

## LEGAL IMPLICATIONS OF JUDICIAL REVIEW ON POLITICAL DISPUTES\*

**Abstract**

*The courts as a cornerstone in a nation's constitutional democracy are invested with the power of judicial review. Yet, exercise of this power on matters which are political in nature is a difficult task. Due to inequalities, injustices and breaches of the law and the constitution by the some political class, aggrieved members often seek refuge in the courts' power of judicial review. Nevertheless, the exercise of such powers by the courts does not go down well with the political class as they view such acts as usurpation of their powers in the guise of judicial review. Based on this premise, this paper analyses the legal and political implications of the exercise of judicial review powers on political questions/disputes. It finds that the exercise of judicial review power on political questions has legal and political implications and is necessary in developing countries for the purpose constitutional justice and sanctity, rule of law and due process. Although the paper is beneficial to countries with constitutional democracy, the focus of discussion is on Nigeria. Constitutional provisions, interviews with some stake holders were used to enrich the legal analysis of this study.*

**Keywords:** Powers of Judicial Review, Political Disputes, Nigerian Courts, Constitutional Democracy

**1. Introduction**

Judicial resolution of political disputes has always been a herculean task.<sup>1</sup> This is mainly due to the thin line of distinction between legal and political matters.<sup>2</sup> Yet, politicians use legal powers for political purposes. To this extent, courts are often invited to resolve high content political disputes although not without some legal or constitutional elements. At times, aggrieved members of the political class ask courts to intervene when he feels that his right has been trampled upon by the fellow politicians. Thus, courts need to find a legal way of controlling or overturning the actions of the political class or deciding disputes which arise from the exercise of powers and functions by the political class.<sup>3</sup> Many modern constitutions permit the courts to resolve disputes, in appropriate proceedings before it, among the political class.<sup>4</sup> Effective resolution of these disputes requires some level of vigilance, independence and creativity of the courts.<sup>5</sup> This shows that there

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<sup>1</sup> This has been a central problem of constitutional theory. See Jamal Greene, 'Giving the Constitution to the Courts' (2008) 117, *Yale L.J.*, 886, a review of Keith E. Whittington's *Political Foundations of Judicial Supremacy: The Presidency, The Supreme Court and Constitutional Leadership in U.S. History*, 2007.

<sup>2</sup> See M. B. Miller, 'The Justiciability of Legislative Rules and the 'Political' Political Question Doctrine' (1990) 78, *Cal. L. Rev.*, 1341.

<sup>3</sup> See L. Fisher, *American Constitutional Law*, 4<sup>th</sup> edn, Carolina Academic Press, Durham, North Carolina, United States of America, 2001, at 35.

<sup>4</sup> See for instance Section 6 (6) (b) of the Constitution of the Federal Republic of Nigeria, 1999 which provides that the judicial powers shall extend to all matters between persons, or between government or authority and to any person in Nigeria, and to all actions and proceedings for the determination of any question as to the civil rights and obligation of the person. See also Articles 121 and 125A of the Federal Constitution of Malaysia conferring the judicial powers in the courts thereby conferring the interpretative powers on the courts to interpret the State and the Federal Constitutions. See also B. O. Okere, 'Judicial Activism or Passivity in Interpreting Nigeria Constitution' (1987) 36 *I.C.L.Q.* 790 – 807 at 788.

<sup>5</sup> The judicial arm of government is confronted with the problem of dealing with judicial review, which sometimes carries some amount of political content. The role of Judicial Review is the legal way of controlling the use of power by the legislature and the executive. To the extent that these two arms of government use power for political purposes, control by the courts of such action means that the courts may enter the political arena, purportedly as an unbiased umpire, applying objective criteria relating to the use of legal power. The Courts are therefore not required to adopt political position regarding the use of such powers. However the dividing line between political leanings and objectivity may be grey. See *Inakoju v Adeleke* (2007) All FWLR (Pt. 353), 3 at 26. See also T.R.S. Allan, 'The Constitutional Foundation of Judicial Review: Conceptual Conundrum or Interpretative Inquiry' (2002) 61 (1) *C.L.J.* 87.

is a relationship between the courts and the political class.<sup>6</sup> Yet, until recently, scholars have not really brought to fore the actual role of the courts in resolving high content political disputes.<sup>7</sup> This is not astonishing because courts have been classically viewed as neutral umpire with no role in resolving political disputes.<sup>8</sup> Courts are expected to resolve disputes observing separation of powers and avoid dabbling into muddy politics.<sup>9</sup> Even judges share this pure legalistic opinion of the nature of judicial powers.<sup>10</sup>

At the moment, democracy has gained high recognition world over.<sup>11</sup> The task of sustainable democratic system requires careful judicial decisions in matters that are highly political.<sup>12</sup> Each arm of government is a coordinate organ of government in line with the theory of separation of powers.<sup>13</sup> The arms also need to respect the rule of law.<sup>14</sup> All these together with the need to comply with the rule of law, power and revenue sharing formula, respect for human rights, and political pluralism means that the courts will regularly be required to decide on issues that have some political undertone.<sup>15</sup> Nevertheless, judicial resolution of political disputes in Nigeria has some legal and political implications. This paper focuses on these implications.

## **2. Legal Powers of Political Class and Judicial Review**

The Constitution establishes the Nigeria's legislature and vests it with legislative powers.<sup>16</sup> Thus, the National Assembly and the State Houses of Assembly are creations of the Constitution vested with legislative powers.<sup>17</sup> The States Houses of Assembly make laws for the States of the Federation.<sup>18</sup> The State Legislative Assemblies also make laws for the States.<sup>19</sup> One important power conferred on the National Assembly and the States Houses of Assembly is the power to regulate their procedure without any need for external

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<sup>6</sup> A. L. Richard., *Politics by other means: Law in the Struggle against Apartheid, 1980 – 1994*, NY:Routledge, 1995, p.7.

<sup>7</sup> See generally the edition titled 'Democracy and Law' of the International Social Science Journal, No. 152, June, 1997.

<sup>8</sup> Jones Bill (ed), *Politics in UK*, NY: Philip Alan, 1991, 473.

<sup>9</sup> See the sharing of Power system under Sections 4, 5 and 6 of the Constitution of the Federal Republic of Nigeria, 1999 for the sharing of powers between the three arms of government namely the executive, the legislature and the judiciary. See also Articles 39, 44 and 121 of the Malaysian Federal Constitution for the operation of the doctrine of separation of power.

<sup>10</sup> See the dictum of Justice Adenekan Ademola of the Court of Appeal in *Balarabe Musa v Hamza & Ors* (1982)3 N.C.L.R 229 at 247.

<sup>11</sup> See A. R. Aden, From Chaos to a State based on Rule of Law, Essay on Political and Legal Aspect of the Somalia's Thorny: Path to Democracy & Constitution, Law & State, (1994) Vol. 49-50, at 203.

<sup>12</sup> A. Left-wich, 'Two Cheers for Democracy', *The Political Quarterly*, (Dec. 1996,) vol. 67 No.4 .334. See also 'The Global Trend' chart on Freedom in the World 2007: Freedom Stagnation amid Pushback against Democracy published by Freedom House at <http://en.wikipedia.org/wiki/democracy> accessed on 13/12/2010.

<sup>13</sup> See generally B. O. Nwabueze, *Military Rule and Constitutionalism in Nigeria*, Ibadan Spectrum Book Ltd, 1992.

<sup>14</sup> See Justice M.L Uwais, An address delivered by Hon. Justice M.L. Uwais, Chief Justice of Nigeria at the Opening Ceremony of the 1997 Induction Course for Judges and Khadis, held 12<sup>th</sup> May, 1997 at the International Conference Centre Abuja.

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

<sup>16</sup> See Section 4(1) Constitution of the Federal Republic of Nigeria, 1999 as altered (the CFRN, 1999). See also Article 44 of the Malaysian Federal Constitution.

<sup>17</sup> See section 47 of the CFRN, 1999 which provides that there shall be National Assembly for the Federation which shall consist of the Senate and the House of Representatives. Section 90 of the Constitution also provides that there shall be House of Assembly for each State of the Federation. Section 4(1) vests the legislative powers of the Federation in the National Assembly.

<sup>18</sup> See section 4(6) of the CFRN, 1999 which provides that the legislative powers of the State of the Federation are vested in the House of Assembly of that State.

<sup>19</sup> Ibid. See Eight Schedule, [Article 71], Part 1, section 3 of the Federal Constitution. It makes law with respect to matters enumerated in State Lists and Concurrent Lists. See Article 95 B (1) List II and List III.

control.<sup>20</sup> It provides: ‘Subject to the provisions of this Constitution, the Senate and the House of Representatives shall have powers to regulate its own procedure...’<sup>21</sup> The Nigerian Constitution provides that the President of the Senate, Deputy President of the Senate, Speaker and Deputy Speaker of the House of Representatives can be removed from office by a resolution of the Senate or of the House of Representatives as the case may be by the votes of not less than two-thirds majority of the members of the House.<sup>22</sup> The Constitution also provides for instances where a member of the National Assembly and State House of Assembly shall be disqualified.<sup>23</sup> In the same vein, part of the actions of the legislature is the removal of the Head of State. In Nigeria, the National Assembly has the power to remove the President.<sup>24</sup> The law provides that the proceeding leading to the removal of the President shall not be entertained or questioned by any court.<sup>25</sup> There is a similar provision in respect to State Houses of Assembly giving the House the power to remove the Governor<sup>26</sup> and the proceedings leading to the same shall not be questioned in any court.<sup>27</sup> The executive power in Nigeria is vested in the President of Nigeria who may also exercise such powers through the Vice-President, Ministers of government of the Federation or officers in the public service of the Federation.<sup>28</sup> The Constitution also vests the powers of making several appointments in the executive.<sup>29</sup> In Nigeria, the President in making his appointments is required to take into consideration the political diversity of the country.<sup>30</sup> This presupposes the facts that the President, when appointing is not allowed to concentrate the appointment in his locality or State. Otherwise, it may be seen as being discriminatory if it is challenged.<sup>31</sup> There are other constitutional requirements regarding the appointments

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<sup>20</sup> See section 60 of the CFRN, 1999 which provides that the Senate and the House of Representatives subject to the provision of the Constitution have the power to regulate its own procedure.

<sup>21</sup> See also section 101 of the CFRN, 1999 for the power of the State House of Assembly to regulate its procedure.

<sup>22</sup> See section 50(2) (c) of the CFRN, 1999. See section 92(2) (c) for similar provisions in respect of State Houses of Assembly.

<sup>23</sup> Ibid. See sections 66 and 107. This relates to pre-election disqualification. Post election disqualification occurs where a member is deemed to have vacated his office under section 68 and 109 of the Constitution.

<sup>24</sup> See generally section 143 of the CFRN, 1999.

<sup>25</sup> See section 143(10) of the CFRN, 1999.

<sup>26</sup> See section 188 of the CFRN, 1999.

<sup>27</sup> See section 188(10) of the CFRN, 1999.

<sup>28</sup> See section 5(1) of the Constitution of the Federal Republic of Nigeria, 1999 as altered (CFRN, 1999). See section 5(2) for similar provisions for state governors.

<sup>29</sup> The appointment of Ministers, special advisers, Attorney General, Accountant General, Chief Justices and Justices of the Supreme Court of Nigeria, The President and Justices of the Court of Appeal of Nigeria, the Chief Judges and judges of the Federal High Courts, High Courts of the Federal Capital Territory, Grand Kadis and Kadis of the Sharia Court of Appeal, President and Judges of the Customary Courts of Appeal of the Federal Capital Territory are made by the President. See generally sections 147(1) to (6), 150(1) and (2), 151(1) and (2), 231(1) and (2), 238(1) and (2), 250(1) and (2), 261(1) and (2), 271(1) and (2), 276(1) and (2), 281(1) and (2). The position is similar in Malaysia. The power of appointing the Malaysian Auditor General under Article 105(1), Election Commissioners under Article 114(1), Judicial Commissioners under Article 122 AB, Chief Justice of the Federal Court, President of the Court of Appeal, Chief Judges of the High Court, and subject to Article 122C, other judges of the Federal Court, Court of Appeal, High Courts under Article 122B (1) are resided in the Yang di-Pertuan Agong.

<sup>30</sup> For instance, the appointments of ministers, secretary to the government of the Federation, ambassadors, the head of civil service, high commissioners and other principal boards of the Federation, officers in the staff of the President, armed forces e.t.c. must reflect the federal character of the Federation and the need to promote national unity.

<sup>31</sup> Section 14(3) of the CFRN, 1999 provides that the appointments of the President must reflect the federal character of the country. Although it may be argued as non justiciable under section 6(6) (c) of the 1999 Constitution, it will be justiciable under section 42 that guarantees the freedom from discrimination. See A. O. Sambo, & A. B. Abdulkadir, ‘Socio-Economic Rights for Sustainable Development in Nigeria: Prospect and Challenges,’ in W. O. Egbewole, M. A. Etudaiye, & O. A. Olatunji, *Law and Sustainable Development in Africa*, Faculty of Law Publications, University of Ilorin-Nigeria, 2012, 256-278.

made by the executive.<sup>32</sup> Also, the power to declare emergency resides in the executive.<sup>33</sup> However, Nigerian Constitution has not precluded the courts from exercising power of judicial review in this respect.<sup>34</sup> The Constitution also specifies, in details, the circumstances that must arise before a state of emergency can be declared by the President.<sup>35</sup> Also, the Constitution lays down the procedure to be followed before making the proclamation<sup>36</sup> and when such a proclamation will cease to have effects.<sup>37</sup> Also, the proclamation must not contradict the provision of the Constitution.<sup>38</sup>

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<sup>32</sup> For instance, at least one Minister must be appointed from each State of the Federation. The Ministers must also be qualified to be elected as a member of the House of Representatives. Also, members of the executive bodies established for the Federation must be similarly qualified and must not have been removed as members of such body for gross misconduct within the preceding ten years; and except for ex-officio, they are permitted only two terms of five years. Also, only persons who, in the opinion of the President, are of unquestionable character can be appointed to the civil service commission. The head of the civil service of the Federation must be from among members of the civil service of the Federation or of the State. The Attorney General in addition to being qualified to be elected as a member of the House of Representatives must be at least ten years post-call. Judges of High Courts is required to have ten years post-call, twelve years for justices of the Court of Appeal and not less than fifteen years for the justices of the Supreme Court of Nigeria before they can be appointed as judges.

<sup>33</sup> Section 305(1) of the CFRN, 1999 confers the power to issue a proclamation of a state of emergency on the President.

<sup>34</sup> Section 305 also subjects the exercise of the powers to the provision of the Constitution.

<sup>35</sup> Section 305 (3) of the CFRN, 1999 states that the President shall have the power to issue a proclamation of a state of emergency only when: a) the Federation is at war b) the Federation is in imminent danger of invasion or involvement in a state of war; c) there is actual breakdown of public order and public safety in the federation or any part thereof to such extent as to require extra-ordinary measures to restore peace and security; d) there is clear and present danger of an actual breakdown of public order and public safety in the Federation or any part thereof requiring extra-ordinary measure to avert such danger; e) there is an occurrence of imminent danger, or occurrence of any disaster or natural calamity, affecting the community or a section of the community in the Federation; f) there is any other public danger which clearly constitutes a threat to the existence of the Federation; or g) the President receives a request to do so in accordance with the provision of subsection (4) of this section. Subsection (4) of section 305 of the CFRN, 1999 states that: The Governor of a State, with the sanction of a resolution supported by two-third majority of the House of Assembly, requests the President to issue a proclamation of a state of emergency in the state where there is in existence within the states any of the situations specified in subsection (3) (c), (d) and (e) of this section and such situation does not extend beyond the boundaries of the state. Subsection (5) of the CFRN, 1999 says: The President shall not issue a proclamation of a state of emergency in any case, to which the provisions of subsection (4) of this section apply unless the Governor of the State fails within a reasonable time to make a request to the President to issue such proclamation.

<sup>36</sup> The procedure is that the President, by instrument published in the Official *Gazette* of the federation issues a proclamation of a state of emergency in the Federation or any part thereof. See section 305(1) of the CFRN, 1999. After this, he immediately transmits copies of the official *Gazette* of the Federation containing the proclamation with the details of the emergency to the president of the Senate and the Speaker of the House of Representatives. Section 305 (2) of the CFRN, 1999. Next, the Senate President and the Speaker of the House of Representatives convene separate meeting of the house in which he is presiding to consider the situation and decide whether to pass a resolution approving the proclamation. Section 305 (2) of the CFRN, 1999.

<sup>37</sup> See subsection (6) of section 305 of the CFRN, 1999 which provides that: ‘A proclamation issued by the President under this section shall cease to have effect a) If it is revoked by the President by instruments published in official gazette of the government of the Federation; b) if it affects the federation or any part thereof and within two days when the National Assembly is in session, or within ten days when the National Assembly is not in session after its publication, there is no resolution supported by two-thirds majority of all the members of each House of the National Assembly approving the proclamation; c) After a period of six months has elapsed since it has been in force provided that the national Assembly may, before the expiration of six months aforesaid, extend the period for the proclamation of the state of emergency to remain in force from time to time for a further period of six months by resolution passed in like manner; or d) at any time after the approval referred to in paragraph (d) of the extension referred to in paragraph (c) of this subsection when each house of the National Assembly revoke the proclamation by simple majority of all the members of each House.’

<sup>38</sup> This is because section 305(1) of the CFRN, 1999 starts with the clause: ‘subject to the provisions of this Constitution...’

There is also in Nigeria, directive principles of State policies contained in Chapter II of the Constitution. However, all these provisions which relate to lofty policies of the government are made non-justiciable by section 6(6) (c) of the Constitution. In the same vein, the Attorney General is part of the executive.<sup>39</sup> It is to be noted that the Attorney General is seen as a law unto himself being the Chief Law officer of the Federation.<sup>40</sup> He has the power under the Constitution to institute,<sup>41</sup> take over<sup>42</sup> and discontinue<sup>43</sup> any criminal proceedings whether or not it was instituted by him.<sup>44</sup>

The Nigerian Constitution contains provisions dealing with political parties.<sup>45</sup> It provides what the constitutions and rules of political parties shall promote and protect.<sup>46</sup> It also provides for what the aims and objectives of the parties must comply with<sup>47</sup> and finances of political parties.<sup>48</sup> Also, under the Electoral Act, political parties can only change their candidates for election in the case of death or express withdrawal in writing by the candidate.<sup>49</sup> The Act also provides rules, regulations and guidelines to be followed by political parties.<sup>50</sup> Also, the Act provides that notwithstanding any provision in the Act or rules of political parties, an aspirant who complains about the violation of the Act or rules of the political party may approach the Federal or State High Court for redress.<sup>51</sup> However, it would appear that the Act does not allow the court to stop the holding of primary or general elections pending the determination of the case.<sup>52</sup>

The questions that may arise from the provisions cited above is whether the court can exercise judicial review in the event of violation of constitutionally provided legislative or executive actions or rules of procedure; whether any aggrieved member of the legislature cannot validly challenge this irregularity. In a situation where the President in exercising his power does not comply with these, what will be the reactions of the

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<sup>39</sup> The Attorney General is a member of the executive Council in Nigeria because he doubles as the Minister of Justice of the Federation. See section 150(1) of the CFRN, 1999. The office is also categorised under Chapter VI, Part 1 of the Constitution with the heading as the Executive. Similarly, in Malaysia, he may be member of the Cabinet. See Article 145(5) of the Federal Constitution.

<sup>40</sup> See section 150(1) of the CFRN, 1999.

<sup>41</sup> See section 174(1) (a) of the CFRN, 1999 which provides that the Attorney General of the Federation shall have the power to institute and undertake criminal proceedings against any person before any Court of law in Nigeria other than Court Martial, in respect to any offence created by or under any Act of the National Assembly.

<sup>42</sup> Ibid. see section 174(1) (b) of the CFRN, 1999 which states that the Attorney General also has the power to take over and continue any such criminal proceeding that might have been instituted by any other person or authority.

<sup>43</sup> The Attorney General also has the power to discontinue any criminal proceedings at any stage before judgement is delivered instituted by him or any other authority or person. See section 174 (1) (c) of the CFRN, 1999.

<sup>44</sup> This means that the law allows some other officers such as the Police to institute criminal proceedings. The Attorney General has the power to take over or discontinue such proceedings notwithstanding the fact that it was not instituted by him.

<sup>45</sup> Section 222 of the Constitution of the Federal Republic of Nigeria, 1999 as altered (CFRN, 1999) requires the political parties to ensure that: the names and addresses of its national officers are registered with Independent National Electoral Commission (INEC); memberships are opened to every Nigerian irrespective of his place of origin, circumstances of birth, sex, religion, or ethnic group; a copy of its constitution is registered in the principal office of INEC and registers its altered constitutions; the symbol should not reflect religious or ethnic colouration and have its headquarters in the Federal Capital Territory (F.C.T.) Abuja.

<sup>46</sup> Section 223(1) (b) of the CFRN, 1999 states that the rules and constitutions of political parties must: provide for the periodical election on a democratic basis of the principal officers and members of the executive committee or other governing bodies of the parties; ensure that the members of the executive committee or other governing bodies reflect the Federal Character of Nigeria. See also section 223(2) of the CFRN, 1999.

<sup>47</sup>Section 224 provides that its aims and objectives must comply with fundamental objectives and directive principles of the state policy contained in chapter II of the CFRN, 1999.

<sup>48</sup>See sections 225 and 226 of the CFRN, 1999 regulations relating to the finances of political parties.

<sup>49</sup>See generally sections 32 to 36 the Electoral Act, no. 6, 2010 as amended Electoral Amendment Act no. 2, 2011 (the Electoral Act) for rules relating to changing of candidates.

<sup>50</sup> See sections to 78 to 102 of the Electoral Act.

<sup>51</sup> See section 87(9) and (10) of the Electoral Act.

<sup>52</sup> See section 87(11) of the Electoral Act.

courts if an issue arises before it? There are numerous constitutional provisions which empower the courts to exercise judicial review power in resolving disputes arising from the political exercise of the constitutional powers stated above. For instance, section 4(8) subjects the action of the legislature to the review of ordinary court of the land. Section 6(6)(a) and (b) is an omnibus provision which gives the courts inherent powers to decide disputes between all persons and authorities. Also, courts can also resolve disputes between the President and the National Assembly, National Assembly and any state House of Assembly or State of the Federation. Courts can also resolve disputes between the Federal government and the State, and states *inter se*.<sup>53</sup> Also, in Nigeria, an injunction can be granted against the executive.<sup>54</sup> Courts can resolve matters relating to administration, management and control of the Federal government or any of its agencies.<sup>55</sup> It can also decide matters relating to interpretation and application of the Constitution as it affects the Federal government or any of its agents.<sup>56</sup> In resolving all the above manners of disputes, there are legal and political implications. This will be the focus of the paper's discussion in the next segment of this paper.

### **3. Legal implications of Exercise of Judicial Review Power on Political Disputes**

Judicial review of political questions has come with some legal implications. This aspect analyses its implications on constitutional sanctity and justice, prevention of tyranny, anarchy and promotion of checks and balances, rule of law and due process in government, and ultimate development of the law.

#### **Constitutional Sanctity and Justice**

The study reveals that reviewing political questions has led to the sanctity of the organic document called the constitution. Judicial review will force the political class to abide by the letter, spirit and intent of the Constitution. The main idea being to retain the integrity and sanctity of the document called the Constitution. In so far as the Constitution has ordained outlined functions of each branch, the judiciary, in resolving disputes, does not pretend to usurp or hijack or arrogate to itself the supremacy over other arms of government. It merely calls attention to that organic document (Constitution) which, first and foremost, outlined the functions of each branch and the means of realising those functions. It does not pretend to be a technician or a technocrat to make argument about budget; policy etc. If there is a substantive provision on matters of budget, there is also an ordained way of doing it. Thus, if it is the duty of the executive to propose appropriation, it is the duty of the legislature to make appropriation i.e. through law. Where the legislature purports to propose appropriation, the court will intervene. The courts also decide each matter on the merit so long as it has jurisdiction without unnecessarily being curtailed under the guise of political question or non-justiciability. This, therefore, leads to the justice of the matter.

It should also be observed that the court does not, by this action of judicial review; purport to usurp the constitutional duties of other arms of government. That would mean it is supplanting the basis of its own authority. This is because the Constitution says the legislature must not violate the constitution. It presupposes the fact that the court cannot also violate the constitution. That is why the courts have not also spared themselves. In situations where the courts, in arriving at the guilt of the accused, violated the clear words of the statute; stating how the courts should exercise its function. The Court of Appeal chastised the lower court.<sup>57</sup> Even where the courts have violated the right to fair hearing, that is the essence of appellate courts; they have nullified those decisions. The former position of political questions did not protect the sanctity of the Constitution. For instance, in *Balarabe Musa's* case, despite the series of alleged constitutional irregularities, the courts nevertheless closed its eyes to it. Despite alleged irregularities in the

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<sup>53</sup> See section

<sup>54</sup> See section 251(1) (r) of the CFRN, 1999.

<sup>55</sup> See section 251(1)(p)(q) (r) of the CFRN, 1999

<sup>56</sup> *Ibid.*

<sup>57</sup> See the Supreme Court affirming the decision of the Court of Appeal in *Ozo Nwankwo Alor v Christopher & Ors SC/21/2002*.

census figures in *AG Eastern Nigeria v AG Federation*, the court declined jurisdiction and others. The hands tied approach is not good for the country.

### **Prevention of Tyranny in Government and Promotion of Checks and Balances**

The practice of judicialisation or judicial review of political questions has prevented tyranny in government of Nigeria. This is the essence of checks and balances. This is also a form of constitutional dialogue. The judiciary is not doing this to spite any arm of government. It merely calls attention to the danger inherent in the abuse or overreaching one's functions. If, for instance, the executive in Nigeria had been allowed to interfere with the tenure of the local government as earlier stated, there would have been tension and this would have consumed everybody; including the three arms of government. That is why it requires somebody (an institution like the court), that is independent itself to remind the other arms of government of their constitutional roles. If the executive were allowed to declare the office of the Vice president vacant, as earlier stated, there would have been tension everywhere as a result of the power overreaching of the then executive.

### **Promotion of Obedience to Rule of Law, Due Process and Prevention of Anarchy**

The practice of judicialisation in Nigeria has ensured the promotion of rule of law, due process and has prevented the nation from going through anarchy. The effect of not judicialising these questions is that there is the chance that people will go to the state of nation i.e. anarchy, chaos, confusion. That is why instead of resulting to self-help, people come to an arbiter which is the judiciary. Where the Constitution does not permit the incursion, the court will decline jurisdiction but must have gone to the merit of the case to be able to do so. In fact, recently, when a presidential candidate declared that he would not challenge the result of the election in court, it led to post-election violence in many parts of the country especially the Northern part claiming so many lives and properties.<sup>58</sup> This is because it was felt that by not seeking courts' intervention, there would not be rule of law and that hopes in the justice of the matter might have been lost.

The practice of judicialisation has today limited the absolute powers of the legislature as they are subject to constitutional limitations with the courts active enough to curtail their excesses. The legislature today knows that they cannot impeach the executive the way they like without any due regard to rule of law and due process. They cannot also manage their own affairs the way they like as their powers are rooted in the Constitution; they have to comply by their standing rules which they have set for themselves and the law. They cannot, like before, reject ministerial nominees without due regard to the procedure. They must also comply with the directive principles of the state policy. They cannot also suspend any member anyhow; they cannot enact laws that restricts or ousts the powers of the courts; they cannot enact laws that affect the fundamental rights of the people. They cannot enact laws that restrict supervisory role of the courts. Today, their discretion is fettered to an extent by the law. This is the power of judicial review.

### **Development of the Law thereby leading to Development of the Nation**

The position of judicialisation or judicial review allows the court to interpret the Constitution and the law in such as to assist in developing the law thereby leading to the development of the country.<sup>59</sup> The law has to be interpreted in a way that will assist the role and development of the nation. The judiciary has recently and marvellously performed this role in Nigeria.<sup>60</sup> Recently, an issue of elongation of the tenures of governors was decided by the court. The matter concerned governors whose elections were nullified by courts and were asked to stay out of office for a while. The governors argued that having been re-elected

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<sup>58</sup>See Report of the Presidential Committee on Post-Election Violence) available at: <http://www.tribune.com.ng/index.php/front-page-news/29487-post-election-violence-committee-submits-report-blames-buhari> accessed on 15th January, 2012.

<sup>59</sup> Where the court does this role very well, it has assisted in growth and development of the country through its interpretation. See Interview with Justice XXX, Justice of the Supreme Court of Nigeria, in his office at the Supreme Court Complex, on 10<sup>th</sup> July, 2011, (Transcript is on file with the author).

<sup>60</sup> Ibid.

into their positions, their tenure would start afresh instead of continuing with the remaining tenure. The Supreme Court has made a decision on that. The Court held that his tenure should start afresh. That accounts for the reason why some 5 states did not have election within the last election period. Their tenure terminates by 2012 in the view of the courts. That has assisted the development of the law thereby assisting the development of the society. This is because there should be no more rancour on what happens when somebody has been removed from office.

Another one which the Supreme Court decided was the issue of on shore off shore. There was a dispute between the Federal government and the littoral states. They opted for a better solution on division of revenue that accrues to them. They agreed on a political solution. One of the Governors tried to resile from the agreement because he felt that does not support their own cause. But the Supreme Court held that once a person has entered into a contract whether good or bad, the court cannot change the terms of the contract because it does not rewrite terms of contract. The Court said they must be bound by their political solution which they have adopted unanimously.<sup>61</sup> That helps in bridging the difference between the states and it helps in cementing the relationship which would have been fight, quarrel between the states. This kind of interpretation has led to the development of the law thereby assisting the development of the nation itself.

#### **4. Political Implications of Judicial Review of Political Questions**

Apart from the legal implication, the exercise of judicial review power on political questions has got its political implications. This segment analyses its implications on stability of polity and deepening of democracy, evolution of opposition parties, reduction on intra-party and legislative strife, and its effects on federalism.

##### **Stability of Polity and Deepening of Democracy**

The present position has ensured stability in polity and has deepened democracy.<sup>62</sup> For instance in between 1999-2007, Nigeria had a powerful President. He was so powerful to the extent that he could muscle up oppositions. Indeed, his Vice President became a target, a casualty, a victim of capricious exercise of executive powers. It took the boldness of the Vice President to recognise the latitude of the powers of the guardian of the Constitution namely the judiciary. Thus, he approached the court in many matters challenging an arrogance of the exercise of powers or the other and he won in all. This is a tribute to what the judiciary can do. It should be noted that that was a sitting President. Systematically, methodically, the court nullified all the acts of the President. Indeed, at a point, the President withheld the funds meant for Lagos State government. Ordinarily, the release of fund was supposed to be a political question purely within the discretion of the President. The court intervened as a guardian of the Constitution. This is because it is the same Constitution that allocated powers to the President. It devolves powers to the President on and the state government namely by creating and funding of the local government. The court was able to ingeniously hold that the federal government lacks such powers to withhold the fund. Earlier before the above, there was an attempt to truncate the tenure of the local government and that gave rise to the case of *AG Abia v AGF*. In that case, AG Abia challenged the power of the Federal government to extend the tenure of the local governments in Nigeria. It should be noted that there are 774 local governments. It means there were 774 chairmen, deputy chairmen, and speakers of local governments. There would have been riots and tensions all over the place. But, the declaration of Uwais CJN doused the tension. What would have been a political volcano was doused over night by the pronouncement of the Supreme Court dabbling into the so-called political question. The practice of judicial review has ensured continuity of the local government. It is necessary for constitutional justice and indeed the system of Nigeria's constitutionality and the entire system

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<sup>61</sup> There were actually no divergences of opinion amongst them.

<sup>62</sup> All the interviewees are of the view that the current practices have deepened democracy and have stabilised the polity in Nigeria.



of government rest upon this proposition.<sup>63</sup> This is because if there is confusion in the 774 local governments, the centre cannot hold. If in a state like Kano State where we have 44 local governments and all of them are in turmoil, then there is no way the governor can govern effectively. Thus, if 774 local governments are in turmoil, the centre can never hold. That would have been the end of our democracy but for the intervention of the courts. All the interviewees are of the opinion that the current attitude of the judiciary especially the Supreme Court of Nigeria has ensured political stability in Nigeria.

### **Evolution of Opposition Parties**

The practice of judicialisation or judicial review of political questions has led to the evolution of many political parties in Nigeria. Many opposition parties have emerged as a result of the nullifications of the result of elections of the ruling party (PDP). Following Electoral Act 2006, several sitting governors of the ruling party were chased out of office through the pronouncements of the courts. Also, evolution of opposition parties in Nigeria today is purely moved by judicial activity. Today, Nigeria has opposition parties: Labour party, Action congress in the South West, APGA in the South east as a result of judicial activity.<sup>64</sup> Today, the Action Congress can declare that they are in the opposition. This is a tribute to what judiciary can do under judicialisation. In fact, the court also reviewed the action of INEC to narrow down the numbers of political parties when it was challenged.<sup>65</sup> An action by INEC to impose further requirement other than the ones listed in the Constitution was challenged and set aside by the Supreme Court.<sup>66</sup> This has now opened political space that Nigeria has up to fifty four (54) political parties today.

### **Reduction in Intra-Party and Legislative Internal Strife**

The practice of judicialisation or judicial review of political questions has reduced the intra-party and legislative internal strife. Unlike the former practice where the political parties would do what they liked as regards their internal affairs, the era appears to have gone.<sup>67</sup> But, there is an ingenious move by the National Assembly to abridge the freedom the courts have introduced in internal affairs of political parties. This is in consequence of the case of *Ugwu v Ararume* which interpreted section 34(2) Electoral Act on cogent and verifiable reason. Historically, in *Onuoha v Okafor*, Obaseki JSC said nomination of candidates is an integral matter for the political parties. The court must not choose for the parties.<sup>68</sup> However, wisdom, experiences and a lot of intrigues subsequently showed that the position in *Onuoha's* case was too open-ended. Thus, there was the need for qualification. Political parties were hiding under this *Onuoha's* case to breach the right of the members. Thus, if the leadership does not like the radical views of a particular candidate, they will truncate his ambition. That is why the courts in modifying electoral justice have led to the interference with the so-called internal affairs of the parties. Qualification has been added to *Onuoha's* case. That is, if a party nominates and one wants to substitute, the party must present cogent and verifiable reason. Also, the Electoral Act now limits reason for substitution to be death of the candidate or express withdrawal. Affairs of the political parties are now subject to judicial review.

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<sup>63</sup> See interview with Justice XXX, (Transcript is in file with the Author).

<sup>64</sup> In Ekiti State the then Governor was removed through election petition and another installed. See *Fayemi v Oni* (2009) 7 NWLR, (PT1140) 223; *Oni v. Fayemi* (2008) 8NWLR (PT.1089) 400. Also, In Ondo State the then Governor was removed through election petition and another installed. See *Agagu v Mimiko* (2009) ALL FWLR (PT 462) 1122. In Osun State the then Governor was removed through election petition and another installed *Aregbesola v. Oyinlola* (2009) (1162) 429. (2008) ALL FWLR (436) CA 2018; *Agagu v Mimiko* (2009) 7 NWLR (PT 1140) 342. In Edo State, the then Governor was removed through election petition and another installed. *INEC v Oshiomhole* (2009) 4 NWLR (PT 1132) 607.

<sup>65</sup> See *National Conscience Party of Nigeria v INEC* (2005) All FWLR (Pt 281) 325.

<sup>66</sup> See *INEC v Balarabe Musa* (2003) 1 SC (Pt 1).

<sup>67</sup> The interviews with the judges prove this fact.

<sup>68</sup> The cases of *Onuoha* and *Ugwu* are sufficiently analysed in chapter 7.4 of this thesis.

It is pertinent to mention, however, that the National Assembly has come behind to truncate this authority in the Electoral Act, 2010.<sup>69</sup> They have added a provision to check or water down the court's intervention. This is because following Electoral Act 2006, several sitting governors of the ruling party were chased out of office. They have now inserted a clause in the Electoral Act i.e. to say that where the courts have found that the elections have been massively rigged or was not in compliance with the Electoral Act, what the courts should do is to order a fresh election and not declare any person as the winner. This has been challenged. The Counsel of the National Assembly made an unusual concession that the National Assembly lacks such powers. It means that the National Assembly is interfering with the exercise of judicial functions. That will be a legislative judgement. They cannot tell the court the way to exercise its jurisdiction because there are consequential orders and section 6(6) (a) conserves the authority and inherent power in the courts of records. Inherent powers include the authority to make consequential orders. If not, the whole exercise of judicial functions will be a nullity. If a court makes a declaration without following it with a consequential order, it will be a declaration in vein; a peril victory. However, Justice Kolawole of the Federal High Court sitting in Abuja has nullified this provision of the law on the ground that it is inconsistent with the provision of the Constitution.<sup>70</sup>

Also, there is a change in legislative behaviours.<sup>71</sup> The legislature now, unlike before, knows that there is a watch dog namely the courts that can overrule any illegal decisions taken by them. This has actually reduced internal strife in the National Assembly and many legislative Assemblies across the states. They have now, to some extent, faced their legislative duties compared to the ones that used to prevail.<sup>72</sup> The courts' decisions have to an extent conditioned the behaviour of the politicians.<sup>73</sup> Initially, what prevailed were high rates of impeachment or threats of impeachment.<sup>74</sup> This has reduced to an extent.

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<sup>69</sup> See section 140(2) and 141 of the Electoral Act 2010 stated that: 'Where an Election Tribunal or Court nullifies an election on ground that the person obtained the highest votes at the election was not qualified to contest the election, the Election Tribunal or Court shall not declare the person with the second highest votes as elected, but shall order a fresh election.'

<sup>70</sup> See the Interview with the said judge at the Federal High Court Complex, Abuja on 19<sup>th</sup> July, 2011 and the judgement where he noted that: 'National Assembly has no competence to enact sections 140(2) and 141 of the Electoral Act 2010 because when it does, it delimits the power of the court to adjudicate dispute between two parties in election petition. Sections 140 (2) and I41 derogate the powers enshrined by sections 4(8) and 6(1) of the constitution. The Court noted that: 'It is true that some electoral disputes extended to some few months to the end of the tenure or term of the last elected officials. But are these sections 140(2) and 141 of the Electoral Act 2010 out to correct the time required to determine electoral dispute? Section 4 of the constitution empowers court on what to decide in any case. It also noted that once an election tribunal sits over election petition, no legislation can curtail its inherent powers on what to decide. It just does not fit. The grund norm of the nation is the constitution, which spells powers of the three tiers of government,.' The Court held that in line with this reasoning, for sections 140(2) and 141 of the Electoral Act 2010, the constitution did not give powers to the legislators to detect what the court should do in any matter before it, adding that: 'any law which is not consistent with any provision of constitution shall be, to the extent of its inconsistency, null and void and of no effect whatsoever.' According to the judge, 'Sections 140(2) and 141 of the Electoral Act 2010 are nothing but legislative judgment, which the National Assembly lacks powers to make. The said provisions are usurpation of judicial powers to do justice between parties in dispute.' I don't think that the Tribunal can operate effectively with these provisions. I, therefore, declare them unconstitutional, null and void and consequently nullified. The plaintiff reliefs are hereby granted and I make no order as to cost,' he added. See also Interview conducted by the researcher with Justice A.O. Owoade, Justice of the Court of Appeal, Owerri Judicial Division, at his assigned Abuja Office, Court of Appeal Abuja Judicial Division on the 11<sup>th</sup> July, 2011 (Transcript is on file with the researcher) supporting the lower court's decisions.

<sup>71</sup> See the Interview with Prof. M. A. O. Alabi, Head of Department, Political Science, University of Ilorin and the former Speaker, Osun State House of Assembly in his office on 21 July, 2011 (Transcript is in file with the researcher).

<sup>72</sup> Ibid. See also the interview with Senator Suleiman M. Ajadi, Senator Federal Republic of Nigeria, (1999-2005) in his Abuja Residence on the 19<sup>th</sup> July, 2011 (Transcript is in file with the Author) and Interview with Honourable Abioye, Member, Kwara State House of Assembly (1999-2003) at Wuye, Abuja, on the 20<sup>th</sup> July, 2011 (Transcript is in file with the Author).

<sup>73</sup> See interview with Alabi. Ibid.

<sup>74</sup> See Ladoja (Oyo State) in *Inakoju v Adeleke*; Peter Obi (Anambra State), Diepreye Alameyeseigha (Bayelsa State), Ayodele Fayose (Osun State). Ladoja, Dariye and Obi successfully challenged theirs and were reinstalled. Others did not challenge theirs in court. Other impeachments are Deputy Governors: Abdullahi Argungu (Deputy

### Development of Federalism

Federalism is an arrangement by which powers of government are divided between a central government and a number of regions or component states.<sup>75</sup> One thing that is central to a federal arrangement is the separateness and independence of each government. This autonomy of each government presupposes independence of each government from the control of the other. Autonomy also implies that neither the Federal government nor state government should confer additional functions or responsibilities on the others without the consent of the other. It therefore carries with it some notion of equality of status as a government.

The federalism in Nigeria is now dictated by the pronouncement of the Supreme Court. An instance is the crisis between the National Assembly and the Houses of Assemblies. What operates now is fallout of the decision of the Supreme Court. Previously, the National Assembly was under the illusion that they could use the concept of overriding power to dabble in an area that the State Assemblies felt it was not meant for the Federal Government. The Supreme Court held that tenure to the extent that it was not expressly mentioned in the Constitution especially under the exclusive legislative list means residual power which falls within the powers of the State.<sup>76</sup> That is the reason why the States do what they like with local government till today.<sup>77</sup> That decision has effectively placed the entirety of the local government within the powers of the States. In *AG Ogun v AGF*,<sup>78</sup> the Supreme Court even said neither of the Federal or State government can confer additional responsibility on each other.<sup>79</sup> The Court also said in *AG Lagos* that money already appropriated for a purpose cannot be used for another purpose. Thus, how the government behaves is largely dictated by the pronouncement of the Supreme Court.

### 5. Conclusion

From the foregoing, the political class in Nigeria is given enormous powers and functions. The granted constitutional powers are mainly exercised for political purposes. Political disputes therefore become inevitable in the exercise of these powers. Since constitutionalism entails legal limitation of governmental powers, all legal and political powers must have legal limits. Disputes as to the proper exercise of these political powers are usually brought to the courts for resolution. Courts are constitutionally empowered to resolve these disputes notwithstanding the controversial nature of the dispute of the high political content the dispute carries with it. The resolution of such disputes has so far brought to fore some legal and political implications. Thus, judicial resolution of the political disputes has positively impacted on constitutional sanctity and justice. This has increased respect for the constitution by the political class. Also, there has been prevention of tyranny, anarchy that would have resulted from judicial abdication of its role in this regard. It has also promoted the principles of checks and balances, rule of law and due process in government. It has also led to ultimate development of the law thereby improving the development of the nation. In terms of political implications, judicial resolution of the disputes has led to stability of polity and deepening of democracy. Also, evolution of opposition parties is a product of judicial activity. Again, there has been to some extent reduction on intra-party and legislative strife. More so, its effect on federalism is enormous because the present federalism being practiced in Nigeria is a product of judicial resolution of disputes.

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Governor of Kebbi State), Iyiola Omisore (Osun State), John Opka (Cross Rivers State) and Eyinnaya Abaribe (Abia State). Despite the severe criticisms of Balarabe Musa's case, the court nevertheless followed the case in *Abaribe v the House of Assembly Abia State* (2002) 14 NWLR (Pt 778), 46. For criticisms of *Balarabe Musa's* case, see B. O. Nwabueze, *Nigeria's Presidential Constitution (1979-1983)*, Longman, 1985, 339-340; M.A.O. Alabi, *The Supreme Court in the Nigerian Political System 1963-1997*, Ibadan Nigeria: Demyax Press Ltd, 2002 at 266-269.

<sup>75</sup> B. O. Nwabueze, *The Presidential Constitution of Nigeria*, C Hurst & Company, London in Association with Nwamife Publishers, Enugu and Lagos, United Kingdom, 1982 at 37 to 43.

<sup>76</sup> See *AG Abia's* case already discussed in details in this thesis.

<sup>77</sup> Some states, like Lagos State made local governments as development centres while many states conduct elections for the local governments and have joint accounts with local government.

<sup>78</sup> (2002) 18 NWLR (Pt. 798) 232.

<sup>79</sup> See also Uwais, JSC in *Attorney General of Bendel State v Attorney General of the Federation* (1983) 1 SCNLR 239 at 253, paras. B-C where he said: 'As a general principle of constitutional law, it is implicit in the character of the federal Constitution that neither the Federation nor the States could make laws imposing extra burden on each other. This is because legislative powers in a true federation usually involve division and limitation of governmental powers.'