

JUDICIAL ACTIVISM AND INTERVENTION IN THE DOCTRINE OF POLITICAL
QUESTIONS IN NIGERIA: AN ANALYTICAL EXPOSITION

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ABSTRACT

Judicial activism is today one of the most misused constitutional terms. Nigeria practices constitutional democracy with emphasis on constitutionalism. This comes with it to high rates of political activities with misuse of political powers granted in the Constitution by the political actors. Naturally, the court is called upon to wear its active posture and interpret the Constitution as it affects the political class. However, each decision of the courts interpreting the constitution against the political class is met with cries of “judicial activism” from one side of the political spectrum or the other. The other cry seems to be that the courts are encroaching into the domain of the political class thereby violating the doctrine of political questions which is essentially a function of separation of powers. The paper sees these terms as being misused and makes an analytical exposition of the term and judicial intervention into political questions in Nigeria. It contends that courts should ensure the limits of governmental action under the principles of a constitutional democracy, even in the delicate field of internal affairs of governmental institutions. For this purpose, various constitutional provisions and judicial decisions are examined.

Keywords: Judicial activism, Political Question Doctrine, Separation of Powers, constitutionalism

1. INTRODUCTION

Since thirteen years of inception of democracy in Nigeria¹, the country has seen a relentless expansion in the size of government and a sharp increase in the legislative, executive and political activities at every level. Despite this sudden increase of political activities, there seems to ideological stripes about the supposed growth in the role of judicial power (particularly the Supreme Court) within the paradigm of political question disputes. Those who opposed

¹ The new Nigerian democratic system of government commenced in 1999 when *General Abdulsalam Abubakar* handed over government to a democratically elected President, *Gen Olusegun Obasanjo*, and since then the country has experienced successful transitions from one government to the other in 2003, 2007 and 2011. The first, 160-1966 and second republic (1979 – 1983) were abruptly terminated by Military junta, so also was the annulment of June 12 elections acclaimed to most free in Nigeria

“judicial activism” on the political question doctrine complain that the Supreme Court too frequently dwells into the area of matters specifically left to be decided by the acts of elected representative thereby infringes on the prerogatives of the political institutions. However, it seems nearly any court decision that checks government power is met with cries of “judicial activism” from one side of the political spectrum or the other. Adversaries of judicial activism on the political question doctrine may criticise the Court for finding that the power of impeachment² or political party’s power of substitution³ is purely within the internal political affair of the legislature or a political party⁴. While many supporters of judicial activism on the political question doctrine may consider the court’s judgment which declared a legislative power of impeachment⁵ or substitution⁶ of a candidate nominated for an election by a political party unconstitutional as appropriate. Perhaps it is not surprising; politicians contribute heavily to the anti-activism drumbeat.⁷

It is apposite to state also that some decisions may even draw criticism from both sides, such as the Court’s holding in *Obi v INEC*⁸ that the tenure of a governor commences from the day he took an oath of office and protects the right of governor to keep and being in office longer than the fixed period of four years which ordinarily an election should take throughout Nigeria. It altered the election timetable. Amidst all the bluster, a simple question seems to have gone unasked: Is the court really encroaching into the powers of the political branches of government power and systematically thwarting their legitimate right to deal with political question? In this pursuit, has the courts carelessly tossed aside settled law as embodied in its past precedents? The paper therefore examines the meaning of the term judicial activism as a prelude to further discourse.

The main purpose of this paper is to examine the judicial activism’s argument used by defenders of the political question doctrine, that, even where a constitutional provision is not judicially enforceable, it is still susceptible to electoral enforcement. When political institutions, this argument runs, have no judicial remedy for a perceived constitutional violation because of the political question doctrine, they can still take to the polls and turn offending politicians out of office. Thus, this argument suggests, we should not be overly concerned that the political question doctrine deprives the courts of enforcement power over certain constitutional provisions, because the constitution and electoral process provides an appropriate substitute⁹.

² *Balarabe Musa v Auta Hamza*, (1982) 3 SCNLR Pg 229

³ *Dalhatu v Turaki*, (2003) 7 SC 1 or (2003) 15 NWLR (pt 843) 300 and *Onuoha v Okafor* (1983) SCNLR or 14 NSCC 494

⁴ Rushaw R. J., “The Presidential Election Disputes: The Political Question Doctrine and the Fourteenth Amendment” (2002) 29, *Florida State University Law Review* pp 603 - 623

⁵ *Inakoju v Adeleke* (2007) 2 MJSC 1 and *Dapainlong v Dariye* (2007) 8 MJSC 140

⁶ *Amaechi v INEC I MJSC 1*, *Uggwu v Ararume* (2007) 6 SC (pt i) 88 and *Uzodinma v Izunwa* (2011) 5 MJSC 1

⁷ For instance, between 2007-2010, some People Democratic Party (PDP) Governors were unseated by Election Petition Tribunals and decisions upheld by the Court of Appeal. The politicians declared this as the courts’ judicial activism which constitutes a grave threat to democracy and the rule of law. The election of Osunbo (PDP candidate) of Edo State was nullified and the mandate given to Adama Oshiomale (ACN candidate), The election of Segun Oni (PDP candidate) of Ekiti State was nullified and the mandate given to Kayode Fayemi (ACN candidate), The election of Olusegun Agagu (PDP Candidate) of Ondo State was nullified and the mandate given to Olusegu Mimiko (LP candidate), The election of Olagunsoye Oyinlola (PDP candidate) of Osun State was nullified and the mandate given to Rauph Aregbesola (ACN candidate) and the election of Chris Egige (PDP candidate) of Anambra State was nullified and the mandate given to Peter Obi (APGA candidate)

⁸ (2007) 9 MJSC 1

⁹ *ibid*

In this paper, we examine what the political question doctrine actually is and, in particular, contending that the term “political question doctrine” should not be employed when referring to cases in which a court merely exercise judicial activism to hold that a challenged governmental action is not subject to legal constraint¹⁰. The essence of the doctrine is that it may bar judicial enforcement of actual legal constraints on the executive of the legislative behaviour. The paper is divided into seven sections: introduction; Meaning of judicial activism and political questions together with their relationship; constitutional justification for judicial intervention in the political question with cases analysis of the court's position on political questions, suggestion and conclusion in other parts.

2. THE CONCEPT OF JUDICIAL ACTIVISM

The term judicial activism despites its popularity to amongst legal experts, judges, scholars and politicians has not until recently been given an appropriate definition of what the term should mean so that it will not be subject to abuse.¹¹ The effect of this has been a misconception about what the term is all about.¹² This therefore creates series of definitions about the concept. Although definitions are usually products of individual idiosyncrasies and it's often influenced by the individual perception or world view, a combination of various definitions gives a description of the concept. It is therefore apposite to consider a few definitions offered by various authors on the concept judicial activism.

Paul Mahoney in offering his own definition of the concept submits that judicial activism exists where the judges modified the law from what was previously stated to be the existing law which often leads to substituting their own decisions from that of the elected representatives of the people.¹³ This definition would consider invalid actions or decisions of the judges given for the purpose of seeking the justice in a particular case or to interpret the law in

¹⁰ Louis Henkin, “Is there a Political Question Doctrine?” (1976) 85 *Yale Law Journal*, p 597 at 622

¹¹ See for instance some of the work that are on judicial activism without really defining the term. Chad M. Old father, “Defining Judicial Inactivism: Models of Adjudication and the Duty to Decide” (2005) 94, *Geo. L.J.* 121, 122 (“[T]he primary danger associated with the judicial branch bears a name—'judicial activism'—that invokes imagery of courts doing more than they should.”); Cass R. Sunstein, *Radicals In Robes: Why Extreme Right-Wing Courts Are Wrong For America* (2005) (positing that the best measure of judicial activism may be how often courts strike down the actions of other branches of government); Richard A. Posner, “The Supreme Court, 2004 Term—Foreword: A Political Court” (2005) 119, *Harv. L. Rev.* 31, 54 (choosing to use the term “aggressive judge” rather than “judicial activism” because the latter term too often expresses mere political preference); Stephen F. Smith, “Activism as Restraint: Lessons from Criminal Procedure” (2002) 80, *Tex. L. Rev.* 1057, 1077 (“Very little attention has been paid to the meaning of the term activism. The term serves principally as the utmost judicial put-down, a polemical, if unenlightening, way of expressing strong opposition to a judicial decision or approach to judging.”); Ernest A. Young, “Judicial Activism and Conservative Politics” (2002) 73, *U. Colo. L. Rev.*, 1139, 1141 (“‘Activism’ is a helpful category in that it focuses attention on the judiciary's institutional role rather than the merits of particular decisions. Its usefulness depends, however, on the recognition that while we may plausibly describe different *aspects* of judicial acts as either ‘activist’ or ‘restrained,’ such terminology will rarely yield persuasive on-balance characterizations of decisions, much less of particular judges or courts.”).

¹² Keenan D. Kmiec, “The Origin and Current Meanings of “Judicial Activism,” (2004) 92, *Cal. L. Rev.*, 1441, 1442; see also Bradley C. Canon, “A Framework for the Analysis of Judicial Activism” in Stephen C. Halpem & Charles M. Lamb eds., *Supreme Court Activism And Restraint* 1982, 385, 386 (describing prevalent activism debates as “little more than a babel of loosely connected discussion”).

¹³ Paul Mahoney, “Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin” (1990) 11, *Hum. Rts. L.J.* 57, 58.

such a way as to conform to social realities thereby not permitting the correction of mistakes in the previous jurisprudence of law.¹⁴

A contrary view has also been offered that the judicial activism becomes the most valuable instrument when the legislative machinery comes to a halt in a case.¹⁵ Thus, where legislative machinery could not apply to a given situation, judicial activism appears to be the most valuable instrument. In other words, judges should not be scared of adjudicating a particular case because the law has not been enacted by the legislature to cover the situation. This therefore justifies the application of judicial creativity in the matter.

It must be stated that other approaches to the meaning of judicial activism has been largely focused on three main issues.¹⁶ One of the approaches focuses on the willingness of the judges to depart from the previous decisions thereby doing away with the doctrine of *stare decisis*. Another approach sees judicial activism as a departure from the original or ordinary meaning of the constitutional text.¹⁷ The last approach measures judicial activism in the light of the numbers of judicial decisions that struck down legislations.¹⁸ These series of approaches to the meaning of judicial activism thereby makes the term one of the most contested constitutional law doctrines.¹⁹ This may likely remain contested as it has also been seen as in three objectively verifiable ways: a 'justice's willingness to invalidate federal legislation, to invalidate state legislation, and to overturn precedent.'²⁰

The concept of judicial activism though has an older foundational meaning; it was in 1947 coined by Authur Schlesinger.²¹ Contrary to some ideas that the concept was initially clear at its inception that it is now unclear,²² the concept was originally blurred as Schlesinger did not explain certain things to clarify the concept.²³ He did not actually explain what constitutes activism and could not state whether activism was a bad or good concept.²⁴ This therefore accounts for why the meaning of the concept is generating much controversy amongst scholars but may not explain why attention is continuously given to this concept.²⁵

¹⁴Dragoljub Popovic, "Prevailing Judicial Activism over Self Restraint in the Jurisprudence of the European Court of Human Rights" (2009) vol. 42, *Creighton Law Review*, 361 at 363.

¹⁵ Thijmen Koopmans, "The Roots of Judicial Activism in Protecting Human Rights: The European Dimension, Studies In Honor Of Gérard J. Wiarda 326 (F Matscher & H. Petzold Eds., 1988).

¹⁶ Mark Tushnet, "The United States Of America" in Brice Dickson Ed., *Judicial Activism in Common Law Supreme Courts* 416-17 2007.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ The contested nature of the doctrine makes a judge to define it as what one does not like. See William P. Marshall, "Conservatives and the Seven Sins of Judicial Activism" (2002), 73, *U. Colo. L. Rev.* 1217 (citing Stephen O. Kline, "Judicial Independence: Rebuffing Congressional Attacks on the Third Branch" (1998) 89, *KY. L.J.* 679, 688. Randy Barnett has noted that the term as usually used is both pejorative and "generally empty." Randy E. Barnett, "Is the Rehnquist Court an "Activist" Court? The Commerce Clause Cases" (2002) 13, *U. Colo. L. Rev.* 1275, 1275 (Barnett offers his own definition of activism. He argues that "it is activist for courts to adopt doctrines that contradict the text of the Constitution either to uphold or nullify a law."

²⁰ Lori A. "Ringhand Judicial Activism: An Empirical Examination Of Voting Behavior On The Rehnquist Natural Court, *Constitutional Commentary*" (2007) vol. 24, 4 at 66.

²¹ Arthur M. Schlesinger Jr., *The Supreme Court: 1947*, Fortune, Jan. 1947, at 73.

²² Frank B. Cross & Stefanie A. Lindquist, "The Scientific Study of Judicial Activism". (2007) 91, *Minn. L. Rev.*, 1752, 1753-54 ("As calls to rein in the activist judiciary have entered popular discourse,... the term 'activism' has become devoid of meaningful content . . ."). see also Keenan D. Kmiec, "The Origin and Current Meanings of "Judicial Activism "" (2004) 92, *Cal. L. Rev.* 1441, 1442 at 1443 ("Ironically, as the term has become more commonplace, its meaning has become increasingly unclear.").

²³ *Craig Green*, "An Intellectual History of Judicial Activism" *Emory Law Journal*, 2009) vol.58, 1196 at 1200.

²⁴ *Ibid.*

²⁵ *Ibid.*

The doctrine is today is more than what Schlesinger invented, it has been argued to have its own intellectual history.²⁶ It has been defined to mean any undesirable and controversial court decision, any serious legal error, any decision that strikes down a statute or a combination of these and other factors.²⁷ It must be stated that defining activism as any undesirable and controversial court decision is less convincing. This is because this view will make the concept irrelevant as judges will be evaluated on the political desirability of their decisions. Also, viewing activism as any serious judicial error will not be appropriate. This is because where a judge ignores precedent, makes mistake as to facts, misreads statutes or gives judgments *per incurium*, these are too wide terms to be put under the heading of activism. This could qualify as incompetence on the part of the judge and not activism. Also, defining activism as where the provisions of the statutes are struck down is not appropriate. This definition appears common in the political science journals.²⁸ It's not correct to say every judgement of the court striking out statutes is activism.²⁹ This may be a line of distinction between activism and review. More still, defining activism as a combination of all the definitions would validate some incorrect definitions of the term or import into its meaning a definition yet to be explored. This therefore makes the concept meaningless as it will mean defining the concept as any or all of the above which is not really a definition. In an attempt to end all definitions of judicial activism, Craig Green had this to say:

I have claimed that current uses of the term "judicial activism" are mistaken. Judicial decisions that invalidate statutes or regulations, for example, have no link to Schlesinger's original use of "activism," and they match only some past examples of controversial judging. By

²⁶ Ibid.

²⁷ See Richard A. Posner, *The Federal Courts: Challenge And Reform*, 1996, 320 (suggesting that a basic element of judicial activism is the willingness to act "contrary to the will of the other branches of government," such as striking down a statute); Jack Wade Nowlin, "Conceptualizing the Dangers of the "Least Dangerous" Branch: A Typology of Judicial Constitutional Violation" (2007) 39, *Conn. L. Rev.* 1211, 1225 ("One can . . . characterize any constitutional mistake—any judicial decision misinterpreting the Constitution and (say) mistakenly upholding unconstitutional legislation or invalidating constitutional legislation—as a violation of the Constitution by the courts. One can hold this view because even the reasonable and good faith upholding of unconstitutional legislation can be thought to entail a violation of the judiciary's structural duty under the separation of powers and the Supremacy Clause to invalidate unconstitutional legislation."). see also Jack Wade Nowlin, "Conceptualizing the Dangers of the "Least Dangerous" Branch: A Typology of Judicial Constitutional Violation" (2007) 39, *Conn. L. Rev.*, 1211, 1225 ("One can . . . characterize any constitutional mistake—any judicial decision misinterpreting the Constitution and (say) mistakenly upholding unconstitutional legislation or invalidating constitutional legislation—as a violation of the Constitution by the courts. One can hold this view because even the reasonable and good faith upholding of unconstitutional legislation can be thought to entail a violation of the judiciary's structural duty under the separation of powers and the Supremacy Clause to invalidate unconstitutional legislation."). Frank B. Cross & Stefanie Lindquist, "The Decisional Significance of the Chief Justice" (2006) 154, *U. Pa. L. Rev.* 1665, at 1756 ("Some complain that the activist judiciary is acting 'like a legislature' instead of a court. Exactly what it means for a court to 'act like a legislature' is less clear. Sometimes, the criticism seems to mean little more than an observation that the Court is deciding a controversial issue . . .")

²⁸ Cross & Lindquist, *ibid.*, at 1701-02 ("A commonly invoked measure of judicial activism is the Court's willingness to invalidate statutes). See also Paul Gewirtz & Chad Golder, *So Who Are the Activists?*, N.Y. TIMES, July 6, 2005, at A19 ("In order to move beyond this labeling game, we've identified one reasonably objective and quantifiable measure of a judge's activism, and we've used it to assess the records of the justices on the current Supreme Court. Here is the question we asked: How often has each justice voted to strike down a law passed by Congress?"); see also William S. Koski, "The Politics of Judicial Decision-Making in Educational Policy Reform Litigation" (2004) 55, *Hastings L.J.* 1077, 1098.

²⁹ Frank B. Cross & Stefanie A. Lindquist, "The Scientific Study of Judicial Activism" (2007) 91, *Minn. L. Rev.* 1752, 1753 at 1760.

contrast, I have reconceived judicial activism as any departure from cultural norms of judicial role; if that is correct, then this driftingly vague and complex term may finally have a rudder.³⁰

As convincing as this definition appears, it cannot end all definitions. The major flaw in the definition is the absence of the word 'deliberate' to precede departure. This is because any departure could be as a result of the ignorance of the judge or for any ulterior motive. However, it sounds more convincing to add that it is any deliberate judicial departure from the cultural norm of the judicial role with the aim of achieving the justice of the matter. This perhaps may clear the air on the controversial meaning of judicial activism. This definition will be used in this paper as the meaning of judicial activism.

3. POLITICAL QUESTION DOCTRINE

It is pertinent to understand what the doctrine actually stands for. By way of background, Justice Marshall in the case of *Marbury v Madison*³¹ recognized 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' has not been subject to definite definition.³² The statement revealed the Marshall's fundamental conception of the separation of powers and highlights the limits of judicial authority and the interpretive role played by the political branches.³³ When these political questions are presented, it is the province and duty of the legislature or the executive, not the courts, to say what the law is.³⁴ These questions have come to form the substance of the so-called 'political question doctrine.'³⁵

Political question is thus seen in this paper as matters which the constitution or the law has given its determination to the political class,³⁶ or a non justiciable matter or questions which the courts will refuse or be reluctant to take cognizance of, or to decide, or review their constitutionality because of their purely political character or because their determination would involve an encroachment upon an executive or legislative powers.³⁷ It is a constitutional law doctrine that was developed to stop the court from deciding on the merit certain questions which

³⁰ *Craig Green*, "An Intellectual History Of Judicial Activism" (2009) vol.58, *Emory Law Journal*, , 1196 at 1260.

³¹ 5 U.S. (1 Cranch) 137 (1803).

³² This was not also defined in the *Marbury* 's case(Ibid.)

³³ See Shamrahayu A.A. & A.O. Sambo "Internal Affairs of Political Parties and Judicial Review: An Expository Study of the Experience in Nigeria and Malaysia" (2011) *Journal of Applied Sciences Research*, 7(13), 2257- 2265.

³⁴ Ibid.

³⁵ 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.

³⁶ See for instance Section 60 of the Constitution of the Federal Republic of Nigeria{ XE "Nigeria" } which confers powers on the Legislature (The National Assembly) power to regulate its own procedure. See Article 62(1) of the Malaysian Federal Constitution for similar provision.

³⁷ See Black's Law Dictionary, HC Black, USA: West Publishing Co., 1979. See also the case of *Baker v Carr* 369 U.S. 186 (1962) for the six factors considered by the United States Supreme Court as constituting the elements of political question doctrine.

may affect the powers or functions of other arms of government, or questions relating to the affairs of the political parties.³⁸

A political question is regarded by the court as being a matter to be determined by another department of government rather than of law courts and therefore are matters which they will not deal with³⁹. Unfortunately, usage reveals that the doctrine has two quite different meanings⁴⁰. One of these is that, in some circumstances, the courts cannot enforce legal constraints on government action even when the occasion for such enforcement arises in what, but for the political question doctrine, would be a proper case or controversy requiring judicial intervention⁴¹. The other, which may be called the legislative action within the meaning of a political question doctrine, merely demonstrates that a plaintiff who challenges government action that is not subject to legal constraint must necessarily lose⁴². Tushnet⁴³ describes the political question issue in two ways i) Who gets to decide what's right answer to a substantive constitutional question? ii) Does the Constitution give a political branch the final power to interpret the Constitution?

The political question doctrine, “a function of the separation of powers⁴⁴,” dictates that courts should refrain from passing judgment on certain legal controversies when doing so would render an “inappropriate interference in the business of the other branches of Government. Matters that often trigger the doctrine are those presenting competing policy goals, making it impossible for a court to apply principles of law without first rendering some type of discretionary policy decision, or those requiring some expertise in managing the issue. Such matters are thought to be better managed by a coordinate political branch⁴⁵.”

The doctrine of separation of powers as developed by Montesquieu and others entails that each of the three arms of government (the legislature, judiciary and the executive) should have just a specific function.⁴⁶ Even though, there are several examples of fusion of power

³⁸ Shamrahayu A.A. & A.O. Sambo “Internal Affairs of Political Parties and Judicial Review: An Expository Study of the Experience in Nigeria and Malaysia” (2011) *Journal of Applied Sciences Research*, 7(13), 2257- 2265. See also the case of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

³⁹ *Black's Law Dictionary* (8th ed., Thomson West, 2004) see also *Mariam Webster Dictionary, Legal Dictionary* 1996

⁴⁰ Kristen L. Richer, “The Functional Political Question Doctrine and the Justiciability of Employee Tort Suits Against Military Service Contractors” (2010), 85, *New York University Law Review*, pp. 1694-1734 at p. 1679.

⁴¹ See *Nixon v United States* 506 US 224 (1993) where the United State Supreme Court held the US Senate’s procedural rules requiring no preliminary hearing by its designated committee nonjusticiable because the senate has sole discretion over impeachment process. See also *Vieth v Jubelir* 541 US 267 (2004) where the US Supreme Court held the political guerrymanding claims to be nonjusticiable.

⁴² Kristen L. Richer, *The Functional Political Question Doctrine and the Justiciability of Employee Tort Suits Against Military Service Contractors* p. 1680.

⁴³ *Ibid* p. 1679.

⁴⁴ Martin, J & Turner, C., *Constitutional & Administrative Law*, (Hodder Education, London, 2008) p 79.

⁴⁵ *Eleonora Mesquita Ceia*, The Applicability of the Political Question Doctrine in the Foreign Affairs Field: Should International Treaties be Regarded as Non-justiciable Acts? Paper presented at the IACL 2007 World Congress Athens, June 2007.

⁴⁶ See generally for discussion of the doctrine, Steven G. Calabresi & Kyle Bady, “Is Separation of Powers Exportable?” (2011) vol. 33 no.1, *Harvard Journal of Law and Policy*, 5-16; Louis Fisher, *American Constitutional Law*, 4th edn., Carolina Academic Press, Durham, North Carolina, United States of America, 2001, 171-271; John Ademola Yakubu, *Constitutional Law in Nigeria* XE “Nigeria” J, Demyaxs Law Books, Ibadan, Nigeria, 2003, at 92, Sheridan & Groves, *The Constitution of Malaysia*, 5th edn., Malayan Law Journal Sdn Bhd, Kuala Lumpur, 2004 at 7; David Fontana, “The Second American Revolution in the Separation Powers,” (2009) vol.87, *Texas Law Review*, 1409-1429; Tom S. Clark, “ The Separation of Powers, Court Curbing and Judicial Legitimacy” (2009) vol.53, no.2 *American Journal of Political Science* 971-989; Maureen Spencer, “Excavating Official Archives: The Separation of Powers and Policy Advice from Judges” (2008) *Cardiff University Law School*, 167-182; R. Stevens, “

within the Nigerian Constitution. The Supreme Court in *Tony Momoh v The Senate*⁴⁷, argued that “the Nigerian Constitution ... is firmly based upon the separation of powers; National Assembly makes the laws, the judiciary interpret them”. Tobi JSC took the same position in *Attorney General Abia State v Attorney General of the Federation*⁴⁸ where he observed that the “proper constitutional relationship of the executive by the courts is that the courts will respect all acts of the executive within its lawful province, and that the executive will respect all decisions of the courts as to what is within its lawful province”.

4. THE RELATIONSHIP BETWEEN JUDICIAL ACTIVISM AND POLITICAL QUESTIONS

The concept of judicial activism in the context of the political question doctrine and the Courts intervention has its evolution in the United States of America which legal system and political arraignment incidentally resembled the Nigerian system of government.⁴⁹ In the realm of the judicial institution of government, there are roles assigned to the courts generally⁵⁰ one of such roles is the determination of the constitutionality of laws in any case were challenged by a party (political question disputes inclusive).⁵¹ These roles⁵² would appear to be encompassing to meet the demands for “active” courts that can stand the test of time and contribute to the growing need for a third independent arm of government to enforce compliance with the Constitution, the rule of law and protect human rights notwithstanding the political nature of a dispute.

It is instructive to note that a prejudice appears to exist in many quarters against the theory of political question, on the supposition of its being opposed to one of the most valuable results of modern political philosophy, the doctrine of refusal of judicial activism by the court and the inevitability of disputes within the realm of the political question doctrine and judicial intervention. The opinions now laid before the reader are presented as corollaries necessarily following from the principles upon which judicial activism rests. The paper has also been

‘A Loss of Innocence?’: Judicial Independence and Separation of Powers” (1999) 19 *Oxford J. of Legal Studies* 365; Gillian E. Metzger, “The Interdependent Relationship Between Internal and External Separation of Powers” (2009) 59 *Emory Law Journal*, 424-457; Yusuf O Ali (SAN), “Separation of Powers Under the 1999 Constitution of the Federal Republic of Nigeria: A critical Review” (2002) *Ilorin Bar Journal* 1(2), pp 36-70, Nwabueze B O., *The Presidential Constitution of Nigeria* (Sweet & Maxwell, 1982) pp 32-33 and Egbewole W. O., “The Place of Judiciary in Sustenance of Democracy” in Saliu, H. A. (ed) *Democracy and Development in Nigeria* (John Archers Publishers Limited, Ibadan, 2006) pp 209-234.

⁴⁷ *Tony Momoh v The Senate* (1981) 1NCLR 21 and Lord Diplock, in *Dupport Steels Ltd. v Sirs* [1980] 1 WLR 142, HL see also Leyland, P., *The Constitution of the United Kingdom: A Contextual Analysis*, (Oxford-Portland: Hart Publishing, 2007) pp. 35-63.

⁴⁸ *Attorney General Abia State v Attorney General of the Federation* (2006) 9 MJSC 1 at 73

⁴⁹ Nigeria is a common law country thus it has lots of influences on the country Legal jurisprudence. See generally, Arnhart L., *Political Question : Political Philosophy from Plato to Rawls* (3rd ed., Waveland Press, 2003)

⁵⁰ The vesting of judicial powers in courts established by the Constitution imposes enormous responsibility on the holder of judicial office whose primary function is to administer justice according to law and the Constitution of Nigeria. Akanbi M. M., *the Many Obstacles to Justice According to Law*, (MIJ Professional Publishers Limited, 1996) Chapter 3, p. 40. See section 6(6) of the Nigerian Constitution 1999 (to be subsequently referred to as Nigerian Constitution)

⁵¹ Nwabueze B. O, *Judicial Guardianship of Constitutional Limitations in the Emergent Democracies in Africa, in Constitutional Democracy in Africa* (Spectrum Book Limited, 2004) Chapter 3(3) p 45.

⁵² General Duties of the Supreme Court includes, Interpretation of the Constitution, Interpretation of laws, Evaluation of the constitutionality of challenged laws, Settles disputes between individual or states and deciding disputes involving the Constitution and federal laws on appeal.

careful to point out, that from these opinions there are justifications that can be derived from judicial activism in protecting infringement upon individual rights arising from duty placed on political institutions to act within the confine and in compliance with the law. But in regard to those duties constitutionally placed on political institutions do operate as protection, for the maintained solely on the rights of others and observance of the rule of law. It is our opinion that any contravention of such duties, beyond what may be required by the constitution should in general be made contingent upon which judicial activism of some corresponding degree of freedom of the individual is justified by the notion from which the political question doctrine are imported.

The courts' judicial activism in Nigeria is defined as embracing "all matters between persons or between government or authority and any person in Nigeria and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person"⁵³ this section of the Nigerian Constitution brings out forcibly the justification of judicial activism in intervention on political question cases and controversies.⁵⁴ The usual argument is that courts' judicial activism negotiate the relationships in a larger tripod or trilogy political space" that consists of most political actors than just courts that is the executive, the legislature and political parties. The idea of a tripod or trilogy space is a metaphor, of course, but it roughly tracks the common thought that the relationship between the executive, the legislature and the judiciary is independent of the other under the doctrine of separation of power.⁵⁵ However considering relationship together gives us a trilogy political institutional space because each institutional space comes with its own depth of complicated relationships, a depth provided with a history of interactions among political and legal institutions within each level⁵⁶. Imagine playing chess on a tripod chessboard where a piece from one level can knock out a piece from another or where a particularly important player can escape to another level for safety.

Sometimes, moves on one level of the chessboard can be duplicated at other levels only after time passes. Sometimes moves on one level speed the moves on another. Courts are both players in the game of governance in constitutionalism, but they do not exist simply in a hierarchical relationship to each other they are assumed to equal but independent organs. They

⁵³ Section 6(6) of the Nigerian Constitution 1999 (as amended in 2010)

⁵⁴ The Nigerian Supreme Court has asserted that, under section 6(6), judicial powers extended to all matters the Constitution permits it to so act without prejudice to the fact that the incursion breached the principle of separation of powers or the dispute is political. Fatai-Williams CJN *Alegbe v Oloyo* At 341-342. said: "In Nigeria, when a superior court such as the Supreme Court, the Federal Court of Appeal, the Federal High Court or the High Court of a State is asked to interpret or apply any of the provisions of the Constitution, it is not thereby dealing with a political question even if the subject matter of the dispute has political implications. Such a court...is only performing the judicial functions conferred on it by the...Constitution. Again if such a court is called upon to interpret or apply the provisions of the Constitution of any organisation with respect to the civil rights and obligations of members of the organization the court is merely performing functions assigned to it by s 6(6) of the Constitution of the Federal Republic of Nigeria. Indeed the court is obliged to perform that function and it is immaterial whether the organization is a political party, or is a cultural, religious or social organization.

⁵⁵ In *Attorney General Abia State v Attorney General of the Federation* (2006) 9 MJSC 1, the Supreme Court reaffirmed the doctrine of separation of power, per Tobi JSC that the doctrine rests upon necessary implication from the establishment by the Constitution of the Federal and State Governments as separate and autonomous governments, and the necessity for the maintenance of their capacity to continue to exercise their respective constitutional functions as such governments... the principle of autonomy in a federal system implies further that neither the central government nor its regional can confer functions or impose duties, obligations, restrictions and liabilities on the functionaries of the other.

⁵⁶ Bruce Acherman; "The New Separation of Powers" (2002) *Harvard Law Review*, 113, pp 642-727

are somewhat different and constitutionally positioned in this three-dimensional space with different sorts of opportunities for manoeuvre or interaction⁵⁷. In this trilogy of institutional space, the pressures for both lawmaking and execution of powers bring with it the inevitability of disputes for judicial intervention arising from a challenge to either a legislative, executive or political party's action from many angles this in turn allows mutual checks and balances by and between the trilogy dimension of the institutions of government⁵⁸.

Sometimes laws passed to comply with mandates, may be challenged on its constitutionality or *ultra vires* of legislative powers in the first place or on legislative action in aberration of constitutional powers⁵⁹. Similarly, executive acts to comply with its mandates, may equally be challenged on its constitutionality in the first place or an infringement of the rights of others in aberration of constitution powers thereby inviting judicial intervention. The overlapping jurisdiction of courts across these levels is particularly intricate because legislation and legislative actions or executive actions can sometimes be adjudicated in courts and courts often have to exercise judicial activism to interpret, the decision that is most often considered to be politically more appropriate to be taken by a political institution rather than the courts⁶⁰.

As part of the political question analysis, courts employ judicial activism to analyse a matter to determine whether there is a regulatory lacuna that demands judicial intervention, that is, a legal void⁶¹. A legal nullity might occur in one of two situations. In the first instance, judicial activism to intervene may come to play where the political branches have failed to regulate or act, whether through inadvertency or intentional design. In such instances, courts will step in to establish the rule of law⁶². In the second situation which is far more common, occurs where an institution of government has regulated a field, but courts in the display of its activism find the regulation unconstitutional because it inadequately protects the relevant

⁵⁷ *ibid* 642-727, see also Elias T.O. *Judicial Process in the Common Wealth*, Lagos State University Press, 1999, p. 112.

⁵⁸ Mathew B.T, "Avoiding Judicial In-Activism: the use of Legislative History to determine Legislative Intent in Statutory Interpretation", (2006), 46, *Washburn Law Journal*, pp189-222. By this mutual checks and balances by and between the branches of government, democracy undertakes to preserve the liberty of the people from executive concentration of authority. The framers of the United States Constitution recognized that "liberty was dependent upon separation of government into three branches of the Executive, The Legislative and the Judiciary. Nwabueze B.O. *The Presidential Constitution of Nigeria* (Sweet & Maxwell, London, 1982), p. 36

⁵⁹ *A.G. Abia, Delta and Lagos state v. AGF* (2006) a MSSC 61, The Supreme Court of Nigeria held that: "When a legislature enacts law in accordance with the constitution, this court (supreme court) and courts below it have not the jurisdiction to question the vires of the law on grounds of non desirability or morality or for any plausible reason at all because the primary duty of a legislature is to make laws, and courts of law cannot remove the constitutional power, unless the law passed is ultra vires the Constitution". See also *Abaribe v Abia State House of Assembly* (2002) 14 NWLR (pt 788) 466 at p 486 C-D; & Frickey P.P. & Smith, S.S., "Judicial Review and Legislative Process, Some Empirical and Normative Aspect of Due Process of Lawmaking" (2000) Boalt, *Law-Making*, Working Paper in Public Law. p.1 & *Marbury V Madison* p 137

⁶⁰ Vile M. J. C., *Constitutionalism and the Separation of Powers*, Indianapolis, In Liberty Fund, 1998, p 14

⁶¹ *Inakoju v Adeleke* (2007) 2 MJSC 1 where in contravention of section 188 of the 1999 Constitution 18 members of the Oyo State House of Assembly short of the 2/3 majority of the 32 members required by the Constitution removed the governor, and rather than conducting the business of impeachment in the House of Assembly went to De'Rovans Hotel. The Supreme Court held that the procedure was irregular, aberration of the impeachment law and unconstitutional. Similarly the removal of governor of Adamawa state by 8 member of the State House of Assembly was declared unconstitutional and short of 2/3 of 16 members of the House that is required by the constitution to conduct impeachment proceedings. See, *Dapainlong v Dariye* (2007) 8 MJSC 140

⁶² *Ibid*, see generally, Thomas K. A., "The Congress: The Politics of Impeachment, In the Clinton Scandal and Future of American Government", (2000) edited by M. J. Rozell and C. Wilcox. Washington D.C: Georgetown University Press, p. 34

constitutional interests at stake or because it is beyond the scope of permissible regulation by that branch.

The functional analyses of the judicial activism in political question doctrine are not mutually exclusive. Particularly where ambiguous language is at play or where a given cause of action does not clearly trigger a textual commitment, courts will resort to functional considerations as indicia of what the Framers might have intended. It is likely that, in the original allocation of power among the three branches, considerations of institutional power and structural policing of the branches' respective checks and balances guided the Framers' hands in determining which branch was to make which decision⁶³.

A country that has proclaimed itself a welfare State seeks its institutions to perform their functions within the limited powers constitutionally assigned to them. Those who enact laws are, however, not the same as those who implement them⁶⁴. The implementation of these laws has, of necessity, to be left to the governmental machinery that is the executive arm of government. There is also the institution vested with the power to interpret the law, examine legislative and executive action in a situation of legal disputes. The bureaucratic apathy and administrative callousness of those who man this machinery compel the beneficiaries of such legislation to sometime resort to the courts to ensure that these benefits are made available to them and they are within the constitutional limitation. This is where judicial activism of court has its place in interfering with political questions to the extent that, the Constitution is usually clear as to who should perform judicial act. And since it is the exclusive function of the judiciary to exercise judicial functions, any member of the executive or the legislative whose function is in operation of its power notwithstanding the political nature of the act must be prepared to face the consequences of such interpolating conduct by way of an action by a person aggrieved⁶⁵.

Justiciable disputes or cases and controversies which limit the business of the courts to questions presented in an advisory context and in a form historically viewed as capable of resolution through the judicial process and in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure the courts will not intrude into the areas committed to the other branches of government⁶⁶.

⁶³ *ibid*

⁶⁴ See generally Nwabueze B O., *The Presidential Constitution of Nigeria*, pp. 32-36

⁶⁵ *Egbuniwe v Federal Republic of Nigeria* (2010) 2 NWLR 368, see also *Steel Bell (Nig) Ltd v Governor of Cross Rivers State* (1996) 3 NWLR (pt 438) 571

⁶⁶ See section 6(6)(b) of the Nigerian Constitution 1999 as amended in 2010, Justiciability is a term of art employed to give expression to the dual limitation placed upon the courts by the case and controversy doctrine. The Supreme Court while considering the issues of justiciability in the case of substitution in *Dalhatu v Turaki* (2003) 7 SC (pt i) 1 at 21 per Tobi JSC observes: It is clear that the right to sponsor a candidate by a party is not legal right but domestic right to the party which cannot be questioned in a matter, a discretion which is unfettered, in the sense that a court of law has no jurisdiction to question its exercise one way or the other. The moment a court goes into domestic affairs of a party it has involved itself in nominating a candidate, a jurisdiction which a court cannot exercise. While a court has jurisdiction to declare a particular candidate as the winner of an election, a court of law cannot be involve in the domestic affair of nomination of a candidate or candidates in primaries.

5. POLITICAL QUESTION AND THE ERA OF JUDICIAL PASSIVISM

The restriction of the courts power of intervention usually manifests in three areas of constitutional matters⁶⁷ namely impeachment proceedings⁶⁸ political party primaries⁶⁹ and the legislative and the executive exercise of powers⁷⁰. The political question doctrine is construed narrowly and it does not stop courts from hearing cases about controversial issues.

Imagine that an executive⁷¹ (President/Vice President or Governor/Deputy Governor) brought an action in a competent court asserting that his right has been infringed upon in the legislative procedure of impeachment and asking the court to order that the action is unconstitutional and thus be reversed. Such a lawsuit would of course deserve immediate dismissal when viewed within the provision of the Constitution on impeachment that is purely legislative business especially in view of the outer clause therein. The Constitution gives the legislature the power to impeach⁷² and imposes no constraint that would prevent the legislature from exercising same. Thus one would assume that Plaintiff would have failed to establish a claim upon which relief could be granted⁷³.

Therefore, rather than the court simply pointing out that the plaintiff has not stated any legal reason why the legislature is required to exercise the power of impeachment following the proper procedures laid down in the Constitution and therefore dismissing the action, the court might invoke the political question doctrine⁷⁴. The court might remark that the choice of legislature to impeach is “committed to the political process for resolution” in dismissing an aggrieved person’s case for lack of jurisdiction based on section 188 (10) of the Constitution.

It would seem from the provision of the 1979 Constitution that vested the power of impeachment in the legislature that it was meant to be a purely political matter limited design to be decided politically. In *Balarabe Musa v Auta Hamza*⁷⁵, the Plaintiff (Governor of Kaduna State) had appealed against the refusal of the High Court of Kaduna State to stay proceedings of the Investigating Committee appointed by the Speaker of the Kaduna State House of Assembly for his impeachment. Thus the court was to determine whether in view of the provision of section 170 (10) the issue of impeachment falls within the jurisdiction of the court to determine.⁷⁶

⁶⁷ See generally, Okpaluba C., “Justiciability, Constitutional Adjudication and the “Political Question” Doctrine in the Commonwealth: Australia, Canada, Nigeria and the United Kingdom” (2003), 18, *South African Public Law* 149.

⁶⁸ *Balarabe Musa v Auta Hamzat and Ugwu v Ararume Inakaju v Adeleke*

⁶⁹ *Rimi v INEC* (2005) 6 NWLR (pt 920) 56, *Onuoha v Okafor* (1983) 14 NSCC 494 or SCNLR, 244, *Dalhatu v Turaki* (2003) 15 NWLR (pt 843)

⁷⁰ See *Alegbe v Oloyo* (1983) NSCC 315, *Attorney General of Abaia State and 3s ors v Attorney General of the Federation* (2002) 3 SC 106, *Attorney General of Lagos State v Attorney General of the Federation* (2003) 1 SC (pt ii) 1, *Attorney General of Abaia State and 3s ors v Attorney General of the Federation* (2003) 1 SC (pt ii) 1, *Attorney General of Abaia State and 3s ors v Attorney General of the Federation* (2002) 4 SC (pt i) 1, *Attorney General of Ogun State v Attorney General of the Federation* (1982) 1-2 SC 12, and *Attorney General of Ondo v Attorney General of the Federation* (2002) 6 SC (pt i) 1

⁷¹ *Attorney General of the Federation v Abubakar* (2007) 6 MJSC 1r

⁷² Section 188 and 134 of Nigerian Constitution 1999 (as amended in 2010)

⁷³ In united case of *Nixon v US* 506 US 224 (1993), the Supreme Court held that the senate authority to try impeachment are political question in line with Article 1 section 2 and 3

⁷⁴ *Balarabe Musa v Auta Hamzat* (1982) 3 SCNLR 229

⁷⁵ *ibid*

⁷⁶ *Adenekan Ademola, JCA* (as he then was) summarized the prevailing position of the law thus:

The court’s authority possessed neither of the purse nor the sword but it ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the court’s complete detachment, in fact and in

The case presents a particularly clear example of a court's invoking the political question doctrine when it really means to say that the plaintiff's claims failed on their merits. The court all but held that the claims were political questions precisely because they failed on their merits. The court determined that the issues presented were committed to the political branches because it determined that the Constitution does not constrain the enforcement discretion of the political branches with regard to immigration matters⁷⁷.

In the case of *Onuoha v Okafor*,⁷⁸ The plaintiff/respondent and the 3rd defendant/appellant are members of the same political party - the Nigerian Peoples' Party (NPP). Both of them applied to their party (N.P.P.) to be nominated for Owerri senatorial district seat and paid N5, 000.00 non-refundable deposits. There was a body set up to select a candidate who will represent the party. The plaintiff was chosen. There was a petition by the 3rd defendant against the selection of the plaintiff and consequently, the State Working Committee of the party (N.P.P.) appointed a panel to look into this complaint. The plaintiff and the 3rd defendant were each given an opportunity to state his case. This panel nullified the selection of the plaintiff and went on to choose the 3rd defendant to represent the party at the forthcoming senatorial election. The plaintiff then went to court to challenge the nomination on the ground that the Nomination Election petition panel did not meet to select a candidate. The case of the plaintiff succeeds at the high court and on appeal the decision of the lower court was nullified. The Supreme Court per *Obaseki JSC* held that, the state of the law and the real question must be, whether the matter in dispute now before this Court on appeal is justiciable.

The exercise of this right is the domestic affair of the N.P.P. guided by its constitution. There are no judicial criteria or yardstick to determine which candidate a political party ought to choose and the judiciary is therefore unable to exercise any judicial power in the matter. It is a matter over which it has no jurisdiction. The question of the candidate a political party will sponsor is more in the *nature of a political question* which the courts are not qualified to deliberate upon and answer. The judiciary has been relieved of the task of answering the question by the Electoral Act when it gave the power to the leader of the political party to answer the question⁷⁹.

The law is therefore certain as to who is to resolve the dispute where two candidates claim sponsorship. It is the Federal Electoral Commission by consulting the leader of the political party concerned. In other words, the Federal Electoral Commission is required to act on the advice of the leader of the political party concerned. The real power to make a choice is, in my view, in the political party through its leader⁸⁰.

appearance, from political settlements...In this situation, as in others of like nature; appeal for relief does not belong here. Appeal must be to an informed, civically militant electorate. In a democratic society like ours, relief must come through an aroused popular conscience that sears the conscience of the people's representatives. In any event, there is nothing neither judicially more unseemly nor more self-defeating than for this court to make *interrorem* pronouncements to indulge in merely rhetoric, sounding a word of promise to the ear, sure to be disappointing to the hope..".

⁷⁷ In this case the Court of Appeal seemed to hold that the governor's (Balarabe Musa) claim presented a political question, concluding that "the ouster clause' in the Impeachment proceedings does not provide an identifiable constitutional limit on the power that is vested in the House of Assembly.

⁷⁸ (1983) CLR 10 (SC)

⁷⁹ *ibid*

⁸⁰ *Ibid*, see *Baker v Carr* 369 US 186, 82 SC 891, DL Ed 2nd 663

The lack of satisfactory criteria for a judicial activism in a political question is one of the dominant considerations in determining whether a question falls within the category of political question. The other is the appropriations of attributing finality to the action of the political departments and political parties under the Nigerian Constitution and system of government⁸¹.

The Supreme Court of Nigeria was asked to settle a critical question of impeachment in the landmark case of *Abaribe v The Speaker Abia State House of Assembly & Ors*⁸², a case of impeachment of the Deputy Governor of Abia State at the material time. The appellant instituted an action for the enforcement of his fundamental rights contending that he was not accorded adequate time to respond to the impeachment allegation level against him as provided by the Constitution. The Court of Appeal following the decision in *Balarabe Musa v Auta Hamza* dismissed the appeal on the ground that the case is more appropriate for the political institution to decide. Pats Acholonu, JCA (as he then was) observed that:

The worrying aspect of this all-embracing provision seems to imply that the court may not even look into the issue as to whether the duly laid down procedure has been followed. Instructive to note that the court, in the two cases relied heavily on the ouster clause contained in sections 170(10) and 188(10) (1979 and 1999 Constitutions) respectively to decline jurisdiction conceding that it was purely a political matter within the competence of the legislature to decide. Invocation of the political question doctrine in such cases would perhaps be harmless it would not much matter precisely which label the court put on dismissal of such an obviously important dispute but it would surely not be pointless⁸³.

In the above instances the judicial activism exhibited showed that the court considered the absolute nature of the provision of sections 170 of the 1979 and 188 of the 1999 Constitution of Nigeria to the extent that irrespective of whether the procedure in the impeachment was not followed nor by an allegation that the fundamental human rights of the Governor had been breached the person involved has no personal rights because the proceedings are political.

Notwithstanding the political nature of impeachment, the court could have relied on the inherent powers of the court established in the determination of the matter to the effect that once it has come to the conclusion that a body or the legislature has not acted within the jurisdiction of an enabling statute, no words in that statute can operate to oust the jurisdiction of the court to control the body in question.⁸⁴

⁸¹ Ibid; See also *Onuoha v Okafor* and *Baker v Carr*

⁸² (2003) 14 NWLR (pt 788) 466

⁸³ *Dalhatu v Turaki* (2003)

⁸⁴ *Anisminic v Foreign Compensation Commission*, (1969) AC 147 In this case the determination of the Foreign Compensation Commission was said to be final. *Anisminic* was adopted in Nigeria in *Adejumo v Johnson* (1974) 5 SC 101 and *Barclays Bank of Nigeria Ltd v Central Bank of Nigeria* (1976) 6 SC 175 193.

6. POLITICAL QUESTIONS AND THE ERA JUDICIAL ACTIVISM

Now, almost two decades after the doctrine was adopted, Nigerian courts seem to have abandoned it. It may be wrong to conclude that the position of the Nigerian Supreme Court is based on the distinct feeling in the US in the wake of *Bush v Gore*⁸⁵ that the doctrine is no longer relevant.⁸⁶ Instead, writ large in the demise of the political question doctrine in Nigeria is the direction of judicial review in Nigeria and specifically, as the case of *Inakoju v Adeleke*⁸⁷ suggests the need to examine the nature of judicial incursion into the affairs of coordinate branches.

The Supreme Court's recent decision purporting to invoke the political question doctrine shows how hard it is to resist the contention that the Court can come up with a constitutional interpretation that answers what is said to be a political question, that is, one as to which the answer must come from the political branches. *Inakoju v Adeleke*⁸⁸ involved Rasheed Ladoja's (former governor of Oyo State) challenge to the processes employed in the Oyo State House of Assembly's impeachment proceedings that resulted in his removal. Having found that conducting impeachments at the House was impossible, 18 members of the House conducted the impeachment at D'Rovans Hotel and took a resolution for the removal of the governor. Under this procedure, not every member of the House actually participated and vote on whether to remove the governor based on the allegation level against him.

The relevant constitutional language is that the House has "the sole Power to try all Impeachments and134 (10)." This provision might seem to stand in Rasheed Adewolu Ladoja's way, but the court relied on the proposition that the courts have the power to engage in ordinary constitutional interpretation. What the Constitution meant, said, was that only the House and no one else-could try him for the allegations with which he was tried. But, the court argued, the House had to give him a trial in compliance with the procedure set out in the constitution, not some truncated proceeding.

In this case the Supreme Court seemed to hold that the governor's claim justiciable though it presented a political question, the House must respect the constitution concluding that "the ouster clause' in the Impeachment section of the constitution does not prevent court from an identifiable textual limit on the authority which is committed to the House⁸⁹. Recognition of the indispensability of political disputes may lead to assigning priority to judicial intervention in the

⁸⁵ 531 US 98 (2000) Political question doctrine's origin goes all the way back to Justice Marshall of the United States Supreme Court's opinion in *Marbury v. Madison*, 5 U.S. 137, 170 (1803) ("Questions, in their nature political, or which are, by the Constitution and laws, submitted to the executive, can never be made by this court."). Another leading authority in the area of political question doctrine is the case of *Baker v. Carr*, 369 U.S. 186, 217 (1962).

⁸⁶ See, Chereminsky E., "Bush v Gore was not Justiciable" (2001) 76 *Notre Dame Law Review* 1093; Tushnet M., "Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine" (2002) 80 *North Carolina Law Review* 1203 and Barkow R., "More Supreme than Court: The fall of the Political Question Doctrine and the Rise of Judicial Supremacy" (2002) 102 *Columbia Law Review* 237.

⁸⁷ (2007) 2 MJSC 1

⁸⁸ *Inakoju v Adeleke* (2007) 2 MJSC 1 (referring to Nigerian Constitution, section 188 (1)-(11). The Court's confidence in its role is suggested by the fact that it reserved the question of whether it could review a decision by the House that did not satisfy any of the enumerated requirements in the impeachment proceedings. See also U.S. Dep't of Commerce v. Montana, 503 U.S. 442, 458-59 (1992) (rejecting a political question argument and finding justiciable a claim challenging Congress's choice of methods of apportioning seats among the states).

⁸⁹ *Ugwu v Ararume* (2007) 7 MJSC 1 and *Dapialong v Dariye* (2007) 8 MJSC 140

case of conflicts between respective parties and the well-being of democratic development⁹⁰. A political question is autonomous within its domain it is not a mere class of justiciable disputes; however the judiciary exists to constitutionally adjudicate legal disputes for the benefits of all citizens and Nigerian democracy⁹¹.

It is pertinent to note that in *Balarabe Musa v Peoples Redemption Party*⁹² the Court held that the way a political party conducts its affairs is not subject to the jurisdiction of a court of law except when the party breaches its constitution. On this basis the Court upheld a resolution of the party banning its serving governors from attending certain political meetings. Similarly in *Abubakar Rimi v Aminu Kano*⁹³ the Court held that it could intervene since the expulsion of members of a party contravened its registered constitution. Thus in this paradigmatic conception of political question is the recognition of political dignity and of the rights which derive from it are the basis of justice and therefore the basis of every legal system which claims to be just. Thus court intervention in the political question as herein demonstrated is only when there is a violation of the law.

The requirement, not to treat political question by courts, makes it possible to determine the limits of that which is acceptable. Compromise outside these limits would be contrary to the respect for the rights of other an infringement upon which would lead to violation of the rights of person affected therein⁹⁴. However recognition of the fact that there are limits within which political decision can be made neither an individual, nor a majority, nor a state authority must act contrary to the limits. This is one of the basic elements of the contemporary conception of political question's non-justiciability⁹⁵. More importantly, the respect for the rule law being related to political action requires ensuring the limits of what are acceptable in settlement of political disputes. If conflicts arise here, because of noncompliance with the limitations there is a space for a compromise between political question and justiciability on the means and ways of achieving democratic development⁹⁶. For instance in the case of *Uzodinma v Izunaso*⁹⁷ the Supreme Court of Nigeria per Rhodes V. JSC said:

⁹⁰ See *Sugaba Darma v Minister of Internal Affairs* (1981) 2 NCLR 34 in the case the Supreme Court of Nigeria intervene to allow a challenge in the manner of the appellant extradition by government from the country to Niger and in *DSSS v Agabakoba* (1999) 3 SC 59, the Supreme Court took up a matter that would have been dismissed and decided that the seizure of the appellant passport by the officer of State Security Service without clear delegation of such power violates his fundamental right to freedom of movement in and outside Nigeria.

⁹¹ In *Ugwu v Ararume* *ibid*, the Supreme Court rejected the assertion of the Appellant that the provision of section 34 of the Electoral Act is not justiciable in the absence of any sanction for failure to comply with the section or that the right of a political party to change the candidate it was sponsoring for an election is an internal affairs of the political party, holding that the contention has no support what so ever from any law under the present dispensation. Section 34 of the Electoral Act glean against the definition of the word justiciable, makes the said section justiciable, sub section (2) of the provision has opened the avenue for any candidate that is aggrieved to have his legal interest ensure in him by setting out the conditions that must be met for any change to succeed. Muhammed JSC pp 61-62

⁹² (1981) 2 NCLR 763

⁹³ (1982) 3 NCLR 478

⁹⁴ Nathan Howe; "The Political Question Doctrine's Role in Climate Change Nuisance Litigation: Are Power Utilities the First of Many Casualties?" (2010) 40, *News & Analysis*, ELR 11229-11241, available at <http://www.eli.org> visited on 18/12/2011.

⁹⁵ Where any rules or regulations are made pursuant to any constitutional provision it has a constitutional force. See *Oyeyipo v Oyinloye* (1987) 1 NWLR (pt 50) 356 at 378, *Bottling Co. Ltd v Abiola* (1995) 3 NWLR (pt 383) 257 at 281

⁹⁶ The several judicial acts of striking down of legislative actions in the following cases exhibited the realms of judicial intervention in political question in Nigeria. *Attorney General Abia & 35 ors v Attorney General of the Federation*⁹⁶ where the court nullified the Monitoring of Allocation to Local Government Act 2006 from Federation Account on the ground that it offended the federal system in the Constitution, the case of *Attorney General Ogun*

The nomination of a candidate to contest election is the sole responsibility of the political party concerned. The Courts do not have jurisdiction to decide who should be sponsored by any political party as its candidate in an election⁹⁸...But where the political party nominates a candidate for an election contrary to its own constitution and guidelines, a candidate has every right to approach the court for redress. In such a situation the Courts have jurisdiction to examine and interpret relevant Legislation to see if the political party complied fully with the Legislation on the issue of nomination. The court will never allow a political party to act arbitrarily or as it likes. Political parties must obey their constitution, and once this is done there would be orderliness and this would be good for politics in the country.

Some cases described as posing political questions actually involve only the question of whether the political branches abused a discretion given them by the Constitution. This is what the Supreme Court exhibited in the nullification of some political parties substitution of candidates submitted for election in the cases of *Ehinlawo v Oke*⁹⁹, *PDP v KSIEC*¹⁰⁰, *Pam v Mohammed*¹⁰¹, *Bwacha v Ikenya*¹⁰², *Amaechi v INEC*. These cases demonstrate a typical attitude of courts to political question doctrine against arbitrariness and despotism in the Nigeria political spectrum. The Supreme Court would have interpreted the Constitution to give the House or political institution's substantial discretion to specify trial procedures, that is, to pin down in detail what the procedure meant. But, the Supreme Court said, and the Court's discussion of the broad meanings of the word seems to agree, that even though the House was given wide latitude in specifying trial procedures, the courts are not precluded from deciding that the Legislature had abused the discretion the Constitution gave them. The Court engages in the interpretive enterprise all the time; though nominally holding that the case presented a political question¹⁰³.

The case of *Alhaji Atiku Abubakar v Attorney General of the Federation*¹⁰⁴ is another recent case in which the political question doctrine figured prominently and illustrates the problem as well. (1st Plaintiff respondent) traveled to United States on his annual leave after seeking and obtaining the president approval, the President through Mall am Uba Sanni, his special adviser on Public Affairs announced the office of the Vice President vacant and that the

*State v Attorney General of the Federation*⁹⁶ in which the court nullified the Joint Local Government Account Alteration Act 2004, the case of *INEC v Musa*⁹⁶ where some sections⁹⁶ of Electoral Act 2001 were nullified as unconstitutional, the case of *Attorney General Lagos State v Attorney General of the Federation* in which the court held that the issue of Urban and Regional Planning matter is not within the legislative competence of the National Assembly being a residual matter in which the state House of Assembly has the legislative power to legislate on, the case of *Attorney General Abia State v Attorney General of the Federation*⁹⁶ in which the court held that the National Assembly has no legislative power to enact legislation affecting Local Government, and the determination of qualification and tenure of Local Government Chairman and Councilors and *Attorney General Ondo State v Attorney General of the Federation*⁹⁶ in the voiding of some sections of the ICPC Act, were clearly evident of checks on legislative tyranny and exercise of judicial power under the constitution to ensure that things are done in consistent way with the law.

⁹⁷ *Uzodinma v Izunaso* (2011) 5 MJSC (pt i) 1 at p. 53

⁹⁸ *Ugwu v Ararume* (2007) 12 NWLR (pt 1048) 365, *Dalhatu v Turaki* (2003) 15 NWLR (pt 843) 310, *Onuoha v Okafor* (1983) 2 SCNLR 244

⁹⁹ (2008) ALL FLR (pt 447) 1087

¹⁰⁰ (2006) 3 NWLR (pt 968) 565

¹⁰¹ (2008) 16 NWLR (pt 1112) 1

¹⁰² (2011) 1 MJSC (pt ii) 1

¹⁰³ *Ugwu v Ararume*, *Substitution of candidate Amaechi v INEC* (2008) 1 MJSC 1) See generally, Seth Korman, "The New Deference-Based Approach to Adjudicating Political Questions in Corporate ATS Cases: Potential Pitfalls and Workable Fixes", (2010), 9, *Rich. J. Global L. & Bus.* 85, 103-06

¹⁰⁴ *Attorney General of the Federation v Alhaji Atiku Abubakar* (2007) 6 MJSC 1-137

immunity conferred on 1st Plaintiff/respondent as Vice president of Nigeria by the Constitution had been withdrawn. The 1st respondent also claimed that the President withdraw all privileges, entitlements, rights and benefit of the First plaintiff / Respondent as Vice President and notify the 3rd – 6th defendants of his intention to send a nominee to them to replace the 1st Plaintiff respondent. In addition the 1st and 2nd defendants threatened to arrest the plaintiff anytime he arrives back to the country. Consequently the 1st respondent institutes this action and urged the court to declare that:

- The President has no power under the 1999 Constitution to declare the office of the vice president vacant
- That the declaration was unconstitutional null and void
- That his term of office which commenced on May 29th 2003 still subsist

The Supreme Court declared the President's action unconstitutional null and void. The court explained further that, unlike the Minister the Vice President cannot be removed by the president in a manner inconsistent with the Constitution¹⁰⁵. The process of removal of the President or the Vice president is provided for in section 143 of the constitution. It is through the process of impeachment, which is to be conducted by the National Assembly as set out in that Section. Section 143 (10) of the constitution specifically ousted interference of the court from the proceeding leading to the impeachment of the holder of the two offices. It is clear from the provisions of section 143(1)-(11) of the constitution that the process leading to the removal of the President and Vice President is entirely that of the National Assembly¹⁰⁶.

It has been argued that how difficult it is for the Justices to assert unqualifiedly that a particular constitutional provision really has no meaning the Court can identify. And, in a world where the Court is comfortable with interpreting the Constitution and uncomfortable with allowing anyone else to do so, once it is conceded that a provision means something, the "textually demonstrable commitment" element simply falls away¹⁰⁷.

Though the Constitution committed the question of who must participate in an impeachment proceedings of an executive (President and his vice and Governor and his deputy) to the political branch, the legislature¹⁰⁸. However while the Constitution is express as to the manner in which the legislature shall participate in the impeachment proceedings, it is silent as to that what happen when a serving vice president left the political party that sponsor for another and participation in political activities for election while still in office. The silence meant that the question was left to the political branches (Legislatures).

¹⁰⁵ Note that the Nigerian constitution like the United State of American Constitution envisages single executive for which the president is the head. See section 5(1) of the 1999 Constitution and Article ii of the United States constitution. Section 130 (1) there shall be for the Federation a President (2) the President shall be the head of State, the Chief Executive of federation and commander-chief of the Armed Forces of federation. See, Carter R., Talliburton Hears "Who? Political Question Development on Global War in Terror and their Impact in Government Contingency Contracting", (2009), 86. *Military Law Review*, 1359 and Jesse H. C., "The Political Question Doctrine", (2005) 54, *Duke Law Journal* p 1457 and Mouryada-Sabbah, "The Political Question Doctrine, Executive Discretion and Foreign Affairs", (2003) White House Studies Summer P 6.

¹⁰⁶ *Abubakar v Attorney General of the Federation* pp33-35

¹⁰⁷ Mark V. T., "Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine" (2010) 80, *North Carolina Law Review*, p. 1211 tushnet@law.georgetown.edu visited on 18/12/2011

¹⁰⁸ Section 188 and/or 134 of Nigerian Constitution 1999

In summary the cases above examined cast doubt on the absolute nature of political question doctrine as basis for declining jurisdiction by courts on such matters. This is because the courts particularly the Supreme Court of Nigeria in its active approach may choose not to adhere rigidly to the rule of political question on the ground that the demand for compliance with the rule of law, fair trial and hearing and fundamental human rights protection outweighed the claim of the political question doctrine to deny courts of their judicial function. It can therefore be concluded that the political question doctrine will not apply to every matter that arouses fierce public disagreement as demonstrated in the cases examined in this part of the paper.

7. CONCLUSION

The paper reveals that courts are now dabbling into the so-called political question doctrine. This is notwithstanding the constitutional independence of other branches of government as envisaged by the doctrine of separation of powers. The courts attitude should be of little surprise. This is because of the lack of clarity surrounding the political question doctrine has spawned generations of scholarship. Thus, judicial activism in political questions, too, is understandable given the rapid growth in the Nigerian democracy insensitivity to the use of powers by political actors in the scheme of governance. In light of these concerns, this paper has attempted to show that, at root, the political question doctrine centers on two questions: Is there a legally unconstitutional action? And, if there is, do courts possess the inherent power to intervene to correct the unconstitutional act? Applied to the political question doctrine with these postulations, this framework suggests that courts should and can competently hear or intervene and or decline intervention in the absence of constitutional breach infield political question disputes. This categorical approach presents the best opportunity to balance individual rights against political action and compliance with the constitutional, while preserving judicial efficiency and, on a broader level, the separation of powers.

Further, the judiciary, the executive the legislature and other agencies of government approach issues of governance and standard setting with different sets of values, making agreement upon the proper balance nearly impossible. The judiciary seeks to deter unconstitutional conduct by potential government institutions; the latter seeks to effectuate governmental strategy. Unless it is crucial to governmental institutions and substantial compliance in governance and actions are observed the risk they face is the policies of the judicial intervention at the instance of any aggrieved party's challenge to the action in the courts. Additionally, pursuant to the extent that constitutional standards set, we might classify the nature of the judicial involvement here as more of checks and balances than standard setting (e.g., "Did defendant intentionally act unconstitutionally?" versus "What actions would constitute reasonable constitutional conduct in this scenario?")¹⁰⁹. Such judicial involvement, because it is not variable to an extent that precludes consistent outcomes and because it does not

¹⁰⁹One could argue that the unconstitutional disputes brought against the political actors may be weak, on the merits, since one might wonder how any individual could have believed they would be safe to have their rights protected in view of political nature of an action. At the margins, though, there is a benefit to be had in allowing some of these claims to proceed to discovery, in particular, those instances in which political actors' efforts are egregious enough to transgress the limits placed on them by the Constitution and an infringement on citizen rights or violation of the rule of law.

impinge on judicial constitutional powers of intervention within the judicial zone of discretion, falls well within the traditional purview of the judiciary.

The most significant summary that can be distilled from this paper is that courts should ensure the limits of governmental action under the principles of a constitutional democracy, even in the delicate field of internal affairs of governmental institutions. It is the duty of the judiciary to make sure that the principles and rules of the Constitution are upheld. At the same time, however, they must take into consideration the specific circumstances under which internal affair of the institutions of government is conducted and try to find a balance between the conditions of Nigerian constitutional law and the particularities of the political question doctrine.

8. RECOMMENDATIONS

The judiciary must exercise caution in interfering with political disputes that is more appropriate to be settled by other political institutions. However courts must not be rigid in compliance with the doctrine when the matter presents a justiciable legal issue. The political institutions of the executive and the legislature (and their agencies) must also learn to observe and ensure the observance of compliance with the Constitution wherein they derived their powers. This includes compliance with internal rules and regulations guiding the exercise of powers. The three arms of government must at all times be mindful of the constitutional limitation of their powers and the checks and balances inherent in the doctrine of separation of powers.