

A Political Question? Reflecting on the Constitutional Court’s Ruling in the Maternal Mortality Case (CEHURD & Others V Attorney General of Uganda)

“Denying an individual or group the ability to make constitutional claims against the State with respect to nutrition, housing, health and education excludes those interests from a process of reasoned interchange and discussion, and forecloses a useful forum for the recognition and redressing of injustices”¹

Introduction:

In 2011, the Centre for Health, Human Rights and Development (CEHURD), Prof. Ben Twinomugisha, Rhoda Kukiriza and Inziku Valente² petitioned the Constitutional Court of Uganda, seeking declarations to the effect that the non-provision of basic indispensable maternal health commodities in government health facilities and the imprudent and unethical behavior of health workers towards expectant mothers are inconsistent with the Constitution and are a violation of the right to health. They argued that the high maternal mortality is caused by the government’s non-provision of the basic minimum maternal health care packages, and the inadequate human resource for maternal health - specifically midwives and doctors, frequent stock-outs of essential drugs for maternal health and lack of Emergency Obstetric Care (EmOC) services at health centres and hospitals.

At the commencement of the hearing, the Attorney General raised a preliminary objection based on the ‘Political Question’ doctrine, and argued that the petition required a decision affecting political questions and that by adjudicating it, the Constitutional Court would be interfering with the political discretion which is by law a preserve of the executive and the legislature. The Attorney General further argued that for the court to determine the issues raised in the petition, it had to call for a review of all the policies of the entire health sector and the sub-sector of the maternal healthcare services and make findings on them, yet implementation of these policies is constitutionally mandated to the legislature and the executive. The State therefore called upon the Court to dismiss the petition.

In its ruling on the preliminary objection, the Constitutional Court agreed with the submissions of the Attorney General and *inter alia* held that:

1 Craig Scott and Patrick Macklem, "Constitutional ropes of sand or justiciable guarantees? Social rights in a new South African Constitution", in *University of Pennsylvania Law Review*, vol. 141, No. 1 (1992), p 28.

2 See *CEHURD & Others V Attorney General*, Constitutional Petition No. 16 of 2011 for the background to the petition.

Much as it may be true that government has not allocated enough resources to the health sector and in particular the maternal healthcare services, the court was reluctant to determine the questions raised in the petition. The court stated that the executive has the political and legal responsibility to determine, formulate and implement policies of government, for among other things the good governance of Uganda. That this duty is the preserve of the executive and no person or body has the power to determine, formulate and implement these policies except the executive.

The Constitutional Court held that it has no power to determine or enforce its jurisdiction on matters that require analysis of the health sector government policies, make a review of some, and let alone, their implementation. That by determining the issues raised in the petition, the Court would be substituting its discretion for that of the executive granted to it by law adding that the court was bound to leave certain constitutional questions of a political nature to the executive and the legislature to determine.

The justices however concluded that:

“In matters which require any court to draw an inference like in the instant petition, an application for redress can best be entertained by the High Court under article 50 of the Constitution.”

This commentary argues that by avoiding adjudicating the merits of a petition on healthcare in Uganda basing on the political question doctrine, the ruling of the Constitutional Court on the preliminary objection in the maternal health case is a threat to the justiciability of social and economic rights in the country. The justiciability of social and economic rights is a principle that has gained notoriety in domestic courts worldwide, and courts have increasingly rejected arguments seeking to deny them opportunity to adjudicate these rights based on the political question doctrine.

The Political Question Doctrine and the enforcement of economic, social and cultural rights:

The political question doctrine originated from United States jurisprudence, initially articulated in the case of *Marbury v. Madison*³ which among other things argued along the lines of separation of powers in determining whether or not it was appropriate for court to review the business of other branches of government. According to the test set down in *Baker v. Carr*, a case involves a non-justiciable political question if there is “a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of respect due coordinate branches of the government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.”⁴

3 5 U.S 137 (1803)

4 *Baker v. Carr*, 369 U.S. 186, (1962) at 217.

The Constitutional Court of Uganda in the maternal mortality case relied on the above cases and some domestic decisions including *Attorney General V Major David Tinyefunza*⁵ to uphold the political question doctrine. The Supreme Court in the *Tinyefunza* case held that 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 individual are clearly infringed or threatened, they do so sparingly and with the greatest reluctance.

The political question doctrine has been frequently invoked to deny courts the opportunity to adjudicate social and economic rights, but in my opinion the argument is no longer sustainable in the current international human rights and domestic constitutional order as shall be discussed.

The Committee on Economic, Social and Cultural Rights (CESR)⁶ has discussed the political question doctrine in relation to social, economic and cultural rights and stated thus:

*It is sometimes suggested that matters involving the allocation of resources should be left to the political authorities rather than the courts. While the respective competences of the various branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters which have important resource implications. The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.*⁷

It is also true that the political question doctrine infringes the right of access to a court, and we see that domestic courts worldwide have over time started rejecting the argument. In South Africa, the main question that initially faced the Constitutional Court in all cases relating to social and economic rights was how the courts could enforce the positive obligations to fulfill rights incorporated in Sections 26 and 27 of the Constitution and at the same time respect the constitutional separation of powers.⁸ The first challenge on adjudication of social and economic rights was seen in the *Constitution Certification case*⁹, where the state argued that the inclusion of economic, social and cultural (ESC) rights in the Constitution would constitute a breach of the principle of separation of powers because the judiciary would encroach upon the terrain of the

5 Supreme Court Constitutional Appeal No.1 of 1997.

6 CESCR is a body of independent experts that monitors implementation of the International Covenant on Economic, Social and Cultural Rights by its States parties. The Committee was established under ECOSOC Resolution 1985/17 of 28 May 1985 to carry out the monitoring functions assigned to the United Nations Economic and Social Council (ECOSOC) in Part IV of the Covenant.

7 General Comment No. 9, paragraph 10.

8Fons Coomans, *Reviewing Implementation of Social and Economic Rights: An Assessment of the "Reasonableness" Test as Developed by the South African Constitutional Court* 2005, accessed on <http://www.zaoerv.de> 27/07/2012

9 *Certification of the Constitution of the Republic of South Africa*, Constitutional Court of South Africa, *Case CCT 23/96*, September 6, 1996, para. 77

executive and legislative arms of government. That inclusion of ESC rights would result in the courts dictating to the government how the budget should be allocated. Court however noted that:

“...even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications. A court may require the provision of legal aid, or the extension of state benefits to a class of people who formerly were not beneficiaries of such benefits. In our view it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the courts so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of the separation of powers.”

Accordingly, rather than deny claimants access to the courts, the South African Constitutional Court progressively articulated the Court’s role in adjudicating social and economic issues and developed the tests of “reasonableness” and “proportionality”¹⁰ which they now use in adjudicating cases involving review of policies and legislations related to these rights. In the *Treatment Action Campaign*¹¹ Case, the State raised the issue of separation of powers, but court concluded that this issue is not relevant to the question of justiciability. Similarly in the *Grootboom*¹² case, the petitioner’s claim was upheld because the state’s housing policy in the area of the Cape Metropolitan Council failed to make reasonable provision within available resources for people in that area who had no access to land and no roof over their heads and were living in intolerable conditions.

In the famous Colombia *Vaccination Case* involving the general failure of the state to provide for the vaccination of children, the Constitutional Court of Colombia concluded that:

*“The negligent abstention by the State, its passivity regarding the marginalized and discriminated groups of society, does not meet its duty to put in place an equitable social order –which constitutes the basis for the legitimacy of the Welfare State under the rule of law. It also fails to comply with the constitutional provision proscribing marginalization and discrimination. In these circumstances, the role of the judiciary is not to replace public authorities which are liable for this abstention. It is rather to order the State to fulfill its duties, where it is clear that failure to act violates a fundamental constitutional right.”*¹³

Similarly, in *Paschim Banga Khet Samity v. State of West Bengal*,¹⁴ the Supreme Court of India found that the State had failed to provide emergency medical treatment as required by the Constitution, and held that:

10 The reasonableness test was developed in the *locus classicus* cases of *Grootboom v Oostenberg Municipality and Others* 2000 (3) BCLR 277 (C), *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 721 (CC) and *Khosa and Others v the Minister of Social Development and Others* (case CCT 12/03)

11 *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 721 (CC)

12 *Grootboom v Oostenberg Municipality and Others* 2000 (3) BCLR 277 (C)

13 Decision (Sentencia) SU-225/98, May 20, 1998, paragraph 29. (Per unofficial translation provided by International Commissions of Jurists)

14 Supreme Court of India, Case No. 169, May 6, 1996, paragraph 16

*“It is no doubt true that financial resources are needed for providing these facilities. But at the same time it cannot be ignored that it is the constitutional obligation of the State to provide adequate medical services to the people. Whatever is necessary for this purpose has to be done. In the context of the constitutional obligation to provide free legal aid to a poor accused, this Court has held that the State cannot avoid its constitutional obligation in that regard on account of financial constraints.” (See *Khatri (II) v. State of Bihar*, (1981) 1 SCC 627 at p. 631 (AIR 1981 SC 928 at p. 931). “The said observations would apply with equal, if not greater, force in the matter of discharge of constitutional obligation of the State to provide medical aid to preserve human life. In the matter of allocation of funds for medical services the said constitutional obligation of the State has to be kept in view. It is necessary that a time bound plan for providing these services should be chalked out keeping in view the recommendations of the Committee as well as the requirements for ensuring availability of proper medical services in this regard as indicated by us and steps should be taken to implement the same.”*

In the recent case of *Patricia Asero Ochieng*¹⁵, the High Court of Kenya held that any legislative measure that would have the effect of limiting accessibility and availability of anti-retroviral medicines would *ipso facto* threaten the lives and health of people infected with HIV and Aids, and would be in violation of their rights under the Constitution. Court further held that the ‘socio-economic factors that promote conditions in which people can lead a healthy life’ imply a situation in which people have access to the medication they require to remain healthy and that if the state fails to put in place such conditions, then it has violated or is likely to violate the right to health of its citizens. The Court concluded that it was incumbent on the State to reconsider the provisions of section 2 of the Anti-Counterfeit Act alongside its constitutional obligation to ensure that its citizens have access to the highest attainable standard of health and make appropriate amendments to ensure that the rights of petitioners and others dependent on generic medicines are not put in jeopardy.

Back home in Uganda, the court in *Salvatori Abuki and Another v Attorney General*¹⁶ held that the banishment of the Petitioner from his home under the Witchcraft Act, thereby depriving him of shelter, food and essential sustenance infringed his right to life in light of Objective XIV, which imposes an obligation on the state to ensure that all Ugandans access health services, food and shelter among others.

From the foregoing discussion, it is evident that the right to health is justiciable in the courts of law and the conservative political question doctrine has been thrown by the way side by national courts worldwide. National courts in Uganda should therefore become more pragmatic and utilize their potential in making constructive contributions to the health system in the country. To not do so would be against the spirit of article 126 of the Constitution which is to the effect that judicial power shall be exercised according to the values, norms and aspirations of the people. Inequality and discrimination in access to, affordability and lack of accountability for social

15 Patricia Asero Ochieng and Others V Attorney General, Petition no. 409 of 2009, paras 52,63 and 88.

16 Constitutional Case No. 2 of 1997

services are characteristic features in Uganda and it will take activism, including judicial activism to achieve social justice.

Furthermore, as argued by the International Commission of Jurists¹⁷, the implication of a distinction between the ‘political’ and the ‘legal’ spheres ignores the fact that these spheres are not mutually exclusive. The laws we have are the outcome of political choices and reflect a choice of certain political values such as the rule of law, democracy and respect for human rights, which are political choices aimed at preventing the practices of an autocratic regime or the unfettered exercise of power by political authorities.

Notably, there is a distinction between policy review on the one hand, and policy making and implementation on the other. In my opinion, the latter would safely be a function of the judiciary without compromising the principle of separation of powers. The judiciary has the duty to ensure that government policies are drafted and implemented in such a manner as to respect, protect, and fulfill the rights enshrined under the constitution and international human rights instruments to which it is a party. Indeed as the justices pointed out in the maternal mortality case, the concept of judicial review allows for courts to scrutinize political decisions. The Constitutional court can safely make declarations on the constitutionality of certain government actions or omissions – including the constitutionality of certain policies and their implementation without violating the principle of separation of powers.

It is our considered opinion that all the actions, decisions, policies, laws etc of the each arm of government must first of all pass the constitutionality test before we argue separation of powers. Otherwise we shall have courts of law failing to adjudicate cases related to unconstitutional laws because of separation of powers.

Basis for justiciability of the right to health in Uganda:

Uganda is a party to the major international human rights treaties providing for economic, social and cultural rights, and specifically relating to the right to health. These include the International Covenant on Economic, Social and Cultural Rights (the “ICESCR”)¹⁸, the International Convention on the Elimination of All Forms of Racial Discrimination (the “ICERD”)¹⁹, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the “CAT”)²⁰, the Convention on the Elimination of All Forms of Discrimination Against Women (the “CEDAW”)²¹ and the Convention on the Rights of the Child (the “CRC”)²² among others.

17 International Commission of Jurists, *Courts and the Legal Enforcement of Economic, social and Cultural Right: Comparative Experiences of Justiciability*, Rule of Law Series No.2, 2008, pg. 74.

18 (16 December 1966) 993 UNTS 3, entered into force 3 January 1976, ratified by Uganda on 21 January 1987.

19 (21 December 1965) 660 UNTS 195, entered into force 4 January 1966, ratified by Uganda 21 November 1980.

20 (10 December 1984) 1465 UNTS 85, entered into force 26 June 1987, ratified by Uganda on 3 November 1986.

21 (18 December 1979) 1249 UNTS 13, entered into force 3 September 1981, ratified by Uganda on 30 July 1985.

22 (20 November 1989) 1577 UNTS 3, entered into force 2 September 1990, ratified by Uganda on 17 August 1990.

At the regional level, Uganda ratified the African Charter on human and Peoples' Rights²³, and adopted the *African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act* (the "African Charter Act") on 17 March 1983.

At the domestic level, Objective XIV of the 1995 Constitution enjoins the state to endeavor to fulfill the fundamental rights of all Ugandans to social justice and economic development and in particular among others to ensure that all Ugandans enjoy rights and opportunities and access to education, health services, clean and safe water, work, decent shelter, adequate clothing, food security and pension and retirement benefits.

Article 8A (1) of the 1995 Constitution of the Republic of Uganda as amended provides that:

"Uganda shall be governed based on principles of national interest and common good enshrined in the national objectives and directive principles of state policy."

Indeed as stated by Mbazira, article 8A's location in the body of the Constitution gives the imperative to give legal effect to the objectives. In this respect, the provision opens up space for judicial activism for the purposes of developing an integrated reading of the Constitution. This approach reads the objectives together with the provisions in the bill of rights as has been the case in India. Constitutional justification for this approach would be found in article 50 of the Constitution, which entitles any person who claims that a fundamental or other right or freedom guaranteed under the Constitution has been infringed or threatened to apply to a competent court for redress which may include compensation.²⁴

The ICESCR, enjoins States Parties to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized therein by all appropriate means, including particularly the adoption of legislative measures,²⁵ The Committee on Economic, Social and Cultural Rights has issued guidance on the nature of State Party obligations in General Comment No. 3,²⁶ and also clarified that minimum core obligations ensure the satisfaction, at the very least, of a minimum level of each of the rights that is incumbent upon every State party.²⁷

It is a notorious principle of international law that the duties of the state to respect, protect and fulfill are also applicable to economic, social and cultural rights.²⁸ The obligation to respect

23 (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.

24 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 Commissioner for 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'* Pg.21

25 Article 2(1) of the ICESCR

26 The nature of States parties obligations (Art. 2, par. 1): 14/12/90 (General Comment 3) in *Compilation of General Comments and General Recommendations adopted by the Human Rights Treaty Bodies*, UN Doc/HRI/GEN/1/Rev.7 (May 12, 2004) at 15-18.

27 General Comment No.3 of 14/12/1990, paragraph 10.

28 Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, January 22-26, 1997, paragraph 6

requires States to refrain from interfering with the enjoyment of economic, social and cultural rights. The obligation to protect requires States to prevent the violation of such rights by third parties, and the obligation to fulfill requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights.

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