



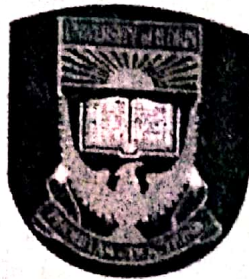
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SHIELDING THE COURTS FROM POLITICAL PRESSURE: A CRITICAL EXPOSITION OF THE DOCTRINE OF POLITICAL QUESTIONS

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Abstract

The doctrine of political questions has always occupied a centre stage in constitutional law discourse. By this, the court is meant to protect itself from political pressure by avoiding the determination of certain questions which are by their nature political. The main reason for this act is that political questions are perceived as not being within the purview of the courts to decide. Yet, democracy enjoins, constitutionalism, open-space in government, free speech, accountability, transparency, human rights protection, political pluralism on the part of governmental institutions. These concepts are mainly anchored on the courts for its promotion. The paper, using qualitative methodology which includes interview with stake holders, makes a critical exposition of various theories on political questions. It finds that the court cannot insulate itself from politics by merely avoiding the determination of political questions. Rather, this will amount to court's abdication of its constitutional role of law interpretation. It concludes by propounding a pragmatic theory of political questions in order realistically delimit the scope of political questions thereby filling the gaps created by existing theories of political questions.

1.0 INTRODUCTION

In a democratic system of government, there is a bias for constitutionalism, good governance, protection of human rights, free speech and transparency. The courts play enormous role in the protection of these democratic values. In playing its constitutional roles, pressures from political class on the courts in the determination of certain matters that are political in nature are difficult to avoid. In fact, recently, a political party in Nigeria raised alarm calling on the courts to resist pressures from the political class in determining election petition matters that are pending before the courts.¹ Politicians by their very nature applaud courts decisions that favour them and condemn the decisions that are given against them. Sometimes, the politicians accuse the judiciary of being bias.² The climax of this attitude of the political class made the Chief Justice of Nigeria to recently call politicians to order with respect to their approach to courts' decisions.³

The nature of pressures from the political class could come in several forms, the main purpose being to influence the outcome of a pending political case before the courts. Of recent, the Minority leader of the House of Representatives

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- 1 Election Tribunals: PDP cautions A'Court President against interferences. Available at < <http://newsng.com/nigeria-news/2015/10/election-tribunals-pdp-cautions-acourt-president-against-interferences/> > (accessed on 30th October, 2015).
 - 2 Daily Post: PDP Accuses Tribunal of Working in APC's Favour: <http://dailypost.ng/2015/10/30/pdp-accuses-tribunals-of-working-in-apcs-favour/> (accessed on 30th October, 2015).
 - 3 Interference Allegations: Don't Cross Your Bounds: CJN Cautions PDP available at <http://www.thisdaylive.com/index.php/2015/10/30/interference-allegation-dont-cross-your-bounds-cjn-cautions-pdp/>

sponsored a motion urging the Speaker of the House to meet with the President on the need to apply a political solution to the case pending against the Senate President at the Code of Conduct Tribunal.⁴ The motion was eventually passed as prayed. At times, some judges withdraw from cases due to pressures.⁵ Sometimes, the pressure could be from the executive, legislature and political parties. Yet, courts want to shield itself from political pressures in playing its constitutional duty of resolving disputes in matters with high political undertone. So, political questions doctrine is seen as a tool to protect the courts from these political pressures. This is done by simply refusing to determine on the merit matters which are political in nature.

Against the above backdrop, this paper is intended to critically expose the doctrine of political questions in order to determine if courts can be really protected from political pressures using the doctrine as a shield. To achieve this objective, the paper first discusses the evolution and nature of the theory of political questions. It also makes a critical exposition of the theories propounded on the meaning, scope and rationale for the political questions doctrine. Due to the

⁴ Reps seek political solution to Saraki's travails <<http://thenationonline.ng/rep-seek-political-solution-to-sarakis-travails/>> (accessed on 16th November, 2015).

⁵ Judge withdraws from Saraki's case against CCT, others <<http://thenationonline.ng/judge-withdraws-from-sarakis-case-against-cct-others/>> (accessed on 6th November, 2015).

weaknesses found in the critical exposition of the theories, this paper will propound a working and realistic theory on the meaning and scope of the doctrine.

2.0 Evolution and Nature of Political Questions Doctrine

The evolution and nature of the doctrine of political questions stems from the effort the court in the United States to insulate the courts from pressures arising from the actions of political class. Justice Marshall, in an attempt to insulate the court from political pressure, in the case of *Marbury v Madison*⁶ seems to have created two major controversial doctrines in constitutional law especially when some of his sentences are read in isolation. The first is the statement issued that it is 'emphatically the province and duty of the judicial department to say what the law is.' The statement, when read in isolation, establishes seemingly limitless constitutional authority in the Supreme Court. The constitution is the law and within the Supreme Court's power - its duty - to say what the law is. Therefore, it is the Supreme Court's province and duty to answer all constitutional questions with finality.⁷ This is the path of judicial review. The second is the assertion that recognised the existence of certain questions that are wholly outside the purview of the courts by the use of the term 'questions in their nature political.' This has not been subject

⁶ 5 U.S. (1 Cranch) 137 (1803).

⁷ See Shamrahayu A. A. and Sambo A.O. Internal Affairs of Political Parties and Judicial Review: An Expository Study of the Experience in Nigeria and Malaysia 7 (13) JASR: (2011) 2257-2265 [hereinafter referred to as Shamrahayu and Sambo].

to definite definition.⁸ The statements when read together may reveal Marshall's fundamental conception of the separation of powers and highlights of both the limits of judicial authority and the interpretive role played by the political branches.⁹ When these political questions are presented, it is the province and duty of legislature or the executive, not the courts, to say what the law is. These questions have formed the gist of the so-called 'political question doctrine.'¹⁰

The above approach is Justice Marshall's larger vision of the constitutional structure in which the institutional strengths and weaknesses of each branch are taken into consideration in resolving particular issues.¹¹ Unfortunately, the term political question has created more confusion than creating room for constitutional structure.¹² In other words, the doctrine of political questions has not been subject to a universally acceptable definition. It is defined the doctrine as a substantive ruling by the justices that a constitutional issue regarding the scope of a particular provision (or some aspects of it) should be authoritatively resolved not by the Supreme Court but rather by one (or both) of the national political

8 This was not also defined in the Marbury case.

9 See Shamrahayu and Sambo.

10 Rachel E. Barkow, More Supreme Than Court? The Fall of Political Question Doctrine and the Rise of Judicial Supremacy (2002), 102, Colum. L. Review, 237.

11 Rachel E. Barkow, More Supreme Than Court? The Fall of Political Question Doctrine and the Rise of Judicial Supremacy (2002), 102, Colum. L. Review, 237.

12 Henkin submitted that failure to maintain the distinction between the ordinary respect for the courts for substantive decisions of the political branches, and extra ordinary deference to those branches determination... has aggravated confusion and controversy as to whether, and why and when such extra ordinary deference is called for... see Louis Henkin, Is there a Political Question Doctrine? (1976) vol., 85 no. 5 Yale L. Rev., 597 at 599.

branches.¹³ It has been described as 'Who gets to decide what the right answer to a substantive constitutional question is?' and 'Does the Constitution give a political branch the final power to interpret the Constitution?'¹⁴ It is also seen as questions which the court foregoes their unique and paramount function of judicial review of constitutionality.¹⁵ It has also been seen as the result of any development of devices for withholding the ultimate constitutional judgement of the Supreme Court and in a sense their sum.¹⁶ It is also defined as questions which the courts will refuse to take cognizance, or to decide, on account of their purely political character or because their determination would involve an encroachment upon the executive or legislative powers.¹⁷ The simplest is that it as a non-justiciable matter.¹⁸ It is seen also as issues of constitutional law that are more effectively resolved by the political branches of government and not appropriate for judicial resolution.¹⁹ It also defined as when the court believes it to be a matter more appropriate for resolution by either of the other branches of government or where the court considers itself as incompetent as the matter is not amenable to resolution by judicial processes.²⁰

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- 13 Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria* 54, *Duke L. J.* (2005) 1457 at 1461.
- 14 Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine* 80, *N.C. L. Rev.* 1203, 1233 (2002).
- 15 Louis Henkin, (n. 12).
- 16 Bickel, *The Least Dangerous Branch*, 1-14, 46-65 (1962).

It appears there is therefore no universally acceptable definition of the doctrine.²¹ The simplest meaning of term is a non-justiciable issue. What is crystal clear from the various attempted definitions of the doctrine is that the court will not go into the merit of the case and will refuse judicial review where a matter has to do with political question.²² When the doctrine of political question is applied in court, it is a way of avoidance because the court defers without reviewing the position taken by the political departments and refuse to comment on the lawfulness of the position.²³ However one must note the difference between avoidance in political question and avoidance on jurisdictional or procedural ground.²⁴ Where it is based on procedural ground, such as ripeness, or standing, it only affects that particular party not the constitutional issue.²⁵ Political question attaches itself to the issue. The court assumes jurisdiction but will not determine the issue in controversy.²⁶ The two however have

- 17 HC Black, Blacks Law Dictionary, (USA: West Publishing Co., 1979).
- 18 Ikenna Nwosu, Judicial Avoidance of Political Questions in Nigeria, Author, 2005, 142-158.
- 19 Martin H. Redish, Judicial Review and the Political Question, 79 Nw. U. L. Rev. 1031, 1031.
- 20 Rohde and Spaeth, Supreme Court Decision Making, (San Francisco: Freeman, 1976) 156 (cited in Ikenna Nwosu, Judicial Avoidance of Political Questions in Nigeria, Author, 2005, 142-158).
- 21 See Shamrahayu and Sambo. See also Ibrahim Imam, A.O. Sambo, Wahab Egbewole and A.B. Abdulkadir, Judicial Activism and Intervention in the doctrine of Political questions in Nigeria: An Analytical Exposition, (2011) vol. 1, no. 2, African Journal of Law and Criminology, 50-69.
- 22 See A. O. Sambo & Shamrahayu A.A. The Court: Insulating itself from Politics through the Doctrine of Political Questions: A Critical Analysis, vol. 4, Journal of Law Policy and Globalization, (2012) 7-15.
- 23 Fritz W. Scharpf, Judicial Review and the Political Question: A Functional Analysis' vol. 75, no. 4 The Yale L.J. (1966) 517 at 535.
- 24 The law normally confers on each court jurisdiction on certain matters exclusively. Other courts will therefore stay away from the matter. This is avoidance based jurisdictional or procedural ground.
- 25 The law normally confers on each court jurisdiction on certain matters exclusively. Other courts will therefore stay away from the matter. This is avoidance based jurisdictional or procedural ground.

the same effect because the court will not eventually decide the matter on the merit. The paper is therefore focusing on where a competent court refuses to decide a case on the merit, not because it does not have jurisdiction on procedural ground but because the controversy presented is non-justiciable being political in nature or encroaching on the powers of the political class.

Notwithstanding the various definitions attached to the doctrine of political questions, the doctrine is further compounded with the various theories that have emerged to discuss the meaning, scope and rationale for non justiciability of questions which are political in nature. The paper therefore makes a critical exposition of the theories on the meaning of political questions and the rationale for the doctrine.

3.0 THEORIES ON THE MEANING AND SCOPE OF POLITICAL QUESTIONS

In order to explain the meaning and delimit the scope political questions, various theories have emerged. They are: the classical theory; the prudential theory which further includes: the opportunistic theory; the cognitive theory; and the normative theory.

3.1 The Classical Theory on the Meaning and Scope of Political Questions

26 The law normally confers on each court jurisdiction on certain matters exclusively. Other courts will therefore stay away from the matter. This is avoidance based jurisdictional or procedural ground.

The classical theory posits that political question is a question of constitutional interpretation rather than judicial discretion and it should be understood as a function of separation of power.²⁷ Wechsler appears to be the main proponent of the classical school. He submitted that the courts are called upon to consider whether the constitution has committed to another agency of government the autonomous determination of the issues raised, a finding which itself requires an interpretation rather than discretion to abstain or intervene.²⁸ He argued while citing constitutional provisions on the impeachment by the Senate and the House as his point of departure, that each House of shall be the judge of the elections, return and qualification of its own members, punish its member for disorderly behavior and expel its members where necessary. He therefore considers all these as political questions which the courts should not interfere.

This position is subject to criticism on the ground that it does not support what Wechsler claims. This is because the examples fall under the justiciable controversy which is within the power of the court to decide in some jurisdictions including United States. It involves dispute which are adjudicative in nature and therefore within the province of the judiciary.³⁰ In the view of Shcarpf, he said whether this

27 The court in *Moyer v Peabody*, 212, U.S. 78 (1909) was of the view where the constitution assigns a particular function wholly and indivisibly to another department, the federal judiciary does not intervene.

28 Wechsler, *Towards Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. (1959) 1 at 12

29 Ibid.

disposition is based upon an interpretation of the constitution cannot, of course, be determined merely by searching for references to a constitutional grant of power in the opinion. In order to answer this question, it becomes necessary to take a broader look at the court's practice in one particular field and to determine whether over all patterns of political question cases and cases decided on the merit could be explained in terms of any reasonable interpretation of the constitution.³¹

3.2 The Prudential Theories on the Meaning and Scope of Political Questions

The prudential theory evolved as a result of the criticism levied on the classical theory. The theory opines that political question is "something greatly more flexible, something of prudence, not construction and not principle."³² It is not based on constitutional interpretation but of prudence. Finkelstein described the prudential theory as follows:

There are certain cases which are completely without the sphere of judicial interference. They are called, for historical reason, 'political questions.' The term applies to all those matters of which the court, at a given time, will be of the opinion that it will be impolitic or inexpedient to take jurisdiction.³³

³⁰ Fritz W. Scharpf, 'Judicial Review and the Political Question: A Functional Analysis' vol. 75, no.4 The Yale L.J. (1966) 517 at 535.

³¹ Fritz W. Scharpf, 'Judicial Review and the Political Question: A Functional Analysis' vol. 75, no.4 The Yale L.J. (1966) 541.

³² Michael J. Finkelstein, 'Political Questions', 125-126 (1962).

Prudential theory is further divided into opportunistic, cognitive and normative theories. This will be discussed.

3.2.1 An Opportunistic Theory of Political Questions

Finkelstein explained this theory in terms of court's instinct for political survival which would persuade the court to avoid the court from deciding 'prickly issues' and 'contentious questions' which touch the hypersensitive nerve of 'public opinion'.³⁴ The premise upon which this theory is based is not convincing because it would make the court apprehensive to the particular position it has taken in a particular case.³⁵ The court cannot run away from deciding a case properly brought before it all on the ground that it is controversial and thus could be hidden under the doctrine of political questions. Also this could be criticised on the ground which would not likely focus on the parties disobedience, but upon the willingness of the public and political institutions to accept the court's determination of controversial issue as final and authoritative. However, where the court avoids political question because of its controversial nature, this cannot be correctly argued that there are no other controversial constitutional issues that

33 Finkelstein, 'Judicial self Limitation' 37 Harv. L. Rev. 338, 344-45 (1924). He noted further that 'Sometimes this idea of inexpediency will result from the fear of the vastness of the consequences that a decision on the merit might entail. Sometimes, it will result from the feeling that the court is incompetent to deal with the particular type of question involved. Sometimes it will be induced by the feeling that the matter is too high for the courts. But always there will be a weighing of considerations in the scale of political wisdom.'

34 Ibid at 339, 363. Thus, he considers 'prickly issues,' 'contentious issues' which touch on the hypersensitive nerves of public opinion' as political questions.

35 Fritz W. Scharpf, at 553.

are more controversial than political question. The court may determine these issues rightly or wrongly but will touch upon the —hypertensive nerves of public opinions.³⁶ It is therefore submitted that the court has all it takes not to seek protection under political question doctrine because of the fear or apprehension that it might be unpopular. What is important is that the court should not abandon its primary duty of formulating and vindicating principles to limit or manage potential clashes with political institutions and opinions of the public without having to resort to complete abdication. This cannot be explained by the political question doctrine satisfactorily.

3.2.2 A Cognitive Theory of Political Theory

Field explains political question in terms of 'a lack of legal principles to apply to the questions presented.'³⁷ If the danger of clash with the political institution or political controversy about an issue will not account for the court to use the doctrine, we may need to analyse the legal nature of questions which the court has avoided.³⁸ Field opined that:

Whatever may be the difficulties in definitively describing the differences between the judicial and the legislative department, it seems settled and clear that the court must have some rule to follow before it can

³⁶ Ibid.

³⁷ Field, *The Doctrine of Political Questions in the Federal Courts* (1924) 8, Minn. L. Rev. 485, 512.

³⁸ Finkelstein, *Judicial Self-Limitation* 37 Harv.L.Rev., (1924) 338, 363.

operate. Where no rules exist the court is powerless to act. From this, it follows that the courts cannot enter into questions of statecraft and policy.³⁹

It is the author's view that even though the courts need to follow rules to operate, to argue that court is powerless to act where there are no rules is difficult to justify. This is because there is no how constitutional law could have grown and flourished anywhere in the world especially in America if the court had not been creative or not doing creative function as advocated by the cognitive theory. Where there are no standards or rules, the court should create legal principles that would be applicable in the circumstances of the case. Although the court in the case of *Baker v Carr*,⁴⁰ Justice Frankfurter showed 'lack of judicially discoverable and manageable standards' as one of the elements of political questions, it is difficult to justify on cognitive grounds.⁴¹ That is the reason why the 'minimum rationality test' has been suggested.⁴²

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- 39 Field, 'The Doctrine of Political Questions in the Federal Courts' (n. 31) Field sees the use of statecraft and policy' as a political question as it based on the action of the executive.
- 40 369 U.S. 186 (1962).
- 41 Field and Frankfurter's views are related in the sense that both are saying where there are no standards or rules to decide a particular situation, the court will not interfere by regarding it as a political question. For instance, since there are no guidelines, rules or standards to regulate an emergency proclamation is needed, it should be regarded as a political question.
- 42 Fritz W. Scharpf at 556.

3.2.3 A Normative Theory of the Political Question

The question of standards has been restated in normative rather than cognitive terms by Jaffe as follows:

We have seen that the constitution grants to the President certain powers which imply certain further auxiliary powers. But there may be something about the nature of these powers which in addition to their constitutional assignments, marks them as *'political.'* Many of the questions that arise are of the sort for which we do not choose, or have not been able as yet to establish, strongly guiding rules. We may believe that the job is better done without rules, that even though there are applicable rules, these rules should only be among the numerous considerations.⁴³

Jaffe therefore sees some other matters flowing from the powers of the political class apart from constitutional assignments as political questions because there are no guiding rules for its operation or its better done without rules. One is tempted to submit that the rationale of the phrase 'that the job is better done without rules'⁴⁴ is less convincing. The reason is that the President and the legislature get to power through legal means such as laws, rules and legal principles. Why should their activities not be regulated by laws and rules? Assuming

⁴³ Jaffe, *Standing to Secure Judicial Review: Public Actions* 74 Harv.L.Rev. (1961) 1265, 1303.

⁴⁴ This phrase means that actions of political class do not have rules to be followed i.e. doing it or even if there are rules, they may not be complied with as its often influenced by political processes. Thus, courts should not enforce the rules of the House where it is not complied with.

without conceding that the job is better done without legal rules, why should the court not make it clear that their activities are lawful and valid as no rule is required thereby deciding the matter on the merit?⁴⁵

The second leg of Jaffe's point is also difficult to justify. He posited that that even though there are applicable rules, these rules should be among the numerous relevant considerations. This appears to be a call for an extra legal measure all in the name of political question. Why should the court regard legal principles as applicable to particular circumstance but refuses to apply or enforce such principles?⁴⁶

It is therefore submitted that such practice would damage the usefulness of the court as a court of law. Where would the court derive its authority to authorise an extra legal approach to solving questions? The court cannot distort the constitution to accommodate an extra legal factor. This would make it difficult for the court to protect constitutional provisions and defend the rights of the common man through the enforcement of legal provisions.

⁴⁵ See *infra*, W. Scharpf, at 559. See also Bickel, *The Least Dangerous Branch*, (1962) at 186.
⁴⁶ *Ibid* at 561. This view was clearly supported and articulated by Scharpf where he opined: "My objection can be stated more broadly, where the court was persuaded that the political departments ought to be able to act with a view to non-legal factors-economic, political, military, international and expediency, it has usually been to allow this freedom of action through its substantive interpretation of the scope of constitutional power and discretion. . . if even the need to accommodate non-legal factors could be met by the decision of the merits, then Mr Jaffe's second formulation does not seem to establish a compelling necessity for the court's reliance on political question doctrine."

What then is the meaning and scope of political questions? It is therefore crystal clear from the above that the definitions and theories offered by various authors do not perfectly define and delimit the scope of the term political questions. All the definitions and theories have one flaw or another. They are products of individual idiosyncrasies. The definitions and theories do not entirely capture the intention of Marshall in *Marbury's* case. This is perhaps the reason why an attempt has been made to list the factors for consideration.⁴⁷ An attempt to propose a definition that will incorporate the various definitions offered does not solve this problem.⁴⁸ This is because the incorporation will be suffering from all the defects of the proposed definitions. It is therefore better to describe the term political question to enable us properly analyse this study. This is not to say however that the definitions offered are not helpful in identifying the doctrine of political questions. Political question is thus seen in this paper as matters which the constitution or the law has given its determination to the political class,⁴⁹ or a non justiciable matter or questions which the courts will refuse or be reluctant to take cognizance

⁴⁷ See Nwabueze B.O., *Nigeria's Presidential Constitution 1979- 1983: The Second Experiment in Constitutional Democracy*, (Longman, New York, 1985) where he identified lack of legal rules or objective standards, the predominance of extra-legal factors, the nature of subject matter and unamenable of proof by judicial evidence as considerations of the doctrine.

⁴⁸ See Nwosu at 21-22 where he defined the doctrine as issues which in the considered opinion of a superior court of record, have in clear and unequivocal terms, been constitutionally or statutorily allocated to the legislative and or executive branches for final resolution, and includes matters in which, in the considered opinion of a court, would for a combination of reasons inappropriate for resolution through judicial process; and matters which the court find itself functionally incompetent to resolve and or enforce.

⁴⁹ See for instance Section 60 of the Constitution of the Federal Republic of Nigeria which confers powers on the Legislature (The National Assembly) power to regulate its own procedure. See Article 62(1) of the Malaysian Federal Constitution for similar provision.

of, or to decide, or review their constitutionality because of their purely political character or because their determination would involve an encroachment upon an executive or legislative powers.⁵⁰ It is a constitutional law doctrine that was developed to stop the court from deciding on the merit certain questions which may affect the powers or functions of other arms of government, or questions relating to the affairs of the political parties.⁵¹

4.0 WHY POLITICAL QUESTIONS? ITS THEORETICAL EVOLUTION AND RATIONALE

The reasons for the doctrine of political questions have also got its theories to rationalize the doctrine. The rationale has been explained in terms of respect for political class otherwise referred to as the pure-theory thereby insulating the courts from politics and in functional term called the functional theory.

4.1 Respect for Decisions of Political Branches: Pure Theory of Political Question

The theory is stating that political question evolves out of an ordinary respect of the courts for the decision of the political branches. The chief exponent of this doctrine is Henkin.⁵² He

⁵⁰ See HC Black Blacks Law Dictionary, (USA: West Publishing Co., 1979). See also the case of *Baker v. Carr* 369 U.S. 186 (1962) for the six factors considered by the United States Supreme Court as constituting the elements of political question doctrine.

⁵¹ See the case of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

⁵² Louis Henkin, *Is there a Political Question Doctrine?* (n. 12).

argued that no special doctrine is needed for an ordinary respect for the decision of the political branches and that if the doctrine is what the constitution has committed to another branch or whether in fact is committed to such a branch does not requires no special doctrine for its non justiciability.⁵³ According to him:

A meaningful political question doctrine in my view implies something more and different: that some issues which prima facie and by usual criteria would seem to be for the courts, will not be decided by them but extra ordinarily left for political decision. In particular, I suggest, in 'pure theory' a political question one in which the courts forego their unique and paramount function of judicial review of constitutionality.⁵⁴

Henkin therefore submitted that the doctrine is unnecessary and misleading but offered no alternative to it.⁵⁵ He however suggested its proper content as namely; that the courts are bound by the decisions of the political branches within their constitutional authority; that the court will not find limitation to the powers of the political branches except where the constitution prescribes; that not all limitations give rights

⁵³ Louis Henkin, *Is there a Political Question Doctrine?* (n, 12).

⁵⁴ *Ibid.* He further stated that: As so conceived, the doctrine would have that in general, in a proper case, the courts will examine the actions of government for constitutional authorization and limitations, some constitutional requirements are entrusted exclusively and finally for the political branches of government for self monitoring. As to these, the courts say to the petitioner in effect: Although you may indeed be aggrieved by an action of the government, although the action may indeed do violence to the constitution, it involves a political question which is not justiciable, not given to us to review.

⁵⁵ *Ibid* at 622.

and standing to private parties; that the court may refuse some remedies for want of equity and the constitution may properly be interpreted wholly or in part as self-monitoring, not subject to judicial review.⁵⁶

Henkin's submission however appears contradictory in terms. If the doctrine is unnecessary and misleading in terms, why is he suggesting the content of the doctrine? In the alternative where he thinks there is no need for such a doctrine to show ordinary respect for the political branches, he should have suggested an alternative doctrine. He appears neither here nor there in his postulations.

4.2 Functional Theory of Political Questions

This theory is an attempt to realistically explain why the court should defer the determination of political questions to the political departments. This is explained in functional terms. The theory pointed out some functional factors and considerations which in various combinations may persuade the court that it would overreach its limit in deciding a particular issue. The theory was actually propounded by J.P Frank in 1954⁵⁷ where he identified the need for a quick decision making, judicial incompetence, avoidance for unimaginable situation and clear prerogative of another branch of government as functional rationale for political questions. This was later developed by

⁵⁶ *I.d.* at 622-623.

Scharpf.⁵⁷ Scharpf therefore explained the functional rationale for political questions in the following terms:

4.2.1 Difficulties of Access to Information

Scharpf doubted the competence of the judiciary to decide matters where it is not seized of full information as to the clarification of all relevant facts and law submitted before it. He submitted that where the court requires information to be able to decide some matters and the information is difficult to obtain, it may redefine the substantive standards in the absolute or abstract terms of an unqualified grant of power or an unqualified limitation upon its power. Thus, where an absolute solution is not acceptable, he argues that an information problem which is inherent in an issue justifies the application of the doctrine of political questions. He argues that the function is clearer in matters of foreign relations where the court would hesitate to trust its own understanding of the broader situation. He however conceded that this will have limited application in matters of domestic issues, yet he contends that inadequate information is significant for decisions relating to the ratification of constitutional amendments,⁵⁸ legislative enactments⁵⁹ and during the

⁵⁷ J. P. Frank, *Political Questions in the Supreme Court and the Supreme Law*, (Cahn, E., Ed. 1954) at 36.

⁵⁸ Scharpf cited in support of his argument the cases of *Coleman v Miller* 307 U.S. 433 (1939) where the court was called upon to determine the validity of the Child Labour Amendment which the congress had postponed much earlier. Kansas legislative members who voted against the ratification contended inter alia that the amendment was invalid because it was not ratified within a reasonable time' by the requisite number of States. The court was however of the view

civil war.⁶⁰ He therefore concluded that full information is important and where this is lacking, the court should defer the determination of such questions to the political department. He argued further that even where the court has the information of deciding these issues; it will still be difficult for the court to determine as the political branches should be responsible for the determination of these issues because they are better informed.

4.2.2 The Need for Uniformity of Decision

The second factor given by Scharpf is political question doctrine needs to be justified on the practical need to ensure uniformity in governmental actions especially in matters of foreign relations.⁶¹ This has been broadly stated as follows: if this were not the rule, cases might often arise in which, on the

noted that question of reasonable time in many cases would involve as in this case it does involve an appraisal of a great variety of relevant conditions, political, social and economic, which can hardly be said to be within the appropriate range of evidence receivable in any court of justice and as to which it will be an extravagant extension of judicial authority to assert judicial notice as a basis of deciding a controversy with respect to the validity of an amendment actually ratified. On the other hand, these conditions are appropriate for the consideration of the political departments of the government. The questions they involve are essentially political and not justiciable. They can be decided by Congress with the full knowledge ascribed to the national legislature of the political, social and economic conditions which have prevailed during the period since the submission of the amendment

⁵⁹ See *United States v Ballin*, 144 U.S. 1 (1892); *Lyons v Woods*, 153 U.S. 649 (1894); *Missouri Pac. Ry v Kansas*, 248 U.S. 276 (1919); *Rainey v United States*, 323 U.S. 310 (1914); *Flint v Stone Tracy Co.*, 220 U.S. 107 (1911); *Twin City Bank v Nebraska*, 167 U.S. 196 (1897). In all these cases, the Supreme court was of the view that a statute becomes law if it conforms fully with the text which was voted in the Congress; a quorum is formed if majority members are present even if not all of them will vote; a two third majority requires consent of two-third members voting, not two-thirds of all members etc. political question in these cases were limited to issues of germaneness of Senate amendment.

⁶⁰ For the cases that treated issue of duration of civil war as political question he cited *Adger v Alston*, 82 U.S. (15 Wall.) 555 (1873).

⁶¹ See Scharpf, at 573-577.

most important questions of foreign jurisdiction, there would be an irreconcilable difference between the executive and the judicial departments. By one of these departments, a foreign island or country might be considered as at peace with United States; whilst the other would consider it in a state of war. No well-regulated government has ever sanctioned a principle so unwise, and so destructive of national character.⁶²

The reason advanced for this might seem convincing on the surface especially where the correctness of the political decision is not really in disputes; which of course does not give room for political questions. Where the validity of political decision is very much disputed or in issue, it is better for the court to determine the lawfulness of the political determination. This appears to be a conflict between unlawful political determination and desire for unity among government department. It is submitted that the desire for unity among departments must give way to the demand for lawfulness of governmental actions.

Scharpf also noted that the ultimate determination of international disputes should be left for international order, then the court's opinions would be provisional rather than final as far as the international disputes is concerned. He argues further that where there is no such prior political determination; the court may justifiably decide even questions that might arise in international disputes. The opinion offered

⁶² *Williams v Suffolk Ins. Co.*, 38 U.S. (13 Pet) 415, 420 (1839).

by Scharpf here appears to be outdated. It is doubtful whether local courts have even procedural jurisdiction in matters relating to international disputes. This is clearly within the powers of the International Court of Justice.⁶³ The issue of international disputes being political question does not therefore arise at the local court. However, where the matter is brought in a local court, the court must decline jurisdiction because it is of international affairs and states sovereignty will come into place. Issue of political question may therefore arise as to where treaties are being negotiated by a government of a country, or issue whether to go to war. It is submitted that this is regulated by law. Thus, where the law is violated in this act, it is a ground for judicial review and the issue of political question should not arise.

4.2.3 The Deference to the wider Responsibilities of the Political Departments

The rationale for political question doctrine has been justified on the ground that to do otherwise would embarrass or interfere with the exercise of power of the political department. In the case of *Chicago and Southern Airlines, Inc v Waterman S.S. Corp.*⁶⁴ Justice Jackson refused judicial review that on the ground that it would embarrass or interfere with effective exercise of the President's power in matters of foreign policy.⁶⁵ Even though this rationale of political questions on grounds of

⁶³ For instance, where there is dispute between two countries on territorial boundary, the ICJ takes jurisdiction of the matter.

⁶⁴ 333 U.S. 103, 111 (1948).

⁶⁵ *Ibid.* He stated that the very nature of the executive decisions as to foreign policy is political and

embarrassment, delicacy, and complexity appears convincing, the effect of this is that it could remove most questions of domestic law from judicial competence without any limitation. This is because most contested cases or political decisions are delicate and complex. This might undermine judicial role in government as the court will have a very limited role as a political institution.

4.2.4 Normative Limitations of the Political Question

Scharpf submitted that the court should limit the thrust of the functional rationale for political questions by way of normative qualification.⁶⁶ Thus, where a fundamental individual right is at stake, the court should not intervene. He argues that political question will not be applicable where the matter has to do with competing claims among the department of the Federal government or between the Federal government and the State.⁶⁷ Such issues should be decided on the merit. Scharpf however noted that if the court had deferred to the claims asserted by one of the conflicting departments, such a decision has therefore delegated to the department general competence under the constitution. He also argues that political question doctrine could be made applicable to the

judicial. Such decisions are wholly confided by our constitution to the political departments of the government, executive and legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which judiciary has no aptitude, facilities nor responsibility and which has long been held to belong to the domain of political power not subject to judicial intrusion or inquiry.

⁶⁶ Scharpf, at 584-585.

⁶⁷ Scharpf, at 584-585

coordinate branches of government to settle their disputes. This it is submitted will confer adjudicatory role on other branches of government other than the judiciary as this will even amount to abdication of duties by the courts.

One must also note with concern from the foregoing that all the doctrines propounded to rationalise the doctrine even though persuasive, they are not absolutely convincing. The first reason is that the theories are too sectional and a look has not been on its universal applications. The discussion has been so much limited to the jurisprudence of United States or the Western perspective. It does not accommodate the social, political, and legal atmospheres of developing nations. Also, no comparative study has been adopted by the propounders for their various rationalizations and conclusions. It is therefore apposite to submit that the doctrine of political question is not of universal application. This is not to say however that some countries are not applying it inadvertently.

Also, the general weaknesses of the theories have been its intended application to all circumstances that present itself. The application of the doctrine should be tied to the specifics of individual cases.⁶⁸ Most of the theories may even undermine the established concept of judicial review but giving way for judicial restraints allowing the courts to establish the criteria for intervention in political questions.⁶⁹ This criterion appears different from the ones applied for reviewing the actions of

⁶⁸ Scharpl, at 566.

the political branches.⁷⁰ This is not to say however that the theories have not been relevant in clearing the air on the possible rationale for the doctrine.⁷¹ It has been revealed that what is political question is subject also to the interpretative powers of the court. Also, that the doctrine of political questions is more of public law but has also been applied to private actions.⁷²

5.0 PRAGMATIC THEORY OF POLITICAL QUESTIONS

In view of the unending meaning attached to the political questions, the paper has come up with the pragmatic theory.⁷³ The theory seeks to re-conceive the idea of political questions

69 Suzie Navot, Political Questions in court: Is the Judicial Self Restraint a Better Alternative than a non-Justiciability Approach?' Being a workshop on Judicial Review of Politically Sensitive Questions, at VII World Congress of the International Association of Constitutional law: Rethinking the Boundaries of Constitutional law.

70 Suzie Navot, Political Questions in court: Is the Judicial Self Restraint a Better Alternative than a non-Justiciability Approach?' Being a workshop on Judicial Review of Politically Sensitive Questions, at VII World Congress of the International Association of Constitutional law: Rethinking the Boundaries of Constitutional law.

71 This perhaps prompted the court in *Baker v Carr* 369 U.S. 186 (1962) to offer certain criteria though not universal, to the issue of political question. It states as follows: ... it is essentially (not solely) a function of separation of powers. Prominent on the surface of any case held to involve political question is found a textually demonstrable constitutional commitment of the issue to a coordinate branch; a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind not of judicial discretion; or the impossibility of the court's undertaking independent resolution without expressing lack of the respect due co-ordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

72 Constitutional Law — Political Question Doctrine — D.C. Circuit Holds That Government Officials' Potentially Defamatory Allegations Regarding Plaintiffs' Terrorist Ties Are Protected By Political Question Doctrine. — *El-Shifa Pharmaceutical Industries Co. v. United States*, 607 F.3d 836 (D.C. Cir. 2010) (*En Bane*) (2010) *Harv. L. Rev.*, vol. 124, 640.

73 See A. O. Sambo, *Judicial Review of Political Questions in Nigeria and Malaysia: A Comparative Analysis* (Ph.D. Thesis, IIUM, Malaysia, April, 2013).

and make practical the meaning of the term. The aim is to ensure clarity and practical application of the doctrine to the real life situation in contemporary political systems. To achieve this, the author embarked on a field study where many experts and stake holders were interviewed. Their views on the practical application of the doctrine led to having a pragmatic meaning of the term. However, unlike previous studies, the pragmatic theory does not engage in the issue of definitions. The reason is because definitions are usually products of individual idiosyncrasies. Rather, theory embarks on stating the essential features of what should be regarded as political questions. Nevertheless, this theory does not bar judicial intervention on such issues. It only asks for caution in the course of such intervention.

Against this backdrop, the essential features of political questions based on pragmatism are: 1) It involves the political class i.e. legislature, executive and political parties or their actions; 2) the constitution or the law gives its determination of such actions to the political class; 3) the question sought to be decided has some political colouration⁷⁴; 4) the court does not go into the merit of the case; 5) it may contain legal or constitutional stings;⁷⁵ 6) deciding it on the merit will encroach on the powers, functions or policies of the political class; 7) It precludes judicial review; 8) It is usually controversial.

74 This should be determined by looking if the matter relates to the exercise of political powers or functions of the political class as conferred on them by the constitution or their rules of practice

75 This is based on opinions of most of the interviewees that say political questions can hardly be pure political. It usually comes with legal and constitutional stings.

Again, there is a very thin line of distinction between political questions and constitutional questions. This thin distinction makes many interviewees to conclude that all political questions are constitutional questions.⁷⁶ This is because study interview reveals that as earlier stated, political questions come with legal and constitutional stings and are conceivable under the constitution. However, it is not all constitutional questions that can properly be regarded as political questions. For instance, where the issue relates to which court has jurisdiction, whether a matter is ripe for hearing, whether a person has locus to sue is not arguably a political question. This is despite the fact that it could be a constitutional question. It becomes a political question as well as constitutional question where in addition to the ripeness, standing, and jurisdiction, it also contains the feature identified under pragmatic theory.

6.0 CONCLUSION

From the fore-going discussion, the court has endeavoured to insulate itself from political pressures through the doctrine of political questions. This evolved from the use, of the word 'questions in their nature political' by Justice Marshall

⁷⁶ See Interview with Justice XYZ, (Justice of the Court of Appeal), Nigeria, conducted by the author on 21st June, 2011, at his office in Ilorin Judicial Division of the Court of Appeal (Transcript is on file with the author). See also Interview with Justice XXX, Justice of the Supreme Court of Nigeria, conducted by the author at his office in the Supreme Court Complex, Abuja, Nigeria on the 10th July, 2011, (Transcript is in file with the author); the Interview with Prof. ABC, Head of Department, Political Science, University of Ilorin and the former Speaker, Osun State House Of Assembly conducted by the author, in his office on 21 July, 2011 (Transcript is in file with the author).

in *Merbury v Madison*. The court felt that these questions should be left for the political class to decide. Thus, when political questions are presented before the court, the court should decline jurisdiction; not because it does not have the procedural jurisdiction to entertain the matter but because the case is seen as having presented a controversy not meant for the court to decide. This, though evolved from the constitutional jurisprudence of the United States, has cropped up into the jurisprudence many countries of the world. This is because courts decline jurisdiction in matters which are political in nature without necessarily discussing the doctrine.

Unfortunately, however, what amounts to political question was not defined by Marshall CJ. This has therefore led to theories to discover the meaning and scope of the doctrine. Thus, the paper examines various definitions offered for the doctrine and contends that none is universally acceptable to discover Marshall's intention by the use of the term political questions. They have however contributed to the understanding of the term. In order to analyse the meaning and the scope of the doctrine therefore, the paper makes a critical exposition of classical and prudential and theories of political questions. The paper also propounds a pragmatic theory of political questions in order to delimit the scope of the doctrine. It also, in order to discuss the rationale for the doctrine in the opinions of authors analyses the theoretical evolution of the doctrine. It therefore critically examines the theories propounded in rationalizing the theory. This has been explained in terms of respect for decisions of political

branches (pure theory of political question). It is also explained in functional terms: difficulties in accessing information; the need for uniformity of decisions; deference to the wider responsibilities of the political departments; and normative limitations of the political question. The paper notes that all the theories propounded to rationalize the doctrine even though persuasive, they are not absolutely convincing. It does not accommodate the social, political, and legal atmospheres of developing nations. This is not to say however that theories are not helpful in contributing to an understanding of the term.

Also, the general weaknesses of the theories have been its intended application to all circumstances that present itself. They are not tied down to specifics of individual cases. Most of the theories may even undermine the concept of judicial review by giving way for judicial passivism in political questions. However, what amounts political question should be subject to the interpretative powers of the court. This will not allow the court to decline jurisdiction in bona fide controversy only for the singular reason of being political questions. The court should not abdicate its adjudicatory role only for wanting to insulate itself from politics. The doctrine has not in itself helped the court from such insulation from political pressures. Therefore, propounding a theory in the name of political questions is not a way from the court to insulate itself from politics. Rather, the court creates more problems when a bona fide controversy is not resolved only because the nature of the questions posed is political in nature.

This will render useless the concept of constitutional law or constitutionalism as many constitutional questions carry with it the sting of politics.