

## **JUSTICIABILITY THEORY VERSUS POLITICAL QUESTION DOCTRINE: CHALLENGES OF THE NIGERIAN JUDICIARY IN THE DETERMINATION OF ELECTORAL CASES**

**By**

**\*WAHAB O. EGBEWOLE Ph.D & OLUGBENGA A. OLATUNJI**

### **ABSTRACT**

*The debate has been on for a long time on the desirability or otherwise of allowing the judiciary to determine all legal questions brought before it whether such questions involve the issue of politics or not. One side of the argument posits that the judiciary should stay clear of what is well-known as 'political questions' as this would be better decided by the concerned coordinate arms of government. On the other hand, some scholars have argued that it would amount to abdication of judicial responsibilities for judges to shy away from determining a legal question properly brought before them all because such question involves a political question. This is the raging doctrinal conflict between the concept of political question and the justiciability theory. The leading question is: how do we reconcile the political question doctrine with the justiciability theory? In other words, what justification would a Judge give for not determining a legal question properly brought before his court?*

*It is thus the focus of this paper to examine the current position of the Nigerian Judiciary on the political question doctrine vis-a-vis whether this doctrine is still in existence or whether it has been partially modified, and how our judiciary has been able to justify its action where political question doctrine is upheld to exclude the entertainment of a suit competently brought before the court, especially in the face of the provisions of Section 6(6)(b) of the 1999 Constitution of the Federal Republic of Nigeria (as amended) that the judicial power conferred on the court shall extend to 'all matters between persons'*

*Specifically, this paper shall trace the development of the political question doctrine and the justiciability theory in Nigeria from the case of **ONUOHA V. OKAFOR (1983) NSCC 494** to the cases decided by the court since the dawn of democratic dispensation in 1999 till date with particular emphasis on the challenges posed to courts on cases dealing with election of candidates to represent political parties. An examination of most of these cases reveals that the Nigerian Court has consistently followed two approaches: permissive and restrictive. They moved from permissive approach in **ALEGBE v. OLOYO (1983) NSCC 315** to restrictive approach in **ONUOHA v. OKAFOR (supra)** and back to the permissive approach since the dawn of the Fourth Republic in 1999.*

*Even assuming it is conceded that the Judiciary should not determine political question, we examine whether argument relating to 'procedural rights' and 'fair hearing' will not be sufficient enough to resuscitate the judicial function of the court to determine rights and obligations of parties coming before it.*

*From the prevailing circumstances and the empirical facts available, it is concluded that, like in the United States where any left cogency of the concept of political question is being continuously whittled down at any available opportunity, the political question doctrine in Nigeria is now giving way to justiciability theory; and looking at the challenges posed to the courts by the plethora of cases arising from parties' primaries, it is suggested that the court should be up and doing even where it determines political question arising from those primaries.*

## 1.0 INTRODUCTION

Since the 'political questions' doctrine makes an inroad into the Nigerian legal lexicon some twenty eight (28) years ago, it has constituted a great challenge on the justiciability principle. This somewhat unpleasant situation is brought about by the fact that the 'political questions' doctrine seeks to achieve the direct opposite of the major aim of the justiciability principle, to wit, while justiciability principle is concerned with allowing all legal matters/issues properly before the court to be heard and decided by the court, the political questions doctrine seeks to rob litigants of legal coverage, not because his suit was not properly brought, but simply because such suit belongs to the realm of actions categorised as 'political questions'. Thus, we have a situation which runs patently contrary to the dictate of the Constitution that the judicial powers of the court "shall extend to all matters between persons or government or authority and to any persons 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."<sup>1</sup> This is basically the dilemma faced in reconciling the two concepts.

This paper is intended to explore the face-off between the two concepts. In the first part, an attempt is made to understand the concepts of political questions and justiciability. The focus here is to embark on some definitional expedition in order to understand and place the two concepts in context. The next part tries to trace the development of the "political questions" doctrine, starting from its emergence in the United States of America to when it was first applied to the Nigerian legal milieu. In the next section, which is probably the most important aspect of the paper, we seek to examine the practical application of the two concepts in the Nigerian courts. Our chief spotlight here is on the attitudes of the various courts to the interpretation of the political questions doctrine and the justiciability principle. We then beam our searchlight on the challenges faced by our courts in the application of these concepts to pre-election cases, particular those affecting nomination and substitution of candidates in elections; after which we examine the question: "what is left of the political question doctrine". In drawing the curtain, we argue that the political questions doctrine in Nigeria is now a shadow of its former self, particularly going by the current attitude of our courts to pre-election and other political question-related matters.

---

\*Ag. Dean and lecturer Faculty of Law, University of Ilorin, [eabdulwahab@unilorin.edu.ng](mailto:eabdulwahab@unilorin.edu.ng) & [lawyer4u2006@yahoo.com](mailto:lawyer4u2006@yahoo.com)

<sup>1</sup> See section 6(6) (b) of the Constitution of the Federal Republic of Nigeria 1999 (as amended)

## 2.0 UNDERSTANDING THE CONCEPTS OF “POLITICAL QUESTIONS” AND “JUSTICIABILITY”

It is ubiquitously recognised and accepted among legal dons that one of the most complex task in the field of legal scholarship is that of coming up with a definition that will command universal followership or acceptance.<sup>2</sup> It will be apposite therefore to warn that the one we are about to embark upon may not provide a different result. The salient idea is to present some of the definitions of these concepts and critique them where necessary before coming up with what we believe a ‘working definition’ should contain.

According to the Black’s Law Dictionary, Political Questions are:

*Questions of which courts will refuse to take cognizance, or to decide, on account of their purely political character or because their determination would involve an encroachment upon the executive or legislative powers<sup>3</sup>*

While this definition provides a good start, it is debatable whether political questions must deal with questions which are *purely political*. In fact, it has been argued elsewhere<sup>4</sup> that this definition does not convey the totality of the doctrine. The reason for this argument in this regard is not far-fetched: there has never been any zero sum position on the issue that it must be of purely political character. What is most important instead is that it must have some political colouration.<sup>5</sup>

In the words of Rohde and Spaeth,

*A matter will be considered (‘a political question’) ... if the court believes it to be a matter more appropriate for resolution by either of the other branches of government, or one that the judges consider themselves incompetent to resolve because the character of the dispute is not amenable to resolution through judicial processes<sup>6</sup>*

The above definition better represents what the concept of political question is all about, for it underscores the fact that the ultimate power to designate any matter arising before the court as involving “political questions” resides with the court itself. This further accentuates our earlier position that a political question need not be of purely political character as the court may decide to label any legal dispute involving the three arms of government as political provided such dispute has some political colouration. This is particularly

---

<sup>2</sup> Okuniga, O. Inaugural Lecture delivered at the University of Ife,

<sup>3</sup> *Black’s Law Dictionary*, H.C. Black, (West Publishing Co., USA, 1979)

<sup>4</sup> Egbewole W.O., “Determination of Election Petitions By the Court of Appeal: A Jurisprudential Perspective” (PhD Thesis, Faculty of Law, University of Ilorin, Ilorin 2009) 135

<sup>5</sup> *Ibid.*

<sup>6</sup> Harold Rohde & David Spaeth, *Supreme Court Decision Making*, (Freeman, San Francisco, 1976), 156

delineated by the learned authors when they said “the simplest and most unequivocal definition of a political question is that a political question is whatever a court says it is”<sup>7</sup>

An attempt to simplify what is meant by the concept of political question was met with sturdy criticism when Nwosu wrote that “a political question is a non-justiciable issue.”<sup>8</sup> The strongest of such criticisms is that of Ben Nwabueze who countered that:

*But he invites criticism when he says that “the simplest definition that could possibly be proposed is that a political question is a non-justiciable issue,” unless he contemplates by this a re-definition of the concept of justiciability or the introduction of a whole new category of what is or is not justiciable...<sup>9</sup>*

We cannot agree less as the fact that a matter is not justiciable does not necessarily make such a matter a political question. Thus, where a court declines jurisdiction and rules that a legal matter brought before it is non-justiciable because the party lacks the standing to sue or because an enabling law denies the court of jurisdiction, this does not turn such a matter in dispute to a political question. A perfect example is the extent of court’s intervention in arbitral proceedings<sup>10</sup>. Where a party approaches the court in respect of matters not allowed by the enabling Act to be taken to the court, the court will decline jurisdiction on the ground of non-justiciability but that does not make this a political question matter. Thus, there are matters/issues which may be justiciable by law but the court may still proceed in its infinite discretion to declare such matters as involving political questions. Nwosu’s definition is therefore one that can hardly be defended, and in a somewhat recognition of this, the learned author offered a more comprehensive definition in the following words:

*“Political questions” could be legitimately and comprehensively defined as comprising, in the main, matters or issues which, in the considered opinion of a superior court of record, have, in clear and unequivocal terms, been constitutionally or statutorily allocated to the legislative and/or executive branches of government for final resolution, and also includes: 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.<sup>11</sup>*

The above more than captured all the essential ingredients of the “political questions” doctrine, viz.: the discretionary power of the court to designate a matter as involving political questions, the fact that such matter has been constitutionally or statutorily allocated to any of the other arms of government, the inappropriateness of judicial process, and the

---

<sup>7</sup> *Ibid.* at p. 156

<sup>8</sup> Nwosu I., *Judicial Avoidance of ‘Political Questions’ in Nigeria* (Ikenna Nwosu, Lagos, Nigeria, 2005), p. 1

<sup>9</sup> Nwabueze B., Introduction to Nwosu’s *Judicial Avoidance of ‘Political Questions’ in Nigeria*, *ibid.* at p. xxxvi

<sup>10</sup> See section 34 of the Arbitration and Conciliation Act, Cap. 19, Laws of the Federation of Nigeria 1990 now cap. A18.2004 Laws of the Federation

<sup>11</sup> Nwosu I., *Judicial Avoidance of ‘Political Questions’ in Nigeria*, at p. 22

fact that if such matter is ruled upon by the court, the court may not be able to ensure the enforcement of its decision. It is believed that any definition of the “political questions” doctrine must take cognizance of these essential elements. This is not in any way saying that definition with these elements will be flawless as definitions generally are always influenced by the idiosyncrasies of their authors and are usually varied by the circumstances of each particular case. Recognizing this fact, Scharpf opined that “a satisfactory explanation of the political question doctrine is necessarily tied to the specifics of individual cases.”<sup>12</sup> Thus, there will be as many definitions of the doctrine as there are scholars researching into this area of the law.

On the other hand however, there has not been much problem delimiting the ambits of the ‘justiciability principle’. A legal matter is justiciable if it is such that can be entertained by a law court, not having breached the rule as to mootness, standing and ripeness. According to Nwabueze in his Introduction to Nwosu’s book, “justiciability is a veritable concept, at once pre-eminently meaningful and intelligible, and rests upon objective rules and principles, which delimit or seek to delimit the province of the judicial function.”<sup>13</sup> It is what confers jurisdiction on the court and matters which are justiciable are simply matters which the court can rule upon.<sup>14</sup>

There are certain factors that determine whether a legal issue in respect of which a litigant has come to court is justiciable or not. The learned author, Ben Nwabueze, itemised some of them to include: the existence of rules of law or other objective standards; the nature of the subject-matter; and amenability of a question to a form of proceeding appropriate to a court of law and to proof by judicial evidence.<sup>15</sup> Where these factors are present, the jurist is of the view that

*...the court is under an inescapable duty to hear and decide it, unless its jurisdiction in the matter is otherwise excluded by an ouster clause contained either in the constitution or other law validly made...<sup>16</sup>*

In the US, a legal right will be justiciable where: the court is not required to give an advisory opinion, the litigant has the requisite standing, the case is ripe for hearing by the

---

<sup>12</sup> Sharpf F.W., “Judicial Review and the ‘Political Question’: A Functional Analysis”, 75 Yale L.J., 517 at 567, (1965 – 1966)

<sup>13</sup> Nwosu I., *Judicial Avoidance of Political Questions in Nigeria*, op. cit. at p. xxxvi

<sup>14</sup> See section 6(6) (a) – (d) of the 1999 Constitution of the Federal Republic of Nigeria (as amended) which provides for the scope of the judicial powers of the court. This section provides for both justiciable and non-justiciable matters. Suffice to say however that this section is not exhaustive as to the matters that are or are not justiciable before the Nigerian court as there are other constitutional and statutory provisions to that effect.

<sup>15</sup> Nwosu I., *Judicial Avoidance of Political Questions in Nigeria*, op. cit. at p. xxxvi

<sup>16</sup> *Ibid.* at p. xxxvii

court, and the legal question has not become ‘moot’.<sup>17</sup> All these are also applicable in Nigeria.

It thus remains incomprehensible that matters which in all respect pass the justiciability test are not heard by the court on the ground that they involve ‘political question’. It only remains to be seen if this is not an apologetic and outright abdication of judicial responsibilities, more so since it has been argued elsewhere that “it is not within the purview of the political question doctrine to say that a matter is not justiciable and to that extent, such a matter is a political question or that a political question is not justiciable; as what is or is not justiciable is usually constitutionally and/or statutorily defined”<sup>18</sup>

### **3.0 THE “POLITICAL QUESTIONS” DOCTRINE AND ITS INCURSION NIGERIAN JUDICIAL SYSTEM**

#### **3.1 The United States and “Political Questions” Doctrine**

The “political questions” doctrine originated from the United States of America. Its root extends back to *Marbury v. Madison*<sup>19</sup> even though the modern touchstone in which the court itemised the various factors that suggest a particular issue presents a political question is *Baker v. Carr*<sup>20</sup> The doctrine as so conceived and developed hypothesizes that courts should abstain from resolving constitutional issues that are better left to other departments of government, mainly the national political branches. There is the need to stress from the onset that this position appear defeatist in the light of the fact that with this thinking, the court will not be able to determine any question because it has no competence to determine engineering issues which are better left for engineers, medical issues better left for medical practitioners to mention but a few. This position has been described as “potentially controversial questions in areas where courts are more at sea than usual, more lacking in the sort of legal resources that enable them to insulate their decisions from easy political counter-attacks.”<sup>21</sup>

---

<sup>17</sup> The courts are reluctant to provide advisory opinions for several reasons which include: reluctance to provide advisory opinions which may be overridden later by the Congress; judgments are better made over actual facts; reluctance to do the jobs of other branches; and acts of advising seems overly-legislative. On standing, for a litigant to have standing, the following three elements must be proved, namely: the defendant must allege either real injury or must be within the “zone of injury”; the injury must be caused by the defendant; and the court must be able to provide a remedy to the defendant.

When evaluating whether a given defendant’s case is ripe, the court may consider any of these three factors, to wit, the probability that the predicted harm will take place; the hardship that may accrue to the parties if immediate review is denied; and the fitness for resolving legal issues presented.

A case may be moot if it is too late for the court to hear it. Mootness may be brought about by death, a change in law, or a change in the underlying facts of the case. See

[http://defensewiki.ibj.org/index.php/Justiciability\\_Doctrine](http://defensewiki.ibj.org/index.php/Justiciability_Doctrine) accessed 15 June 2011. See also:

<http://classes.ils.edu/archive/manheimk/fedcts/echarts/justdoc-t.htm> accessed 15 June 2011

<sup>18</sup> Egbewole W.O., “Determination of Election Petitions By the Court of Appeal: A Jurisprudential Perspective” *op. cit.* at p. 136

<sup>19</sup> 5 U.S. 137 (1803)

<sup>20</sup> 369 U.S. 186, 217 (1962)

<sup>21</sup> John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U L. Rev. 962, 1014 (2002).

In *Marbury* which could be said to be the starting point for the emergence of the doctrine, the plaintiff sought an order of mandamus to compel the Secretary of State to deliver to him his commission as a Justice of the Peace. Declining jurisdiction, the court, per *Chief Justice Marshall* while claiming the power to decide questions of law authoritatively for all three branches of government, recognised limitations on that power in the following terms:

*The province of the court is, solely to decide on the rights of individuals, not to inquire how the executive or executive officers perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive can never be made in this court*<sup>22</sup>

The above case was followed by *Luther v. Borden*.<sup>23</sup> In that case, the plaintiff approached the court for damages for trespass to his Rhode Island home by the defendants. While admitting that they did break into the plaintiff's home for the purpose of searching it, the defendants maintained that they did so in the service of the state government. It was the plaintiff's response that the government to which the defendants referred, that is the charter government under which Rhode Island had operated before the resolution, was not the lawful government of Rhode Island. The question was thus indirectly before the court as to which of the two governments was the legitimate one. In refusing to rule on such a question, the court, per *Chief Justice Taney*, recognised that the Constitution mandates a particular form of government for the state but concluded that only the political branches of government could enforce the constitutional mandate in question.<sup>24</sup>

As we have already mentioned, the leading case on "political questions" doctrine in the US is *Baker*.<sup>25</sup> In this case, the court saw a reason to reduce the scope of applicability of the "political questions" doctrine and therefore took on this opportunity to review the doctrine and articulated a new more stringent formula for issues that should still fall within the ambit of the doctrine. This case involved a challenge under the equal protection clause to mal-apportionment of legislative districts in Tennessee. The Supreme Court discountenanced

---

<sup>22</sup> *Op. cit.* at 170

<sup>23</sup> 48 U.S. (7 How.) 1 (1849). Note that *Luther* combined two cases into one, as both Martin and Rachel Luther were suing Luther Borden and others on identical facts.

<sup>24</sup> *Ibid.* at 42

<sup>25</sup> There are other cases between *Marbury*, *Luther* and *Baker* where the Supreme Court applied the "political questions" doctrine to avoid testing the merit of the case. Some of these included: *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 143 (1911) (finding *Luther* absolutely controlling in holding that enforcement of U.S. Constitution art. IV, § 4, belong to the legislative branch); *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302-303 (1918) (taking as given that the Executive's official recognition of the Mexican regime touched on foreign relations and consequently was a matter committed to the political departments and beyond judicial review); *Colegrove v. Green*, 328 U.S. 549, 553-554 (1946) (holding that the duty to secure fair representation of the states in the House of Representatives has been committed to the exclusive control of Congress).

with the argument that the “political question” doctrine precluded it from determining this question.<sup>26</sup> This is a glimpse of what is to later become the demise of the doctrine.

Thus, in order to justify a different result from *Colegrave*, the court in *Baker* provided the longest criteria which should guide the application of the doctrine in subsequent cases. Justice William J. Brennan who delivered the majority decision of 6 to 2 laid down the criteria in the following terms:

*Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government, or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question*

*Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence.*<sup>27</sup>

Thus except any of the above six conditions/criteria is present, the court will be unwilling to resort to the “political questions” doctrine. This attitude on the part of the US courts is obviously borne out of the recognition of the need to respect the rule of law. If judicial review/intervention is not curtailed by the Constitution or statute, the court will be cautious

---

<sup>26</sup> This decision of the court is in obvious antithesis to its earlier decision in *Colegrave* where the court had refused to consider a similar challenge to mal-apportionment of congressional districts in Illinois. Justice Frankfurter's plurality opinion in *Colegrave* was a strong statement of the political question argument against considering such cases, identifying reapportionment as a “political thicket” that courts would not enter. See *Colegrave (supra)* at 556. Justice Frankfurter in that case wrote: “Courts ought not to enter this political thicket... The Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of executive and legislative action, and ultimately, on the vigilance of the people in exercising their political rights” *ibid.* at 556

<sup>27</sup> 369 U.S. at 217. From Justice Brennan's statement, any of the following six(6) criteria must have taken place before the court will sign off on the issue as involving a political question:

- a) There must be a textually demonstrable constitutional commitment of the issue to a coordinate political department;
- b) There must be lack of judicially discoverable and manageable standards for resolving it;
- c) It must be impossible for the court to decide without an initial policy determination clearly for non-judicial discretion;
- d) It must be impossible for the court in the instant case to undertake resolution without expressing lack of respect due coordinate branches of government;
- e) There must be an unusual need for unquestioning adherence to a political decision already made; or
- f) There must be the potentiality of embarrassment from multifarious pronouncements by various departments on one question

in applying the doctrine. This is also in tandem with the age long tradition of the court that it has a duty to jealously guard its jurisdiction and will not lightly dis-invest itself of jurisdiction except with the clear provisions of the law. In essence, it is the law that confers jurisdiction on courts.<sup>28</sup>

The above trend started in *Baker* continued even in subsequent cases as the Supreme Court was always out (so it would seem) to whittle down the doctrine. In the subsequent case of *Powell v. McCormick*<sup>29</sup> the court was confronted with whether the exclusion of a member-elect from sitting in the house by the United States House of Representatives was a political question. Applying *Justice Brennan's* criteria, *Chief Justice Warren* noted that the only applicable one was whether there was a “textually demonstrable constitutional commitment” to the House to determine in its sole discretion the qualifications of members. The court found that the Constitution vested the House with power only to look at the qualification of age, residency, and citizenship. The court therefore held that in deciding on *Powell's* conduct and character, the House had exceeded the powers committed to it and thus judicial review was not barred by this factor of the political question doctrine.<sup>30</sup>

So far, what is discernible from American jurisdiction from where the “political questions” doctrine emanated is that the application of the doctrine is not determined by a strait-jacket rule; the path to be followed by the court is mostly a function of the facts of individual cases. To this end, the growing trend in the United States indicates that the doctrine is being gradually asphyxiated of any relevance. This is however not to say in the least that it cannot resuscitate at a later stage since the Supreme Court has never been consistent in its application.

### 3.2 The Arrival of the “Political Questions” Doctrine in Nigeria

The “political questions” doctrine properly so-called made inroad into the Nigerian judicial system in the Second Republic. There was however a semblance of the doctrine in the First Republic.<sup>31</sup> That this was the case may be understandable. Nigeria was colonized by Britain

---

<sup>28</sup> See *Obiweubi V CBN (2011) 2-3 SC (Pt.1) 46*

<sup>29</sup> 395 U.S. 486 (1969)

<sup>30</sup> *Ibid.* at 519-47. The recent case of *Boumediene v. Bush*, 553 U.S., 128 S. Ct. 2229 (2008) further whittled down the scope of applicability of the “political doctrine” question. In that case, the court held that § 7 of the Military Commissions Act (MCA), which limited judicial review of executive determinations of the petitioners’ enemy combatant status, did not provide an adequate habeas substitute and therefore acted as an unconstitutional suspension of the writ of habeas. This is a further proof that the American courts are always pre-occupied with the supremacy of the rule of law and the recognition of the rights conferred on its citizens. To deprive them of such rights on the ground of political question, the courts must be convinced that that clearly is the intention of the law and that the laid down conditions for activation have been met.

<sup>31</sup> The First Republic witnessed such knotty issues as the removal of a Premier (see *Adegbenro v. Akintola & Anor.*, (1962) WNLR 205), the existence of a state of emergency (see *Adegbenro v. AGF & 2 Ors* (1962) WNLR 156), and the accuracy of a population census report (see *AG, Eastern Nigeria v. AGF* (1964)1 All NLR 224). In all these three legal scenarios, it was only in *AG, Eastern Nigeria v. AGF* that the court made a shallow reference to the “political questions” doctrine. The court stated in that case that the issue of accuracy of census figures “...is essentially a political matter, where the irregularities fall short of that, to decide what margin of error is acceptable” Even here, the court did not go into the details of what is meant by the doctrine as well as what its scope was. We therefore disagree with Nwosu that these three cases were

and at departure; the British government bestowed on us a Parliamentary System of government where the offices of the executive and legislature are fused thus relegating the principle of separation of powers to the background.

After thirteen years stunt of military interregnum, Nigeria returned to Democracy in 1979 but, unlike the First Republic, under an American-style Presidential System of government where the principle of separation of powers and checks and balances are well-pronounced. Since our system of government was patterned after the American government, the Nigerian judiciary also borrowed from the American doctrine of “political questions”. The doctrine was given full attention in the case of *Onuoha v. Okafor*.<sup>32</sup>

The *Onuoha case* dealt with nomination of candidate by Nigerian Peoples Party (NPP) to the Owerri Senatorial District. It was the contention of the appellant that he went through the party’s primary and was elected as NPP candidate for his senatorial district. The respondent later wrote a petition against him as a result of which his name was illegally substituted by his political party for that of the respondent. He therefore approached the court to be reinstated as the party’s candidate. According to the Court of Appeal, the selection of a candidate for sponsorship was the prerogative of a political party. Any decision of the party in that respect was binding on the members and was not subject to judicial review.<sup>33</sup> At the Supreme Court, the decision of the Court of Appeal was affirmed and that court specifically held that the appeal be dismissed because the appellant lacked *locus* and the issue he sought answer for was a political question.<sup>34</sup>

The doctrine has been followed in several other cases after *Onuoha*. The court applied it in the impeachment case of *Balarabe Musa v. Hamza*.<sup>35</sup> The doctrine was also followed in *Okwu v. Wayas and Makarfi v. Ume Ezeoke*<sup>36</sup> where it was held that the doctrine applied to the activities of the National Assembly which represents the legislative arm of government.

The doctrine held a strong sway in the Second Republic<sup>37</sup> when it was religiously applied by our courts in impeachment and other internal affairs of the legislature. However, a return back to democracy in 1999 has thrown the doctrine in a state of uncertainty as to whether it is still of any relevance or not. Issues hither-to considered as involving political questions are now entertained in the Fourth Republic.<sup>38</sup> This submission will be further dwelt upon in the subsequent part of the paper.

---

apposite cases for the “political questions” doctrine. The first two, that is, the removal of a premier and the declaration of state of emergency were decided pursuant to the enabling laws and the courts did not make any reference, however minute, to the doctrine.

<sup>32</sup> (1983) NSCC 494

<sup>33</sup> (1983)6 NCLR 204 (*Phil-Ebosie, Aseme, and Olatawura, JJ. CA*)

<sup>34</sup> (1982)2 SCNLR 244

<sup>35</sup> (1982)3 NCLR 229

<sup>36</sup> (1981)2 NCLR 522

<sup>37</sup> See *Balarabe Musa v. PRP* (1981)2 NCLR 453; *Dalhatu v. Turaki Abaribe* (1981)2 NCLR 763; etc.

<sup>38</sup> See *Inakoju v. Adeleke* (2003)7 SC 1; *AGF v. Abubakar* (2002)14 NWLR (pt. 788) 466; *AC v. INEC* (2007)1 SC (pt I) 1; *Ugwu v. Ararume* (2007)12 NWLR (pt. 1048) 222; *Amaechi v. INEC* (2007)12 NWLR (pt. 1048) 367 among others.

#### **4.0 THE NIGERIAN COURTS ON POLITICAL QUESTIONS DOCTRINE AND JUSTICIABILITY THEORY**

This section will examine the attitude of the Nigerian courts to the “political questions” doctrine and the justiciability principle. The different approaches of our courts vis-a-vis the two concepts under the Second and Fourth Republics shall be considered. This becomes necessary since the attitudes of courts under the two republics are antithetical. While the Second Republic courts were always willing to give effect to the doctrine of political questions at the detriment of the principle of justiciability and rule of law any time some categories of cases came before them, the Fourth Republic courts are willing to give full effect to the justiciability principle and the rule of law. This is not to gloss over ‘aberration’ in some of the cases determined within the same period in question where the political questions doctrine was upheld.<sup>39</sup>

A critical perusal of cases dealing with political questions in the second republic reveals that the courts often adopted one of two approaches: restrictive or permissive. Where the restrictive methodology is adopted in the interpretation of what is justiciable, the court would often end up finding in favour of political questions and against justiciability. On the other hand, where the permissive approach is resorted to, the court was always liberal in its interpretation of what is justiciable, and where this is the case, the end result is often that the court would assume jurisdiction and deny the applicability of the “political questions” doctrine. No doubt, the former approach was prevalent in the second republic, but the dawn of the fourth republic brought with it a drastic change in courts’ approaches/attitudes: courts now adopt the permissive approach.

We will now look at these approaches during the first, second and the fourth republics.

#### **4.1 Attitudes of Courts to the “Political Questions” Doctrine and Justiciability Principle under the Second Republic**

##### ***The Permissive Approach***

The 1979 Constitution of Nigeria provides for the scope of the court’s jurisdiction in matters coming before it. Section 6(6) of that constitution specifically provides as follows:

*The judicial powers vested in accordance with the foregoing provisions of this section –*

- a) shall extend, notwithstanding anything to the contrary in this Constitution, to all inherent powers and sanctions of a court of law*
- b) shall extend, to all matters between persons, or government or authority and to any persons in Nigeria, and to all actions and proceedings relating*

---

<sup>39</sup> See *Abaribe V Abia House of Assembly (2000) FWLR (Pt.9) 1558*

*thereto, for the determination of any question as to the civil rights and obligations of that person*<sup>40</sup> (emphasis supplied.)

The above provisions, it is believed, are clear, unambiguous and self-explanatory enough that one can posit that there should not be any question that the court cannot try on whatever ground. This includes questions purely or partially political in nature. That the Constitution itself states that the judicial powers shall extend to *all inherent powers and sanctions of a court of law, and to all matters between persons, or government or authority, and to all actions and proceedings... for the determination of any question as to the civil rights and obligations of that person* further supports such an assertion.

However, since our foray in the second republic into the American-type presidential system of government, we in addition imported the “political questions” doctrine into our country for the determination of some matters which are political in nature and would therefore be better handled by the appropriate political or governmental departments than the judiciary. Initially, the scope of the doctrine was restricted to questions at the intersection of law and public policy such as the ability of the legislature to regulate its own internal proceedings and matters relating to foreign affairs (e.g. questions regarding when a war begins and ends, whether a particular state or government should be recognised by the executive, whether diplomatic immunity should be granted to the officials of a foreign states/governments/countries etc.).<sup>41</sup> Other areas include: prerogative of mercy, the grant of honours, the dissolution of the parliament, the appointment of ministers among several others.<sup>42</sup> In Nigeria during the second republic and even now, the doctrine has been applied in three major areas namely impeachment proceedings, internal affairs of the legislature and political parties’ primaries.<sup>43</sup>

In the second republic, whether the “political questions” doctrine would apply or not to preclude adjudication in some matters would depend on how section 6(6) of the Constitution is interpreted by the judge. Where it is permissively interpreted, the court would find that it has jurisdiction in the acclaimed political question-related matter. On the other hands, if the section is restrictively interpreted so as to cut short the ambit of justiciability principle, the result would often be that the matter is caught by the political question doctrine.

---

<sup>40</sup> See section 6(6) (a) & (b) of the 1999 Constitution of the Federal Republic of Nigeria (as amended). Paragraphs (c) and (d) respectively, categorically in clear and unequivocal terms state that the jurisdiction of the court shall not extend to matters contained in Chapter Two of the Constitution on Fundamental Objectives and Directive Principles of State Policy, and in respect of the question of validity or applicability of any law made on or after 15<sup>th</sup> January 1966.

<sup>41</sup> David Strass, “The Decline of the Political Questions Doctrine” <<http://balkin.blogspot.com/2008/12/decline-of-political-question-doctrine.html>> accessed on 17 June 2011

<sup>42</sup> Paul Daly, “Justiciability and the ‘Political Questions’ Doctrine”, (2010) P.L. 160 – 178 at 163 <[agc-wopac.agc.gov.my/e-docs/Journal/0000016602.pdf](http://agc-wopac.agc.gov.my/e-docs/Journal/0000016602.pdf)> . See also *Council of Civil Service Union v. Minister for the Civil Service* (1958) A.C. 374 at 418, per Lord Roskill

<sup>43</sup> Enyinna Nwauche S., “Is the end near for the Political Question Doctrine in Nigeria?” (June 30, 2010). *Fostering Constitutionalism in Africa*, Charles Fombad, Christiana Murray, eds., pp. 31-60, Pretoria University Law Press, 2010. Available at SSRN: <http://ssrn.com/abstract=1632861>

The permissive approach was first adopted by the court in *Alegbe v. Oloyo*<sup>44</sup> where the appellant was a member of the old Bendel State House of Assembly. The respondent, who was the Speaker of that House declared appellant's seat in the House vacant on the ground that he had absented himself from the House's sitting for 94 times, a period more than the one-third required by the law.<sup>45</sup> The appellant contended that it was not within the power of the Speaker to declare his seat vacant as it was the court, and only the court, that could exercise such power. He therefore approached the High Court which found in his favour. The Court of Appeal allowed the speaker's appeal while a further appeal to the Supreme Court by the appellant was dismissed. Before the Supreme Court, the question arose as to how the provisions of the Constitution conferring jurisdiction on the court should be interpreted. *Fatai-Williams, CJN* adopted the permissive approach to find in favour of the justiciability principle when he observed as follows:

*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 provisions of sections 6(6) (b), 33, 212, 213(2) (b) & (c)... of the said 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.*<sup>46</sup> (Emphasis supplied)

Thus, the Supreme Court in that case was of the opinion that once a matter has been conferred with constitutional or statutory justiciability, the court has no discretion to decline jurisdiction regardless of whether the matter in respect of which the jurisdiction of the court is activated involves a political question or not. This does not in any way infract on the independence of the other arms of government as the court will be willing to enforce the independence where the Constitution or Statute has provided for same. For instance, in *Alegbe's case* the Supreme Court found in the end that the court need not intervene before the seat of the member in question could become vacant. That the provisions of section 103(1) (f) of the 1979 Constitution are mandatory and automatic, and confer no power or

---

<sup>44</sup> (1983) NSCC 315

<sup>45</sup> See section 103 of the 1979 Constitution of the Federal Republic of Nigeria. That section in subsection 1(f) provides thus: (1) A member of a House of Assembly shall vacate his seat in the House if –  
(f) without just cause he is absent from meetings of the House of Assembly for a period amounting in the aggregate to more than one-third of the total number of days during which the House meets in any year. Section 98 of the 1979 Constitution provides that a House of Assembly shall sit for a period not less than 181 days in a year. The Bendel State House of Assembly sat for 182 days that year.

<sup>46</sup> *Alegbe v. Oloyo (supra)* at 341-342

authority on the Speaker of the House to declare or pronounce the seat vacant. Continuing, the court further held that since the member's seat became vacant by the operation of law, the Speaker has the power to enforce the provisions of section 103(1) by treating defaulting member's seat as vacant and excluding him from the House without necessarily seeking a court declaration of its vacancy.

The import of the above decision is that the court indirectly recognises that the matter related to the internal proceedings of the House and could have qualified as a political question. This notwithstanding, the jurisdiction of the court is not ousted as the court could intervene to see if the circumstances which would lead to the seat of the member in question become vacant had taken place. In the instant case, facts before the court showed that the Speaker wrote to the appellant informing him of the fact that his seat would be declared vacant if he did not show reasonable cause for his absent for 94 days, and that the appellant did reply to this letter. Not having found anything fishy in the procedure leading to the vacant seat, the court went ahead to restate the position of the law on the matter.

The same approach (permissive) was followed by the Supreme Court, *per Fatai-Williams*, in *AG, Bendel v. AGF*.<sup>47</sup> In that case, the court was called upon to interpret section 2 of the Act Authentication Act<sup>48</sup> despite the fact that the Act ousts the jurisdiction of the court. According to that section:

*The schedule shall set forth the long title of a Bill and a summary of its contents and the respective dates on which each Bill passed each House of the National Assembly; and subject to the provisions of this section, when signed by the Clerk of the National Assembly, the certificate shall be conclusive for all purposes...*<sup>49</sup>

Thus by this section, all that is required in determining whether an Act of the National Assembly has been properly passed in accordance with the Constitution is a signed certificate of the Clerk of the Assembly. The Court held that the certificate of the clerk was subject to the provisions of the Constitution and that the Court could go behind such a certificate and admit legislative papers to ascertain if the National Assembly was constitutionally compliant in the passage of a Bill. According to *Fatai-Williams CJN*:

*I would endorse the general principle of constitutional law that one of the consequences of separation of powers, which we adopted in our constitution is that the courts should respect the independence of the legislature in the exercise of its legislative powers and would refrain from pronouncing or determining the validity of the internal proceedings of the legislature or the mode of exercising its legislative powers. However if the Constitution makes provision as to how the legislature should conduct its internal affairs or as to the mode of exercising its legislative powers the*

---

<sup>47</sup> (1982) 10 SC 1

<sup>48</sup> Cap 4, Laws of the Federation of Nigeria 1990

<sup>49</sup> Section 2(3) of Cap 4, Laws of Federation 1990

*Court is in duty bound to exercise its jurisdiction to ensure that the legislature complies with the constitutional requirements. Sections 52, 54, 55 and 58 of our constitution clearly state how the National Assembly should conduct its internal affairs in exercise of its legislative powers. That being the case the Court is bound to exercise its jurisdiction under section 4(8) of the Constitution to ensure that the National Assembly comply with the provisions of the Constitution.<sup>50</sup>*

It seems from the foregoing observations of the court that what was always paramount in the mind of the court is the rule of law, and it may not be wrong to say that the court in the above cases effectively discharged the ‘moral cost’ that would have been on it anytime it gives effect to the ‘rule of politics’ at the expense of the ‘rule of law’.

To further give effect to the permissive approach, the court drew a distinction between “matters which the Constitution prescribes” and “purely internal proceedings of the legislature”. While the court is always willing to intervene and apply the permissive theory in the former case, the court is very cautious and hesitant to intervene in the latter case. This situation can be seen by a comparison of two cases: one during the military interregnum, the other during the fourth republic.

In the first case, *Ekpenkhio v. Egadon*<sup>51</sup> where the question was placed before the Court of Appeal whether the constitutionally laid down procedure had been followed in the removal of the Deputy Speaker of the Edo State House of Assembly, the court saw this as a matter which the Constitution prescribed and held that the removal was constitutional since the requisite majority voted for the removal as stipulated in the Constitution. But in *Asogwa v. Chukwu*<sup>52</sup> the court declined from intervening in what it deemed purely internal affairs of the legislature. In that case, the Speaker of the Enugu State House of Assembly had been removed by two-third majority. There was however a contention that the House was not properly constituted as at the time the vote was carried on the ground that a suspended member was allowed to vote in the removal. The Court of Appeal held that the status of the suspended member was an internal affairs of the legislature in which the court would not interfere. The court was of the view that the House was on a better plinth to determine whether the member in question was suspended or whether his suspension had been lifted.

### **The Restrictive Approach**

The application of the restrictive approach in the second republic was very prevalent in political parties’ primaries and impeachment cases. The adoption of this approach by our courts often leads to the affirmation of the “political questions” doctrine as the approach is applied to narrow down the scope of the justiciability principle. The adoption also means that the court would interpret its judicial review power narrowly and restrictively so as to decline jurisdiction where it ought not to.

---

<sup>50</sup> (1982)10 SC 1 at 52

<sup>51</sup> (1993)7 NWLR (pt. 308) 717

<sup>52</sup> (2004) FWLR (pt. 189) 1204

This approach was applied by the Supreme Court in the *Onuoha's case*. The issue framed for the determination of that court was “whether a court of law ought to make an order directing a political party as to which of two persons it ought to sponsor for an elective office.”<sup>53</sup> The Supreme Court dismissed the appellant’s appeal on the following two (2) grounds:

- 1) that the plaintiff had no *locus standi*; and
- 2) that the issue was a political question

According to Nwosu<sup>54</sup>, the court rationalized its denial of judicial review on the following three (3) grounds:

- 1) By the 1979 Constitution and the Electoral Act 1982, it was the prerogative of a political party to decide whom to sponsor as its candidate for an elective office;<sup>55</sup>
- 2) There was no available yardstick to be employed by the court to determine which of the two (2) candidates was a better and more suitable person to stand as a political party’s candidate at an election;<sup>56</sup> and
- 3) Certain impossibility of enforcing the judgment.<sup>57</sup>

With respect to the Supreme Court, while the 1982 Electoral Act provided that the question of whether a candidate had been sponsored by a political party should be resolved by consulting the leader of the political party concerned, we submit that this is a discretion that must be exercised with a lot of circumspection by the political party concerned; so that the court can go behind this provision to examine whether the requisite preconditions have been complied with. The preoccupation of the court should be the enforcement of the rule of law and the doing of justice. The court can therefore go behind the provision of section 82(3) of the 1982 Electoral Act, just as it is now being done in respect of the 2006 Electoral Act, to see if there is any reason why it should intervene. For instance, if a candidate can prove collusion between FEDECO and the political party to rob him of his candidacy, shouldn’t this be enough reason for the court to look into the matter? Or if a candidate alleged that he was properly nominated in a duly conducted primary and that the other candidate whose name had been substituted with his did not participate in any primary,

---

<sup>53</sup> *Onuoha v. Okafor* (1982)2 SCNLR 244

<sup>54</sup> Nwosu I., *Judicial Avoidance of “Political Questions” in Nigeria op. cit.* at p. 45-47

<sup>55</sup> This submission is supported by sections 201, 37(b) and 67(1) (g) of the 1979 Constitution and section 83(2) of the 1982 Evidence Act. In fact, the latter section provided thus: “Where there is doubt as to whether a candidate is sponsored by a political party, the Commission (FEDECO) shall resolve same by consulting the leader of the political party concerned”

<sup>56</sup> In fact, *Obaseki JSC* did observe that “even if a member had secured nomination, the party could, on the basis of suitability and party loyalty, deny the nominee sponsorship...” at p. 254. Continuing, the court stated: “...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 question” at p. 260

<sup>57</sup> According to *Aniagolu JSC*: “where the court forces a candidate on a political party, will the court proceed to campaign for votes for the candidate of its verdict? If not, in order not to render its order nugatory, will the court then proceed to make a further order that the political party must campaign for the candidate of its verdict? The obvious negative answers to the two (2) questions show how ridiculous it is for a court to dabble into affairs which do not lie within its competence...” at p. 267

wouldn't the court be justified to look into this? If we answer these two questions in the negative, it will be necessary to ask: why conducting a primary then? Why not impose a candidate?

We therefore believe the Supreme Court was wrong to have interpreted their judicial review power restrictively in *Onuoha's case*. In fact, the court's position that to hold otherwise would 'instantly project or propel the court into the area of jurisdiction to run and manage political parties and politicians'<sup>58</sup> is untenable and devoid of any judicial logic. It has been rightly observed elsewhere as follows:

*The court constantly intervenes in corporate takeovers and disputes between contending directors and shareholders of corporations. It has never declined jurisdiction based on a fear that the court will instantly be propelled into the area of jurisdiction to run and manage corporations*<sup>59</sup>

On the second ground for denial, to wit, that the court could not determine which of two candidates is better and more suitable to stand as a political party's candidate at an election; we equally believe too that the Supreme Court misconceived the question before it. The court was not called upon to decide on which of two candidates hoping to fly the flag of his party was better and more suitable to ensure victory for the political party; rather the court was called upon to rule on who has the legal right to so do. The court was expected to apply all the applicable laws including the Constitution of the political party in deciding whether the candidate being supported by that party was a product of a primary duly conducted in compliance with the party's constitution. The court is not out to help a political party win an election; it is out to enforce the legally protected rights of individuals including the right to ensure that members of an organisation obey the constitution of that organisation.

On the third reason for denial, we share the sentiments of the court that enforcement could be nigh impossible, but we still believe that is no enough reason to deny the plaintiff/appellant of positive judgment if he is ordinarily entitled to it. Even in areas not dealing with elections, it is not all the orders or decisions of the court that are obeyed. Once the court has ruled according to rule of law, any party who flouts its order/decision should be accordingly dealt with or, alternatively, should be left in the court of public opinion.

This approach was followed in subsequent election cases of the second republic. In *Okoli v. Mbadiwe*<sup>60</sup> the plaintiff was nominated and duly elected at the party's primary as the candidate representing Akokwa/Arondizogu Constituency for the National Party of Nigeria (NPN). The Constitution of NPN allowed the National Executive Committee (NEC) of the party to depart from the rules and regulations of the party provided such departure was in the interest of the party. Relying on this provision, the NEC submitted the name of the

---

<sup>58</sup> At p. 501

<sup>59</sup> Etudaiye M., "Law: Its Boundaries and Frontiers and the Nigerian Society" <[http://www.etudaiyeandco.com/publications/law\\_its\\_boundaries\\_and\\_frontiers\\_and\\_the\\_nigerian\\_society.pdf](http://www.etudaiyeandco.com/publications/law_its_boundaries_and_frontiers_and_the_nigerian_society.pdf)> accessed 18 June 2011 p. 12

<sup>60</sup> (1985)6 NCLR 742

defendant to Federal Electoral Commission (FEDECO) as its candidate instead of the plaintiff who was duly nominated and elected at the primary. The plaintiff sued. The court declined jurisdiction on the ground that the question before it was a political one. According to the court, section 82(1) of the 1982 Electoral Act vested the political party with the rights to sponsor whomsoever it desired, and it was not for the court to choose a candidate for the party. The court could have, at least, looked into what amounts to an act “in the interest of the party” and if it is convinced that the particular acts paraded before it by the NEC of the party is such that, in its judicial estimation, could qualify as such, it can then sanction the action of NEC; and where it is not convinced, it can hold otherwise.

In *Rimi & Musa v. PRP*<sup>61</sup> the constitution of the party provided that convention of the party must be held “within 14 days from the date of the notice” of the convention. The chairman of the party arranged for a convention to be held 18 days after the notice of convention had been given. In an action challenging this, the court held that the issue was non-justiciable since under the party’s Constitution the chairman’s interpretation of the constitution was final and binding.<sup>62</sup>

As earlier mentioned, this approach was also applied in impeachment cases during the period under review. *Balarabe Musa v. Auta Hamzat*<sup>63</sup> aptly represents the approach and it will now be considered. In that case, the then Governor of Kaduna State began proceedings in the Kaduna State High Court seeking leave to apply for an order of Prohibition prohibiting the respondents (the Kaduna State House of Assembly) from further proceeding with his impeachment pursuant to section 170 of the 1979 Constitution. He contended that the requisite preliminary conditions to the investigation were not complied with; and that the respondents had no jurisdiction to proceed with the investigation. These lapses included the fact that no member of the state legislature signed the notice of allegations of misconduct; there was no detailed particulars of alleged misconduct as required by section 170(2) (b) of the Constitution; and the allegations were not investigated by the respondents within the time limit stipulated by section 170(5).

Section 170(10) provides that “no proceedings or determination of the Committee or the House of Assembly or any matter relating thereto shall be entertained or questioned in any court.” This is an ouster clause. The question was urged before the court whether it could go behind this ouster clause to entertain complaints with regards to the impeachment proceedings. *Ademola CJN* stated the restrictive approach in the most pungent manner. According to him:

---

<sup>61</sup> (1981)2 NCLR 734

<sup>62</sup> This approach is also adopted by the court in other cases. In *Ogunsan v. Oshunrinde* (1985)6 NCLR 611 the Abeokuta High Court held that the controversy before it in respect of the political party was not justiciable for the reason *inter alia* that the dispute was “a matter of a political nature in that it related to internal affairs of the party which the courts have always been loath to interfere with.” Also, in *Akure v. NPN Benue State* (1984)5 NCLR 449 the court, in declining jurisdiction, advised that since the constitution of the political party bound both the party and its members to keep litigation out of the law courts, the only option open to the plaintiff, if he did accept the nomination of Mr Aku was to quit the party.

<sup>63</sup> (1982)3 NCLR 229

*Apart from the fact that its jurisdiction is ousted, the impeachment proceedings are political and as such 'for the court to enter into the political thicket as the invitation made to it clearly implies would 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.'*<sup>64</sup>

This is a restrictive approach per excellence to the interpretation of the scope and extent of court's intervention in impeachment cases. Contrary to what His Lordship said above, an intervention would have put the court in a good position to do justice in the case, more so when the appellant was alleging that the preconditions were not observed at all.<sup>65</sup> It is in realization of the inherent problem associated with this kind of approach that Ikhariale states that:

*The interpretation that the court gave to section 170(10) does not accord with the objects and purposes of the Nigerian Constitution and it must have contributed its fair quota to the wrecking of the second republic. It is therefore necessary to conclude that the forthcoming third republic could be spared the agonies of irregular impeachment proceedings if the courts are prepared to abandon their initial stance as demonstrated by the decision in Balarabe Musa.*<sup>66</sup>

Towing the same path, another writer noted:

*The doctrine of the political question does not justify the total and absolute preclusion of judicial review and it would be more rejectable as a basis of lack of judicial review when, as it seems to be the case in Nigeria than elsewhere, impeachment is utilized as a weapon to intimidate and subjugate the executive branch to the dictates of a legislature hostile to it.*<sup>67</sup>

What is deducible from the above consideration of the attitudes of our courts to the practical application of the two concepts is that judges in this period (second republic) appear to favour a restrictive interpretation of the court's judicial review power. This may not be unconnected with the fact that by this period, coming after 13 years of military rule, the court had not really grasped what is meant by the doctrine of separation of powers

---

<sup>64</sup> *Ibid.* at 247

<sup>65</sup> More will be said on this in the next section of the paper.

<sup>66</sup> Ikhariale M., 'Impeachment Proceedings and the Political Question Doctrine: The Nigerian Experience' (1990) 1 *LASU Law Journal* 45 at 54.

<sup>67</sup> Anonymous, adopted by Musdpaher JSC in *Inakoju v. Adeleke* (2007) *All FWLR* (pt. 353) 3 at 146-147.

which provided that the judiciary should not interfere in the area of activities of other arms of government and vice versa. It is our view that a determination of a question involving any of the three arms of government by the court does not make it a meddlesome interloper or a violator of the separation of powers principle, once it can show that it is empowered to so act by an enabling statute or the constitution itself. The courts seem to have realised this in the fourth republic as we shall see below.

#### **4.2 Attitudes of Courts to the “Political Questions” Doctrine and Justiciability Principle in the Fourth Republic**

Immediately the fourth republic was set in motion in 1999, the Nigerian court seemed to recognise from afar the herculean tasks heaped on its shoulder as the last hope of the masses. This recognition may have come from the ill-treatment meted out to the country at the pleasure of the military government and particularly the June 12 unsavoury incident which led to the demise of MKO Abiola, the acclaimed winner of the June 12 1993 presidential elections. The demise of the presidential hopeful was the last straw that eventually broke the camel’s back. Another factor that may have spurred the judiciary into unprecedented action may be the realization that its wing was no longer unwarrantedly pruned as it was under the military government where that government chose which law should apply as well as which court order/ruling/decision it should obey. Thus, an examination of most of the cases that came up during the ongoing republic points to the conclusion that the court is first and foremost concerned with the doing of justice and respect for the sanctimonious rule of law.

The first case where the political question doctrine was urged before the court is *Abaribe v. Speaker, Abia State House of Assembly*.<sup>68</sup> The court was called upon to interpret section 188 of the 1999 Constitution<sup>69</sup> following the impeachment of the deputy governor of Abia State. The court applied what was remained of the restrictive approach to decline jurisdiction on the ground that section 188(10) meant what it said and that impeachment provisions were a political matter which the Constitution wisely left to the legislature since it enables the people to remove who they elected. A deep scrutiny of that decision would however reveal that the court reached that decision out of lack of civilian judicial authorities to base its judgment on. Explaining the dilemma in which he found himself, *Ikongbeh JCA* observed as follows:

*...For this reason I do not feel confident with the view that decisions based on the interpretation of ouster clauses in these decrees can provide a good guide for the interpretation of provisions in a constitution limiting the power of courts. All governmental power derives from the Constitution in a civilian regime. There cannot be any legitimate complaint if the constitution withdraws a particular power from one*

---

<sup>68</sup> (2000) FWLR (pt. 9) 1558

<sup>69</sup> The provision is on all fours with section 170 of 1979 Constitution considered in *Balarabe Musa 1982 case*.

*organ of government in favour of another...I prefer to approach the construction of S.188(10) of the Constitution from a different perspective. In fact I do not think that the term 'ouster clause' is an appropriate description of the provisions of that section.*<sup>70</sup>

The above case was followed by *AGF v. AG, Abia State*.<sup>71</sup> In that case, in response to a preliminary objection that the determination of the seaward boundary of a littoral state within the Federal Republic of Nigeria involved a political question and should therefore be resolved exclusively by the legislature, *Karibi-Whyte JSC*<sup>72</sup> was the only one who agreed that the dispute fell under the political question doctrine and should be resolved by both the legislature and the executive. *Uwais CJN* stated that a cumulative reading of sections 232(1) and 6(1) of the 1999 Constitution show that the Supreme Court “*has the jurisdiction to interpret ... all ... provisions of the constitution whether on appeal or in exercise of its original jurisdiction.*”<sup>73</sup>

This decision presages what the attitudes of the court would be to subsequent matters involving political questions. The issue of whether section 188(10) of the 1999 Constitution is conclusive was given full attention in *Inakoju v. Adeleke*.<sup>74</sup> The question was placed before the court whether in applying section 188(10) the court is required or permitted to embark on a voyage of discovery as to whether the pre-conditions in subsections 1-9 of that section have been complied with. The application of the restrictive approach would have elicited a negative answer, but the court made an important and a long-awaited u-turn in this area of the law. *Tobi JSC*, after chronicling the infractions that led to the majority of the court overturning the impeachment, observed in very pungent words, as follows:

*Ouster clauses are generally regarded as antitheses of democracy as the judicial system regards them as unusual and unfriendly. When ouster clauses are provided in statutes, the courts invoke section 6 as barometer to police their constitutionality or constitutionalism. The courts become helpless when the Constitution itself provides for ouster clauses, such as section 188. In such a situation, the courts hold their heads and hands in despair and desperation. They can only bark they cannot bite. Their jurisdiction is to give effect to the ouster clause because that is what the Constitution says. It is in light of this very helpless situation of the courts, the upholders of the rule of law, that parties should not urge them to*

---

<sup>70</sup> *Op. cit* at 1582. See also *Pats-Acholonu JCA* at 1574.

<sup>71</sup> (2001) FWLR (pt. 64) 202

<sup>72</sup> This is not surprising since *Karibi-Whyte* was equally part of the learned Justices who heard *the 1982 Balarabe Musa's* impeachment case.

<sup>73</sup> *AGF v. AG, Abia (supra)* at p. 251.

<sup>74</sup> (2007) All FWLR (pt. 353) 3

*interpret sections of the Constitution as ousting their jurisdiction when it is not...I am of the view that the wrong procedure adopted is clearly outside section 188(1) ouster clause, and I so hold.*<sup>75</sup>

The same permissive approach has been applied by the court in electoral cases. In *Ugwu v. Ararume*<sup>76</sup> PDP substituted the name of Ararume with that of Ugwu. The question arose whether the court could intervene. *Tobi JSC* stated thus:

*Right of access to court is a constitutional right which is guaranteed in the Constitution and no law, including that of a political party, can subtract from or derogate from it or deny any person of it. Such a law will be declared a nullity by virtue of section 1(3) of the Constitution*<sup>77</sup>

On the learned counsel for appellant's argument that the duty is on INEC to interpret what is 'cogent and verifiable', the court, per *Tobi JSC* said:

*While I agree with learned Senior Advocate that the duty is on INEC to interpret what is cogent and verifiable, I do not agree with them that the tennis ball ends at the court of the INEC. In my humble view, the tennis ball moves from the court of INEC to the court of law at the instance of an aggrieved party who is not satisfied with the interpretation of what is cogent and verifiable.*<sup>78</sup>

However, even in this case, the Supreme Court was not prepared to overrule its earlier decision in the *Onuoha's case* holding instead that the facts and circumstances of the two cases were distinguishable. According to the court:

*I will neither uphold the decisions of this court nor overrule them in this appeal. It is elementary law that a case is decided on its facts. No case is decided outside its factual milieu. The situation in the two cases is not*

---

<sup>75</sup> *Ibid.* at 93-94. See also *Dapialong v. Dariye* (2007)8 NWLR (pt. 1036) 332. In this case the Supreme Court overturned the impeachment of Gov Dariye on the ground that in accordance with section 188 of the 1999 Constitution, the impeachment of a governor can only proceed on the votes of at least two thirds of *all* members. Since a number of legislators had cross-carpeted to another party and lost their legislative seats, there could be no impeachment exercise because *all* the members of the house were not present for the exercise.

<sup>76</sup> (2007)6 SC (pt. 1) 88

<sup>77</sup> *Ibid.* at p. 135

<sup>78</sup> *Ibid.* at p. 121

*similar to the situation in this case. While Onuoha was decided on an earlier Electoral Act, Dalhatu was decided on the Electoral Act of 2002. What is involved in this appeal is the Electoral Act 2006. The provisions of section 34(2) of the 2006 Act was not in any of the previous Acts and that makes the whole big difference. Apart from the provision of section 34(2) of the Electoral Act, article 2 of the Constitution of the 3<sup>rd</sup> respondent is yet another reason why this court cannot follow its earlier decisions in Onuoha v. Okafor and Dalhatu v. Turaki<sup>79</sup>*

It is our humble view that the Supreme Court should have taken up this opportunity to restate its position on the need for the court to enforce the legal rights of *all* person regardless of whether doing so will involve deciding a political question or not. Of particular curiosity is the fact that if the Supreme Court said it will not overrule *Onuoha*, should it be understood as saying that we might go back to that era when whatever political parties do is final and could not be examined by the court, even if it involves obvious abuse of discretionary power? To answer this question in the affirmative would not accord with the ongoing revolution of the Nigerian court to finally bid the political doctrine and deniability of justiciability a final goodbye. We therefore hope the Supreme Court would one day grasp the next available opportunity to restate the law in this area to reflect the current tide. This need is recognised by *Oguntade JSC* in the following terms:

*My humble view on the decision in Onuoha v Okafor...is that it has ceased to be a guiding light in view of the present state of our political life. I have no doubt that the reasoning in the case might have been useful at the time the decision was made. It seems to me, however that in view of the contemporary occurrences in the political scene, the decision needs to be viewed (sic) or somewhat modified. If the political parties, in their own wisdom had written it into their Constitutions that their candidates for election would emerge from their party primaries, it becomes unacceptable that the court should run away from their duty to enforce compliance with the parties Constitution...An observer of the Nigerian*

---

<sup>79</sup> *Ibid.* at p. 135. This same approach was applied by the court in *Amaechi v. INEC (2007)9 NWLR (pt. 1040) 504* where the party substituted Amaechi's name with that of Omehia. The court also held that the reason given must be cogent and verifiable. This requirement was not met as the document relied upon was subjudiced contrary to section 97(3) of the Evidence Act.

*political scene today easily discovers that the failure of the parties to ensure intra-party democracy and live by the provisions of their constitutions as to the emergence of candidates for elections is one of the major causes of the serious problems hindering the enthronement of a representative government in the country.<sup>80</sup>*

This surging revolution also affects the disqualification of candidate. This is to enable the court decide that the disqualification is properly done according to the stipulation of the relevant applicable laws. Thus, in *AC v. INEC*<sup>81</sup> while the High Court held that the INEC lacked the power to disqualify candidate<sup>82</sup> the Court of Appeal held otherwise claiming that by Item 15 of the 3<sup>rd</sup> Schedule of the 1999 Constitution, INEC does not have to go to court before disqualifying candidates that fail to meet the stipulations for their offices in the Constitution.<sup>83</sup> The Supreme Court has however settled the dust by holding that it is for the court, and not for INEC, to disqualify candidates.

In closing, it is crystal clear from our expedition above that the courts have palpably moved away from the prevailing approach in the second republic when the restrictive interpretation of what is and what is not justiciable held sway. The courts have now realised the need to do justice and enforce legal rights of individual in every case that comes before them. By this, one can say with all accuracy that the judiciary is truly living to its expectation as the last hope of the people.

## **5.0 THE JUDICIARY AND THE CHALLENGES OF THE POLITICAL QUESTION DOCTRINE AND JUSTICIABILITY PRINCIPLE DETERMINATION OF ELECTION CASES**

The major challenge faced by the court in determining whether or not to apply the “political questions” doctrine and reject the principle of justiciability is how to deal with the “moral cost” involved in so doing. A handful of commentators have argued that there should be no “political questions” doctrine at all, on the basis that there is an unconscionable “moral

---

<sup>80</sup> (2007)12 NWLR (pt. 1048) 368 at 461

<sup>81</sup> (2007)12 NWLR (pt. 1048) 222

<sup>82</sup> Reliance was placed on section 32(5) of the Electoral Act 2006

<sup>83</sup> See section 137 of the 1999 Constitution of the Federal Republic of Nigeria (as amended)

cost” in allowing a potential legal violation to go inevitably unpunished.<sup>84</sup> In other words, it is believed, and reasonably so, that the application of “political questions” doctrine in electoral cases, like in every other case, “can cause the courts to fall short of upholding the ideal of the rule of law.”<sup>85</sup> Recognising this challenge *Oguntade JSC* observed thus:

*If the political parties, in their own wisdom had written it into their Constitutions that their candidates for election would emerge from their party primaries, it becomes unacceptable that the court should run away from their duty to enforce compliance with the parties Constitution...An observer of the Nigerian political scene today easily discovers that the failure of the parties to ensure intra-party democracy and live by the provisions of their constitutions as to the emergence of candidates for elections is one of the major causes of the serious problems hindering the enthronement of a representative government in the country.*<sup>86</sup>

*Niki Tobi JSC* identified the need to avoid having to pay this “moral cost” in election cases when he submitted in unequivocal terms as follows:

*Right of access to court is a constitutional right which is guaranteed in the Constitution and no law, including that of a political party, can subtract from or derogate from it or deny any person of it. Such a law will be declared a nullity by virtue of section 1(3) of the Constitution*<sup>87</sup>

Thus, in pre-election cases where the court has to decline jurisdiction on the ground of this doctrine, they always face, deep down within them, the challenge of paying the moral cost. This fear was voiced out by the court in *Inakoju v. Adeleke* when the Supreme Court, *per Niki Tobi JSC* lamented:

*The courts become helpless when the Constitution itself provides for ouster clauses, such as section 188. In such a situation, the courts hold their heads and hands in despair and desperation. They can only bark they cannot bite. Their jurisdiction is to give effect to the ouster clause because that is what the Constitution says.*<sup>88</sup>

---

<sup>84</sup> See generally Redish M., “Judicial Review and ‘Political Questions’” (1984-1985)79 Nw. U.L.R. 1031, 1060; Allan TRS, *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP, Oxford, 2001), pp. 161-199; Barak A., *The Judge in a Democracy* (Princeton University Press, Princeton, 2006), pp. 177-189; Dyzenhaus D., *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press, Cambridge, 2006)

<sup>85</sup> Harris B.V., “Judicial Review, Justiciability and the Prerogative of Mercy” (2003)62 CLJ 631, 633

<sup>86</sup> *Ugwu v. Ararume* (2007)12 NWLR (pt. 1048) 368 at 461

<sup>87</sup> *Ugwu v. Ararume* (2007)6 SC (pt. I) 88 at p. 135

<sup>88</sup> At p. 93

What the “political questions” doctrine does when applied is to render constitutional provisions in respect of causes and matters that the court can hear meaningless. It is ironical that some of these constitutional provisions were put in place to limit the powers of the various arms of government in order to reduce the incidence of abuse. If our courts are now holding that they have no jurisdiction in pre-election matters because the power to nominate and substitute candidates has been vested in the party mechanism, how do we prevent some a clique who has the control of the party from becoming autocratic? Non-intervention even where it is ineluctably warranted would mean that few people can lord it over majority members of the party. Better still, wouldn't it amount to the subversion of the will of the majority where a candidate who emerges through a duly conducted and well-supervised party primary is substituted with a candidate who did not participate in the primary at all?<sup>89</sup>

Adherents of the application of the doctrine in pre-election cases have argued that lack of judicial enforcement does not automatically render a constitutional constraint meaningless as, in their belief, the political branches may successfully police themselves by obeying judicially unenforceable constitutional provisions.<sup>90</sup> Indeed, some scholars further argue, the political branches may have institutional advantages that make them *better* suited to apply certain constitutional provisions than the judiciary.<sup>91</sup>

As elegant as the above argument in favour of application seems to appear, it remains to be seen how it can be employed or how it is being employed in Nigeria. Just in the last elections in Nigeria, the Peoples Democratic Party Kwara State Chapter had its primaries for the selection of candidates for the three (3) senatorial seats in Kwara. Alhaji Isiaka Gold won the ticket for the Kwara Central Senatorial seat. He later withdrew its candidacy, and and it was argued by some party faithfuls that by the party's constitution, the candidate next to him in the primary ought to pick up the ticket. This was not done. A fresh primary was conducted instead which produced Governor Bukola Saraki as the new candidate. The various hilarious but despicable play-outs in various states of the federation in respect of parallel primaries are further pointers to the conclusion that the other arms of government could not be trusted with such important decisions. Another very apposite example is the impeachment of the former Governor of Oyo State, Senator Rasheed Ladoja. This is relevant since the section dealing with impeachment contains an ouster clause. Before the court came to the aid of the Nigerian polity, we all saw how impeachment was being used as a stick with which a pliant legislature could deal with the executive. It is therefore our view that the court be allowed to perform its constitutional duty fully without any pruning.

Another important challenge which is associated with where the courts go ahead to hear a matter alleged to involve political question such as pre-election matters is the challenge of enforcement. The threat is indeed real that the court may find it difficult to enforce its decision. Two examples in this regard would be sufficient. In *Ugwu v. Ararume (supra)* and

---

<sup>89</sup> See *Onuoha v. Okafor (supra)*; *Ugwu v. Ararume (supra)*; *Amaechi v. INEC (supra)*; *Okoli v. Mbadiwe (supra)* among several others.

<sup>90</sup> Mulhern Peter J., *In Defence of the Political Question Doctrine*, 137 U. Pa. L. Rev. 97, 156-162 (1988)

<sup>91</sup> Rachel Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 Colum. L. Rev. 237, 239 (2002)

*Amaechi v. INEC (supra)* the plaintiffs were able to get favourable judgments from the courts to the effect that they remained the gubernatorial candidates for their party for the 2007 general elections. What the PDP did after these judgments was to expel the two candidates from the party. According to Odey, the party was miffed that Ararume and Amaechi refused “to abide by the provisions of Articles 21(L) of the PDP Constitution which precludes party members from taking fellow party members or the party to court without exhausting the avenues within the party to resolve the issue”<sup>92</sup>

The question here is: what then is the way out? Should the court desist from hearing such legally ripe matter? Absolutely No! The court should give effect to the provisions of the Constitution which it has sworn to protect. Persons who flout its orders/decisions should be appropriately dealt with by way of contempt. Alternatively, such a person, group of persons or arm of government should be left in the court of public opinion which would definitely trail non-obedience. Former President Olusegun Obasanjo is one president who had flouted several court orders. He is still being remembered for that purpose today. Besides, if the court stood its ground in pre-election matters by finding for candidates wrongfully substituted, a political party would just get used to it because it would dawn on it that by not supporting a candidate for that particular election it runs the risk of losing its popularity in that state. The realisation of this fact might be the reason why we experienced massive obedience of court orders both by political parties and INEC in the just concluded election.

In sum, the best way to deal with the “moral cost” challenge is for the court to strive as hard as it can in ensuring that it hears all matters which are properly before it. The executive and legislative arms of government cannot be trusted to be a better alternative in resolving matters dealing with political questions as shown in their recklessness and selfishness. The challenge of enforcement can also be properly dealt with if the court maintains its ground and leaves any erring government official in the unsavoury mud of public criticism.

## **6.0 WHAT IS LEFT OF THE ‘POLITICAL QUESTIONS’ DOCTRINE?**

It is just natural that one asks in the light of the present disposition of the Nigerian judiciary in respect of the “political questions” doctrine: what is left of the doctrine? Our answer will be “nothing much.” Even in the United States of America where the doctrine was taken from, the *judex* had shown in *Baker (supra)* that the end is near for the doctrine. In that case which had similar facts with *Colegrave (supra)* (both dealing with mal-apportionment of districts), the Supreme Court painstakingly laid down six (6) guiding principles which should be patiently considered before the doctrine is applied. The court ended up de-applying the doctrine holding that none of the six criteria was present in the case before it. This decision may not be unconnected with the court’s discovery of the importance of adhering to the rule of law and the realization that a deviation from this sacrosanct legal principle must only be allowed in extremely exceptional circumstances.

Still in America, the scope of the doctrine was further pruned down in *Powell (supra)* where it was held that the House had exceeded the powers committed to it and that this

---

<sup>92</sup> Punch Correspondents, “PDP Expels Ararume, Rivers Speaker” Punch Newspaper (Nigeria 11 April 2007)

made judicial review justifiable. Then came *Boumediene (supra)* which also refused to apply the doctrine on the ground that in making the law in question (MCA), the legislature did not put an alternative mechanism to *habeas* procedure in place. The long and short of all these recent cases is that the doctrine is on a very short leash in America from where we “imported” the doctrine.

In fact Daly has said, and correctly too, that the core message of *Justice Brennan* in *Baker* is that various considerations may litigate against applying the general principles of judicial review but that there are no categories of decisions that are beyond judicial review.<sup>93</sup> This perfectly mirrors our submission as we believe that no considerations should supersede that of doing justice and respecting the rule of law which sustains any democracy the world over. Thus, the American courts have intervened in several areas that would be thought to involve the political questions doctrine.

Underscoring the need for unlimited judicial review and the adoption of permissive approach in dealing with the scope of the courts’ jurisdiction some learned authors observed thus:

*Judicial review has developed to the point where it is possible to say that no power – whether statutory or under prerogative – is any longer inherently unreviewable.*<sup>94</sup>

It is therefore obvious that what is left of the doctrine is little as the court will be ready to intervene in areas which should enjoy non-intervention on this ground. The moment the court is however satisfied that the laid down procedure is followed, it will back off. For instance, it is within the prerogative of the attorney general of the federation to discontinue a criminal action ongoing before the court. But in the case of an egregious abuse of the attorney general’s power of discontinuance, will the court still be expected to fold its arms? Again, one of the well-known areas that still enjoy the application of the doctrine is the conclusion of treaties by the executive arm of government. However, one might think the questions of whether the signing of the treaty took the *legally-prescribed form or used the correct procedure* apt questions for judicial review. Leaving aside any question as to jurisdiction, if a minister off on a frolic of his own were to conclude a treaty, a court might well, as a matter of domestic law, regard the treaty as a nullity, on procedural grounds.<sup>95</sup>

Thus, the court held in *Nixon v. United States*<sup>96</sup> that despite the commitment of the matter to the political branches, the court can quash an impeachment verdict reached on the toss of a coin. *White J* in the same case also suggested that a summary determination that the president was a “bad guy” would also justify judicial intervention.

---

<sup>93</sup> Paul Daly, “Justiciability and the ‘Political Questions’ Doctrine”, (2010) P.L. 160, 166

<sup>94</sup> Woolf H., Jowell J., and Le Sueur A., *De Smith’s Judicial Review*, 6<sup>th</sup> edn (Sweet and Maxwell, London, 2007) p. 15

<sup>95</sup> This was stated *obiter* by the Divisional Court in *R (on the application of Wheeler) v. Prime Minister (2008) EWHC 1409 (Admin)* at 55

<sup>96</sup> 506 U.S. 224, 253-254 *per Souter J.*

The above trend is now being followed by the Nigerian courts in impeachment and pre-election cases as well as the internal proceedings of the legislature. The Supreme Court intervened in several impeachment cases in the fourth republic, the leading one being *Inakoju v. Adeleke (supra)* to restate the position of the law that it has the power to go behind section 188(10) to see if the provisions of section 188(1) – (9) have been complied with. Where it finds that those pre-conditions have been met, the court will then back off but will intervene if those pre-conditions have not been met. In pre-election matters, the courts, in unmistakable terms, laid down the principles that it will not interfere in the internal affairs of political parties if it can be shown that in substituting one candidate for another the party shows cogent reason(s) which INEC is able to verify. Anything short of this, the court will intervene to rule in favour of the candidate nominated and voted for at the party's primary. This position can be seen in *Ugwu v. Ararume (supra)* and *Amaechi v. INEC (supra)*. In matters involving the legislature, the courts entertained the suit brought before it by the executive on whether the ICPC Act was properly passed and did hold that that Act was null and void for improper passage.

The dilemma of the court in respect of political questions especially as it relates to pre-election matter is represented in *Dutsima v. PDP & Ors*<sup>97</sup> where Dutsima sued President Goodluck Jonathan on the zoning issue which is provided for in the PDP constitution. *Justice Lawan Hassan Gunmi* held:

*Although Article 7.2 (c) of the PDP constitution, 2009, as amended, recognized the principle of zoning and rotation of party and elective offices, but “the power to nominate and sponsor candidates to an election is vested in a political party and the exercise of this right is the domestic affair of the party.”*<sup>98</sup>

The court also held that the provisions of the party's constitution sought to be enforced in court dwelt on a political question that was non-justiciable. In a dramatic manner however *Justice Gunmi* said:

*...the onus was on the party to respect the provisions of the said Article 7.2(c) because it was subsisting and binding on the party, its organs and members.*<sup>99</sup>

Whatever the court meant by the above statement is only clear to it; for when it has declared in one breath that the relief sought before it involved a political question, one would have expected that it would dismiss the suit without saying more but it went on to say in another breath that the article of the party's constitution under consideration “was still subsisting and binding on the party, its organs and members.” This is notwithstanding

---

<sup>97</sup> Kayode Oladele, “Zoning and Jonathan: The Political Question and Justiciability” <<http://africanheraldexpress.com/blog6/2010/12/28/zoning-jonathan-the-political-question-and-justiciability/>> accessed 19 June 2011

<sup>98</sup> *Ibid.*

<sup>99</sup> *ibid*

the fact that if the article is enforced it would breach the fundamental right of Goodluck Jonathan.

The “political questions” doctrine therefore only exists to the extent of the modification stated above.

## **7.0 CONCLUSION**

Our foray into the twin concepts of “political questions” doctrine and justiciability principle has taken us through the paths of the definitions of the concepts; the origin of the political questions doctrine in the United States; how the doctrine makes inroad into Nigeria; the various attitudes of our courts to the concepts both in the second and fourth republics; the challenges faced by our courts in the application of the doctrine in pre-election matters; before we finally touch down at the doorstep of whether anything still remains of the “political questions” doctrine.

There is no doubt about it: the doctrine of political questions may be relevant in some instances but the over-application of the doctrine will impose a “moral cost” on the courts which will have to decline jurisdiction, not because there is no legal justification for assuming jurisdiction, but because the matter in question before it involves some political colouration. It has been rightly argued that “it is escapist to attempt to insulate the court from the politics of its environment”<sup>100</sup> and further that “it is begging the point to categorize some issues as political and avoid determining them when courts were created to resolve disputes.”<sup>101</sup>

The major argument often given in favour of application of the doctrine is that it ensures smooth running of government and separation of powers. But it logically follows from our arguments in the body of this paper that allowing the judiciary to decide all legal issues properly before it will not, in any way, diminish from the cogency of this age-long principle. It is our argument above that the jurisdiction of the scope of judicial review should be limited to those provided by the Constitution itself or other statutory provisions. Thus, where the Constitution has provided in lucidly unmistakable terms that the doing of a thing should be by an organ of government, the judiciary will be ready to back off once it is convinced that the conditions or procedure laid down before that section can come into operation have been met.

---

<sup>100</sup> Egbewole W.O., “Determination of Election Petition by the Court of Appeal: A Jurisprudential Perspective” *op. cit.* at p. 130

<sup>101</sup> *Ibid.*

A good example in this regard is the provisions relating to impeachment of the president, vice president, governor, and deputy governor. Section 188(10) of the 1999 Constitution obviously ousts the jurisdiction of the court, but this ouster clause will not become operative until the court can confirm that the pre-conditions in subsections 1-9 of that section have been complied with. Once the court is satisfied of this, it will go on to give effect to the independence of the legislature to remove an erring governor or deputy governor. This, in actual sense, is separation of power. The court's going round section 188(10) to look at the activities of the legislature with respect to the provisions of subsection 1-9 is the twin concept of checks and balances. This position is well-captured by the learned constitutional lawyer, Ben Nwabueze, in his introduction to Nwosu's book, when he said:

*If a power granted to a political organ by the constitution or the laws is exercised validly in accordance with the terms, tenor and purpose of the grant, then a court of law has no competence or business interfering.*<sup>102</sup>

Any argument predicated on the separation of powers principle cannot stand for the above reason.

The summary that can be inferred from the various case laws in the fourth republic, and which is superbly stated by Nwosu in his book is as follows: so long as no provision of the Nigerian Constitution is breached by a political party, the court would refrain from adjudicating intra-party disputes because such disputes are generally political in nature. But on the other hand, if a party contravenes its own constitution, the courts would not intervene unless the party also breaches a provision of the Nigerian Constitution (e.g. a fundamental right provision).<sup>103</sup> This, in sum, is what is remained of the "political questions" doctrine in respect of pre-election matters, while for other matters involving political questions, the court will be willing to carry out its role of judicial review at all times except where it is constitutionally or statutorily precluded from doing so, and even in such a case, the court will go around the ousting provision to see if any pre-conditions are set, and if such pre-conditions have been complied it.

---

<sup>102</sup> Nwosu I., *Judicial Avoidance of Political Questions in Nigeria*, *op. cit.* at p. xxxix

<sup>103</sup> *Ibid.* at p. 54 This summary is exemplified in the case before the Federal High Court in Abuja where Dutsima sued the PDP and President Goodluck Jonathan on the zoning issue. While the court recognised the fact that the constitution of the party should be respected, it could not come with a positive decision that President Jonathan should not contest, since to so hold would have breached his constitutionally protected right to vote and be voted for. See note 94 above

