POLITICAL QUESTION DOCTRINE AND ITS JUSTICIABILITY IN TANZANIA: A CRITICAL ANALYSIS OF ATTORNEY GENERAL V. REVEREND CHRISTOPHER MTIKILA

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Abstract

This article examines the nature, application and scope of the controversial political question doctrine. What the doctrine seeks to achieve is at odds with what is intended by the justiciability theory. While justiciability principle aims at allowing all legal questions properly brought before the court to be conclusively determined by the court, political question doctrine intends to deny litigants of legal protection by prohibiting the courts from entertaining legal disputes properly presented and which are otherwise justiciable. The controversy has always been on how to reconcile the two theories. This paper evaluates the existence and efficacy of the doctrine in legal disputes relating to the interpretation of the Constitution. It is submitted that, although the doctrine remains relevant since there are matters of public policy which are constitutionally non-justiciable, courts in Tanzania have not developed criteria for determining when and under what circumstances should the doctrine be invoked.

Key words: *Political Question, Justiciability, Interpretation of the Constitution, Separation of Powers, Judicial Review, Tanzania.*

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1. INTRODUCTION

In June, 2010, the Court of Appeal of Tanzania in *Attorney General v. Reverend Christopher Mtikila*[1] held, *inter alia*, that it was not within its mandate to decide on whether or not independent candidates should be allowed to contest for presidential, parliamentary and local council elections in Tanzania. The court was of the view that the issue of independent candidates is political and not legal, thus, that it can only be decided by Parliament which has power to amend the Constitution. In holding, the Court of Appeal of Tanzania adopted a cautious and restrained approach in its adjudicative role by deferring the required decision on the matter to the elected branch of the government, the legislature. In other words, the court adopted the principle of judicial restraint[2] as opposed to judicial activism[3] and this was done through the invocation of the popularly known *political question doctrine.*[4]

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[1]Civil Appeal No. 45 of 2009, Court of Appeal of Tanzania, at Dar es Salaam (unreported).

[2] Under *judicial restraint*, the courts interpret the Constitution and any law in a manner that avoids the possibility of contradicting or interfering policy decisions made by other institutions of the government. It is when judges refuse to act on policy issues and defer the decisions to the elected branches of the government, that is the executive and legislature, which are considered to be better place to decide those issues within their constitutional mandate [*see*, Quansah & Fombad**,** "Judicial Activism in Africa: Possible Defence Against Authoritarian Resurgence?", p. 4, available at <www.ancl-radc.org.za/sites/default/files/Judicial% 20Activism %20in%20Africa.pdf>, (accessed 15 May, 2019)].

[3] *Judicial activism* can be appropriately defined as a situation where the court interprets the constitution or statute not strictly according to its letter but in the light of its spirit taking into account the changing social conditions of the society. It is the practice in the judiciary of protecting or expanding individual rights through decisions that deliberately depart from the cultural norm or established precedent with the sole aim of achieving the justice of the matter [*see*, Egbewole, et al, "Judicial Activism and Intervention in the Doctrine of Political Questions in Nigeria: An Analytical Exposition", 1(2) *African Journal of Law and Criminology,* 2011, p. 55]. In words of Twinomugisha, judicial activism is when judges' interpretation goes beyond words and matters mentioned in the constitution, instead "breathe life" into its provisions in order to augment the "promotion of democracy and human rights [*see*, Twinomugisha, B.K., "The Role of Judiciary in the Promotion of Democracy in Uganda", 9 (1) *African Human Rights Law Journal*, 2009, p.20].

[4] The political question doctrine is defined by Merriam-Webster's Dictionary of Law as **"***a doctrine under which a court will refrain from adjudicating a question that is more properly resolved by the other branches of government because of its inherently political nature and not because of a lack of jurisdiction*"

Prior to that decision, the same Respondent had earlier in 1994 successfully challenged the amendments made to the Constitution through the Eighth Constitutional Amendment Act[5] in *Christopher Mtikila v. Attorney General*.[6] The High Court nullified the constitutional amendments which had the effect of barring independent candidates from contesting for presidential, parliamentary and local council elections in Tanzania. After the High Court decision, the Constitution was amended and independent candidates were again barred through the Eleventh Constitutional Amendment Act.[7] The Respondent, being a very determined man, once again successfully filed a constitution petition challenging the said amendments before the High Court of Tanzania.[8] In deciding the petition, the Full Bench of the High Court of Tanzania held that the amendments to the Constitution were unconstitutional and invalid for contravening the essential features of the Constitution.

The Attorney General, upon being aggrieved by the decision of the High Court, appealed to the Court of Appeal of Tanzania. In its decision, the Court of Appeal quashed the High Court's decision on the reason, *inter alia*, that the dispute on the constitutionality of a constitutional amendment is a political one and thus not within the preserve of the court to decide.[9] In its reasoning, the Court of Appeal held in effect that courts in Tanzania have no jurisdiction to review the constitutionality of constitutional amendments on substantive grounds since doing so would be to encroach upon the functions of Parliament which has powers to amend the Constitution.

However, with due respect to honourables justices of appeal, Reverend Christopher Mtikila was not asking the court to amend the Constitution so as to allow independent candidates in Tanzania general elections. The

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[*see*, Merriam-Webster, *Merriam-Webster's Dictionary of Law*, Merriam-Webster, Inc, 1996, p. 368].

5 Act No. 4 of 1992.

6 [1995] TLR 31.

7 Act No. 34 of 1994.

8 *Reverend Christopher Mtikila v. Attorney General*, Misc. Civil Cause No. 10 of 2005, High Court of Tanzania, Main Registry, at Dar es Salaam (unreported).

9 See, *Attorney General v. Reverend Christopher Mtikila,* Civil Appeal No. 45 of 2009, Court of Appeal of Tanzania, at Dar es Salaam (unreported).

complaint by Reverend Christopher Mtikila before the High Court was that, through the amendments made to the Constitution, he was denied his fundamental constitutional right to freely associate and participate in elections as an independent candidate. He wanted the court to interpret the Constitution and come up with a decision as to whether or not his constitutional rights to contest in elections as an independent candidate was violated by an amendment which compels contestants to belong to political parties. Thus, the invocation of the political question doctrine by the Court of Appeal had the result of denying him any legal remedy from the court.

It is a notable fact that the Court of Appeal blindly invoked the doctrine without expounding on its meaning, origin, application, scope and limitations. The Court of Appeal, despite being the highest court in Tanzania with decisions binding upon all other courts in the country, neither took into regard the growing controversies over the legality, propriety and existence of the doctrine nor did it analyse contending arguments on the application and scope of the doctrine with a view of coming up with criteria for determining the applicability and scope of the doctrine in Tanzania. In so doing, the court failed to articulate and develop the doctrine for future use in the country. This is contrary to the trend adopted by courts in other jurisdictions, such as Uganda[10], South Africa[11], Ghana[12], Nigeria[13], etc, where the meaning, application and scope of the doctrine are sufficiently articulated.

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10 See: *Uganda v. Commissioner of Prisons, Ex-parte Matovu,* [1966] EA 514; *Attorney General vs David Tinyenfuza,* Supreme Court Constitutional Appeal No. 1 of 1997, *Centre of Health Human Rights Development (CEHURD) and Three Others v. Attorney General,* Constitutional Petition No. 16 of 2011 and *Centre for Health, Human Rights and Development & 3 Others v. Attorney General*, Supreme Court Constitutional Appeal No. 1 of 2013.

11 See: *Ferreira v Levin* 1996 (1) BCLR 1 (CC) and in *re: Certification of the Constitution of the Republic of South Africa 1996 10 BCLR 1253 (CC)*

12 See: *Ghana Bar Association v Attorney General* [2003-2004] SCGLR 250; *Lotto Operators Association v National Lottery Authority* [2007-2008] SCGLR 1088 and in *Professor Stephen Kwaku Asare v Attorney- General*, J1/15/2015 unreported at 64-65

13 See: *Balarabe Musa v Auta Hamza* (1983) 3 NCLR 229; *Onuoha v Okafor* (1983) NSCC 494 and *Onuoha v Okafor* (1983) 2 NCLR 244

The approach adopted by the Court of Appeal of Tanzania is not unusual for it has been adopted by the judiciary, albeit indirectly, in other previous cases decided by the High Court of Tanzania.[14] However, going through the various cases and available literature in the country, it is clear that the political question doctrine is still very undeveloped for the absence of any guidelines as to when and under what circumstances should the doctrine be invoked. Even the Court of Appeal which, in the words of Justice Robert H. Kisanga, "has adjudicatory and educative role",[15] perfunctorily invoked the doctrine without illuminating on what it entails and without exposing on its amplitudes and frontiers.

As such, owing to paucity of decided cases and writings on the doctrine in Tanzania, the author has felt it necessary to expose the meaning, nature, application and limits of the political question doctrine by relying on jurisprudence as established by various courts in constitutional democracies and writings by various renowned legal scholars as indicated in this paper. Since Tanzania does not exist in isolation but a party in the comity of nations, those materials are of utmost importance in construing our Constitution and are useful guides in evaluating our domestic legal system especially when they "illuminate common concepts, and challenges about our own legal questions".[16]

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[14] For instance, see the decisions of the High Court of Tanzania in *Augustine Lyatonga Mrema and Others v. The Attorney General and Others* [1996] TLR 273; *Mwalimu Paul John Mhozya v. Attorney General* [1996] TLR 130; *Augustine Lyatonga Mrema and Others v. The Speaker of the National Assembly and Attorney General* [1999] TLR 206*; Tanganyika Law Society v. Attorney General,* Miscellaneous Civil Case No. 40 of 2014, High Court of Tanzania, Main Registry, at Dar es Salaam (unreported); *The Legal and Human Rights Centre and Another v. Hon. Mizengo Pinda*, Misc. Civil Cause No. 24 of 2013, High Court of Tanzania, Main Registry, at Dar es Salaam (unreported); *Saed Kubenea v. The Attorney General*, Misc. Civil Cause No. 28 of 2014, High Court of Tanzania, Main Registry, at Dar es Salaam (unreported); etc.

[15] Kisanga, J.A., "A Critical Assessment of the Adjudicatory and Educative Role of the Court of Appeal as the Highest Judicial Organ in Tanzania", 8 *University of Dar es Salaam Law Journal*, 1991, p. 20, at p. 21.

[16] Jackson, V., "Could I Interest You in Some Foreign Law? Yes Please, I'd Love to Talk with You*", Legal Affairs* (July-August 2004), at p. 43.

Thus, this article examines the meaning, evolution, application, propriety and legality of the political question doctrine in constitutional law and ultimately makes an assessment as to whether or not the invocation of the doctrine by the Court of Appeal of Tanzania in Mtikila's case was appropriate and legally justified.

2. GENERAL OVERVIEW OF THE DOCTRINE

The political question doctrine has been developed by courts with a view of abstaining from deciding matters thought to be political in nature on the reason that those disputes "are better resolved by political branches of the government".[17] In other words, the invocation of the doctrine prevents a court of law from deciding matters which are regarded to be fundamentally "political" and within the exclusive mandate of the executive and/ or legislative branches of government and, thus, not open for judicial inquiry.[18] Proponents of the political question doctrine view the doctrine as a derivative of the principle of separation of powers[19] and contend that certain constitutional law questions are committed by the Constitution to the elected branches of government for resolution.[20] Thus, such questions are non-

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17 See the decisions of Supreme Court of US in *Marbury v. Madison,* 5 U.S. 137 (1803); *Coleman v. Miller,* 307 U.S. 433 *(1939)* and *Colegrove v. Green, 328 U.S. 549 (1946)*. See also decisions of Supreme Court of Canada in *Native Women's Association of Canada v. Canada* [1994] 3 S.C.R. 627 and *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)* [1993] 1 S.C.R. 319. Furthermore, see the decision of the Supreme Court of Nigeria in *Onuoha v Okafor* (1983) NSCC 494 *and the decision of the Constitutional Court of Uganda in Centre for Health Human Rights and Development & others v Attorney General,* Constitutional Petition No. 16 of 2011, UGCC 4; etc.

18 Daley, J., "Defining Judicial Restraint", in Campbell, T., and Goldsworthy, J. (eds.) *Judicial Power, Democracy and Legal Positivism,* Aldershot: Ashgate, 2000.

19 *Baker v. Carr*, 369 U.S. 186, 216 (1962); See also the decision of the Supreme Court of US in *Nixon v. United States*, 506 U.S. 224 (1993), where it was held that "*The political question doctrine is essentially a function of the separation of powers, existing to restrain courts from inappropriate interference in the business of the other branches of Government, and deriving in large part from prudential concerns about the respect we owe the political departments*."

20 Mhango, M.O., "Separation of Powers in Ghana: the Evolution of the Political Question Doctrine", pp. 2704 – 05, available at <http://dx.doi.org/10.4314/pelj.v17i6.13> (accessed 16 July 2018).

justiciable and the judiciary should abstain from deciding them so as not to encroach upon the mandates of the other coordinate branches of the government.[21] They see the rationale of the doctrine as resting on the necessity of balancing the courts' role in checking unconstitutional acts of the executive and legislature with its duty not to usurp the political power exercised by the people through elected representatives.[22]

However, opponents of the doctrine seriously criticise its existence, propriety and invocation which result in denying legal remedies to litigants who complain against unwarranted infringement of their legal or constitutional rights.[23] They contend that the judiciary should determine all legal disputes brought before it regardless of whether such disputes involve political questions or not, essentially in cases where there is an apparent infringement of the Constitution or a person's legal right. They assert that the judiciary will abdicate its constitutional duty if it desists from determining a legal issue properly brought before it on the sole reason that such an issue involves a political question.[24]

There are scholars who contend that courts have sometimes wrongly invoked the doctrine,[25] others even assert that the doctrine either does not exist[26] or

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21 Egbewole, *Judicial Activism and Intervention*, above note 3, at p. 50.

22 Savitzky, A.J., "The Law of Democracy and the Two Luther v. Bordens: a Counter History" *New York University Law Levien*, 2011.

23 Redish, M.H., "Judicial Review and the "Political Question". 79 *Northwestern University Law Review*, 1984, p. 1060; Barak, A., *The Judge in a Democracy*, Princeton: Princeton University Press, 2006, p. 177; Allan, T.R.S., *Constitutional Justice: a Liberal Theory of the Rule of Law*, Oxford: OUI, 2001, p. 188.

24 Egbewole, W.O., and Olatunji, O.A., "Justiciability Theory Versus Political Question Doctrine: Challenges of the Nigerian Judiciary in the Determination of Electoral and Other Related Cases", *The Journal Jurisprudence* (2012), p. 117.

25 Redish, *Judicial Review*, above note 23, at p. 1062.

26 Henkin, L., "Is There a 'Political Question' Doctrine?", 85 (5) *Yale Law Journal,* 1976, p. 597; Tigar, M.E., "Judicial Power, the 'Political Question Doctrine,' and Foreign Relations"*,* 17 *UCLA Law Review,* 1970, p. 1135, at p. 1136

it should not exist.[27] Furthermore, there are scholars who contend that the "precise contours of the doctrine are murky and unsettled"[28] since there is a lack of predictability in the application of the doctrine such that the determination as to when it should be invoked becomes a very difficult endeavour.[29] It is claimed that the doctrine has caused "much confusion" and that the assessment of its appropriateness and application require "a delicate exercise in constitutional interpretation".[30]

There are, thus, controversies and uncertainties not only on the applicability and scope of the political question doctrine but also on its utility and legality. This is because the invocation of the doctrine constitutes a great challenge on the justiciability principle. While the justiciability principle aims at allowing all legal questions properly brought before the court to be heard and conclusively determined by the court, the political questions doctrine intends to deny litigants of legal protection by prohibiting the courts from entertaining legal disputes which are otherwise justiciable.[31]

However, the existence and applicability of the doctrine in Tanzania is generally undisputed by the author. The High Court in various decisions has approved the need to abstain from deciding matters the resolution of which is constitutionally committed to political branches of the government[32]. But this has always been done without expressly acknowledging or pronouncing on the existence of the political question doctrine in Tanzania. As such, there is a lack of clearly formulated principles to guide the courts whenever similar disputes will be arising in future. It is submitted that the Court of Appeal of

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27 Chemerinsky, E., *Interpreting the Constitution*, Westport: Praeger Publishers, 1986, p. 99-100; Redish, *Judicial Review*, above note 23, at p. 1031.

28 *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 803 n.8 (D.C. Cir. 1984)

29 Goldsmith, J., "The New Formalism in United States Foreign Relations Law", *70 University of Colorado Law Review*, 1999, p. 1395, at pp. 1401 -03.

30 *Baker v. Carr,* 369 U.S. 186 (1962),

31 Egbewole, *Justiciability Theory*, above note 24, at p. 118.

32 See footnote no. 14 above.

Tanzania in Mtikila's case missed the crucial opportunity to articulate and develop that important jurisprudence in the country.

3. MEANING, NATURE AND APPLICATION OF THE POLITICAL QUESTION DOCTRINE

Despite the fact that a multitude of scholars have written and courts in various jurisdictions have made pronouncements regarding the phrase 'political question doctrine' many years back, yet it appears that there is no universally acceptable definition of the doctrine up to the moment.[33] According to John P. Frank, the phrase 'political question doctrine' is one of the contested phrases known in law and that its origin, scope, and purpose have eluded all attempts to have a precise definition.[34] In Henkin's views, the doctrine has created more confusion than creating room for constitutional structure.[35] On the other hand, there is a lack of clear standards or consistency in determining when the doctrine should be invoked, a fact which has led to the same being poorly conceived.[36] As such, there is a lack of consensus among the members of the judiciary or legal scholars as to what the doctrine entails.[37] This may be due to the fact that "coming up with a definition that will command universal followership or acceptance" has always been "the most complex task" in the legal discourse.[38] Thus, it is possible that this work may not have a different result. However, the author tries to analyse various definitions on the subject and attempts to come up with what he thinks to be a proper definition of the doctrine.

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33 Egbewole, *Judicial Activism and Intervention*, above note 3, p. 51.

34 Frank, J.P., *Political Questions, in Supreme Court and Supreme Law*, Bloomington, Greenwood Publication Group, 1954, at pp. 36-37.

35 Henkin, *Is There a Political Question*, above note 26, at p. 597.

36 Willig, S., "Politics as Usual? The Political Question Doctrine in Holocaust Restitution Litigation", 32 (2) *Cardozo Law Review*, 2010, p. 729.

37 According to Bork, J, (in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, p. 803.

38 Egbewole, *Justiciability Theory*, above note 24, at p. 120.

Amanda defines "political questions" to mean matters that are informed by political considerations and are delegated by the Constitution to the political branches for conclusive resolution.[39] According to Spaeth and Rohde, a matter will be considered 'a political question' if the court believes it to be a matter more appropriate for resolution by either of the other branches of government.[40] Furthermore, Black's Law Dictionary defines 'political questions' to mean questions of which courts will refuse to take cognizance, or to decide, on account of their purely political character or because their determination would involve an encroachment upon the executive or legislative powers.[41]

However, other scholars are of the view that it is significant to make a distinction between the political question doctrine and "cases presenting political issues".[42] They contend that the mere fact that a suit intends to protect a political right does not necessarily mean that it presents a political question.[43] Ordinarily courts do entertain constitutional disputes with political ramifications and certainly political consequences, yet it does not mean that those cases present political questions.[44]

Therefore, while the above definitions set a good threshold towards a workable definition of the political question doctrine, it is questionable whether the doctrine must always deal with questions which are purely

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39 Tyler, A.L., "Is suspension a political question?", 59 (2) *Stanford Law Review*, 2006, p. 362.

40 Rohde, H., and Spaeth, D., *Supreme Court Decision Making,* San Francisco: Freeman, 1976, p.156.

41 Black, H.C., *Black's Law Dictionary*, USA: West Publishing Co., 1979.

42 Cole, J.P., "The Political Question Doctrine: Justiciability and the Separation of Powers", p.2, available at < https://fas.org/sgp/crs/misc/R43834.pdf>, (accessed on 17 August 2020).

43 See US Supreme Court decisions in *Nixon v. Herndon,* 273 U.S. 536 (1927) and *Baker v. Carr,* 369 U.S. 186 (1962).

44 Cole, *The Political Question Doctrine*, above note 42, at p. 2.

political. A strict isolation of law and politics seems almost impossible and it would be "escapist to attempt to insulate the court from the politics of its environment".[45] As put by Egbewole, "the reason for this argument is not far-fetched: there has never been any zero sum position on the issue that it must be of purely political character. What is most important instead is that it must have some political colouration".[46] Thus, it is submitted that the above definitions do not represent the accurate meaning and true nature of the doctrine.

In an attempt to define the concept of political question, Rohde and Spaeth are of the views that "a matter will be considered 'a political question' if the court believes it to be a matter more appropriate for resolution by either of the other branches of government" and because of the nature of the dispute, judges consider that it is "not amenable to resolution through judicial processes".[47] Substantially similar views are shared by Nwosu who defines a political question as a doctrine comprised of matters or issues considered by courts to be "constitutionally or statutorily allocated to the legislative and/or executive branches of government for final resolution" or matters or issues which "would, for a combination of reasons, be inappropriate for resolution through the judicial process".[48]

Going through the above definition, one is able to extract three elements considered relevant by the author in defining a political question. The first element is that it is in the discretion of the court to label a matter as falling

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45 Egbewole W.O., "Determination of Election Petitions by the Court of Appeal: A Jurisprudential Perspective", PhD Thesis, University of Ilorin, 2009, p. 130.

46 Id, at p. 135.

47 Rohde, H., and Spaeth, D., *Supreme Court Decision Making*, Freeman: San Francisco, 1976, p. 156.

48 Nwosu I., *Judicial Avoidance of 'Political Questions' in Nigeria*, Lagos: Ikenna Nwosu, 2005, at p. 22.

within the ambit of a political question.[49] Secondly, such a matter should be allocated by the Constitution or a statute to a coordinate political branch of the government. Thirdly, the court should consider itself incompetent to resolve it or that it is not appropriate for judicial resolution. It is submitted that these are essential elements to be put into consideration when one tries to formulate the definition of the political question doctrine.[50] It is this understanding that informs the succeeding discussion in this article.

4. ORIGIN AND DEVELOPMENT OF THE POLITICAL QUESTION DOCTRINE

The "political questions" doctrine originated from the United States of America. The doctrine can be traced back to Chief Justice Marshall's decision in *Marbury v. Madison.*[51] Marshall, while claiming the power to decide questions of law authoritatively for all three branches of government, recognized limitations on that power in the following terms:

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

In the above quotation, the Supreme Court of the United States held that courts should refrain from deciding certain matters which are of political nature or for which there is a clear indication that their resolution is constitutionally committed to either of the political branches of the

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49 Rohde, H., and Spaeth, D., *Supreme Court Decision Making,* San Francisco: Freeman, 1976, p. 156.

50 Egbewole, *Justiciability Theory*, above note 24, at p. 121.

51 5 U.S. 137 (1803).

government. Thus, the doctrine, as propounded by Chief Justice Marshall, was constitutionally based in the sense that it was rooted in the text and structure of the Constitution itself.[52] As a result, judicial self-restraint, in matters sought to be best reserved for political branches, was constitutionally required.

However, it was until March, 1962 when the US Supreme Court pronounced its landmark decision on the political question doctrine. This was in *Baker v. Carr*[53] in which the court itemised the various factors to be put into consideration before the court can come to a conclusion that a particular matter under consideration presents a political question. In this decision, the Court, apart from overruling its earlier decision in *Colegrove v. Green*[54], sought to bring some uniformity in the application of the political question doctrine by setting predetermined criteria to be used by court in deciding whether or not to invoke the doctrine. The court, thus, reviewed the doctrine and articulated six decisive factors to be considered prior to the court refraining from entertaining a matter for political question ground. The Court had this to say:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning

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52 This is what later came to be known as the 'classical' formulation of the doctrine
53 369 U.S. 186 (1962)
54 *328* U.S. 549 (1946)

> adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question[55]

From the above holding, the six factors or criteria as established in *Baker*'s case can be itemised as hereunder:

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

However, later on it became clear that it was impossible to lay down an unequivocal test for *determining* the existence of political questions in every matter brought for determination before the court. It became obvious that there is no any *straight jacket* formula that can be utilised in determining the existence or non-existence of the doctrine. This position is aptly put by Egbewole when he says:

> So far, what is discernible from American jurisdiction from where the "political questions" doctrine emanated is that the application of the doctrine is not determined by a

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55 *Baker v. Carr* 369 U.S. 186 (1962)

> straitjacket rule; the path to be followed by the court is mostly a function of the facts of individual cases[56]

For instance, *Baker's* factors were seen to be inapplicable in *Powell v. McCormick*.[57] In this case, the court had to make a decision on whether or not the action by the United States House of Representatives to exclude an elected member of the House from attending the House was a political question. Invoking the criteria as set in Baker's case, the Supreme Court concluded that the only applicable criterion was whether there was a "textually demonstrable constitutional commitment" to the House to determine the matter in question. Yet, the court held that such a criterion was inapplicable in this case since the House of Representatives had exceeded powers granted to it by the Constitution. Thus, that the matter was justiciable and the political question doctrine could not apply. It follows therefore that disputes in which the doctrine applies cannot be identified through a predetermined rule. Instead, as rightly put by Cole, "whether a case raises a political question must be determined on a case-by-case basis".[58]

Nevertheless, Baker's case remains a landmark decision as far as the political question doctrine is concerned and the formulated six factors have been categorised into two major groups thus creating two versions of the political question doctrines.[59] The first two factors fall under the 'classical version' of the doctrine and the remaining four factors fall under the 'prudential version'.[60] However, the exposition of these two categories, '*classical political*

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56 Egbewole, *Justiciability Theory*, above at note 24, p. 125.

57 395 U.S. 486 (1969)

58 Cole, *The Political Question Doctrine*, above note 42, at p. 9.

59 Thus, Baker's factors represented the convergence of classical and prudential factors into a single test.

60 Barkow, R.E, "More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy", 102 *Columbia Law Review*, 2002, p. 265.

questions doctrine'[61] and '*prudential political questions doctrine*'[62] falls outside the purview of this work.

5. POLITICAL QUESTION VERSUS JUSTICIABILITY

The political question doctrine presents a mammoth challenge on the justiciability principle, the reason being that the political question doctrine aims to attain something which is directly opposed to the main objective of the justiciability principle. While the justiciability principle aims at ensuring that whenever a legal matter is properly brought before the court, the same must be heard and its merit decided by the court, the political question doctrine is intended to deny judicial remedies to litigants on the sole reason that the matter is better decided by political branches of the government, especially where there is a political issue or issues with political ramifications. The controversy between political question doctrine and justiciability principle is best summarised by Egbewole:

> The debate has been on for a while on the desirability or otherwise of allowing the court to determine all legal questions brought before it regardless of whether such

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61 The classical theory of political question doctrine places a duty upon courts to adjudicate cases only when such a duty has been committed to court by the constitution. The duty emanates from the constitution itself and it not based on the discretion of the court. In other words, the theory is itself a product of constitutional interpretation, rather than of judicial discretion. Thus, the court must refrain from deciding any matter which is constitutionally committed to another branch.

62 The prudential version of political question doctrine is a judge-made doctrine that courts have used at their discretion to protect their legitimacy and to avoid conflict with the other political branches. Under this theory, the court would refrain from entertaining a dispute on prudential reasons. The courts usually refrain from making decisions which may seem to frustrate the will of the majority or seem to contradict decisions already made by elected representatives. The overall intention of the courts being to protect its legitimacy, instead of protecting the Constitution.

> questions involve political questions or not. One side of the argument posits that the court should stay clear of what is well known as 'political questions' as this would be better decided by the concerned coordinate arms of government; while the other side contends that it would amount to abdication of judicial responsibilities for judges to shy away from determining a legal question properly brought before them all because such question involves a political question[63]

Ordinarily, there are matters which fall squarely under the powers of political branches and for which the judiciary is not expected to intervene. For instance, as observed by Lord Roskill, "the courts are not the place to determine whether a treaty should be concluded or the armed forces disposed of in a particular manner or Parliament dissolved on one date rather than another".[64] Furthermore, it is not expected that the court will embark in an academic dispute in which a student alleges to have been awarded a lower grade on a particular subject contrary to what he thinks to deserve. It is the university alone which "possesses the power to state whether a particular work is below standard or not" and the court cannot "substitute its standard with that of the university" since there is no manageable criteria for such a judicial engagement.[65]

However, a matter is justiciable if it presents a real and substantial dispute that requires adjudication of the rights claimed.[66] In other words, a matter is justiciable if it is capable of being determined by the court of law through

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63 Egbewole, *Justiciability Theory*, above note 24, at p. 117.

64 *Council of Civil Service Union v Minister for the Civil Service* [1985] A.C. 374 at 418.

65 Nigerian Supreme Court in *Esiaga v University of Calabar* (2004) All FWLR (Pt. 206) 381.

66 Tribe, L.H., *American Constitutional Law*, (2nd Edn.), New York: Foundation Press, 1978, at p.68.

application of legal principles. This is when there is a real legal dispute between the contending parties in the sense that a legal right which is being claimed by one party has been denied by the other. Furthermore, a matter is justiciable if the claimant has a *locus standi* and the court has the required jurisdiction to entertain it and grant the sought remedies. This is when the claimant has suffered actual or threatened injury that has a nexus with the acts or omissions by the Defendant.

The doctrine of *Ubi Jus Ibi Remedium*[67] holds that where there is a right, there is a remedy. Thus, it is a cardinal rule of law and a well established principle that whenever a legal right is violated, the law must provide a remedy. As such, in the field of constitutional law, it is expected that "any alleged contravention of the Constitution for which there is a remedy is justiciable".[68] The author makes such a submission despites being aware of pronouncement by Justice Brennan in the case of *Baker v. Carr*, when distinguishing justiciable issues from non-justiciable ones. Justice Brennan had these to say:

> A dispute is non-justiciable if there is a textually demonstrable constitutional commitment of the issue to a coordinate political department; ... or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question[69]

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67 Literally translated the doctrine means that '*for every wrong, the law must provide a remedy*'.

68 *Njoya & 6 Others v. Attorney General and Others* [2004] 1 KLR 232, p. 257.

69 *Baker v. Carr*, 369 U.S. 86, 217 (1962).

However, the above views by Justice Brenan have been critically analysed as unconvincing by Aharon Barak.[70] The author subscribes to the critical analysis by Aharon Barak. This is because of the reasons below:

Firstly, the mere fact that a matter is entrusted to a coordinate political branch of the government is not a guarantee for such a branch to act contrary to the Constitution and laws of the country. When the provisions of the Constitution or any other law vest authority to a certain political institution, still there is a requirement for such an institution to abide by the law by acting within the mandates granted to it.[71] The fact that a decision or act on a particular issue is entrusted by the Constitution to a political branch of the government, does not mean that the determination of the legality of that decision or act is also entrusted to that political branch. It is the court which has the authority to determine the scope and application of those provisions as well as determining as to whether or not the granted mandates were exercised lawfully and within the limits. Such a determination cannot be legally termed as non-justiciable.

Secondly, Justice Brennan regards as non-justiciable any matter which cannot be judicially resolved without expressing disrespect to other branches of the state. This reasoning is also unmeritorious for the simple reason that the court is supposed to enforce the law and the Constitution without fear or favour. The duty of the court is to interpret the law and when the interpretation adopted by the court differs from the one given by a political branch of the government that cannot be termed as showing disrespect on the part of the court. If that was not the case, then courts' roles would have been rendered nugatory since each and every interpretation of the law and the Constitution contrary to the opinions of elected branches would have resulted into cries for disrespect from those branches.

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70 Barak, A., "A Judge on Judging: The Role of a Supreme Court in Democracy", 116 *Harvard Law Review,* 2002, pp. 101-102.

71 *Powell v. McCormick* 395 U.S. 486 (1969).

Thirdly, it is the judiciary which has a final say in issues of interpreting the Constitution and dispensation of justice.[72] Any matter, the decision of which depends on the interpretation of the Constitution, is justiciable and the court is under an unavoidable obligation to hear and determine it.[73] Where a party comes before the court alleging that the Constitution has been violated, it would be a remiss of the court to refuse to entertain such a dispute.[74] If the judiciary does not do so, that would be an "apologetic and outright abdication of judicial responsibilities".[75] As such, the court is obliged to pronounce its decision on matters brought before it regardless of pronouncement made by other political branches on the same matter. In so doing, the judiciary does not abrogate the doctrine of separation of powers instead it reaffirms it. Separation of powers doctrine does not allow any branch of the state to act contrary to the Constitution and the law.[76] It is trite to note that in circumstances where Parliament acts within the confines of the Constitution, the judiciary will have no power to intervene. However, if parliamentary powers are exercised in outright violation of the Constitution, the judiciary will be justified to intervene and protect the Constitution.[77] Any contrary interpretation will lead to "stultification" by the judiciary of its constitutional duty.[78]

Thus, even where a political branch takes into account political considerations in making its decision, those considerations must not be contrary to the Constitution. Otherwise the court will be justified to intervene

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72 See article 107A (1) of the Constitution of the United Republic of Tanzania, 1977.

73 See the *Pocket-Veto Case,* 279 U.S. 655. (1929)

74 See the decision of Supreme Court of Kenya in *Speaker of the National Assembly -Vs- Attorney General &3 Others* (2013) eKLR.

75 Egbewole, *Determination of Election Petitions*, above note 45, at p. 136.

76 See the decision of Supreme Court of Kenya in *Speaker of the National Assembly -Vs- Attorney General &3 Others (2013) eKLR*. See also the decision of the Constitutional Court of Uganda in *Okello Livingstone and Others v Attorney General and Another,* Constitutional Petition No. 4 of 2005.

77 *Mensah v Attorney-General,* 1996-97 SCGLR 320, p. 368.

78 See the reasoning of Mr. Justice Frankfurter in *Rochin v. California,* 342 U.S. 165, 173 (1952).

by declaring such a decision unconstitutional. It is the role of the judiciary to ensure that every organ of the state acts within its constitutional mandates and thus guaranteeing separation of powers. As rightly put by Justice Acquah when speaking for the Supreme Court of Ghana in *Mensah v Attorney-General*, the political questions doctrine is not meant to grant political immunity to elected branches to violate the dictates of the Constitution.[79]

It is worthy to note that a written Constitution exists not only as the supreme law of the land but also as a limit on "what everyone in government, at all levels, can do".[80] These limits would have been worthless if the judiciary had no power to enforce them.[81] The judiciary must always intervene whenever political branches exceed their limits or act unfairly and in so doing injury is caused or in cases where the intervention is necessary to determine the constitutionality or legality of their actions.[82] The separation of powers doctrine does not bar the intervention by the judiciary in cases where there are clear excesses or abuses of power by political branches.[83] As such, since the political question doctrine is a derivative of the separation of powers doctrine,[84] there is no justification, in relevant cases, for the former to be non-justiciable in instances where the latter is justiciable.

It is on the above reasons that the author submits that the Court of Appeal of Tanzania in *Attorney General v. Reverend Christopher Mtikila*[85] was wrong and

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79 *Mensah v Attorney-General1996-97 SCGLR 320, p. 368.*

80 Chemerinsky, **'**In Defense of Judicial Supremacy', 58 *William. & Mary Law Review*, 2017, at p. 1464.

81 Chemerinsky, *In Defense of Judicial*, above note 80, at p. 1461.

82 *Picture House Ltd Vs Wednesbury corporation* [1948]1KB 223, at p. 229. See also the decision of *M'mbembe & Another Vs The speaker of the National assembly and Others* (1996) 1LRL 584. See also decision of the Supreme Court of Nigeria in *Inakoju vAdeleke (2007) All FWLR (Pt. 353), p. 123.*

83 *Okello Okello Livingstone and Others Vs The Attorney General and Another,* Constitutional Petition No. 4 of 2005.

84 *Centre for Health Human Rights & Development & 3 Ors v Attorney General*, Constitutional Petition No. 16 of 2011; *Ghana Bar Association v Attorney General* 5[1995-96] 1GLR 598; etc.

85 Civil Appeal No. 45 of 2009 (unreported)

abdicated from its duty to interpret the Constitution.[86] This is because any issue that requires the court to interpret the Constitution is undoubtedly a legal issue and "must necessarily be justiciable".[87] As rightly put by Barnabas Samatta:

> though the issue concerning independent candidates may have been a political one in a certain sense, it was justiciable because it related to the interpretation of constitutional provisions and the determination of the legal issue, among others, whether a citizen has a fundamental right to contest a public election as an independent candidate[88]

As stated earlier, Mtikila's complaint before the court was that Parliament made certain constitutional amendments which denied him and the rest of Tanzanians their rights to contest for presidential, parliamentary and local council elections without being sponsored by any political party. It is strange for the Court of Appeal to hold that such a dispute can be resolved by the very Parliament which allegedly committed an unconstitutional act the subject matter of the complaint. The decision is implausible and disguises the crux of the complaint presented before the Court. At any rate, it is unsafe for Parliament to have a final say over the interpretation of constitutional provisions because decisions of Parliament in Tanzania are sometimes

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86 Under articles 4(1), 30(3) & (5), 107A(1) and 107B of the Constitution of the United Republic of Tanzania of 1977, the judiciary is an organ of the state with final decision in dispensation of justice in the United Republic of Tanzania. Whenever any person alleges that any law enacted or any action taken by the Government or any other authority abrogates or abridges any of the basic rights and freedoms guaranteed under the Constitution, such a person may institute proceedings in courts for redress.

87 Samatta, B., "*Judicial Protection of Democratic Values: the Judgement of the Court of Appeal on Independent Candidates"* (A Public Lecture Delivered by Chief Justice (rtd) Barnabas Albert Samatta at Ruaha University College), Iringa, 25 November 2010, p. 30, available at <https://xa.yimg.com/> (accessed 18 February, 2016).

88 Id, p. 34.

influenced by "the tugs and pulls of political polarisations".[89] Being a politically partisan institution, Parliament may be tempted to make decisions which denude persons of their constitutional rights "at the altar of political expediency".[90]

One could consider an imaginary situation whereby Members of Parliament in Tanzania may opt to amend the Constitution by cancelling the usual regular elections and perpetuate themselves in power. In such an eventuality, Tanzanians will probably approach the court with a complaint that such an amendment by Parliament has denied people of their rights to vote in contested elections. However, if we are to follow the analogy and reasoning of the Court of Appeal's decision, such a dispute can only be decided by Parliament which has the power to amend the Constitution. This means that people will be denied of their legal remedy in circumstances where they can no longer exercise their political remedy of voting out of office the offending Members of Parliament since their right to vote has already been extinguished by Parliament.

It is thus prudent to submit that the Court of Appeal of Tanzania in the above mentioned case adopted a restrictive approach instead of a permissive approach.[91] This is because, as held by the Supreme Court of Nigeria, when the court 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

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89 See Moyo, S., "The Role of the Legal Profession in Promoting and Protecting the Rule of Law and Independence of the Judiciary" 1 (3) *The Tanzania Lawyer*, 2007, at p. 89.

90 Samatta, *Judicial Protection of Democratic Values*, above note 87, at p. 29.

91 Where the restrictive approach is adopted in the interpretation of what is justiciable, the court would often end up finding in favour of political questions and against justiciability. On the other hand, where the permissive approach is resorted to, the court would always liberal in its interpretation of what is justiciable, and where this is the case, the end result is often that the court would assume jurisdiction and deny the applicability of the "political questions" doctrine.

subject matter of the dispute has political implications", instead the court in such a situation "is only performing the judicial functions conferred on it by the…Constitution".[92] While it is true that ordinarily courts of law will not entertain issues falling under purely political questions or involving policies, a question involving the interpretation of the Constitution falls under the sacred duty of the court and cannot be brushed as a political one.[93]

6. THE FATE OF THE POLITICAL QUESTION DOCTRINE

Several scholars have contended that the political question doctrine is heading toward its demise;[94] since it has recently been on the decline.[95] Others have even gone to the extent of submitting that the doctrine no longer exists[96] or that it should not exist.[97] Another group has strongly disputed the

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92 *Alegbe v Oloyo* (1983) NSCC 315, pp. 341-342,

93 See the decision of the Supreme Court of Ghana in *New Patriotic Party v Attorney General [*1993-94] 2 GLR 35 at 65 where it held that "… *the Constitution itself is essentially a political document. Almost every matter of interpretation or enforcement which may arise from it is bound to be political, or at least to have a political dimension*"

94 *See, for instance,* Barkow, *More Supreme than Court*, above note 60, at p. 244; Kramer, L.D., "The Supreme Court, 2000 Term—Foreword: We the Court", 115 (4) *Harvard Law Review*, 2001, p. 153, at p. 158; Tribe, L.H., "Comment, Erog v. Hsub and Its Disguises: Freeing Bush v. Gore from Its Hall of Mirrors", 115 *Harvard Law Review*, 2001, p. 299, at p. 304.

95 Barkow, *More Supreme than Court*, above note 60, at p. 240; Robert F. Nagel, *Political Law, Legalistic Politics: A Recent History of the Political Question Doctrine*, 56 U. CHI. L. REV. 643, (1989), pp. 649 – 650.

96 See, for instance*,* Henkin, *Is There a Political Question,* above note 26, at p. 600; McCormack, W., "The Justiciability Myth and the Concept of Law"*,* 14 *Hastings Constitutional Law Quarterly*, 1987, p. 595, at p. 614.

97 *See, e.g.,* Henkin, L., "Lexical Priority or 'Political Question': A Response"*,* 101 *Harvard Law Review*, 1987, p. 524, at p. 529; Redish, *Judicial Review*, above note 23, at pp.1059-60; Tigar, M.E., "Judicial Power, the 'Political Question Doctrine,' and Foreign Relations"*,* 17 *UCLA Law Review,* 1970, p. 1135, at p. 1136. (arguing that federal courts should not abstain from ruling on American military involvement abroad on the basis of the political question doctrine).

nature, application, and rationale of the doctrine.[98] Furthermore, courts in various jurisdictions have clearly asserted themselves to be the final arbiters and expositors of constitutional law, whose constitutional views are binding on all other organs and institutions of the government and and have been distrustful of any doctrine purporting to limit the scope of their judicial review powers[99]and have been distrustful of any doctrine purporting to limit the scope of their judicial review powers.[100] Rachel Barkow adequately captures the popular outlook, when she says that "the political question doctrine cannot coexist" with the modern court's perception of itself as "the ultimate expositor of the constitutional text".[101]

As exposed earlier in this paper, the political question traces its origin in the US. Yet in various recent decisions of the Supreme Court of US, the court has opted for the course that aggrandize its own powers. These decisions

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98 *See,* Barkow, *More Supreme than Court*, above note 60, at pp. 319–36; Mulhern, J.P., "In Defense of the Political Question Doctrine", 137 *University of Pennsylvania Law Review*, 1988, p. 97, at p. 101; Brown, R.L., "When Political Questions Affect Individual Rights: The Other Nixon v. United States", *Supreme Court Review,* 1993, p. 125,at p. 127; Redish, *Judicial Review*, above note 23, at pp. 1049–50; Weinberg, L., "Political Questions and the Guarantee Clause", 65 *University of Colombia aw Review*, 1994, at p. 889; Henkin, *Is There a Political Question,* above note 26, at pp. 600–01.

99 Barkow, *More Supreme than Court*, above note 60, at p. 240: "*[T]he demise of the political question doctrine is of recent vintage, and it correlates with the ascendancy of a novel theory of judicial supremacy.*"); Choper, J.H., "The Political Question Doctrine: Suggested Criteria", 54 *Duke Law Journal*, 2005, p. 1457, at p. 1459.

100 Barkow, *More Supreme than Court*, above note 60, at p. 240: ["*T]he demise of the political question doctrine is of recent vintage, and it correlates with the ascendancy of a novel theory of judicial supremacy.*"]; Choper, J.H., "The Political Question Doctrine: Suggested Criteria", 54 *Duke Law Journal*, 2005, p. 1457, at p. 1459.

101 Barkow, *More Supreme than Court*, above note 60, at p. 300 [quoting *United States v. Morrison*, 529 U.S. 598, (2000) p. 616]; See also, Grove, T.L., The Lost History of the Political Question Doctrine, 90 *New York University Law Review*, 2015, p. 1908, at p. 1911.

include, decision of the Supreme Court of US in in *Zivotofsky v. Clinton*[102] in which the court rejected the application of the political questions doctrine in any matter where the applicant is seeking the vindication of his rights. It was held that in such a dispute the court must interpret the law at issue, and the political question doctrine would be inapplicable. Again, the Supreme Court of US in *Bush vs. Gore*[103] held that it "had the responsibility to resolve the Federal and Constitutional issues the judicial system has been forced to confront". The Supreme Court made a decision without any mention on the political question doctrine although the subject matters of the dispute were prima facie political in nature.

A similar trend has been exhibited by the Supreme Court of India which has also extended its authority in indeterminate areas, such as its jurisdiction to do "complete justice in any cause or matter pending before it".[104] Furthermore, though the political question doctrine has been, for a quite long period of time, used in Nigeria, it came into severe trouble after the judgment of the Supreme Court in *Inakoju v Adeleke*[105] and in its subsequent decisions in *Ugwu v Ararume*[106] and *Alegbe v Oloyo.*[107] In the latter case, the Supreme Court of Nigeria held to the effect that when the judiciary is requested to interpret the provisions of the Constitution of Nigeria, it has to perform that judicial function conferred upon it by the Constitution. In so doing, the court will not be entertaining a political question even if the "subject matter of the dispute has political implications".[108]

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102 132 S. Ct. 1421, 1425 (2012).

103 531 U.S 98. (2000).

104 For instance, see *State of Punjab v. Bakshish Singh,* (1998) 8 S.C.C. 222; *Supreme Court Bar Ass'n v. Union of India,* (1998) 4 S.C.C. 409; *Vishaka v. State of Rajasthan,* (1997) 6 S.C.C. 241; *Delhi Judicial Service Ass'n v. State of Gujarat,* (1991) 4 S.C.C. 406; *Union Carbide Corp. v. Union of India,* (1991) 4 S.CC. 584

105 (2007) All FWLR (Pt. 353) 3.

106 (2007) 12 NWLR (Pt. 1048) 367.

107 *Alegbe v Oloyo* (1983) N.S.C.C.. 315

108 Ibid.

The above holding by the Supreme Court of Nigeria is similar to the views by Supreme Court Appeal of Uganda in the *Centre for Health Human Rights & Development & 3 Others v Attorney General*[109] where it was held in effect that the political question doctrine cannot be used as a shield to the executive or legislature where either institution is improperly exercising its constitutional mandate. It thus held that political question doctrine cannot be invoked to deny the court of its jurisdiction where the petitioner alleges that acts or omissions of the government violate the Constitution[110].

The limited scope and diminishing utility of the political question doctrines is indirectly exhibited by M.P. Jain asserts that "many Constitutional law questions have political overtones" and thus that if courts refuse to entertain them "the scope of constitutional litigation will be very much reduced". He is of the view that "merely because a question has a political complexion, that by itself is not a ground why the court should shrink from performing its duty under the constitution if it raises an issue of constitutional determination".[111]

Views similar to those expressed by Jain are expressed by Professor Nwabueze to the effect that in constitutional law field almost all legal questions are political in nature[112] since the Constitution is a charter for regulating the political relations of the people. Thus, the fact that constitutional questions have political character should not be a ground to

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[109] Constitutional Petition No. 16 of 2011) [2012] UGCC 4 (5 June 2012)

[110] The Supreme Court held that Article 137(3)(b) of the Constitution of Uganda allows any person who alleges that an act or omission of an authority is inconsistent with the Constitution to file a petition with the Constitutional Court to seek redress

[111] Jain, M.P., *Indian Constitutional Law*, (5th edn), Nagpur: Wadhawa and Company, 2003, at pp. 847-848.

[112] Nwabueze, B., *Constitutional Democracy in Africa:* Volume 3, Ibadan: Spectrum Books, 2003–200, pp. 62-63. This is also a view expressed by Justice Dixon in *Melbourne v Commonwealth of Australia* [1947] C.L.R. 31

deny the court of its jurisdiction to entertain them if they are otherwise justiciable.[113] In his words, the court is "not at liberty to refuse to hear and decide it simply because it is politically explosive or sensitive, or because it is likely to embroil the judiciary in the politics of the people or provide a conflict between it and the political organs".[114] Nwabueze cites with approval the statement by Chief Justice Marshall who held in effect that the court cannot decline to exercise jurisdiction on a constitutional matter brought before it for determination and that if it does so, it "would be treason to the constitution".[115]

The analysis above establishes the fact that matters that would have been rejected as political questions are becoming justiciable disputes in many jurisdictions.[116] The principle that some constitutional questions of political nature must be decided by political organs of the government and not through the judiciary "is beginning to seem antiquated".[117] This is because courts in various countries now "deal with political issues all the time".[118] Even in the US where the doctrine of political question emanated, the US Supreme Court has currently embraced the view that it is the judiciary which has the power and competency to provide the full substantive meaning of all constitutional provisions[119]. But more to the point, a handful of renowned legal scholars reject the applicability of political question doctrine if its effect would be to render the violation of a constitutional or legal right go

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113 Nwabueze*, Constitutional Democracy*, above note 112, at pp. 62-63.

114 Id, at pp. 59-60.

115 *Cohens v. Virginia*, 19 U.S. (6 Wheat) 264, 404, (1821).

116 *R (on application by Gentle) v Prime Minister* [2008] 1 AC 1356.

117 Barkow, *More Supreme than Court*, above note 60, at p. 240.

118 Chemerinsky, E., *Federal Jurisdiction*, (2nd edn.), New York, Aspen Publishers, 1994, at p. 143.

119 *Nixon v. Herndon,* 273 U.S. 536, 540; *Baker v. Carr,* 369 U.S. 186 (1962); *Powell v. McCormack*, 395 U.S. 486. etc

unremedied.[120] As such, the current position of the law is that there is no allegation of constitutional violation which courts cannot adjudicate.[121]

However, it is the author's contention that views, which purport to treat the political question doctrine as a useless or a non-existing one, are misplaced. It is submitted that the doctrine is still relevant and applicable since "the distinction between judicial and political power implies some limits on the extent to which the courts can command the exercise of the latter".[122] The rationale of the doctrine rests primarily in "distinguishing cases in which courts will exercise their power of judicial review from those in which they will not".[123] As rightly put by Mulhernt, it is the constitutional role of the courts "to protect the oppressed from abuses of government power. They refrain from exercising review in cases far removed from that paradigm".[124]

The intervention of the courts is crucial in protecting people's fundamental liberties. However, they must "refuse to grapple with non-legal and non-interpretive policy questions"[125] because the "function of determining the political policy of the government belongs to the legislature"[126] which is politically responsible to voters for policy decisions it makes. This is best summarised in the holding by Lord Roskill, when he had this to say:

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120 Redish, *Judicial Review*, above note 23, at p. 1060; Barak, *The Judge in a Democracy*, above note 23, at p. 177; Allan, T.R.S., *Constitutional Justice: a Liberal Theory of the Rule of Law*, Oxford: OUI, 2001, p. 188.

121 Chemerinsky, *In Defense of Judicial*, above note 80, at p. 1480.

122 Harrison, J., "The Political Question Doctrines" *American University Law Review*, Vol. 67:457, at p. 459.

123 Mulhernt, *In Defense of the Political Question Doctrine*, above note 98, at p. 175.

124 Id, p. 175.

125 Id, p. 133.

126 Finkelstein, Judicial Self-Limitation*,* 37 Harvard *Law Review*, 1924, p. 338, at p. 361.

> Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others are not, I think susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process. The courts are not the place wherein to determine whether a treaty should be concluded or the armed forces disposed in a particular manner or Parliament dissolved on one date rather than another[127]

It must be understood that the political question doctrine was developed by courts in order to abstain from deciding disputes sought to be of political nature on the reason that those disputes are better decided by political branches of the government.[128] The invocation of the doctrine prevents a court of law from deciding matters which are regarded to be fundamentally "political", within the exclusive mandate of political organs and, thus, not amenable for judicial inquiry or review.[129]

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127 Council of Civil Service Unions v Minister for Civil Service [1985] A.C. 374 at 418.

128 See the decisions of Supreme Court of US in *Marbury v. Madison 5 U.S. 137 (1803); Coleman v. Miller 307 U.S. 433 (1939)* and *Colegrove v. Green 328 U.S. 549 (1946)*. See also decisions of Supreme Court of Canada in *Native Women's Association of Canada v. Canada [1994] 3 S.C.R. 627* and *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly) [1993] 1 S.C.R. 319*. Furthermore, see the decision of the Supreme Court of Nigeria in *Onuoha v Okafor (1983) NSCC 494 and the decision of the Constitutional Court of Uganda in Centre for Health Human Rights and Development & others v Attorney General, Constitutional Petition No. 16 of 2011, UGCC 4*; etc.

129 see John Daley, 'Defining Judicial Restraint', in Tom Campbell & Jeffrey Goldsworthy (eds.) *Judicial Power, Democracy and Legal Positivism* (Aldershot: Ashgate, 2000).

7. CONCLUSION

The survey into the disparate concepts of political question doctrine and justiciability theory has revealed that the political question doctrine may be relevant in some instances where there are no manageable criteria for making a judicial determination.

The main reason often raised in favour of the doctrine is that it allows smooth running of the country and separation of powers between organs of the state. However, on the basis of comments and authorities cited in this paper, it is obvious that courts of law are enjoined to hear and conclusively determine all justiciable legal disputes regardless of the fact that the issue involved may be politically explosive.

It has been demonstrated that, under the law, whenever a legal right is violated, the law must provide a remedy. As such, in the field of constitutional law, it is expected that "any alleged contravention of the constitution for which there is a remedy is justiciable."[130] Although the principle of separation of powers must be respected by all state institutions, the mere fact that a matter is entrusted to a coordinate political branch of the government is not a warranty for such a branch to act contrary to the Constitution and laws of the country. Courts would be justified to intervene whenever there is a cry for violation of the Constitution and it would be a lax of the court to refuse to entertain such a dispute. It goes without saying that the Court of Appeal of Tanzania in Mtikila's case abdicated its duty to interpret and apply the provisions of the Constitution with the consequent results of denying a remedy to a litigant. This is because any dispute the determination of which calls for the interpretation of the Constitution is justiciable regardless of its political sensitivity. In particular, a complaint to the effect that Parliament has violated the Constitution resulting in the infringement of a person's

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[130] *Njoya & 6 Others v. Attorney General and Others* [2004] 1 KLR 232, p. 257.

constitutional right, as was the case in Mtikila's suit, cannot be justifiably dismissed as being political.

The existence, propriety and invocation of the doctrine which results in denying legal remedies to litigants who complain for unwarranted infringement of their legal or constitutional rights is seriously contested. It is submitted that the judiciary should be able to determine all legal disputes brought before it regardless of whether such disputes involve political questions or not and essentially in cases where there is a perceived violation of the Constitution. This is a judicial function conferred to the court by articles 4(1), 30(3) & (5), 107A(1) and 107B of the Constitution of the United Republic of Tanzania of 1977.[131]

While the author acknowledges the existence and potential role of the political question doctrine, such a doctrine is very undeveloped in Tanzania for absence of any judicial decision which clearly articulates its application, role and limitations. Thus the major problem remains over its incoherence. This creates an uncertainty on the application of the doctrine for want of lucid principles to guide the courts whenever the application of the doctrine may be desired. It is submitted that the Court of Appeal of Tanzania had an occasion to set a precedent by indicating a vital limit on judicial powers to matters better reserved for political branches. This was so essential in order to prevent possible jurisdictional problems between the three organs of the state whenever similar questions arise in future. However, the Court of Appeal missed such a rare opportunity.

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131 Under the Constitution, the judiciary is an organ of the state with final decision in dispensation of justice in the United Republic of Tanzania. Whenever any person alleges that any law enacted or any action taken by the Government or any other authority abrogates or abridges any of the basic rights and freedoms guaranteed under the Constitution, such a person may institute proceedings in courts for redress.