

**A DOCTRINAL ANALYSIS OF JUDICIAL REVIEW IN NIGERIA - BALANCING
ACTIVISM AND RESTRAINT IN CONSTITUTIONAL ADJUDICATION**

Abstract

This paper exposes the foundation, substance and philosophy underpinning judicial review by the judiciary. Traditionally, the judiciary is designed to expound (interpret) the law and resolve disputes. However, with the contemporary constitutional order, the judiciary's responsibility has expanded and become more complex than the traditional limited role of interpretation of law and dispute resolution. The court now plays a vital role in guaranteeing legal certainty, maintaining social order and control, promoting economic development, protecting the human rights of the citizenry, law-making, and invoking its powers of judicial review to check the excesses of the political branches in strengthening the rule of law in a democratic society. Using analytical research methodology by scrutinising data sourced from secondary materials, the paper sought to analyse how judicial review has developed and the intersection of broad legal principles that govern and regulate its application. It identified the grounds for invalidating legislative or executive acts, how judicial review serves as a check on executive and legislative powers and ensures accountability in government actions and three dimensions critical to understanding the judiciary's reluctance to review the activities of the political branches. The cumulative effects of the three dimensions tremendously influence the perspective of judicial review that transcends different legal jurisdictions. It ended with a conclusion speculating on the future direction of judicial review, considering potential reforms and emerging trends in the legal landscape.

Keywords: Constitution, Judiciary, Judicial Independence, Judicial Power, Judicial Review, Political Branches.

1. Introduction

In every democratic system, the government is organised into three branches namely: legislative, executive, and judiciary, each with distinctive authority and responsibilities. Each branch's powers differ amongst political systems based on constitutional frameworks. The legislative branch is in charge of making laws, including constitutional amendments.¹ The executive branch (headed by the head of state)² executes and enforces laws through government ministries, agencies, and departments. The judicial branch interprets laws, ensuring that laws and government actions/activities are constitutional, and resolves legal disputes.

Judiciary is crucial because it oversees the enforcement of the constitution, protects individual and collective rights, and mediates disputes between citizens, government agencies, and other parties. The judiciary has its roots in ancient periods when it was crucial to find peaceful solutions to conflicts. In Nigeria, it evolved from traditional practices, which mainly centred on family, community and religious organisations that settle disagreements and resolve disputes.³ Though the traditional processes were informal, criminal trials and serious disputes were resolved through some recognised religious rituals

* **Othuke Amata, ASO B.Sc (Political Sc.), B.Sc., MPA, LL.B, LL.M, B.L.,** Legal practitioner, Chartered Arbitrator and currently a Ph.D. candidate at Osun State University. Corresponding email: profyole@gmail.com

¹ The legislature has different names in different countries, such as National Assembly (Senate and House of Representatives) in Nigeria; Parliament (House of Commons and House of Lords) in the United Kingdom; Congress (Senate and House of Representatives) in the United States.

² The office of the head of state may be referred to as President, Prime Minister, or Chancellor based on the constitutional framework.

³ GA Bello, *Modern Nigerian Legal System* (LawLords Publications, Abuja, 2018) 455-457

involving oath-taking among others. Generally, punishments were mostly fines, corporal punishment, and banishment from the community.⁴

The common law system of the British colonial authority was gradually transplanted to replace the indigenous justice system as colonialism took off effortlessly within local peculiarities.⁵ It later produced formal judicial institutions (courts and administrative institutions) conducive to dispute resolution. Since then, the government, through the constitutional framework, regulates the system of resolving disputes through the courts.⁶ It is widely accepted that the court in every system of government (even in a military dictatorship) is the independent arbiter for dispute resolution and enforcing human/socio-political rights. Creating an impartial and independent judiciary for resolving disputes on any issue or determining any question and protecting human (political) rights remains the principal responsibility of the government.⁷

Thus, whenever the judiciary is mentioned, it is ordinarily understood as the court,⁸ the place for settling legal disputes.⁹ However, limiting the definition of the judiciary to courts is too restrictive to demonstrate the enormity of its status in a social formation. Such a restrictive conception fails to fully acknowledge other important institutions that have significant influence in ensuring the operation of the judiciary, including the administrative apparatus for the exercise of the judicial function, such as the registry of the courts and judicial appointment bodies (the National Judicial Council - NJC in Nigeria, Administrative Office of the United States Courts,¹⁰ or National Council of Justice¹¹ in Brazil). The judiciary depends on the support of these quasi-judicial and administrative institutions to function effectively.¹² Therefore, the judiciary can be referred to as the judicial system responsible for administering justice, interpreting and applying the law through the judicial process.

The judiciary, by the contemporary constitutional framework, plays the vital role of maintaining law and order through the instrumentality of administration of criminal justice, social order and control;¹³ guarantying legal certainty and consistency in the adjudicatory process;¹⁴ promoting social and economic development through access to justice for enforcement of laws that govern business transactions/contractual agreements;¹⁵ protection of human rights, socio-political, and individual liberties;¹⁶ law-making - shaping the development of legal principles through establishing precedents (case law);¹⁷ resolving conflicts of authority in federal structures between the federal government and

⁴ IJ Koni, *Appreciating the Nigerian Legal System* (Fiftyfifty Institute Ltd, Ilorin, 2021) 301.

⁵ N Tobi, *Sources of Nigerian Law* (MIJ Professional Publishers, Lagos, 1996) 1-5.

⁶ JA Yakubu, *Constitutional Law in Nigeria*, (Demyaxs Law Books, 2003) 262.

⁷ SA Palekar, *Comparative Politics and Government* (PHI Learning Private Limited, 2009) 134.

⁸ *Akintokun v LPDC* (2014) LPELR-22941(SC) 45.

⁹ A Taiwo, *The Principles Practice and Procedure of Civil Litigation in Nigeria* (Ababa Press Limited. 2015) 51.

¹⁰ The Administrative Office provides a broad range of legislative, legal, financial, technology, management, administrative, and program support services to federal courts. <<https://www.uscourts.gov/about-federal-courts/judicial-administration>> accessed 18 May 2024.

¹¹ The National Council of Justice was established through a constitutional amendment in 2004 to regulate the operations of the judiciary. <<https://www.devex.com/organizations/national-council-of-justice-cnjbrazil-241062>> accessed 18 April 2024.

¹² Others are the Federal and State Ministries of Justice, Federal Judicial Service Commission, State Judicial Service Commission (SJSC), National Judicial Institute, Body of Benchers, Legal Aid Council of Nigeria, National Human Rights Commission, Council on Legal Education, and Commissions of Inquiry.

¹³ JH Farra and AM Dugdale, *Introduction to Legal Method* (3rd Edn, Sweet and Maxwell, 1990) 15-21.

¹⁴ SA Basiru, and OA Aso, 'The Challenges and Conflicting Values in the Doctrine of Stare Decisis and the Law-Making Powers of the National Assembly.' [2022] 1(1) UPLJ, 187-204.

¹⁵ KW Dam, 'The Judiciary and Economic Development.' https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1536&context=law_and_economics accessed 09 March 2022.

¹⁶ F Piovesan 'Social, Economic and Cultural Rights and Civil and Political Rights' [2004] 1 SUR – IJHR, 21-45.

¹⁷ GA Bello (n 3) 273-283.

its federating entities.¹⁸ Lastly, it exercises its power to review the actions undertaken or made by the legislative and executive arms of government.

Judicial review is, therefore, critical in maintaining constitutional supremacy and the rule of law, thus becoming an indispensable aspect of constitutional governance. Against this background, the Constitution of the Federal Republic of Nigeria 1999 (as amended) gives the court the power of judicial review to nullify legislative, executive, and administrative decisions that contravene the Constitution. The paper investigates judicial review from a multidimensional perspective through doctrinal research, revisiting its theoretical underpinnings, legal dynamics, and practical implications within Nigeria's legal and socio-political environment.

2. Statement of Research Problem and Methodology

Judicial review remains one of the cardinal pillars in constitutional governance aimed at, among other objectives, enforcing the supremacy of the Constitution and ensuring a check-and-balance principle among the three arms of government. In theory and practice, judicial review has been imperative in settling conflicts between agencies in Nigeria and protecting citizens against legislative or executive overreach. Yet, the scope, consistency, and effectiveness of judicial review in Nigeria's legal system are challenging. The core of the problem is that judicial review is not conceptually understood. Even with a constitutional basis, judicial review is often applied inconsistently, depending on how different courts interpret the Constitution and statutes. All these different meanings weaken the predictability and certainty of judicial review as a mechanism for the assurance of justice and accountability.

Furthermore, there are hurdles, such as the absence of judicial independence, several layers of obstructive procedures, and interference with the judicial functions by the political powers. Such barriers or hurdles have created doubts about whether the courts can perform the role of impartial umpire, mainly where powerful political interests are at stake. The tension between the need for judicial review (or activism) to ensure that constitutional values are preserved and the requirement of judicial restraint is a significant challenge. Hence, courts have to navigate and balance these conflicting yet competing needs, usually without doctrinal or jurisprudential guidance, with results in various decisions that are sometimes controversial or contentious.

Therefore, the research problem's scope will be to conceptualise judicial review in Nigeria by analysing legal principles and theoretical foundations, practical implementation challenges, and obstacles to improving consistency, effectiveness, and legitimacy of judicial review as a critical element of constitutional governance. The paper aims to fill the gaps in the extant literature by clearly understanding the practice of judicial review in Nigeria's peculiar socio-political and legal environment. This study employs a qualitative research methodology that combines doctrinal technical with comparative analysis. The doctrinal study analysed the application of judicial review in Nigeria by focusing on the statutory and constitutional provisions, appellate court decisions, and socio-legal commentary. Primary materials, particularly case law and statutory provisions, were extensively scrutinised to understand the scope and limitations of judicial review in Nigeria. The study will also draw on a comparative analysis of other countries' systems of judicial review, particularly the United States.

¹⁸ C Saunders, *Courts in Federal Countries* (International IDEA, Stockholm, 2019) 7.

3. Understanding Judicial Review in Nigeria

The conceptual framework for this study is anchored on the theoretical foundations and practical dimensions of the powers of the courts in exercising judicial review. Judicial review is inherently linked to the rule of law, the doctrine of separation of powers and the principle of constitutional supremacy, as outlined in Sections 1(3), 4, 5 and 6 of the 1999 Constitution. This constitutional provision empowers the courts to invalidate laws, policies, or actions that contravene the Constitution. Judicial powers ensure that laws, policies, and actions comply with constitutional and statutory provisions. *Abacha v FRN*¹⁹ defines judicial power as the court's authority to decide cases brought before it. In *Abba v JAMB*,²⁰ it was held that the 1999 Constitution vested judicial powers in the judiciary (court) only. Thus, Nwabueze defines judicial power as the ability of a court to determine justiceable issues, make authoritative legal declarations, and render binding decisions.²¹ Fundamentally, the scope and legitimacy of judicial power are manifestly embedded in the constitution,²² which establishes the organs of government and forms the underlying basis for exercising legitimate state power.²³ As a result, judicial power is distinct from political authority and can only be exerted by courts created by the Constitution (and other statutes) to decide disputes. Judicial power confers on courts, as held in *Muskra v United States*,²⁴ 'the right to adjudicate genuine disputes between different parties, lawfully initiated in courts with appropriate jurisdiction.'

A discussion on judicial power will only be complete by examining jurisdiction. Although the two terms are frequently used interchangeably, their meanings and legal implications differ significantly. Ojomo explains that though judicial power is the capacity of governmental institutions to execute judicial duties effectively, jurisdiction refers to the institution's ability to exercise its powers about a specific subject matter.²⁵ An example will help to put things in proper context. The Supreme Court has the authority to consider appeals from the Court of Appeal; however, its jurisdiction does not cover appeals for electoral petitions for National and State Assemblies. The Court of Appeal has the last authority to determine the conclusiveness of such matters.²⁶ Jurisdiction is a term of comprehensive import, but by judicial authorities, it refers to a court's powers (or authority) to adjudicate and deliver decisions on issues brought before it.²⁷ The court's jurisdiction is contingent upon the restrictions or boundaries set forth by the legislation that created the court.²⁸

It is essential to define the scope of a court's jurisdiction. The judiciary strictly upholds the constitutional and other enabling statutes that grant them judicial authority, ensuring that their actions are within the boundaries of the law.²⁹ Under the constitutional provisions, citizens possess the inherent right to pursue legal recourse through the judiciary in situations where their rights have been, are currently being, or are expected to be infringed upon.³⁰ However, it is essential to emphasise that such actions are confined

¹⁹ (2014) LPELR-22014(SC) 98; *Ikechukwu v Nwoye* (2013) LPELR-22018(SC).

²⁰ (2014) LPELR-24205(CA).

²¹ B Nwabueze, *Judicialism in Commonwealth Africa: The Role of the Courts in Government* (C. Hurst & Company, London, 1977) 1.

²² 1999 Constitution, Section 6.

²³ *Dapianlong v Dariye* (2007) LPELR-928(SC) 55.

²⁴ 219 U.S. 346, 361 (1911).

²⁵ E Ojomo, Introduction to Law, Lecture Notes [2012] Faculty of Law, University of Lagos. <<http://www.yararena.org/uploads/Topic%20Two%20-%20History%20of%20the%20Nigerian%20Judicial%20System.pdf>> accessed 05 July 2022, 1-2.

²⁶ 1999 Constitution, Section s246(1); *Madumere v Okwara* (2013) LPELR - 20752(SC).

²⁷ L Pedro, *Jurisdiction of Courts in Nigeria - Materials and Cases* (Ministry of Justice Law Review Series, Lagos, 2006) 1-6, 11-17; *Onyema v Oputa* (1987) LPELR-2736(SC) 39-40.

²⁸ *A.-G., Fed. v Guardian Newspapers Ltd* (1999) LPELR-3162(SC) 63-64.

²⁹ *Procon Group Africa Ltd v Ayuba* (2020) LPELR-51189(CA) 38-39.

³⁰ 1999 Constitution, s46(1); *Oluwatimilehin v Kehinde* [2020] 13 NWLR (Pt. 1740) 21, 36.

to filing cases in court with the competence to consider and resolve them. Thus, jurisdiction refers to a court's authority to decide on disputed matters. It is established in law that any party involved may raise or challenge whether a court has the jurisdiction to consider a matter or by the court itself *suo motu* at any point during the legal process.³¹ This challenge can be raised in both the initial court hearing and during an appeal (including the Supreme Court), and if successful, it can result in the termination of the proceedings.³²

Judicial review, as an aspect of judicial powers, involves explicitly examining legislative, executive, and administrative actions to determine their conformity with the Constitution. By linking judicial powers to judicial review, it becomes evident that the latter is a mechanism through which the judiciary exercises jurisdiction to enforce constitutional supremacy and uphold the rule of law. Thus, while judicial power encompasses a broader range of functions, judicial review specifically pertains to the judiciary's role in safeguarding constitutional governance by invalidating unlawful governmental actions.

4. The Judiciary, Judicial Review and Restraints

Judicial review refers to the authority granted to courts to determine the legality of activities of the executive or legislative branch.³³ Grossman defines the institutional capacity of courts of law as their ability to review decisions made by other arms of government to determine whether they are constitutional.³⁴ Ensuring the constitutionality of governmental actions is the main objective of judicial review, not establishing the judiciary's authority or dominance over political institutions.³⁵ Constitutional supremacy is a fundamental assumption upon which judicial review is based. The judiciary has jurisdiction to pronounce on the constitutionality of executive and legislative actions and consequent invalidity. Determining whether actions taken by the legislative and executive branches are constitutional and voiding any actions found to violate the Constitution or other laws is the fundamental idea of judicial review,³⁶ ensuring that they are conducted rationally, reasonably, and proportionally. The need to preserve the supremacy of the Constitution can always be emphasised. This is the judicial practice of many jurisdictions. Also, this, in the main, usually "frustrates the will of the legislature or the executive."³⁷ As a result, by exercising judicial review, the court and political branches are brought into collision, which can radically alter the equilibrium of political power. Judicial review has even been seen as 'antimajoritarian' or 'antidemocratic' for invalidating the actions of democratically elected political branches that consist of representatives drawn from different constituencies. However, according to Gardbaum, judicial review is believed to safeguard against potential democratic excesses by scrutinising majoritarian politics.³⁸

A practical illustration will clarify this aspect. The Supreme Court ruled in *A.-G., Bendel State v A.-G., Fed.*³⁹ that the Allocation of Revenue (Federation Account, etc.) Act 1981 was unconstitutional and null. This decision was founded on the National Assembly's failure to follow the prescribed constitutional procedure during its enactment.⁴⁰ The Act's invalidation caused frustration regarding a

³¹ *Ezomo v Oyakhire* (1985) LPELR-1216(SC) 22-23.

³² *Aladesae v Adejuwon* (2022) LPELR-58597(SC) 11-12.

³³ J Amadi, *Fundamental Principles in Judicial Review* (Smile Printers Nig., 2021) 1-17.

³⁴ JB Grossman, 'Judicial Review in Law' [2001] IESBS, 8020-8024.

³⁵ *IJ Koni* (n 4) 295.

³⁶ A Mason, 'The Importance of Judicial Review of Administrative Action as a Safeguard of Individual Rights' [1994] 1(1) AJHR, 4.

³⁷ B Nwabueze (n 21) 230.

³⁸ S Gardbaum, 'Are Strong Constitutional Courts Always a Good Thing for New Democracies?' [2015] 53 CJTL 285, 292.

³⁹ (1981) LPELR-605(SC).

⁴⁰ E Malemi, *Administrative Law* (3rdEdn., Princeton Publishing Co., Ikeja, 2008) 36-37.

new revenue formula for the federation. One can imagine how the above issue of revenue allocation (including a range of key economic/financial policies) and the dramatic events that followed reflected the political climate, with the opposition gaining some political currency.

In this context, the Supreme Court's ruling on the issue of redesigning the naira currency is equally significant. The policy was found illegal and an abuse of executive power by the court because it violated the provisions of the 1999 Constitution and the Central Bank of Nigeria (CBN) Act.⁴¹ The court's decision followed a legal action initiated by Kaduna, Kogi, and Zamfara States (later joined by other states) in opposition to the currency redesign initiative implemented by the federal government. The decision temporally halted the implementation of the naira notes swap, defeating the President and the CBN's monetary policy of replacing the old naira notes. The negative, if not acerbic, reactions to these decisions of the judiciary raise concerns about judicial decisions in matters of constitutional significance or national importance.

Considering the above, it will be proper to emphasise that judicial review is seen as undue encroachment or unwarranted intrusion that affects crucial functions of the political branches by restricting the exercise of their powers. This can lead to heightened tensions and, in many cases, unwarranted confrontations between the judiciary and political authorities. The potential repercussions of these confrontations may include the political authorities withholding resources (finance) from the judicial system and engaging in acts of intimidation, such as arrests, prosecutions, or invasions of judges' residences, as observed recently in Nigeria.⁴² Moreover, these actions could potentially lead to the dismissal of judges, blatant disregard for court rulings or orders, infringement on judicial autonomy,⁴³ and the implementation of limitations on the court's jurisdiction through ouster clauses.⁴⁴ The objective of imposing these restrictions or limitations on exercising judicial power is ultimately to degrade the judiciary's status.

Though the Constitution does not recognise such detestable reactions to ordinary judicial reviews, the unnecessary attacks from the political branches (and even civil society) on the judiciary are different from fair criticism of judgments and other decisions of the courts, which is permissible. Inevitably, given its position, the dreadful consequences of the political branches' responses make the judiciary vulnerable to such excessive political reactions so much that it could easily be submerged. The point being made from the above illustration explains the imperative for the judiciary to deal tactfully with tensions emanating from such collusion whenever they occur, especially in delicate or critical matters of national or constitutional (political) importance.

Judicial review must be carefully considered to safeguard the fundamental principles of constitutionalism. Any review interpreted outside the contemplation or intended scope of the Constitution can be characterised as overreaching (exceeding its boundaries) and infringing upon the authority of the legislature and executive branches. This will reveal no hidden motivation or agenda other than the constitutionally mandated tasks of checking the political branches' actions. Thus, the most straightforward means is to uphold the law, a very effective instrument of constitutionalism, once the

⁴¹ *A.-G., Kaduna State v A.-G., Fed.* (2023) LPELR-59936 (SC).

⁴² <<https://www.thisdaylive.com/index.php/2021/11/02/the-invasion-of-justice-odilis-residence>> accessed 04 November 2023.

⁴³ I Gwunireama 'The Executive and Independence of the Judiciary in Nigeria.' [2022] 2(1) PJAHS, 57.

⁴⁴ L Pedro (n 27) 381-389; *Inakoju v Adeleke* (2007) LPELR-1510(SC) 68.

so-called 'majoritarian attributes of the politically elected branches' act undemocratically or unconstitutionally.⁴⁵

Judicial review is a dynamic and evolving aspect of constitutional governance, subject to interpretation and refinement by the judiciary over time. In many countries, including Nigeria, the judiciary has repeatedly emphasised the primacy of the constitution over the goals, agendas or objectives pursued by the executive and legislative branches. Judicial review is a strategic approach that emphasises the courts' vital role in protecting the Constitution and democracy against possible violations by the political branches.⁴⁶ This is why judicial review has become integral to constitutional law.⁴⁷ Barnett suggests a strong consensus among constitutional academics regarding the widespread acceptance of the legitimacy of judicial review.⁴⁸ Kommers asserts that constitution-makers have made a deliberate choice worldwide to entrust the safeguarding of fundamental law to the judiciary.⁴⁹ The focal point underscored in this context is the significance attributed to the important function that courts consistently assume in upholding constitutional or democratic order, a prevailing global characteristic. According to Craig,⁵⁰ the concept of judicial review is independent of the limitations imposed on the legislative and executive branches of government power. He explained that Judicial review has also been employed to guarantee the proper execution of legislative or executive objectives.

Judicial review has continuously evolved and transformed due to constitutional necessity and political exigencies or demands. By and large, in checking the political branches, it is possible to detect some common grounds that form the basis for the courts to review and invalidate a legislative or executive action as unconstitutional or illegal, thereby contributing to the functioning of a constitutional democracy. Nwabueze contributed by formulating the grounds, though there may be some scepticism about whether these grounds have sufficient legal weight or impact for the courts to defend the constitutional order. These include the fact that the action was not executed in the prescribed manner or form, infringes upon constitutionally protected or guaranteed rights, breaches the constitutional authorities or jurisdiction of different government agencies or levels, and violates constitutional provisions.⁵¹ While the grounds or rationale for judicial review is widely accepted, debates may arise over the scope and limits of this power and the appropriate balance between judicial authority and the democratic process.

6. Emerging Trends and Implications for Judicial Review

The judiciary has consistently played an important part in resolving disputes. However, it exercises caution when reviewing and invalidating legislative and executive actions. When considering the level of caution exhibited by the judiciary, it is important to consider three fundamental dimensions critical to understanding the reluctance or unwillingness to scrutinise (review) the activities of the political branches. One is that most political branches' decisions or actions, particularly policy decisions, "stand

⁴⁵ DM O'Brien, 'Judicial Review and Constitutional Politics: Theory and Practice.' <<https://chicagounbound.uchicago.edu/uclrev/vol48/iss4/10>> accessed 22 January 2023. 1052.

⁴⁶ PI Monahan, 'Judicial Review and Democracy: A Theory of Judicial Review.' [1987] 21(1) UBCLR, 87-164.

⁴⁷ IJ Udofa, 'The Power of Judicial Review in the Promotion of Constitutionalism in Nigeria: Challenges and Prospects. [2015] 40 JLPJ, 192. In *Inakoji v Adeleke* (2007) 1 SC (Pt. I) 1, 185, Musdapher (JSC) highlighted the judiciary's duty to step in when the political branches disregard the law. He emphasised that when politicians engage in self-destructive behaviour, undermine the rule of law, and blatantly abuse constitutional provisions, it is the responsibility of the courts to intervene. The courts, he noted as guardians of the Constitution, must assess the legality of legislative actions, impeachment or other matters.

⁴⁸ RE Barnett, 'The Original Meaning of the Judicial Power.' [2013] <<https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1853&context=facpub>> accessed 22 January 2023, 4.

⁴⁹ DP Kommers, 'Comparative Judicial Review and Constitutional Politics' [1975] 27 WP, 283.

⁵⁰ P Craig, 'Judicial Power, the Judicial Power Project and the UK.' [2017] 36(2) UQLJ, 368.

⁵¹ B Nwabueze (n 21) 229.

within the realm of politics rather than law."⁵² They are, by implication, above the contemplation of judicial inquisition, and, therefore, the courts cannot undermine what has been described as the 'majority democratic will.' Cataloguing some issues as politics, as opposed to law, raises the fundamental query of how to differentiate between what falls under the purview of 'political' matters and what falls under the domain of law.

Jurisprudentially, the ascendancy of the doctrine's theoretical construct supports the judiciary's exhibition of the 'apolitical garb' by declining to intervene in value-based judgment concerning what proper or 'morally' correct political or policy decisions of the other branches are. That is not to say the judiciary is unconcerned with political matters such as judicial review of legislative processes (constitutional amendment, enactment of statute, and other legislative activities such as confirmation of appointments) and political processes (electoral issues, policy formulation such as the recent currency swap policy of the CBN, and implementation or the exercise of authority by ministries, departments, and agencies - MDA). There is no guarantee that the judiciary would not entertain political issues or disputes or that court decisions do not necessarily have political consequences or effects.⁵³

Thus, it is unsurprising that Alabi and several authors like Tushnet, Latham, Hooks, and Maeva have refuted the Anglo-Saxon notion of the judiciary as a legal entity devoid of any discernible involvement in the political framework.⁵⁴ In debunking the judiciary's influence on political operations, Alabi contended that the judiciary remains relevant in the context of political advancements and has impacted the political trajectory. His thematic assessment focuses on the Supreme Court's function of influencing social, political, and economic development, especially regarding decisions of significant national importance. In a federal government, the judiciary, the Supreme Court, serves a substantial and readily identifiable purpose. This is because it is the court's duty to resolve conflicts that emerge between the federal government and its federating entities.⁵⁵ Therefore, the courts have the authority to declare any law or policy that deviates from the federal principles specified in the Constitution invalid or unconstitutional.⁵⁶ A critical case in this area is the decision in *A.-G., Fed. v A.-G., Abia State*⁵⁷ by the Supreme Court, which resolved an apparent dispute between the federal government and the littoral states on the revenue allocation formula based on the derivation principle.⁵⁸ Falana has offered a lengthy list of occasions in which state governments were forced to launch legal processes to challenge several federal legislation or practices that violated fundamental federal principles.⁵⁹

What is the significance of the judiciary, explicitly exercising its judicial powers, regarding the interaction between the legislative and executive powers? The court assumes a pivotal position within the political system due to its ability to universally enforce decisions across all authorities and individuals. One important point to consider is that the courts do not function independently but are influenced by various external factors. They are rooted in the political, historical, and constitutional arrangements that comprise how the political branches recruit judges (appointed, screened, and

⁵² A Mason (n 36) 10.

⁵³ O Ashenfelter, T Eisenberg and SJ Schwab, 'Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes.' [1995] 24(2) JLS, 257-281.

⁵⁴ MOA Alabi, 'Politics and Law: Anatomy of the Siamese Twins.' The 153rd Inaugural Lecture of University of Ilorin (Library and Publications Committee, University of Ilorin, Ilorin) 14.

⁵⁵ SA Palekar (n 7) 177.

⁵⁶ RT Suberu, 'The Supreme Court and Federalism in Nigeria.' [2008] 46(3) JMAS, 451.

⁵⁷ (2001) LPELR-24862(SC).

⁵⁸ E Egede 'Who Owns the Nigerian Offshore Seabed: Federal or States? An Examination of the Attorney General of the Federation v. Attorney General of Abia State & 35 Ors Case.' [2005] 49(1) JAL, 73-93.

⁵⁹ F Falana, 'The Legal Battle for Restructuring.' <<https://www.thisdaylive.com/index.php/2019/01/28/the-legal-battle-for-restructuring/>> accessed 05 July 2023.

confirmed). Available information sufficiently supports the assumption that court decisions, particularly those delivered by the apex court, the Supreme Court impact political choices. The Supreme Court (judiciary) in every political system is a policy court that instigates or shapes courses of action underpinning government programmes in response to socioeconomic development,⁶⁰ especially in a federal system. The involvement should be acknowledged because of a judicial inquest into the constitutionality or lawfulness of government policies or legislative enactments aimed at addressing societal needs rather than a deliberate action. For instance, the court declared that the National Assembly's decision to override presidential assent on the 2002 Electoral Bill by using its veto power was unconstitutional.⁶¹ Conversely, the Supreme Court upheld the constitutionality of the Corrupt Practices and Other Related Offences Act.⁶²

Given this context, some scholars, including Latham, Hooks, Maeva, and Anyasi, have regarded the court as primarily a political institution. Their contention is predicated on the submission that keeping the judiciary away from politics is almost impossible. In support of this position, Latham asserted that public law, including American constitutional law, encompasses the broad concept of politics.⁶³ He emphasised the significance of making legally binding decisions, with a specific focus on upholding the principles of federalism. The underlying rationale is that the Supreme Court operates inside a political context. The author observed the Court's inherent political character or inclination becomes evident through its analysis and interpretation of the Constitution and other statutes. Hooks mainly focused on the composition of the courts and gave the impression that political concerns are considered when appointing judges rather than based on their qualifications and expertise.⁶⁴ Marcus's position is not in any way different, as he advanced the position that judicial decision-making cannot be isolated from politics, emphasising that in most cases, the court has overridden the political branches' decisions and substituted them with its own.⁶⁵

Much ambiguity surrounds the definition of the court's restricted yet institutional function within the democratic system. Commenting directly, Anyasi⁶⁶ emphasised the crucial role of courts, specifically the Supreme Court, in influencing public policy. This is accomplished through their legal interpretation, which aims to uphold principles of fairness, conduct thorough examinations of legal cases, and consider political ideologies and inclinations. He analysed the impact of some decisions by the Supreme Court, such as the instances concerning *Skye Bank v Iwu*,⁶⁷ *Inakoju v Adeleke*,⁶⁸ *Savannah Bank v Ajiloh*,⁶⁹ *Mojekwu v Iwuchukwu*,⁷⁰ and *Governor of Ekiti State v Olubunmo*⁷¹ have impacted and influenced the evolution and advancement of government policy. There were many other points that Magashi et al. raised in further amplification of Anyasi's position.⁷² They observed that the Supreme

⁶⁰ Policies dictate government direction, such as funding of education, access to healthcare, minimum wage, human rights, land ownership, etc. Policies are mainly encapsulated in laws made by the legislation and enforced by the executive.

⁶¹ *National Assembly v President* [2003] 9 NWLR (Pt. 824) 104.

⁶² *A.-G., Ondo State v A.-G., Fed.* [2002] 9 NWLR (Pt. 772) 222.

⁶³ E Latham, 'The Supreme Court as a Political Institution.' [1947] 13(3) MLR, 205.

⁶⁴ BL Hooks, 'The Supreme Court as a Political Institution.' [1992] 26(3) URLR, 451.

⁶⁵ M Marcus, 'Is the Supreme Court a Political Institution.' [2003] 72(1-2) GWLR, 95.

⁶⁶ N Anyasi 'The Supreme Court as a Policy Making Court.' <https://legalnaija.com/the-supreme-court-as-a-policy-making-court-nonso-anyasi/adedunmade/?utm_source=rss&utm_medium=rss&utm_campaign=the-supreme-court-as-a-policy-making-court-nonso-anyasi> accessed 11 November 2022.

⁶⁷ [2017] 16 NWLR (Pt. 1590) 24 (which resolved the issue of appeals from decisions of the National Industrial Court).

⁶⁸ [2007] 4 NWLR (Pt. 1025) 423 (illegality of impeachment proceedings).

⁶⁹ [1989] 1 NWLR (Pt. 97) 305 (land registration policy - essentially, Governor's consent).

⁷⁰ [2004] 11 NWLR (Pt. 883) 196 (nullifying a customary law in Eastern Nigeria that prevented females from inheriting their parents' estates).

⁷¹ [2017] 3 NWLR (Pt. 1551) 1 (the unconstitutionality of replacing elected Local Government Councils with caretaker committees).

⁷² SB Magashi and Others, 'The Effect of the Supreme Court Reviewed Landmark Decisions in Electoral Matters on the

Court serves as the judiciary's policy court, broadly advancing democratic values, increasing public trust in the democratic process, and defending constitutional principles. This serves as an illustration of the judiciary's responsibility in the political structure.⁷³

But the exciting thing is that the conception of the judiciary that encompasses or is impacted by politics is a radical rethink that presents a broader approach to understanding an inclusive judicial system. According to Alabi, politics impact the law, making it challenging, if possible, to separate the judicial system from political influence. He rationalised that although the courts are not allowed to dabble into matters that are essentially political, judges still make decisions of significant political value and impact on the broader political environment.⁷⁴ As arbiters of political disputes, the judiciary exercises decisive power in policy and political matters in the entire configuration of state powers. Therefore, any idea of a dichotomy between law and politics is blurry.⁷⁵ According to Sambo, there is no fundamental difference between political and legal matters. He pointed out that politicians exploit legal authority for political reasons, frequently including the courts in resolving high-profile contentious conflicts. The courts, he stated, have intervened when aggrieved members of the political class believed that their rights had been infringed upon.⁷⁶

Although political influence or matters cannot always be practically isolated from the judicial inquisition, the courts are obligated not to descend into the political arena and encroach on the powers of the other branches in a meddlesome manner. Consequently, emphasising the perceived influence or alleged impact of politics on the judiciary appears to overestimate its significance in weakening judicial independence and the innovative role that judges, particularly judicial activism, play in the judicial process. Also, it must be stressed that legal matters lie outside policy and politics as the judiciary is customarily concerned with adjudicating purely justiciable legal issues or controversies.⁷⁷ A claim or matter is justiciable if it can be examined in courts of justice.⁷⁸ Inescapable, the court is expected to stick to issues justiciable and free itself from meddling in political matters to demonstrate that they are mutually exclusive rather than inclusive.

Throughout history, the judiciary has been important in settling disputes. However, it exercises caution when reviewing and invalidating legislative and executive actions. When considering the level of caution exhibited by the judiciary, it is important to consider three fundamental dimensions critical to understanding the reluctance or unwillingness to scrutinise (review) the activities of the political branches. One is that most political branches' decisions or actions, particularly policy decisions, "stand within the realm of politics rather than law."⁷⁹ They are, by implication, above the contemplation of judicial inquisition, and, therefore, the courts cannot undermine what has been described as the 'majority democratic will.' Cataloguing some issues as politics, as opposed to law, raises the fundamental query of how to differentiate between what falls under the purview of 'political' matters and what falls under the domain of law.

The courts have encountered situations where they must deal with 'political' matters. However, to navigate such political questions or sensitive issues, the court has technically avoided being frontally dragged into the arena and dynamics of politics. Nevertheless, the dichotomy between legal claims affecting rights that are justiciable in law and political matters became tangible and manifest in the long corridor of judicial self-

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⁷³ JA Yakubu (n 5) 270.

⁷⁴ MOA Alabi (n 54) 3.

⁷⁵ M Cerar 'The Relationship Between Law and Politics.' [2009] 15(1) ASICL, 19

⁷⁶ AO Sambo, 'Legal Implications of Judicial Review on Political Disputes' [2019] 10(2) NAUJILJ, 85.

⁷⁷ *A.-G., Abia State v A.-G., Fed.* [2022] 16 NWLR (Pt. 1856) 205, 490.

⁷⁸ *PDP v APC* (2023) 17 NWLR (Pt. 1914) 497.

⁷⁹ A Mason (n 36) 10.

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restraint, evincing the exercise of vigilance and avoidance. The fundamental rationale for self-restraint is to constrain the judiciary to its traditional role by systematically applying what is now known as the doctrine of political question. As a theoretical construct, the doctrine provides an analytical proposition for understanding the judiciary's refusal to "intervene in political cases because to do so would be to insert itself unjustifiably in political and policy decisions reserved for the democratic process and not for judges."⁸⁰

The second dimension to consider is that while no court of law can ignore constitutional violations, no court can activate its powers of judicial review on its own, no matter the degree of the breach of the Constitution or any other statutes by the political branches. Granted that the courts are obligated to evaluate or determine the conduct of the political branches with discretion, but unlike the political branches, the courts are unelected and non-political. They cannot directly call the political branches to account without a juristic person whose rights have been violated instituting a matter. It has to, as observed by Nwabueze, be invited by a complaint of someone to determine the issues in controversies.⁸¹

However, it is important to acknowledge that the right of action is not automatic. It depends on the capacity to present a legally valid and easily identifiable claim. A court is not required to offer redress for a claim if the plaintiff (claimant) does not possess a distant, uncertain, or non-existent right or interest.⁸² Therefore, the commencement and continuation of the lawsuit necessitate an individual who possesses a vested interest or faces the potential injury they may endure.⁸³ This leads us to issues of *locus standi*.⁸⁴ The case of *Adesanyan v President FRN*⁸⁵ is a well-known example demonstrating how the lack of locus can preclude a court from having the jurisdiction to hear and decide a case on its merits.⁸⁶ *Locus standi*, particularly in public interest litigation, safeguards the courts against individuals who may exploit litigation for personal gain, unnecessary interference, or frivolous reasons. It restricts participation in legal proceedings to only those who possess an authentic genuine stake or interest in the subject matter of the action.⁸⁷ Strict adherence to the 'locus' principle results in the legal exclusion of numerous public interest cases that challenge the constitutionality, validity, desirability, correctness, and justification of specific actions undertaken by the political branches.

The last distinctive dimension is that the court consistently follows its policy of avoidance, even when individuals have appropriately sought the court's intervention by the law. Nwabueze argues that the avoidance policy is based on a mindset of exercising self-control.⁸⁸ The judicial self-restraint approach, commonly observed in many jurisdictions, involves the court's deliberate choice to avoid intervening or obstructing the political branches' exercise of their functions.⁸⁹ The scope of analysis is limited to examining the legality of activities undertaken by other arms of government, excluding any evaluation of the merits of decisions or actions carried out by the executive or legislative branches.⁹⁰

According to Harrison, there are certain situations where the law assigns a non-judicial decision maker, like in Senate impeachment trials, to make final rulings on legal questions. The acknowledgement of a differentiation between judicial and political power suggests that there are inherent constraints on the court's ability to compel the exercise of the latter.⁹¹ This is expressed in the political question doctrine, which

⁸⁰ GE Charles and LE Fuentes-Rohwe, 'Judicial Intervention as Judicial Restraint' [2018] 132 HLR, 235-236.

⁸¹ B Nwabueze (n 21) 49.

⁸² *Okwu v Umeh* (2015) LPELR-26042(SC) 22-27.

⁸³ *UBA v Mabogunje* [2022] 14 NWLR (Pt. 1851) 99, 116-117.

⁸⁴ *A.-G., Kaduna State v Hassan* (1985) LPELR-617(SC) 25.

⁸⁵ (1981) 2 NCLR 358.

⁸⁶ *SDP v INEC* [2023] 14 NWLR (Pt. 1905) 499, 534.

⁸⁷ *Ukegbu v NBC* [2007] 14 NWLR (Pt. 1055) 551, 571.

⁸⁸ B Nwabueze (n 21) 69.

⁸⁹ *Wabara v Nnadede* (2009) LPELR-4247(CA) 15-16.

⁹⁰ *ACB Plc v Nwaigwe* (2011) LPELR-208(SC) 14-15.

⁹¹ J Harrison, 'The Political Question Doctrines' [2017] 67 AULR, 457.

recognises that judicial review is not absolute. The foundational presumption firmly embedded in constitutional jurisprudence is that specific matters or inquiries possess a political character and should be addressed by the political branches rather than the judiciary. Anyhow, taken from the core of the discussion above is the suggestion that the nature and character of the doctrine invariably and primarily demands that the judiciary abstains from deciding certain matters that are fundamentally political because it will interfere with the duties left to the political arms of government.⁹²

The judiciaries in various legal systems often encounter significant challenges when exercising their power of judicial review in cases involving political questions. They must navigate the difficult task of balancing and upholding the separation of powers. In some jurisdictions, such as the US, the doctrine has developed as a valuable tool for resolving political cases. Its objective is to restrict the authority of the judiciary to conduct judicial review and prevent it from infringing on or interfering with political authority. Most legal systems agree that the non-justiceability of political activities and government actions is generally accepted, as articulated by Frulli, albeit with significant variations in terminology (denominational) and meaning.⁹³

7. Conclusion and Recommendations

The paper sought to analyse the judiciary's exercise of powers of judicial review. It began with an examination of the role of the judiciary within the Constitution. It recognised the judiciary conventionally as the branch of the government that upholds order and good governance through the impartial interpretation of the law and resolving disputes. The paper found that going by the contemporary constitutional order, the judiciary's role has extended beyond its conventional scope to more complex responsibilities that include guarantying legal certainty, maintaining social order and control, promoting social and economic development, protecting human/socio-political rights, law-making to keeping the other arms of government in check through judicial review.

Judicial review is a cornerstone of constitutional governance, ensuring that the exercise of power by the legislature, executive, and administrative bodies remains within the bounds of the law. In Nigeria, judicial review plays a critical role in safeguarding constitutional supremacy, protecting fundamental rights, and maintaining the balance of power among the arms of government. However, the paper reveals significant challenges in its conceptualisation and application, including inconsistencies in judicial interpretations and political (external pressures) that compromise judicial independence and undermine the effectiveness and credibility of judicial review in Nigeria. A clear and consistent understanding of judicial review is essential to address these issues and strengthen its effectiveness in promoting the rule of law.

This paper has highlighted the need for a coherent theoretical framework for judicial review in Nigeria, firmly anchored in constitutional supremacy and the separation of powers. It identified the grounds for invalidating legislative or executive acts as unconstitutional or illegal. It also observed contemporary trends in judicial approach by establishing three dimensions critical to understanding the judiciary's reluctance to review the activities of the political branches. The cumulative effects of the three dimensions tremendously influence the perspective of judicial review that transcends different legal jurisdictions. The dimensions also emphasise the necessity of balancing judicial activism and restraint to ensure that courts act as impartial arbiters while respecting the functions of the legislative and executive branches. To enhance the effectiveness of judicial review in Nigeria, this paper recommends judicial training and capacity building to ensure consistency in judicial interpretation and application of constitutional principles.

⁹² *Abaribe v Speaker, Abia State House of Assembly* (2000) LPELR-6801(CA) 10-11.

⁹³ M Frulli, 'The Multi-Faceted Character of the 'Political Question' Doctrine in Recent Practice: A one-size-fits-all tool?' <http://www.qil-qdi.org/the-multi-faceted-character-of-the-political-question-doctrine-in-recent-practice-a-one-size-fits-all-tool/> accessed 15 May 2022.