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IS THE END NEAR FOR THE POLITICAL QUESTION DOCTRINE IN NIGERIA?*

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1. Introduction

The political question doctrine has been used in Nigeria over a long period but now seems to be in serious trouble after the decision of the Supreme Court in *Inakoju v Adeleke*¹ (*Inakoju*). A subsequent decision of that court in *Ugwu v Ararume*² (*Ararume*) seems to have cast further doubt on the doctrine. In 1983 in *Onuoha v Okafor*³ (*Onuoha*) the Supreme Court laid down two principles by which to determine political questions, based on the principles developed by the US Supreme Court.⁴ The Court in that case interpreted the provisions of the 1979 constitution of the Federal Republic of Nigeria⁵ modeled after the United States Constitution. In the earlier case of *Balarabe Musa v Auta Hamzat*⁶ (*Balarabe Musa*) the Court of Appeal held that the impeachment of the Kaduna State Governor pursuant to section 170 of the 1979 Constitution is a political question and that, in addition, a constitutional provision ousting judicial review of impeachment was binding on the court. Accordingly, the courts would not engage in any type of review.

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(2007) All FWLR (Pt. 353) 3.

² (2007) 12 NWLR (Pt. 1048) 367.

³ (1983) NSCC 494.

⁴ The Court relied on *Baker v Carr* 369 US 186 (1962).

⁵ Hereafter 1979 Constitution.

⁶ (1982) 3 NCLR 229.

The restriction of the courts power of review during the second republic (1979-1983) occurred in three areas of constitutional activity⁷ namely impeachment proceedings,⁸ political party primaries⁹ and the internal affairs of the legislature.¹⁰ Even though the military take over in 1984 impacted on the development of the political question doctrine, the political effect of the impeachment process was well understood¹¹ especially by the Nigerian political class and the judiciary. The discussion in the rest of this article will show that during the post-second republic military rule between 1984-1992 and a short lived third republican experiment between 1990-1992 there were renewed concerns as to the suitability of the political question doctrine. These concerns were enough to demonstrate that the doctrine was far from settled. Now, almost two decades after the doctrine was adopted, Nigerian courts seem to have abandoned it. It may be wrong to conclude that the position of the Nigerian Supreme Court is based on the distinct feeling in the US in the wake of *Bush v Gore*¹² that the doctrine is no longer relevant.¹³ Instead, writ large in the demise of the political question doctrine in Nigeria is the direction of judicial review in Nigeria and specifically, as the tenor of *Inakoju* suggests, the need to examine the nature of judicial incursion into the affairs of coordinate branches.

In the next part of the paper I examine the application of the political question doctrine in Nigeria. In part three I examine the demise of the doctrine in detail. In part four I situate the doctrine in the context of the some relevant aspects of the constitutional interpretation of the Nigerian Supreme Court. I make concluding remarks in part five.

⁷ See generally C Okpaluba 'Justiciability, constitutional adjudication and the "political question" doctrine in the Commonwealth: Australia, Canada, Nigeria and the United Kingdom' (2003) 18 *South African Public Law* 149.

⁸ *Balarabe Musa* (n 6 above).

⁹ *Onuoha* (n 3 above).

¹⁰ See *Alegbe v Oloyo* (1983) NSCC 315.

¹¹ For example academic commentators on the impeachment proceedings that led to *Balarabe Musa* were wary of the approach of the Court of Appeal. See M Nduaguibe 'Impeachment and the ouster of judicial review' (1986) 1 *Calabar Law Review* 5; M Ikhariale 'Impeachment proceedings and the political question doctrine: The Nigerian experience' (1990) 1 *LASU Law Journal* 45 and BA Susu 'Impeachment provisions in the 1979 Constitution and indirect judicial review' (1984) *Nigerian Current Law Review* 98.

¹² 531 US 98 (2000).

¹³ See, for example, American academic commentary in this regard: E Chereminsky '*Bush v Gore* was not justiciable' (2001) 76 *Notre Dame Law Review* 1093; M Tushnet 'Law and prudence in the law of justiciability: The transformation and disappearance of the political question doctrine' (2002) 80 *North Carolina Law Review* 1203 and R Barkow 'More supreme than court: The fall of the political question doctrine and the rise of judicial supremacy' (2002) 102 *Columbia Law Review* 237.

2. The Political Question Doctrine in Nigeria

In *Onuoha*, the Supreme Court defined the political question doctrine in Nigeria as consisting of two principles. One is that '[t]he lack of a satisfactory criteria for judicial determination of a political question is one of the dominant considerations in determining whether a question falls within the category of political questions'.¹⁴ The other is '[t]he [appropriateness] of attributing finality to the action of the political department and political parties under the Nigerian Constitution and system of government'.¹⁵ The Supreme Court cited *Baker v Carr* in support of these two principles. This suggests that Nigerian courts have taken the doctrine from American jurisprudence, a conclusion strengthened by the fact that it was declared in the context of the 1979 Constitution of the Federal Republic of Nigeria which is closely modeled on the American presidential constitution. However, before the 1979 Constitution was adopted Nigerian courts applied a political question doctrine although not recognising or classifying it as such. For example, in the first republic the Supreme Court held in *Attorney General Eastern Nigeria v Attorney General of the Federation*¹⁶ that the determination of the margin of error in a census is a political matter.

The judicial powers under the 1979 Constitution are defined by section 6(6)(b) as extending to 'all matters between persons or between government or authority and any person in Nigeria and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person.'¹⁷ This provision seems to contemplate unlimited or full judicial review by the courts. How did Nigerian courts interpret it? Nigerian constitutional interpretation in the second republic between 1979 and 1983 can be classified into two different periods. The first period saw the Nigerian courts assert that it is their duty within the constitutional scheme to say what the law is.¹⁸ In the second period, represented by *Onuoha*, the original attitude changed and the courts retreated to the view that they had a limited judicial review role.

¹⁴ n 3 above, 507.

¹⁵ As above.

¹⁶ (1964) All NLR 218.

¹⁷ My emphasis.

¹⁸ *Alegbe* (n 10 above).

In the first period the Nigerian Supreme Court asserted that, under section 6(6), judicial powers extended to *all* matters. For example, if by this endowment the judiciary encroached on the legislative domain, it was permitted to do so irrespective of the fact that the incursion breached the concept of separation of powers and even if the matter was political. Fatai-Williams CJN said in *Alegbe v Oloyo* that:

In Nigeria, when a superior court such as the Supreme Court, the Federal Court of Appeal, the Federal High Court or the High Court of a State is asked to interpret or apply any of the provisions of the Constitution, it is not thereby dealing with a political question even if the subject matter of the dispute has political implications. Such a court...is only performing the judicial functions conferred on it by the...Constitution. Again if such a court is called upon to interpret or apply the provisions of the Constitution of any organisation with respect to the civil rights and obligations of members of the organization the court is merely performing functions assigned to it by s 6(6) of the Constitution of the Federal Republic of Nigeria. Indeed the court is obliged to perform that function and it is immaterial whether the organization is a political party, or is a cultural, religious or social organization.¹⁹

It is this attitude that led the Supreme Court to resist the political question doctrine in *Attorney General of Bendel State v Attorney General of the Federation*²⁰ where the Supreme Court held that it had jurisdiction to determine how the legislature exercised its law making powers. Fatai-Williams CJN stated that:

I would endorse the general principle of constitutional law that one of the consequences of separation of powers, which we adopted in our constitution is that the courts should respect the independence of the legislature in the exercise of its legislative powers and would refrain from pronouncing or determining the validity of the internal proceedings of the legislature or the mode of exercising its legislative powers. However if the Constitution makes provision as to how the legislature should conduct its internal affairs or as to the mode of exercising its legislative powers the Court is in duty bound to exercise its jurisdiction to ensure that the legislature complies with the constitutional requirements. Sections 52, 54, 55 and 58 of our constitution clearly state how the National Assembly should conduct its internal affairs in exercise of its legislative powers. That being the case the Court is bound to exercise its jurisdiction under section 4(8) of the Constitution to ensure that the National Assembly comply with the provisions of the Constitution.²¹

¹⁹ At 341-342.

²⁰ (1982) 10 SC 1.

²¹ As above 52.

Nigerian courts have thus drawn a line between matters which the Constitution prescribes and the internal proceedings of legislatures. In the case of the former they will conduct review to ensure that constitutional prescriptions are properly adhered to but they will not review matters which concern the internal affairs of the legislature.²² Thus the removal of a deputy Speaker of a legislature in contravention of a requirement for a constitutionally specified majority was struck down by the Cross River State High Court.²³ In *Ekpenkhio v Egbadon*²⁴ the Court of Appeal confirmed that the process for the removal of the deputy speaker of the Edo State House of Assembly was constitutional because the requisite majority voted as constitutionally stipulated. Even after the second republic, in *Asogwa v Chukwu*²⁵ the trend continued. In this case the Speaker of the Enugu State House of Assembly had been removed by a two-thirds majority, which, it was alleged, was not properly constituted as a suspended member of the House voted for the removal. Whether the member was suspended or not became the bone of contention. The Court of Appeal held that the status of the suspended member was an internal affair of the legislature and presumed that he had been recalled to the house since he had voted. Accordingly it refused to review the decision.

In order to ensure constitutional compliance, in line with its unlimited powers of review the Supreme Court disregarded *statutory* ouster clauses in *Attorney General Bendel State v Attorney General of the Federation*.²⁶ In this case the Court disregarded section 2 of the Acts Authentication Act 1961 which provides that a certificate by the clerk of the National Assembly was final and conclusive as to compliance with constitutional requirements for the passage of a Bill. The Court held that the certificate of the clerk was subject to the provisions of the Constitution and that the Court could go behind such a certificate and admit legislative papers to ascertain if the National Assembly was constitutionally compliant in the passage of a Bill. The Court of Appeal assumed that the legislature was competent to determine the status of the suspended

²² See *Ume Ezeoke v Makarfi* (1982) 3 NCLR 663; *Okwu v Wayas* (1981) 2 NCLR 522.

²³ *Ndaeyo Uttah v House of Assembly* (1985) 6 NCLR 761.

²⁴ (1993) 7 NWLR (Pt. 308) 717.

²⁵ (2004) FWLR (Pt. 189) 1204.

²⁶ n 20 above.

member and accepted the determination of the legislature as final instead of engaging in an enquiry as to whether a suspended member of a legislature is competent to vote.

Whether the judiciary was prepared to comply with a *constitutional* ouster of its jurisdiction was tested in the middle of the second republic. Complying with a constitutional ouster of its jurisdiction and recognizing the finality committed to coordinate branches is fidelity to the principle of a *limited* judicial review. So is the recognition that certain matters are incapable of judicial determination. An *unlimited* power of judicial review, on the other hand, jealously guards a court's jurisdiction and even a constitutional ouster is subjected to a compliance scrutiny of the impugned action to ascertain strict compliance before the ouster is given effect. Furthermore a court committed to unlimited review is unlikely to admit that there are actions that are incapable of being judicially determined.

The test of fidelity to a constitutional ouster of a court's jurisdiction and the judicial indeterminacy of a cause of action came up in 1982 in the *Balarabe Musa*.²⁷ In this case, the then Governor of Kaduna State began proceedings in the Kaduna State High Court seeking leave to apply for an order of Prohibition prohibiting the respondents (the Kaduna State House of Assembly) from further proceeding with his impeachment pursuant to section 170 of the 1979 Constitution. He contended that the conditions precedent to the investigation were not complied with and that the respondents had no jurisdiction to proceed with the investigation. These lapses included the fact that no member of the state legislature signed the notice of allegations of misconduct; there was no detailed particulars of alleged misconduct as required by section 170(2)(b) of the Constitution; and the allegations were not investigated by the respondents within the time limit stipulated by section 170(5). Section 170(10) provides that '[n]o proceedings or determination of the Committee or the House of Assembly or any matter relating thereto shall be entertained or questioned in any court.' This provision was regarded as an ouster clause and two interpretations of its effect were open to the court.

First, the Court could construe the provision as an *absolute* prohibition on review, notwithstanding section 236 of the 1979 Constitution which, in the manner of section 6(6), granted the High Court unlimited jurisdiction. It was also contended that the use of

²⁷ n 6 above.

words ‘entertained’ and ‘questioned’ pointed to the absolute character of the provision. The absolute character of the provision was neither assailed by the fact that the procedure in the impeachment was not followed nor by an allegation that the fundamental human rights of the Governor had been breached. This interpretation contends that in an impeachment proceeding, the official involved has no personal rights since the proceedings are political and not civil. Second, the court could have relied on the inherent powers of the court established in *Anisminic v Foreign Compensation Commission*²⁸ to the effect that once a court has come to the conclusion that a body has not acted within the jurisdiction of an enabling statute, no words in that statute can operate to oust the jurisdiction of the court to control the body in question. Thus a legislature must act in strict accordance with section 170 of the 1979 Constitution in order to enjoy its protection.

Adenekan Ademola JCA, who read the decision of the Court in *Balarabe Musa*, held that the purpose of section 170 of the 1979 Constitution was to stop any interference with any proceeding in the House or the committee or any determination by the House or the Committee and that ‘no court can entertain any proceedings or question the determination of the House or of the Committee’.²⁹ The Court asserted that while the *Anisminic* principle was appropriate for statutory interpretation, it did not apply to a constitution, especially when there was evidence that the Constitution ousted the jurisdiction of the Court.³⁰ The constitutional ouster of jurisdiction was also extensively discussed by Karibi-Whyte JCA who delivered a separate opinion. He agreed that ‘the moment the Legislature commenced removal proceedings under section 170(2), the

²⁸ (1969) AC 147. In this case the determination of the Foreign Compensation Commission was said to be final. *Anisminic* was adopted in Nigeria in *Adejumo v Johnson* (1974) 5 SC 101 and *Barclays Bank of Nigeria Ltd v Central Bank of Nigeria* (1976) 6 SC 175 193.

²⁹ *Balarabe Musa* (n 6 above) 245.

³⁰ The Court referred to instances of clear ouster of the jurisdiction of courts. First it referred to the case of *Enwenzor v Onyejekwe Obi of Onistsha* 1964 1 All NLR 14, 16. This case concerned the provisions of s 158(4) of the 1963 Constitution of Nigeria. That provision stated that no chieftancy question shall be entertained by the courts. The Supreme Court upheld the ouster of the court’s jurisdiction by that section. The court also referred to an *obiter dictum* of Fatai-Williams CJN in *Adesanya v President of the Federal Republic of Nigeria* (1981) 2 NCLR 358 (*Adesanya*) where two sections of the 1979 Constitution were stated as ousting the jurisdiction of Nigerian courts. S 145 states that the Federal Civil Service Commission, the Federal Judicial Service Commission, the Federal Electoral Commission, and the national Population Commission shall not be subject to the direction and control of any other authority or person and s 267 clothes certain members of the executive with immunity from suit during the duration of their office.

jurisdiction of the court was ousted by section 170(10).³¹ It may be asserted that the decision is not based on the political question doctrine as the court merely complied with the s 170(10) ouster. However, an alternative interpretation was possible and it is important to appreciate the fact that the constitutional ouster could itself be based on the realization that the matter is political because it is committed to another branch.

In *Balarabe Musa*, the inherent political nature of the issue was relied on by the court in coming to its decision. Ademola JCA stated that apart from the fact that its jurisdiction is ousted, the impeachment proceedings are *political* and as such ‘for the court to enter into the political thicket as the invitation made to it clearly implies would in my view be asking its gates and its walls to be painted with mud; and the throne of justice from where its judgments are delivered polished with mire.’³² The political nature of the dispute was such that self restraint is a ‘virtue the court should cultivate’³³ and that judicial intervention is inappropriate. Karibi-Whyte JCA did not refer to the political question directly even though he stated that the court should not encroach on the functions of other branches of government ‘not only because it has no jurisdiction to do so but essentially because such an inquiry is productive of insoluble conflicts.’³⁴

The *Balarabe Musa* case is important because it establishes two principles. First, a constitutional commitment of a function to another branch of government will be upheld, relying on the principle of separation of powers. Accordingly the judiciary cannot rely on its inherent jurisdiction in the *Anisminic* way, which is appropriate for statutory and not constitutional interpretation. Secondly, it established that some conflicts are political in nature and not amenable to judicial resolution. The principles enunciated in the *Balarabe Musa* case were confirmed in *Onuoha*. In *Onuoha*, the plaintiff brought an action to compel his party to nominate and sponsor him for election to a senatorial seat instead of the defendant. Both parties had contested for the party’s ticket and the plaintiff was chosen. Based on a petition written by the defendant, the panel set up to consider the petition nullified the election and went on to chose the defendant. The Supreme Court held that it could not entertain the action because the 1979 Constitution makes nomination and sponsorship of a candidate a political matter solely within the discretion

³¹ *Balarabe Musa* (n 6 above) 257.

³² At 247.

³³ At 246.

³⁴ At 257.

of the political party concerned. The Court stated that read together, the Electoral Act, and the 1979 Constitution provide that the right to canvass votes lies with political parties and that implicit in the right to canvass for votes for a candidate is the right to sponsor or not to sponsor a candidate for election. According to the Court, this power is strengthened by the provisions of section 30(4) of the Electoral Act which empower a party to choose one of the two or more candidates who are in contention. In addition, the Court declined to exercise jurisdiction because confirmation that the plaintiff/respondent was the party's candidate would 'instantly project or propel the court into the area of jurisdiction to run and manage political parties and politicians'.³⁵ The Court continued:

Can the court decide which of the two candidates can best represent the political interest of the N.P.P? In all honesty, I think the court will in so doing be deciding a political question which it is ill fitted to do.³⁶

And:

There are no judicial criteria or yardstick which candidate a political party ought to choose and the judiciary is therefore unable to exercise any judicial power in the matter. It is a matter over which it has no jurisdiction.³⁷

The *Onuoha* case can be interpreted to establish that it is only the sponsorship of candidates that is outside the jurisdiction of the courts.³⁸ This position clarifies the uncertainty over the extent of a court's jurisdiction over the affairs of political parties that resulted from two decisions of the Lagos State High Court. In *Balarabe Musa v Peoples Redemption Party*³⁹ (an earlier matter heard in 1981), the Court held that the way a political party conducts its affairs is not subject to the jurisdiction of a court of law except when the party breaches its constitution. On this basis the Court upheld a resolution of the party banning its serving governors from attending certain political meetings. In

³⁵ *Onuoha* (n 3 above) 501

³⁶ As above.

³⁷ At 504.

³⁸ See, *Davies v Mendes* (2007) All FWLR (Pt. 348) 883; *Okon v Bob* (2004) 1 NWLR (Pt. 854) 388; *Adegoroye v Alliance for Democracy* (2003) FWLR (Pt. 176) 604; *Ibrahim v Gaye* (2003) FWLR (Pt. 171) 1559 and *Dalhatu v Turaki* (2003) FWLR (Pt. 174) 247.

³⁹ (1981) 2 NCLR 763.

*Abubakar Rimi v Aminu Kano*⁴⁰ the Court similarly held that it could intervene since the expulsion of members of a party contravened its registered constitution.

A close reading of the judicial interpretation of the political question doctrine shows that two issues appear fatal to *limited* judicial review. One is peculiar to the interpretation of the constitutional ouster clauses and is the effect of lack of observance of the procedure laid down in provisions such as section 170 of the Constitution. The second is the breach of the fundamental human rights of a person. It may be the case for example that the impeached officer contends that his right to fair hearing has been breached and that the ouster of a court's jurisdiction does not extend to the protection of his human rights. These issues indicate that because of a need to address them, a court ought to assume jurisdiction in all cases where they are in contention. They were dealt with only by Karibi-Whyte JCA in *Balarabe Musa* (1982).⁴¹ With respect to the invitation of the court to exercise its inherent powers because of a failure of the pre-conditions for the operation of section 170(10), the Appeal Court judge held that it did not arise. He stated that he was more concerned with the fact that the judiciary should respect constitutional determinations of powers and the principle of separation of powers. Consequently, unless there was an express enabling of the supervisory powers of the judiciary it should not encroach on the sphere of influence of the legislature and proceed on an inquiry 'of the manner Parliament had performed the functions assigned to it by the constitution.'⁴² In *Balarabe Musa v Kaduna State House of Assembly*⁴³, a later decision (1983), Karibi-Whyte JCA again confronted the issue of failure to comply with the preconditions of s 170 (10) of the 1979 Constitution. Here, the impeached governor of Kaduna State sought judicial review of his impeachment. Several irregularities were pointed out which did not sway the Court of Appeal. Again the matter seems to have been glossed over. In a more emphatic tone the Court declared that

the subject matter of the removal of the appellant is not within the judicial powers of the Constitution vested in the courts; it is a matter exclusively left to the legislature for determination and in my opinion not a justiciable issue within the provisions of section 6(6)(b) of the Constitution. The Constitution in my opinion has regarded the issue of the removal of the

⁴⁰ (1982) 3 NCLR 478.

⁴¹ n 6 above.

⁴² *Balarabe Musa* (n 6 above) 257.

⁴³ (1984) 5 NCLR 241.

Appellant, as in the American context, a political question, unsafe for the exercise of the jurisdiction of the Court.⁴⁴

The other issue considered by Karibi-Whyte JCA is the allegation of breach of the fundamental human rights of a person. It was contended that breach of fundamental human rights is enough to confer jurisdiction on courts despite constitutional ouster clauses. A survey of the cases shows a mixed response by Nigerian courts. In the 1982 *Balarabe Musa* decision, Karibi-Whyte JCA intimated that the impeachment proceedings did not rob the Governor of his fundamental human rights but that it was safeguarded by the provision of s 170(6) of the 1979 Constitution.⁴⁵ A survey of other Nigerian cases show a mixed response to the issue of the denial of fundamental human rights. In *Ndaeyo Uttah v House of Assembly Cross River State*⁴⁶ the Court dwelt at length on the lack of fair hearing for the deputy speaker during his removal proceedings. In *Ekpenkhio v Egbadon*⁴⁷ Ogundare JCA stated that the right to a fair hearing of an impeached speaker of the Edo State House of Assembly was not relevant, since by statute law and the Constitution the impeachment was not justiciable. In *Onuoha* the Supreme Court stated that there was no breach of the rights of the substituted candidate as there is no constitutional, statutory or common-law right to be sponsored by a political party. The Court did not consider whether any procedural right was in issue even though it was alleged that members of the panel set up to investigate the petition against the plaintiff/respondent were biased.⁴⁸

It is clear with the benefit of hindsight that the treatment of the issues of non-compliance with the constitutional procedure for impeachment and allegations of breach of fundamental human rights was not conclusive and convincing in the cases discussed above. Together they pointed to the need to rethink the political question doctrine. In the next section I shall demonstrate how these two issues contributed to the retreat of the political question doctrine.

⁴⁴ As above 252.

⁴⁵ n 6 above 253. Insert page no

⁴⁶ (1985) 6 NCLR 761. Ref and p

⁴⁷ n 24 above.

⁴⁸ n 3 above, 501.

3. The Retreat of the Political Question Doctrine - *The Return to Unlimited Judicial Review*

The Nigerian fourth republic (which began in 1999 -) has seen the retreat if not the demise of the political question doctrine. The Supreme Court has tacked on a new course, retreating from the principles laid down in *Balarabe Musa* (1982) and *Onuoha*. One explanation is that the Nigerian judiciary in the fourth republic has returned to its supremacist stand in the pre-*Onuoha* second republic because of a marked concern about the breach of constitutional provisions encouraged by the judicial avoidance of certain issues. Clearly a court that is mindful of its jurisdiction is likely to resist any attempt to curtail it. In addition, the development of the jurisprudence of the second republic, when the political question doctrine was formulated, was cut short by the military takeover in 1984. Under military rule, Nigerian courts battled with military ouster clauses and took refuge in the *Anisminic* principle as a reaction to the endless ouster clauses in draconian legislation. The courts returned to the principles of statutory interpretation after the brief detour to the field of constitutional interpretation. At the end of the military rule in 1999, the warmth of the common law had become comforting and difficult to give up. To be asked by the 1999 Constitution to revert to the previously established approach by Nigerian courts for constitutional interpretation was difficult. This was more so when the effect of the political question doctrine was evident. Politicians who misunderstood the responsibilities that arose from judicial avoidance of certain issues thought that this provided them with a sledgehammer to be used against their opponents. These politicians acted as ‘extensions’ of predecessor-military governments and courts reacted by falling back on the standards of statutory interpretation that require a strict compliance with provisions regarded as pre-conditions for the exercise of ouster clauses. In other cases, the judiciary refused to recognize that certain questions were not amenable to judicial determination. In this category the judiciary, in effect, intervened in the activities of political parties by affirming the choice of candidates to represent political parties. This generated controversial consequences, as I shall soon point out.

The judicial review of ouster clauses in the impeachment provisions of section 188 of the 1999 Constitution⁴⁹ requires strict compliance with s 180 (1)-(9) before subsection 10 can be given effect. It is plausible to argue that giving effect to subsection (10) at all constitutes fidelity to the political question doctrine. After all, the court eventually defers to a constitutional commitment of finality of a coordinate branch. It is, however, not as simple as that. The key issue is the determination of strict compliance. Where the pre-conditions are procedural matters such as a required majority or time periods, scrutiny is easy and not many problems arise. However, where pre-conditions

⁴⁹ Section 188 states (1) The Governor or Deputy-Governor of a State may be removed from office in accordance with the provisions of this section.

- (2) Whenever a notice of any allegation in writing signed by not less than one-third of the members of the House of Assembly –
 - (a) is presented to the Speaker of the House of Assembly of the State;
 - (b) stating that the holder of such office is guilty of gross misconduct in the performance of the functions of his office, detailed particulars of which shall be specified, the Speaker of the House of Assembly shall, within seven days of the receipt of the notice, cause a copy of the notice to be served on the holder of the office and on each member of the House of Assembly, and shall also cause any statement made in reply to the allegation by the holder of the office, to be served on each member of the House of Assembly.
- (3) Within fourteen days of the presentation of the notice to the Speaker of the House of Assembly (whether or not any statement was made by the holder of the office in reply to the allegation contained in the notice), the House of Assembly shall resolve by motion, without any debate whether or not the allegation should be investigated.
- (4) A motion of the House of Assembly that the allegation be investigated shall not be declared as having been passed unless it is supported by the votes of not less than two-thirds majority of all the members of the House of Assembly.
- (5) Within seven days of the passing of a motion under the foregoing provisions of this section, the Chief Judge of the State shall at the request of the Speaker of the House of Assembly, appoint a Panel of seven persons who in his opinion are of unquestionable integrity, not being members of any public service, legislative house or political party, to investigate the allegation as provided in this section.
- (6) The holder of an office whose conduct is being investigated under this section shall have the right to defend himself in person or be represented before the Panel by a legal practitioner of his own choice.
- (7) A Panel appointed under this section shall –
 - (a) have such powers and exercise its functions in accordance with such procedure as may be prescribed by the House of Assembly; and within three months of its report its findings to Assembly.
 - (b) within three months of its appointment, report its findings to the House of assembly.
- (8) Where the Panel reports to the House of Assembly that the allegation has not been proved, no further proceedings shall be taken in respect of the matter.
- (9) Where the report of the Panel is that the allegation against the holder of the office has been proved, then within fourteen days of the receipt of the report, the House of Assembly shall consider the report, and if by a resolution of the House of Assembly supported by not less than two-thirds of all its members, the report of the Panel is adopted, then the holder of the office shall stand removed from office as from the date of the adoption of the report.
- (10) No proceedings or determination of the Panel or of the House of Assembly or any matter relating to such proceedings or determination shall be entertained or questioned in any court.
- (11) In this section - ‘gross misconduct’ means a grave violation or breach of the provisions of this Constitution or a misconduct of such nature as amounts in the opinion of the House of Assembly to gross misconduct.

require value judgments, a compliance scrutiny may result in an incursion into the sphere of the legislature, making nonsense of the finality implicit in s 180(10). This is a point I return to later.

To set the context of my discussion in this section, I shall commence with some of academic commentary that reacted to *Balarabe Musa* (1982). Professor Ikhariale states that:

The interpretation that the court gave to section 170(10) does not accord with the objects and purposes of the Nigerian Constitution and it must have contributed its fair quota to the wrecking of the second republic. It is therefore necessary to conclude that the forthcoming third republic could be spared the agonies of irregular impeachment proceedings if the courts are prepared to abandon their initial stance as demonstrated by the decision in *Balarabe Musa*.⁵⁰

Professor Nwabueze concludes that the allegations that were the basis of the impeachment proceedings in *Balarabe Musa* (1982) were ill motivated.⁵¹ Another writer states that:

The doctrine of the political question does not justify the total and absolute preclusion of judicial review and it would be more rejectable as a basis of lack of judicial review when, as it seems to be the case in Nigeria than elsewhere, impeachment is utilized as a weapon to intimidate and subjugate the executive branch to the dictates of a legislature hostile to it. Save for certain aspects of impeachment...court review of impeachment determination is a potential national conflict detonator.⁵²

Such strong criticism evident in the judicial treatment of ouster clauses in post-second-republic military rule and the short lived third republic reflects a move away from *Balarabe Musa*. In a number of cases Nigerian courts strictly construed ouster clauses in military decrees.⁵³ They gave effect to the ouster clause only when they were satisfied that the provisions of the decree were strictly complied with. During the short-lived third

⁵⁰ See M Ikhariale (n 11 above) 54.

⁵¹ See BO Nwabueze *The Presidential Constitution of Nigeria* (1982) 143.

⁵² Anon adopted by Musdpaher JSC in *Inakoju* (n 1 above) 146-147.

⁵³ See *Wilson v Attorney General of Bendel State* (1985) 1 NWLR (Pt.4) 572; *Nwosu v Imo State Environmental Sanitation Authority* (1990) 2 NWLR (Pt. 135) 668; *Okoroafor v Miscellaneous Offences Tribunal* (1995) 4 NWLR (Pt. 387) 59 and *Garba v Federal Civil Service Commission* (1998) 1 NWLR (Pt. 71) 449.

republic, the approach of Nigerian courts to ouster clauses in impeachment provisions was the same. In *Ekpo v Calabar Local Government*⁵⁴ the Court of Appeal interpreted s 11(1) of the Local Government (Basic Constitutional Transitional) Decree which is similar to s 188 (10) of the 1999 Constitution. The Court held that for the ouster clause to apply the Court must ensure strict compliance with the preconditions in that section. This is also the interpretation it gave in *Jimoh v Olawole* where section 26 of the Kwara State Local Government Law (another ouster clause), identical to s 188(10), was in issue.⁵⁵

A clear indication of a return to a supremacist and unlimited judicial review is evident from the Supreme Court decision in *Attorney General of the Federation v Attorney General of Abia State*.⁵⁶ In response to a preliminary objection that the determination of the seaward boundary of a littoral state within the Federal Republic of Nigeria raised a political question and should be resolved exclusively by the legislature (in whom the matter is vested by the 1999 Constitution), only Karibi-Whyte JSC, who had heard *Balarabe Musa* (1982), agreed that the dispute fell under the political question doctrine and should be resolved by legislative and executive action. Uwais CJN (for the rest of the court) stated that a combination of sections 232(1) and 6(1) of the 1999 Constitution show that the Supreme Court ‘has the jurisdiction to interpret ... all ... provisions of the constitution whether on appeal or in exercise of its original jurisdiction’.⁵⁷ Clearly the Supreme Court had changed course.

In the earlier case of *Abaribe v The Speaker Abia State House of Assembly*,⁵⁸ s 188 of the 1999 Constitution dealing with the impeachment of a Deputy Governor of a State was in issue and it may have been plausible to conclude that the courts would employ the principles of statutory interpretation to construe constitutional provisions. However, in a judgment that presaged the uncertainty of the path to follow, it did not. The judgment of Ikongbeh JCA highlights the dilemma of either following a constitutional or statutory standard of interpretation. Reacting to the proposition that section 188(10) should be construed in a statutory manner, he said:

⁵⁴ (1993) 3 NWLR (Pt. 281) 324.

⁵⁵ (2003) 10 NWLR (Pt. 828) 307.

⁵⁶ (2001) FWLR (Pt. 64) 202.

⁵⁷ As above 251.

⁵⁸ (2000) FWLR (Pt. 9) 1558.

Although the military governed under law in the sense that that they made laws, oftentimes after the event, to back up their actions, they did not necessarily rule in accordance with the principles of the rule of law which requires that every governmental act must be based on the rules and procedure pre determined by law. They passed *ad hominem* laws with retroactive force to catch up with perceived transgressors. There was therefore, the need for vigilance on the part of the courts to see that the military in their overzealous bent to cleanse what they perceived as the ills of their predecessor did not unnecessarily trample on the rights of their people. For this reason I do not feel confident with the view that decisions based on the interpretation of ouster clauses in these decrees can provide a good guide for the interpretation of provisions in a constitution limiting the power of courts. All governmental power derives from the Constitution in a civilian regime. There cannot be any legitimate complaint if the constitution withdraws a particular power from one organ of government in favour of another...I prefer to approach the construction of s 188(10) of the Constitution from a different perspective. In fact I do not think that the term ‘ouster clause’ is an appropriate description of the provisions of that section.⁵⁹

The Court of Appeal held that the provisions of section 188(10) were absolute and that the impeachment provisions were a political matter which the Constitution wisely left to the legislature since it enables the people to remove who they elected. The court held that the lower court was right to have abstained from inquiring into allegations that some of the pre conditions in sections 188 (2)-(3) were not complied with. However, the uncertainty of the court is evidenced by an undertaking of constitutional compliance scrutiny of the actions of the Abia State House of Assembly irrespective of its finding on s 188 (10). It concluded that the Abia State House of Assembly had complied with the relevant provisions of section 188. This decision caused a chink in the court’s armour. So much so that the Court of Appeal⁶⁰ and the Supreme Court in *Inakoju* held that *Abaribe* and *Balarabe Musa* (1982) were distinguishable because in those cases the question of non-compliance with the pre conditions in section 188(10) was *not* in issue. This is not so. Our review of the two cases shows that the question of non-compliance *was* in issue. The *Balarabe Musa* (1982) and *Abaribe* courts chose to follow the path of constitutional interpretation.

⁵⁹ As above 1582. See also *Pats-Acholonu JCA* at 1574.

⁶⁰ See *Ogebe JCA* in *Adeleke v Oyo State House of Assembly* (2007) All FWLR (Pt. 345) 211, 255-256 and *Tobi JSC* in *Inakoju* (n 1 above) 89.

It is a strong belief in legislative recklessness and impunity that is at the heart of the Court's recourse to statutory interpretation. It is a countermeasure. Tobi JSC, for the majority in *Inakoju* said as much:

The legislature is expected to abide by the provisions of the Constitution.... And so when the legislature, the custodian is responsible for the desecration and abuse of the provisions of the Constitution in terms of patent violation and breach, society and the people are the victims and the sufferers... Fortunately society and its people are not totally helpless as the judiciary in the performance of its judicial functions under section 6 of the Constitution, is alive to check acts of violation breach and indiscretions on the part of the legislature. This is what I have done in this judgment.⁶¹

This is the context in which it is not surprising that the Supreme Court interpreted the provisions of section 188 as a whole and concluded that it had the jurisdiction to ensure constitutional compliance of the actions of the Oyo State House of Assembly in removing Governor Ladoja.⁶² Tobi JSC chronicles the infractions⁶³ that led to a majority of the court overturning the impeachment. There is no doubt that the Court was using the standard of statutory interpretation when it stated that:

Ouster clauses are generally regarded as antitheses of democracy as the judicial system regards them as unusual and friendly. When ouster clauses are provided in statutes, the courts invoke section 6 as barometer to police their constitutionality or constitutionalism. The courts become helpless when the Constitution itself provides for ouster clauses, such as section 188. In such a situation, the courts hold their heads and hands in despair and desperation. They can only bark they cannot bite. Their jurisdiction is to give effect to the ouster clause because that is what the Constitution says. It is in light of this very helpless situation of the courts, the upholders of the rule of law, that parties should not urge them to interpret sections of the Constitution as ousting their jurisdiction when it is not...I am of the view that the wrong procedure adopted is clearly outside section 188(1) ouster clause, and I so hold.⁶⁴

⁶¹ n 1 above, 123. My emphasis.

⁶² See also *Dapialong v Dariye* (2007) 8 NWLR (Pt. 1036) 332. In this case the Supreme Court overturned the impeachment of Gov Dariye on the ground that in accordance with section 188 of the 1999 Constitution, the impeachment of a governor can only proceed on the votes of at least two thirds of *all* members. Since a number of legislators had floor crossed to another party and lost their legislative seats, there could be no impeachment exercise because *all* the members of the house were not present for the exercise.

⁶³ *Inakoju* (n 1 above) 95.

⁶⁴ As above 93-94.

As stated above it may be claimed that the strict approach adopted by the *Inakoju* Court ensures respect to the finality of the constitutional commitment of the impeachment process on the legislature. At least from the judgment it is clear that the Court indirectly repudiated any linkage of its approach to the political question doctrine. In response to the Appellant's contention that the United States Constitution bars judicial review of impeachment under the political question doctrine, Tobi JSC reasoned that the impeachment provisions of the 1979 and 1999 Constitutions were not adopted from the American impeachment process as s 188 of the 1999 Constitution was different from Article 1 (3) of the US Constitution; that while the word impeachment appears in the US clause, it is not present in the Nigerian Constitution; and that the quorum for the removal of the office holder are different in the two constitutions. Accordingly he held that the American cases cited by the appellant were not binding on the court.

The reason why compliance scrutiny departs from the political question doctrine is because of the nature of the *Inakoju* compliance scrutiny. I point out above that a compliance scrutiny that assesses ordinary procedural steps is likely to affirm the process if there is fidelity to the Constitution. However, where value judgments entrusted to the legislature are evaluated, it is likely that scrutiny will result in a finding of non-compliance. Thus when the judiciary develops the standards of performance, as the Supreme Court did in *Inakoju*, it becomes easy for the court to review the conduct of the legislature against its own standard which may have doubtful constitutional basis. Tobi JSC dwelt at length on the procedure contained in section 188 of the 1999 Constitution and proceeded to lay down standards for each of the steps of the impeachment process. A few examples will suffice. First, while section 188 (11) of the Constitution provides that the legislature shall determine what in its opinion amounts to 'gross misconduct', the Supreme Court defined what *in its own opinion* amounts to gross misconduct.⁶⁵ Second,

⁶⁵ Tobi JSC in his lead judgment in *Inakoju* (above) 85-86 extensively defined what amounts to 'gross misconduct': 'By the definition, it is not every violation or breach of the Constitution that can lead to the removal of a Governor or Deputy Governor. Only a grave violation or breach of the Constitution can lead to the removal of a Governor or Deputy Governor. Grave in the context does not mean an excavation in earth in which a dead body is buried, rather it means, in my view, serious, substantial, and weighty.

IV. The following, in my view, constitute grave violation or breach of the Constitution:

- (a) Interference with the constitutional functions of the Legislature and the Judiciary by an exhibition of overt unconstitutional executive power;
- (b) Abuse of the fiscal provisions of the Constitution,;

while section 188(5) states that the members of the panel must be persons of unquestionable integrity and not members of any public service, legislative house or political party, the Supreme Court infused professional qualifications, age and gender concerns into this list.⁶⁶ The Court went further and defined the psychological features of persons of 'unquestionable character'.⁶⁷ In formulating these standards, which seem intended to guide review, the Supreme Court cast doubt on the status of the legislature as

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- (c) Abuse of the Code of Conduct for Public Officers;
 - (d) Disregard and breach of Chapter IV of the Constitution on fundamental rights;
 - (e) Interference with Local Government funds and stealing from the funds or pilfering of the funds including monthly subventions for personal gains or for the comfort and advantage of the State Government;
 - (f) instigation of military rule and military government;
 - (g) Any other subversive conduct which is directly or indirectly inimical to the implementation of some other 'major sectors of the Constitution.

V. The following in my view, are some acts which in the opinion of the House of Assembly, could constitute grave misconduct;

- (a) Refusal to perform constitutional functions;
- (b) Corruption;
- (c) Abuse of office or power;
- (d) Sexual harassment (I think I should clarify this because of the parochial societal interpretation of it to refer to, only the male gender. The misconduct can arise from a male or female Governor or Deputy Governor as the case may be);
- (e) A drunkard whose drinking conduct is exposed to the glare and consumption of the public and to public opprobrium and disgrace unbecoming of the holder of the office of Governor or Deputy Governor;
- (f) Using, diverting, converting or siphoning State and Local Government funds for electioneering campaigns of the Governor, Deputy Governor or any other parson;
- (g) Certificate forgery and racketeering. (Where this is directly connected, related or traceable to the procurement of the office of the Governor or Deputy Governor, it will not, in my view, matter whether the misconduct was before the person was sworn in. Once the misconduct flows into the office, it qualifies as gross misconduct because he could not have held the office but for the misconduct. Such a person, in my view, is not a fit and proper person to hold the office of Governor or Deputy Governor. It is merely saying the obvious that a Governor or Deputy Governor who involves in certificate forgery and racketeering during his tenure has committed gross misconduct. It is not a lawful or legitimate exercise of-the constitutional function in section 188 for a House of Assembly to remove a Governor or a Deputy Governor to achieve a political purpose or one of organised vendetta clearly outside gross misconduct under the section. Section 188 cannot be invoked merely because the House does not like the face or look of the Governor or Deputy Governor in a particular moment or the Governor or Deputy Governor refused to respond with a generous smile to the Legislature *qua* House on a parliamentary or courtesy visit to the holder of the office'.

⁶⁶ At 81-82. The subsection only talks about the integrity of the persons. The subsection does not talk about the professional callings, age, gender and all that of the persons. It is my view that no profession disqualifies a person from being a member of the Panel. However, in view of the fact-that the exercise of investigation under the Constitution will invariably touch law in its large parts, it is my view that a legal person, either a retired Judge or a Solicitor and Advocate of the Supreme Court, preferably of the status or rank of Senior Advocate of Nigeria, should be appointed the Chairman. The other professional groups that should be on the Panel will depend largely on the allegation made against the Governor or Deputy Governor. And so an arm-chair recommendation will not be made. The point should be made however that an allegation involving money and falsification of accounts or re-ordering of figures, will certainly need the services of an Accountant. I think I can stop here on this fairly difficult area. Although there is no age

a coordinate branch of government. It has strayed into the legislative enclosure because of a belief in legislative incompetence. .

As if on a mission to demolish the political question doctrine, Justice Niki Tobi presided and read the lead judgment of the Supreme Court of Nigeria in *Ararume*.⁶⁸ The *Ararume* court held that the Peoples Democratic Party (PDP) had not complied with section 34(2) of the Electoral Act of 2006 which required any political party wishing to substitute its candidates to give cogent and verifiable reasons. The PDP substituted the name of Senator Ifeanyi Ararume with that of Engineer Charles Ugwuh to contest the gubernatorial election in Imo State. The Court distinguished *Ararume* from *Onuoha* on two bases. First, former dealt with the interpretation the Electoral Act of 2006 whereas the latter with the Electoral Act of 1982.⁶⁹ Second, the 1982 Act did not contain an equivalent provision to the one in issue in the 2006 Act. Further, Article 2 of the PDP constitution expressly provided that the PDP was subject to the provisions of the Constitution of Nigeria (1999), and there existed no equivalent to article 2 in the constitution of the Nigerian Peoples Party, the political party in question in the *Onuoha* case. Irrespective of these differences and the fact that the name of Senator Ifeanyi Ararume had been submitted to the Independent National Electoral Agency (INEC) before the substitution, the facts of the two cases are similar, and I would argue not distinguishable, especially as the name of the victorious candidate at the party primaries was changed by the party in each case.

It is this substantial similarity that ensured that in one breath the Court declared that it would neither apply nor overrule the *Onuoha* case and in another breath it substantively engaged in refuting the fundamental plank of the *Onuoha* case. For example, counsel for the respondents asked rhetorically how the INEC could verify a claim by a political party that a candidate who wins the party primary cannot win an

restriction, the Chief Judge will certainly go for adults and youths. Youths will be handy if the Governor or Deputy-Governor is himself a youth. Gender is a most sensitive area in contemporary Nigerian society. Although the Constitution does not provide for representation in the Panel on basis of gender, it will not be out of place if the Chief Judge has this in mind in constituting the Panel. I do not want to sound dogmatic on this fairly sensitive area in our contemporary society. The Chief Judge is a man of law and good judgment and should be trusted to take decisions with egalitarian outlook.

⁶⁷ As above.

⁶⁸ n 2 above.

⁶⁹ See Tobi JSC in *Ararume* (n 2 above) 451: 'While *Onuoha* was decided on an earlier Electoral Act... what is involved in this appeal is the Electoral Act, 2006'.

election. In response Tobi JSC held that the contention made nonsense of the requirement of the primary elections in the PDP constitution and the Electoral Guidelines For Primary Elections 2006 for the PDP⁷⁰ which was made to guide such elections. Some of the members of the *Ararume* Court were more direct in refusing to follow the *Onuoha* case. For example, Oguntade JSC said:

My humble view on the decision in *Onuoha v Okafor*...is that it has ceased to be a guiding light in view of the present state of our political life. I have no doubt that the reasoning in the case might have been useful at the time the decision was made. It seems to me, however that in view of the contemporary occurrences in the political scene, the decision needs to be viewed (sic) or somewhat modified. If the political parties, in their own wisdom had written it into their Constitutions that their candidates for election would emerge from their party primaries, it becomes unacceptable that the court should run away from their duty to enforce compliance with the parties Constitution...An observer of the Nigerian political scene today easily discovers that the failure of the parties to ensure intra-party democracy and live by the provisions of their constitutions as to the emergence of candidates for elections is one of the major causes of the serious problems hindering the enthronement of a representative government in the country.⁷¹

At issue in *Ararume* was the requirement of ‘cogent and verifiable reasons.’ The Supreme Court held that a political party that had acted in ‘error’ was not a cogent and verifiable reason for the purposes of section 34(2) of the Electoral Act of 2006. Even though the Court realized the difficulty in defining the meaning of ‘cogent’ and ‘verifiable’, it defined these two terms. Tobi JSC defined cogent as ‘powerful; convincing’,⁷² ‘strongly and clearly expressed in a way that influences what people believe’⁷³ and able ‘to persuade or produce belief’.⁷⁴ Oguntade JSC defined the terms as

⁷⁰ The concept of primary elections in Nigerian political parties is the selection of the party candidate. It is conducted on the principle of first past the post.

⁷¹ n 2 above 461. See also Muhammed JSC at 497 where it was stated that ‘(i)t appears that the Legislature has found some lapses or lacunae in the provisions of section 83(2) of the Electoral Act of 1982 under which the case of *Onuoha v Okafor* ... and section 23 of the Electoral Act 2003 under which *Dalhatu v Turaki* ... were decided respectively. These sections in the 1982 and 2002 Electoral Acts left the issue of substitution of candidates entirely in the hands of political parties without let or hindrance. But when the legislature realized that the political parties were abusing the unfettered powers of ‘making’ and ‘unmaking’ of prospective candidates for the political offices to be contested at election periods, it then decided to re-draft provisions relating to substitution of candidates for the elective offices.’

⁷² *Ararume* (n 2 above) 440.

⁷³ At 440- 441.

⁷⁴ As above 441.

‘a reason self-demonstrating of its truth and which can be checked and found to be true’.⁷⁵ Muhammad JSC held that the term ‘cogent’ and ‘verifiable’ means that ‘the reason(s) to be adduced by a political party to INEC before the latter can accede to the substitution must be genuine, convincing, compelling and persuading. It should not be flimsy or obvious’.⁷⁶ These dicta lead to the conclusion that the court will carry out an objective assessment of the reason(s) and that it will not rely solely or substantially on the assertion of the political party. For example, it may be difficult for a party to assert successfully that it is convinced that the nominated candidate cannot win an election for it. Going by the *Ararume* test, the courts will demand more detail or explanation for this view. This may explain why the Court rejected the simple assertion of ‘error’ in *Ararume*. In fact, the Court went on to prove that there was no error since the new candidate was the fourteenth candidate in the primaries. Oguntade JSC expressed this point clearly when he said:

Given the fact that 2nd defendant scored 36 votes as against the plaintiff who scored 2,061 votes at the 3rd defendants primaries, how can the reason given by 3rd defendant as ‘error’ qualify to be a ‘cogent and verifiable reason’. In my view, the reason given for the substitution by the 3rd defendant is patently and demonstrably false such that it might be dismissed by a wave of hand.⁷⁷

It is tempting to assume that a substitution with the second candidate in the primaries may have been found ‘cogent and verifiable’. It seems, however, that the Court will demand details of the substitution. While it is easy to see that the death, withdrawal of a nominated candidate or inability to meet the general qualification for candidates set out by sections 66, 107, 137 and 182 of the 1999 Constitution may suffice, it is difficult to imagine the reasons a political party is to give that will satisfy this standard, especially if the political party relies on her judgment. An objective assessment by the court gives it a wide discretion to decide what is ‘cogent and verifiable’. This objective assessment is

⁷⁵ At 465.

⁷⁶ At 512.

⁷⁷ As above 465.

evident in the later case of *Amaechi v Independent National Electoral Commission*⁷⁸ the facts of which are similar to the *Ararume* case.

In *Amaechi* the Supreme Court upheld its interpretation in the latter i.e. that ‘error’ is not a cogent and verifiable reason as required by section 34(2) of the Electoral Act of 2006. The appellant in *Amaechi* had won the gubernatorial primaries of his party but was subsequently dropped by his party and his name substituted with that of another person who did not contest the primaries. The party claimed that the substitution was because the appellant’s name was submitted in ‘error’. Oguntade JSC who read the lead judgment of the Court said

The question that arises is –what ‘error’ made it possible for a non-candidate at PDP primaries to be named the PDP Candidate in place of eight candidates who contested and of whom Amaechi came first? It seems clear that the reasons given by PDP for the substitution of Omehia for Amaechi was (sic) patently untrue and certainly unverifiable.⁷⁹

It is clear that the question of substitution of candidates has been moved from the exclusive preserve of the political party to the review of the electoral agency and ultimately the courts. Should the Supreme Court have demurred in line with its decision in the *Onuoha* case? By stating that the two cases are different the Court seems to be pointing to the statutory cast of the 2006 Electoral Act, rather than the 1999 Constitution as its authority. In the Court’s opinion it was a simple case of statutory interpretation. But then this was also the situation in the *Onuoha* case where, in the absence of any statutory or constitutional ouster, the Supreme Court decided not to intervene in the question of sponsorship of party candidates. Then the Court held that the 1979 Constitution and section 83 of the 1982 Electoral Act gave the political party the right to decide which of two or more contending candidates it supports and that it would not intervene in the choice of the party. This determination is also capable of review just as compliance with ‘cogent and verifiable reasons’.

⁷⁸ Unreported suit no. SC/252/2007. Hereafter *Amaechi*. The judgment of the court was handed down on 25-10-2007. The reasons for the judgment of the court were given on 18 January 2008 and are reproduced in *The Beam* 22-28 January 2008 8.

⁷⁹ As above.

However, *Ararume* should not come as a surprise. After *Inakoju*, it was clear that Nigerian courts were less likely to decline review in a matter that seemingly requires interpretation. The reaction of the PDP to the *Ararume* case was to expel Senator Ifeanyi Ararume, withdraw from the Imo State gubernatorial race,⁸⁰ and back another candidate.⁸¹ This can be viewed either as an affront to the rule of law or as confirmation of the inherent difficulty of judicial involvement in the selection of a political party candidate. The latter seems more plausible as the party was intent on resisting interference in its internal affairs especially in the knowledge that the 1999 Constitution allows parties to contest elections only through their nominated candidates.⁸² Is this not what the *Onuoha* court sought to avoid? Didn't the court warn that to intervene in such a matter would be to 'instantly project or propel the court into the area of jurisdiction to run and manage political parties?'⁸³ On the other hand it seems to me that a party unwilling to abide by rules of natural justice, for example, may not be ready and able to engage meaningfully in governance. If that same party subverts its candidate in an election, then it is to be avoided by the electorate as its conduct should be a warning sign of what it is capable of doing when it is responsible for governing. Its conduct robs it of the legitimacy that a political party must have to qualify it for serious contention.

Should a court back away from the enforcement of the human rights of party members or other internal matters on the ground of the difficulty in developing manageable criteria? I think not. I shall dwell more on the criteria for judicial review in this area. Is the difficulty related to the standard of review? With respect to the observance of human rights, the principles developed in the course of interpretation of the right in question can be used to assess compliance by the political party. In this regard politically sensitive issues are no different from any others. Perhaps the difficulty lies with the post-decision effect. For example, in *Ararume* the party hierarchy did not like or accept the outcome of the decision of the Supreme Court. Yet the fact remains that the party allowed the candidate to run the primaries. By putting a number of candidates

⁸⁰ *The Guardian* 11 April 2007 1.

⁸¹ See 'How PPA captured Imo-Obasanjo' *Punch* 25 May 2007 1.

⁸² In reaction to the expulsion of Chief Ararume, the Independent National Electoral Commission initially declared that he cannot put himself forward in the just concluded gubernatorial election. See *The Guardian* 12 April 2007 1. Eventually he contested the election as the candidate of the party.

⁸³ *Onuoha* (n 3 above) 501.

forward, the party impliedly warranted that any of them was capable of being its candidate. This is more so for the candidate who won the primaries. It was the subversion of the members' mandate for party leaders to install another candidate. In restoring the candidate it may well be said that the court was affirming the associational mandate of the members of the party. Therein lies one of the important goals of judicial review in this area as it enables segments of the party to address their grievances. If it were not so and if internal party mechanisms were the only available option for redress, ordinary members of a party would have no real option. This is more so for Nigerian political parties where the handpicking of candidates seems to be the order of the day. In a country where the party hierarchy is often a reflection of ethnic elite or financial capture it is untenable that disputes should be settled internally, because to submit disputes to a hierarchy that is at the heart of the dispute is to entrench their hegemony.

The *Ararume* case represents a trend of strong judicial review of political party activities. It appears to accord with a noticeable trend of the Nigerian judiciary in refusing to defer to the determinations of the executive branch in political matters. Specifically, even in the face of precedent of the executive determination of the qualification of political party candidates, the Nigerian Supreme Court has divested the INEC of substantive powers in the verification of eligibility to contest elections. In *Action Congress v Independent National Electoral Commission*⁸⁴ the plaintiff/respondents sought, amongst others, a declaration that the power to disqualify any candidate sponsored by any political party is exclusively vested in the Court by section 32(5) of the Electoral Act 2006.⁸⁵ The judgment of the Federal High Court that

⁸⁴ (2007) 12 NWLR (Pt. 1048) 222.

⁸⁵ Section 32 of the Electoral Act 2006 provides that

- (1) Every political party shall not later than 120 days before the date appointed for a general election under the provisions of this Act submit to the Commission in the prescribed forms the list of the candidates the Party proposes to sponsor at the elections.
- (2) The list shall be accompanied by an Affidavit sworn to by each candidate at the High Court of a State, indicating that he has fulfilled all the constitutional requirements for election into that office.
- (3) The Commission shall, within 7 days of the receipt of the personal particulars of the candidate, publish same in the constituency where the candidate intends to contest the election.
- (4) Any person who has reasonable grounds to believe, that any information given by a candidate in the Affidavit is false may file a suit at the High Court of a State or Federal High Court against such person seeking a declaration that the information contained in the Affidavit is false.
- (5) If the Court determines that any of the information contained in the Affidavit is false the Court shall issue an Order disqualifying the candidate from contesting the election.
- (6) A political party which presents to the Commission the name of a candidate who does not meet the qualifications stipulated in this Section, commits an offence and is liable on conviction to a maximum

only the courts could disqualify candidates was overturned by the Court of Appeal. The Court of Appeal held that the duty and power of INEC pursuant to Item 15 of the third schedule to the 1999 Constitution to ‘organize, undertake, and supervise all elections’ enables the electoral agency to ensure compliance with the provisions of s 137 of the Constitution which sets out electoral qualifications. This power includes the authority not only to screen candidates sent to it by political parties, but also to remove the name of any candidate that fails to meet the criteria set out by the Constitution without having to go court.⁸⁶ The Court further held that the power granted to the court of law by section 32(5) of the Electoral Act enables any person to file an action before it on reading the affidavit accompanying the constitutional compliance certificate. Accordingly the Court held that it would be a circus show for the Commission to be expected to go to Court first to seek a declaration before treating the information supplied to it. The decision of the Court of Appeal seems worthy of support to the extent that the electoral agency did not seek the exclusivity to screen candidates. It seems a lot neater that the electoral agency performs its functions and that these are reviewable by the court. However, the approach of the Court of Appeal did not hold water with the Supreme Court which overturned its decision. The Supreme Court held that the INEC had no power to disqualify any candidate submitted to it by a political party without a valid order of court. Overturning the Court of Appeal’s judgment has the effect of divesting the electoral agency of any substantive power. It is to be remembered that INEC was locked in a serious dispute with many opposition candidates whom it disqualified from contesting the 2007 elections. These candidates accused the agency of being an instrument of the ruling party and asserted that their disqualification was political. Amongst these candidates was the Vice President of Nigeria, Alhaji Atiku Abubakar who fell out with President Olusegun Obasanjo and even resigned from the party for which they won the presidential election.⁸⁷ By engaging in functions that would normally be within the provenance of the executive, because of a seeming lack of confidence in the credibility of the electoral agency, the

fine of N500,000.00.

⁸⁶ The Court of Appeal relied on the case of *Ajadi v Ajibola* (2004) 16 NWLR (Pt. 898) 16.

⁸⁷ The Nigerian Supreme Court has ruled that a sitting Vice President owes his allegiance to the country and not to the political party on whose ticket he came into office. Accordingly he does not constructively lose his office on defection to another party since the 1999 Constitution only provides for loss of office on his impeachment. See *Attorney General of the Federation v Abubakar Atiku* (2007) All FWLR (Pt. 375) 405.

Supreme Court refused to *defer* to the determination of the electoral agency and thereby ensured that political parties are able to present their candidates in furtherance of its associational prerogative.

4. The Political Question Doctrine and Constitutional Interpretation in Nigeria

The discussion in this section is based on the view of the Supreme Court in *Inakoju* that the political question doctrine is '[s]till in its embryonic stage in Nigeria. Let us not push it too hard to avoid the possibility of a still-birth.'⁸⁸ This may be the caution we need to bear in mind as we grapple with the question whether the doctrine is dead, dying or still alive. It may just be too early to decide one way or the other. Perhaps constitutional design and adjudication make it inevitable that the doctrine and the like continue to remain relevant or otherwise at different times in the judicial history of a country.⁸⁹ This view is consistent with the position of the Court that procedural compliance with section 188 of the 1999 Constitution should oust the jurisdiction of the Court. On this score the doctrine may be alive and kicking since ultimately the textual commitment of giving the legislature the final word is respected. But, as I argue in the previous section, any review carried out by the standards set in the *Inakoju* case is *substantive* and is likely to open up the possibility that an impeachment proceeding will be struck down. If this is the case the doctrine can be regarded as imperiled in Nigeria, at least in so far as it relates to impeachment proceedings.

The direction of the Supreme Court will certainly become clear soon as it rules on the propriety of new impeachment exercises that come before it. In particular, constitutional compliance scrutiny of the recent impeachment of Mr Femi Pedro the former Deputy Governor of Lagos State⁹⁰ may provide such an opportunity. It seems that the Lagos

⁸⁸ n 1 above, 91.

⁸⁹ This is the situation in the United States where the doctrine has enjoyed mixed prominence. Thus even after *Bush v Gore* (n 12 above) it will be a quick rush to judgment to declare that the doctrine is dead. See JH Choper 'The political question doctrine: Suggested criteria' (2005) 54 *Duke Law Journal* 1457.

⁹⁰ See 'Lagos Assembly Impeaches Pedro' *The Guardian* 11 May 2007 1. An interesting dimension of this case is that the Deputy Governor resigned his appointment before the House of Assembly impeached him.

State House of Assembly proceeded in the belief that the procedural requirements of section 188 were adequate and not on the standards set by the *Inakoju* court. In a related development, the Court may be asked to rule on the propriety of the reversal of impeachment proceedings.⁹¹ Clearly if the textual commitment of finality to the legislature is upheld by the Supreme Court, it is likely that the legislature may be tempted to reverse itself in impeachment proceedings since its decision will not be reviewed.

Another critical point that underscores the contention that the political question doctrine is still relevant is the fact that in certain other areas of its jurisdiction the Nigerian Supreme Court has without constitutional or statutory backing refused to engage in judicial review on grounds that can best be described as the absence of or difficulty in developing manageable criteria for judicial engagement. For example in two recent cases, *Esiaga v University of Calabar*⁹² and *Magit v University of Agriculture Makurdi*⁹³ the Court held that it will not engage in a review of academic disputes relating to examination grades and the award of degrees. In *Esiaga*, the Court said:

A university is a degree awarding institution and can...neither delegate its degree awarding powers nor be stampeded to make award where it does not see it fit to do so. For a court to use its awesome magisterial powers to compel a university to award a degree would in effect mean that the court has invested itself with necessary powers to fully appreciate the nuances taken into consideration to award university degrees...A university is a place of great learning and research. I would view with consternation and trepidation *the day the court would immerse itself into the cauldron of academic issue which is an area it is not equipped to handle*. It will indeed be alarming for any court worth its salt to enter into the arena of questioning why a university has refused to award a degree to any student...It is my view that it is the indisputable right of a university to award or withhold the award of a degree and it is no business of the court to question its motives let alone compelling it to award a degree which it has stated a claimant is not qualified for...It alone possess the power to state whether a particular work is below standard or not...Is the court going to substitute its standard with that of the university? I think not.⁹⁴

⁹¹ A number of impeachment reversals have been adopted by State houses of Assembly in the fourth republic. Of note is the reversal of the impeachment of Dr Oley Udeh who was the Deputy Governor of Anambra State. Recently the Ekiti State House of Assembly reversed a number of impeachments including that of two Deputy Governors to wit Mrs Abiodun Olujinmi and Mr Abiodun Aluko. See 'Ekiti Assembly Reverses Olujinmi's Impeachment' *The Guardian* 27 May 2007 1.

⁹² (2004) All FWLR (Pt. 206) 381.

⁹³ (2006) All FWLR (Pt. 298) 1313.

⁹⁴ n 91 above, 1344. My emphasis.

The decision of the Court in the cases of *Esiaga* and *Magit* find resonance in the *Onuoha* case. To that extent, it may be contended that the Court may be minded in political matters to recognize the limitation of its review as it has done in the academic sphere. In the religious sphere enough dicta exist to conclude that this may be an area where the court may decline to review.⁹⁵

Lest it appear that the Nigerian Supreme Court is without restraint, it is important to point out that fidelity to constitutional design which is part of the basis of its supremacist stand may well constrain its powers of review. Even though case law is scanty and the point not well argued and discussed, it may well be forecast that the Court will be wary of intervening in matters where considerable discretion bordering on politics is endowed on the executive and legislature. In such cases the Court may well defer to the decisions made by coordinate branches.⁹⁶ A good example is where the courts have deferred to the determination of the Attorney General of a state who is empowered to discontinue criminal prosecution.⁹⁷ In *State v Ilori*⁹⁸ Eso JSC interpreting section 191(3) of the 1979 Constitution, which is similar to section 211(3) of the 1999 Constitution, held that the determination of ‘public interest, the interest of justice and the need to prevent abuse of legal process’ is at the sole and final discretion of the Attorney General. He said:

⁹⁵ See, for example, *Shodeinde & Others v Registered Trustees of the Ahmadiyya Movement-In-Islam* (1983) 2 SCNLR 284, 323 where the court said that ‘matters of faith are hardly matters for a court of law’.

⁹⁶ This deference is a key part of the prudential strain of the political question doctrine in the United States. See for example A Bickel ‘The Supreme Court, 1960 Term-Foreword: The passive virtues’ (1961) 75 *Harvard Law Rev* 40 and L Henkin ‘Is there a political question doctrine?’ (1976) 85 *Yale Law Journal* 597.

⁹⁷ Section 211 of the 1999 Constitution provides that:

- (1) The Attorney General of a state shall have power
 - (a) to institute and undertake criminal proceedings against any person before any court of law in Nigeria other than a court-martial in respect of any offence created by or under any law of the House of Assembly;
 - (b) to take over and continue any such criminal proceedings that may have been instituted by any other authority or person; and
 - (c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by him or any other authority or person.
- (2) The powers conferred upon the Attorney-General of a state under subsection 1 of this section may be exercised by him in person or through officers of his department.
- (3) In exercising his powers under this section, the Attorney-General of a state shall have regard to the public interest, the interest of justice and the need to prevent abuse of legal process.

⁹⁸ (1983) 1 SCNLR 94.

The appellant has strenuously harped on the possibility of the abuse of his powers by an Attorney General who is left with this absolute discretion. I have already pointed out earlier that the sanction lies in the reaction of his appointer but also in public opinion. ... His remedy is not to ask the court to question or review the exercise of the powers of the Attorney General.⁹⁹

Another instance is the appointment of ministers by the President.¹⁰⁰ Even though a number of requirements for the appointment are verifiable such as the requirement that a minister should be qualified to run for office as a member of the House of Representatives and that the President should appoint at least one minister from each state of the federation, the Court should be reticent in selecting one of the many qualified candidates. While the legislature may refuse to confirm a candidate for political reasons, a court would be well advised to decline review of a ministerial appointment on grounds that particular section(s) of a state have monopolized the ministerial slot. Yet another group of examples relates to issues on which the Constitution is silent; one of which is the conduct of external relations endowed on the Federal Government by virtue of Item 26 of part 1 of the second schedule to the Constitution. Without constitutional guidance, a court may well be circumspect in its review of the conduct of foreign affairs by the executive.¹⁰¹

In addition, a number of examples support the inference that the Nigerian judiciary, especially the Supreme Court, has employed a number of principles of

⁹⁹ As above 111.

¹⁰⁰ This is provided for by s 147 of the 1999 Constitution which provides

- (1) There shall be such offices of Ministers of the Government of the Federation as may be established by the President.
- (2) Any appointment to the office of Minister of the Government of the Federation shall, if the nomination of any person to such office is confirmed by the Senate, be made by the President.
- (3) Any appointment under subsection (2) of this section by the President shall be in conformity with the provisions of section 14(3) of this Constitution:- provided that in giving effect to the provisions aforesaid the President shall appoint at least one Minister from each State, who shall be an indigene of such State.
- (4) Where a member of the National Assembly or of a House of Assembly is appointed as Minister of the Government of the Federation, he shall be deemed to have resigned his membership of the National Assembly or of the House of Assembly on his taking the oath of office as Minister.
- (5) No person shall be appointed as a Minister of the Government of the Federation unless he is qualified for election as a member of the House of Representatives.
- (6) An appointment to any of the offices aforesaid shall be deemed to have been made where no return has been received from the Senate within twenty-one working days of the receipt of nomination by the Senate.

¹⁰¹ It should be borne in mind that the exercise of foreign policy is increasingly being reviewed courts. See for example the South African Constitutional Court in *Kaunda & Others v President of the Republic of South Africa & Others* 2005 (4) SA 235 (CC).

justiciability to side step issues that may be considered political. A good example is the requirement of *locus standi* established in *Adesanya v President of the Republic of Nigeria*.¹⁰² Even after the clarification in the subsequent cases of *NNPC v Fawehinmi*¹⁰³ and *Owodunni v Registered Trustees of the Celestial Church*¹⁰⁴ that *locus standi* signifies the requirement of *sufficient interest*, a somewhat more liberal concept than *personal interest* (evident in *Adesanya*), the concept presents a credible technique for courts to side step political matters. Many cases declining review on the basis of lack of standing indicate a wide discretion exercised by the court in determining sufficiency of interest.¹⁰⁵

Another technique employed by the Supreme Court is to assume jurisdiction only on the existence of ‘a legal right.’ Again a court’s determination of this requirement leaves it with a wide margin of discretion. In *Attorney General of the Federation v Attorney General of Imo State*¹⁰⁶ and *Attorney General Ondo State v Attorney General of the Federation*,¹⁰⁷ where compilation of the register of voters was in issue, the Supreme Court refused to exercise jurisdiction on grounds that the matters did not present a legal dispute.

Evidence of the utility of political solutions to certain problems even after judicial review is found in the political process subsequent to the decision of the Nigerian Supreme Court in *Attorney General of the Federation v Attorney General of Abia State*.¹⁰⁸ Egede points out that ‘immediately after the decision of the Supreme Court which had far reaching adverse financial implication for certain littoral states, the federal government embarked on what it termed a “political solution” to the issue.’¹⁰⁹ A panel set up by the federal government recommended a solution that effectively overruled the decision of the Supreme Court. While the Supreme Court ruled that natural resources found in offshore areas belonged to the federal government, the panel’s recommendation which became the

¹⁰² n 30 above.

¹⁰³ (1998) 7 NWLR (Pt 559) 598.

¹⁰⁴ (2000) FWLR (Pt.9) 455.

¹⁰⁵ See for example *Thomas v Olufosoye* (1986) 1 NWLR 669.

¹⁰⁶ (1982) 12 SC 147.

¹⁰⁷ (1983) 2 SCNLR 269.

¹⁰⁸ n 56 above.

¹⁰⁹ 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 *Journal of African Law* 73, 91. See also KSA Ebeku ‘Nigerian Supreme Court and ownership of oil’ (2003) 27 *Natural Resources Forum* 291.

basis of an Act of the National Assembly¹¹⁰ was that the natural resources found in the offshore areas of littoral states were owned by the state and not the federal government. This political solution may have been more speedily reached had the preliminary objection that the matter involved a political question because of a lack of criteria to adjudicate on the matter was upheld by the majority of the Supreme Court. It is doubtful, given recent decisions of the Supreme Court, that the lessons of this case have been internalized. This, of course, does not mean that it does not hover in the background as a credible path to follow.

5. Concluding Remarks

It seems to me that the last has not been heard of the political question doctrine in Nigeria. As I point out above, it may well be that in respect of impeachment proceedings the doctrine is alive and kicking as successful compliance scrutiny will lead to the court to abide by a constitutional ouster. It is in respect of the judicial review of political party activities that it is unlikely to continue. There seems to be a realization that the price for avoiding issues relating to political parties is the failure of the democratic project in Nigeria.

It is important to recognize an inherent danger - that the judiciary may belittle other branches of government and ignore constitutional design imperatives and the doctrine of separation of powers in order to substitute its opinion for that of other branches of state. It is possible that with a legislature and executive more committed to upholding the Constitution, the doctrine will become stronger and compliance scrutiny may merely be formal or done away with completely. Whatever the case, it is important for Nigerian courts to further examine whether the standards of statutory interpretation are suitable for constitutional interpretation. It is also important to clarify the status of the fundamental human rights provisions in the 1999 Constitution and to determine whether they apply to all constitutional activity; or whether it is really a red herring and limited by other parts of the Constitution.

¹¹⁰ The Allocation of Revenue (Abolition of Dichotomy in the Application of the Principle of Derivation) Act 2004.

To end it is worth noting that the supremacist tendencies of the Nigerian judiciary are encouraged by the immense popularity which the judiciary enjoys. The fact that judges locate their legitimacy in the people may make them less cautious, encouraging a head on collision with other branches of government. A number of consequences including undue interference in the appointment of judicial officers or the curtailment of plenitude of judicial powers are possible responses by coordinate branches of government. There is no doubt that for the sake of the system, restraint is a virtue that must find accommodation with unlimited review.

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