parties should not be at the mercy of the party stalwarts or officials who always want to protect their interest by hiding under the party's constitution to perpetuate injustice while the court, which is the last hope of the helpless members, hide under non-involvement on political controversies.

Another area of applying the political question doctrine in the Second Republic was the interpretation of electoral law. In a celebrated case of Chief *Obafemi Awolowo v. Alhaji Sheu Shagari*, which was the issue of interpretation of the meaning of two-thirds of nineteen States of the Federation by the Supreme Court.⁷⁹ The court's jurisdiction was invoked through an appeal from the decision of an electoral tribunal and not through the normal court. The Supreme Court could not otherwise invoke the doctrine of the political question because it bothers with the interpretation of the statute. It was a political matter. It was the first case in Nigeria's electoral history of the court determining the election's outcome. One would have expected the Supreme Court, in the usual way of court abstaining from political controversies decide to do the same. The apex court affirmed the election of Alhaji Shargari as the duly elected president of Nigeria. The Supreme Court could not have ruled otherwise because of the sensitive nature of the case. The Supreme court could not have

⁷⁸ Ikenna Nwosu, *supra* note 10 at 51.

⁷⁹ (1979) 6-9 S.C.5.

overturned the election for political stability and peace and the public interest.

C. The Third and Fourth Republics

The Third Republic was aborted with the annulment of the presidential election popularly called the 'June 12 Presidential' election by the military administration led by General Ibrahim Babangida. The transition to a fully democratic government was inconclusive even though the National Assembly, State Houses of Assembly, and Governors were inaugurated in 1992. The court's role in this regard can be analyzed based on the event that culminated in the annulment of the election. The application of the doctrine of political question during this was minimal except towards the termination of the Third Republic. Political party disputes were hardly brought to court because of the Second Republic's experience of applying the political question by the courts. In the military jurisprudence, the decree was omnibus law that could not be challenged in a court of law. The decrees contained ouster clauses likened to the doctrine of political question. The provisions of the Federal Military Government (Supremacy and Enforcement Powers) Decree 1984 are obvious on the issue of jurisdiction of the court to entertain election matters.

In the Fourth Republic, the political question doctrine was not applied as the court entertained all political matters brought to it for adjudication. The impeachment saga that characterized the current Fourth Republic. There were three significant cases – Anambra, Plateau, and Oyo States where the State House of Assembly removed the governors. The governors were Peter Obi (Anambra), Joshua Dariye (Plateau), and Rasheed Ladioja (Oyo). The governors challenged the constitutionality of their removal by the state legislative house in court. The court interpreted the lawmakers' action as unconstitutional, reversed their removal, and reinstated them to office. The basis for the reversal of the impeachment of these governors was that the legislature did not follow due process. In other words, the rules set in the constitution for removing governors or deputy governors were not followed. What took place at various impeachments was a personal

vendetta. The three cases mentioned here showed how the legislature abused its power of impeachment.⁸⁰ This is why the court should not abstain from adjudicating such a matter. However, the court was expected to abstain from intervening in the matter of proceedings of the house based on Section 180(10) of the 1999 Constitution.

The Fourth Republic witnessed cases of political party primaries irregularities and substitution of candidates after the exercise leading to a barrage of litigation challenging the constitutionality of the political party activities. First was the case of PDP substitution of Rotimi Amaechi's name with Celestine Omehia after Amaechi's name had been submitted to the electoral body.⁸¹ The circumstance by which the court has decided to dabble into the province of politics without applying the doctrine of political question shows the judiciary's politicization level.

There is a replication of active judicial intervention in political matters, such as President Obasanjo against his Vice President, Atiku Abubakar.⁸² INEC excluded Atiku Abubakar in the 2007 presidential election. Abubakar and Action Congress (AC) challenged his exclusion, and the court ruled that his exclusion was illegal, and the case went to the Supreme Court. The Supreme Court unanimously declared that INEC had no power to exclude or disqualify any candidate. Either by design or default, the judiciary has been ceded political power to decide the outcome of an election and not the electorates. Whether the judiciary has judiciously exercised this power is subject to debate. The various decisions taken by the Supreme Court on electoral matters can only be said that it has opened up the political space hitherto constricted by an incumbent political leader, as demonstrated in Obasanjo and Atiku Abubakar case.

⁸⁰ See Section 180(2) of the 1999 Nigeria Constitution, which stipulates the procedure to be followed by the legislative house for impeachment. The number of members required to carry out an impeachment. In these three cases, the number of members carried was less than the constitution stipulated. See Omololu Fagbadebo & Nirmala Dorasamy, *supra* note 54.

⁸¹ See (2008) I.S.C Pt.36.

⁸² The case of President Obasanjo against his Vice President foregrounded AC v. INEC. The case was only one of the series instituted by Abubakar and in conjunction with others, including the Action Congress, which was the political party he joined to fulfill his ambition of contesting the presidential position.

V. JUDICIAL ATTITUDES TO POLITICAL CONTROVERSIES IN NIGERIA

In exercising judicial power, the courts shape government policies and, by extension, get involved in politics. In other words, in the policy-making role of the judiciary, it gets itself involved in overt political controversies. The courts are apt and swift to act in many political controversies. The Supreme Court sometimes brave public uproar in defense of constitutional principles and asserts itself against the executive and legislative branches. The only restriction is that courts do not initiate actions and would remain silent if issues of interpretation of the constitution or any law are not brought to them. The court behaves like a medical doctor who does not look for patience to treat but rather a patient looking for the doctor.

We can understand the attitudes of the Nigerian judiciary to political controversies from the permissive and restrictive perspectives. Looking at some cases in the Second Republic, the courts adopted a restrictive approach in dealing with political matters. Where the courts assumed jurisdiction on matters, they denied the application of "political question." The attitudes of the court in the Second and Fourth Republics as regards the application of the political question doctrine and the justiciability principle are somewhat antithetical.

The legal basis for exercising judicial powers in Nigeria finds its source under the Constitution of the Federal Republic of Nigeria, 1999 Constitution (as amended) Section 6 results in superior courts of record and empowers them to exercise judicial authority. In Nigeria, there are two principal categories of courts - superior courts of the record made up of the Supreme Court, the Court of Appeal, the Federal High Court, the High Court of the State, the Shari Court of Appeal of the State, the Customary Court of Appeal of the State and the National Industrial Court, and other courts of lower in the hierarchy which are not courts of record (inferior courts) such as Magistrate Courts, District Courts, Area Courts, Customary Courts, Juvenile Courts and Courts Martial or Military Courts. The Supreme Court of Nigeria is the court of appellate jurisdiction from the Court of Appeal. The Supreme Court has exclusive jurisdiction to hear

and determine appeals from the Court of Appeal. It plays a significant role in constitutional matters and generally fashions out the judicial policies affecting the environment.

The 1979 Constitution defines the scope of the court's jurisdiction in matters before it. Section 6(6) of that Constitution provides that the judicial powers vested by the above Section 6(a) and (b).⁸³ The courts were favorably disposed to give effect to the doctrine of political question contrary to the principle of justiciability and the rule of law. In *Alegbe v. Oloye*, bothered on the Speaker of the House of Assembly declared the seat of a member vacant on the ground that the member did not sit for 94 times required. The court regarded the matter as internal proceedings of the house and therefore declined to hear it based on the political question. In *AG, Bendel v. AGF*,⁸⁴ the Supreme Court acted in deference to the principle of separation of powers and the independence of the legislature in the exercise of its legislative powers. Therefore, it refrains from pronouncing or determining the validity of the internal proceedings of the legislature or the mode of exercising its legislative powers. However, a court should ensure that the legislature exercises its legislative functions by the constitution. Sections 52, 54, 55 & 58 of the 1979 Constitution clearly state how the National Assembly should conduct its internal affairs to exercise its legislative powers. Egbewole and Olatunji are of the view that the court should always be duty-bound to defend the rule of law.⁸⁵ As they put it, "The court has 'moral cost' to discharge its constitutional responsibility rather than give effect to the 'rule of politics' at the expense of the 'rule of law.'"⁸⁶

The court is always willing to intervene in a matter that the constitution prescribes, no matter that bothers internal proceedings of the legislature. It is also cautious and hesitant to intervene. For instance, when removing an elected legislature official follows constitutionally laid down procedure, the court would see it as a matter that has followed constitutional provisions

⁸³ See the details of the provisions, Section 6(6)a and b of the 1979 Constitution.

⁸⁴ (1982) 10 SC 1.

⁸⁵ Wahab Egbewole & Olugbenga Olatunji, *supra* note 1.

⁸⁶ *Ibid.*

because the majority voted for the removal.⁸⁷ There were situations where the court declined jurisdiction in what it deemed purely internal affairs of the legislative body.⁸⁸

There was no case of nullification of election by the court in the Second Republic as it was in the Fourth Republic. The adoption of this approach by the courts in Nigeria often leads to the affirmation of the "political question" doctrine as it is applied to narrow the scope of the justiciability principle rather than affirming non-justiciability. The adoption also means that the court would interpret its judicial review power narrowly and restrictively to decline jurisdiction where it ought not.⁸⁹

The Supreme Court's interpretation of judicial review power restrictively in Onuoha's case was seen as wrong in the law's eyes. The Supreme Court in 'robes found itself on tight ropes.' It was illogical for the Supreme Court to assume that intervening meant propelling the court into the area of jurisdiction to run or manage political parties and politicians.⁹⁰ Critics found the court denial to determine which of the two candidates is better and more suitable to stand as a political party's candidate at an election was a misconception of the question before. One cannot refute this position because the court's constitutional responsibility is to determine cases before it and not choose the candidate with the legal right to fly the party's flag. The court was expected to examine the relevant laws – the political party's constitution but not necessarily help a political party win an election. The court is to protect the right of individuals, including the right to ensure that members of a political party comply with the provisions of the party's constitution and other relevant laws. The court's justification of denial in determining the case before it was because of the impossibility of enforcement that will amount to finding an excuse for its failure to live up to its constitutional responsibility. In similar cases in the Second Republic, the courts were favorably disposed to give effect to the doctrine of political

⁸⁷ See (1993) 7 NWLR(pt. 308) 717.

⁸⁸ See the case of the removal of Enugu State Speaker of House of Assembly.

⁸⁹ Wahab Egbewole & Olugbenga Olatunji, *supra* note 17 at 15.

⁹⁰ Wahab Egbewole & Olugbenga Olatunji, *supra* note 17 at 17.

question contrary to the principle of justiciability and the rule of law.⁹¹ For instance, in *Balarabe Musa v. Auta Hazmzat*, the jurisdiction was ousted because it was a political issue that had to do with impeachment.⁹²

The procedure for impeachment was not followed. The interpretation given to the constitution was not in conformity with the fundamental principles of the Nigerian Constitution. Arguably, impeachment is a political instrument but has legal consequences. The legislative body must follow the procedure for impeachment. The inherent problem associated with the observance of the political question was that it contributed to the demise of the Second Republic because of irregular impeachment proceedings and the attitude of the courts. The court's avoidance of judicial review of the legislature's action was an invitation to legislative lawlessness and recklessness in exercising its power of impeachment. In Nigeria, impeachment has become an instrument to settle executive-legislative power tussles.

Judges in the Second Republic adopted a restrictive approach to abdicate their legal responsibility of determining the constitutionality of acts of the other branches of the government. The courts' attitude in exercising judicial review power shows how the judiciary appears to be politicized—not adjudicating on the crucial issue of impeachment and reviewing the constitutionality of an action amount to the negligence of duty. The principle of separation of powers should be respected but to the extent where the fundamental human rights of an individual are affected. The dictatorship of one arm of government would be entrenched in a democracy by the restrictive approach of the court.

The attitude of the courts to the doctrine of political question and the justiciability principle in the Fourth Republic can be appraised. The courts in this new democratic dispensation can be best described as 'judicial activism' as can be seen from the judgment and cases determined by them.

⁹¹ See *Rimi & Musa v. PRP*, where the court held that the issue was non-justiciable since the party's constitution, the Chairman's interpretation of the constitution was final and binding. The non-justiciable matter falls under the realm of political question.

⁹² See *Balarabe Musa v. Auta Hazmzat*.

The doctrine of political question came under scrutiny in *Abaribe v. Speaker, Abia State House of Assembly*,⁹³ which was a case of impeachment of the deputy governor of Abia State. The court was called upon to interpret Section 188 of the 1999 Constitution (as amended). The court approach was restrictive as it declined jurisdiction because Section 188(10) does not allow the court to determine any matter relating to impeachment on the grounds of proceedings.⁹⁴ By this provision, the court declined jurisdiction because impeachment is a political matter. The court's decision was based on the doctrine of the ouster clause, which appears to give a semblance of a military decree. Politically, the ouster clause is antithetical to fundamental rights in a democracy which also negates Section 6(6) of the constitution, which vested power on the judicial to determine any matter. The court can only give effect to any law that includes the ouster clause; therefore, it does not preclude it from entertaining the impeachment case. The court is only playing into the hands of desperate politicians by exercising its power of judicial review in a discretionary manner.

In another case regarding the substitution of a candidate by a political party (PDP), in *Ugwu v. Ararume*, the court adopted a permissive approach; the party substituted the name of Ararume with that of Ugwu.⁹⁵ The Supreme Court held that the "right to court is a constitutional right guaranteed in the constitution. No law, including a political party, can subtract from, derogate, or deny any person of it. Such a law will be declared nullified by Section 1(3) of the Constitution."⁹⁶

In the case of *Amaechi v. Omehia*, as a result of this, Amaechi contested the party primary, in which he emerged as the candidate for the Governorship election. His name was submitted to the electoral body (Independent National Electoral Commission, INEC). The party decided at the late hour to substitute Amaechi's name with Omehia because the former was alleged to have been corruptly enriched. Omehia won the

⁹³ (2000) FWLR (pt.9)1558.

⁹⁴ (1999) Federal Republic of Nigeria Constitution, Section 188(10).

⁹⁵ (2007)6 SC (pt.1) 88.

⁹⁶ *Ibid* at 135.

election, and Amaechi went to court. The court subsequently ruled in favor of Amaechi on the argument that political parties contest elections and voters voted for political parties, not candidates per se.

This case was more political than legal. The decision of the party to substitute Amaechi's name with that of Omehia was based on the party's interest. The mere allegation of corruption without any court trying him shows clearly the political maneuvering by some party members to choose a preferred candidate that will be loyal to them. The courts in Nigeria have always been dragged into political controversies by politicians. The courts have been used to judicialize politics at the expense of constitutionalism. The court argued that the case was purely an election dispute between two members of a political party and not an election petition and, therefore, could not order a new election.⁹⁷ The court tried to avoid being caught in the trap of politicians by succumbing to the pressure for a fresh election in order not to set a bad precedent. Amaechi's case was about the invalid substitution of candidates by political parties under the 2006 Electoral Act.

The 2019 Governorship in Zamfara State was contested by the two major and dominant political parties –The All Progressives Congress (APC) and the People's Democratic Party (PDP). At the end of the election, APC was declared the winner, having scored the highest number of votes cast as required by the Electoral Act, 2010. The APC had an internal crisis in Zamfara State and, to that extent, had two factions that conducted primary elections. One party faction produced the candidate that contested in that election and eventually won. The faction of APC that produced the gubernatorial candidate also produced the candidates for National Assembly and State House of Assembly, respectively. Ironically, the two camps pursued their case to the Supreme Court.⁹⁸ What is instructive and

⁹⁷ *Ibid.*

⁹⁸ Two factions in APC conducted primarily for the 2019 general election in Zamfara State. The Yari faction of the party approached the State High Court 111 to seek an order instructing INEC (Electoral body) and the Party National Headquarters to accept the list of candidates produced by the Yari faction in the primary. Kabiru Garba Mafara led the other camp of the party in the state. INEC had communicated to the APC National Headquarters that the party failed to conduct a valid primary within the stipulated time in the Electoral Act 2010 (as amended). Dissatisfied with

very ridiculous was the contradictory judgment given by two different courts of coordinated jurisdictions on the same day: the State High Court 111 in Sokoto and the Federal High Court in Abuja. The State High Court in Zamfara agreed with the submission of Yari that the primary election conducted by APC Zamfara was valid and ordered INEC to include the candidates of APC in the elections. The Federal High Court, Abuja, dismissing the application of APC against INEC, held *inter alia*: "it is evident from a dispassionate perusal of facts contained in the affidavit of the parties, documents exhibited, submission of the Counsel, oral and documentary, and the law, that, at the close of nomination for 2019 general election, by the INEC time table as in exhibit INEC1, the APC has no candidate for the election, having failed to conduct primaries according to the Electoral Act and the Constitution. The court arrived at that decision based on the indiscipline exhibited by APC by not putting their house in order and not conducting credible primaries. It further shows the lack of internal democracy in the party and obedience to due process among political parties and their handlers which ran contrary to establishing a democratic order.

However, INEC bowed to the pressure from politicians to include the names of Yari's faction in the list of candidates for the election. It marked the beginning of intense legal-political squabble, as witnessed in the unprecedented ruling by different courts. On appeal by Sen. Kabiru Marafa at the Sokoto Division of the Court of Appeal, he sought the court to set aside the ruling of the Zamfara High Court. At the same time, the APC National Headquarters filed an appeal separately seeking the upholding of the ruling of the Zamfara High Court, which ordered INEC to include the names of APC candidates in the ballot boxes and papers.

the position of INEC, the APC National Headquarters filed a separate suit at the Federal High Court Abuja challenging the position of INEC. In another suit, APC challenged INEC for not accepting the consensus candidate the party presented for Zamfara State. In the suit, the APC claimed to have conducted primaries by consensus on the 7th October 2018, at City King Hotel, Gusau, Zamfara State.

The Sokoto Division of the Court of Appeal struck out the judgment of the Zamfara High Court on the ground that available evidence was not dully and diligently considered by the court. Unfortunately and regrettably, the judgment was appealed, and the Court of Appeal in Sokoto and Abuja ruled, nullifying the election of the APC candidate. However, the court did not specify what happened to the elected APC members whose nominations were affected, from the governor to the National Assembly and State House of Assembly. The Supreme Court was finally approached, nullified the votes for all the APC candidates, and ruled that the political parties that came second in the polls would be declared winners.⁹⁹

The attitude of the judiciary, as amply demonstrated in this case, was a big lesson to political parties. The Zamfara scenario became a precedent in the cases in Imo and the Bayelsa States, in which the Supreme Court insisted that it lacks the power to review its judgment once delivered. The judiciary can entertain any political dispute, either pre-election, election, or post-election matters, to interpret or protect the fundamental rights of individuals.

The Court of Appeal and the Supreme Court have demonstrated moral and political courage by addressing any form of injustice. It has further helped to deepen Nigeria's democracy as the judicial can be relied upon to right the wrong done to an individual. The Supreme Court has risen to the occasion on several instances in recent times on election matters and other political issues which ordinarily would have been absent or decided to claim non-justiciable. It has decided to enforce the legal and political rights of all persons regardless of whether doing so will amount to interfering with a political question or not. The Supreme Court could rule and nullify the election won by APC candidates in Zamfara for lack of compliance with the Electoral Act, signaling political parties to do the right thing.

⁹⁹ See Ade, *Punch Newspaper*, online: <<https://punchng.com/just-in-appeal-court-nullifies-zamafara-APC-primaries-for-gov-assembly-elections/>>; Evelyn Okakwu, "Why Supreme Court ruled against APC in Zamfara", *Prem Times* (24 May 2019), online: <<https://www.premiumtimesng.com/news/headlines/331517-why-supreme-court-ruled-against-apc-in-zamfara.html>>.

VI. IMPLICATIONS OF THE PRACTICE OF POLITICAL QUESTION FOR CONSTITUTIONALISM

The implications of the practice of political questions for constitutionalism are discussed. First, the constitution recognizes the co-equal powers of the three arms of the government; an all-powerful judiciary is a threat to constitutional democracy, just like an all-powerful executive or legislature is a threat to democracy. There is a need for checks and balances to guarantee constitutional democracy. With the practice of a political question doctrine, the court will not review the constitutionality of acts of the other branches of government. However, the principle of separation of powers, a feature of constitutionalism, presupposes that there are limitations on exercising the power of judicial review. The judicial attitude of treating some matters as political and others as not means that the judge is political in its approach to determining matters brought before it. The reciprocal character of institutional interactions among the three arms of government cannot be ignored or jettisoned in the altar of the practice of jurisprudence of political question or political avoidance or non-interference.

Second, there is an incontestable affinity between legality and equality in a democracy and constitutionalism. Constitutionalism is premised on the rule of law founded on the equality of every man before the law. The rule of law is negated if the court abdicates its responsibility to adjudicate a political matter. The mobilization of constitutional legal rights has important implications for both normative integrity and policy efficacy of liberal democracy.¹⁰⁰ Legality is an essential feature of constitutionalism and a thin version of liberal democracy. The court is expected to promote legal accountability not by treating political matters as a violation of the principle of separation of powers. In other words, legal accountability is about the protection against injustice and individual rights. Electoral accountability is deemed incomplete, unreliable, and self-destructive

¹⁰⁰ S A Scheingold, *The Path of the Law in Political Science: De-Centering Legality from Olden Times to the Day Before Yesterday* (2010) at 744.

without legal accountability.¹⁰¹ Electoral accountability is a necessary condition of democracy, which can be guaranteed through the judiciary.

Third, if the court does not adjudicate on political matters, men tend to behave arbitrarily and oppressively. As Madison has noted, since the government is to be administered by men and not by angels, a 'barrier to authoritarianism' becomes imperative.¹⁰² Constitutionalism has become a victim of intellectual attack due to the practice of political questions in our constitutional democracy and presidential system. The attitudes of the judiciary are much more important than legal guarantee, which constitutionalism entails. Parties' right to be heard in a dispute is integral to constitutionalism. For the court to deny any of the aggrieved parties seeking court's intervention to redress injustice has severe implications for constitutionalism. The court must determine the constitutionality of any governmental action or even any institution of the state.

Fourth, judicial review as part of constitutionalism is limited by the practice of political questions. The application of constitutionalism is a form of political restraints to the political question doctrine in the sense that it is an instrumentality through which the arbitrary expansion of government is limited.

The other side of the argument is that the court adjudication of electoral matters, especially election disputes, has invariably transferred the power vested on the electorates to the court. It has implications for democratic stability and constitutionalism. The independence of the judiciary is an essential ingredient for democratic stability.¹⁰³ It means that courts can decide cases fairly and impartially, relying on the facts of laws. It is not only when judges are elected to the bench that the judiciary is politicized but by dabbling into political controversies of deciding outcomes of elections, or entertaining impeachment cases.

The 1999 Constitution contains elaborate provisions that are sufficient to protect liberal democracy in Nigeria. The executive has breached the

¹⁰¹ *Ibid.*

¹⁰² Bayo Okunade, *supra* note 54 at 52.

¹⁰³ Ferdinand O Ottoh, *supra* note 2 at 101.

constitution during this Fourth Republic and the judiciary's role therein. It may not be an appropriate place to discuss them. The judiciary is expected to ensure that power given to the two branches of government is used for the good of society. The constitution, therefore, requires the judiciary to review the action or inaction of the two arms of government. The "Constitution intends that the judicial determination of the issues raised before it should have a bearing on democratic values..."¹⁰⁴

The political and legal implication of the government produced through the court implies that government would begin to experience legitimacy problems. The people will see it as a 'stolen mandate' and 'stolen presidency' as in the case of Shagari in 1979. The judiciary, in many instances, arrogated to itself a specific role not available to it under the constitution, namely, the elective role. The constitution encourages judicial activism. However, activism must be guided by judicial creativity, promoting democratic values. It cannot be said to be the judiciary's impact in many of its decisions, either in promoting the doctrine of political question or constitutionalism. The government produced by the court's decision, like in the case of Umaru Musa Yaradua in 2007 as president, Hope Uzodinma as Governor of Imo State, 2020. lacked democratic legitimacy, and this lack of legitimacy produced problems at the level of governance. The people of Imo State describe him as 'Supreme Court Governor.' The Supreme Court did not excuse itself from adjudicating such matters because it has done that to protect the integrity and sanctity of the country's democracy and election.

The disputed 1983 gubernatorial election resulted in Anambra, Benue, and the Plateau States, among others. The court's decisions in each of these cases only helped expose the democratic processes, particularly the electoral process, to abuse by incumbents. The judiciary, in many instances illustrated in this paper, did not operate to enhance democracy as expected. Section 267 of the 1979 Constitution, under which the court conveniently

¹⁰⁴ I A Ayua, *The Judiciary in the Second Republic* (Zaria: Ahmadu Bello University, 1983); Ejembi Anefu Unobe, "The Rule of Law and Democracy in Nigeria" in SG Tyoden, ed, *Const Natl Dev Niger* (Ibadan: The Nigerian Political Science Association, 1990).

took refuge, aims to secure an order for the political system. This interpretation seemed to inform the court's decision.¹⁰⁵ Nevertheless, in a democratic system, a court order cannot be isolated from justice. In this situation, interpretations of Section 267 requires creativity which the court decision in question lack.

When a court simply, in a political matter, rules that the case was not ripe for hearing, whatever that means is disturbing and poses a danger to constitutionalism and democratic order. In a situation where the case is unripe for hearing, especially in an election matter, the incumbent who has been sworn in and later challenged in the court while still holding and wielding power; power he may have acquired through ways other than democratic ones are all issues that undermine democratic stability and consolidation.

The implication of the judiciary deciding the outcome of an election, or avoidance of political matters, not reviewing the action of two arms of government, is that the judiciary must resist any attempt to convert it into an autocratic referee preventing the struggle for power between political interests from being realistically resolved. It must see itself as constituted to modify forces of political conflicts, thereby making itself available as an instrument of manipulation by politicians and paving the way for constitutional breakdown.

It is politically expedient for the judiciary to be involved in political controversies to bring justice, but at the same time province of politics should be outside the domain of judicial determination. According to Justice Frankfurter of the United States: "to sustain public confidence in the judiciary, it must be nourished by the court's complete detachment from entanglements."¹⁰⁶ Similarly, Justice Ademola of the Court of Appeal (as he then was) said that "the court to enter into the political ticket as allowing its gates and walls painted with mud."¹⁰⁷

¹⁰⁵ (1979) Federal Republic of Nigeria Constitution, Section 267.

¹⁰⁶ A S Akpotor, *Politics and Law: African Perspectives* (Benin City: Godson Int'L Press, 2001).

¹⁰⁷ See Constitutional Law Reports 3 (1982) 247.

VII. CONCLUSION

Protecting the constitution through adherence to constitutionalism is essential to safeguard against the court's abuse of the political question doctrine. Social and political order breakdown would begin with legality breaches and constitutionalism, whereas a threat to democracy would arise with frequent abuse of judicial process and power. While the court is responsible for ensuring legality, in which it is suggested to protect democracy by actively reviewing other branches of government actions, it is not a question of combining the administration of justice with political administration. On the other hand, over-politicizing the judiciary and judicializing politics is counter-productive to the country's democratic journey. By referring to the popular quote, "power corrupts absolute power corrupts absolutely," there is the need for power to be used to check power. The court cannot hide under the issue of ripeness or being impolitic to abdicate its responsibility of judicial review of the action of the other organs of government. In contrast, the political organs will continue to exercise the power of scrutinizing or checking the judicial powers through government agencies responsible for persecuting corruption.

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COMPETING INTEREST

The author declared that he has no competing interests.

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