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The Political Question Doctrine in Uganda: A Reassessment in the Wake of the CEHURD

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by

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1 INTRODUCTION

On 5 June 2012 the Constitutional Court[1] of Uganda issued its decision in *Centre for Health Human Rights and Development (CEHURD) and Three Others v. Attorney General*[2] (hereinafter "*CEHURD*"). The *CEHURD* petitioners[3] challenged the adequacy of maternal health services in Uganda. The petitioners claimed that the present levels of funding and care amount to a denial of the right to health.[4] The petitioners sought various forms of judicial remedies ranging from judicial declarations as to the unconstitutionality of government policies to the award of compensation for the families of two alleged victims of poor maternal health care.

The Constitutional Court dismissed the petition, holding that matters of government health policy are non-justiciable political questions. The ruling was a significant blow to advocates for the judicial enforcement of social and economic rights and proponents of public interest litigation in Uganda. Suddenly, a legal principle of American origin, stood in the way of judicial engagement with pressing matters of maternal health.

The *CEHURD* case is presently on appeal before the Supreme Court of Uganda. Oral argument was to take place in September of 2013. However, the case was postponed when counsel for the government failed to appear. Thus the stage is set for consideration of this case by the highest appellate court in Uganda in 2014. The role the political question will play in the Supreme Court's treatment of the case is anyone's guess at this point. Regardless of the ultimate outcome, the decision of the Constitutional Court has reinvigorated the political question doctrine in Uganda.

The re-emergence of the doctrine in Uganda has brought the doctrine under scrutiny. The use of the doctrine to block consideration of the claims in *CEHURD* has generated its share of handwringing from the human rights community. Criticisms range from critiques of the borrowed origins of the doctrine to claims that the doctrine is inapplicable in matters of human rights.

Despite many protestations[5], the political question doctrine is an established and legitimate principle in Uganda. Its roots go back to post-independence jurisprudence and it enjoys the

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[1] The Court of Appeals of Uganda sits as a constitutional court in constitutional matters. Its rulings may be appealed to the Supreme Court of Uganda. *See* 1995 Constitution of Uganda, Arts 132, 137.

[2] Constitutional Petition No. 16 of 2011, UGCC, available at http://www.ulii.org/ug/judgment/constitutional-court/2012/4.

[3] Petitioners included CEHURD and petitioners acting on behalf of two women who died in childbirth when medical assistance was lacking. CEHURD is an indigenous, non-profit, research and advocacy organization.

[4] Article 137 of the Ugandan Constitution provides in part that that "(a) person who alleges that . . . any act or omission by any person or authority, is inconsistent with or in contravention of a provision of this Constitution, may petition the constitutional court for a declaration to that effect, and for redress where appropriate."

[5] See e.g. Initiative for Social and Economic Rights (ISER) "A political question? Reflecting on the Constitutional Court's ruling in the maternal mortality case (CEHURD and Others v Attorney General of Uganda)." (2012).

recognition of prominent legal figures. While it has been largely unmentioned and ineffectual in the years leading up to *CEHURD*, it was never judicially eradicated or denounced.

The prominent resurfacing of the political question doctrine in Uganda warrants an assessment of the doctrine's origins and legitimacy. This article begins with a brief treatment of the doctrine's birth and development in the United States. Next, the article recounts the migration of the political question doctrine to Uganda and outlines the life of the doctrine over the past half century.

After that review, the article transitions from description to analysis. The article addresses the appropriateness of the political question doctrine in the context of human rights generally and economic and social rights claims particularly. Next the article presents the reasons for the use and utility of the political question doctrine in Uganda. This is intertwined with a critique of the application of the doctrine in *CEHURD*. The article ends with recommendations and a short general conclusion.

2 AMERICAN ORIGINS

US Supreme Court CJ John Marshal brought the political question doctrine into the jurisprudential foreground in 1803. In *Marbury v. Madison* he wrote "(q)uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."[6] This cryptic dicta has evolved into a internationally recognised doctrine. Contemporary Kenyan authors Juma and Okpaluba describe the doctrine "[a]s a theory of interpretive deference" which "demands that a court decline to exercise jurisdiction on a dispute that it is either ill-equipped to deal with or where the political organ may render the best possible resolution."[7]

The political question doctrine was a necessary upshot of *Marbury*'s grander consequence. *Marbury* famously established judicial review.[8] Inherent within the establishment of this radical judicial power is the need to limit its scope and application.

Since *Marbury,* American courts have set about to develop the scope and contours of the political question doctrine. This endeavour entails the classification of legislative and executive actions that are of a 'political nature' and thereby exempt from judicial review. This jurisprudence developed slowly and crystallised partially a century and a half later in *Baker v. Carr.*[9]

In *Baker* the US Supreme Court held that it had the power to consider whether the delineation of state voting districts violated the equal protection clause. It held that the apportionment of electoral districts was not a 'political question' exempt from judicial review. Justice Brennan wrote:

> "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 standard for resolving it; or the impossibility of deciding without an initial policy determination of the kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of

[6] *Marbury v. Madison*, 5 U.S.137, 170 (1803).
[7] Juma L Okpaluba C "Judicial intervention in Kenya's constitutional review process" (2012) 11 *Wash U Global Stud LR* 326.
[8] Seidman JM "The secret life of the political question doctrine" (2004) *37 John Marshall LR* 441-80.
[9] *Baker v. Carr,* 369 U.S. 186, (1962).

> government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements on one question."

Brennan's test has become the most prominent standard for applying PDQ.

The political question doctrine arises in a number of common typologies.[10] According to Chopper, the doctrine traditionally surfaces in seven contexts: 1) so-called 'guarantee clause' claims[11], 2) matters of electoral process, 3) matters of foreign affairs, 4) congressional (e.g. legislative) rules and procedures, 5) matters pertaining to constitutional amendment, 6) matters concerning the separation of national and state authority, 7) and matters of impeachment.[12] Notably Chopper's list does not include matters pertaining to social and economic rights. We will address this category of American political question jurisprudence in section 5.3 below.

3 THE MIGRATION OF THE POLITICAL QUESTION DOCTRINE TO UGANDA

The political question doctrine first appeared in Uganda in *Uganda v. Commissioner of Prisons, Ex-parte Matovu*.[13] *Matovu* included the weighty issue of what regime was the true government of Uganda. *Matovu* is best known for its application of Hans Kelsen's "pure theory of law." However, prior to engaging in Kelsenian analysis, the court had to decide whether it had the legal power to make such a determination.

In *Matovu*, the de facto government argued that the determination of what regime was the legal government was beyond the scope of judicial review. The Attorney General of the de facto government cited the US case of *Luther v. Borden*[14] in support of this argument. *Luther* arose out of the context of disenfranchised urban voters in the state of Rhode Island. The US Supreme Court, in an opinion by CJ Taney, held that under the political question doctrine, responsibility for determining appropriate institutions of governance is diverted to the legislative and executive branches of government. Taney wrote that "the sovereignty in every State resides in the people" and the determination as to the regime in power "is a political question to be settled by political power."

The Ugandan Supreme Court responded by reading the *Luther* decision proffered by the Attorney General[15] and by locating the more recent *Baker* case.[16] The court ultimately cited *Baker* in support of its decision to issue a substantive holding in the matter. The court reasoned that the Kelsenian[17] theory provided the *Matovu* court with a discoverable and manageable standard for making the determination, thereby satisfying the second element of Brennan's test for justiciability. Thus the political question doctrine made a high profile first appearance in Ugandan jurisprudence, despite the fact that it did not ultimately limit the court's power.

4 THE ONGOING LIFE OF THE POLITICAL QUESTION DOCTRINE

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[10] *See* Chemerinsky E *Constitutional law: Principles and policies*, 2 ed (2002) 130; Chopper J 'The political question doctrine: suggested criteria' (2005) 54 *Duke LJ* 1457-1532.
[11] Chopper J (2005) *citing* Bonfield AE 'The Guarantee Clause of Article IV, Section 4: a study in constitutional desuetude' (1961),46 *Minn. LR* 513.
[12] Chopper J (2005) 1479-1522.
[13] *Uganda v. Commissioner of Prisons, Ex-parte Matovu* [1966] EA 514.
[14] 48 U.S. 1 (1849).
[15] *Matovu* 530-531 (The court purportedly quotes CJ Marshal from *Marbury v. Madison* but this citation is patently inaccurate as the quote includes a reference to *Luther* which was issued 46 years after *Marbury*. This bad citation is indicative of the limited resources that the court faced at this time of political transition).
[16] *Matovu* 531-533.
[17] *Matovu* 535-537 *quoting extensively from* Kelsen H *General theory of law and state* (1945) 117-118 and 220.

Legal scholars have long posited that the political question doctrine should be dead, is dying or is actually dead.[18] Per Mulhern, opponents of the doctrine build their critiques on "two intertwined assumptions."[19] The first assumption is that "the judiciary is the only institution with the authority and capacity to interpret" a constitution.[20] The second is that "to limit the judicial monopoly on constitutional interpretation is to threaten, if not destroy, the rule of law."[21] These same assumptions undergird the criticism of the Constitutional Court in *CEHURD*.[22]

Do those assumptions have merit? Is the political question doctrine a misguided jurisprudential dinosaur? A survey case law in United States and Uganda demonstrates the continued vitality and relevance of the doctrine.

4.1 Survival of the political question doctrine in America's federal courts

Much like *Marbury* before it, *Baker*'s place as a standard bearer for the political question doctrine is ironic. The issuance of *Baker* coincided with a power grab by the federal judiciary. After *Baker*, the political question doctrine slipped beneath the rising tide of judicial activism exemplified by the Warren Court.

The diminishing impact of the political question doctrine in the United States caused some to pronounce it dead. Others are less drastic and qualified in their assessments. Some describe the state of the doctrine as "profoundly unclear"[23] and "fuzzy at best".[24] Seidman depicts the doctrine as living a "secret life".[25]

The US Supreme Court has added minimal the political question doctrine jurisprudence since *Baker*.[26] Key cases include *Powell v. McCormack*[27] (rejecting the argument that the political question doctrine prevented the court from questioning the grounds for Congress' refusal to seat a Congressman), *Gilligan v. Morgan*[28] (finding that the political question doctrine prevented judicial review of certain aspects of the National Guard's functional standards and policies) *Nixon v. U.S.*[29] (finding the political question doctrine prevented the judiciary from assessing the propriety of the Senate's impeachment procedures), *Vieth v. Jubelirer*[30] (a plurality of the court finding that the political question doctrine would apply in a case where there were lack of judicially discoverable standards in the context of alleged gerrymandering) and *Zivotofsky v. Clinton*, 566 U.S.___ (2012) (holding that a dispute over the regulation of passports in a politically sensitive context was not a political question).

This post-*Baker* case law shows that the political question doctrine is not dead. However, the Supreme Court's infrequent invocation of the doctrine, combined with its tendency to question the political judgment of Congress, casts doubts on the doctrine's vibrancy. The recent cases of *Shelby County v. Holder*[31] (dismissing the judgment of Congress as to the basis for the continued

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[18] Barkow RE "More supreme than court? the fall of the political question doctrine and the rise of judicial supremacy" (2002) 102 *Columbia LR* 267 at footnotes 156, 157, 158, 182 and 271.
[19] Mulhern JP "In defense of the political question doctrine" (1988) 137 *Univ Pennsylvania LR* 98.
[20] Mulhern JP (1988) 98.
[21] Mulhern JP (1988) 98.
[22] See ISER (2012).
[23] *District of Columbia v. United States Dep't of Commerce*, 789 F. Supp. 1179, 1184 (D.D.C. 1992).
[24] Nelson C, 'Originalism and interpretive conventions, 70 *Univ Chicago LR* 519, 598 (2003).
[25] Seidman JM (2004) note 3.
[26] See generally Barkow RE (2002)
[27] 395 U.S. 486 (1969).
[28] 413 U.S. 1 (1973).
[29] 506 U.S. 224 (1993).
[30] 395 U.S. 486 (1969).
[31] 570 U.S. _____ (2013).

application of two provisions in Section 5 of the Voting Rights Act of 1965) and *United States v. Windsor*[32] (dismissing the legitimacy of Congress' asserted basis for the Defence of Marriage Act) come to mind. Also, looming in the not so distant past is the spectre of *Bush v. Gore*[33] — arguably the Court's most overtly political act.[34]

The political question doctrine persists in America's lower federal courts as well. Breedon catalogues federal court activity as of 2008.[35] She lists three circuit court cases applying the political question as a bar to judicial review between 2005 and 2006[36] as well as two circuit court decisions and one district court decision conducting a political question analysis yet finding that the doctrine did not bar court review in those situations between 2006 and 2007.[37] Moreover, the doctrine has played a recent role in assessing the justiciability of novel climate change claims.[38]

4.2 The life of the political question doctrine in Uganda pre-*CEHURD*

Assessing the vibrancy of common law phenomena can be more speculative in Uganda. Ugandan appellate courts produce far less case law. Uganda's top tier appellate courts issue approximately 40 opinions a year into the public domain.[39] Thus the resulting sample size is relatively minuscule. This can result in an absence of pertinent case law. Nonetheless, Ugandan case law reflects the presence of the political question doctrine.

The most thorough and eloquent exposition on the political question doctrine appears in *Attorney General v. David Tinyefuza.*[40] Here Justice Kanyeihamba prefaces his application of the doctrine as a bar to judicial consideration of the questions presented with a mini-treatise on the doctrine:

> The rule appears to be that courts have no jurisdiction over matters which arise within the constitution and legal powers of the Legislature or the Executive. Even in cases, where courts feel obliged to intervene and review legislative measures of the legislature and administrative decisions of the executive when challenged on the grounds that the rights or freedoms of the Individuals are clearly infringed or threatened, they do so sparingly and with the greatest reluctance.

Kanyeihamba characterises "political" as "relating to the possession of political power of sovereignty of Government, the determination of which is based on congress in our case parliament, and on the president whose decisions are conclusive on the courts." Kanyeihamba lists typical circumstances where the doctrine applies including "whether or not courts should demand proof whether a statute of the legislature was passed properly or not, conduct of foreign relations and when to declare and terminate wars and insurgences." He advises that "courts should avoid in

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[32] 570 U.S. _____ (2013).
[33] 531 U.S. 98 (2000).
[34] Barkow RE (2002) 295-300.
[35] Breedon K "Remedial problems at the intersection of the political question doctrine, the standing doctrine, and the doctrine of equitable discretion" (2008) 34 *Ohio Northern LR* 523-66.
[36] *Bancoult v. McNamara*, 445 F.3d 427, 429 (D.C. Cir. 2006), *Gonzalez-Vera v. Kissinger*, 449 F.3d 1260 (D.C. Cir. 2006), *Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57 (2d Cir 2005).
[37] *Doe v. Exxon-Mobil Corp*, 473 F.3d 345 (D.C. Cir. 2007). *City of New York v. Permanent Mission of India to the United Nations*, 446 F.3d 365 (2nd Cir 2006), *Gross v. German Foundational Industrial Initiative*, 456 F.3d 363 (3d Cir. 2006).
[38] Jaffe J "The political question doctrine: an update in response to recent case law" (2011) 38 *Ecology LQ* 1033-65.
[39] See www.ulii.org.
[40] Supreme Court Constitutional Appeal No. 1 of 1997.

adjudicating upon unless very clear cases of violation or threatened violation of individual liberty or infringement of the Constitution are shown."

Ultimately, Kanyeihamba's fellow justices did not join him in applying the political question doctrine as a bar to judicial review in the *Tinyefuza* case. However, his opinion is significant. Kanyeihamba is an icon of judicial pugnacity in Uganda. He is a recognised champion of the rule of law and judicial review who is willing to stand up to the executive.[41] For Kanyeihamba to personally acknowledge the legal force of the political question doctrine is strong testimony to the vitality of the doctrine in Uganda.

The political question doctrine lived a quiet Ugandan existence in the fifteen years between *Tinyefuza* and *CEHURD*. It appeared in fact, if not in name, three and one half months before *CEHURD* in *Severino Twinobusingye v. AG*.[42] The *Severino* petition challenged the formation of an ad hoc parliamentary committee. The Constitutional Court noted that Article 90 of the Uganda Constitution empowered the Parliament to set up committees and that interfering with the power of Parliament to do so "would amount to this Court interfering with the legitimate internal workings of Parliament." This zone of non-interference within the inner workings of another branch of government is one of the most common typologies of the political question doctrine. Although the holding of the Constitutional Court made no reference to the doctrine, it was proof the doctrine retained legal currency.

Thus the political question doctrine' appearance *CEHURD* should not have come as a complete surprise. It was present within the jurisprudence and had never been revoked. Yet, its invocation in *CEHURD* seems to have caught many off-guard. One reason for this surprise is the belief that the doctrine should not apply in the context of human rights claims.

5 THE VIABILITY OF THE POLITICAL QUESTION DOCTRINE IN THE HUMAN RIGHTS CONTEXT

5.1 Human rights and the political question doctrine

The assertion that matters of procedure and legal technicalities should not stand in the way of judicial consideration of human rights claims sounds good to modern ears. However, this broad claim works better in rhetoric than in practice. Human rights are expansive. It is possible to assert almost any claim in a way that couches it as a matter of human rights. Thus all matters of human rights cannot be given sweeping exceptions to procedural rigour and technical legal requirements.[43]

Human rights-based claims do not bar to the invocation of the political question doctrine. Instead, courts balance the separation of power concerns entailed in the political question doctrine with human rights interests. Practical balancing is necessary for the ongoing survival of the political question doctrine as essentially all claims entail human rights to some degree. Thus human rights are always sacrificed when a court defers from considering a claim based on the political question doctrine. Balancing human rights and separation of powers can be a delicate challenge.

5.2 The justiciability of claims for economic and social rights.

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[41] *Besigye v. Electoral Commission*, [2007) UGSC 24 (in dissent).

[42] Constitutional Petition No. 27 of 2011, UGSC, available at http://www.ulii.org/ug/judgment/constitutional-court/2012/1 .

[43] Certain human rights abuses classified as jus cogens make up a limited category of human rights claims that are provided procedural and technical leeway in order to ensure that such matters are addressed on the merits. *See* Bassiouni C *Crimes against humanity: Historical evolution and contemporary application* (2011) 266.

Claims of economic and social rights are 'notoriously indeterminate'[44] and highly political. As such they are the types of claims that courts will seek to avoid. This makes such claims prime targets for the application of the political question doctrine.

Claims for social and economic rights are different from claims where rights are infringed. Instead, economic and social rights claims concern entitlements. The challenges pertaining resource allocation are obvious and inevitable.[45] Ultimately they call for the progressive realisation of a welfare state.[46] Most courts do not consider themselves to be the actors charged with establishing social and economic policies. For courts that want to avoid such responsibilities, the political question doctrine provides them with a way out.

In some states there are problems with the sourcing of such rights. While some nations such as Hungary, Lithuania and Portugal include directly enforceable economic and social rights in their constitutions, most nations do not.[47] Chirwa discusses the problem of establishing the right to health in the Zambian context where it is not expressly established in the Constitution.[48] This leaves proponents of economic and social rights championing robust interpretations of constitutional rights[49] and pointing to regional and international conventions such as the ICESCR[50], the CEDAW[51], the CRC[52] and the African Charter on Human and Peoples Rights.[53]

In addition, claims for economic and social rights do not necessarily entail the anti-majoritarian concerns that caution against the invocation of the political question doctrine. Chopper addresses the effect of anti-majoritarian elements.[54] Per Chopper, courts should be "exceedingly reluctant to find an individual rights claim to be nonjusticiable, even though it may concern 'politics', the political process, or the internal workings of the political branches."

Chopper's focus is on civil and political rights. He writes "there may be controversies implicating personal liberties that the Court concludes are governed by the political question doctrine", but he qualifies that concession by stating that there must be a clear textual commitment to another branch for the political question doctrine to pre-empt a claim arising out of "a violation of a constitutionally protected individual right." Chopper's concern is for the justiciability of active violations of rights as opposed to failures to affirmatively meet rights-based standards.

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[44] Young K "The minimum core of economic and social rights: a concept in search of content" (2008) 33 *Yale J Int'l L* 113-75.

[45] For an overview of the basic and inevitable problems facing the allocation of economic and social rights with an emphasis on Ireland, the United States and South Africa see Tushnet M "Social welfare rights and the forms of judicial review" (2004) 82 *Texas LR* 1895-1919.

[46] *"The Vaccination Case"* Decision (Sentencia) SU-225/98, May 20, 1998.

[47] Bilchitz D "South Africa: right to health and access to HIV/AIDS drug treatment" (2003) 1 *I•CON* 524 at footnote 1.

[48] Chirwa DM "A full loaf is better than half: The constitutional protection of economic, social and cultural rights in Malawi" (2005) 49 *J of African L* 2007-241.

[49] See e.g. Mbazira C "Uganda and the UN treaty bodies: Reflections on the past and thoughts for the future in the implementation of economic, social and cultural rights" in United Nations Office of the High Commission of Human Rights *Uganda and the United Nations Human Rights Mechanisms: a compilliation on the occasion of the 60th anniversary of the Universal Declaration of Human Rights*. (submitting that Article 8a of the Uganda Constitution makes rights embedded the National Objectives and Directive Principles of the Constitution enforceable rights

[50] International Covenant on Economic, Social and Cultural Rights, (16 December 1966) 993 UNTS 3, entered into force 3 January 1976, ratified by Uganda on 21 January 1987.

[51] Convention on the Elimination of All Forms of Discrimination Against Women, (18 December 1979) 1249 UNTS 13, entered into force 3 September 1981, ratified by Uganda on 30 July 1985.

[52] Convention on the Rights of the Child, (20 November 1989) 1577 UNTS 3, entered into force 2 September 1990, ratified by Uganda on 17 August 1990.

[53] African Charter on Human and Peoples' Rights, (26 June 1981) OAU Doc CAB/LEG/67/3 rev.5; 1520 UNTS 217; 21 ILM 58 (1982) entered into force 21 October 1986, ratified by Uganda on 10 May 1986.

[54] Chopper (2005) 1468.

Some claims for economic and social rights fail to occasion Chopper's anti-majoritarian concerns. Generalised claims for government provision of services do not necessarily entail the interests of minority groups. However, it is possible to bring such claims in the context of individualised or group discrimination.[55] Some of the economic and social rights claims asserted in the South African context present anti-majoritarian concerns.[56]

Third, claims for economic and social rights are legally dubious in their own right. Unlike other human rights claims that are clearly justiciable, the vast majority of jurisdictions have not recognised the right to bring such claims. The denial of speculative claims is less vicious. Moreover, the reason for invoking the political question doctrine aligns with the policy grounds for not recognising such claims.

5.3 American courts on economic and social rights claims and the political question doctrine

Given the reasons above, it might come as a surprise that there is a dearth of precedent from the US Supreme Court and other American federal courts concerning the political question doctrine in the context of economic and social rights claims. Why is this the case? The answer lies in the US Constitution.

The plain language of United States Constitution is bereft of provisions establishing economic and social rights. Moreover, the US Supreme Court has never interpreted the broader principles and protections of the US Constitution to include economic and social rights.[57] In *San Antonio Independent School District v. Rodriguez*[58] the Court disposed of the argument of the existence of economic and social rights under the US Constitution in the context of a claim for the establishment of a right to education.

Despite the lack of federal jurisprudence about economic and social rights, there is a body of American state court precedent. All 50 American states have a constitution. Many state constitutions have provisions establishing economic and social rights. These rights have precipitated litigation and judicial opinions.[59] American state court jurisprudence is mixed on the issue of the political question doctrine and the judicial enforcement of economic and social rights. This paper will address three distinct approaches in the context of the right to education.

The Supreme Court of Nebraska rejected a claim brought by a coalition of school districts and other interested parties asserting that Nebraska's education funding system failed to allocate the funds necessary to provide an "adequate" and "quality" public education.[60] The court conducted a

[55] See e.g. *Plyer v. Doe*, 457 U.S. 202 (1982) (where the denial of educational benefit to children based on their immigrant status was deemed unconstitutional despite the fact that there was no right to education under the US Constitution).
[56] See e.g. *Khosa v Minister of Social Development*, 2004 (6) SA 505 (CC) (rights to social security programs extended to permanent residents); *Minister of Health v Treatment Action Campaign*, 2002 (5) SA 721 (CC) (pregnant mothers provided drug to prevent transmission of HIV for the benefit of unborn children); *Government of the Republic of South Africa and Others v Grootboom and Others*, 2000 (11) BCLR 1169 (CC) (homeless have the right to housing).
[57] For discussion and analysis of the US federal judiciary's unwillingness to address or establish constitutionally-based economic and social rights see Michelman F "Socioeconomic rights in constitutional law: explaining America away" (2008) 6 *I•CON* 663-86.
[58] 411 U.S. 1 (1973).
[59] For a discussion of U.S. jurisprudence concerning the right to health under state constitutions see Soohoo C Goldberg J "The full realization of our rights: the right to health in state constitutions" (2010) 60 *Case Western Reserve LR* 997-1072.
[60] *Neb. Coal. for Educ. Equity & Adequacy v. Heineman*, 731 N.W.2d 164, 178-83 (Neb. 2007); For an analysis on this case see Storious M "*Nebraska Coalition for Educational Equity Adequacy v. Heineman*, 273 Neb. 531, 731 N.W.2d 164 (2007)--the political question doctrine: a thin black line between judicial deference and judicial review" (2009) 87 *Nebraska LR* 793-820.

Baker analysis and concluded that legislative school funding decisions are non-justiciable political questions. The court held that the only justiciable matter was whether free education was being provided. This was a minimum threshold, denial of which would amount to the denial of the right itself. The court declined to consider claims pertaining to the quality and implementation of free education. It left such matters to the legislature.

Meanwhile, the South Carolina Supreme Court adopted a more activist approach. That court held that the political question doctrine did not prevent it from considering whether the state was meeting its obligations arising out of a constitutional right to education.[61] The court set a minimum threshold of adequate education.[62] It defined the minimum floor as "providing students with adequate and safe facilities in which they have the opportunity to acquire: 1) the ability to read, write, and speak the English language, and knowledge of mathematics and physical science; 2) a fundamental knowledge of economic, social, and political systems, and of history and governmental processes; and 3) academic and vocational skills." Thus both Nebraska and South Carolina pronounced baselines that were not subject to the political question doctrine, although the South Carolina baseline is far more qualitative and involved.

A third state offers a compelling object lesson. In *Ex parte James,* the Supreme Court of Alabama reversed a prior course of judicial assessment of the right to education.[63] The court held that school-funding litigation in Alabama demonstrates the problems that can occur when the courts attempt to assume the role of the legislature. After issuing four decisions of judicial review of the implementation of the right to education, the court retreated from the field and left the task to the discretion of the legislature.

The diversity of American state court applications of the political question doctrine in the context of social and economic rights underscores the discretionary and pragmatic qualities of the doctrine. The doctrine rests in the breasts of courts. Courts decide whether or not to invoke it. The doctrine allows courts to avoid stepping into matters that it does not feel qualified, able or constitutionally empowered to address. The result is a range of approaches that can be modified with time and experience.

5.4 The South African vanguard

South Africa is home to a prominent judicial engagement with economic and social rights. South African courts are willing to assess and direct the implementation of economic and social rights. Some, including the CEHURD petitioners, would like to see other African jurisdictions following South Africa's adventurous lead. Scholars point to the South African approach as a model for other nations to follow.[64]

However, the South African dispensation is unique. South Africa's history calls for an aggressive approach to social welfare. There are historic economic benefactors of an infamously

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[61] For a critique of this decision see Durant B "The political question doctrine: a doctrine for long-term change in our public schools" (2008) 59 *South Carolina LR* 531-548.

[62] This decision demonstrates the importance of context. Education is a service that American states have grown accustomed to providing. Moreover, American courts are accustomed to judicially evaluating whether or not school districts are offering 'free and appropriate public education' in order to comply with the mandate of a federal special education law that conditions legal compliance with the provision of federal funds. Thus the Supreme Court of South Carolina, a notoriously conservative court in a notoriously conservative state, was willing to step in a set minimum policy standards for public education.

[63] *Ex parte James*, 836 So. 2d 813, 815-16 (Ala. 2002).

[64] Germain S "Taking 'health' as a socio-economic right seriously: is the South African constitutional dialogue a remedy for the American healthcare system?" (2013) 21.2 *African J of Int'l and Comp L* 145-71.

unjust heritage. The Ugandan context is different.[65] The social justice agenda in Uganda is not charged with the same political urgency.

In addition, even if Uganda were to follow South Africa's lead, the policy interests undergirding the political question doctrine could still temper judicial activism. South African courts do not expressly apply the doctrine. Instead courts openly wrestle with how social and economic rights can be judicially enforced and managed. Young proffers a variety of typologies for the judicial review of governmental delivery of social and economics rights in the South African context.[66] The diversity is representative of both a judicial boldness and a cognisance of limited role of the judiciary in the implementation of social policy. The ongoing South African experiment is shaped by the desire to develop frameworks that enable courts to add value and accountability to the process without taking on roles they are not equipped to handle. As noted by Davis, "the South African experience cautions us that political organization remains the primary means for securing different forms of distributional decisions for the vulnerable within society."[67]

The judicial products of the South African approach share similarities with the American state courts applying the political question doctrine. Like the courts in Nebraska and South Carolina, South African Courts appear most comfortable assessing of the government's willingness and capacity to meet the "minimum core" of economic and social rights realisation.[68] So, while the political question doctrine is not present in name, the separation of power concerns remain within the reasoning and rulings of the South African courts.

It is conceivable that the South African judiciary could follow an Alabama style retreat one day. Alabama's story shows that judicial intervention in the matter of economic and social rights is not a one-way progression. Judicial engagement with the provision of economic and social rights inevitably slips into the assessment and creation of government policy. Courts that recognise their overreach have the power to recast the scope of judicial review. The story of the South African judicial experiment in economic and social rights is incomplete.

South African jurisprudence does not sound the death knell of the political question doctrine in Uganda. While South African Courts have proven to be relatively aggressive on the issue of judicial enforcement and oversight of social policy, the structural concerns addressed in the doctrine are pertinent in South Africa. Also, the judicial activity in South Africa does not oblige replication in Uganda. The socio-economic, historical and legal context in Uganda is distinct from South African. Theses differences temper any purported mandate for the South African approach to social and economic rights.

6 AN ANALYSIS OF THE USE OF THE POLITICAL QUESTION DOCTRINE IN *CEHURD*

The Initiative for Social and Economic Rights proffers a new legal order that has outgrown the political question doctrine.[69] This is not a new refrain. Theoretical attacks against the doctrine are longstanding. If progressive commentary could kill the political question doctrine it would have been dead long ago.

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[65] The economically successful Asian population in Uganda was the victim of past injustice in Uganda under Amin.
[66] Young K "A typology of economic and social rights adjudication: exploring the catalytic function of judicial review" (2010) 8 *I•CON* 390 (describes five typologies for the judicial review of economic and social rights: 1) deferential; 2) conversational; 3) experimentalist; 4) managerial review; and 5) peremptory review).
[67] Davis D "Socioeconomic rights: do they deliver the goods?" (2008) 6 *I•CON* 711.
[68] Davis D (2008) at 695-696.
[69] ISER (2012).

Mulhern asserts that the failure of long held theoretical assumptions to bear out in reality is significant. He writes that "in law, as in science, a phenomenon that refuses to confirm with orthodox theory should inspire re-examination of that theory."[70] After so much noise, critics must come to grips with the staying power of the political question doctrine. In the context of *CEHURD,* the continuing presence of the doctrine is legitimate in terms of law and policy.

6.1 Legal legitimacy of an American doctrine in the Ugandan setting

The use of the political question doctrine in Uganda raises questions about the legitimacy of legal borrowing. Certainly courts in African jurisdictions must not use American legal precedents without first considering context.[71]

There is no direct common law link or lineage between the US and Uganda. So why should Uganda pay homage to an American legal invention? As Chief Justice Marshal recognised, the political question doctrine is a necessary corollary to judicial review. If the legal borrowing of judicial review from the American context is appropriate, the legal borrowing of the political question doctrine is appropriate and arguably necessary to preserve separation of powers.

Legal borrowing is more about political choices than importing legal innovations. Non-indigenous legal concepts are used as tools for sculpting institutional design.[72] Uganda adopted framework of separation of powers and judicial review that emulates the American system as opposed the British parliamentary system. In the context of this larger choice, embracing the political question doctrine makes sense.

Also, at some point within common law systems the legal heritage of the courts becomes the law of the land. The *Matovu* opinion came out in 1966. The political question doctrine has been in Uganda's jurisprudence ever since. Origins cease to matter at some point.

6.2 The political question doctrine's alignment with popular constitutionalism

The American and Ugandan Constitutions share the proclaimed philosophical basis for the political question doctrine.[73] In the American context "(t)here is no provision of the Constitution more closely associated with the political question doctrine than Art. IV, 4's mandate that 'the United States shall guarantee to every State in this Union a Republican Form of Government.'"[74] This so called "guarantee clause" has been a key element in the political question doctrine jurisprudence in the US.[75]

Similarly, and more explicitly, Article 1 of the Ugandan Constitution provides in part that "[a]ll power belongs to the people", "all authority in the State emanates from the people of Uganda", "the people shall be governed through their will and consent", and "[t]he people shall

[70] Mulhern JP "In defense of the political question doctrine" (1988) 137 *Univ Pennsylvania LR* 97-176.
[71] Davis D "Constitutional borrowing: the influence of legal culture and local history in reconstitution of comparative influence: the South African experience" (2003) 1 *I•CON* 181 quoting Justice Johann Kriegler in *Bernstien v. Bester*, 1996 (2) *SALR* 751 [133] (CC) "Far too often one sees citation by counsel of, for instance, an American judgment in the support of a proposition relating to our Constitution, without any attempt to explain why it is said to be in point. Comparative study is always useful, particularly where Courts in exemplary jurisdictions have grappled with universal issues confronting us …. But that is a far cry from blithe adoption of alien concepts of inappropriate precedents."
[72] Epstein L & Knight J "Constitutional borrowing and nonborrowing' (2003) 1 *I•CON* 196-223.
[73] For a full description of the functional integration of popular constitutionalism through stakeholder input and involvement see Odoki B *The search for a national consensus: the making of the 1995 Uganda Constitution* (2005).
[74] Chopper J (2005) 1479.
[75] Chopper J (2005) 1479-1486.

express their will and consent on who shall govern them and how they should be governed, through regular, free and fair elections of their representatives or through referenda." Article 1 is a forceful manifesto of popular constitutionalism and the supremacy of the political will of the people as manifested through elected officials. In addition, Article 126(1) provides that "[j]udicial power is derived from the people and shall be exercised by the courts established under this Constitution in the name of the people and in conformity with law and with the values, norms and aspirations of the people." The political question doctrine provides courts with a legal mechanism to abide by these mandates. The doctrine is an implement for protecting core democratic principles against the threat posed by aggressive judicial review,[76] thus maintaining the foregoing Constitutional meta-principles.

The "prudential" use of the political question doctrine can maintain the legitimacy of the judiciary.[77] Where the judiciary is fragile in terms of relative power, the doctrine can allow courts to choose their battles wisely and avoid constitutional crises that can undermine the legitimacy of the judiciary.[78] In *CEHURD*, the petitioners asked the court to direct the government concerning the use of limited resources and the implementation of government policy. Crossing such barriers could reap a whirlwind that could do damage to the judiciaries capacity to maintain the rule of law.

6.3 The political question doctrine in the context of expansive standing and the presence of outside influences

The political question doctrine is particularly valuable in the context of expansive standing. Uganda has an expansive allowance for standing under Article 137 of the Uganda Constitution. A constitutional petition under Article 137 does not require an actual case or controversy.

The case or controversy requirement is a key limitation on judicial power. Absence of the requirement enables organisations and individuals interested in impacting policy the power to judicially test every action or inaction attributable to the government. Given the presence of well-resourced, non-Ugandan actors with ideological objectives, the potential impact of policy-based public interest litigation is immense. An encouraging result in *CEHURD* could spark a flood of public interest litigation initiatives reflecting the ideologies of whoever funds the litigation. The political question doctrine gives courts the power to curb public interest litigation.

The political question doctrine should not be used to prevent the full flowering of Article 137 petitions. The drafters intended for Article 137 to facilitate the presentation of constitutional issues for determination by the Constitutional Court. Substantive claims should be considered and judicial review should ensure that the Constitution is effectively upheld and enforced.

As framed in *Baker*, the political question doctrine is not concerned with reducing or discouraging the filing of lawsuits. The threat of an increased number of public interest case filings does not amount to a "lack of judicially discoverable and manageable standard for resolving" a matter. We have seen the Constitutional Court shy away from the merits in another case brought by

[76] See Pillay A "Toward effective social and economic rights adjudication: the role of meaningful engagement" 10 *I•CON* 735 (recognising the legitimacy of Jeremy Waldon's concern that courts equipped with strong powers to review the actions of the legislature have the potential of diminishing democratic principles of participation, equality and legitimacy.)

[77] Chopper J (2005) 1476-1478.

[78] The challenges facing the Supreme Court during the presidency of Andrew Jackson comes to mind as a situation where the political legitimacy of the court was severely challenged as a result of its ruling in *Cherokee Nation v. Georgia*, 30 U.S. (5 Peters) 1 (1831). For an insightful treatment of this flashpoint moment in American legal history see Breyer S *Making our democracy work* (2010) ch 3.

a human rights organisation on technical grounds.[79] Hopefully, engagement on the merits will become more commonplace in future cases.

6.4 Issue avoidance under the political question doctrine

While the *CEHURD* court was within its legal rights to invoke the political question doctrine, it was overly aggressive in its use of the doctrine. The emergence of another avenue of issue avoidance is particularly disconcerting in a Ugandan environment where courts have a tendency to exercise "extreme deference" to the other branches of government.[80] Here, the court used the doctrine to dodge the issue as to whether there is a right to health in Uganda. That determination should have been the preliminary step in any *Baker* analysis. A court must know what rights are there before it can weigh the interests in hearing or not hearing claims concerning such rights.

The existence of the right to health in Uganda is not a settled matter. There are legitimate arguments on both side of this debate. While the right to health is not one of the social and economic rights specifically pronounced in the Uganda Constitution,[81] there are articles that can be construed to support a right to health generally, and maternal health especially, in Uganda.[82]

If the court held that there is no right to health, the petition would stop there. If the court held that there is such a right, then it could in turn apply a *Baker* test to assess its capacity to judicially consider the implementation policies and provision of funding to satisfy that right.

Perhaps the desire to keep things simple influenced the court in invoking the political question doctrine. Any determination as to the right to health presents challenges. However, just because a determination is complex and weighty does not make it a proper matter for pre-emption of judicial review. The determination of the existence or nonexistence of rights is a core function of the judiciary that cannot be shed through the political question doctrine.

Perhaps the Supreme Court of Uganda will appreciate that the threshold determination on the right to health must be made. If the right to health does exist it will be for the court to determine where the minimal threshold lies as there should be some minimum threshold of health that is not subject to pre-emption under the political question doctrine. Alternatively, the Supreme Court of Uganda could find that the right exists, but is completely non-justiciable.

6.5 The right to a hearing and the problem of issue pre-emption under the political question doctrine

A highly unsatisfying aspect of the political question doctrine is that parties to a dispute do not get their real day in court. This is especially true in the case of human rights claims that are particularly well suited for judicial review.[83]

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[79] See *Mifumi (U) Ltd and 12 Others v. Attorney General,* Constitutional Petition No. 12 of 2007, UGCC 2010, available at http://www.ulii.org/ug/judgment/constitutional-court/2010/2 where the Constitutional Court used non-substantive machinations to avoid substantive judicial engagement with the issue of bride price.

[80] Bussey E "Constitutional dialogue in Uganda" (2005) 49 *J of African L* 2.

[81] The Uganda Constitution provides for the right to education (Art 30)), the right to a clean and health environment (Art 39), and economic rights (Art 40).

[82] Arguments include the legal significance of the International Covenant on Economic, Social and Cultural Rights, the present constitutional significance of Constitutional objective XX, and the cumulative constitutional effect of Art 22 (the right to life), Art 24 (respect for human dignity and protection from inhuman treatment, Art 31 (rights of the family), Art 33 (rights of women) and Art 34 (rights of children) among others.

[83] Boyd KL "Are human rights political questions'"(2001) 53 *Rutgers LR* 277-331. (Noting that that human rights invoke aspects of "higher law" that courts are well suited to rule upon based on their relative freedom from political pressure and operational pragmatism.)

Uganda has a constitutional right to a hearing.[84] This is one of the four non-derogable rights under the Ugandan Constitution.[85] For its part, the Constitutional Court noted that the injured parties were not barred from bringing claims under Article 50 of the Constitution which provides in part that "[a]ny person who claims that a fundamental or other right or freedom guaranteed under this Constitution has been infringed or threatened, is entitled to apply to a competent court for redress."[86] This has been done. Thus a right to a hearing is preserved.

Presumably courts can steer the Article 50 claim from broader based policy decisions. One could expect that the Article 50 case might probe more deeply into the conduct of the medical staff at the hospitals where the two named individual litigants died in labour. The holding in the case will likely be fact intensive and difficult to apply to the health systems as a whole.

Ultimately, if courts of Uganda find that there is a right to health, the Constitutional Court might realise that an Article 137 Petition presents the best opportunity for a pragmatic approach to judicial review. A generalised claim opens itself to generalised relief and general standards that can be applied across the board.

As is stands, the CEHURD ruling leaves the courts with the task of deciding whether the right to health has been not been violated on a case-by-case basis. This is one of the potentialities that the Ugandan Constitution sought to avoid by including Article 137. Social and economic rights that are met through government provision are best assessed from a macro standpoint as opposed to a micro standpoint. As recognised in the South African case of *Soobramoney v Minister of Health KwaZulu Natal*[87], the good of all needs to be considered over the needs of a single individual when considering the just distribution of limited resources. Moreover, the Article 50 approach endorsed in *CEHURD* would limit access to judicial relief to parties who can afford to bring their own litigation or who are fortunate enough to have their cases handled on a pro bono basis. This runs counter to the purpose of Article 137 to ensure broad access to justice in a nation with high poverty levels.

7 A WAY FORWARD FOR THE *CEHURD* PETITIONERS

Categorical critiques of the political question doctrine are specious. The doctrine is established in Uganda and it serves a purpose. Due to its discretionary aspect, the doctrine is actually a source of judicial power that courts are unlikely to relinquish. Moreover, even where the doctrine does not exist in name, it exists in effect because judicial deference is a necessary corollary to judicial review.

Instead, the *CEHURD* petitioners should assert that the Constitutional Court made an error in terms of sequence. The first step should have been a determination about the existence of the right to health or the right to maternal health. If the right to health exists, the *CEHURD* petitioners should argue that even in cases where the political question doctrine applies courts acknowledge that there are baseline standards that are exempt from pre-emption under the doctrine. The *CEHURD* petitioners could argue for a baseline that includes the provision of basic maternal and neo-natal care.

Thus the *CEHURD* petitioners can present two layers of victory that obviate the political question doctrine. From there it can engage the political question doctrine directly with a *Baker*

[84] Uganda Constitution Art 28.
[85] Uganda Constitution Art 44(c).
[86] Uganda Constitution Art 50(a).
[87] 1997 (12) BCLR 1696 (CC).

analysis concerning any provision of maternal care that goes beyond the baseline. It can argue against the application of the doctrine based on the fact that this claim concerns the interests of a minority group that is being discriminated against and overlooked in terms of the distribution of national resources.

The *CEHURD* petitioners might also want to consider bringing the rights of the unborn children into the case. The unborn is a minority group with little political clout. Such groups have been successful in the South African context. Moreover, in terms of minimum care, CEHURD could fairly argue that unborn children who have not had the chance to earn funds for medical care should receive care at the very baseline level of any right to health. [88]

8 CONCLUSION

It is impossible to know what the Supreme Court of Uganda will do with the *CEHURD* appeal. The political question doctrine is a discretionary tool. As such, the court will be under no obligation to uphold the ruling below or to apply the political question doctrine to the same effect.

The intentions of the petitioners in *CEHURD* are noble. They want to see more money spent on maternal health. They want to see the Government meet certain minimum standards of maternal health care. They have chosen litigation to accomplish this end and have been rebuffed by a sound doctrine rooted in the separation of powers, popular constitutionalism and political practicality.

While their frustration in the Constitutional Court is understandable, their criticism of the use of the political question doctrine is not. The invocation of the doctrine in this case is both practical and legally warranted. It must be reckoned with in a strategic manner that will best achieve the underlying goals of the health advocacy initiative.

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[88] Presumably CEHURD's allegiances to and involvement with a pro-choice movement will prevent it from modifying its litigation strategy to include unborn children as constitutionally mandated recipients of health care.

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