The Resurfacing Political Question Doctrine in Uganda:
Self-Imposed Freedom from the Judicial Review

by

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I. INTRODUCTION

On 5 June 2012 the Constitutional Court[2] of Uganda issued its decision in *Centre of Health Human Rights Development (CEHURD) and Three Others v. Attorney General*[3] (hereinafter '*CEHURD*').

The *CEHURD* petitioners[4] sought a judicial declaration that the funding and provision levels in Uganda for health care in the context of material health amount to a denial of the right to health.[5] The allegations of violations to the right to health in the petition are compendious. A key allegation concerns the failure by the Government of Uganda to abide by the minimum WHO standards for maternal care that Uganda. Other focus areas within the allegations include unacceptable levels of maternal health[6], and unprofessional behaviour of government health care workers.

The Constitutional Court dismissed the petition, holding that matters of government health policy amounted to non-justiciable political questions. The ruling was a major 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 right to health and the well being of mothers in Uganda. This holding has generated its share of handwringing from the human rights community.

Despite protestations from legal progressives and members of academia[7], the political question doctrine (hereinafter "PQD") is an established and legitimate principle in Ugandan jurisprudence. Its roots go back to post-independence jurisprudence and enjoys the recognition of prominent legal figures. While it has been largely unmentioned by name in the years leading up to *CEHURD*, it was never judicially eradicated or denounced.

The prominent resurfacing of PQD in Uganda calls for an assessment of the doctrine's origins, legitimacy and purposes. 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 PQD over the past half century.

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

[3] Constitutional Petition No. 16 of 2011 (Uganda).

[4] Petitioners included CEHURD and petitioners acting on behalf of two women who died in childbirth in situations where they were not provided needed medical assistance. CEHURD describes itself as 'is an indigenous, non-profit, research and advocacy organization.'

[5] 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."

[6] Notably the petition fails to mention claims arising out of the death of the unborn children as a constitutional violation. The interests of the unborn children are not directly put forward in the petition. This is despite the fact that unborn children died in both of the specific factual scenarios related in the petition.

[7] 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 others V Attorney General of Uganda).' (2012)

After that review, the article transitions from description to analysis. The article addresses the appropriateness of PQD in the context of human rights generally and economic and social rights claims particularly. Next the article addresses the reasons for the use and utility of the PQD in Uganda intertwined with a critique of the way PQD was used in *CEHURD*. The article ends with recommendations for the *CEHURD* litigation going forward and a short general conclusion.

II. AMERICAN ORIGINS

US Supreme Court CJ John Marshal brought the PQD 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."[8] This cryptic dicta has evolved into a internationally recognised doctrine. Now Kenyan authors Juma and Okpaluba describe the political question 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."[9]

The PQD was a necessary upshot of *Marbury*'s grander consequence. *Marbury* famously established judicial review.[10] 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 PQD. 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 partially crystallised a century and a half later in *Baker v. Carr.*[11]

In *Baker* the US Supreme Court held that it had the power to consider whether 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 that "(p)rominent on the surface of any case held to involve a political question is found a textually demonstratable 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 nonjudicial 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." Brennan's test has become the standard for applying PDQ.

PDQ arises in a number of typical typologies within American jurisprudence.[12] According to Chopper, the doctrine traditionally surfaces in seven contexts: 1) so-called "Guarantee Clause" claims[13], 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.[14] Notably

[8] *Marbury v. Madison, 5 U.S.137, 170 (1803).*
[9] Juma L Okpaluba C 'Judicial intervention in Kenya's constitutional review process' (2012) 11 Wash U Global Stud LR 326.
[10] Seidman JM 'The secret life of the political question doctrine' (2004) 37 John Marshall LR 441-80.
[11] *Baker v. Carr*, 369 U.S. 186, (1962).
[12] *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.
[13] Chopper J (2005) *citing* Bonfield AE 'The Guarantee Clause of Article IV, Section 4: a study in constitutional desuetude, 46 Minn. LR 513 (1961).
[14] Chopper J (2005) 1479-1522.

Chopper's list does not include matters pertaining to social and economic rights. We will address this category of American political question jurisprudence in sub-section IV. 3 below.

III. THE MIGRATION OF THE POLITICAL QUESTION DOCTRINE TO UGANDA

PQD first appeared in Uganda in *Uganda v. Commissioner of Prisons, Ex-parte Matovu*.[15] *Matovu* included the weighty legal issue of what regime was the true government of Uganda. *Matovu* is best known internationally for its real-world application of Hans Kelsen's 'pure theory of law.' However, prior to engaging in Kelsenian analysis, the court had to first 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 power. The Attorney General of the de facto government cited the US case of *Luther v. Borden*[16] 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 PQD 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 Supreme Court of Uganda responded to this submission by reading the *Luther* decision proffered by the Attorney General[17] and by locating the more recent *Baker* case.[18] The court ultimately cites *Baker* in support of its decision to issue an opinion on the matter. The Court reasoned that the Kelsenian[19] theory provided the *Matovu* court with a discoverable and manageable standard for making the determination at issue thereby satisfying that element of Brennan's test for justiciability. Thus PQD made a dramatic and high-profile first appearance in Ugandan jurisprudence, despite the fact that it did not ultimately limit the court's power.

IV. THE ONGOING LIFE OF THE POLITICAL QUESTION DOCTRINE

Legal scholars have long posited that PQD should be dead, is dying or is actually dead.[20] Per Mulhern, opponents of the doctrine build their critiques on "two intertwined assumptions."[21] The first assumption is that "the judiciary is the only institution with the authority and capacity to interpret" a constitution.[22] The second is that "to limit the judicial monopoly on constitutional interpretation is to threaten, if not destroy, the rule of law."[23] These same assumptions undergird the criticism of the Constitutional Court in *CEHURD*.[24]

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

[15] *Uganda v. Commissioner of Prisons, Ex-parte Matovu* [1966] EA 514.
[16] 48 U.S. 1 (1849).
[17] *Matovu* 530-531 (Here the court purportedly quotes CJ Marshal from *Marbury v. Madison* but this citation is patently inaccurate as the quote includes a reference to the *Luther* case 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).
[18] *Matovu* 531-533.
[19] *Matovu* 535-537 *quoting extensively from* Kelsen H *General Theory of Law and State*, pp 117-118 and 220.
[20] 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.
[21] Mulhern JP 'In defense of the political question doctrine' (1988) 137 Univ Pennsylvania LR 98.
[22] Mulhern JP (1988) 98
[23] Mulhern JP (1988) 98
[24] Initiative for Social and Economic Rights '

A. 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*, PQD slipped beneath the rising tide of judicial activism exemplified by the Warren Court.

The diminishing impact of the PQD 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'[25] and 'fuzzy at best'.[26] Seidman depicts the doctrine as living a 'secret life'.[27]

The US Supreme Court has added minimal jurisprudence concerning the doctrine since *Baker*.[28] Key cases include *Powell v. McCormack*[29] (rejecting the argument that the PQD prevented the court from questioning the grounds for Congress' refusal to seat a Congressman), *Gilligan v. Morgan*[30] (finding that PQD prevented judicial review of certain aspects of the National Guard operational standards and policies's training standards and practices) *Nixon v. U.S.*[31] (finding PQD prevented the judiciary to assess the propriety of the Senate's impeachment procedures due to a lack of judicially discoverable standards), *Vieth v. Jubelirer*[32] (a plurality of the court finding that PQD would apply in a case where there were lack of judicially discoverable standards in the context of assessing equal protection challenges to alleged gerrymandering) and *Zivotofsky v. Clinton*, 566 U.S.___ (2012) (holding that a dispute over the regulation of passports was not a political question).

This post-*Baker* case law shows that PQD 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*[33] (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*[34] (dismissing the legitimacy of Congress' asserted basis of the Defence of Marriage Act) come to mind. Also, looming in the not so distant past is the spectre of *Bush v. Gore*[35] which many view as the Court's most political act.[36]

PQD persists in America's lower federal courts as well. Breedon catalogues federal court activity as of 2008.[37] She lists three circuit court cases applying the political question as a bar to judicial review between 2005 and 2006[38] 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

[25] *District of Columbia v. United States Dep't of Commerce*, 789 F. Supp. 1179, 1184 (D.D.C. 1992)
[26] Nelson C, 'Originalism and interpretive conventions, 70 Univ Chicago LR 519, 598 (2003)
[27] Seidman JM (2004) note 3
[28] *See generally* Barkow RE (2002)
[29] 395 U.S. 486 (1969).
[30] 413 U.S. 1 (1973).
[31] 506 U.S. 224 (1993).
[32] 395 U.S. 486 (1969).
[33] 570 U.S. _____ (2013).
[34] 570 U.S. _____ (2013).
[35] 531 U.S. 98 (2000).
[36] Barkow RE (2002) 295-300.
[37] 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.
[38] *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).

review in those situations between 2006 and 2007.[39] Moreover, PQD has played a recent role in assessing the justiciability of novel climate change claims.[40]

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

Assessing the vibrancy of common law phenomena can be more speculative in the Ugandan context. Ugandan appellate courts produce far less case law. Uganda's top tier appellate courts issue approximately 40 opinions a year into the public domain.[41] Thus the resulting sample size of Ugandan case law is relatively minuscule. This can result in an absence of pertinent case law. Nonetheless, Ugandan case law reflects the presence of the doctrine.

The most prominent exposition on PQD appears in *Attorney General vs David Tinyenfuza.*[42] Here Justice Kanyeihamba provides 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.' Kanyeihamba advises that 'courts should avoid in adjudicating upon unless very clear cases of violation or threatened violation of individual liberty or infringement of the Constitution are shown.'

Kanyeihamba's authorship 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 the the executive.[43] Kanyeihamba's personal acknowledgement is strong testimony to the vitality of the doctrine in Uganda.

During the fifteen years between *Tinyenfuza* and *CEHURD* PQD lived a quiet existence in Uganda. It appeared in fact, if not in name, three and one half months before *CEHURD* in *Severino Twinobusingye v. AG*.[44] 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

[39] *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).
[40] Jaffe J 'The political question doctrine: an update in response to recent case law' (2011) 38 Ecology LQ 1033-65.
[41] See www.ulii.org
[42] Supreme Court Constitutional Appeal No. 1 of 1997.
[43] *Besigye v. Electoral Commission*, [2007) UGSC 24 (in dissent)
[44] *Severino Twinobusingye v. Attorney General*, Constitutional Petition No. 27 of 2011

most common typologies of PDQ. Although the holding of the Constitutional Court made no reference to the doctrine, it was proof the doctrine maintained retained legal currency.

Thus PQD did not make a surprise visit to Ugandan jurisprudence in *CEHURD*. Yet, its invocation in *CEHURD* seems to have caught many off-guard. One reason for this surprise is the belief that PQD should not apply in the context of human rights claims.

IV.
V. THE VIABILITY OF THE PQD IN THE HUMAN RIGHTS CONTEXT

1. Human rights and the political question doctrine

The assertion that matters of procedure and legal technicalities should not pretermit the 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 can not be given sweeping exceptions to procedural rigour and technical legal requirements.[45]

Human rights-based claims do not bar to the invocation of PQD. 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 especially the right to a hearing and rights to due process. Thus rights are always sacrificed when a court defers from considering a claim based on the political question doctrine. The balancing act of human rights and the separation of powers can be a delicate balancing act.

2. The justiciability of claims for economic and social rights.

In many ways claims for economic and social rights are prime targets of PQD. First, claims for the economic and social rights do not typically involve matters of freedom and infringement of the exercise of constitutional rights. In the context of economic and social rights claims often arise out of unestablished entitlements. Such claims concern what a claimant would like to receive as opposed to what the government has taken. They do not seek the enforcement of natural rights. Instead, they call for the realisation of the a welfare state.[46]

Second, 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 anti-majoritarian problem.[47] 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 qualifies that concession but stating that there must be a clear textual commitment to another branch for the political question doctrine to preempt a claim arising out of 'a violation of a constitutionally protected individual right.' Chopper's concern is for active violations of rights as opposed to failures to affirmatively meet rights-based standards.

[45] 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.
[46] *"The Vaccination Case"* Decision (Sentencia) SU-225/98, May 20, 1998.
[47] Chopper at 1468.

Some claims for economic and social rights fail to occasion Chopper's anti-majortitarian 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.[48] Some of the economic and social rights claims asserted in the South African context are rooted in anti-majoritarian concerns.[49]

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 he political question doctrine aligns with the policy grounds for not recognising such claims. Therefore the mere positing of such claims raises the spectre of the political question doctrine.

3. American courts on economic and social rights claims and PQD

Given the reasons above, it might come as a surprise that there is a dearth of precedent from the United States Supreme Court and other American federal courts concerning PQD 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 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. In *San Antonio Independent School District v. Rodriguez*[50] 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 precedent from state courts. Each of the 50 American states has its own state constitution. Many of these constitutions have provisions that proclaim the existence of economic and social rights such as the right to education. These state constitutional rights have resulted in legal challenges and judicial opinions. American state court jurisprudence is mixed on the issue of the PQD and the judicial enforcement of economic and social rights. This paper will address three distinct approaches.

The Supreme Court of Nebraska rejected a claim brought by a coalition of school districts and other interested parties that Nebraska's education funding system failed to allocate the funds necessary to provide an "adequate" and "quality" public (re: free) education.[51] The Nebraska conducted a *Baker* analysis and concluded that legislative school funding decisions are nonjusticiable political questions. The court held that the only juscticiable matter was whether free education was being

[48] 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.

[49] 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) (hereinafter TAC) (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)

[50] 411 U.S. 1 (1973)

[51] 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.

provided. This was a minimum threshold, denial of which would amount to the denial the right itself. However, the quality and implementation of that free education is left to the legislature.

Meanwhile in South Carolina the Supreme Court held that PQD did not prevent it from considering whether the state was meeting its obligations arising out of a constitutional right to education.[52] The Supreme Court of South Carolina set a minimum threshold of adequate education.[53] 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.

The state of Alabama offers a particularly interesting object lesson. In *Ex parte James* the Supreme Court of Alabama reversed a prior course of judicial assessment of the right to education.[54] The court held that school funding litigation in Alabama also demonstrates the quagmire that occurs when courts infringe on the legislature's power and try to assume legislative responsibilities.' After issuing four decisions in this case over the past nine years," the Alabama Supreme Court held that its 'Equity Funding Case' must come to an end because the duty to fund Alabama's public schools belongs to the state legislature.

The diversity of American state court applications of PQD in the context of social and economic rights underscores the discretionary aspect of PQD. 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 diversity of responses and a willingness to use the doctrine to change course based on lessons learned.

4. What about South Africa?

The greatest ongoing experiment of judicial review of government implementation of economic and social rights is taking place in South Africa. In South Africa we see a judiciary that feels empowered to assess the provision of economic and social rights. The CEHURD petitioners were inspired and informed by South African jurisprudence in area of economic and social rights.

The South African jurisprudence does not directly address the PQD. Instead the South African Courts wrestle with how social and economic rights can be judicially enforced and managed. They seek to develop frameworks that enable courts to add value and accountability to the process without taking on roles they are not equipped to handle. The decisions to this point reflect judicial flexibility and a willingness to engage with with problems of government provision on a case by case basis as opposed to establishing rule-based approaches. So, while the PQD is not present in name or full preemptive impact, the separation of power and allocation of function concerns addressed by the doctrine are present within the reasoning and rulings of the South African courts. The courts are exercising their discretionary power through their flexible approach.

[52] 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.

[53] 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.

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

The jurisprudential development in South Africa is not proof of a new world order in social and political rights. South African is a global outlier in the judicial role in welfare policy. The ultimate result of the South African experiment is not known at this point. Current results are mixed.[55]

It could be 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 street. Judicial engagement with the provision of economic and social rights inevitably slips in to the creation and assessment of government policy. Although courts in South Africa have bravely ventured into this arena they are practically alone in this endeavour.

Finally, the South African dispensation is a bit of a red herring. South Africa's history mandates an aggressive approach to social welfare. There are historic economic winners with a heritage that calls the justice of their economic status into questions. Uganda is not home to economic winners. Only an outward looking effort to extract funds from the external beneficiaries of colonialism and global economic exploitation would tap an economic source with a moral justification for redistribution. Just because South Africa is African does not mean that its jurisprudence has greater persuasive legitimacy. There is more to context than sharing a continent.

VI. AN ANALYSIS OF THE USE OF PQD IN *CEHURD*

ISER proffers a new legal order that has outgrown the PQD.[56] This is not a new refrain. Theoretical attacks against PQD are longstanding. If progressive commentary could kill the PQD would have been dead long ago.

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 reexamination of that theory.'[57] After so much noise, critics must come to grips with the staying power of PQD. In the context of *CEHURD*, the continuing presence of PQD is legitimate in terms of law and policy.

A. 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. There is no direct jurisprudential link between the US and Uganda.

So why should Uganda pay common law 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 PQD is appropriate and arguably necessary to preserve separation of powers.

Legal borrowing is more about political choices than importing legal innovations. Uganda has made the political choice to have a 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 the adoption of PQD 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. PQD has been in Uganda's jurisprudence ever sense. Origins cease to matter at some point.

[55] Davis D 'Socioeconomic rights: do they deliver the goods? (2008) 6 I•CON 687-711.
[56] ISER 2005
[57] Mulhern JP 'In defense of the political question doctrine' (1988) 137 Univ Pennsylvania LR 97-176.

B. PQD's alignment with popular constitutionalism

The US and Ugandan Constitutions share the proclaimed philosophical basis for the political question doctrine. 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."'[58] This so called 'guarantee clause' has been a key element in PQD jurisprudence in the US.[59]

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 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. PQD provides courts with a legal mechanism to abide by such mandates.

The 'prudential' use of PQD can maintain the legitimacy of the judiciary.[60] Where the judiciary is fragile in terms of relative power, PQD can allow it to choose its battles wisely and avoid constitutional crises that can undermine the legitimacy of the judiciary.[61] In the context of *CEHURD* the petitioners have asked the courts 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 the judiciaries capacity to maintain the rule of law.

C. PQD in the context of expansive standing and the presence of outside influences

PQD is particularly valuable in the context of expansive standing. Uganda has an expansive allowance for standing under Article 137 of the Uganda Constitution. Article 137 enables the "voiceless" to be heard. It obviates certain the legal technicalities connected to standing that tend to surface in American jurisprudence. 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. The absence of a case or controversy requirement provides organisations and individuals interested in impacting policy the power to 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 whomever funds the litigation. PQD gives the courts the power to curb public interest litigation.

The PQD should not be used to prevent the full flowering of Article 137 petitions. Article 137 was not drafted on accident. The drafters new that matters of constitutional interpretation would be easier to present to the Constitutional Court. Substantive claims should be considered and judicial review should ensure that the Constitution is effectively upheld and enforced.

The PQD as developed *Baker* is not concerned with reducing or discouraging the filing of law suits. The threat of an increased number of public interest litigation case filings does not amount to a

[58] Chopper J (2005) 1479.
[59] Chopper J (2005) 1479-1486.
[60] Chopper J (2005) 1476-1478.
[61] 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).

'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 a human rights organisation on technical grounds.[62] Hopefully engagement on the merits will become more commonplace in future cases.

D. Issue avoidance under the PQD

While the *CEHURD* court was within its legal rights to invoke PQD, it was overly aggressive in its use of the doctrine. The court used PQD 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 before it before it can weight 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[63] there are articles that can be construed to support a right to health generally, and maternal health especially, in Uganda.[64]

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 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 PQD. 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 PQD preemption. The determination of the existence or nonexistence of rights is a core function of the judiciary that cannot be shed through PQD.

Perhaps the Supreme Court of Uganda will recognise that the threshold determination on the right to health must be made and might as well be made in the context of an Article 137 petition. 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 pretermitted by the political question doctrine. In the alternative the Supreme Court of Uganda could find that the right exists but is completely non-justiciable. This would be an extreme view of PQD that would go beyond the conservative framework established by the Nebraskan court.

E. The right to a hearing and the problem of issue preemption under the PQD

The aspect of the political question doctrine that is most unsatisfying is the fact that the parties to the dispute do not get their day in court. This is especially true in the case of human rights claims that are particularly well suited for judicial review.[65]

[62] Similarly in the case of *Mifumi (U) Ltd and 12 Others v. Attorney General, Constitutional Petition No. 12 of 2007, Constitutional Court of Uganda 2010* the Constitutional Court also used non-substantive machinations to avoid coming to grips with an NGO spearheaded lawsuit concerning sexist practices in customary law.

[63] 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)

[64] Arguments include the legal significance of the International Covenant on Economic, Social and Cultural Rights**,** the present constitutional significance of 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.

[65] 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.[66] This is one of the four non-derogable under the Ugandan Constitution.[67] 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 Any 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 . . .”[68] 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. On could expect that the Article 50 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.

If courts of Uganda ultimately find that there is a right to health, the Constitutional Court might realise that the Article 137 Petition presented the 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 any the right to health has been met 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 noted in the South African case of *Soobramoney v Minister of Health KwaZulu Natal*[69], the good of all needs to be considered over the needs of a single individual when considering the just distribution of limited resources to meet a social or economic right. 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.

VII. A WAY FORWARD FOR THE CEHURD PETITIONERS

Railings against the existence of the PQD will not serve the *CEHURD* petitioners. The doctrine is established and it serves a purpose. Moreover, due to its discretionary aspect it is actually source of judicial power that the judiciary is unlikely to relinquish.

Instead, the petitioners should point out on appeal to the Supreme Court 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 PQD applies courts acknowledge that there are bare minimum standards that are exempt from PQD analysis. In the context of a right education the minimum threshold is free access to the classroom. The *CEHURD* petitioners could argue for minimum standards that could offer some benefit in the context of maternal health. At the end of the day such minimum standards could look substantially similar to the some of desired South African results.

Thus the Petitioners can present two options for victories that obviate the PQD. From there it can engage the PQD directly with a *Baker* analysis concerning all any matter for judicial review that

[66] Uganda Constitution Art 28
[67] Uganda Constitution Art 44(c)
[68] Uganda Constitution Art 50(a)
[69] 1997 (12) BCLR 1696 (CC).

goes beyond the minimum threshold associated with the existence of such a right. It can argue against the application of the doctrine based on the fact that their case concerns the interests of a minority group that are being discriminated against and overlooked in terms of the distribution of national resources.

The *CEHURD* might also want to consider bringing the rights of the unborn children into a case.[70] This group 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 argument that unborn children who have not had the change to earn funds for medical care should receive care at the very baseline level of any right to health.

VII. CONCLUSION

It is impossible to know what the Supreme Court of Uganda will do with the *CEHURD* appeal. PQD is a blunt and 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 PQD is not. The invocation of PQD 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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[70] 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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