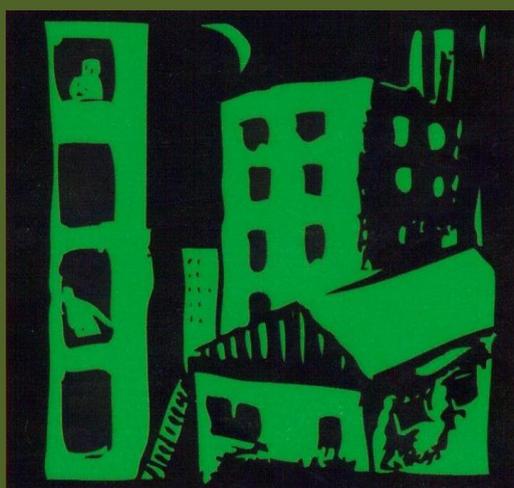


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The political question doctrine in Uganda: A reassessment in the wake of *CEHURD*

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1 INTRODUCTION

On 5 June 2012, the Constitutional Court¹ of Uganda handed down its decision in *Centre for Health Human Rights and Development (CEHURD) & others v Attorney General*² (“*CEHURD*”). The *CEHURD* petitioners³ challenged the adequacy of maternal health services in Uganda. Central to the petitioners’

¹ The Court of Appeal of Uganda sits as the Constitutional Court in constitutional matters. Its rulings may be appealed to the Supreme Court of Uganda. See Arts 132 and 137 of the 1995 Constitution of Uganda. The Constitutional Court has original jurisdiction to hear constitutional petitions filed pursuant to Article 137 of the 1995 Constitution of Uganda.

² Constitutional Petition No. 16 of 2011, UGCC 4. Available at <http://www.ulii.org/ug/judgment/constitution-al-court/2012/4> (accessed 9 December 2014).

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

assertions is the claim that the levels of funding and maternal health care in Uganda amount to a denial of a constitutionally mandated 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 to the families of the deceased victims of poor maternal health care. Uganda's 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 the pressing matter of maternal health.

CEHURD is presently on appeal before the Supreme Court of Uganda. The role the political question doctrine will play in the Supreme Court's treatment of the case is anyone's guess. However, regardless of the ultimate outcome, the decision of the Constitutional Court has reinvigorated the political question doctrine in Uganda. The re-emergence of the political question 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 to matters involving human rights.⁵

Despite these protestations, the political question doctrine is an established and legitimate legal doctrine in Uganda. Its roots go back to post-independence jurisprudence and it enjoys the recognition of prominent legal figures. While it has been largely unmentioned and ineffectual in the years leading up to *CEHURD*, the doctrine has never been 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 presenting that groundwork, 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* and analysis regarding the prospective use and application of the doctrine in Uganda. The article ends with a

⁴ Among their factual averments, the petitioners assert that per capita health care expenditures in Uganda amount to an average of USD 8.90 over the ten years leading up to the filing of the petition and that "(t)he percentage of government allocation to health as a proportion of the total budget has not significantly increased" over that time, par. 10(f) of *CEHURD* Petition. The petitioners also assert that the Ugandan government spends only USD .50 (fifty cents) per capita on maternal and newborn health. See par. 10(o) of *CEHURD* Petition.

⁵ 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*)" (self-published: Kampala) (2012).

general conclusion that addresses the decisions facing the Supreme Court of Uganda as it addresses the *CEHURD* appeal.

2 AMERICAN ORIGINS

US Supreme Court Chief Justice John Marshall brought the political question doctrine into the jurisprudential foreground in 1803. In *Marbury v. Madison* (Marbury) he wrote that “[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 juridical seed has grown into an 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 most recognised consequence. *Marbury* famously established judicial review.⁸ Inherent within the establishment of this considerable judicial power is the need to set its scope and limit its application.

However, Marshall’s political question doctrine was more than a pragmatic necessity. Tuomala points out that for Marshall the doctrine flowed from a philosophically and theologically grounded approach to political theory.⁹ At the root of Marshall’s theoretical approach is a worldview that sees God as the ultimate lawgiver.¹⁰ Marshall viewed God as the source of all law, all political sovereignty and the rights of humankind. This theistic approach to the source of law, power and rights formed the analytical underpinning of Marshall’s political question doctrine. For Marshall a key distinction about the rightful province of the judiciary hinges on whether matters pertain to matters delegated by God to human political discretion and those the State was formed in large part to protect.¹¹ The former includes matters that could be removed from judicial review by design and matters that the judiciary did not have the sovereign mandate to direct. The latter includes the divinely endowed unalienable rights famously referenced in the American Declaration of Independence as including “Life, Liberty and the Pursuit of Happiness”.¹² Such are the rights that Marshall maintains an officer of the executive does not have the right to “sport away”.¹³

⁶ *Marbury v Madison* (1803) 5 U.S.137 at 170.

⁷ Juma L & Okpaluba C “Judicial intervention in Kenya’s constitutional review process” (2012) 11 *Washington University Global Studies Law Review* 326.

⁸ Seidman JM “The secret life of the political question doctrine” (2004) 37 *The John Marshall Law School Law Review* 441.

⁹ Tuomala J “*Marbury v. Madison* and the foundation of law” (2010) 4 *Liberty University Law Review* 297.

¹⁰ Tuomala (2010) at 307.

¹¹ Professor Tuomala designates this dichotomy with reference to the opening lines of the American Declaration of Independence as the distinction between “laws of nature and nature’s God”. See Tuomala (2010) at 300.

¹² The Unanimous Declaration of the Thirteen United States of America (4 July 1776).

¹³ *Marbury* at 166.

Marshall also asserts that courts have the power to enforce individual rights that are clearly established by law. He writes “[b]ut where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy”.¹⁴ For Marshall the judiciary is the organ of the government charged with the role of protecting the rights of the individual. The individual-centric role of the judiciary is proclaimed in the very sentence preceding Marshall’s reference to political questions where he writes that “[t]he 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”.

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. The jurisprudence has shifted from Marshall’s emphasis on rights and individual protection to the pragmatic and formalistic approach epitomised by the test established in the majority opinion of Justice Brennan in *Baker v. Carr*.¹⁵ 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 of the US Constitution. 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 standards 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 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.¹⁶

Brennan’s test has emerged as the most prominent standard for applying the political question doctrine. The political question doctrine arises in a number of common typologies.¹⁷ According to Chopper, the doctrine traditionally surfaces in seven contexts: (1) so-called “guarantee clause” claims¹⁸, (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, and (7) matters of impeachment.¹⁹ 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 part 5.4 below.

¹⁴ *Marbury* at 166.

¹⁵ *Baker v Carr* (1962) 369 U.S. 186.

¹⁶ At 217.

¹⁷ See Chemerinsky *E Constitutional law: Principles and policies*, 2 ed (New York: Aspen 2002) at 130; Chopper J “The political question doctrine: suggested criteria” (2005) 54 *Duke Law Journal* 1457.

¹⁸ Chopper (2005) at 1479 citing Bonfield AE “The Guarantee Clause of Article IV, Section 4: A study in constitutional desuetude” (1961) 46 *Minnesota Law Review* 513.

¹⁹ Chopper (2005) at 1479-1522.

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*.²⁰ *Matovu* was a *habeas* case that entailed the weighty issue of what regime was the true government of Uganda. *Matovu* is widely known for its use and 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.

Matovu arose in the midst of a constitutional crisis. Uganda became an independent nation in 1962. Uganda's 1962 Constitution was the product of political compromise that incorporated the Bugandan king into the official structure of the government as President. This government of compromise unravelled quickly and forcefully under the political and military machinations of Prime Minister Milton Obote. Obote's non-democratic and non-constitutional consolidation of dictatorial power included the sack of the Bugandan kingdom's palace, the resulting exile of the Bugandan King (known as the "Kabaka crisis") and the adoption of the so-called "pigeon-hole" Constitution in 1966.²¹

In *Matovu*, Obote's new de facto government argued that the determination of which 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*²² 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".²³ The Ugandan Supreme Court responded by reading the *Luther* decision proffered by the Attorney General²⁴ and by locating the more recent *Baker* case.²⁵ The Court ultimately cited *Baker* in support of its decision to issue a

²⁰ *Uganda v Commissioner of Prisons, Ex-parte Matovu* [1966] EA 514.

²¹ For an efficient and insightful recounting of the post-independence constitutional challenges endured in Uganda see Oloka-Onyango J "Constitutional transition in Museveni's Uganda: new horizons or another false start?" (1995) 39 *Journal of African Law* 156 at 157-159.

²² (1849) 48 U.S. 1.

²³ A scenario somewhat reminiscent of the dispute in *Luther* is presently taking place in Uganda. The dispute, which has blown into a full-scale political and legal circus, concerns the legal status and authority of the elected mayor of Kampala. At the core of the dispute is determining who has the power to determine the status of the mayor and the identity of the individual who has the right to carry out the duties of the mayor. However, at least to the author's knowledge, there has been no official reference to *Luther* or the political question doctrine.

²⁴ *Matovu* at 530-531 (The Court purportedly quotes CJ Marshall from *Marbury* but this citation is patently inaccurate as the quote includes a reference to *Luther* which was decided 46 years after *Marbury*. This bad citation is indicative of the limited resources that the Court had at this time of political transition).

²⁵ *Matovu* at 531-533.

substantive holding in the matter. The Court reasoned that the Kelsenian²⁶ 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

Legal scholars have long posited that the political question doctrine should be dead, is dying or is actually dead.²⁷ Mulhern writes that opponents of the doctrine build their critiques on "two intertwined assumptions".²⁸ The first assumption is that "the judiciary is the only institution with the authority and capacity to interpret" a constitution.²⁹ The second is that "to limit the judicial monopoly on constitutional interpretation is to threaten, if not destroy, the rule of law".³⁰ These same assumptions undergird the criticism of the Constitutional Court in *CEHURD*.³¹ Do those assumptions have merit? Is the political question doctrine a misguided jurisprudential dinosaur? A survey of case law in the 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. *Baker* coincided with a substantial increase in the scope of judicial review and the exercise of judicial power by the US Supreme Court. After *Baker*, the political question doctrine slipped beneath the rising tide of judicial activism exemplified by the Warren Court.³² As noted above, the diminishing impact of the political question doctrine in the United States cause some to pronounce it dead. Others are less drastic, and qualified in their assessments. One court describes the state of the doctrine as "profoundly unclear"³³, while Professor Nelson calls the doctrine "fuzzy at best".³⁴ Seidman depicts the doctrine as living a "secret life".³⁵

²⁶ *Matovu* at 535-537 quoting extensively from Kelsen H *General theory of law and state* (1945) at 117-118 & 220.

²⁷ Barkow RE "More supreme than court? the fall of the political question doctrine and the rise of judicial supremacy" (2002) 102 *Columbia Law Review* 267 at footnotes 156, 157, 158, 182 & 271.

²⁸ Mulhern JP "In defense of the political question doctrine" (1988) 137 *University of Pennsylvania Law Review* 98 at 99.

²⁹ Mulhern (1988) at 99.

³⁰ Mulhern (1988) at 99.

³¹ See ISER (2012).

³² For an excellent and thorough narrative of this time of judicial transition see N Feldman *Scorpions: the battles and triumphs of FDR's great Supreme Court justices* ([Twelve: New York 2010]).

³³ *District of Columbia v. United States Dep't of Commerce* (D.D.C. 1992) 789 F. Supp. 1179, 1184

³⁴ Nelson C "Originalism and interpretive conventions" (2003) 70 *University of Chicago Law Review* 519 at 598.

³⁵ Seidman (2004).

The US Supreme Court has added limited gloss to the political question doctrine since *Baker*.³⁶ Supreme Court cases applying the doctrine include *Powell v McCormack*³⁷ (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*³⁸ (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.*³⁹ (finding the political question doctrine prevented the judiciary from assessing the propriety of the Senate's impeachment procedures), *Vieth v Jubelirer*⁴⁰ (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*⁴¹ (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 the Court's willingness to question the political judgment of Congress, casts doubts on the doctrine's current potency. The recent cases of *Shelby County v Holder*⁴² (dismissing the judgment of Congress as to the basis for the continued application of two provisions in section 5 of the Voting Rights Act of 1965) and *United States v Windsor*⁴³ (dismissing the legitimacy of Congress's 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*⁴⁴ -- arguably the US Supreme Court's most overtly political act.⁴⁵

The political question doctrine persists in America's lower federal courts as well. Breedon catalogues Federal Court activity as of 2008.⁴⁶ She lists three Circuit Court cases applying the political question as a bar to judicial review between 2005 and 2006⁴⁷ 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 judicial review in

³⁶ Barkow RE (2002).

³⁷ 395 U.S. 486 (1969).

³⁸ 413 U.S. 1 (1973).

³⁹ 506 U.S. 224 (1993).

⁴⁰ 395 U.S. 486 (1969).

⁴¹ 566 U.S. __ (2012).

⁴² 570 U.S. __ (2013).

⁴³ 570 U.S. __ (2013).

⁴⁴ 531 U.S. 98 (2000).

⁴⁵ Barkow (2002) at 295-300.

⁴⁶ 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 University Law Review* 523.

⁴⁷ *Bancoult v. McNamara* (D.C. Cir. 2006) 445 F.3d 427, 429; *Gonzalez-Vera v. Kissinger* 449 F.3d 1260 (D.C. Cir. 2006); *Whiteman v. Dorotheum GmbH & Co. KG* (2d Cir 2005) 431 F.3d 57.

those situations between 2006 and 2007.⁴⁸ Moreover, the doctrine has played a recent role in assessing the justiciability of climate change claims.⁴⁹

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

Assessing the life and potency of common law phenomena is a more speculative exercise in Uganda than it is in the United States. Ugandan appellate courts produce far less case law. Uganda's top tier appellate courts issue roughly 30 to 50 opinions a year into the public domain.⁵⁰ 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. Uganda's most prominent and eloquent judicial exposition on the political question doctrine appears in Justice Kanyeihamba's opinion in *Attorney General v David Tinyefuza*.⁵¹ Kanyeihamba prefaces his application of the doctrine 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.⁵²

Kanyeihamba characterises "political" as "relating to the possession of political power of sovereignty of government, the determination of which is based on Congress, or in our case Parliament, and on the President, whose decisions are conclusive on the Courts".⁵³ 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".⁵⁴ He advises that these are matters "courts should avoid adjudicating upon unless very clear cases of violation or threatened violation of individual liberty or infringement of the Constitution are shown".⁵⁵

Interestingly Kanyeihamba's portrayal of the doctrine rings true to the doctrine's American foundations. For Kanyeihamba, matters of individual liberties are those where courts must take the most care not to allow the doctrine to prevent judicial review. Such liberties are akin in many ways to the natural rights Justice Marshall sought to protect through judicial review. In addition, by referring to liberties instead of

⁴⁸ *Doe v. Exxon-Mobil Corp* (D.C. Cir. 2007). 473 F.3d 345; *City of New York v. Permanent Mission of India to the United Nations* (2nd Cir 2006) 446 F.3d 365; *Gross v. German Foundational Industrial Initiative* (3d Cir. 2006) 456 F.3d 363.

⁴⁹ Jaffe J "The political question doctrine: an update in response to recent case law" (2011) 38 *Ecology Law Quarterly* 1033.

⁵⁰ Refer to www.ulii.org to get a sense of the annual output of publically available judgments handed down by the courts of Uganda.

⁵¹ Supreme Court (Uganda) Constitutional Appeal No. 1 of 1997.

⁵² At 11.

⁵³ At 12.

⁵⁴ At 12.

⁵⁵ At 12.

rights, Kanyeihamba denotes that judicial review is most crucial in contexts where individuals are having something taken from them as opposed to being denied a benefit. This approach draws parallels with Marshall's focus on the protection of inalienable rights in *Marbury*.

Kanyeihamba's treatment of the political question doctrine disregards Brennan's multi-part test in *Baker*. Instead, Kanyeihamba presents the doctrine as conventional wisdom from another constitutional democracy that serves as wise counsel for his nation. The political question doctrine is there to let the other branches of government do their business without interference. It is a practical and functional guideline as opposed to a multi-part test or rubric. For Kanyeihamba the overriding principle of the doctrine is that courts should avoid ruling on matters that are customarily to be left to the legislative and executive branches unless there are "clear" violations or threats of violations of individual liberty or constitutional infringements. Thus Kanyeihamba's rendition of the political question doctrine includes a margin of appreciation that allows other branches of government deference when violations and infringements are not clear. Kanyeihamba's national reputation and status makes his appreciation of the political question doctrine 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.⁵⁶ 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 existence in Uganda during the 15 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*.⁵⁷ The *Severino* petition challenged the formation of an ad hoc parliamentary committee. The Constitutional Court noted that Article 90 of the Uganda Constitution empowered Parliament to set up committees and that judicial interference 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 with 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 that the doctrine retained legal currency. Thus the political question doctrine's appearance in *CEHURD* should not have come as a complete surprise. It was present within Ugandan 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.

⁵⁶ *Besigye v Electoral Commission* (2007) UGSC 24 (Kanyeihamba J dissenting).

⁵⁷ Constitutional Petition No. 27 of 2011, UGSC. Available at <http://www.ulii.org/ug/judgment/constitutional-court/2012/1> (accessed on 9 December 2014).

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.⁵⁸ 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. This is particularly true in light of the modern recognition of social and economic rights as a category of human rights. Thus all matters of human rights cannot be given sweeping exceptions to procedural rigour and technical legal requirements.⁵⁹ Human rights-based claims do not bar the invocation of the political question doctrine. Instead, courts balance the separation of powers concerns entailed in the political question doctrine with human rights interests. Balancing human rights and separation of powers presents a delicate challenge.

5.2 The justiciability of claims for economic and social rights

Claims for economic and social rights are “notoriously indeterminate”⁶⁰ and highly political. As such courts often seek to avoid these claims. Thus such claims are prime targets for the application of the political question doctrine. Claims for social and economic rights are different from claims where rights are infringed. Economic and social rights claims concern entitlements to affirmative benefits to be provided by the government. The challenges pertaining to resource allocation are obvious and inevitable.⁶¹ Ultimately social and economic rights are tied to the progressive and successful realisation of a welfare state.⁶² 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 a way out.

In some States there are problems with the sourcing of such rights. While some countries, such as, Hungary, Lithuania and Portugal, include directly enforceable economic and social rights in their constitutions, most do not.⁶³ Chirwa discusses the problem of establishing the right to healthcare in Malawi where the right is not

⁵⁸ Notably, Art 126(2)(e) of the 1995 Uganda Constitution provides that “substantive justice shall be administered without undue regard to technicalities”.

⁵⁹ Certain human rights abuses classified as *jus cogens* constitute a limited category of human rights claims that are provided procedural and technical leeway in order to ensure that such matters are addressed on their merits. See Bassiouni C *Crimes against humanity: Historical evolution and contemporary application* (Cambridge University Press, Cambridge 2011) at 266.

⁶⁰ Young K “The minimum core of economic and social rights: a concept in search of content” (2008) 33 *Yale Journal of International Law* 113.

⁶¹ 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 Law Review* 1895.

⁶² “*The Vaccination Case*” Decision (Sentencia) SU-225/98, 20 May 20 1998.

⁶³ Bilchitz D “South Africa: right to health and access to HIV/AIDS drug treatment” (2003) 1 *International Journal of Constitutional Law* 524 at footnote 1.

expressly established in the Constitution.⁶⁴ Uganda's Constitution is similarly devoid of an express proclamation regarding the rights to health. Instead, Uganda has a catch-all provision in its Constitution which provides that "[t]he rights, duties, declarations and guarantees relating to the fundamental and other human rights and freedoms specifically mentioned in (Chapter Four entitled "Protection and promotion of fundamental and other human rights and freedoms") shall not be regarded as excluding others not specifically mentioned".⁶⁵ This leaves proponents of economic and social rights championing robust interpretations of constitutional rights⁶⁶ and pointing to regional and international conventions, such as, the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁶⁷, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)⁶⁸, the Convention on the Rights of the Child (CRC)⁶⁹ and the African Charter on Human and Peoples Rights.⁷⁰

5.3 Anti-majoritarian concerns and economic and social rights claims

In addition, claims for economic and social rights face a further challenge in the context of jurisdictions applying the political question doctrine because such claims are not seen as raising anti-majoritarian concerns. One of the fundamental policy grounds for judicial review is the ability of courts to protect minority groups and individuals from the tyranny of the majority.⁷¹ In theory at least, courts are better able to resist the political sway of the masses and ensure that the rights of the politically marginalised are protected than other branches of government. The need for courts to protect anti-majoritarian concerns militates against the pre-emption of judicial review. Chopper addresses the effect of anti-majoritarian elements in the context of the American political question doctrine jurisprudence.⁷² According to Chopper, courts should be "exceedingly reluctant to find an individual rights claim to be nonjusticiable, even

⁶⁴ Chirwa DM "A full loaf is better than half: The constitutional protection of economic, social and cultural rights in Malawi" (2005) 49 *Journal of African Law* 2007.

⁶⁵ 1995 Constitution of Uganda Art 45

⁶⁶ 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 compilation on the occasion of the 60th anniversary of the Universal Declaration of Human Rights* (who submits that Art 8a of the Uganda Constitution makes rights embedded the National Objectives and Directive Principles of the Constitution enforceable rights).

⁶⁷ 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.

⁶⁸ 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.

⁶⁹ 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.

⁷⁰ 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.

⁷¹ Madison J "Federalist Paper 10" from *The Federalist Papers* (1787). Madison cautions about the need to include structural protections within government to offer protection against "the superior force of an interested and overbearing majority".

⁷² Chopper (2005) at 1468.

though it may concern ‘politics’, the political process, or the internal workings of the political branches”.⁷³

Chopper’s focus is on civil and political rights. He writes that “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. There is a clear correlation between Chopper’s description of the proper application of the political question doctrine and Kanyeihamba’s reference to the violation of individual liberties as a form of government action that is not protected from judicial review by the political question doctrine.⁷⁴

In the case of liberty rights, the government is often limiting or taking away the existing rights of an individual or a minority group. With liberty interests we can see the tyranny of the majority at work. Cases regarding the practice of religious liberty are excellent examples of such matters. Examples include disputes over the wearing of burkas in France⁷⁵ and the Hobby Lobby from the United States.⁷⁶ Claims seeking the provision of economic and social rights to the general public fail to present classic anti-majoritarian problems. First, such claims concern what claimants are not getting as opposed to what the government is taking away. This aspect of social and economic claims is particularly pertinent in developing nations that are largely unable to meet the obligations for economic and social rights they have committed to deliver. Thus we do not see the government overtly taking away or limiting the rights of others through affirmative acts. Instead, economic and social rights involve the passive—or even in many contexts inevitable—denial of benefits. In addition, claims for social and economic rights can be seen as benefits that are due and owing to the public as a whole. Thus they do not specially concern qualified minority groups.

However, it is possible to bring claims for economic and social rights as claims that entail effective discrimination against certain designated groups.⁷⁷ Some of the economic and social rights claims asserted in South Africa present anti-majoritarian concerns.⁷⁸ *CEHURD* presents an example of how a claim for social and economic rights

⁷³ Chopper (2005) at 1469.

⁷⁴ *Tinyefuza*, at 12.

⁷⁵ *Dogru v France* (2009) 49 EHRR 8.

⁷⁶ *Burwell v. Hobby Lobby* (2014) 573 U.S. (a case balancing the sincerely held religious convictions of the owners of closely held corporations against the prerogative of a government agency to force employers to cover certain contraceptives within mandated health insurance plans).

⁷⁷ *Plyer v Doe* (1982) 457 U.S. 202 (where the denial of educational benefits to children based on their immigrant status was deemed unconstitutional despite the fact that there was no right to education under the US Constitution).

⁷⁸ Such as *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 drugs to prevent transmission of HIV for the benefit of unborn children);

can be couched in anti-majoritarian terms. In *CEHURD* there are clear categories of the population that the failure to deliver maternal health care most affects: pregnant women and the unborn. Thus, to the extent that the general public fails to address the special and considerable needs of these population groups there is a democracy problem.

Moreover, failure to provide adequate maternal health has a disparate impact on women. Women are recognised as a group that has been the subject of historic marginalisation in Uganda. As a result they are benefactors of affirmative action initiatives pursuant to the mandate established in Article 32 of the 1995 Uganda Constitution. Moreover, Article 33(3) of the Constitution provides that “[t]he State shall protect women and their rights, taking into account their unique status and natural maternal functions in society”. Thus *CEHURD* presents the factual capacity needed to tap into an anti-majoritarian context that can militate against the barring of claims by the political question doctrine in Uganda.

5.4 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 the US 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.⁷⁹ For example, in *San Antonio Independent School District v Rodriguez*⁸⁰ 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 an emerging canon of relevant American state court precedent. All 50 American states each have a constitution. Many state constitutions have provisions establishing economic and social rights. These rights have precipitated litigation and judicial opinions.⁸¹ American state court jurisprudence is mixed on the issue of the political question doctrine and the judicial enforcement of economic and social rights. This article will outline three varying state court approaches in the context of the right to education. The Supreme Court of Nebraska rejected a claim brought by a coalition of

Government of the Republic of South Africa and others v Grootboom and others 2000 (11) BCLR 1169 (CC) (homeless have the right to housing).

⁷⁹ 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 *International Journal of Constitutional Law* 663.

⁸⁰ (1973) 411 U.S. 1.

⁸¹ For a discussion of US 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 University Law Review* 997.

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.⁸² The court conducted a *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.⁸³ 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.⁸⁴ The court set a minimum threshold for adequate education.⁸⁵ 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".⁸⁶ Thus both Nebraska and South Carolina pronounced baselines that were proper subjects of judicial review, although the South Carolina baseline is far more qualitative and involved.

A third state offers an instructive object lesson. In *Ex parte James*, the Supreme Court of Alabama reversed a prior course of judicial assessment of the right to education.⁸⁷ 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 four decisions of judicial review on the implementation of the right to education, the Court used the political question doctrine as grounds for retreating 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

⁸² *Nebraska Coalition for Education Equity & Adequacy v Heineman* (Neb. 2007) 731 N.W.2d 164, at 178-83. For an analysis of 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 Law Review* 793.

⁸³ *Abbeville County School District v. State* (1999) 335 S.C. 58, 515 S.E.2d 535.

⁸⁴ 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 Law Review* 531.

⁸⁵ 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 and set minimum policy standards for public education.

⁸⁶ *Abbeville County School District* at 68.

⁸⁷ *Ex parte James* (Ala. 2002) 836 So. 2d 813, at 815-16.

matters that they do not feel qualified, capable or constitutionally empowered to address. The functional result is a range of approaches that can be modified with time and experience.

5.5 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.⁸⁸ However, the South African dispensation is unique. South Africa's history calls for an aggressive approach to social welfare. South African society consists of economic beneficiaries and victims of an infamously unjust heritage. The Ugandan context is different.⁸⁹ 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 economic rights in the South African context.⁹⁰ The diversity is representative of a judicial boldness, a commitment to the public endorsement of the legal legitimacy of social and economic rights, and a cautious cognisance of the limited role that the judiciary can play in the functional 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".⁹¹

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 the government's willingness and capacity to meet the "minimum core" of economic and social rights realisation.⁹² So, while the political question doctrine is not present in

⁸⁸ 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 *African Journal of International and Comparative Law* 145.

⁸⁹ The economically successful Asian population in Uganda was the victim of past injustice in Uganda under Idi Amin.

⁹⁰ Young K "A typology of economic and social rights adjudication: exploring the catalytic function of judicial review" (2010) 8 *International Journal of Constitutional Law* 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).

⁹¹ Davis DM "Socioeconomic rights: do they deliver the goods?" (2008) 6 *International Journal of Constitutional Law* 711.

⁹² Davis (2008) at 695-696.

name, the separation of powers 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 cautionary tale demonstrates 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 morphs 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 respect of economic and social rights is incomplete.

South African jurisprudence does not sound the death knell of the political question doctrine in the context of social and economic rights in Uganda. While South African courts have proved 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. Moreover, the socio-economic, historical and legal context in Uganda is distinct from the South African. These differences temper any calls for mirroring the South African approach to social and economic rights in Uganda.

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

The Initiative for Social and Economic Rights contends that there is a new legal order that has outgrown the political question doctrine.⁹³ This is not a new refrain. Theoretical attacks against the doctrine are long-standing. If progressive commentary could kill the political question doctrine it would have been dead long ago. Mulhern observes 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".⁹⁴ 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.⁹⁵ While both the United

⁹³ ISER (2012).

⁹⁴ Mulhern (1988) at 98.

⁹⁵ Davis DM "Constitutional borrowing: the influence of legal culture and local history in reconstitution of comparative influence: the South African experience" (2003) 1 *International Journal of Constitutional Law* 181 quoting Justice Johann Kriegler in *Bernstien & others v Bester No and others* 1996 (2) SA 751 (CC) 133: "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".

States and Uganda are historic recipients of the English common law, there is no direct common law link or lineage between the US and Uganda. So why should Uganda pay judicial homage to an American legal invention? As Chief Justice Marshall 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 the separation of powers.

Legal borrowing is more about political choices than importing legal innovations. Non-indigenous legal concepts are tools for sculpting institutional design.⁹⁶ Uganda adopted a framework of separation of powers and judicial review that emulates the American system as opposed to 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 both include strong pronouncements regarding the nature and attribution of political power.⁹⁷ Such pronouncements can serve as fertile ground for the emergence of the political question doctrine. According to Chopper, 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'".⁹⁸ This so-called "Guarantee Clause" has been a key element in American political question doctrine jurisprudence.⁹⁹

Similarly, and more populistically, 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 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

⁹⁶ Epstein L & Knight J "Constitutional borrowing and nonborrowing" (2003) 1 *International Journal of Constitutional Law* 196.

⁹⁷ 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* (Kampala: Fountain Publishers 2005).

⁹⁸ Chopper (2005) at 1479.

⁹⁹ Chopper (2005) at 1479-1486.

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,¹⁰⁰ thus maintaining the foregoing constitutional meta-principles.

The “prudential” use of the political question doctrine can maintain the legitimacy of the judiciary.¹⁰¹ 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.¹⁰² 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 damage the judiciary’s political capacity and influence to maintain the rule of law.

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

The political question doctrine offers pragmatic benefits to courts in the context of expansive legal 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. Article 137(3) provides that “[a] person who alleges that—(a) an Act of Parliament or any other law or anything in or done under the authority of any law; or (b) 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”.¹⁰³ Thus Article 137 allows any person to bring a petition on the basis of the constitutionality of the law, the constitutionality of an action done under the authority of a law, or the constitutionality of what the government or a government official is or is not doing. The petitioner need not show that the petitioner has experienced, is experiencing, or is under the threat of experiencing harm based on the challenged law, act or omission.

The case or controversy requirement is an important limitation on the political power of both judges and litigants.¹⁰⁴ Uganda’s expansive approach to legal standing enables organisations and individuals to bring legal actions to test the legitimacy of everything that government does and does not do whether or not they are actually

¹⁰⁰ Pillay A “Toward effective social and economic rights adjudication: the role of meaningful engagement” (2012) 10 *International Journal of Constitutional Law* 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).

¹⁰¹ Chopper (2005) at 1476-1478.

¹⁰² The challenges facing the Supreme Court during the presidency of Andrew Jackson come 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* (1831) 30 U.S. (5 Peters) 1. For an insightful treatment of this flashpoint moment in American legal history see Breyer *S Making our democracy work* (Random House, New York 2010) ch 3.

¹⁰³ 1995 Constitution of Uganda.

¹⁰⁴ Redish M & Joshi S “Litigating Article III standing: a proposed solution to the serious (but unrecognized) separation of powers problem” (2014) 162 *University of Pennsylvania Law Review* 1373 at 1375; B Mask “Is prudential standing jurisdictional” (2013) 64 *Case Western Reserve University Law Review* 413 at 419-420.

affected. Given the actual and proxy presence of comparatively well resourced, non-Ugandan actors with ideological objectives in Uganda, the potential social and political impact of public interest litigation is substantial. A progressively encouraging judicial result in *CEHURD* could incite a flood of public interest litigation initiatives reflecting the ideologies of whoever funds the litigation. The political question doctrine gives courts the effective power to stem the tide of such litigation.¹⁰⁵

That said, there is irony in the use of the political question doctrine to quell the potential of public interest litigation. The drafters of the 1995 Constitution intended for Article 137 to facilitate the presentation of constitutional issues for determination by the Constitutional Court. The drafters believed that generous mechanisms to judicial access were needed to see that the Constitution is upheld and so that the interests of the poor and legally marginalised can be heard in court through the actions and resources of others. This was a purposeful political decision made in a recent constitution. To surreptitiously re-tool the political question doctrine as a device for limiting judicial caseloads is an internally dissonant application of the doctrine that runs contrary to an express political choice found in the 1995 Constitution.

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 standards for resolving” a matter. Manageability under *Baker* concerns the ability of the court to consider the issue at law and not whether the court is concerned about a potentially high caseload. We have seen the Constitutional Court shy away from the merits on technical grounds in another case brought by a human rights organisation.¹⁰⁶ Hopefully, engagement on the merits will become more commonplace in future cases.

¹⁰⁵ In May 2014 a Member of Parliament and the Initiative for Social and Economic Rights filed a civil suit in the High Court of Uganda challenging the constitutionality of budget cuts to the funding of education programmes in Uganda. (Okenya A “Government sued over plan to reduce UPE funds” *New Vision* 6 May 2014 at 4). The Assistant Registrar of the Civil Division of the High Court refused to grant any order blocking the budget on the grounds that it was not the place of the court to destabilise government programmes or to usurp the authority of government to provide such services. Thus the Assistant Registrar applied a form of the political question doctrine to initially thwart this initiative.

¹⁰⁶ *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> (accessed 9 December 2014) (where the Constitutional Court used non-substantive machinations to avoid substantive judicial engagement with the issue of bride price); In addition, on 1 August 2014 the Constitutional Court of Uganda overturned Uganda’s Anti-Homosexuality Act on the basis of a lack of quorum at the time the law was passed by Parliament. Gettleman J “Uganda anti-gay law struck down by court” (1 August 2014) *New York Times*. Available at <http://www.nytimes.com/2014/08/02/world/africa/uganda-anti-gay-law-struck-down-by-court.html> (accessed 9 December 2014). Conversely, see the recent decision where the Constitutional Court struck down the efforts of the executive to extend the judicial term of the former Chief Justice of the Supreme Court of Uganda beyond the constitutional age limitation. *Karuhanga v. Attorney General*, Constitution Petition No. 39 of 2013, UGCC 2014. Available at www.ulii.org/ug/judgment/constitutional-court/2014/13 (accessed 9 December 2014).

6.4 Issue avoidance under the political question doctrine

While the Constitutional Court in *CEHURD* had the jurisprudential licence to invoke the political question doctrine, it was overly aggressive in its application. It should not have used the doctrine to side-step the determination of whether or not there is a constitutional right to health in Uganda. The emergence of a categorically applied avenue of issue avoidance¹⁰⁷ is particularly disconcerting in a Ugandan environment where courts have a tendency to exercise “extreme deference” to the other branches of government.¹⁰⁸ Certainly Uganda’s history does not engender confidence in judicial activism or the durability of constitutional rule of law.¹⁰⁹ In this context, a means of judicial avoidance can be all too willingly wielded by courts that do not want to bring about government scorn, pressure or disregard for the judiciary. It is easy to see why those who want to see the rise of the rule of law and human rights in Uganda would like to see the political question doctrine disappear.

Heightening this concern over the political question doctrine is the fact that Brennan’s test in *Baker* legitimises political expediency and the fear of political consequences as proper legal considerations for applying the doctrine. Consider the following three grounds for barring a claim under the doctrine found in the *Baker* test: (1) the impossibility of a court’s undertaking independent resolution without expressing lack of respect due coordinate branches of government; (2) an unusual need for unquestioning adherence to a political decision already made; or (3) the potentiality of embarrassment from multifarious pronouncements on one question. Thus Ugandan courts applying *Baker* have the legal blessing to practise issue avoidance in sensitive matters.

It is fair to question the utility of the *Baker* test in Uganda. Recent history demonstrates that judicial independence has the potential for generating political backlash. Absurdly, grounds in the *Baker* test create an incentive for the Executive to be more politically volatile and reactionary with respect to judicial decisions, thus increasing the legal merits for the application of the political question doctrine. Perhaps

¹⁰⁷ The use of the word “avoidance” here may elicit associations with the “avoidance canon” in American jurisprudence. That canon encompasses certain means by which American federal courts have managed to avoid ruling on the merits in certain cases. One well established example is where the United States Supreme Court chooses not to consider a matter of federal law when it can construe a state law ground as being dispositive of an issue. Treatment and examples of such cases can be found in Mitchell J “Reconsidering ‘Murdoch’: state-law reversals as constitutional avoidance” (2010) 77 *University of Chicago Law Review* 1335. This ground for avoidance is only applicable in a federal system of government and is not relevant in the Ugandan context. Another method of judicial issue avoidance from the “avoidance cannon” is where courts will apply a rule of construction whereby the legislation and rules established by other branches are to be given the interpretation that is constitutional instead of unconstitutional alternative interpretations. Treatment and examples of these cases can be found in Vitarelli A “Constitutional avoidance step zero” (2014) 119 *Yale Law Journal* 837. A form of this second means of avoidance from the “avoidance cannon” is another potentially viable means of issue avoidance in Uganda as it can find easy traction within the English law traditional rules of statutory construction with which Ugandan judges are quite familiar.

¹⁰⁸ Bussey E “Constitutional dialogue in Uganda” (2005) 49 *Journal of African Law* 2.

¹⁰⁹ For a better understanding of the rule of law challenges faced in Uganda see Ovonji I “Constitutional government and human rights in Uganda” (1990) 6 *Lesotho Law Journal* 207; and J Ogoola, “The rape of the temple” from *Songs of paradise: a harvest of poetry and verse* (2009).

this is why Justice Kanyeihamba chose to emphasise the naturalist legal philosophy of Marshall instead of the pragmatism of Brennan when relating the doctrine in the *Tinyefuza* case. Marshall himself would surely be surprised to see that his political question doctrine has shifted from its natural law roots to the pragmatism and political expediency present in Brennan's test. Perhaps Brennan's test would have kept the US Supreme Court silent in the days of Andrew Jackson or even subdued Marshall himself during Jefferson's presidency. Marshall's political question doctrine concerned deference to the proper exercise of sovereignty and constitutional allocation of power. Although his doctrine is called "political", it is more about the delegation of legal authority and not politics for its own sake. At this juncture in the nation's history, Uganda's judiciary would be well served to adhere to a version of the doctrine more true to its early 19th Century American roots.

One can hope that the Constitutional Court in *CEHURD* did not hand down their judgement because of tacit governmental coercion or intimidation. However, the net result of the holding is indicative of a Court that wants no part in trying to tell the government what it has to do in the context of the right to health. The Court used the political question doctrine to avert the issue as to whether there is a right to health in Uganda. That determination should have been the preliminary step in any *Baker*-style 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 sides. While the right to health is not one of the social and economic rights specifically pronounced in the Uganda Constitution,¹¹⁰ there are provisions and international instruments that can be construed to support a right to health generally, and maternal health especially, in Uganda.¹¹¹ If the Constitutional Court had held that there is no right to health, the matter would stop there. If the Court held that there was such a right, then it could in turn apply the *Baker* test or (preferably) its own grounds to assess its capacity to judicially consider the implementation policies and provision of funding to satisfy that right. Perhaps a desire to keep things simple influenced the Court in invoking the political question doctrine. However, the complexity and political fall-out that would flow from the judicial enforcement of the right to health do not warrant the avoidance of this threshold issue. The determination of the existence or nonexistence of rights is a core function of the judiciary that cannot be rightly shed through the political question doctrine.

Supreme Court of Uganda might correctly decide that the threshold determination of the constitutional existence of the right to health must be made. If the right to health does exist, it might also be incumbent on the Court to determine where the minimal threshold lies. Arguably if there is a right to health there should be some

¹¹⁰ The 1995 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).

¹¹¹ Arguments include the legal significance of the ICESCR, 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.

minimum threshold of health that is not subject to pre-emption under the political question doctrine. Whether the Court can properly avoid the question of a minimum core under the political question is up for debate. After all, the judicial designation of a minimum core is likely to have resulting policy implications that are more intrusive of the functions of the other branches of government than the mere acknowledgement of a right. However, as seen in the Nebraska education rights case, a minimum core can be stated so bluntly and generally as to be of no real legal effect.¹¹² In fact, one could argue that some designations of the minimum core can reduce the potency of the unqualified right.

The third layer of potential avoidance concerns matters that go beyond the minimum core. Possible examples include judicial directives regarding the level of funding that must be dedicated to maternal health and the level and quality of services that must be provided. Other examples of judicial engagement include a judicially crafted plan for ensuring compliance with the applicable standards established by the Court. Deep judicial engagement beyond the establishment of a minimum core seems unlikely at this juncture. The political question doctrine provides ample legal authority for the court to pre-empt such engagement. The right to health is a politically weighty issue. Certainly the trials and tribulations of America's "Patient Protection and Affordable Care Act of 2010" (aka "Obamacare") is evidence of that. One could certainly commiserate with a judiciary that desires to leave matters regarding the public provision of health care to the other branches of government. It is easy to see why avoiding judicial engagement with the issue of health rights would be an attractive option. In turn, it is easy to see why the political question doctrine has judicial staying power.

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 substantive day in court. This is especially true in the case of human rights claims that are particularly well suited for judicial review.¹¹³ Uganda has a constitutional right to a hearing.¹¹⁴ This is one of the four non-derogable rights under the Ugandan Constitution.¹¹⁵ For its part, the Constitutional Court noted that the injured parties were not barred from bringing claims under Article 50¹¹⁶ of the

¹¹² *Nebraska Coalition for Educational Equity & Adequacy v Heineman* (Neb. 2007) 731 N.W.2d 164, 178-83 (the test applied by the Court only considered whether or not free education was being provided and set no standard for assessing the quality of the education).

¹¹³ Boyd KL "Are human rights political questions?"(2001) 53 *Rutgers Law Review* 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).

¹¹⁴ Art 28 of the Constitution of Uganda.

¹¹⁵ Art 44(c) of the Constitution of Uganda.

¹¹⁶ As with Art 137, Art 50 comprises provisions that ensure the judicial protection of constitutional rights under Uganda's 1995 Constitution. Like claims under Art 137, Art 50 provides that any person can bring a claim. In addition to any person, Art 50 allows any organization to bring an action as well. (Note: The ramifications of this distinction are not yet settled as the corporate form of most organisations makes

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”.¹¹⁷ A related Article 50 claim has since been instituted; thus the right to a hearing has not been fully extinguished even if the ruling of the Constitutional Court in the Article 137 action is upheld. Article 50 claims are less abstract than Article 137 claims. Article 50 claims involve actual harm or threat of harm to a specific person. Presumably, courts can make factually intensive findings and special remedies steer Article 50 claims away from generating broader policy implications. With respect to the claims at issue in *CEHURD*, one could expect that the Article 50 action might probe more deeply into the conduct of the medical staff at the hospitals where the two named individual litigants died during labour. The holding in the case will likely be fact intensive and difficult to apply to the health system as a whole.

6.6 The potential for procedural re-calibration

The Supreme Court of Uganda could take the opportunity in *CEHURD* to re-calibrate the use of Article 50 and Article 137 in the context of claims for social and economic rights. Based on the trajectory set by the Constitutional Court in *CEHURD*, litigants will be encouraged to bring Article 50 claims when possible as opposed to Article 137 claims. However, the Supreme Court might decide that this course is unwise. If the Supreme Court finds that there is a right to health in Uganda, it might also decide that an Article 137 petition is a superior means for addressing such matters.

As is stands, the ruling of the Constitutional Court presents lower courts with the task of deciding whether the right to health has been violated on a case by case basis. Social and economic rights in the process of progressive realisation through limited resources are best assessed from a macro standpoint as opposed to a micro standpoint. After all, instances where individuals have failed to receive adequate health services will be quite commonplace in Uganda. An individualised approach will leave the government scrambling to address individual claims and remedies instead of operating with the greater good in mind. As recognised in the South African case of *Soobramoney v Minister of Health KwaZulu Natal*¹¹⁸, 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 prescribed by the Constitutional Court would limit

them persons under the law.) Art 50 claims must arise out of the infringement of or threat to a right or freedom guaranteed under the Constitution. Thus Art 50 differs from Art 137 as such claims must concern the rights and freedoms of an actual person that are being infringed or threatened. Procedurally Art 50 claims differ from Art 137 claims because Art 50 claims cannot be brought directly to the Constitutional Court; the Art 50 claims are typically first brought in the High Court. Finally, Ugandan courts have noted that a key distinction between Art 50 and Article 137 is that Art 137 claims necessarily entail an aspect of constitutional interpretation and Art 50 claims do not. *Ssemongerere and Another v AG* [1999] UGCC 5 at 9-11. Available at <http://www.ulii.org/ug/judgment/constitutional-court/1999/5> (accessed 9 December 2014).

¹¹⁷ Art 50(a) of the Constitution of Uganda.

¹¹⁸ 1997 (12) BCLR 1696 (CC).

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.

The Supreme Court could zero in on Article 50's language about rights having to be either "infringed" or "threatened" to find that Article 50 is not intended to apply to the provision of government benefits. Instead, Article 50 claims could be classified as claims where the government is actually taking away a right or infringing upon a freedom. Such claims would be more in accordance with the individualised rights claims described by Marshall and the liberty claims described by Kanyeihamba that should not be barred by the political question doctrine. Under this approach, Article 50 claims would only arise out of rights and freedoms that are not dependent on the governmental allocation of benefits and resources. Instead, Article 50 claims would only arise out of the "[f]undamental rights and freedoms of the individual" that are "inherent and not granted by the state".¹¹⁹

The Supreme Court could advise the legislature and the executive that it will be for them to establish procedures for handling individual claims concerning the provision of government services and benefits. This can enable the other branches of government to design mechanisms for the orderly and efficient resolution of benefit suits through administrative bodies much in the way such claims are handled all over the world. In turn, the Supreme Court could make Article 137 the procedural home for claims concerning the progressive realisation of social and economic rights. Such claims are based on what the government is not doing and whether what it is not doing amounts to a violation of the social and economic rights established in the Constitution. Thus the Court could clarify that claims that concern the realisation of social and economic rights can be brought under Article 137 as matters of constitutional interpretation. Such claims can be disconnected from individualised facts. Instead they can give the appellate courts big picture overviews of the progressive realisation process.

Limiting the review of social and economic rights claims to Article 137 would also limit the judicial oversight of such claims to the Constitutional Court and the Supreme Court. This would keep matters of social policy wholly outside the jurisdiction of the lower courts. Moreover, the judicial oversight of the implementation of social and economic rights could still be tempered by the political question doctrine. The net result could be a manageable but relevant judicial perch from which to ensure governmental accountability for the progressive realisation of social and economic rights.

7 CONCLUSION

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

¹¹⁹ Art 20(1) of the Constitution of Uganda.

judicial deference is a necessary corollary to judicial review. That said, at a bare minimum the Supreme Court of Uganda should make a pronouncement as to whether there is a constitutional right to health in Uganda. Beyond this necessary act, it is very difficult to say what the Supreme Court should or should not do. With the political question doctrine in its breast, the Supreme Court has a judicial tool that gives it the flexibility it needs to only intervene to the extent with which it is comfortable. If the Supreme Court invokes the political question doctrine we can hope that it invokes the principled version of the doctrine conceived by Marshall and restated by Kanyeihamba. We can hope that the court leaves the pragmatic approach to the doctrine pronounced in *Baker* for jurisdictions where the emergence of a free standing and emboldened judiciary is not a work in progress.

In terms of predictions, we can expect the Supreme Court to be cautious. The Court is not in the practice of claiming political turf. Moreover, it has never shown an inclination to take on more than its allotted work. Thus a South African style judicial engagement with the right to health would be surprising. Yet for the Supreme Court to establish a wise and sensible system for the judicial review of social and economic rights it will need to do more than the minimum. A thoughtful and forward thinking approach to legal groundwork, such as the recalibration away from Article 50 and to Article 137 for the presentation of social and economic rights claims described above, could generate long-term benefits for all three branches of government. The Supreme Court should remember that the political question doctrine belongs to the judiciary. It is a judicially created doctrine that is formed, interpreted and applied by the judges. It is a means for self-regulating and self-policing judicial power. As such, the judiciary retains the power to change its mind as well. Therefore, the Supreme Court has the power to enter into the oversight and enforcement of social and economic rights to the extent that it deems itself proper, able and willing to do so. If it learns from experience that its approach to judicial engagement has been too modest or too aggressive, the Supreme Court can borrow a leaf from the Supreme Court of Alabama: it can change its course. The political question doctrine is a forgiving and malleable tool.